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ELIZABETH S. ANDERSON

## Is Women's Labor a Commodity?

In the past few years the practice of commercial surrogate motherhood has gained notoriety as a method for acquiring children. A commercial surrogate mother is anyone who is paid money to bear a child for other people and terminate her parental rights, so that the others may raise the child as exclusively their own. The growth of commercial surrogacy has raised with new urgency a class of concerns regarding the proper scope of the market. Some critics have objected to commercial surrogacy on the ground that it improperly treats children and women's reproductive capacities as commodities.<sup>1</sup> The prospect of reducing children to consumer durables and women to baby factories surely inspires revulsion. But are there good reasons behind the revulsion? And is this an accurate description of what commercial surrogacy implies? This article offers a theory about what things are properly regarded as commodities which supports the claim that commercial surrogacy constitutes an unconscionable commodification of children and of women's reproductive capacities.

### WHAT IS A COMMODITY?

The modern market can be characterized in terms of the legal and social norms by which it governs the production, exchange, and enjoyment of

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1. See, for example, Gena Corea, *The Mother Machine* (New York: Harper and Row, 1985), pp. 216, 219; Angela Holder, "Surrogate Motherhood: Babies for Fun and Profit," *Case and Comment* 90 (1985): 3-11; and Margaret Jane Radin, "Market Inalienability," *Harvard Law Review* 100 (June 1987): 1849-1937.

commodities. To say that something is properly regarded as a commodity is to claim that the norms of the market are appropriate for regulating its production, exchange, and enjoyment. To the extent that moral principles or ethical ideals preclude the application of market norms to a good, we may say that the good is not a (proper) commodity.

Why should we object to the application of a market norm to the production or distribution of a good? One reason may be that to produce or distribute the good in accordance with the norm is to *fail to value it in an appropriate way*. Consider, for example, a standard Kantian argument against slavery, or the commodification of persons. Slaves are treated in accordance with the market norm that owners may use commodities to satisfy their own interests without regard for the interests of the commodities themselves. To treat a person without regard for her interests is to fail to respect her. But slaves are persons who may not be merely used in this fashion, since as rational beings they possess a dignity which commands respect. In Kantian theory, the problem with slavery is that it treats beings worthy of *respect* as if they were worthy merely of *use*. “Respect” and “use” in this context denote what we may call different *modes of valuation*. We value things and persons in other ways than by respecting and using them. For example, love, admiration, honor, and appreciation constitute distinct modes of valuation. To value a thing or person in a distinctive way involves treating it in accordance with a particular set of norms. For example, courtesy expresses a mode of valuation we may call “civil respect,” which differs from Kantian respect in that it calls for obedience to the rules of etiquette rather than to the categorical imperative.

Any ideal of human life includes a conception of how different things and persons should be valued. Let us reserve the term “use” to refer to the mode of valuation proper to commodities, which follows the market norm of treating things solely in accordance with the owner’s nonmoral preferences. Then the Kantian argument against commodifying persons can be generalized to apply to many other cases. It can be argued that many objects which are worthy of a higher mode of valuation than use are not properly regarded as mere commodities.<sup>2</sup> Some current argu-

2. The notion of valuing something more highly than another can be understood as follows. Some preferences are neither obligatory nor admirable. To value a thing as a mere use-object is to treat it solely in accordance with such nonethical preferences. To value a thing or person more highly than as a mere use-object is to recognize it as having some

ments against the colorization of classic black-and-white films take this form. Such films have been colorized by their owners in an attempt to enhance their market value by attracting audiences unused to black-and-white cinematography. But some opponents of the practice object that such treatment of the film classics fails to appreciate their aesthetic and historical value. True appreciation of these films would preclude this kind of crass commercial exploitation, which debases their aesthetic qualities in the name of profits. Here the argument rests on the claim that the goods in question are worthy of appreciation, not merely of use.

The ideals which specify how one should value certain things are supported by a conception of human flourishing. Our lives are enriched and elevated by cultivating and exercising the capacity to appreciate art. To fail to do so reflects poorly on ourselves. To fail to value things appropriately is to embody in one's life an inferior conception of human flourishing.<sup>3</sup>

These considerations support a general account of the sorts of things which are appropriately regarded as commodities. Commodities are those things which are properly treated in accordance with the norms of the modern market. We can question the application of market norms to the production, distribution, and enjoyment of a good by appealing to ethical ideals which support arguments that the good should be valued in some other way than use. Arguments of the latter sort claim that to allow certain market norms to govern our treatment of a thing expresses a mode of valuation not worthy of it. If the thing is to be valued appropriately, its production, exchange, and enjoyment must be removed from market norms and embedded in a different set of social relationships.

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special intrinsic worth, in virtue of which we form preferences about how to treat the thing which we regard as obligatory or admirable. The person who truly appreciates art does not conceive of art merely as a thing which she can use as she pleases, but as something which commands appreciation. It would be contemptible to willfully destroy the aesthetic qualities of a work of art simply to satisfy some of one's nonethical preferences, and it is a mark of a cultivated and hence admirable person that she has preferences for appreciating art. This account of higher and lower modes of valuation is indebted to Charles Taylor's account of higher and lower values. See Charles Taylor, "The Diversity of Goods," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), pp. 129–44.

3. This kind of argument shows why treating something as a commodity may be deplorable. Of course, more has to be said to justify prohibiting the commodification of a thing. I shall argue below that the considerations against the commodification of children and of women's labor are strong enough to justify prohibiting the practice of commercial surrogacy.

### THE CASE OF COMMERCIAL SURROGACY

Let us now consider the practice of commercial surrogate motherhood in the light of this theory of commodities. Surrogate motherhood as a commercial enterprise is based upon contracts involving three parties: the intended father, the broker, and the surrogate mother. The intended father agrees to pay a lawyer to find a suitable surrogate mother and make the requisite medical and legal arrangements for the conception and birth of the child, and for the transfer of legal custody to himself.<sup>4</sup> The surrogate mother agrees to become impregnated with the intended father's sperm, to carry the resulting child to term, and to relinquish her parental rights to it, transferring custody to the father in return for a fee and medical expenses. Both she and her husband (if she has one) agree not to form a parent-child bond with her child and to do everything necessary to effect the transfer of the child to the intended father. At current market prices, the lawyer arranging the contract can expect to gross \$15,000 from the contract, while the surrogate mother can expect a \$10,000 fee.<sup>5</sup>

The practice of commercial surrogacy has been defended on four main grounds. First, given the shortage of children available for adoption and the difficulty of qualifying as adoptive parents, it may represent the only hope for some people to be able to raise a family. Commercial surrogacy should be accepted as an effective means for realizing this highly significant good. Second, two fundamental human rights support commercial surrogacy: the right to procreate and freedom of contract. Fully informed autonomous adults should have the right to make whatever arrangements they wish for the use of their bodies and the reproduction of children, so long as the children themselves are not harmed. Third, the labor of the surrogate mother is said to be a labor of love. Her altruistic acts should be permitted and encouraged.<sup>6</sup> Finally, it is argued that commer-

4. State laws against selling babies prevent the intended father's wife (if he has one) from being a party to the contract.

5. See Katie Marie Brophy, "A Surrogate Mother Contract to Bear a Child," *Journal of Family Law* 20 (1981-82): 263-91, and Noel Keane, "The Surrogate Parenting Contract," *Adelphia Law Journal* 2 (1983): 45-53, for examples and explanations of surrogate parenting contracts.

6. Mary Warnock, *A Question of Life* (Oxford: Blackwell, 1985), p. 45. This book reprints the Warnock Report on Human Fertilization and Embryology, which was commissioned by the British government for the purpose of recommending legislation concerning surrogacy and other issues. Although the Warnock Report mentions the promotion of altruism as one defense of surrogacy, it strongly condemns the practice overall.

cial surrogacy is no different in its ethical implications from many already accepted practices which separate genetic, gestational, and social parenting, such as artificial insemination by donor, adoption, wet-nursing, and day care. Consistency demands that society accept this new practice as well.<sup>7</sup>

In opposition to these claims, I shall argue that commercial surrogacy does raise new ethical issues, since it represents an invasion of the market into a new sphere of conduct, that of specifically women's labor—that is, the labor of carrying children to term in pregnancy. When women's labor is treated as a commodity, the women who perform it are degraded. Furthermore, commercial surrogacy degrades children by reducing their status to that of commodities. Let us consider each of the goods of concern in surrogate motherhood—the child, and women's reproductive labor—to see how the commercialization of parenthood affects people's regard for them.

#### CHILDREN AS COMMODITIES

The most fundamental calling of parents to their children is to love them. Children are to be loved and cherished by their parents, not to be used or manipulated by them for merely personal advantage. Parental love can be understood as a passionate, unconditional commitment to nurture one's child, providing it with the care, affection, and guidance it needs to develop its capacities to maturity. This understanding of the way parents should value their children informs our interpretation of parental rights over their children. Parents' rights over their children are trusts, which they must always exercise for the sake of the child. This is not to deny that parents have their own aspirations in raising children. But the child's interests beyond subsistence are not definable independently of the flourishing of the family, which is the object of specifically parental aspirations. The proper exercise of parental rights includes those acts which promote their shared life as a family, which realize the shared interests of the parents and the child.

The norms of parental love carry implications for the ways other people should treat the relationship between parents and their children. If children are to be loved by their parents, then others should not attempt to

7. John Robertson, "Surrogate Mothers: Not So Novel after All," *Hastings Center Report*, October 1983, pp. 28–34; John Harris, *The Value of Life* (Boston: Routledge and Kegan Paul, 1985).

compromise the integrity of parental love or work to suppress the emotions supporting the bond between parents and their children. If the rights to children should be understood as trusts, then if those rights are lost or relinquished, the duty of those in charge of transferring custody to others is to consult the best interests of the child.

Commercial surrogacy substitutes market norms for some of the norms of parental love. Most importantly, it requires us to understand parental rights no longer as trusts but as things more like property rights—that is, rights of use and disposal over the things owned. For in this practice the natural mother deliberately conceives a child with the intention of giving it up for material advantage. Her renunciation of parental responsibilities is not done for the child's sake, nor for the sake of fulfilling an interest she shares with the child, but typically for her own sake (and possibly, if “altruism” is a motive, for the intended parents' sakes). She and the couple who pay her to give up her parental rights over her child thus treat her rights as a kind of property right. They thereby treat the child itself as a kind of commodity, which may be properly bought and sold.

Commercial surrogacy insinuates the norms of commerce into the parental relationship in other ways. Whereas parental love is not supposed to be conditioned upon the child having particular characteristics, consumer demand is properly responsive to the characteristics of commodities. So the surrogate industry provides opportunities to adoptive couples to specify the height, I.Q., race, and other attributes of the surrogate mother, in the expectation that these traits will be passed on to the child.<sup>8</sup> Since no industry assigns agents to look after the “interests” of its commodities, no one represents the child's interests in the surrogate industry. The surrogate agency promotes the adoptive parents' interests and not the child's interests where matters of custody are concerned. Finally, as the agent of the adoptive parents, the broker has the task of policing the surrogate (natural) mother's relationship to her child, using persuasion, money, and the threat of a lawsuit to weaken and destroy whatever parental love she may develop for her child.<sup>9</sup>

8. See “No Other Hope for Having a Child,” *Time*, 19 January 1987, pp. 50–51. Radin argues that women's traits are also commodified in this practice. See “Market Inalienability,” pp. 1932–35.

9. Here I discuss the surrogate industry as it actually exists today. I will consider possible modifications of commercial surrogacy in the final section below.

All of these substitutions of market norms for parental norms represent ways of treating children as commodities which are degrading to them. Degradation occurs when something is treated in accordance with a lower mode of valuation than is proper to it. We value things not just "more" or "less," but in qualitatively higher and lower ways. To love or respect someone is to value her in a higher way than one would if one merely used her. Children are properly loved by their parents and respected by others. Since children are valued as mere use-objects by the mother and the surrogate agency when they are sold to others, and by the adoptive parents when they seek to conform the child's genetic makeup to their own wishes, commercial surrogacy degrades children insofar as it treats them as commodities.<sup>10</sup>

One might argue that since the child is most likely to enter a loving home, no harm comes to it from permitting the natural mother to treat it as property. So the purchase and sale of infants is unobjectionable, at least from the point of view of children's interests.<sup>11</sup> But the sale of an infant has an expressive significance which this argument fails to recognize. By engaging in the transfer of children by sale, all of the parties to the surrogate contract express a set of attitudes toward children which undermine the norms of parental love. They all agree in treating the ties between a natural mother and her children as properly loosened by a monetary incentive. Would it be any wonder if a child born of a surrogacy agreement feared resale by parents who have such an attitude? And a child who knew how anxious her parents were that she have the "right" genetic makeup might fear that her parent's love was contingent upon her expression of these characteristics.<sup>12</sup>

10. Robert Nozick has objected that my claims about parental love appear to be culture-bound. Do not parents in the Third World, who rely on children to provide for the family subsistence, regard their children as economic goods? In promoting the livelihood of their families, however, such children need not be treated in accordance with market norms—that is, as commodities. In particular, such children usually remain a part of their families, and hence can still be loved by their parents. But insofar as children are treated according to the norms of modern capitalist markets, this treatment is deplorable wherever it takes place.

11. See Elizabeth Landes and Richard Posner, "The Economics of the Baby Shortage," *Journal of Legal Studies* 7 (1978): 323–48, and Richard Posner, "The Regulation of the Market in Adoptions," *Boston University Law Review* 67 (1987): 59–72.

12. Of course, where children are concerned, it is irrelevant whether these fears are reasonable. One of the greatest fears of children is separation from their parents. Adopted children are already known to suffer from separation anxiety more acutely than children who remain with their natural mothers, for they feel that their original mothers did not love



The unsold children of surrogate mothers are also harmed by commercial surrogacy. The children of some surrogate mothers have reported their fears that they may be sold like their half-brother or half-sister, and express a sense of loss at being deprived of a sibling.<sup>13</sup> Furthermore, the widespread acceptance of commercial surrogacy would psychologically threaten all children. For it would change the way children are valued by people (parents and surrogate brokers)—from being loved by their parents and respected by others, to being sometimes used as objects of commercial profit-making.<sup>14</sup>

Proponents of commercial surrogacy have denied that the surrogate industry engages in the sale of children. For it is impossible to sell to someone what is already his own, and the child is already the father's own natural offspring. The payment to the surrogate mother is not for her child, but for her services in carrying it to term.<sup>15</sup> The claim that the parties to the surrogate contract treat children as commodities, however, is based on the way they treat the *mother's* rights over her child. It is irrelevant that the natural father also has some rights over the child; what he pays for is exclusive rights to it. He would not pay her for the "service" of carrying the child to term if she refused to relinquish her parental rights to it. That the mother regards only her labor and not her child as requiring compensation is also irrelevant. No one would argue that the baker does not treat his bread as property just because he sees the income from its sale as compensation for his labor and expenses and not for the bread itself, which he doesn't care to keep.<sup>16</sup>

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them. In adoption, the fact that the child would be even worse off if the mother did not give it up justifies her severing of ties and can help to rationalize this event to the child. But in the case of commercial surrogacy, the severing of ties is done not for the child's sake, but for the parents' sakes. In the adoption case there are explanations for the mother's action which may quell the child's doubts about being loved which are unavailable in the case of surrogacy.

13. Kay Longcope, "Surrogacy: Two Professionals on Each Side of Issue Give Their Arguments for Prohibition and Regulation," *Boston Globe*, 23 March 1987, pp. 18–19; and Iver Peterson, "Baby M Case: Surrogate Mothers Vent Feelings," *New York Times*, 2 March 1987, pp. B1, B4.

14. Herbert Krimmel, "The Case against Surrogate Parenting," *Hastings Center Report*, October 1983, pp. 35–37.

15. Judge Sorkow made this argument in ruling on the famous case of Baby M. See *In Re Baby M*, 217 N.J. Super 313. Reprinted in *Family Law Reporter* 13 (1987): 2001–30. Chief Justice Wilentz of the New Jersey Supreme Court overruled Sorkow's judgment. See *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

16. Sallyann Payton has observed that the law does not permit the sale of parental rights, only their relinquishment or forced termination by the state, and these acts are subject to

Defenders of commercial surrogacy have also claimed that it does not differ substantially from other already accepted parental practices. In the institutions of adoption and artificial insemination by donor (AID), it is claimed, we already grant parents the right to dispose of their children.<sup>17</sup> But these practices differ in significant respects from commercial surrogacy. The purpose of adoption is to provide a means for placing children in families when their parents cannot or will not discharge their parental responsibilities. It is not a sphere for the existence of a supposed parental right to dispose of one's children for profit. Even AID does not sanction the sale of fully formed human beings. The semen donor sells only a product of his body, not his child, and does not initiate the act of conception.

Two developments might seem to undermine the claim that commercial surrogacy constitutes a degrading commerce in children. The first is technological: the prospect of transplanting a human embryo into the womb of a genetically unrelated woman. If commercial surrogacy used women only as gestational mothers and not as genetic mothers, and if it was thought that only genetic and not gestational parents could properly claim that a child was "theirs," then the child born of a surrogate mother would not be hers to sell in the first place. The second is a legal development: the establishment of the proposed "consent-intent" definition of parenthood.<sup>18</sup> This would declare the legal parents of a child to be whoever consented to a procedure which leads to its birth, with the intent of assuming parental responsibilities for it. This rule would define away the problem of commerce in children by depriving the surrogate mother of any legal claim to her child at all, even if it was hers both genetically and gestationally.<sup>19</sup>

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court review for the sake of the child's best interests. But this legal technicality does not change the moral implications of the analogy with baby-selling. The mother is still paid to do what she can to relinquish her parental rights and to transfer custody of the child to the father. Whether or not the courts occasionally prevent this from happening, the actions of the parties express a commercial orientation to children which is degrading and harmful to them. The New Jersey Supreme Court ruled that surrogacy contracts are void precisely because they assign custody without regard to the child's best interests. See *In the Matter of Baby M*, p. 1246.

17. Robertson, "Surrogate Mothers: Not So Novel after All," p. 32; Harris, *The Value of Life*, pp. 144-45.

18. See Philip Parker, "Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry," *International Journal of Law and Psychiatry* 5 (1982): 341-54.

19. The consent-intent rule would not, however, change the fact that commercial surrogacy replaces parental norms with market norms. For the rule itself embodies the market

There are good reasons, however, not to undermine the place of genetic and gestational ties in these ways. Consider first the place of genetic ties. By upholding a system of involuntary (genetic) ties of obligation among people, even when the adults among them prefer to divide their rights and obligations in other ways, we help to secure children's interests in having an assured place in the world, which is more firm than the wills of their parents. Unlike the consent-intent rule, the principle of respecting genetic ties does not make the obligation to care for those whom one has created (intentionally or not) contingent upon an arbitrary desire to do so. It thus provides children with a set of preexisting social sanctions which give them a more secure place in the world. The genetic principle also places children in a far wider network of associations and obligations than the consent-intent rule sanctions. It supports the roles of grandparents and other relatives in the nurturing of children, and provides children with a possible focus of stability and an additional source of claims to care if their parents cannot sustain a well-functioning household.

In the next section I will defend the claims of gestational ties to children. To deny these claims, as commercial surrogacy does, is to deny the significance of reproductive labor to the mother who undergoes it and thereby to dehumanize and degrade the mother herself. Commercial surrogacy would be a corrupt practice even if it did not involve commerce in children.

#### WOMEN'S LABOR AS A COMMODITY

Commercial surrogacy attempts to transform what is specifically women's labor—the work of bringing forth children into the world—into a commodity. It does so by replacing the parental norms which usually govern the practice of gestating children with the economic norms which govern ordinary production processes. The application of commercial norms to women's labor reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use.

Respect and consideration are two distinct modes of valuation whose

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norm which acknowledges only voluntary, contractual relations among people as having moral force. Whereas familial love invites children into a network of unwilled relationships broader than those they have with their parents, the willed contract creates an exclusive relationship between the parents and the child only.

norms are violated by the practices of the surrogate industry. To respect a person is to treat her in accordance with principles she rationally accepts—principles consistent with the protection of her autonomy and her rational interests. To treat a person with consideration is to respond with sensitivity to her and to her emotional relations with others, refraining from manipulating or denigrating these for one's own purposes. Given the understanding of respect as a dispassionate, impersonal regard for people's interests, a different ethical concept—consideration—is needed to capture the engaged and sensitive regard we should have for people's emotional relationships. The failure of consideration on the part of the other parties to the surrogacy contract explains the judgment that the contract is not simply disrespectful of the surrogate mother, but callous as well.<sup>20</sup>

The application of economic norms to the sphere of women's labor violates women's claims to respect and consideration in three ways. First, by requiring the surrogate mother to repress whatever parental love she feels for the child, these norms convert women's labor into a form of alienated labor. Second, by manipulating and denying legitimacy to the surrogate mother's evolving perspective on her own pregnancy, the norms of the market degrade her. Third, by taking advantage of the surrogate mother's noncommercial motivations without offering anything but what the norms of commerce demand in return, these norms leave her open to exploitation. The fact that these problems arise in the attempt to commercialize the labor of bearing children shows that women's labor is not properly regarded as a commodity.

The key to understanding these problems is the normal role of the emotions in noncommercialized pregnancies. Pregnancy is not simply a biological process but also a social practice. Many social expectations and considerations surround women's gestational labor, marking it off as an occasion for the parents to prepare themselves to welcome a new life into their family. For example, obstetricians use ultrasound not simply for diagnostic purposes but also to encourage maternal bonding with the fetus.<sup>21</sup> We can all recognize that it is good, although by no means inevitable, for loving bonds to be established between the mother and her child during this period.

20. I thank Steven Darwall and David Anderson for clarifying my thoughts on this point.

21. I am indebted to Dr. Ezekiel Emanuel for this point.

In contrast with these practices, the surrogate industry follows the putting-out system of manufacturing. It provides some of the raw materials of production (the father's sperm) to the surrogate mother, who then engages in production of the child. Although her labor is subject to periodic supervision by her doctors and by the surrogate agency, the agency does not have physical control over the product of her labor as firms using the factory system do. Hence, as in all putting-out systems, the surrogate industry faces the problem of extracting the final product from the mother. This problem is exacerbated by the fact that the social norms surrounding pregnancy are designed to encourage parental love for the child. The surrogate industry addresses this problem by requiring the mother to engage in a form of emotional labor.<sup>22</sup> In the surrogate contract, she agrees not to form or to attempt to form a parent-child relationship with her offspring.<sup>23</sup> Her labor is alienated, because she must divert it from the end which the social practices of pregnancy rightly promote—an emotional bond with her child. The surrogate contract thus replaces a norm of parenthood, that during pregnancy one create a loving attachment to one's child, with a norm of commercial production, that the producer shall not form any special emotional ties to her product.

The demand to deliberately alienate oneself from one's love for one's own child is a demand which can reasonably and decently be made of no one. Unless we were to remake pregnancy into a form of drudgery which is only performed for a wage, there is every reason to expect that many women who do sign a surrogate contract will, despite this fact, form a loving attachment to the child they bear. For this is what the social practices surrounding pregnancy encourage. Treating women's labor as just another kind of commercial production process violates the precious emotional ties which the mother may rightly and properly establish with her "product," the child, and thereby violates her claims to consideration.<sup>24</sup>

22. One engages in emotional labor when one is paid to express or repress certain emotions. On the concept of emotional labor and its consequences for workers, see Arlie Hochschild, *The Managed Heart* (Berkeley and Los Angeles: University of California Press, 1983).

23. Noel Keane and Dennis Breo, *The Surrogate Mother* (New York: Everest House, 1981), p. 291; Brophy, "A Surrogate Mother Contract," p. 267. The surrogate's husband is also required to agree to this clause of the contract.

24. One might ask why this argument does not extend to all cases in which one might

Commercial surrogacy is also a degrading practice. The surrogate mother, like all persons, has an independent evaluative perspective on her activities and relationships. The realization of her dignity demands that the other parties to the contract acknowledge rather than evade the claims which her independent perspective makes upon them. But the surrogate industry has an interest in suppressing, manipulating, and trivializing her perspective, for there is an ever-present danger that she will see her involvement in her pregnancy from the perspective of a parent rather than from the perspective of a contract laborer.

How does this suppression and trivialization take place? The commercial promoters of surrogacy commonly describe the surrogate mothers as inanimate objects: mere "hatcheries," "plumbing," or "rented property"—things without emotions which could make claims on others.<sup>25</sup> They also refuse to acknowledge any responsibility for the consequences of the mother's emotional labor. Should she suffer psychologically from being forced to give up her child, the father is not liable to pay for therapy after her pregnancy, although he is liable for all other medical expenses following her pregnancy.<sup>26</sup>

The treatment and interpretation of surrogate mothers' grief raises the deepest problems of degradation. Most surrogate mothers experience grief upon giving up their children—in 10 percent of cases, seriously enough to require therapy.<sup>27</sup> Their grief is not compensated by the \$10,000 fee they receive. Grief is not an intelligible response to a successful deal, but rather reflects the subject's judgment that she has suffered a grave and personal loss. Since not all cases of grief resolve themselves into cases of regret, it may be that some surrogate mothers do not

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form an emotional attachment to an object one has contracted to sell. If I sign a contract with you to sell my car to you, can I back out if I decide I am too emotionally attached to it? My argument is based upon the distinctive characteristics of parental love—a mode of valuation which should not be confused with less profound modes of valuation which generate sentimental attachments to things. The degree to which other modes of valuation generate claims to consideration which tell against market norms remains an open question.

25. Corea, *The Mother Machine*, p. 222.

26. Keane and Breo, *The Surrogate Mother*, p. 292.

27. Kay Longcope, "Standing Up for Mary Beth," *Boston Globe*, 5 March 1987, p. 83; Daniel Goleman, "Motivations of Surrogate Mothers," *New York Times*, 20 January 1987, p. C1; Robertson, "Surrogate Mothers: Not So Novel after All," pp. 30, 34 n. 8. Neither the surrogate mothers themselves nor psychiatrists have been able to predict which women will experience such grief.

regard their grief, in retrospect, as reflecting an authentic judgment on their part. But in the circumstances of emotional manipulation which pervade the surrogate industry, it is difficult to determine which interpretation of her grief more truly reflects the perspective of the surrogate mother. By insinuating a trivializing interpretation of her emotional responses to the prospect of losing her child, the surrogate agency may be able to manipulate her into accepting her fate without too much fuss, and may even succeed in substituting its interpretation of her emotions for her own. Since she has already signed a contract to perform emotional labor—to express or repress emotions which are dictated by the interests of the surrogate industry—this might not be a difficult task.<sup>28</sup> A considerate treatment of the mothers' grief, on the other hand, would take the evaluative basis of their grief seriously.

Some defenders of commercial surrogacy demand that the provision for terminating the surrogate mother's parental rights in her child be legally enforceable, so that peace of mind for the adoptive parents can be secured.<sup>29</sup> But the surrogate industry makes no corresponding provision for securing the peace of mind of the surrogate. She is expected to assume the risk of a transformation of her ethical and emotional perspective on herself and her child with the same impersonal detachment with which a futures trader assumes the risk of a fluctuation in the price of pork bellies. By applying the market norms of enforcing contracts to the surrogate mother's case, commercial surrogacy treats a moral transformation as if it were merely an economic change.<sup>30</sup>

The manipulation of the surrogate mother's emotions which is inherent in the surrogate parenting contract also leaves women open to grave forms of exploitation. A kind of exploitation occurs when one party to a transaction is oriented toward the exchange of "gift" values, while the other party operates in accordance with the norms of the market exchange of commodities. Gift values, which include love, gratitude, and appreciation of others, cannot be bought or obtained through piecemeal calculations of individual advantage. Their exchange requires a repudia-

28. See Hochschild, *The Managed Heart*, for an important empirical study of the dynamics of commercialized emotional labor.

29. Keane and Breo, *The Surrogate Mother*, pp. 236–37.

30. For one account of how a surrogate mother who came to regret her decision viewed her own moral transformation, see Elizabeth Kane: *Birth Mother: The Story of America's First Legal Surrogate Mother* (San Diego: Harcourt Brace Jovanovich, 1988). I argue below that the implications of commodifying women's labor are not significantly changed even if the contract is unenforceable.

tion of a self-interested attitude, a willingness to give gifts to others without demanding some specific equivalent good in return each time one gives. The surrogate mother often operates according to the norms of gift relationships. The surrogate agency, on the other hand, follows market norms. Its job is to get the best deal for its clients and itself, while leaving the surrogate mother to look after her own interests as best as she can. This situation puts the surrogate agencies in a position to manipulate the surrogate mothers' emotions to gain favorable terms for themselves. For example, agencies screen prospective surrogate mothers for submissiveness, and emphasize to them the importance of the motives of generosity and love. When applicants question some of the terms of the contract, the broker sometimes intimidates them by questioning their character and morality: if they were really generous and loving they would not be so solicitous about their own interests.<sup>31</sup>

Some evidence supports the claim that most surrogate mothers are motivated by emotional needs and vulnerabilities which lead them to view their labor as a form of gift and not a purely commercial exchange. Only 1 percent of applicants to surrogate agencies would become surrogate mothers for money alone; the others have emotional as well as financial reasons for applying. One psychiatrist believes that most, if not all, of the 35 percent of applicants who had had a previous abortion or given up a child for adoption wanted to become surrogate mothers in order to resolve their guilty feelings or deal with their unresolved loss by going through a process of losing a child again.<sup>32</sup> Women who feel that giving up another child is an effective way to punish themselves for past abortions, or a form of therapy for their emotional problems, are not likely to resist manipulation by surrogate brokers.

Many surrogate mothers see pregnancy as a way to feel "adequate," "appreciated," or "special." In other words, these women feel inadequate, unappreciated, or unadmired when they are not pregnant.<sup>33</sup> Lacking the power to achieve some worthwhile status in their own right, they must

31. Susan Ince, "Inside the Surrogate Industry," in *Test-Tube Women*, ed. Rita Arditti, Ranate Duelli Klein, and Shelley Minden (Boston: Pandora Press, 1984), p. 110.

32. Philip Parker, "Motivation of Surrogate Mothers: Initial Findings," *American Journal of Psychiatry* 140 (1983): 117-18.

33. The surrogate broker Noel Keane is remarkably open about reporting the desperate emotional insecurities which shape the lives of so many surrogate mothers, while displaying little sensitivity to the implications of his taking advantage of these motivations to make his business a financial success. See especially Keane and Breo, *The Surrogate Mother*, pp. 247ff.



subordinate themselves to others' definitions of their proper place (as baby factories) in order to get from them the appreciation they need to attain a sense of self-worth. But the sense of self-worth one can attain under such circumstances is precarious and ultimately self-defeating. For example, those who seek gratitude on the part of the adoptive parents and some opportunity to share the joys of seeing their children grow discover all too often that the adoptive parents want nothing to do with them.<sup>34</sup> For while the surrogate mother sees in the arrangement some basis for establishing the personal ties she needs to sustain her emotionally, the adoptive couple sees it as an impersonal commercial contract, one of whose main advantages to them is that all ties between them and the surrogate are ended once the terms of the contract are fulfilled.<sup>35</sup> To them, her presence is a threat to marital unity and a competing object for the child's affections.

These considerations should lead us to question the model of altruism which is held up to women by the surrogacy industry. It is a strange form of altruism which demands such radical self-effacement, alienation from those whom one benefits, and the subordination of one's body, health, and emotional life to the independently defined interests of others.<sup>36</sup> Why should this model of "altruism" be held up to *women*? True altruism does not involve such subordination, but rather the autonomous and self-confident exercise of skill, talent, and judgment. (Consider the dedicated doctor.) The kind of altruism we see admired in surrogate mothers involves a lack of self-confidence, a feeling that one can be truly worthy only through self-effacement. This model of altruism, far from affirming the freedom and dignity of women, seems all too conveniently designed to keep their sense of self-worth hostage to the interests of a more privileged class.<sup>37</sup>

34. See, for example, the story of the surrogate mother Nancy Barrass in Anne Fleming, "Our Fascination with Baby M," *New York Times Magazine*, 29 March 1987, p. 38.

35. For evidence of these disparate perspectives, see Peterson, "Baby M Case: Surrogate Mothers Vent Feelings," p. B4.

36. The surrogate mother is required to obey all doctor's orders made in the interests of the child's health. (See Brophy, "A Surrogate Mother Contract"; Keane, "The Surrogate Parenting Contract"; and Ince, "Inside the Surrogate Industry.") These orders could include forcing her to give up her job, travel plans, and recreational activities. The doctor could confine her to bed, and order her to submit to surgery and take drugs. One can hardly exercise an autonomous choice over one's health if one could be held in breach of contract and liable for \$35,000 damages for making a decision contrary to the wishes of one's doctor.

37. See Corea, *The Mother Machine*, pp. 227–33, and Christine Overall, *Ethics and Hu-*

The primary distortions which arise from treating women's labor as a commodity—the surrogate mother's alienation from loved ones, her degradation, and her exploitation—stem from a common source. This is the failure to acknowledge and treat appropriately the surrogate mother's emotional engagement with her labor. Her labor is alienated, because she must suppress her emotional ties with her own child, and may be manipulated into reinterpreting these ties in a trivializing way. She is degraded, because her independent ethical perspective is denied, or demoted to the status of a cash sum. She is exploited, because her emotional needs and vulnerabilities are not treated as characteristics which call for consideration, but as factors which may be manipulated to encourage her to make a grave self-sacrifice to the broker's and adoptive couple's advantage. These considerations provide strong grounds for sustaining the claims of women's labor to its "product," the child. The attempt to redefine parenthood so as to strip women of parental claims to the children they bear does violence to their emotional engagement with the project of bringing children into the world.

#### COMMERCIAL SURROGACY, FREEDOM, AND THE LAW

In the light of these ethical objections to commercial surrogacy, what position should the law take on the practice? At the very least, surrogate contracts should not be enforceable. Surrogate mothers should not be forced to relinquish their children if they have formed emotional bonds with them. Any other treatment of women's ties to the children they bear is degrading.

But I think these arguments support the stronger conclusion that commercial surrogate contracts should be illegal, and that surrogate agencies who arrange such contracts should be subject to criminal penalties.<sup>38</sup> Commercial surrogacy constitutes a degrading and harmful traffic in children, violates the dignity of women, and subjects both children and women to a serious risk of exploitation. But are these problems

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*man Reproduction* (Boston: Allen and Unwin, 1987), pp. 122–28. Both emphasize the social conditions which undermine the claim that women choose to be surrogate mothers under conditions of autonomy.

38. Both of these conclusions follow the Warnock commission's recommendations. See Warnock, *A Question of Life*, pp. 43–44, 46–47. Since the surrogate mother is a victim of commercial surrogacy arrangements, she should not be prosecuted for entering into them. And my arguments are directed only against surrogacy as a commercial enterprise.

inherent in the practice of commercial surrogacy? Defenders of the practice have suggested three reforms intended to eliminate these problems: (1) give the surrogate mother the option of keeping her child after birth; (2) impose stringent regulations on private surrogate agencies; (3) replace private surrogate agencies with a state-run monopoly on surrogate arrangements. Let us consider each of these options in turn.

Some defenders of commercial surrogacy suggest that the problem of respecting the surrogate mother's potential attachment to her child can be solved by granting the surrogate mother the option to reserve her parental rights after birth.<sup>39</sup> But such an option would not significantly change the conditions of the surrogate mother's labor. Indeed, such a provision would pressure the agency to demean the mother's self-regard more than ever. Since it could not rely on the law to enforce the adoptive parents' wishes regardless of the surrogate's feelings, it would have to make sure that she assumed the perspective which it and its clients have of her: as "rented plumbing."

Could such dangers be avoided by careful regulation of the surrogate industry? Some have suggested that exploitation of women could be avoided by such measures as properly screening surrogates, setting low fixed fees (to avoid tempting women in financial duress), and requiring independent counsel for the surrogate mother.<sup>40</sup> But no one knows how to predict who will suffer grave psychological damage from surrogacy, and the main forms of duress encountered in the industry are emotional rather than financial. Furthermore, there is little hope that regulation would check the exploitation of surrogate mothers. The most significant encounters between the mothers and the surrogate agencies take place behind closed doors. It is impossible to regulate the multifarious ways in which brokers can subtly manipulate the emotions of the vulnerable to their own advantage. Advocates of commercial surrogacy claim that their failure rate is extremely low, since only five out of the first five hundred cases were legally contested by surrogate mothers. But we do not know how many surrogate mothers were browbeaten into relinquishing their children, feel violated by their treatment, or would feel violated had their perspectives not been manipulated by the other parties to the contract.

39. Barbara Cohen, "Surrogate Mothers: Whose Baby Is It?" *American Journal of Law and Medicine* 10 (1984): 282; Peter Singer and Deane Wells, *Making Babies* (New York: Scribner, 1985), pp. 106–7, 111.

40. Harris, *The Value of Life*, pp. 143–44, 156.

The dangers of exploiting women through commercial surrogacy are too great to ignore, and too deep to effectively regulate.

Could a state-run monopoly on surrogate arrangements eliminate the risk of degrading and exploiting surrogate mothers?<sup>41</sup> A nonprofit state agency would arguably have no incentive to exploit surrogates, and it would screen the adoptive parents for the sake of the best interests of the child. Nevertheless, as long as the surrogate mother is paid money to bear a child and terminate her parental rights, the commercial norms leading to her degradation still apply. For these norms are constitutive of our understanding of what the surrogate contract is for. Once such an arrangement becomes socially legitimized, these norms will govern the understandings of participants in the practice and of society at large, or at least compete powerfully with the rival parental norms. And what judgment do these norms make of a mother who, out of love for her child, decides that she cannot relinquish it? They blame her for commercial irresponsibility and flighty emotions. Her transformation of moral and emotional perspective, which she experiences as real but painful growth, looks like a capricious and selfish exercise of will from the standpoint of the market, which does not distinguish the deep commitments of love from arbitrary matters of taste.<sup>42</sup>

The fundamental problem with commercial surrogacy is that commercial norms are inherently manipulative when they are applied to the sphere of parental love. Manipulation occurs whenever norms are deployed to psychologically coerce others into a position where they cannot defend their own interests or articulate their own perspective without being charged with irresponsibility or immorality for doing so. A surrogate contract is inherently manipulative, since the very form of the contract invokes commercial norms which, whether upheld by the law or by social custom only, imply that the mother should feel guilty and irresponsible for loving her own child.

But hasn't the surrogate mother decided in advance that she is not interested in viewing her relationship to her child in this way? Regardless of her initial state of mind, once she enters the contract, she is not

41. Singer and Wells support this recommendation in *Making Babies*, pp. 110–11. See also the dissenting opinion of the Warnock commission, *A Question of Life*, pp. 87–89.

42. See Fleming, "Our Fascination with Baby M," for a sensitive discussion of Americans' conflicting attitudes toward surrogate mothers who find they cannot give up their children.

free to develop an autonomous perspective on her relationship with her child. She is contractually bound to manipulate her emotions to agree with the interests of the adoptive parents. Few things reach deeper into the self than a parent's evolving relationship with her own child. To lay claim to the course of this relationship in virtue of a cash payment constitutes a severe violation of the mother's personhood and a denial of the mother's autonomy.

Two final objections stand in the way of criminalizing commercial surrogacy. Prohibiting the practice might be thought to infringe two rights: the right of procreation, and the right to freedom of contract. Judge Harvey Sorkow, in upholding the legality and enforceability of commercial surrogate parenting contracts, based much of his argument on an interpretation of the freedom to procreate. He argued that the protection of the right to procreate requires the protection of noncoital means of procreation, including commercial surrogacy. The interests upheld by the creation of the family are the same, regardless of the means used to bring the family into existence.<sup>43</sup>

Sorkow asserts a blanket right to procreate, without carefully examining the specific human interests protected by such a right. The interest protected by the right to procreate is that of being able to create and sustain a family life with some integrity. But the enforcement of surrogate contracts against the will of the mother destroys one family just as surely as it creates another. And the same interest which generates the right to procreate also generates an obligation to uphold the integrity of family life which constrains the exercise of this right.<sup>44</sup> To recognize the legality of commercial surrogate contracts would undermine the integrity of families by giving public sanction to a practice which expresses contempt for the moral and emotional ties which bind a mother to her children, legitimates the view that these ties are merely the product of arbitrary will, properly loosened by the offering of a monetary incentive, and fails to respect the claims of genetic and gestational ties to children which provide children with a more secure place in the world than commerce can supply.

43. *In Re Baby M*, p. 2022. See also Robertson, "Surrogate Mothers: Not So Novel after All," p. 32.

44. The Catholic Church makes this principle the fundamental basis for its own criticism of surrogate motherhood. See Congregation for the Doctrine of the Faith, "Instruction on Respect for Human Life In Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day," reproduced in *New York Times*, 11 March 1987, pp. A14–A17.

The freedom of contract provides weaker grounds for supporting commercial surrogacy. This freedom is already constrained, notably in preventing the purchase and sale of human beings. Yet one might object that prohibiting surrogate contracts could undermine the status of women by implying that they do not have the competence to enter into and rationally discharge the obligations of commercial contracts. Insofar as the justification for prohibiting commercial surrogacy depends upon giving special regard to women's emotional ties to their children, it might be thought to suggest that women as a group are too emotional to subject themselves to the dispassionate discipline of the market. Then prohibiting surrogate contracts would be seen as an offensive, paternalistic interference with the autonomy of the surrogate mothers.

We have seen, however, that the content of the surrogate contract itself compromises the autonomy of surrogate mothers. It uses the norms of commerce in a manipulative way and commands the surrogate mothers to conform their emotions to the interests of the other parties to the contract. The surrogate industry fails to acknowledge the surrogate mothers as possessing an independent perspective worthy of consideration. And it takes advantage of motivations—such as self-effacing “altruism”—which women have formed under social conditions inconsistent with genuine autonomy. Hence the surrogate industry itself, far from expanding the realm of autonomy for women, actually undermines the external and internal conditions required for fully autonomous choice by women.

If commercial surrogate contracts were prohibited, this would be no cause for infertile couples to lose hope for raising a family. The option of adoption is still available, and every attempt should be made to open up opportunities for adoption to couples who do not meet standard requirements—for example, because of age. While there is a shortage of healthy white infants available for adoption, there is no shortage of children of other races, mixed-race children, and older and handicapped children who desperately need to be adopted. Leaders of the surrogate industry have proclaimed that commercial surrogacy may replace adoption as the method of choice for infertile couples who wish to raise families. But we should be wary of the racist and eugenic motivations which make some people rally to the surrogate industry at the expense of children who already exist and need homes.

The case of commercial surrogacy raises deep questions about the

proper scope of the market in modern industrial societies. I have argued that there are principled grounds for rejecting the substitution of market norms for parental norms to govern the ways women bring children into the world. Such substitutions express ways of valuing mothers and children which reflect an inferior conception of human flourishing. When market norms are applied to the ways we allocate and understand parental rights and responsibilities, children are reduced from subjects of love to objects of use. When market norms are applied to the ways we treat and understand women's reproductive labor, women are reduced from subjects of respect and consideration to objects of use. If we are to retain the capacity to value children and women in ways consistent with a rich conception of human flourishing, we must resist the encroachment of the market upon the sphere of reproductive labor. Women's labor is *not* a commodity.