

# For Your First Born Child: An Ethical Defense of the Exploitation Argument Against Commercial Surrogacy

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## Abstract

In this essay I explore two arguments against commercial surrogacy, based on commodification and exploitation respectively. I adopt a consequentialist framework and argue that commodification arguments must be grounded in a resultant harm to either child or surrogate, and that a priori arguments which condemn the practice for puritanical reasons cannot form a basis for public law. Furthermore there is no overwhelming evidence of harm caused to either party involved in commercial surrogacy, and hence Canadian law (which forbids the practice) must (and can) be justified on exploitative grounds.

Objections raised by Wilkinson based on an 'isolated case' approach are addressed when one takes into account the political implications of public policy. I argue that it is precisely these implications that justify laws forbidding commercial surrogacy on the grounds of preventing systematic exploitation.

**"A free race cannot be born of slave mothers."  
—Margaret Sanger**

Recent advances in medical technology have brought the advent of many new ethical concerns regarding how, if at all, we may take the liberty of tampering with life. As scientists busily forge the frontiers of what can be done, the more opaque, and problematic task of determining what should be done is left to ethicists and governments. To this end, in 2004 the Canadian Liberal government passed Bill C-13, the Assisted Human Reproduction Act which prohibits—among other things—the paid commission of surrogate mothers.

In this essay I will outline the objections of Anderson (1993) Brazier et al (1997) and van Niekerk et al (1995) who argue that commercial surrogacy (CS) corrupts the natural bond between mother and child by commodifying the surrogate and/or the prospective child. I will ultimately argue that these writers have come to the right answer for the wrong reasons. I will then outline the objections to CS based on exploitative arguments, and the various objections

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to them. I will show that, again, these arguments fall somewhat short of the mark, and that the missing element to a compelling exploitation-based argument against CS lies in a sort of 'feedback' effect that exists between policy makers and the general public. The relationship between law-makers and society is not a one-way street, as is tacitly assumed by CS proponents such as Wilkinson (2003). Because of this reciprocal relationship, I will argue in favour of the legal prohibition of CS, using the framework of both a welfarist, and a consequentialist. Finally, I will defend this position against objections based on paternalism and discrimination. Total prohibition, I will show, is necessary for such a potentially exploitive market.

Commercial surrogacy, in this paper, is defined as an arrangement in which a woman (the 'surrogate') is paid more than a compensatory fee for bringing a fetus (possibly, though not necessarily her own genetic offspring) to term, and for subsequently giving up that child—and all parental rights to it—to another party (the 'commissioning parents') (Wilkinson, 2003, p.169-170). Altruistic surrogacy, by contrast, is defined as a similar arrangement wherein the surrogate receives, at maximum, a compensatory reimbursement for expenses directly related to pregnancy (such as medical bills, etc.).

There are many ethical lenses through which we may appreciate surrogate motherhood and laws regarding this practice. From a conservative, legal moralist perspective it may seem like an abomination to trade in human life in this way. Because of its tendency to separate the physical and emotional unification of men and women that are 'inseparable in the laws of nature,' Pope Paul IV (1968) condemned surrogate motherhood of any kind, a position the catholic church has maintained since 1968.<sup>1</sup>

In a pluralistic society comprised of a wide variety of religious backgrounds, however, we cannot permit just one religious doctrine to determine government policy unless that doctrine is grounded in a more universally accepted value system. That something is unconventional, or seems 'unnatural,' does not make it unethical. Still, there may be valid commodification arguments against CS. Anderson, for example, argues that CS degrades children and debases their inherent moral worth as human beings (Anderson, 1993, p.170-175).

<sup>1</sup> It is, perhaps, fortunate that this doctrine was not yet promulgated at the time of the birth of Christ!

We are then forced to consider the following question: 'is it always wrong to treat people as commodities?' I will answer 'no' for reasons that are well illustrated by an example taken from Mclachlan et al (2000, p. 5.)

In the era of slavery, Africans were kidnapped against their will and taken to North America to be sold as property. The fact that white land owners purchased these slaves as mere commodities for manual labour now seems barbaric and woefully unjust.

However, if purchasing a particular slave (and subsequently giving him his freedom) was the only possible way to free him, the very act of purchasing him involves treating him, in part, as a commodity. Is it then wrong? I think not. What this example illustrates is that treating a person as a commodity is not itself unethical, but rather, when treating people as commodities becomes an adopted practice, it is the implications of this practice which make it unethical due to its harmful effects on the individuals themselves (i.e. the loss of autonomy, the subjugation to potential abuse, etc.). Note that my intention here is to illustrate precisely why slavery is so unethical, and to separate its effects from the isolated act of treating people as commodities. It seems evident that the consequentialist effects of slavery are what prompt condemnation since purchasing a human being, I would argue, is a moral imperative in this case to prevent such injustice.

Similarly, I will consider the commodification argument a valid one if -and only if- the (supposed) dehumanizing aspect of CS can be associated with unjust treatment of the children or surrogates concerned, or with a wider social attitude of indifference or callousness and inhumanity. From a consequentialist perspective, we must ascertain how people will treat one another, and how society will behave given the total repercussions of changing social norms. From a humanist, consequentialist perspective, it seems that the discussion surrounding the 'value' and 'intrinsic worth' of a person is somewhat abstract and intangible, unless it influences policy-making in such a way as to have concrete impact on individuals or groups in society. For this reason we must assess whether CS will contribute to poor treatment of children or surrogates.

Mclachlan and Swales point out that people who pay money to purchase kittens, or expensive pedigree dogs do not, in general, treat their animals worse than people who acquire their pets as strays or as gifts (Mclachlan et al., 2000, p. 5). Indeed, purchased animals may well be treated better than adopted strays as they are brought into a household that is able to provide for their needs. What Mclachlan and Swales overlook, however, is the tendency for affluent parents to spend money, rather than time, on their children. Parenting is a time-consuming obligation that requires attentive, responsive parents. Children whose parents see them as 'investments' may mature in an environment with more expensive toys than any of their peers, but without

the sort of nurturing comfort that children require. If commissioning parents of CS can be shown to exhibit this type of trend in parenting, then the commodification argument might have merit.

This prospect, however, is not limited to affluent parents; poor parents can be just as emotionally negligent as any others. Drug abuse, and crime are often associated with poverty, and if CS systematically prefers affluent parents, then their respective children may, in fact, be better off than other children. Furthermore, there is no available evidence to show that commissioning parents of CS are generally emotionally inattentive. Indeed, commissioning parents most likely have tried many alternatives to achieve pregnancy and are eager, if not desperate, for a bundle of joy to dote on.

The burden of proof, then, must lie with opponents of CS to show that the concerned children tend to be neglected. Since Canadian law currently forbids the practice, a domestic study is not possible, and there is no other compelling evidence to attest to this claim. Arguments based on the commodification of children, I argue, are somewhat unsubstantiated.

The commodification of surrogates, however, may be somewhat different. Anderson suggests that applying commercial norms to a woman's reproduction diminishes the woman's status to that of an object for mere use (Anderson, 1993, p. 175-182).

If commercial surrogates are, however, performing a role for pay, and if this role supposedly dehumanizes them, then we must ascertain exactly what differentiates a surrogate from, say, a worker performing manual labour. The implication, it seems, is that pregnancy involves a sort of deep, intimate devotion that is debased by trading in the common market.

As a crude analogy, however, great artists, such as Leonardo da Vinci are renowned for investing the deepest aspects of their personal passion in their work, baring their soul in the art they create. Does it then follow that da Vinci himself is dehumanized when the Mona Lisa is bought and sold?

Admittedly this example lacks the element of human kinship that is demonstrated in surrogate pregnancy, however we have already considered arguments regarding commodification of the child/fetus. We are now focused on determining whether the investment of deep, heartfelt love (by the surrogate) into a task renders it unethical for sale. I would argue that the intimate human bond inherent in pregnancy is not cheapened by commercial sale, and hence I am not persuaded by arguments against CS based on commodification. However, I intend to show that CS should remain illegal for other, more compelling reasons.

Does CS exploit women?

To answer this question we must first determine what is meant by exploitation. What is often implied in the word

is an act of coercion and manipulation by one individual onto another for the purposes of personal gain. Wilkinson (2003, p.173) proposes the following:

- A transaction between **A** and **B** amounts to **A**'s exploiting **B** if and only if
- a) the distribution of benefit and harm between **A** and **B** is (other things being equal) unjust (in **A**'s favour); and,
  - b) **B** does not validly consent.

The reason this definition is particularly useful in this context is that it does not require an overt, active coercion on the part of A. If B is stranded in the desert, dying of thirst, and A happens to come along with a canteen full of water, a compassionate person would say that A has an obligation to provide B with water (assuming A is not also in danger of dehydration.) If A insists that B promise to pay her a huge sum of money for a small amount of water then clearly B has no choice but to agree, and her consent is invalid.

The salient point in this definition of exploitation is that it does not necessarily involve A making B worse off than she was originally, (B would surely have died in the desert had A not stumbled upon her) but may involve merely a threat not to take action in situations of dire need. Even though CS has the potential for ommissive coercion (and hence exploitation by the above definition) there remain objections to legal prohibition.

Wilkinson argues that surrogate mothers are bound to benefit from CS if they are choosing to engage in it, rather than the alternative, which (however terrible a scenario it might be) is something the commissioning parents are acting to prevent. Therefore, he argues, the commissioning parents are acting to improve the welfare of the surrogate, and hence, regardless of what alternatives are available to the surrogate, CS cannot be coercive or exploitative.

To label CS as unethical or unjust in these instances then requires making an assumption central to welfarist ideology, namely that either the commissioning parents or (more likely) society has an obligation to bring the surrogate up to a certain standard of welfare so that she can exercise free choice.

Even then Wilkinson argues against the criminalization of CS. If a surrogate has no other means of obtaining the money she needs, he argues, and if the court has no power to alleviate the plight she is in, is it right to deny her the opportunities that paid surrogacy might afford in order to save her from exploitation? This absurd conclusion—in an isolated case—makes a weighty objection to prohibition measures on CS. The flaw in this argument, however, is that we must consider the implications of public policy beyond isolated cases.

What the above argument overlooks is that the political system does have the power to alleviate the poor surrogate's

plight. Supposing government law has a causal influence on society's circumstances, and further supposing that there exists no causal relation in the reverse sense then it would indeed be absurd to deny women the option of surrogacy for their own benefit, (since the choice they make is surely done to better their situation) and Wilkinson's objection would be well-founded.

In our society, however, there is an abundance of feedback mechanisms that serve to influence the decision making of those in political power. It is the role of journalists to expose injustice and to document matters of interest to the public. It is the role of public interest groups to rally political support around issues and lobby government officials to take action. As long as government politicians are beholden to voters for their jobs, the needs of society will dictate its laws.

When destitute women resort to the income that CS provides, they become no longer poverty stricken (or at least less so) and the surrogate's financial gain may appear to many to be an indication of free choice. Consequently, the dire nature of this woman's poverty has now been hidden behind what may be ostensibly perceived as valid consent to CS. (Although the logic of this inference is deeply flawed, it is quite likely reflective of widespread public perception.) As a result, governments are alleviated of a certain amount of pressure to resolve the conditions of poverty that have led to this problem (and may consider reducing child-care funding and other social services). Hence, the problem in effect is quietly swept under the rug, and citizens will be inclined to think that there are no longer any poor, childless women in the world. If we are to agree that having people in our society near starvation is morally unacceptable, and if it is also unacceptable (though possibly less so) for women to part with their newborn children for financial reasons, then we cannot permit one injustice to become the solution for another.

The harsh reality confronting unwilling surrogate mothers must be made clear to society so that political support may be galvanized to change their conditions. In the long run of national policy, we must aim at a just society, not a 'less unjust' one.

There remains one other objection to the prohibition of CS in Bill C-13, and that is its paternalistic nature. The decision of the Canadian parliament (an 80% male dominated institution) to deny women the right to choose to engage in paid surrogacy can be seen as an assault on the autonomy of women and their reproductive rights. Even if the bill is motivated by the most genuinely well-intentioned goal of protecting women from exploitation, the denial of free choice on the issue may serve to subordinate women and perpetuate the perception of women as weak, and in need of male protection. In many countries, men are often paid money for the donation of sperm, a transaction most people regard as benign—even comical.

A woman who carries a fetus to term, and is then told she can never hold this baby again, however, is no laughing matter. The difference in these cases is clearly the emotional impact, and harm of the transaction on the concerned parties.<sup>2</sup> Furthermore, it may be difficult for a woman to foresee the difficulty that is inherent in the agreement she is making while pregnant. From a consequentialist stand point, neither the donation of sperm, nor ova, result in the dramatic post-partum effects that are often experienced by women after birth. According to Anderson (1993, p. 178), most surrogate mothers (commercial and altruistic) experience grief upon giving up their children – in 10% of cases seriously enough to require therapy.

The laws against CS then can be seen as somewhat parallel to laws against the sale of organs. The potential for ommissive coercion in these cases is enormous, and society has a duty to ensure that nobody falls to such a level of financial ruin that these sorts of alternatives become necessary (because of the devastating losses that these alternatives result in.) Laws regarding the sale of human tissue apply to everyone, and by analogy, it seems reasonable that laws regarding CS apply to women for no reason other than the simple fact that only women are ever pregnant. Systematic discrimination and paternalism, then, do not seem to be reasonable objections to Bill C-13.

As we have seen, the objections to CS are many and diverse. Arguments proposed by Brazier that paid surrogacy is an a-priori debasement of human worth are unfounded as they do not reflect the diverse range of values in society. On the other hand, arguments to the effect that the commodification of parties concerned results in their mistreatment or harm do not present an overwhelming basis of evidence. The potential for harm to children due to CS seems no more credible than the prospect that genetic parents may be abusive, or negligent. Furthermore, the connection between paying a woman for pregnancy, and the lowering of this woman's moral worth in the eyes of

society is a possible, but highly speculative one. It does not seem immediately clear that CS should be banned on the basis of such conjectural guesswork.

The exploitative argument against CS is ultimately the most sound reason to prohibit CS when one considers the long term effect that public welfare has on government policy making. Wilkinson's objection to the exploitation argument is then addressed and the exploitation argument is redeemed. For this reason, the component of the Assisted Human Reproduction Act regarding commercial surrogacy should be maintained in order to prevent the exploitation of financially destitute women. Commercial surrogacy should remain illegal in Canada. 🍌

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<sup>2</sup> It should be noted that in Canada, Bill C-13 forbids, equally, the purchase of ovum and sperm – a policy that I do not endorse. This issue, however, will not be addressed here as it is somewhat tangential.