

SURROGACY: HUMAN INCUBATORS AND A DEFENSE OF CONTRACTUAL AND FINANCIAL AGREEMENTS

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This paper addresses the rising trend of surrogacy and the use of women as human incubators (both as full and gestational surrogates), employed by couples that experience infertility. Surrogacy is one of the common approaches now adopted by infertile parties as a method of producing a child. As of yet, the United States federal government has remained silent on the matter of surrogate contracts, leaving the decision in the hands of each state government. One issue to be examined is the commercialization and commodification of women as surrogates are entering into contracts and receiving payments. Some even liken this commodification of human life to a return to slavery. Other critics point to the exploitation and degradation of women assuming the role of surrogates, calling them “breeder-woman.” There is a worry that women’s bodies are being exploited for their reproductive capacities. Opponents claim that surrogacy seekers are inappropriately targeting women from minority races and lower-income demographics. Supporters of surrogacy contracts argue that providing a financial incentive simply encourages women to become surrogates and ultimately gives the gift of life to desperate parents and should therefore trump any other concern. While this approach is not entirely satisfactory, the author suggests, with the aid of human testimonies and via analogies, that surrogacy be viewed through the lens of providing a service, a laudatory one indeed. Invoking our right to procreate and our right to contract, the author demonstrates how surrogacy contracts seem to escape all of the commonly attributed moral and ethical concerns. Along the lines of treating surrogacy as a pure contractual service, the author further argues for the surrogate woman’s right to demand a different price depending on whether gestational or full surrogacy is chosen.

In 1985, twenty-six-year-old Mary Beth Whitehead agreed to carry the child of William and Elizabeth Stern, the intending parents (Spar, p. 69). The price: \$10,000. In April 2005, twenty-five-year old Teresa Anderson agreed to carry the child of Enrique and Luisa Gonzalez. The price: \$15,000 (Spar, p. 229). These women, referred to as surrogate mothers, or quite simply as surrogates, are but two participants in the growing practice of contractual and commercial surrogacy. The rising trend of employing a woman to gestate a child not entirely her own calls into question critical ethical issues. Are women being used, taken advantage of, exploited, and treated like commercial items? Or, perhaps there should be nothing troubling about women voluntarily offering their wombs as human incubators and receiving compensation.

For centuries, infertile couples have been searching for remedies and solutions to solve their problems of infertility. The advent of in vitro fertilization (IVF), first performed successfully in 1978, allowed couples experiencing difficulty in conceiving through conventional means to enter into a process in which sperm and egg were collected and fertilized outside of the human body, in a test tube or Petri dish in a fertility lab. The fertilized egg and resulting embryo was then placed in the womb of the mother-to-be. The popularity of the innovative and promising technology of IVF spurred an increase in gestational surrogacy

cases worldwide.¹ A woman physically incapable of carrying and giving birth to her genetic child (perhaps due to a hysterectomy or old age) could now have one of her eggs removed, fertilized with the sperm of her husband or donor, and inserted in a surrogate mother willing to carry and give birth to “their” own genetic child. Occasionally, a biological, single-parent father may choose to form a contract with a surrogate much like a single unmarried woman may use the sperm of a third-party donor. Janet L. Dolgin, a professor of law at Hofstra School of Law and author of *Defining the Family*, clarifies that “although now surrogacy arrangements can take many forms, they all involve the participation of a woman who agrees to gestate and give birth to the child whom she further agrees to surrender to other parents. These parents are variously called ‘contracting,’ ‘intending,’ or ‘social’ parents” (Dolgin, p. 64).

The commercial and contractual aspect of the relationship between the intending parents and the surrogate mother has aroused great interest and curiosity. Deborah L. Spar, a professor at Harvard Business School and author of *The Baby Business*, comments on this unique relationship: “Instead of giving birth to her child, the intended mother borrows—employs, rents, purchases—the womb of another. The pregnant woman is not the mother in a surrogacy arrangement; the paying woman is (p. 71).”

Although some women are altruistic enough to

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lend their bodies to relatives and friends at no cost, the vast majority of surrogacy arrangements presently involve some form of payment or compensation. What is being paid for exactly, the child or the physical labors and inconveniences that the surrogate undergoes, might be a matter of dispute. What is clear, however, is that contracts are being formed and money is being exchanged.² In the United States, the federal government has been silent and has yet to legislate any law prohibiting surrogacy contracts.³ The matter is mostly left up to the state courts and legislative bodies, allowing for a wide array of opinions. Some legislatures outlaw contractual surrogacy on all grounds and make it a criminal offense to participate in such a contract. In Michigan, for example, “arranging or mediating such a contract is a felony, punishable by a fine of up to \$50,000 and/or a prison term of up to five years. In New York, surrogacy agreements are void and unenforceable; participants are subject to civil penalties and brokers and other mediators receiving payment are subject to a civil penalty for a first offense and to criminal penalties for subsequent offenses” (Dolgin, p. 77). Some states like Alabama, Nevada, and West Virginia, exclude contractual surrogacy from the laws prohibiting payment for adoption, but do not actively regulate surrogacy arrangements. States like New Hampshire, on the other hand, permit surrogacy contracts and efficiently regulate them (Dolgin, p. 77).

Many critics of surrogacy point to the commercialization and commodification of women and children. In 1987, Gena Corea, an author who writes profusely on women in contemporary society, stated: “The rise of the surrogate industry does not take place in isolation. It is part of the industrialization of reproduction. It is part of the opening up of the ‘reproductive supermarket’” (Spar, 77). The making of babies is turning into an industry; people are beginning to ‘shop’ for babies. Opponents of commercial surrogacy maintain that the very notion of putting price tags on humans is deemed inappropriate and considered unacceptable. Of course, society at large subscribes to the view that babies themselves should not be bought or sold. Spar expresses this majority feeling in the preface to her book: “As people—as parents—we don’t like to think of children as economic objects. They are products, we insist, of love, not money, of an intimate creation that exists far beyond the reach of any market impulse” (Spar, p. xi). Renting space in surrogates’ wombs, critics claim, does not circumvent the uneasiness surrounding the buying and selling of babies. The implication is one and the same; human life is being treated as a commodity. In 2004, the President’s Council on Bioethics raised some ethical con-

cerns regarding the commercialization of reproduction:

Some argue that the commercialization of reproductive tissues might diminish respect for the human body and human procreation...If the essential materials of human procreation are regularly bought, sold, and esteemed in accordance with market valuations, the human meaning of bringing forward the next generation may be obscured or undermined. (p. 149-150).

Those who maintain that the “essential materials of human procreation” should not be treated as commodities do not always make their reasons explicit. There is a general sense of uneasiness that hovers over any talk of babies as property or exchangeable items. When asked to pinpoint the problem, it is not unusual for someone to respond by saying ‘it’s just wrong’ or ‘it doesn’t sit right with me.’ As Spar simply commented, “we don’t like to think of children as economic objects” (emphasis mine, p. xi). Certain individuals, such as Ron Gray from the Christian Heritage Party of Canada, however, argue that the commodification of people is morally objectionable in that it is a “return to slavery.” “Slaves,” explains Peter King of the University of Toronto, “are unambiguously treated as mere things—as property...this treatment is reflected in the authority claimed by the masters, who, in failing to treat the slaves as complete moral agents, dehumanize them, and thereby regulate them to inferior status” (King, p. 11). King continues to elaborate that dehumanization is a form of injustice that unduly limits the moral status of an individual. Thus, the treatment of babies, and people in general, as commodities may be the moral equivalent of slavery. If slavery was outlawed, then the reaction to baby selling should be no different. In short, whether an explicit argument is presented or not, critics opine that something is bothersome, troubling, and making us anxious about mingling economics with procreation.

Dolgin notes that by entering into surrogacy contracts, the resulting babies are no longer thought of as “gifts of nature.” The children born from such business dealings are mere commodities that may be exchanged for money in the marketplace. Babies “are valuable,” insists Dolgin, “but are not to have a monetary value put on them” (Dolgin, p. 72). A gift is bestowed upon a person with no strings attached; yet, a contract becomes necessary when the item being transferred is a commodity. A gift is also something that is usually exchanged between people in a close relationship, such as friends or relatives. The gift giving experience is characterized by love, care, and emotion. The acquiring of a commodity, on the other hand, is a rather cold, market-oriented, and purely business-like transaction.

In addition, the treatment of babies as commodities and property tends to lead to difficult relationships between surrogates and intending parents once the baby is surrendered. As Dolgin paraphrases the Kenyon College professor, Lewis Hyde: "While gifts transform relationships, contracts leave them untouched, and while gifts bespeak attachment, contracts bespeak freedom" (Dolgin, p. 74). When anthropologist Helena Ragoné asked one of the contractual surrogates she studied to reflect on her experience, the woman reported: "I felt they [the intending parents] had been my friends, but after they got what they wanted, they weren't" (Dolgin, p. 74-75). In other words, once the business deal in a surrogacy contract is completed, ties are often cut and further communication is not always desired, leaving surrogates vulnerable and frustrated.

Others object to the exploitation and degradation aspect of the surrogate women. Corea goes so far as to refer to these surrogates as "breeder-women" (Spar, p. 77). Similarly, Spar quotes a critic who claims that surrogacy contracts "create a national traffic in women exploited for their reproductive faculties and functions...They are reproductive purchase orders where women are procured as instruments in a system of breeding" (Spar, p. 83). Susan Martha Kahn, a Brandeis University anthropologist who studied fertility cases in Israel, worries that "the reproductive capacities of women both Jewish and non-Jewish, married and unmarried may be exploited in both the local and international marketplace" (Kahn, p. 157). Women should not be treated as tools to be used and exploited, even for the production of something as cherished as a child. The New Jersey Supreme Court mirrored this view when it ruled that financial payment to a surrogate is "illegal, perhaps criminal, and potentially degrading to women" (Dolgin, p. 86).

Since every pregnancy is accompanied by physical labors, stress, personal sacrifices, and inconveniences, most women today who nevertheless opt to be surrogates are naturally from the poorer sections of society. Mary Gordon, professor of English at Barnard College, is thus concerned by the danger posed by surrogacy in that it could lead to "large-scale baby farms where poor women are turned into breeders for the rich who cannot or choose not to bear their own children" (Dolgin, p. 74). Surrogacy arrangements may also lead to increased racial gaps as intending parents are likely to select a gestational surrogate from a different racial background to demonstrate that they, not the surrogate, are the real genetic parents. Spar writes: "By 2000, thirty percent of gestational surrogacy arrangements at the largest U.S. program involved surrogates from different racial backgrounds" (Spar, p. 82).

Surrogacy opponents see a phenomenon of inappropriate race exploitation taking place; often, the well-off Caucasian woman is seen as essentially handpicking the poorer black or Hispanic woman and 'using' her facilities.

Supporters of surrogacy contracts argue that providing a financial incentive helps a couple produce a child, and should therefore be endorsed. They call upon the "parental desperation" (Spar, p.77) and the pain experienced by parents who cannot conceive a baby on their own. In its discussion of buying and selling gametes, the President's Council on Bioethics similarly justified the sale of gametes: "...the ability to buy and sell gametes helps otherwise infertile couples to participate in the activities of human procreation and child-rearing...if there are no payments for gametes, some couples might remain childless because of an inadequate supply of eggs and sperm" (p. 150-151). Although the issue of gamete transactions might be different from surrogacy contracts in some regards, they are certainly related. Reproductive essentials (eggs, sperm, womb, ect.) are being exchanged and the practice is validated due to its benefits. Couples willing to pay the right price could secure a child for life. If monetary compensation was not allowed, there would likely be a decrease in the numbers of donors and surrogates offering their resources. Payment, some claim, is the only method to maintain a constant supply for the increasing demand of infertile couples.

The above approach, however, does not entirely escape the previously mentioned objections to surrogacy. It does not really dispel the moral dilemma of buying and selling babies nor does it completely avoid the notion of women being exploited or discriminated. Instead, it acknowledges these problems and nevertheless confirms that the primary concern must be providing the means to have a child. Champions of this view must hold that the troubling moral issues surely do not outweigh or amount to anything as great as the possibility to procure a child.

The unsettling moral problems of commercial surrogacy, I believe, stem solely from the fact that people choose to view surrogacy contracts as actual baby selling. We would do much better by looking at surrogacy as a pure service, albeit a procreative service. Individuals and groups provide services and construct contracts regularly in everyday society with ease. The dry cleaner, waiter, and exercise instructor all offer services that we pay for willingly and gladly, even without the slightest bit of ethical and moral inner conflict. Surrogacy contracts should be no different. As free citizens, we have the right and freedom to contract, and as Spar points out "if individuals were allowed to procreate and to contract, then surely they should be

able to procreate under contract” (Spar, p. 77). Indeed, the surrogate woman is providing a vital and noble service—a means to an end—and it is only right that she be allowed to be compensated duly for the stress, discomfort, restricted lifestyle, and overall labors that come along with being pregnant. Contractual surrogacy is far from baby selling; payment is solely for the service, not for the child.

Surrogates themselves often mention the ‘service’ aspect of surrogacy in their decisions to carry a child in their wombs. A surrogate woman from Herzliya, Israel, explained what it means for her to be a surrogate: “To me, it’s like someone who rents their car, I rent my womb, and then cut the connection” (Kahn, p. 149). Another woman said, “...the egg and sperm will not be mine, and I will just give my womb to rent. It’s exactly like giving my child to a babysitter to take care of: she feeds him and takes care of him” (Kahn, p. 153). One husband seeking a surrogate insisted that “we just want to use the services of a womb that we don’t have... We just don’t have a human incubator for our embryo” (Kahn, p. 154). These testimonies demonstrate that individuals treat surrogacy as a service. Whether it is likened to a rental car, a babysitter, or a human incubator, the message is clear. Commercial surrogacy is viewed as yet another service; like any other service in which a monetary agreement is reached, compensation is not only appropriate, but also obligatory.

Once contractual surrogacy is regarded as a service, the issue of treating babies and women as commodities is no longer applicable. Babies and women’s bodies are not being bought or sold. The payment is the fee for the pregnancy service. The baby produced is still a “gift of nature,” for no price tag was ever put on the priceless baby itself. There need not be worries of discrimination, degradation, or exploitation. We are not dealing with surrogate women who are coerced into carrying the child of another couple. Surrogate women, as conscious and free citizens, willingly decide whether they are interested in performing this procreative service. The fact that the majority of women performing the surrogacy service may be poor or from a particular minority race should not be regarded as discrimination. It just happens to be that a particular class of women is attracted to this service. If an individual opens a sushi restaurant and seeks workers and all the applicants turn out to be Japanese, is it discriminatory to hire only Japanese individuals? I would tend to think not. It should be no different then if the vast pool of surrogacy candidates is poor or belongs to a minority race. There is no intentional singling out or handpicking, but rather the coming together of two free parties to forge a legal and binding

contract.

I do, however, believe that there should be a difference in price between traditional and gestational surrogacy along the lines of treating surrogacy as a pure service. In traditional surrogacy, the surrogate gives her genetic material in addition to her womb. This should mean that the traditional surrogate at least be allowed to demand higher fees than the gestational surrogate, who only rents her womb. The higher price should not be taken to mean that more money is necessary to pay for the actual genetic material. The service in which both the womb and the genetic material of the surrogate are utilized is defined as a more expensive service. The surrogate is giving more of herself and has a right, therefore, to demand more money for the overall service if so desired. When forming a contract, the two parties may stipulate whatever conditions they agree upon. If the couple is looking for a particular genetic makeup that only a certain surrogate possesses, then the surrogate may stipulate that providing such a service may cost more money. This is not to say that the contracting parents must pay more for traditional surrogacy. I am only arguing that the traditional surrogate has the right to demand greater compensation if she considers traditional surrogacy a more elevated service.

Some might object and say that contractual surrogacy is baby selling after all. They may point out that a surrogate who goes through with the whole pregnancy only to give birth to a stillborn often receives less payment than if the child was born alive and healthy. If one is not paying for the actual baby, then why should there be a difference if the baby is born alive or dead, or for that matter, with seven fingers or a missing arm? Clearly, the critics contend, we are indeed paying for the result. But this is incorrect reasoning in light of the fact that the two parties have a right to stipulate whatever conditions they desire when forming the binding contract. A couple may decide to pay x amount of dollars for a service that produces a live child and y amount of dollars for a service that results in a stillborn. It is not the live or dead newborn, however, that is being paid for. The result is only an indicator of what type of service has been provided. Although the pregnant woman who gives birth to a stillborn goes through the same exact process of the woman who bears a live child, the quality of the service, not the child, is the determining factor. Granted that the quality of the child affects the quality of the service in return, but this by no means implies that the child is the item being paid for here.

An analogy may be helpful. Consider the service provided by a driver of a car service. A businessman hires

a driver to take him to the airport and agrees to pay him \$50 on condition that they arrive at the airport 3:00 PM. In addition, the businessman stipulates the following condition: even if they arrive to the airport at 3:00 PM, he will only pay the driver the full price if he makes his flight in time. If he misses the flight, there will be a \$15 deduction. The driver willingly agrees with all the conditions and the two parties sign a contract and shake hands. They arrive at the airport by 3:00 PM, and yet the businessman misses his flight. The businessman rightfully pays the driver only \$35. Now, one may ask why this is so. The driver performed the same activities as he would if the businessman had indeed made his flight. He filled up the car with gas, he was cautious on the road, he loaded and unloaded all the suitcases, picked him up and dropped him off on time, etc. Yet, there was a crucial, stipulated condition that was missing. The driver had not performed the exact service requested of him. The service entailed the businessman making his flight. In other words, the outcome or result—the making or missing of the flight—was a reflection of the type of service provided. The surrogacy case is quite similar. The surrogate woman refrains from alcohol and drugs, she nourishes her body, she shows up for all the necessary doctors appointments, and ultimately delivers the baby. Yet, the status of this baby is a reflection of the quality of service provided by the woman. The surrogacy service that brings forth a stillborn baby is a different type of service than surrogacy that involves a live baby, even though the same protocol was adhered to prior to delivery. If this difference in services is stipulated in the contract, then different levels of payment may apply.

The issue of commercial surrogacy is complex and laden with subtleties. We live in a society where individuals enter into contracts freely and are no strangers to the idea of paying money for services we wish to benefit from. Surrogacy should be treated no differently. It is an integral and vital service that is worthy of payment. Thus, when it comes to our particular case of the use of human beings in science—surrogate mothers—let us regard the practice as upholding the highest ethical and legal standards in our society.

References and Notes

Editors Note: Due to the nature of this paper the citations have been left as parenthetical

1. There are, in fact, two forms of surrogacy: partial (traditional) surrogacy and full (gestational) surrogacy. In partial surrogacy, the sperm of the commissioning father and the egg of the surrogate mother are

used to conceive the child, thus resulting in a child genetically related only to the intending father. In full surrogacy, however, both the egg and sperm come from the commissioning and intending parents, producing a child that is genetically related to both of the parents (Golombak, p. 38-39). Although traditional surrogacy was an option even before IVF, the technology added a new twist in that it allowed for the separation between the egg utilized and the womb into which it would be placed; another woman other than the gestational surrogate could now provide the egg.

2. Dolgin estimates that commercial surrogacy “involves payments of between \$10,000 and \$15,000 to the surrogate” (Dolgin, p. 65). More money is dispensed to brokers and middlemen, such as entrepreneurs Noel Keane and Bill Handel, who charged approximately \$15,000 per surrogacy arrangement (Spar, p. 80). As early as 1979, Dr. Richard Levin of Kentucky opened a practice in commercial surrogacy. Levin charged around \$15,000 for just sealing the deal between surrogates and intending parents (Spar, p.76-77). Dolgin records that couples were paying fees between \$28,000 and \$45,000 for the entire surrogacy process in 1994 (Dolgin, p. 65). Spar’s findings are quite similar, as she notes that couples “were paying roughly \$25,000 to \$45,000: a \$10,000 fee for the surrogate, \$15,000 for the brokers, and all expenses” (Spar, p. 80). As the price for surrogacy settled at around \$20,000, 1,210 gestational surrogacy attempts had been recorded in the year 2000 alone (Spar, p. 82). Currently on the Family Formation website, the surrogate agency promises that “if you are selected to be a gestational carrier, the compensation is \$23,000 plus additional amounts for gestating multiples, delivery via c-section, certain expense reimbursements, etc. (<http://www.gestationalcarriers.com>).

3. Some countries have been quick to bring surrogacy contracts to a halt. Egypt, Germany, France and Denmark prohibit surrogacy. In the United Kingdom, surrogacy is permitted only if the couple is married and is then regulated by the Human Fertilization and Embryology Authority (HFEA). In Israel, the couple must be married, the surrogate must be single, and the process is regulated by the Ministry of Health (Spar, P. 71, 215). Surrogates in Israel are barred from accepting more money than the sum approved by the government-appointed committee. Violators, including both the surrogate and the contracting parents, are liable to a one-year prison sentence (Kahn, p. 151).

4. Dolgin, Janet L. *Defining the Family*. New York: New York University Press, 1997.

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8. Kahn, Susan Martha. *Reproducing Jews*. Durham: Duke University Press, 2000.

9. King, Peter. “Slavery and Commodification: The Case against Market Socialism.” <http://individual.utoronto.ca/pking/unpublished/Slavery_and_Commodification.pdf>

10. “Reproduction and Responsibility: The Regulation of New Biotechnologies.” The President’s Council on Bioethics. March 2004. <<http://bioethics.gov/reports/reproductionandresponsibility/chapter6.html>>.

11. Spar, Deborah L. *The Baby Business*. Boston: Harvard Business School Press, 2006.