1995

Surrogacy: The Case for Full Contractual Enforcement

Richard A. Epstein

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INTRODUCTION: EVERYTHING'S SPECIAL

MOST work in law and economics is not concerned with the visceral issues of flesh and blood. Thus it is common for scholars in the tradition to examine the optimal measure of damages in contract disputes, or to develop models that allow for the efficient trading of options and futures—issues that are critical to the vigorous operation of society, but which attract little passion and debate save from those who are already deeply committed to the specialized enterprises they study. When the discussion switches to questions of family law, the nature and interest of the participants and audience typically changes, and radically so. Virtually everyone has some deep-seated belief on how the fundamental institutions of social life should be organized, and virtually everyone brings to social questions profound moral and religious convictions that cut close to the quick and define their personal identity. So deep do these issues run that it is difficult for them (as it is for me) to gain any kind of intellectual distance from these powerful precommitments. The narrative tradition is strong in both conservative and liberal quarters. One striking piece of evidence is how many papers on this subject are cast in the narrative mode, whereby the authors reveal something of their own personal situation in order to set the stage for the remarks that follow.[1] I am not immune from these pressures, for my experiences with fertility work have given me a certain sympathy for couples who have decided to try the surrogacy route as a last measure of desperation.

Yet, as difficult as it is, intellectual progress in these hotly disputed areas depends on the ability to resist the temptation to sus-

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[1] See, e.g., Barbara B. Woodhouse, Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action, 81 Va. L. Rev. 2493, 2495-99 (1995).

pend the ordinary rules of evaluation because of the intuitive pull of the substantive questions. Indeed, one of the greatest intellectual failures of modern public debate is the routine assumption that special problems require special solutions, usually ones that call for some form of government intervention into the operation of markets. Thus the early regulation of labor markets derived strength from the proposition that "labor" was not an article of commerce.[2] But this rhetorical flourish did not lead to a world in which labor was neither bought nor sold. Instead it granted unions an exemption from the antitrust laws, legalizing worker cartels. In housing markets, the rhetoric for rent control usually starts from the same premise.[3] Shelter is special and hence its price should be regulated by sitting tenants (who then use their voting power in local elections to reap below-market rents at the expense of landlords and potential tenants). Similarly, the Clinton Health Security Act went astray because it started from the proposition that life and death issues require special and distinctive rules for the provision of health care.[4] Yet if the Clinton proposals had been enacted into law, the consequences would have been rather different from those envisioned by its proponents: a National Health Plan would have created a vast and impersonal bureaucracy to restrict entry, to divide markets, to regulate prices, and to breed hidden cross-subsidies. So by accretion the toll quickly adds up. Everything turns out to be special, which is to say that nothing is special at all.

The emotive force of the word "special" works to displace the operation of markets with some system of state regulation. If ever there were an obvious candidate for "special" status, the structure of the family and the interactions of its members are it. Yet once again that label marks the first step down the road to government bans and state control. One obvious target of regulation concerns the addition of new members to an ongoing family. The obvious and preferred form of expanding a family is through ordinary procreation, which responds to our most powerful social and biological imperatives. But that option is not open to some couples: where

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[2] See Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17 (1988)).

[3] For an illustration of the philosophical mischief associated with this position, see Margaret J. Radin, Residential Rent Control, 15 Phil. & Pub. Aff. 350, 352 (1986).

[4] See Health Security Act, H.R. 3600, 103d Cong., 1st Sess. (1993).

the husband is infertile, artificial insemination allows the woman to carry the child to term in a relatively noncontroversial fashion. But matters are not so simple when women are rendered infertile by a variety of diseases or conditions, or are able to carry a child to term only by exposing themselves or their offspring to grave danger.

Faced with this problem, adoption is one alternative, albeit for many couples an imperfect one, and one that in any event is highly regulated by the state.[5] One method to circumvent the senseless and intrusive inquiries that social workers often make in adoption cases is simply to "purchase" a baby from its natural parents (usually, but by no means always, the biological mother) for cold hard cash. But that alternative precludes the opportunity for any genetic connection between either parent and the offspring. Surrogacy contracts offer a means to supply that genetic connection, at least on the father's side. In the standard form of surrogacy contracts, the sperm of the biological father is used to impregnate the designated female surrogate, and the resulting offspring becomes by contract the exclusive child of its biological father, later to be adopted by his spouse. More recently, advanced technology has allowed some surrogacy arrangements to take a more sophisticated turn: under full surrogacy contracts, the fertilized egg of the married couple is inserted into the uterus of the surrogate mother and carried to term by a woman who has no (necessary) genetic connection with the offspring.[6]

The key question about these surrogacy contracts is whether either or both forms should be enforced and respected by the state,

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[5] New Jersey law, for example, requires that all adoptions involve a voluntary surrender of the child to a state-approved agency, N.J. Stat. Ann. § 9:2-14 (West 1993), and it prohibits the use of consideration (e.g., cash or other things of value) in adoption. N.J. Stat. Ann. § 9:3-54(a) (West 1993). Both of these provisions were invoked to deny the enforceability of the surrogate contract in In re Baby M, 537 A.2d 1227 (N.J. 1988). Not all state courts have refused to enforce surrogacy arrangements. See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (enforcing the surrogacy contract and denying any rights to the surrogate mother).

[6] In these cases one question is whether the state will recognize the woman whose egg led to conception as the parent of the child. See, e.g., Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio C.P. 1994) where, in a friendly action, the court ordered that the birth certificate list as the mother the woman who furnished the egg, and not her sister who carried it to term. Amen. Contractual enforcement between the parties was not involved in this transaction.

or whether there is something special (and degrading[7]) about these contracts that makes them proper objects for prohibition, or at least for stringent forms of regulation: the imposition of extensive physiological and psychological testing of potential surrogates is but one of many possible approaches. Many writers have urged that bans and criminalization are too harsh a sanction and have claimed that the proper approach is to render these contracts unenforceable by the biological father against the surrogate, at least before the child is handed over pursuant to the contract.[8]

For my own part, I think that total bans and half-measures illustrate the pattern of mistake that has been repeated so often on matters of work, housing and health. The situations that prompt the use of surrogacy contracts are by definition extraordinary, but in and of itself that hardly marks them out for a regime of state regulation. Rather, the distinctive nature of these relationships is best captured in the way surrogacy contracts are drafted, not by the legal rules of prohibition or regulation. It is quite evident that the purchase of a child (or more accurately, parental rights over a child—a big difference!) is different from the purchase of a bottle of vinegar or a package tour of the wine country—which is why the contracting process for surrogates, and the terms of a surrogacy contract, take on a form that is radically different from the ordinary contract of sale for a fungible good or service. Like most transactions it is a bit of both.[9] The important task is first to understand the motivations of the parties to these transactions, as a window into contract formation and contract terms. Once these elements are exposed, then I think that the case for full enforcement of these contracts is fully defensible, notwithstanding the urgent pleas for their unenforceability, regulation or prohibition.

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[7] The word is not mine. See Elizabeth Anderson, Value in Ethics and Economics 175 (1993) ("These degrading failures of respect and consideration on the part of the surrogate industry are of concern to the state, because they are embodied in relations of domination that deny surrogate mothers their autonomy."). For an examination of both the autonomy and the domination claims, see infra text accompanying notes 35-36.

[8] See, e.g., Katharine T. Bartlett, Re-Expressing Parenthood, 98 Yale L.J. 293, 336 (1988) (arguing that a father's relationship with his child is weaker than that of the woman who carried the baby, and is thus less deserving of legal enforcement); Martha A. Field, Surrogate Motherhood 75-83, 97-109 (1988) (discussing the enforceability of surrogacy agreements under contract law).

[9] This is a point often ignored by the opponents of surrogacy contracts. See the discussion of specific performance, infra text accompanying notes 46-47.

From a theoretical point of view, however, it is important to avoid an ad hoc inquiry. Thus, it is a mistake to approach any subject, from health care to surrogacy, on the assumption that it stands on its own bottom. Instead what is needed is a more comprehensive theory that offers some overall assessment of the strength and weaknesses of a system of voluntary exchange. Once that theory is developed in a general form, it can then be applied to particular transactions. In some cases the claims for regulation will be borne out by showing that the basic conditions necessary for a successful regime of market transactions have not been satisfied. Yet it may well be that the opposite conclusion is true: while the conditions for voluntary exchange are far from perfect, no feasible system of regulation is able to improve on them. So in this Article I propose to take the long way round to the full enforcement position on surrogacy. In the next Part I ask when and why systems of strong property rights are desirable, why these systems normally carry with them the rights of exchange and alienation on terms that the parties see fit, and why the principled limitations on freedom of alienation do not apply in surrogacy cases. In one sense the fundamental observation of the model is that gains to the contracting parties are social gains that cannot be ignored even if other costs, and other benefits, have to be taken into account. Those gains therefore deserve to be included in any overall assessment of the soundness of the contracting practice.

Within this framework, three types of objections might be plausibly offered to counteract the case for full contractual enforcement. The first of these examines defects in the bargaining process that could undermine the mutual gain assumption; the second looks to questions of adverse external effects on third parties that are not taken into account by the contracting parties; and the third looks to questions of coordination, freeriding and holdout that often lead to the underproduction of public goods. In addition to these standard concerns of the law and economics tradition, it is also necessary to confront concerns that arise outside of it: matters of commodification, matters of incommensurability, and matters of inequality of bargaining power, gender inequality and social symbolism.[10] Once

[10] See, e.g., Anderson, supra note 7, at 168 ("I will argue that contract pregnancy commodifies both women's labor and children in ways that undermine the autonomy and

these areas are covered, the last Part of the Article will then examine some of the particular provisions of surrogacy contracts, including those terms that are most often held up to hostile criticism, in order to show that the condemnations of these provisions proceed not from an understanding of the nature and context of the surrogate transaction but rather from a rigid misapplication and misunderstanding of contract doctrine.

I. The Logic of Alienation and Exchange

The first task is to examine the role that alienation plays in ordinary markets. That inquiry is necessary to set the stage for a discussion of surrogacy, and the practices with which it is often compared: baby-selling and organ sales (as distinguished from voluntary donations). Any system of markets depends for its operation on a well-articulated system of property rights. Unless it is known who is the owner of a particular resource—human, physical or material—it cannot be determined who is entitled to use, sell or otherwise dispose of the property or thing. If I could occupy the house you built, why should you build it in the first place? If I could sell the house you occupy, what then is the position of my buyer who wishes to move in when you will not move out? Even if the buyer forced his way in, what is to prevent someone else from selling the house out from under him, setting the stage for yet another ugly confrontation? Any alienation of property (which includes all forms of transfer—sale, mortgage, gift, bequest, loan—with or without conditions) must be made by its owner. Similarly any sale of human labor must be made by the person whose labor will be used. The separation of use from exchange rights is manifestly unstable and counterproductive.[11]

This brief account of the right of alienation begs one important question. Alienation, if it should take place, should be executed by the owner of the resource in question. But why allow *any* aliena-

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dignity of women and the love parents owe to children."). For an effective counterattack on Anderson's position, from which I have learned much, see Richard J. Arneson, Commodification and Commercial Surrogacy, 21 Phil. & Pub. Aff. 132, 139-40, 154-55 (1992).

[11] For my defense of this general framework, see Richard A. Epstein, Why Restrain Alienation?, 85 Colum. L. Rev. 970 (1985), which did not extend to the issues discussed here.

tion, or some particular forms of alienation—gift not sale, sale not gift—at all?[12] The point has been debated from ancient times to the present. Aristotle, for example, in his *Politics* is at many critical points a strong defender of a system of private property, and for reasons that we would regard as quite modern: "Property should be in a certain sense common, but, as a general rule, private; for, when every one has a distinct interest, men will not complain of one another, and they will make more progress, because every one will be attending to his own business."[13] His explanation for that preference is again familiar: property that is common to all is tended after by none, for none are able to obtain a return from the labor that they invest in it.[14] The private nature of the property thus secures the investment in question. Yet Aristotle's qualified defense of private property does not carry with it a parallel defense of market exchange. In some sense his position rings odd to the modern ear, as so much of Anglo-American property law is devoted to preserving the alienability of property as an inherent condition of the fee simple.[15] Modern statutes often condemn restraints on alienation as "repugnant" to the fee simple or some lesser interest.[16] In contrast, a caution about property is found in Aristotle, for his defense of private property in large measure rests upon two conceptions. The first is the ethical imperative of self-sufficiency, and the second is the belief in the primacy of productive labor that transforms the materials of the earth into useful

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12 For a general discussion of the theory of inalienability, see Margaret J. Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987); Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985).

13 Aristotle, Politics 1263a25-29 (Benjamin Jowett trans., Random House 1943).

14 Id.

15 See A.W.B. Simpson, A History of the Land Law (2d ed. 1986).

16 See, e.g., Cal. Civ. Code § 711 (West 1982) ("Conditions restraining alienation, when repugnant to the interest created, are void."). The proposition implies that some such conditions have this characteristic, even when created by a voluntary transaction. The judicial gloss created on the provision has taken the line that a "strong presumption" is established against the restraint on alienation. This gloss was applied with disastrous consequences in the "due-on-sales" clause context in Wellenkamp v. Bank of America, 582 P.2d 970 (Cal. 1978). In *Wellenkamp* the court invalidated these clauses with respect to existing mortgages, such that lenders were forced to keep low interest loans in place after the sale of the underlying property even though the low yields pushed them to the brink of bankruptcy or over it.

objects. In this world, market exchanges offend both these values, which leads Aristotle to condemn them as "unnatural" acts.[17]

Aristotle's point of view shows that it is quite possible to regard rights of exchange as fully separable from rights of possession and use. To use the modern phrase, the alienability of property seems to be a contestable concept. But why should a separation between possession and use on the one side, and alienation on the other side, take place? Aristotle's conception is again suggestive of the problem: he sees that in market exchanges each side "exploits" the weaknesses of the other. It is as though both parties become worse off, and are degraded by the exchange.

Within a moral framework, his point is that there are some exchanges that could be regarded as pandering, corrupt or degenerate, even though both sides regard themselves as better off as a result of the transaction in question. Few would dispute this conclusion. But Aristotle's condemnation of the retail trade goes far beyond settings where admission is charged to enter peep shows, for it covers the exchange of all goods and services. Aristotle, and the modern critics of exchange, pose two critical questions. The first asks, in which direction should the presumption lie? Do we set the presumption in favor of exchange or against it? Do we, in other words, believe that exchange promotes human welfare or that it degrades human dignity? The second question is, what should be done with the insight that at least some exchanges do not meet our highest collective moral instincts? Aristotle himself was free and easy with the condemnation "unnatural" for a huge range of individual actions, and he did not trouble himself much with deciding whether the proper response to these unnatural acts

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[17] For a general discussion of market transactions, see Aristotle, Politics, supra note 13, at 1256b40-1258b8. The passage ends as follows:

> There are two sorts of wealth-getting, as I have said; one is a part of household management, the other is retail trade: the former necessary and honourable, while that which consists in exchange is justly censured; for it is unnatural, and a mode by which men gain from one another. The most hated sort, and with the greatest reason, is usury, which makes a gain out of money itself, and not from the natural object of it. For money was intended to be used in exchange, but not to increase at interest. And this term interest, which means the birth of money from money, is applied to the breeding of money because the offspring resembles the parent. Wherefore of all modes of getting wealth this is the most unnatural.

Id. at 1258a40-1258b8.

should be mere disapproval or legal prohibition and regulation. But it is quite clear that he did not wish to ban all exchanges, for he also has an extensive discussion about the advantages of money (and sale) over barter.[18]

The answers to these two questions do much to shape the overall nature of the general inquiry. As to the first, the safer presumption by far is that people know their own interest well and that contracts usually are mechanisms to achieve mutual gain, not mutual exploitation (or one-sided exploitation). The tradition of subjective value states that each person has and may act on his own conception of the good, and may surrender that which is of less value to him in exchange for something that he values even more. There is no external ruler that will tell individuals whether they have given too much for the things they have acquired in exchange. Where both parties have engaged voluntarily in a transaction, there is the prospect of mutual gain, which is what makes people so eager to seek out contractual opportunities in the first place. Any theory of value that places the entire retail trade at risk does no better a job in explaining the norms of ancient societies than it does in describing our own. Production does not take place in a vacuum, and self-sufficient individuals who seek to do and make everything for themselves end up losing all the benefits from the division of labor. Ironically, therefore, they embark upon a course of action that usually requires healthy subsidies from others to maintain their "self-sufficient" ways of life. The strong presumption therefore should be set in favor of voluntary exchange, even as we recognize that some transactions count as mutually voluntary yet also mutually degrading. The traditional "morals" head of the police power captures that view on, for example, such issues as prostitution.[19] Yet in the grand scheme of things a prohibition on voluntary exchange for these moral reasons should be narrowly circumscribed.

An inquiry into their legality, however, does not exhaust the full range of responses to activities that meet with moral disapproval. It is still possible to speak out against transactions that one would

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[18] Id. at 1257a5-42.

[19] For an account of the "morals" head of the police power, see Ernst Freund, The Police Power: Public Policy and Constitutional Rights chs. 7-9 (1904).

not ban. No one should take the position that it is impermissible to urge people to avoid entering into legal transactions. The separation of law and morals is not a reason for regret but rather is an important feature of any free society. We respect the right of individuals to do things that offend others, but we expose them to criticism for doing those things, without imposing legal sanctions for their mistakes. Everyone therefore is at some risk of criticism, but still keeps the power of choice over his own personal affairs.

The basic legal presumption should be set therefore in favor of voluntary exchange. The next question is, what reasons must be advanced to overcome that basic presumption? Here the first source of concern is the process whereby the agreement itself is formed. Thus all legal systems recognize that contracts procured by force, duress, fraud or misrepresentation cannot be enforced if still executory, and may, under appropriate circumstances, be set aside even after performance. The source of this prohibition seems clear: the mutual gain hypothesis cannot survive when any of these invalidating conditions are present. At the very best, the outcome of the conduct has one winner and one distinct loser. That outcome might (barely) be acceptable under Kaldor-Hicks notions of efficiency if there were reasons to believe that the size of the gains dwarfed the size of the losses.[20] But it is wholly indefensible when the size of the loss exceeds the size of the gain. In practice we may not know for any tainted transaction the relative magnitudes of gains and losses.[21] But we do know this: in those cases where the gain to the winner exceeds the costs to the loser, a voluntary transaction without the taint can usually be arranged, so that both sides are indeed better off. Yet the parties could not formulate any successful voluntary transaction where total losses exceed total gains: there is just not enough that the winner could pay the loser and still

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[20] Under Kaldor-Hicks efficiency the winners receive enough so that they could compensate the losers, even if in fact they do not do so. See Richard A. Posner, Economic Analysis of Law 12-16 (4th ed. 1992).

[21] In other cases we are confident about the needed information on relative value. The usual case of necessity allows individuals to enter and use the property of another person, for no one wants to contend that the value of a dock in a storm to a drowning man is less than the value to the owner of having it lay vacant. So the law dispenses with the need for consent to enter, but imposes a duty to compensate on the user of the property, so as to return again to the mutual gain condition. See, e.g., Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

gain from the transaction himself. Forcing persons to conduct their affairs in the "right" way therefore *weeds out* those suspect transactions and leaves in place only those transactions that result in net social improvement. Conditions of this sort could, and should, be attached to every voluntary transaction, including those which involve surrogacy or its "kindred" transactions, such as baby-selling.

The second constraint on voluntary transactions addresses their effects on third persons. In considering this question of externalities, there is an all-too-common sense today that virtually all externalities will be negative: the persons who are not parties to voluntary transactions will necessarily be hurt by them. Assuming for the moment—but only for the moment—that this is true, then the following dilemma is posed: the external losses could be either greater or lesser than the gains to the contracting parties. Yet typically the ability to enter into a voluntary transaction with these third parties is highly limited because it is so difficult to identify them, much less to figure out appropriate levels of compensation. As a rough rule of thumb, the legal response should be to ban or restructure those transactions whose negative third-party consequences outweigh the gains to the transacting parties. Once again gains and losses are measured by a compensation criterion: could the contracting parties buy out all the parties who suffer negative externalities and still have some gain left over for themselves to share? Stated in this unrestricted form, the vaunted institution of voluntary exchange seems to hang by a fingernail. After all, there are millions of persons who could be hurt by any transaction to which they are not parties; yet there are only two, or at least very few, parties to that transaction who gain from it. Any comparison of transactional gains to negative externalities alone, therefore, heavily biases the inquiry against contractual validity. Clearly something is amiss if external losses dwarf contractual gains.

The missing piece of the puzzle is that many transactions routinely generate *positive* externalities that have to be added into the social ledger as well. Thus in the simple case in which A and B are able to increase their wealth and utility by voluntary exchange, they offer more opportunities for third persons to sell their services or their wares, more opportunities for third persons to raise funds for charitable purposes. In practice the working assumption should

be set in favor of voluntary exchange: the increased satisfaction of the parties creates an excess of positive over negative externalities, such that some clear showing of large negative externalities is needed to defeat a voluntary transaction. That burden is not impossible to meet: contracts to murder third persons, and even contracts in restraint of trade, have *systematic* negative effects on third parties. Do any negative externalities from surrogacy contracts reach that level, or even come close to it?

Finally, contractual regimes may be insufficient to provide for the public goods—roads, defense, courts—required in any well-ordered society. Here is not the place to recite the usual litany of holdout problems, coordination games and prisoner's dilemmas. All those complications arise only in cases where private parties are *unable* to enter into the contracts needed to achieve their ends. To overcome these difficulties, the well-ordered state taxes all to benefit all, ideally in equal proportion. But neither surrogacy nor baby-selling raise any coordination problems worth speaking about. These transactions, which involve a small number of parties, can be facilitated by a group of eager intermediaries. The transactions *do* take place, even in a hostile environment. Surely their pace would increase in a more hospitable legal environment. The key challenges to a contractual regime therefore are restricted to the first two points: the risks these contracts hold as between the contracting parties, and their external effects (positive and negative) on third parties. It is to those issues that we now turn in the specific context of surrogacy contracts.

A. Transactions as Between the Parties

The initial question is how large do risks of transactional breakdown loom as between the parties? My own conclusion is that these problems do not offer any serious argument for the prohibition or regulation of surrogacy arrangements. Of course, surrogacy contracts differ from contracts for the sale of fine wine or fast cars. Surrogacy involves the creation of a new human being with claims against his parents. That insight, however, is hardly lost on the parties to a surrogate transaction, who are alert to the ensuing complications right off the bat. This knowledge, moreover, shapes the practices that lead up to the formation of a surrogacy contract in ways that reduce the risk of transactional breakdown. In ordinary

markets, the seller of a commodity is usually willing to sell the goods to the first person who can pay for them. Go to any check-out line in America, and see if the cashier cross-examines the buyer on his qualifications to cook a pound of meat or assemble a lawn sprinkler. The only relevant question is, cash, check or credit card?

No surrogacy contract takes such a casual form. In the first place, the sharp opposition between buyer and seller is blurred in the surrogacy context. Of course the cash payment goes from the father (and his spouse) to the surrogate. But his sperm, and with it his obligations of parenthood, go with it. The purchased "product" does not appear in a cellophane wrapping or a tin can; all parties have a deep concern about the health and well-being of the baby who will be born from this contract. That concern translates into a careful and extensive selection process to find those women who are most likely to be able to deliver a healthy baby at term. Similarly, potential surrogate mothers, like parents placing infants for adoption, want to select suitable parents for the babies to whom they give birth. It is very clear that no sane couple would entrust their surrogacy arrangement to a woman who has a history of alcohol and drug abuse, who has nagging health problems, who is unable to care for herself in relative comfort, or who has already experienced complications in delivering her own children.

The acquiring couple therefore have an intimate interest in the condition and conduct of the surrogate mother, which leads to the most important maxim about partnerships and other forms of relational contracts. The most important decision is with *whom* the contract is made: specific terms are critical but they occupy a subordinate role insofar as they are designed to see that midcourse regrets do not send the arrangement off the rails.[22] That focus on selection, moreover, helps protect against diffuse concerns of exploitation and advantage that could lead to fraud and other forms of sharp practice. The last thing that an acquiring couple wants is a surrogate whose misbehavior could harm the child. Their interest is in choosing a woman able to fend for herself. It is not in their interest to find a woman whom they can exploit. That vested interest in the health and the welfare of the surrogate mother in turn helps protect against the manifold forms of con-

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[22] See infra Part IV.

tracting abuse. In the event that some abuse does take place, all the standard legal remedies for fraud and misrepresentation are available to the surrogate mother as a matter of course.

Knowledge of those risks again influences the way in which the process is carried out. No matter what the background legal rule, no one will (as no one has) believe that caveat emptor is the appropriate rule for surrogacy contracts. Instead, wholly without regulation, the norms of disclosure dominate. The terms and conditions of the relationship can be fully explained; independent counselors and advisers can be brought in to explain the situation to the potential surrogate. Many women choose to become surrogate mothers on more than one occasion, while those who are first-time surrogates can be encouraged to speak to other women who have gone through the experience before they sign on the dotted line. The need for these precautions, or at least some of them, should be quite apparent to contracting parties, making it quite dangerous to pile on additional restrictions, whose major purpose is typically to stymie the transaction under the guise of supplying full information to the potential surrogate.

The common concerns about exploitation of the surrogate mother are then effectively countered by the social institutions and legal doctrines that surround these transactions. We cannot even appeal to the misguided picture of the giant corporation working mischief on the hapless consumer. It is therefore not surprising to see the opposition to surrogate motherhood coalesce around other issues. Quite commonly the debate hones in on the question of status: the mere fact that the woman chooses to enter into such a contract shows that she occupies a subordinate sphere and has allowed herself to become debased, or at least exploited, by the biological father, and perhaps his wife as well.

Once again, however, a bit of perspective is required. Suppose that one takes the Aristotelian view and believes, first, that certain voluntary exchanges are inconsistent with the "natural desires" of the parties, and, second, that the state should intervene to prevent these transactions from taking place. What kinds of transactions might conceivably fall within that class? From an Aristotelian point of view the cardinal virtue would be moderation, so that transactions that smack of various forms of excess—gluttony, cruelty, indiscriminate sexual dalliances—might all be condemned

under such a standard. Prostitution also might easily be condemned on such a view.

But surrogate mother contracts? Here it takes little imagination to realize that these contracts are not born of momentary excesses or transient and base desires. No one thinks that surrogate arrangements are a first choice. They are a desperate last hope, often for couples who have tried for years to conceive without success, often taking Progesterone and Provera in order to stimulate ovulation (which carries with it the risk of multiple pregnancy and a host of unpleasant side effects). Other women have had multiple miscarriages during pregnancy. Still other women have endured multiple operations to eliminate endometriosis or to unblock Fallopian tubes, only to fail to conceive after spending thousands of dollars. As Richard Arneson has written, none of the many writers who attack the legitimacy of surrogate mother contracts show the slightest empathy for the plight of the woman who wants her husband to participate in a surrogate relationship.[23] Yet once any weight is given to the sense of frustration and quiet desperation that drives couples to a surrogacy decision, how could one condemn the transaction on the ground that it glorifies base instincts and practices?

Nor can one condemn surrogacy transactions by looking at the position of the surrogate. As Lori Andrews and others have pointed out, the motivations for becoming a surrogate mother are many and diverse.[24] In some cases it is a straightforward calculation that the income received from the process justifies the emotional sacrifices that are necessarily required. In other cases the motivations are mixed. Some money is accepted by a surrogate who empathizes with the plight of the married couple with whom she has contracted. The context may be novel but the set of mixed motivations is familiar. At some level it is akin to the motivation of the man who sells his $2000 car to the couple next door for half

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[23] See Arneson, supra note 10, at 145-48.

[24] See Lori Andrews, Between Strangers: Surrogate Mothers, Expectant Fathers, & Brave New Babies 68-73 (1989); Lori B. Andrews, Surrogate Motherhood: The Challenge for Feminists, 16 Law Med. & Health Care 72, 76 (1988). Professor Andrews makes the same point with great power in her comments on my paper. See Lori B. Andrews, Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood, 81 Va. L. Rev. 2343, 2353-54 (1995).

price to help them out in a rough patch. There is little sense of exploitation and a clear recognition of what is done and why it is done. Once again the surrogate should be praised for her actions, not condemned by those who disagree with her motives. The same narrative tradition which normally cautions us to understand transactions before condemning them surely applies to this case if it applies to any. Those women who choose to become surrogates do not need our protection against their own weaknesses of judgment or will.

B. External Effects

At this point, the inquiry switches to the second line of attack: may these transactions be invalidated because they produce adverse effects on third parties? The examples of contracts to kill third persons and contracts to rig bids show that this class of cases is not empty. The issue is whether the surrogacy contract falls within its scope. Here there is little or no concern about market structure or monopoly power, so there is no reason to worry about monopoly. The point of departure therefore is the contract to kill or maim a third person. The question is whether the adverse impact, if any, on the unborn child should be treated as falling in a same or similar class of cases.

Simply to state the comparison is to show its extravagance. The main point goes to the direction of the anticipated effect. How many people enter into surrogacy contracts in order to hurt the newly conceived child? If anything, exactly the opposite is to be expected. The people who have struggled so hard to conceive their own child are probably the best candidates to be good parents and not the worst. It hardly seems likely that a couple that endured so much grief to have its own child would embark on a course of abuse and neglect with a surrogate child. Elizabeth Anderson claims that the first obligation of a parent is unconditional love of a child.[25] Would that all parents showed that to their own children.

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[25] Anderson, supra note 7, at 170 ("The most fundamental obligation of parents to their children is to love them. Children are not to be used or manipulated by their parents for personal advantage."). But there can be as much, or as little, love of a child from surrogacy as a child from adoption or foster care. It is one thing to believe that parents must take into account the interests of their child, but quite inconceivable to think that they must always neglect their own. Parents differ from ordinary trustees in that they are allowed to

But is there any reason to think that parents by surrogacy would not love the children whom they obtain by this arrangement? Of course the risks here are not zero, and one should not assume that this is the case. But by the same token the appropriate baseline for an unacceptable risk of harm to the child is not zero. After all, children conceived by normal means often run a far greater risk of abuse. There is surely a risk of abuse even in apparently stable families. The risk is greater for children born of troubled marriages that end in divorce, and still greater for illegitimate children, especially if the mother's new boyfriend moves in.[26] In these cases, we do not think that the risk of harm to children constitutes a powerful reason to license, limit, or ban procreation: it seems hard to believe that these concerns rise to this level in a surrogacy context.

Let us assume for the moment, however, that some risk of abuse remains. Even so, prohibition is not the remedy that fits the offense. The prohibition of surrogacy contracts operates ex ante, and falls upon innocent and guilty alike, making no effort to weed out high-risk surrogacy situations while allowing good ones to survive.[27] At the very least the law should seek to find a filter that would accomplish the needed separation. I have little or no confidence in the states' ability to screen those couples seeking parental rights either by adoption or surrogacy. The process surely would

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take into account their own interests just as they must take into account the interests of their children. There is a level of built-in conflict that is just not present in routine financial situations. For a somewhat different view of the trustee/parent comparison, see Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 Va. L. Rev. 2401 (1995).

[26] No great research is needed to support these points. But here are two items picked up from a casual search of the Sunday newspapers: "A 10-year-old South Side boy was in critical condition Saturday after being set afire, allegedly by his mother's boyfriend, who police said was upset because he believed the child had stolen about $20 worth of food stamps." Teresa Puente, Boy Set Afire Over Missing Food Stamps, Chi. Trib., Mar. 26, 1995, § 2, at 1.

And more generally, a letter to the New York Times by Esther Wattenberg, a professor in the School of Social Work at the University of Minnesota, noted that it is false to assume that children are taken away from their parents "only because they are poor." Indeed, the "blunt truth is that even with these hazardous situations [parental alcoholism, drug addiction, and other disabilities] for children, only a small portion, where 'imminent harm' can be demonstrated, are accepted for investigation and possibly for services." Esther Wattenberg, Child Welfare System, Under Fire, Staggers On, N.Y. Times, Mar. 26, 1995, § 4, at 14.

[27] Thus one thinks of the unmarried man who entered into a surrogacy contract only to kill the child after assuming parental obligations. See Tamar Lewin, Man Accused of Killing Son Borne by a Surrogate Mother, N.Y. Times, Jan. 19, 1995, at A16.

be as intrusive and unreliable as the stringent requirements and prying interrogatories that are routinely imposed by state agencies that supervise adoption and foster care. Moreover, the remedies for abuse and neglect after the fact remain, just as they do for other children, where they can exercise a deterrent effect that is no smaller than it is for other parents. More importantly, perhaps, the availability of these contracts underscores the point that the surrogacy contract is *not* the sale of a child, in the sense that a sack of potatoes is sold. The mere existence of a child confers rights against its natural parents; those obligations are retained as a matter of course by the natural father and assumed as part of the adoption process by his wife. It would be grotesque to claim that the child is placed at increased risk by the release of maternal rights by the surrogate or the assumption of these obligations by the adopting mother. The legal obligations to the child survive the surrogacy contract and offer protection that is every bit as strong, and probably less needed, than similar rights against natural parents.

It could, of course, be argued that the introduction of a new child into the family could have effects on other children of the marriage. But again the argument falls far short of what is required to establish the case for a ban, or indeed any anticipatory restrictions, on surrogacy. Many of these same problems arise when a new child is born into a stable family, or when an adoptive or foster child is introduced into a family with other children, either born of the marriage or adopted. In all these countless cases, a little foresight, patience and understanding go much further than a cold or impersonal set of legal rules. These dislocations are likely to be small; and often the interaction with a second child will be a positive experience for the existing children of the marriage. To use this issue as a reason to prevent surrogacy contracts is to grasp at straws. Well-functioning families negotiate greater dislocations year in and year out.

As a variation on this theme, it seems a mistake to suggest, as Anderson does, that all children will be subject to increased fears that they will be alienated by their parents, and thus cease to be objects of love and affection.[28] Surrogacy contracts only contemplate the transfer of newborn infants, not of older children who

[28] Anderson, supra note 7, at 172.

have already formed emotional attachments to their parents. When changes in parental rights or custody of older children are required their preferences have to be taken into account, even if they are not given decisive weight. The same considerations apply when the parents of surrogate children seek to relinquish custody or control. While that situation is of genuine concern, it must be remembered that these transfers can only be made on the same terms and conditions that transfers of one's own children are allowed. At this point, the interests of the child clearly *do* (and should) limit the freedom to assign parental rights and control. Nothing in surrogacy agreements or surrogacy practices undermines that set of expectations.

The second form of externality is different in its scope and dimension. Here the argument is that the surrogacy contract has negative impact on the social status and psychological self-definition of women as a class, and should for that reason be banned and prohibited. But this class of externalities again is entitled to no weight. Indeed there is a great intellectual vice in making any legal rule turn on what might be termed *soft, selective, negative* externalities. A word of explanation seems in order about this mouthful. The first part of the expression is designed to indicate that the externality in question does not fall into the first two categories of external harm: (a) physical injury to person or property, which for these purposes can be defined to include the threat thereof, as in the case of assault or intentional infliction of emotional distress by extreme and outrageous conduct; or (b) economic harm brought on by certain market practices that allow the creation or exploitation of monopoly power. Neither of these durable cases of externality are present. Only the symbolic effects of the transaction can be used to throw doubt on its social desirability.

It is important to note the weaknesses of any position that attaches such great weight to these soft externalities. First, this class of soft externalities is not limited to the negative responses that some persons have toward the practice of paid surrogacy. Externalities, as noted above, come in both positive and negative forms, and soft positive externalities are as important as soft negative ones. It may well be that some academic feminists and their supporters believe that the indirect social effects of surrogate concepts lead to the loss of self-respect to women, the disintegration of

the family, and the loss of sensitivity attendant to the commercialization of transactions. But these critics are scarcely a random draw from the population: other women and men might well disagree.

So let me add my own sentiments to the register on the assumption that they count no more, but no less, than anyone else's: surrogacy is an affirmation of family values (which I applaud), and one which allows for the continuation of family ties across the generations. Their commercial aspects are a regrettable but necessary part of transactions that yield enormous nonquantifiable benefits to the biological father and his wife, and to their friends and family who have comforted them during their years of anxiety and distress. The ability of individuals to handle these transactions with sensitivity and discretion is not precluded because money changes hands. Indeed the success of the venture may be aided if the money allows skilled professionals to ease the transition of both sides. I am far from saying that these sentiments should persuade the ardent opponent of surrogacy that the rest of us gain tangibly from allowing these contracts to go forward. But it is a misguided truncation of the social welfare calculation to ignore the positive sentiments that develop around a particular institution because other individuals hold a strong but abstract conviction that the transaction should be banned altogether.

The full sum of these soft externalities may be negative, assuming that the difficult aggregation of sentiments can be made across parties. But I would be loath to use this possible balance of negative sentiments to justify any intervention, given the palpable gains from trade to the parties. Nor are the difficulties in summing preferences confined to the question of surrogacy. There are other areas in family law where controversy abounds. Many people find interracial marriage offensive, yet that is hardly a reason to have anti-miscegenation laws on the books. Likewise same-sex marriages are the source of profound discomfort and opposition. But while individuals who do not believe in the practice need not attend the celebrations, their resentment is hardly a reason to ban the practice.[29] In all these cases we are far better off with one uniform principle than with an endless series of ad hoc and case-by-

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[29] For my own views on same-sex marriages, see Richard A. Epstein, Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages, 92 Mich. L. Rev. 2456 (1994).

case decisions. The proper rule of decision is to ignore the offense that people take at the conduct of others, just as we ignore the positive sentiments that some people have about the actions of others. We should allow the gains to the parties to legitimize the transaction. The selective invocation of some soft external effects is far riskier than ignoring these sentiments on the ground that the opposite points of view largely cancel each other out. John Stuart Mill's classic statement that the sole justification for restricting individual liberty is the prevention of harm to others is wholly gutted if the conception of harm is given a meaning as broad as that supposed in this context.[30] Hard externalities count, and should be assessed on an individualized basis so that the proper mix of remedies, whether by way of damages or injunctions, can be imposed. Soft externalities should always be ignored.

II. Dubious Grounds to Deny Contractual Enforcement

Although the opponents of surrogacy contracts address issues of contract formation and externalities, they do not confine their objections to these traditional grounds. In addition, to justify their result they put forward an array of additional considerations that are more difficult to categorize. In this Part I shall confront several of these concerns: commodification, subordination, and incommensurability.

A. Commodification

The question of soft externalities, far from being ignored, is often pursued under the rubric of commodification. Thus we are

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30 [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.

John Stuart Mill, On Liberty, *reprinted in* Utilitarianism, Liberty, and Representative Government 81, 95-96 (E.P. Dutton & Co. 1951) (1859).

told that the surrogate relationship is improper because it commodifies women, their labor and their offspring.[31] Yet once again the argument seems fatally flawed for two interconnected reasons. The first point is obvious: there is no compulsion for any couple or any woman to enter into this market. Those infertile couples who choose not to pursue surrogacy, or indeed not to pursue adoption, are perfectly within their rights. They have not sought to become buyers in this new market. And the vast majority of women who choose not to become surrogates are also within their rights. The claim about commodification therefore has nothing whatsoever to do with what a woman may or not do with her own body, or what a man may or may not do with his own sperm. Instead it is an effort by some to *impose* their own conception of the right and proper thing to do with bodies, eggs and sperm on other individuals who hew to different conceptions of the good. In order to restrain the behavior of others, some greater warrant than a diffuse condemnation of their conduct is needed, and that requirement forces the inquiry back to the discussion of defects in the contracting process and negative third party effects, both of which have already been found wanting. No one's views on commodification should be imposed on other individuals who do not share those views. The women who want to enter into surrogacy contracts are not reduced to commodities solely because others mistakenly hold to that view.

The second reason for rejecting the commodification argument is related to the first. The word "commodification" builds on the word "commodity," and thus skillfully exploits an avoidable ambiguity in the English language. In one sense "commodity" has a very broad meaning: it can cover "something that can be bought and sold," or "a movable article of trade or convenience."[32] To use this definition of a commodity is to equate it with the full domain of items of economic or exchange value (excluding land). But when one talks about things that are traded over the commodity

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[31] See, e.g., Anderson, supra note 7, at 168-75; Radin, supra note 12, at 1855-56, 1928-36; Field, supra note 8, at 28 (quoting Barbara K. Rothman, The Tentative Pregnancy 2 (1986)) ("When we talk about the buying and selling of blood, the banking of sperm, the costs of hiring a surrogate mother, we are talking about bodies as commodities. . . . The new technology of reproduction is building on this commodification.").

[32] See Funk & Wagnalls New Comprehensive International Dictionary of the English Language 264 (1982).

exchange, a narrower definition is employed, one which stresses the fungible nature of the goods in question. And "fungible," we are told by the U.C.C., refers to goods "of which any unit is, by nature or usage of trade, the equivalent of any other like unit."[33] In this definition the U.C.C. quite consciously brackets fungible goods with "securities," all of which are of the same group or class. The key element of a commodity in this account is the perfect substitutability of one unit for another, from which it is easily inferred that there is no special subjective value that is attached to any particular unit. The ownership of any distinctive good, from a favorite photograph to an old pair of shoes, is not by this definition a commodity because that condition of perfect substitutability is lacking: the presence of subjective value precludes any thing from becoming a commodity in this sense. Indeed when a specially valued person or thing is called a "rare commodity" the use of the adjective "rare" is meant to distinguish the particular subject matter from fungible commodities. Commodities in the narrower sense are, of course, of enormous value because the ability to substitute reduces the cost and increases the velocity of trade, for all concerned. But surrogacy contracts are for the duration, not for resale.

There is a second sense in which commodities differ from ordinary goods: goods may be, and often are, durable. Commodities are typically meant for consumption, either in their original form or after they have been converted into other consumable products: grapes into wine, cattle into steaks, iron into cars, and the like. To place the label "commodity" on any good therefore means that it has no unique subjective value and is likely to be quickly transformed or consumed. To commodify something that is not a standard commodity makes it appear, wrongly, that this good, service or relationship lacks any distinctive value and will in any event quickly be consumed or transformed. It connotes the sale of cattle being led to the slaughter for the benefit of their owners. That term is wholly inappropriate to describe the relationship of an artist to a picture, a doctor to a patient, or a parent to a child.

This linguistic analysis shows how inappropriate it is to apply the term "commodification" in the surrogate setting. No one wants to "commodify" children in ways that treat them as fungible goods to

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[33] U.C.C. § 1-201(17) (1990).

be sold and consumed in the ordinary course of business. The law of contract may specify a uniform way of making agreements for the transfer of anything—the rules of offer and acceptance, consideration, and the like do apply to all contracts. But no one should be misled by the universality of the contractual form in the face of the diversity of the contractual subject matter. It is very clear that the same terms can be used to buy and sell, transfer and assign, very different objects or rights in very different ways.

Surrogacy contracts should stand and fall on their own merits. These are not contracts for the sale or repair of goods. They are contracts for the release of parental rights and obligations, specially tailored to the situation that they address.[34] No participant in the surrogacy contract would describe the newborn child as a "commodity" in the narrower sense of that term. It is therefore no wonder that the mischievous phrase "commodification" is only used as a form of descriptive rebuke by those who attack the transaction, not by those who participate in it.

B. Gender Subordination

Another common theme is that of gender subordination. The argument proceeds that women cannot be expected to fend for themselves because of their inferior position and economic power in society at large. Thus Margaret Radin writes that "paid surrogacy within the current gender structure may symbolize that women are fungible baby-makers for men whose seed must be carried on."[35] Similarly Debra Satz writes that "it is the background gender inequality that makes the commodification of women's and children's attributes especially objectionable." Her explanation: these power differentials turn "women's labor into something that is used and controlled by others."[36]

The argument here in part reflects the misguided use of the commodity analogies already addressed, but raises the distinct element of inequality of bargaining power based on background conditions. This argument assumes without demonstration the level of domi-

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[34] On the content of these terms, see infra Part IV.

[35] Radin, supra note 12, at 1935. The term "fungible" again presses the misleading analogy of children to commodities.

[36] Debra Satz, Markets in Women's Reproductive Labor, 21 Phil. & Pub. Aff. 107, 123-24 (1992).

nance that it claims, without any identification of the institutional features that lead to its perpetuation in all areas of social life. In addition, it ignores the obvious point that the interests of women and children lie on both sides of these transactions. Nor is it explained how far this argument goes. Conditions of gender inequality, to the extent that they exist, are all-pervasive in society and surely are not confined to this narrow set of transactions. How far then does the prohibition run? Are women to be prevented from ever working for men? From having men work for them? The whole point seems so loose and abstract, for it challenges the very idea that women can be autonomous individuals capable of legal respect. It is difficult to see how a claim that sweeping bears any relevance at all to the question of surrogacy contracts.

C. Incommensurability

Discussions of commodification typically carry in their wake yet another obstacle to voluntary exchange: incommensurability.[37] Here the basic idea is that no common metric (much less one dependent on utility) can capture that which is relevant and distinctive about persons or experiences. Love of course cannot be bought and sold for dollars, and we do not know how to put a price on it. But once again the point seems to be a giant non sequitur. In those cases where monetary values cannot be put on arrangements, we should not expect to see cash involved in those relationships. Since the Beatles reminded us that "money can't buy you love," we would not expect to see loving arrangements arise in which sums of money are paid for each act of companionship and gratification. But from that premise it hardly follows that transactions that do have a cash component should be banned. If a

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[37] For my more extensive critique of the idea of incommensurability generally, see Richard A. Epstein, Incommensurability of Values: Or Is Utility the Ruler of the World?, 1996 Utah L. Rev. (forthcoming 1996) (on file with the Virginia Law Review Association).

For leading expositions of the incommensurability position, see, e.g., Joseph Raz, The Morality of Freedom 321-66 (1986); Anderson, supra note 7, at 177-79; Radin, supra note 12, at 1924-30; Margaret J. Radin, Justice and the Market Domain, *in* Markets and Justice 165 (John W. Chapman & J. Roland Pennock eds., 1989); Margaret J. Radin, Compensation and Commensurability, 43 Duke L.J. 56 (1993); Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994).

For a defense of commensurability, see James Griffin, Are There Incommensurable Values?, 7 Phil. & Pub. Aff. 39 (1977).

woman wishes to serve as a surrogate for reasons of love (as when one woman carries the child of her sister to term), that relationship should be evaluated on its own terms. If another woman receives $10,000 to serve as surrogate, which she uses to take care of her own children, that is a different kind of relationship to be sure. Yet it sounds hollow for a third party to insist that no monetary value can be assigned to this relationship when the contract in question has already specified a price for the services to be rendered.

As an abstract matter we may wonder how we, or anyone else, weigh the intangibles associated with choosing a career, getting married, having children, migrating to a new country and the like. But our sense of abstract wonderment hardly justifies banning any of these transactions or decisions. Instead, the more sensible approach to the subject is to recognize that trade-offs are invariably subjective. The differences in subjective valuation lead to diversity of viewpoints and activities, and that diversity in turn enriches our overall culture. Intelligent people can overcome the obstacles to sound decisionmaking that block their path. When they have made up their minds, their evaluation should be final. Incommensurability, then, may pose a complex philosophical problem, but, like appeals to the idea of commodification, it neither advances nor retards a case for government intervention in voluntary transactions. The key questions are always and only: were there defects in the contracting process, and were there net negative hard externalities? Otherwise we all have to learn to live with transactions and behaviors of which we disapprove and to grow stronger in our frustration and uneasiness.

III. The Comparison with Baby-Selling

Thus far I have confined my analysis to surrogacy transactions on the assumption that they are sui generis. But in some sense they are not. In particular, the release of parental rights by the biological mother, followed by the assumption of parental rights by the adoptive mother, could be compressed into a single transaction: the sale of a half-interest in a baby. The condemnation of any transaction as "baby-selling" is all too often treated as a conversation stopper, so that the only question left to ask is whether the preservation of the father's interest in the transaction sufficiently

distinguishes surrogacy from baby-selling transactions between total strangers.

My own answer to that question is twofold. The first part is that the distinctions are small, but not unimportant. With surrogacy the father receives exclusive custody (with his wife) over his own child so that the baby has strong biological ties in its new environment. The second part is that the ban on baby-selling is misguided for the same reason that any total ban on surrogacy contracts would be misguided: none of the impediments to contract outweighs the gains from trade. With a respectful nod to those who have taken this path before me,[38] it is instructive to critique the arguments now regarded as strong enough to condemn baby-selling as illegal in every state of the Union.[39] Consider the case for illegality offered by Judge Wilentz of the New Jersey Supreme Court in *In re Baby M*:[40]

> The prohibition of our statute is strong. Violation constitutes a high misdemeanor, a third-degree crime, carrying a penalty of three to five years imprisonment. The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. Furthermore, the adoptive parents may not be fully informed of the natural parents' medical history.
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> Baby-selling potentially results in the exploitation of all parties involved. Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child.[41]

The intensity of this denunciation belies the weakness of its arguments. Take the points in order. The first objection is that the

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[38] For the most systematic defense of baby-selling, see Elisabeth M. Landes & Richard A. Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323 (1978). For criticism, see J. Robert S. Prichard, A Market for Babies?, 34 U. Toronto L.J. 341 (1984).

[39] See Field, supra note 8, at 17. Field cites Senate Hearings of a generation ago which concluded that the practice of baby-selling was widespread. See Juvenile Delinquency (Interstate Adoption Practices): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess. (1955).

[40] 537 A.2d 1227 (N.J. 1988).

[41] Id. at 1241-42 (citations omitted).

mother (or parental couple) will not take care to see that the child is sold to suitable parents. But there is little reason to believe that the decision to sell her parental rights to a child leaves the mother indifferent to the identity of the buyer. What evidence we have from the operation of the gray market (where fees go to the brokers, lawyers and doctors who handle these transactions, and to the (inflated) medical expenses of the mother) suggests quite the opposite. These transactions do not betray any indifference on the part of the women who part with their babies. The common practice is for potential adoptive couples to prepare résumés indicating why they are suitable, and for extensive interviews to take place on both sides, to see if the baby is suitable for adoption and whether the adoptive couple is suitable to take it. There is little reason to believe that the information generated by this process is inferior to that which is required in adoptions supervised by public agencies, where bureaucratic imperatives can more easily intervene.

The second argument put forth in *Baby M*, that counseling and guidance should be provided, does nothing to support a ban, but only justifies, at most, a requirement that such counseling take place before the transaction is completed. Yet ironically, counseling and guidance would be more accessible and more affordable if the ban were removed, for then people could offer their services without running the risk of being branded as criminal accomplices. One final twist is that the demand for counseling once again reveals the strange bedfellows that arise in family law matters. When the issue is abortion, the pro-life groups support counseling as a way to slow down the process; the pro-choice groups vigorously oppose this alternative, and have for the most part been successful in defending the proposition that counseling "burdens" the abortion right. But with surrogacy, the pro-life forces (which tend to be more conservative than libertarian) often join forces with many pro-choice groups to use counseling requirements as a means to curtail the number of surrogacy transactions. But the shifting coalitions cannot conceal one odd point about the debate: the

adverse psychological consequences of an abortion can be far greater than those of participating in a surrogacy transaction.[42]

Nor is the court in *Baby M* correct to say that the transfer of money negates the voluntary nature of the transaction. Money only converts the transaction from a voluntary donation of parental rights to a sale of parental rights. It does not make the transaction corrupt; it does not carry with it the conclusive mark of fraud, concealment, or misrepresentation, which cannot be inferred from the payment of money in this context any more than it can in any other. The most that can be said is that the money may create some kind of conflict of interest between parent and child, so that the sale will be made to a higher bidder when the child is better off in the care of a lower bidder. Yet once again the decisions made in the gray market suggest that this concern is overblown. The mother who surrenders custody of her child will have to weigh one interest against another, just as she does when she keeps custody of the child and has to decide whether she can afford to send the child to day-care or private school. The problem of conflicts of interest is one that a sensible system of counseling might address, but except in extreme cases, it hardly seems to be a reason to ban the transaction. State-run adoption systems are rife with conflicts of interest and incompetence, yet the response is not to ban their operation entirely.

Finally, medical history is hardly a dispositive concern. A simple rule—which should be desired by the parties in any event—could require the natural parents to give their medical histories in confidence should they be needed for diagnosis or treatment. There is nothing in these slight procedural difficulties that comes close to justifying the ban.

For the rest, the arguments about baby-selling only track those for surrogate mothers. There are concerns about protection of the baby against abuse by the new parents. But is it more likely that these parents will abuse children than, say, the new live-in boyfriend of the mother of an illegitimate child? And the sanctions against abuse and neglect remain on the new parents as they did on

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[42] For an account of the psychological difficulties with abortion, see Michael W. McConnell, How Not to Promote Serious Deliberation About Abortion, 58 U. Chi. L. Rev. 1181 (1991) (reviewing Laurence H. Tribe, Abortion: The Clash of Absolutes (1990)).

the old. One can find cases in which ostensible sales seem abusive per se, as with the couple who wanted to trade their baby for an $8,800 Corvette.[43] Yet oddly enough, the baby may well have been better off if sold than if retained, and the father was surely guilty of abuse for proposing the transaction in this form. Likewise it makes no sense to allow babies to be used as security for an unpaid debt, for that hostage transaction hardly comports with the best interests of the child. But the use of these extreme examples should not discredit the general practice in its far more benign form. And the concerns of commodification and incommensurability are no more persuasive here than with surrogacy. The analogy to baby-selling, then, only strengthens the conclusion that surrogacy transactions should be legal.

IV. Enforceability of the Surrogacy Contract

We come at last to the question of the enforcement of the surrogacy contract. Here there are two issues that must be addressed. The first one is a continuation of the attack on surrogacy contracts based on the terms that they contain. Elizabeth Anderson, for example, notes that the standard surrogacy contract requires the surrogate mother

> to obey all doctor's orders made in the interests of the child's health. These orders could include forcing her to give up her job, travel plans, and recreational activities. The doctor could confine her to bed, regulate her diet rigidly, and order her to submit to surgery and to take drugs.[44]

These are indeed very severe restrictions, but the explanation for them is not hard to come by. The surrogate mother has only a short-term interest in the child. The father has a permanent one.

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[43] See Radin, supra note 12, at 1925-28. She quotes from Lewis Hyde, The Gift: Imagination and the Erotic Life of Property (1983) as follows:

> In 1980 a New Jersey couple tried to exchange their baby for a secondhand Corvette worth $8,800. The used-car dealer (who had been tempted into the deal after the loss of his own family in a fire) later told the newspapers why he changed his mind: "My first impression was to swap the car for the kid. I knew moments later that it would be wrong—not so much wrong for me or the expense of it, but what would this baby do when he's not a baby anymore? How could this boy cope with life knowing he was traded for a car?"

Id. at 96 (quoted in Radin, supra note 12, at 1926 n.267).

[44] Anderson, supra note 7, at 176 (citations omitted).

While there is a substantial correspondence of interest, there is also a potential conflict of interest between surrogate mother and child (especially as the surrogacy contract is designed to discourage the development of affective relationships between surrogate and child), and something has to be done to fill that gap. The right approach therefore is to devise a contractual scheme that seeks at reasonable cost to eliminate that conflict of interest without allowing the father to dominate the life of the surrogate mother. The introduction of a physician into the picture creates a third-party buffer, and the restrictions that are imposed here are in practice no different from those which would ordinarily be required of a mother who wanted to carry a child to term when no surrogacy arrangement was involved. Even the requirement of surgery is hardly one to attract condemnation, for it could be that a caesarian section is necessary for the delivery of the child. To be sure, the surrogate mother has to surrender some degree of freedom which would otherwise be hers. But the terms of the contract are born of the occasion, and the friction that they create is thought justified by the promise of greater gains. For some women these conditions are so onerous that they would not enter into the transaction at all. But for others the cost of these additional restrictions is perceived as being far lower. To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor. Full control over their own bodies and labor is what autonomous individuals have before they contract. The process of contracting always requires a surrender of some portion of autonomy, but only in exchange for things that are thought to be more valuable.

A more difficult term in the surrogacy contract is that which allows (presumably in the cases where the infant is found to be seriously defective) the father to order an abortion to terminate the pregnancy. One possible response is that the woman would refuse to accept this particular term, at which point someone has to decide who has custodial obligations to the child when it is born.

Yet if this term is included in the surrogacy contract, we should all be of two minds on the question because of the underlying ambiguity that surrounds abortion in ordinary contexts. Thus I find the question of whether abortion should be legal a difficult issue, to say the least, given that the harm to the fetus is one that

cannot be ignored in any social calculation, and may well deserve a dominant position in the overall judgment. If abortion were illegal, even in cases when the unborn child suffered serious birth defects it is clear that a clause of this sort could not be inserted into any surrogacy contract. The surrogacy arrangement does not remove any of the legal restrictions on pregnancy that exist for ordinary married couples. If they were required to carry a child to term, then so too the surrogate. Similarly, if the father would have parental obligations to a child carried by his wife, then he would have similar obligations to the surrogate. There would be an unexceptionable justification for a restriction on contractual freedom.

Yet so long as the law is otherwise on the question of abortion, so long as *Roe v. Wade*[45] is the law, then it should be otherwise in this context as well. It is the father who has, under contract, the longterm obligations for the child, and it cannot be regarded as unjust or unwise that his decision should determine whether the abortion should take place for precisely those reasons that are so important to ordinary married couples. Indeed it would be quite extraordinary if any contract would allow the separation between risk and reward that is created by allowing the surrogate to carry the baby to term when the obligations of care devolve thereafter on the father. One can imagine a situation where the converse is true, so that the surrogate could terminate the pregnancy when the father wishes for it to continue: such an outcome might happen if the surrogate faces some medical risk from the pregnancy. But allowing the surrogate to carry the child to term against the wishes of its father is inconsistent with the basic contractual design.

There is still one last issue of great importance in these contracts: whether the father is entitled to specific performance over all of the terms. As has been noted by Debra Satz, in the ordinary contract a default by the promisor results not in specific performance of the service obligation, but in an action for damages. "Thus, by analogy, if the woman in a pregnancy contract defaults on her agreement and decides to keep the child, the other parties should not be able to demand performance (that is, surrender of the child); rather, they can demand monetary compensation."[46] In this

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[45] 410 U.S. 113 (1973).

[46] Satz, supra note 36, at 126.

context, moreover, the suggestion about monetary compensation may be academic: the surrogate mother may not have the resources to pay any compensation, which would be difficult to determine in any event. And even if such compensation could be set and paid, it would leave the biological father and his wife far short of what they sought to achieve from this agreement.

To see the error in Satz's suggestion, it is necessary to begin with the observation that specific performance as a remedy is—ironically—unnecessary in those cases where the contract in question calls for the sale of a fungible commodity that can be covered in the market.[47] In cases involving the sale of land, which is generally regarded as "unique," and certain specialized goods, the remedy of specific performance is routinely awarded. One reason is the difficulty of finding a sum of money that will leave the buyer indifferent between the goods promised and their money substitute.

A second reason is that the specific performance of transfers, unlike that of employment contracts, does not require constant judicial supervision. In this connection denying the specific performance remedy still leaves the biological father with parental obligations that require greater supervision than the transfer of the child at birth. And even if the law were prepared to allow the surrogate to cancel the contract only if she assumed all parental obligations, the problem would not would be solved: the father would still be required to abandon all parental rights, and to sever all connections with his own biological child. Yet the remaining obligations on the surrogate mother (such as those to supply medical information when necessary) are surely easier to supervise than a full-blown custodial arrangement. Once therefore it is realized that surrogacy contracts are *not* transactions for the sale of commodities, it should be painfully clear that damages at law are not an adequate remedy, and that specific performance is needed.

In similar fashion, the standard surrogacy contract offers its own response to any incommensurability concern. In the abstract it is hard to determine whether the surrogate mother or the biological father has a greater interest in the child. But the genius of contract

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[47] See, e.g., U.C.C. § 2-712 (1990), in which the buyer's remedy is to "cover" for the nondelivery of goods. Obviously the condition will only work where the goods are fungible.

is to take this decision out of the public realm and to allow the parties to decide the issue for themselves. If specific performance is called for, then there has been a prior mutual evaluation as to who should have custody of the child, and there exists no reason for any court to reverse that judgment by refusing to enforce the contract as written.

Lest there be any uncertainty about this conclusion, consider what happens when the transaction is examined from the other side. Suppose that the father decides that he no longer wants the child after birth. The right response is "too late, so sorry." The surrogate mother cannot be forced to retain the child, even if she is provided with an action in damages or child support against the wayward father. Nor should she be required to bear the expense and the worry of putting the child out for adoption when the biological father still has some rights and obligations for the child. Just as the sellers of land can get specific performance from their buyers, so too the surrogate mother should be entitled to it unless the contract provides otherwise. That last caveat shows what is fundamentally wrong with Satz's suggestion. The choice of remedies should normally be left to the parties, not subject to direct control by the state. If the parties think that specific performance is the appropriate remedy, then that should conclude the matter unless there is some third-party claim at stake. That last qualification in turn brings us back to the question of externalities and third-party effects, which has been addressed once and need not be addressed again.

This discussion of specific performance is important because it shows the weakness in the compromise position which holds that surrogacy contracts should be neither criminal nor enforceable (at least at the option of the father). Martha Field urges courts to treat the contracts as valid but unenforceable at the option of the biological mother, but not the biological father.[48] Her position is designed to allow the biological mother the best of both worlds under the surrogacy contract: she can keep the baby if she wants, or let it go if she prefers the bargain. Her only constraint is that she must make a once-and-for-all-choice, typically going through with the original plans, as some ninety-nine percent of surrogate

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[48] See Field, supra note 8, at 75-83, 97-109.

mothers have done.[49] Field's solution has the obvious virtue of seeking some golden mean between total enforcement and complete illegality, but her compromise is more elegant than sound.

The key objection to Field's proposal is that it overlooks one of the major functions of the contracting process—to sort out the parties who choose to participate in the venture in the first place. That issue is of little concern with commodity contracts, where one buyer is just as good as another for number two wheat. But precisely because surrogacy contracts are not contracts for commodities, we need a legal regime where surrogacy contracts will be enforced come hell or high water. Once the legal regime is unmistakably clear, then any woman with doubts about her psychological willingness to part with her child will steer away from it. She knows that she will be denied the luxury of the wait-and-see option later on. But once surrogacy contracts are rendered unenforceable, two important changes will happen. First, women who were once committed to letting go of the child at birth have the luxury of second thoughts. Second, women who are not quite sure what they will do at childbirth will be more willing to participate in surrogacy transactions. Two advantages of the firm contract are therefore lost. First, it no longer functions as a safeguard against psychological regret. Second, it strips away from the biological father and his wife an essential sorting device for selecting the right surrogate mother.

The composition of the pool of women who will contemplate surrogacy will change, and change for the worse. Now women who are uncertain as to what they will do could enter the bidding, since the biological father and his wife are stripped of any contractual sorting device. Without the firm contract, greater reliance would be placed on psychological testing, thus adding expense to the process and possibly deterring willing surrogates who knew their own preferences and were comfortable with the older, leaner process. The upshot is that the rate of withdrawal would increase, and if it went even from one to three percent it could have enormous impact on the willingness of couples to enter surrogacy contracts. Small risks are often difficult to calculate, and the resultant uncer-

[49] The empirical figure cited by Field is 495 out of 500 successful contracts. See id. at 184 n.16.

tainty can undermine the fragile resolve to enter into such a transaction.

To be sure, the wait-and-see option is *not* always bad. When a married couple wishes to adopt a child outside of surrogacy, this arrangement is often used: the birth mother can change her mind up to the last moment. But if she does, all that happens (in addition to the psychological pain and investment by the adopting parents) is that she keeps her own child. With surrogacy the failure of the contract does not spell the end of the relationship, for the biological father still shoulders parental obligations. Instead of a clean contract, an ugly fight over custody and support looms on the horizon. Given this risky prospect, many couples wanting surrogacy may decide not to go ahead. The intermediate solution therefore will undermine the market, and for what?[50] The needs of the natural father and his adopting spouse are palpable. Yet the risks attributed to baby-selling by Judge Wilentz in *Baby M* simply are not present at all. Why surrogacy contracts should not be a source of hope and affirmation remains something of a mystery to me.

CONCLUSION

The purpose of this Article has been to review the arguments that can be made over the proper social response to surrogacy contracts. The most important methodological point is to recognize that new technologies and new contracts do not require abandoning the standard techniques for evaluating the efficiency of various social arrangements. Surrogacy contracts are no exception to

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[50] Custody fights of this sort are avoided when the transaction is a true womb-rental situation. And there have been as of late some advertisements placed in college newspapers in the Northeast offering to pay money to college students for eggs that can be fertilized by a biological father and then implanted into his wife's womb. See Karen S. Peterson, Ads for Egg Donors Raise Ethical Ire, USA Today, Feb. 7, 1995, at 1D (reporting an ad reading: "Donor sought: empathetic, intelligent, healthy, attractive (preferably dark-haired/Jewish) woman 21-28."). The payment offered was $2,000 plus a free medical examination. A sidebar to the article noted that the use of fertility drugs, characteristic among egg donors, could raise the risk of ovarian cancer. See Tim Friend, Giving Could Raise Cancer Risk, USA Today, Feb. 7, 1995, at 1D. These transactions require the surrogate to undergo extensive drug treatment to produce a suitable yield of harvestable eggs, and clearly demand a level of technical medical sophistication not required in simple surrogacy transactions. But they do avoid the problem of enforcement when the wife gives birth to the surrogate's child. It is an open question whether these transactions have a future in an unregulated market.

this rule. The technology needed for surrogacy arrangements is not sophisticated or obscure. The desire for these contracts is palpable; people enter into them. As a general rule the law follows the right course when it enforces serious promises unless there is a good reason not to do so. In general these good reasons fall into two classes: defects in the contracting process or adverse effects on third parties. Both of these issues may surely be raised in this context, but neither of them is persuasive if we confine our concern to such matters as duress or misrepresentation on contracting, or the imposition of serious harms on third parties.

Unfortunately the history of contract law does not always remain within these well-charted paths. Side by side with this approach, there is a long history to disrupt the system of contractual enforcement by appeals to such notions as exploitation and unequal bargaining power. Today a fresh set of concerns is tied to commodification, incommensurability and gender inequality. Yet no matter how insistent and ubiquitous these claims, they do not offer sufficient reason to block the enforcement of contracts simply because people disapprove of the motives and actions of the parties to those arrangements. Tested against any general theory of contractual obligations, surrogacy contracts may be complex and difficult arrangements, as befits the powerful emotions tied to their subject matter. But they are also contracts deserving of full legal enforcement, which they are unfortunately too often denied.