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### Analogizing Commercial Gestational Surrogacy

With the advent of commercial surrogacy, a debate was sparked as to whether the commercialization of women's reproductive labour is appropriate and allowable. In the process of trying to respond to the debate surrounding commercial surrogacy, some theorists have tried to draw a comparison between the female reproductive labour of commercial surrogacy (gestational surrogacy only will be the focus of the present paper) and other types of commercial labour. Whether commercial surrogacy can be properly compared to these other types of labour can be referred to as the symmetry/asymmetry debate. This debate is important to the issue of commercial surrogacy because if symmetrical forms of labour can be named, analyzing them would provide a framework to re-evaluate the issue of commercial surrogacy, and thereby move out of the so called 'money-dignity bind' and toward "concrete solutions that genuinely promote women's autonomy" (McLeod 279). If the reproductive labour of commercial surrogacy is found to be asymmetrical to all other forms of labour, however, this would seem to imply that an alternative line of argument (one that does not rely on attempts to compare commercial surrogacy with other occupations) is required to move in a similarly fruitful direction.

Some have tried to argue that treating reproductive labour with the same economic principles as other types of labour is inappropriate – a position known as the asymmetry thesis (Satz 108). It is my contention, however, that the proper answer to the symmetry/asymmetry debate is that commercial surrogacy *can be* properly analogized to other types of labour.

Furthermore, I posit that when considering its relevant features, commercial surrogacy can be appropriately analogized to legal prostitution. To argue these two theses, I will first reiterate several arguments that supporters of the asymmetry thesis have presented, and then provide counterarguments that leave open the possibility for an analogous form of labour to exist. I will then specify the relevant features of commercial surrogacy that another form of labour would need to possess to be used as its analog, and argue for my position that a legal prostitute fits each of those criteria. To conclude, I will list several implications of the adoption of this analogy and respond to possible criticisms.

Supporters of the asymmetry thesis have presented several compelling arguments for their position. Debra Satz (112) iterates three common arguments for the asymmetry thesis. Firstly, that commercial surrogacy, unlike other occupations, involves a large amount of involuntary labour – which is to say that gestation, birth, and the other automatic bodily processes necessary to perform reproductive labour do not occur under the conscious decision of the surrogate mother. Secondly, that commercial surrogacy extends over a period of nine months – other types of labour typically do not involve such a long-term commitment. Thirdly, commercial surrogacy typically involves significant control over the surrogate's body (in accordance with the norms of modern prenatal care) – whereas other forms of labour do not impose such contractual restrictions on the contractor's bodily autonomy. Finally, as Carolyn McLeod (269) illustrates, commercial surrogacy is unique in that many women believe that their worth resides in their reproductive potential, and therefore they agree to the contract with the belief that they will be valued as a result. This valuation is different in character from that sought by individuals performing other types of labour, who might seek to be valued for the quality of the work that they perform (as opposed to how the work they do changes others' opinion of them as people, as

can be the case for commercial surrogates).

To demonstrate the potential fallacy of the asymmetry thesis, I will now respond to each argument presented for it above. In response to the argument that the labour of a commercial surrogate is largely involuntary and is therefore unique, I would cite another form of labour where individuals are compensated monetarily for the directed use of their involuntary bodily processes. In the case of blood donors in the United States, individuals can repeatedly sell the blood produced involuntarily and outside of their conscious awareness by their bodies (and neither the donor, the recipient, nor the general public take issue with this arrangement).

In response to the argument that commercial surrogacy requires an unusually long-term commitment on the part of the contractor, Satz (113) has already pointed out that other forms of labour (like book contracts or terms of military service) can extend far longer than nine months. Proponents of the asymmetry thesis who use this argument surely do not also take issue with military or book contracts because of their duration.

Thirdly, with regard to the claim that commercial surrogacy is unique in its level of control over the contractor's bodily autonomy, I point out two other labour contracts that require similar impositions on the bodies of the contractor. Military recruits, for example, surrender almost complete control of their diet and activities over to their commanding officer's during training and tours of duty. Astronauts too, in their training and missions, are similarly required to eat whatever and work wherever their contractee mandates.

Finally, by appealing to strength of the decision-making power surrogate mothers, I respond to the argument that commercial surrogacy is asymmetrical to other labour contracts because of the form of valuation that the contractor seeks. To disallow a rational woman from entering into a surrogacy contract because of an assumption that her reasons for doing so are

self-degrading would seem to deny her the very respect such a prohibition seeks to protect. (A similar argument emphasizing the paternalism of this prohibition is presented by McLeod, 269).

The refutation of each supposedly unique feature of commercial surrogacy proposed in support of the asymmetry thesis seems to ‘leave the door open’ for a relevant, analogous, labour contract to be found. Such an analogy would need to share several relevant features with commercial surrogacy, which I argue include:

1. The contract is made between a contractee and contractor where the contractee sets the terms based on government guidelines and the contractor is free to accept or decline the contract ‘as-is’
2. The contract includes items governing the health-related activity of the contractor
3. The performance of the contract bears a certain health-risk to the contractor
4. The performance of contractual duties requires the use of the contractor’s body or unconscious bodily processes
5. The contract includes provisions for the case that the contractor wishes to terminate the contract before its completion

Feature one is relevant for analogizing commercial surrogacy in that women’s freedom to contract has been an important argument for supporters of commercial surrogacy (McLeod 270). To respect women’s capacity to understand and reason about contractual arrangements, recognition of that capacity (in the form of an unrestricted freedom to contract) in both commercial surrogacy and an analogous occupation is required. Furthermore, proponents of commercial surrogacy have argued that many supposed harms of commercial surrogacy (e.g. poor compensation, a lack of post-natal counselling, and a lack of informed consent) can be remedied with mandatory contractual obligations on the part of the contractee to provide greater compensation, counselling for the surrogate, or notarized confirmation of informed consent (Satz 120).

Features two and three are relevant because the health-related implications of commercial surrogacy have been a significant source of concern for its opponents. The surrogate mother is often subject to a number of invasive tests and medical procedures (e.g. hormone injections,

episiotomy, possibly also therapeutic abortion), and the nature of her work (gestation and birthing) includes a certain risk of health complications (McLeod 265). The second and third features of contract surrogacy are relevant to arguments against commercial surrogacy and should therefore be shared with an analogous occupation in the interests of respecting those arguments against commercial surrogacy.

In a similar way to the second and third relevant feature of contract surrogacy listed above, the fourth feature is relevant because the contractually negotiated use of the contractor's body and unconscious bodily process have been used as arguments against commercial surrogacy (Satz 112). In performing the duties of gestational surrogacy, a mother relies on her body to automatically form a placenta, an umbilical cord, and transfer blood to the fetus. As such, an analogous occupation would have to rely on similarly automatic processes in the performance of its duties.

Finally, one of the most important features of contract surrogacy is the change that can occur in the surrogate mother over the course of her performance of the contract duties – namely, that many surrogate mothers find they want to keep their gestational child after birth despite their prior agreement to relinquish custody rights to its biological parents (Anderson 84). At the heart of many emotional appeals against contract surrogacy, provisions for the case that the surrogate wishes to default on the contract and no longer perform according to its specifications should be considered extremely important. As such, any analogous occupation should include similar provisions for the contractor's failure to perform according to contract specifications.

It is my position that legal prostitution in the state of Nevada in the USA possesses these five relevant features of commercial surrogacy, and can therefore be used as its analog. The possession of each feature is explicated below:

1. In Nevada, prostitutes are independent contractors who negotiate individual contracts with clients, however do so within state legal guidelines (e.g. mandatory condom use) – and are free to refuse any contract they find unappealing (Brents, and Hausbeck 279)
2. In Nevada, prostitutes are required to undergo regular medical exams and sexually transmitted infection (STI) screening (Brents, and Hausbeck 271), and are expected to remain STI free regardless of their activities in their personal lives
3. By the nature of their occupation, all sex workers face some risk of STI infection and in the case of female sex workers, the risk of pregnancy
4. In their sexual performance, legal prostitutes allow others the contractually specified use of their body (e.g. for anal or vaginal intercourse), which also includes unconscious bodily processes (e.g. genital lubrication, vasocongestion, or ejaculation)
5. If a prostitute wishes to terminate a contract with a contractee, he or she can discontinue their activities, and refund the client his or her money (and point her or him to another prostitute who might be willing to perform to his or her satisfaction)

The use of legal prostitution as an analogy for commercial surrogacy has three main implications. Firstly, and drawing on their first shared feature, a freedom to contract (albeit with government regulations for safety reasons) can be seen to be an important freedom in modern Western societies. It has been suggested that one of three primary purposes of Western governments is to enforce contracts agreed upon by its citizens (Spar 304). For a government to pass legislature banning its citizens from entering into what can be shown to be mutually beneficial contracts is to neglect this purpose. Furthermore, this first shared feature serves to highlight how government *regulation* (as opposed to prohibition) of certain contracts can serve to protect the physical and monetary securities of both contractee and contractor.

The second implication of analogizing commercial surrogacy to legal prostitution is that contractual agreements allowing another the use of one's body or unconscious bodily processes are not wrong a priori. Although some make that claim (see Satz 112), as demonstrated above it is unjustified and the successful practice of prostitution in Nevada illustrates that both contractor and contractee can prosper in such an arrangement.

Finally, drawing on their third shared feature, the case of legal prostitution serves to show that solely on the basis that the contractor assumes a certain health risk, he or she should not be

paternalistically denied the right to enter into that contract with informed consent. Legal prostitutes know the risks of their profession (e.g. STI infection or pregnancy), however weigh them against the possible benefits (e.g. job satisfaction and money), and take precautions to prevent them (e.g. condom use). Similarly, commercial surrogates know the risks of their profession (e.g. mental strain, childbearing complications), however weigh them against possible benefits (e.g. job satisfaction and money), and take precautions to prevent them (e.g. dissociating oneself from the child, medical examinations).

My critic might argue that legal prostitution is not comparable to commercial surrogacy because there is no social pressure to form an emotional attachment to form between a prostitute and his or her client, however there is such pressure in the case of a mother and child (whether they are genetically related or not). I would respond with the point that although there is an increased likelihood of a surrogate mother forming an emotional attachment for her gestational child, the fifth relevant shared feature between legal prostitution and commercial surrogacy accommodates for this discrepancy. In both situations, the contractor could have a strong compulsion (whether it be discomfort with the client or attachment to the fetus) to terminate the contract outside the terms of its standard completion. As such, the possibility for a provision for that eventuality in both contracts makes the difference in likelihood of premature contract termination between commercial surrogacy and legal prostitution an irrelevant consideration.

Having presented my argument against the asymmetry thesis and for the proper analogy of commercial gestational surrogate motherhood to legal prostitution in the state of Nevada, it might seem that I have bound myself to support commercial surrogacy on the grounds that prostitution in Nevada is a legal and recognized occupation. To take this appearance as fact, however, would be to ignore an important extension of my argument – namely that insight into

the nature of commercial surrogacy can be obtained by finding any other contracted occupations that also share its relevant features. My aim in arguing for the above theses was to attack the problem of commercial surrogacy legislation from a different angle, while leaving the floor open for other occupations that might prove to be more apt analogies. It is ultimately my hope that by following a similar framework of specifying relevant features of commercial surrogacy and naming occupations that share them, philosophical theory on the topic of commercial surrogacy can in fact move toward “concrete solutions that genuinely promote women’s autonomy” (McLeod 279) instead of remaining in the now pedestrian ‘dignity or money’ double bind.



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