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**AN AUTONOMY-BASED FRAMEWORK FOR SURROGACY CONTRACTS**

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Submitted in partial fulfilment of the degree of PhD in the Department of Philosophy  
at the University of Sheffield.

November, 2020

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PhD in Philosophy

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### **Abstract:**

Surrogacy is a highly controversial route for alleviating childlessness. The contemporary philosophical literature on the matter raises a number of objections that weigh against the right to surrogacy, such as harm to children, exploitation worries, the commodification of reproduction, gender inequality worries, and negative externalities. However, it is very unlikely that surrogacy will be terminated anytime soon. Therefore, there is a need for good regulation that can better protect the interests of the parties involved, namely surrogates, intended parents and children.

In this thesis, I propose and defend a specific regulatory framework for commercial surrogacy contracts that can protect the reproductive autonomy of surrogates. My case hinges on the premise that surrogacy can be treated as *bipartite arrangements*, where the first part deals with the childbearing and the second with the transfer of the child. The focus of this thesis is on the first part (the childbearing) and sets aside issues related to the second, such as whether surrogacy amounts to the commodification of children or parental rights. Chapter One argues that we should reject the *consumer contract framework* under which current surrogacy practices are modelled. I argue that we rather look at more imaginative contractual frameworks that can better protect the reproductive autonomy of surrogates. Chapter Two argues that it is morally permissible for surrogates to accept payment in exchange for their reproductive labour services. Chapter Three advances an autonomy-based account for surrogacy contracts realised through asymmetrically enforceable contracts (AESCs), according to which intended parents would be bound to perform, but surrogates would not. Chapter Four argues that AESCs can be translated into the model of unilateral contracts of the common law of contracts, such as an offer for a reward. Finally, Chapter Five concludes the thesis by considering a further concern to the bipartite approach, to wit: on what grounds do intended parents acquire the right to parent the resultant child, if it is not as a consequence of the contract?

## Acknowledgements

I am indebted to my supervisors, Christopher Bennett and Jules Holroyd, for their valuable feedback and advice in shaping my philosophical formation. Without their encouragement and support, this thesis would have never been completed.

I would also like to thank my examiners, Megan Blomfield and Cécile Fabre, for reading my thesis, for their comments and suggestions, and for asking me many challenging questions I hope to answer in future work.

Versions of various portions of this thesis have been presented at the Society of Applied Philosophy Annual Conference 2018, the 22<sup>nd</sup> Oxford Graduate Philosophy Conference, the 2019 LSE Political Theory Graduate Conference, the 2019 Oxford Graduate Conference in Political Theory at Nuffield College, the XVII Pavia Graduate Conference in Political Philosophy, and the 2<sup>nd</sup> POLEMO Symposium at CEU. I benefitted very much from the feedback and discussion that took place on each occasion, and I am grateful to all of the organizers and participants.

I would like to thank two anonymous reviewers for the *Journal of Political Philosophy* and the editor for valuable comments and suggestions on an article published in the journal which comprise the material in Chapter 3.

I am grateful to all my philosopher friends and to my non-philosopher friends for making this journey memorable: Isela González-Vázquez, Giulia Casini, Cristina Roadevin, Adriana Clavel-Vázquez, César Palacios-González, Gonzalo Nuñez-Erices, Alexandre Duval, James Lewis, Jingbo Hu, Jack Herbert, Viktoriia Kononova, Barend de Rooij, Kayleigh Doherty, Yuhan Fu (Felicity), Yifan Mei, Lijiaozi Cheng, Anna Pace, Aranzazú Carmona-Orbezo, and María López-Pérez.

I want to thank my family, especially to my parents, who have given me support and encouragement of various kinds during the time I was writing this thesis.

Special thanks are due to Alejandro Espinosa-Herrera, for his encouragement, support, love and companionship throughout these years. For listening to my ideas, reading many drafts of the thesis and engaging in philosophical discussions even though he is not a philosopher.

I gratefully acknowledge the financial support of CONACYT in funding this PhD.

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## INTRODUCTION

Many people value having their own biological children very much. People who cannot have children often respond in sorrow, and with painful ruminations on what their lives might otherwise have been. The desire to have children is a very powerful one. It has driven childless people who cannot have children through ordinary means of reproduction to seek a number of ways to fulfil their childrearing desires, including illegitimate transfers, such as stealing children from their parents or guardians, or forcing fertile women, usually slaves, to bear children for them.<sup>1</sup>

Traditionally, formal adoption has been considered the standard route for would-be parents to become parents in a legitimate manner. However, adoption is not a stand-in option that anyone with strong childrearing desires can or ought to pursue.<sup>2</sup> Adopted children usually have a difficult time coping with their sense of abandonment and prospective adopters are thoroughly investigated to determine their suitability for this kind of parenting.<sup>3</sup> The significant financial, legal, and logistical costs of adopting a child are often too high to expect prospective parents to pay. Furthermore, the suggestion that childless people should opt for adoption imposes disproportionate burdens on the infertile in alleviating the needs of adoptive children. Likewise, this suggestion overlooks the fact that for many people it is very important to have a child genetically related to them.

Many childless people have had miscarriages, or have undergone several painful and unsuccessful fertility treatments, or are not able to bear the significant financial, legal, and logistical costs of adoption, or face legal and social discriminatory policies that prevent them from pursuing adoption. Yet, for many people, parenthood is one of the most important and satisfying conceptions of the good they can ever have. It is also one of the most difficult to have to give up when it comes to enduring infertility or discriminatory policies. The emotional and psychological difficulties experienced by many involuntary childless couples are well known, ranging from anxiety and distress to severe clinical depression.

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<sup>1</sup> If we are to believe the Bible, Hagar, slave of Sarah, was used to bear a child for Sarah's husband, Abraham, because Sarah could not have children. (Cécile Fabre, "Surrogacy", La Follete (ed.). *The International Encyclopaedia of Ethics*, (2013) p. 5086.

<sup>2</sup> Anne Phillips. *Our Bodies, Whose Property?* (Princeton: Princeton University Press, 2013), p. 75.

<sup>3</sup> *Ibid.*, p. 75-76.

While the emergence of assisted reproductive technologies (ARTs), like *in vitro* fertilisation (IVF), has opened a new feasible route for involuntary childless people with a stronger desire for genetic relatedness, there are still some for whom ARTs do not help realise their wishes of having their own child unless someone else makes her womb available to them. Surrogacy is thus the last remaining avenue for some involuntary childless people.

Surrogacy<sup>4</sup> is the process whereby a woman<sup>5</sup> becomes pregnant through artificial insemination or embryo implantation after having agreed to transfer any child that may be born from this process to the intended parents.<sup>6</sup> The practice of surrogacy varies greatly around the globe. Currently, people distinguish between two types of surrogacy: *gestational* surrogacy and *traditional* surrogacy. In traditional surrogacy (also called *genetic surrogacy* or *partial surrogacy*), the ovum of the surrogate is used. In gestational surrogacy (also known as *host surrogacy* or *full surrogacy*), the reproductive gametes are provided by the intended parents and/or gametes donors, but not by the surrogate. The arrangement is at times remunerated, while at others it is assumed to be a 'gift' that does not necessitate payment. The intended parents can be residents of the country where the process takes place or foreigners. They can be couples or single people intending to build their family. Surrogates can be married, single, have children, be close friends with the intended parents or complete strangers.

In recent years, surrogacy has become an increasingly popular means for building families in some countries,<sup>7</sup> particularly for upper-middle-class and upper-class couples.<sup>8</sup>

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<sup>4</sup> I shall use the term 'surrogacy' throughout the thesis because I consider it is neutral and acceptable from a human rights perspective.

<sup>5</sup> I shall use the term 'surrogate' to refer to the person who offers her reproductive labour to the intended parents because of the familiarity in the literature. However, it is important to mention that some authors reject the term 'surrogate mothers' because they think that women are not 'surrogates' but *actual* mothers by virtue of gestation (for example, Christine Overall, 'Reproductive "Surrogacy" and Parental Licensing', *Bioethics*, 29 (5) (2015), 353-61). I will refer to surrogate as 'she' and use the term 'woman' to refer to the surrogates, because most individuals who currently work as surrogates are women. However, by saying this, I do not want to be understood as meaning that I am excluding trans-men from working as surrogates.

<sup>6</sup> I shall use the term 'intended parents' as an interchangeable term with 'commissioning parents', 'prospective parents' or 'would-be parents'.

<sup>7</sup> For example, in the United Kingdom, the number of parental orders made after surrogacy has been increasing rapidly. For instance, the General Register Office reports 185 parental orders in 2013 and 258 in 2014. It is likely that the number of surrogacy agreements is even higher, since there is no obligation to request such an order. Claire Fenton-Glynn and Jens M. Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (2017).

However, surrogacy is a highly controversial route for alleviating childlessness. Because ARTs are used to achieve pregnancy in surrogacy arrangements, the absence of assisted reproduction regulations in some jurisdictions affects the conditions in which surrogacy arrangements are implemented. For example, some jurisdictions do not limit the number of embryos that can be implanted per assisted reproduction process, which, in turn, increases the likelihood of harm to the life and health of the surrogates involved in any in vitro fertilization (IVF) procedures. Likewise, it is sometimes thought that whether surrogacy is conceived as a type of ART has implications for decision-making about the pregnancy. For example, it is sometimes thought that because the intended parents are using surrogacy as a means to achieve their childrearing projects, they have a right to dictate (stringent) restrictions on the surrogate's body and lifestyle for the sake of the foetus.

Since the emergence of ARTs, such as gamete donation or the freezing of embryos, genetic motherhood and gestational motherhood have become separable. The use of reproductive technologies in surrogacy is thought to have particular implications for the basis of parenthood. One can imagine a scenario of a five-person surrogacy agreement involving two persons who intend to rear a child (the intended parents), two gamete donors (different from the intended parents), and a woman who will gestate the foetus (thus three biological progenitors).<sup>9</sup> To date, there is a lack of uniformity in the legal parentage of the children born through surrogacy agreements around the globe. Unfortunately, we cannot say that any of the existing models of legal parentage are able to protect the interests of the parties involved in the surrogacy transaction, namely intended parents, surrogates and children. For example, in the United Kingdom, the surrogate is recognised as the mother of the child and she may transfer the child to the intended parents via adoption. This regulation has been largely criticised by defenders of surrogacy for the reason that intended parents cannot be certain that the child will be finally theirs to parent and because they cannot avoid all the financial, legal, and logistical costs of adoption. Furthermore, this

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<[https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge\\_family\\_law\\_submission.pdf](https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf)>

<sup>8</sup> The shortage of surrogates in many countries can be explained, at least in part, as a consequence of the prohibition or strict restrictions surrounding this practice. This, in turn, has driven many intended parents who wish to have a child through surrogacy to turn to transnational surrogacy. However, this route is very expensive, and not all intended parents can afford it.. Claire Fenton-Glynn and Jens M. Scherpe, *Surrogacy: Is the law governing surrogacy keeping pace with social change?*, p. 6 .

<sup>9</sup> John Lawrence Hill, 'The Case for Enforcement of the Surrogacy Contract', *Politics and the Life Sciences*, 8 (2) (1990), p. 415.



regulation is not more able of protecting the interests of surrogates. It places surrogates in a position where they would have to be responsible for the children they did not plan to raise if the intended parents change their minds and refuse to take the children.<sup>10</sup>

Consider an alternative regulatory framework. In California, surrogacy arrangements are treated as enforceable, thus legal parentage is assigned to the intended parents prior to the birth of the child.<sup>11</sup> This regulation looks more attractive for intended parents because they can be certain that the child will be ultimately theirs. However, few intended parents can afford surrogacy in California because its monetary costs are particularly high.<sup>12</sup> On the other hand, treating surrogacy contracts as enforceable has been strongly criticised by opponents of surrogacy. One important critique is that this regulation overlooks the emotional and psychological bonding that surrogates may form with the child during the period of gestation, and hence it ultimately fails to consider the interests of the surrogate as well as the interests of the child.<sup>13</sup>

The rapid development and increasing use of reproductive technologies have brought into question traditional models of legal parentage. While some jurisdictions have banned surrogacy arrangements altogether, it seems unrealistic to think that surrogacy will be terminated any time soon. Therefore, there is a need for good regulation that can protect all parties involved. In the context of current, non-ideal conditions there seem to be numerous considerations that weigh in favour of providing support to would-be parents whose only chance to have children is through surrogacy. However, these considerations must be carefully balanced against the rights and interests of the other parties who are implicated in the surrogacy arrangement, notably the surrogate and the child. The right to surrogacy of intended parents, rather than being viewed as something that is immune from moral scrutiny or as something unqualified, ought to be seen as the site of potentially conflicting interests that must be carefully balanced against one another.

The risks encountered by intended parents and surrogates in current surrogacy practices are significant. Intended parents frequently confront medical, emotional, and

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<sup>10</sup> See Jennifer Parks and Timothy F. Murphy, 'So not mothers: responsibility for surrogacy orphans', *Journal of Medical Ethics*, 44 (8) (2018), 552-554.

<sup>11</sup> See California Assembly Bill No. 1217, Chapter 466, section 7972 (e).

<sup>12</sup> The costs are typically estimated to be between 100,000 to 150,000 USD. (See for example, [circlesurrogacy.com](https://circlesurrogacy.com) in the section 'Programs and Costs').

<sup>13</sup> For an interesting defence of this argument, see Anca Gheaus, 'The Right to Parent One's Biological Baby', *Journal of Political Philosophy*, 20 (4) (2012), 432-455.

financial complications. Surrogacy firms often offer their services to intended parents to help them manage these potential risks. However, in some contexts, surrogacy firms themselves represent a further risk to intended parents. Some surrogacy firms seem reputable and reliable until their businesses unexpectedly closes.<sup>14</sup> Likewise, some surrogacy firms are known to take advantage of the emotional desperation of intended parents to enrich themselves in an unfair manner.<sup>15</sup>

On the other hand, surrogates often confront physical, emotional, psychological, financial and social complications. Childbearing always presents a risk of serious harm, disability or death to the pregnant woman. Surrogacy pregnancies involve the same medical risks of carrying a child and giving birth. These may include nausea and vomiting from morning sickness, weight gain, back pain, bloating, fatigue, increased urination, and other uncomfortable side effects.<sup>16</sup> Some more serious side effects are conditions that can develop during the pregnancy, such as hypertension, gestational diabetes anaemia, preeclampsia, or potential damage to the reproductive organs.<sup>17</sup> Like ordinary pregnancies, there is also the risk of a miscarriage or pre-term labour. Besides these risks, surrogates may find their reproductive autonomy restricted with regard to the consumption of food and everyday activities, and must undergo any physical examination or intervention that the doctors or the surrogacy firm (if any) deem necessary, or otherwise risk a lawsuit for breach of contract.<sup>18</sup> In some contexts, surrogates are required to move to a surrogacy hostel during the period of the pregnancy, which increases the control of surrogacy firms over the bodies and lifestyle of surrogates. Likewise, surrogates may lose their entitlement to the remuneration or compensation when they have a miscarriage or an abortion or deliver a child with unwanted traits. Surrogates may also suffer (long-term) emotional and psychological stress (including post-partum depression) or clinical depression caused by the loss of a child in pregnancy or as a result of being forced to give up a child with whom they have formed an emotional bond.

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<sup>14</sup> Consider, for example, the (in)famous case of the Planet Hospital surrogacy house based in Cancun, Mexico, which went bankrupt after a series of financial mismanagement problems and malpractices (Tamar Lewin, 'A Surrogacy Agency That Delivered Heartache', *The New York Times* (July 27, 2014)).

<sup>15</sup> Kristin Lozanki and Irene Sankar, 'Surrogates as risk or surrogates at risk? The contradictory constitution of surrogates' bodies in transnational surrogacy', *Social Theory Health* (17) (2019), p.41.

<sup>16</sup> <americanfertility.com/health-risks-problems-surrogacy/>

<sup>17</sup> Ibid.

<sup>18</sup> Teresa Baron. 'Nobody Puts Baby in the Container: The Foetal Container Model at Work in Medicine and Commercial Surrogacy', *Journal of Applied Philosophy* 36 (3) (2019), p. 499.

Given the strength with which the interest in surrogacy is held by many intended parents, we may ask whether this interest is strong enough to ground a moral claim-right against fertile women to offer their wombs. I think the answer is 'no'. The intended parents' interests in having a child through surrogacy might supply fertile women with a *reason* to offer their reproductive labour to them, but they are not in themselves sufficient to hold fertile women under a *duty* to do so. When weighing the interest of intended parents in becoming parents against the bodily integrity and the reproductive autonomy of fertile women, we can agree that bodily integrity and reproductive autonomy are necessary preconditions for a minimally decent life to which all individuals have a moral entitlement. In contrast, parenthood is a way in which intended parents may further their autonomy and pursue their specific conception of good.<sup>19</sup> The desire to become parents is not strong enough to hold fertile women under a duty to provide their reproductive labour to that end, because, in doing so, the fertile women's conditions for a minimally decent life could be jeopardised.

What, then, may justify a right to surrogacy, and what are its limits? In many ways, of course, the interests of the intended parents and the interests of surrogates coincide: intended parents need surrogates to satisfy their specific conception of the good by becoming parents, and surrogates themselves are often happy to offer their reproductive labour to intended parents, sometimes in exchange for money, sometimes for purely altruistic motivations, or sometimes for both. Therefore, it seems that the right to surrogacy can be justified by the willingness of both sides.

However, the right to surrogacy should not be seen as an unfettered right even if the surrogate and the intended parents have reached mutual understanding or even if it will help both parties realise important goals in their lives. The right to surrogacy needs to be carefully balanced and weighed against other considerations. For example, some limits may be justified with conflicting interests or potential harms.

In this thesis, I advance a partial account of the right to surrogacy by addressing a series of core debates in the ethics and politics of surrogacy. The contemporary literature on the matter raises five different objections that might be taken to weigh against the right to surrogacy: (i) harm to children, (ii) exploitation worries, (iii) the commodification of

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<sup>19</sup> I import this framework from Cécile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person*. (Oxford: Oxford University Press, 2006). I focus on her view in more detail in Chapter Three.

reproduction, (iv) gender inequality worries, and (v) negative externalities. These objections are diverse in their focus: some have to do with the interests of the children who are born as a result of the surrogacy; some have to do with interests of the intended parents; some have to do with the interests of the surrogate; and some have to do with the wide range of third parties who might be affected by the surrogacy arrangement. Since no thesis of reasonable length could hope to provide a satisfactory treatment of all these objections, I have limited my focus to (ii), (iii), and (iv), and only address (i) and (v) peripherally. In this sense, my thesis provides a *partial* account of the right to surrogacy: it offers a specification of how the rights and interests of surrogates and intended parents should be carefully balanced in order to avoid exploitation and wrongful commodification of reproduction, and a partial prescription of how the rights and obligations of the surrogates and intended parents ought to be distributed during the period of gestation.

The focus of the thesis is on commercial contractual surrogacy. My argument hinges on the premise that surrogacy arrangements can be treated as *bipartite arrangements*, where one part of the arrangement governs the childbearing and another the transfer of the child. My thesis deals only with the first part: the arrangements for childbearing. The childbearing part involves a transaction between two identifiable actors: the intended parents and the surrogate (and the surrogacy firm, if any). I argue that contract law can govern this part of the arrangement because it has the capacity to deal with commercial transactions between consenting adults. By contrast, the part of the arrangement related to the transfer of the child involves three identifiable actors: the intended parents, the surrogate, and the baby. Family law is a more appropriate framework to govern this, because it has the capacity to resolve cases in which there are multiple conflicting claims over who gets to parent the new-born child. What the relevant principles of family law are, and whether these two legal frameworks can be compatible or not is an issue that goes beyond the scope of my thesis.

My thesis provides a *partial* account of a regulatory framework for commercial surrogacy realised through asymmetrically enforceable contracts: it offers a specification of how the rights and interests of surrogates and intended parents should be carefully balanced during gestation, but it does not address how the transfer of the child should be governed. Many authors worry about the part of the arrangement which deals with the

transfer of parental rights, but few concentrate on what happens during gestation. The focus of my thesis on the childbearing part of the arrangement offers a new approach to the surrogacy debate. It has the benefit that it enables us to direct our attention to the first part of the contract (the childbearing) and set aside issues that commonly arise in relation to the second (handing over the child), such as objections to baby selling, the commodification of parental rights, and the like. For all that I argue here, these latter issues may still prove to be decisive objections to surrogacy. Nevertheless, it is only by looking at the issues in sufficient detail that we could evaluate such objections, and in this thesis my focus is on the childbearing part of the arrangement.

There are three advantages to the bipartite account in general. First, it is compatible with the integration of existing mechanisms of the law that have the capacity to assign parental rights and parental obligations in light of the child's best interests, such as those available in family law. Second, it is consistent with the principles and norms that govern other parenthood-related rights, and therefore avoids worries of treating the resultant child as commodity or product. And third, it enables surrogacy contracts to strike a fair balance between the interests of the contracting parties during the period of gestation without the implication that the child's interests in being parented by suitable parents will be jeopardised. The account of the bipartite approach I presuppose in this thesis has the advantage that it can fairly balance the interests of the parties implicated, namely the surrogate, the intended parents and the resultant child.

The bipartite approach is not new to the surrogacy debate. It has been used in some jurisdictions to underpin surrogacy regulations. For example, in the United Kingdom, surrogacy arrangements are seen as a hybrid between contract law and adoption law. The surrogate is considered the legal mother of the child and intended parents have to apply for a parental order to acquire parental rights.<sup>20</sup> This regulatory framework presumes that it can protect the child's best interests *and* the surrogate's reproductive autonomy. In some way, this regulatory framework mirrors policies designed to govern adoption. Just as the pregnant woman has no obligation to hand over the child to the expectant parents even if she had promised them she would do so, so too the surrogate has no obligation to

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<sup>20</sup> See for example Mary Warnock (ed.). *Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Wiley-Blackwell, 1985) and Margaret Brazier, et.al. 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulations', *Human Reproduction Update*, 3 (6) (1997).

relinquish the child to the intended parents. Likewise, just as the expectant parents have no right to impose restrictions on the pregnant women's body and lifestyle for the sake of their childrearing projects, so too intended parents lack a right to dictate restrictions on the surrogate's pregnancy-related behaviours.

However, the UK's current regulatory framework is vulnerable to a serious problem that may harm the surrogate's reproductive autonomy. Just as expectant parents have no obligation to parent the child they had promised to parent, intended parents have no obligation to parent the resultant child. If the intended parents change their mind and refuse to parent the child they have contributed to bringing into existence, the surrogate has to take parental responsibility for the child she did not plan to parent.<sup>21</sup> Furthermore, this regulatory framework overlooks that there are substantial differences between adoption and surrogacy. It is not obvious why in the surrogacy context intended parents lack a presumptive right to parent the child they took part in creating.

This thesis assumes an alternative account of the bipartite approach according to which intended parents have a presumptive though defeasible right to parent the resultant child. This view has the advantage that it can explain why the intended parents have special childrearing rights and obligations with respect to the child that results from the surrogacy agreement. My account of the bipartite approach can better protect the interests of the resulting child and the reproductive autonomy of the surrogates than alternative accounts: if the intended parents change their minds and refuse to take the child, this would not nullify their parental obligations regarding the child they took part in creating. Therefore, even if they do not end up rearing the child, they would have an obligation to support the child financially. However, my account is compatible with the view that the surrogate might also have a presumptive right to parent the resultant child (perhaps grounded on gestation). Hence, family law is more adequate framework to resolve which right-bearer should parent the child.

Surrogacy arrangements could plausibly be accommodated by multiple existing bodies of the law. For example, (a) surrogacy might be covered by the prohibition upon trade in human beings, and thus be regulated under criminal law; or (b) it could be classified as a particular type of adoption (e.g. 'pre-conception adoption'), and thus be regulated

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<sup>21</sup> For an interesting discussion on the maternal responsibility of surrogates, see Parks, Jennifer and Timothy F. Murphy. 'So not mothers: responsibility for surrogacy orphans'.

under family law; or (c) it could be classified as one of the range of assisted conception services that are provided in licensed clinics and regulated under the ARTs legal framework; or (d) surrogacy could be subsumed under the ordinary rules of contract law, such as those governing commercial exchanges or those governing employment relationships and thus be subject to the minimum wage requirement. These might not be mutually exclusive options (except for (a)) and an effective regulatory scheme might borrow elements from more than one legal tradition.

Currently, the rules governing surrogacy vary widely between different jurisdictions around the world. Nevertheless, many jurisdictions that permit surrogacy usually use a combination of the provisions related to health and infertility treatments and family law to accommodate surrogacy. For example, in the United Kingdom the recommendations of the Brazier Report maintain this family-medical law hybrid.<sup>22</sup> In this thesis, I argue that contract law is a more suitable framework to govern the childbearing part of the arrangement because it has the resources to deal with issues related to the relationship between the surrogate and the intended parents (and the surrogacy firm, if any). Although the provisions related to ARTs do play a role in the childbearing part of the arrangement, (mainly because ARTs are used to achieve pregnancy in surrogacy), I show that it is inappropriate to consider surrogacy only as a type of assisted reproductive technology. Moreover, framing the childbearing part of the arrangement only under the provisions related to health and family treatments, would leave out many of the matters related to the relationship between the surrogate and the intended parents (and the surrogacy firm, if any). A contractual approach would have the benefit that it can incorporate these matters and bring a better understanding of what is implicated in surrogacy arrangements during the period of gestation.

Some readers may be uncomfortable with the incorporation of principles from contract law into the regulation of surrogacy, especially the idea that such contracts ought to be treated as legally binding. Some authors have warned that using contracts might undermine the appropriate type of relationship between the intended parents and the surrogate because instead of being treated as a relationship of mutual trust and cooperation, the use of a contract would, they claim, inject mistrust into their relationship.

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<sup>22</sup> Margaret Brazier, et.al. 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulations', *Human Reproduction Update*, 3 (6) (1997)

Contracts establish legal remedies and legal sanctions that the injured party can invoke in the event of a breach of contract. In this way, using contracts might suggest that the parties are likely to break their promises. However, this is a weak objection. The use of contracts in surrogacy arrangements may increase the level of trust and cooperation between the parties because they make explicit the rules of the 'game', so the parties would know in advance what they can expect from each other and their expectations would be protected by the law.

Furthermore, the contractual approach may provide four benefits to surrogacy arrangements. First, contracts can facilitate the realisation of important goals of the surrogate and the intended parents and thus increase their overall welfare: intended parents would further their specific conception of the good by becoming parents, and surrogates would gain money and increase their income. Second, contracts can make explicit what the parties have consented to when establishing the terms and conditions of the contract, so informed consent can be obtained. Third, contracts establish clear standard minimal conditions of validity, such as that the parties did not enter into the contract by mistake, or that both parties have the (mental and financial) capacity to engage in the contract, or that the contract is not unconscionable or against public policy. The minimal conditions of validity circumscribe the types of contracts we have a right to enter. Hence, for example, the minimal conditions of validity would rule out surrogacy arrangements that involve coercion, exploitation, or fraud. The fourth benefit is that contracts have the resources to allocate risks and to use legal remedies and legal sanctions to protect the injured party in the event of a breach of contract, so the injured party would not be worse off as a result of the arrangement. Taking these four benefits together, we can conclude that it would be unacceptably paternalistic to prohibit surrogacy contracts. Freedom of contract is an important interest that must be protected by a liberal democratic state. Moreover, these benefits provide some initial support for the view that a contractual framework is promising for governing the childbearing part of surrogacy arrangements. Yet, as I mentioned earlier, in order to guarantee the freedom of contract, some restrictions must be put in place in order to deal with potentially conflicting claims and potential harms.

In sum, this thesis argues for separating surrogacy contracts and parenting, conceptually and legally. Surrogacy contracts are neither necessary nor adequate for



assigning parental rights. Because tying surrogacy contracts to parenting fails to protect both the surrogates and the resultant children, a more suitable formal mechanism should be developed whereby intended parents can commit to take responsibilities over the resultant children, without the implication that the surrogates' reproductive autonomy and the intended parents' procreative interests will be jeopardised. The bipartite approach implicates that the surrogacy contract does not dictate arrangements for the transfer of the child. Thus, if the bipartite approach is successful, it could not be as a result of the contract that intended parents have a presumptive right to parent the resultant child. Rather some other basis for this right must be found. Whether the bipartite approach is successful is beyond the topic of the thesis. This thesis defends a view of surrogacy contracts, which, if successful, lends support to the bipartite approach, but it doesn't establish it.

I will say more about the scope of the thesis in the Chapter Overview below; but first, it is worth saying a few words about the important objections I do not address in significant detail, namely objections (i) and (v).

Objection (i) refers to the impact of surrogacy arrangements on children. There are three different lines of argument available in the contemporary philosophical literature in support of this objection.

The first line of argument is that surrogacy harms the children thus created because the knowledge that their gestational mother relinquished them, sometimes in return for money, shortly after birth may produce emotional trauma. However, to date, there has been limited research on the long-term impact of surrogacy on the adults and children involved in the process, and there is no conclusive evidence that surrogacy produces psychological harm to the children born through surrogacy.<sup>23</sup>

The second line of argument is that surrogacy harms the pre-existing children of the surrogate. There are concerns about how children within the surrogate's own family might be feeling about their mother carrying a pregnancy and then witnessing that baby being given to another couple to raise. So far as I have been able to find, the only empirical work which explicitly attempts to examine the psychological impact on the pre-existing children

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<sup>23</sup> Golombok, et.al. carried out a study in the United Kingdom involving 32 surrogacy children of 7 years old. The study examined the impact of surrogacy on mother-child relationships and children's psychological adjustment. The findings suggest that surrogacy families function well in the early school years. (Susan Golombok, et. al., 'Families Created Through Surrogacy: Mother-Child Relationships and Children's Psychological Adjustment at age 7', *Developmental Psychology*, 47 (6) (2011), 1579-1588).

of the surrogate is Susan Imrie and Vasanti Jadva's study of the long-term experiences of the surrogates and their families. They argue that there is no conclusive evidence to assert that the pre-existing children are harmed. They note that the surrogate's family and pre-existing children develop resourceful strategies to deal with surrogacy within contexts where it is not socially accepted. For example, some of the surrogate's pre-existing children refer to the surrogacy child 'cousin' or 'surrogacy sibling', and some of them establish a personal relationship with them.<sup>24</sup>

Finally, the third line of argument is that children born from surrogacy arrangements are at risk of harm because one of the parties might refuse to take the child after birth. I find this line of argument particularly compelling. Sadly, there are many cases at hand of child abandonment in the context of surrogacy. To illustrate this worry, consider the (in)famous case of Baby Manji. In 2008, a Japanese couple hired an Indian woman to act as a surrogate for them. Before the child was born, the couple divorced and both the intended mother and the surrogate refused to take responsibility for the child. The law did not recognise the intended father as the father of the child because India does not allow the adoption of children by unmarried men.<sup>25</sup> The surrogacy contract absolved the surrogate of any responsibility for the child, and in this sense, the child was effectively orphaned and stateless.<sup>26</sup> Eventually, Baby Manji's Japanese grandmother secured custody of the child. In 2014 another case of child abandonment caught similar attention. A Thai woman was hired by an Australian couple to carry a child for them. The surrogate became pregnant with non-identical twins. At the seventh month of the pregnancy, the male child (Baby Gammy) was discovered to have Down syndrome. After the children were born, the Australian couple took only the female child and abandoned Baby Gammy in Thailand.

The refusal to take responsibility for the child by even one party can be sufficient to place the child in legal limbo, leaving the child without clearly established parents or, in some cases, stateless.<sup>27</sup> The lack of uniformity in the assignment of legal parental responsibilities around the world facilitates this risk of harm, especially when it comes to

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<sup>24</sup> Vasanti Jadva and Susan Imrie, 'Children of Surrogate Mothers: psychological well-being, family relationships and experiences of surrogacy', *Centre for Family Research, Department of Psychology* (University of Cambridge: Free School Lane, 2014), 90-96.

<sup>25</sup> Jennifer Parks and Timothy F. Murphy, 'So not mothers: responsibility for surrogacy orphans', p. 552.

<sup>26</sup> Jennifer Parks, 'Care Ethics and the Global Practice of Surrogacy', *Bioethics* 24 (7) (2010), 333-334.

<sup>27</sup> See Jennifer Parks and Timothy F. Murphy, 'So not mothers: responsibility for surrogacy orphans', p.551 n. 2.

transnational surrogacy arrangements. However, this potential harm is not inherent to surrogacy agreements. For instance, surrogacy laws could integrate provisions establishing the parental responsibilities of the parties that coordinate with the legal parentage provisions of the jurisdictions at issue. Likewise, surrogacy laws could integrate safeguards to protect the best interests of the children. For example, the intended parents could have the obligation to contract life insurance for the child, so even if they change their minds and do not want to raise the child they took part in creating, they would have to support (financially) the child.

Objection (v) refers to the negative externalities of surrogacy arrangements. Some worry that surrogacy has a negative impact on the social status and psychological self-definition of women as a class; or that the normalisation of surrogacy would produce the disintegration of what we value about the traditional structure of the family; or that creating more children in an already overpopulated world would produce negative environmental externalities in virtue of its contribution to environmental degradation and anthropogenic climate change.

Objections (i) and (v) are both interesting issues that merit scholarly attention, though, for reasons of space and prioritization, I will not consider them further in this thesis. With respect to objection (i), I will simply assume that surrogacy arrangements have room to accommodate the best interests of the children involved in the practice of surrogacy. I consider that intended parents have parental obligations towards the children they took part in creating, such as to support the children financially even if they do not end up raising them. With respect to objection (v), I will assume that autonomy-respecting surrogacy contracts produce positive externalities and I will assume that they do not produce negative effects or that if they produce negative effects these effects are not strong enough to outweigh the positive effects of surrogacy. Nevertheless, making these assumptions should not be taken imply that the practice of surrogacy as a whole does not have negative effects or that the positive effects of autonomy-surrogacy contracts outweigh the negative effects that surrogacy as a whole could produce. It is rather that investigating this matter in depth is something that goes beyond the scope of my thesis. Therefore, in relation to objection (v), I remain mostly silent. While I consider briefly in Chapter Two the role that the integration of money has in tempering arguments for the effects that surrogacy could have on the social

status of women as a class, I do not consider in detail what effects commercial surrogacy arrangements may have on what we value about the traditional structure of the family, nor do I consider whether would-be parents have a moral obligation to adopt already existing children and not to create new children through surrogacy. These questions are bound to increase in importance as we continue to use surrogacy arrangements, though they are ultimately outside the scope of the present investigation.

## **Chapter Overview**

My arguments are developed over the course of five chapters. I begin in Chapter One by investigating the nature of surrogacy contracts. I argue that popular and scholarly debates about surrogacy uncritically presuppose that commercial surrogacy contracts are governed by a particular contractual framework: *the consumer contract framework*. In the context of surrogacy, intended parents act as consumers and surrogates act as traders who exchange goods or services for money. Widespread uncritical reliance on this model has been highly detrimental to the surrogates' reproductive autonomy. In Chapter One, I extend existing critiques of the use of the consumer contract framework in surrogacy transactions with a particular focus on procedural injustice. I show that the use of the consumer contract framework in the context of surrogacy masks the unfairness of the procedures commonly used in current surrogacy practices. While the consumer contract framework is fair when utilised in ordinary commercial transactions, it is not when utilised in surrogacy. The consumer contract framework imposes greater duties on surrogates qua sellers, such as disclosure and transparency, fair and equitable treatment, and to not to pose unnecessary risks of harms on intended parents, but does not grant surrogates any rights. Moreover, it obscures the *special responsibilities* of intended parents (and surrogacy firms, if any) towards surrogates. The aim of Chapter One is not to promote an alternative contractual framework, (though I myself will propose one in Chapter Four). Rather, by analysing the use of the consumer contract framework in the context of surrogacy, I aim in Chapter One to show that the uncritical adoption of this framework constrains and distorts our moral analysis of commercial surrogacy contracts. I conclude that we should look at more

imaginative contractual frameworks that can better respect the reproductive autonomy of those working as surrogates.

In Chapter Two, I turn to the commercial aspect of surrogacy contracts. I explore the objection that payments for women's reproductive labour services are morally impermissible, at least assuming that cases of paid surrogacy are otherwise indistinguishable from permissible altruistic surrogacy. In other words, Chapter Two explores what makes the introduction of money into surrogacy transactions specifically morally problematic. I argue that the so-called commodification objection is not a decisive objection against paid surrogacy (given that altruistic surrogacy is permissible). I identify three major problems facing the commodification objection when applied to paid surrogacy. I argue that under some conditions, payment for women's reproductive labour services is morally permissible. I conclude the chapter by offering two reasons for the moral permissibility of commercial surrogacy contracts. The first has to do with fairness-based reasons and the second has to do with welfare concerns.

Having identified the conditions under which it is permissible to pay (or receive payment) in exchange for reproductive labour services (Chapter Two), Chapter Three shifts the focus to consider reasons in favour of asymmetrically enforceable surrogacy contracts (henceforth, AESC). I advance an autonomy-based account of commercial surrogacy contracts through asymmetrically enforceable contracts (as proposed by Cécile Fabre). However, I argue that Fabre's framework is inadequate to protect those working as surrogates, and that a better model of is that of unilateral contracts, such as the offer of a reward, according to which the party who makes the offer (that is, the intended parents) is bound to perform, but the person who is offered the money (that is, the surrogate) is not. I argue that unilateral contracts can also further the autonomy of intended parents, but that they are appropriately weighted towards the interests of the surrogate, who bears the greatest risk in the enterprise. Chapter Three ends by considering four potential problems for AESCs – fraud, extortion, negligence, and the diminution of the market – and argues that none of these problems is insurmountable.

Chapter Four teases out the details of the model of unilateral surrogacy contracts. It argues that AESCs can be translated into the Anglo-American model of unilateral contracts, according to which a person makes an offer to another in exchange for an act. I defend that

unilateral surrogacy contracts can better protect the reproductive autonomy of surrogates. I show that this framework can integrate procedural fairness norms and produce fair outcomes. Furthermore, I show that unilateral surrogacy contracts can deal with standard objections raised against surrogacy contracts.

Finally, Chapter Five considers a further concern to the bipartite approach, to wit: on what grounds (if any) do intended parents acquire the right to parent the resulting child, if it is not as a consequence of the contract? I suggest that a tentative account of the intended parents' presumptive parental rights might be grounded on ownership-like rights (or something closely related to ownership-like rights) over the reproductive gametes or embryo from which the child develops. Assuming that the intended parents have legitimately acquired the reproductive gametes or the embryo from which the child grows, they stand in a privileged right position with respect to the resultant child. I consider potential objections to this view, including those that assert that it is normatively and conceptually problematic. I conclude that the ownership account can provide a sufficient basis for the acquisition of parental rights of intended parents, but it may not be a necessary condition. The ownership account is compatible with other types of kinship (for example, gestation) that could also be sufficient for the acquisition of parental rights. Therefore, my account of the bipartite approach does not exclude the possibility that surrogates could also have a presumptive right to parent the child that results from surrogacy.

In my Conclusion, I offer some brief concluding remarks, summarising the main conclusions and implications of my arguments, and identifying some unanswered questions that might provide avenues for future research.

### **Contribution to Existing Literature**

This thesis aims to make two major contributions to the existing philosophical literature on the surrogacy contract debate. The first is to provide a cohesive and integrated model of surrogacy contracts that can govern the childbearing part of surrogacy arrangements. With a few recent exceptions,<sup>28</sup> the philosophical literature on the surrogacy

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<sup>28</sup> One example is Sophie Lewis' book *Full Surrogacy Now: Feminism Against Family*, which centres on surrogacy clinics and the conditions of the surrogates during the pregnancy (Sophie Lewis, *Full Surrogacy Now: Feminism Against Family* (Verso Books, 2019)).

contract debate has focused on the transfer of the child and not what happens during gestation. For example, whether the contract is seen as enforceable or as non-enforceable is often considered to have implications on whether or not the surrogate has an obligation to hand over the child to the intended parents shortly after birth. However, very little is said about whether the surrogate's pregnancy-related obligations should be treated as enforceable. Most of the literature on the matter assumes that surrogates must undergo any physical examination or intervention deemed necessary to comply with the intended parents' procreative projects, or else risks a lawsuit for breach of contract. However, the perception that the surrogate must be subject to whatever is deemed necessary for the health of the foetus is often taken, overly quickly, as true in virtue of occupying the ground between dominant views about maternal responsibility for foetal health and the nature of contracts of commercial exchanges. My case for AESCs challenges this perception. It offers reasons in favour of treating surrogacy contracts as enforceable for intended parents and non-enforceable for surrogates during the period of gestation. Furthermore, AESCs can be translated into the legal framework of unilateral contracts and thus be integrated into existing legal frameworks, which ultimately prove the applicability of my model. My work is novel in this regard because it involves a detailed exploration of this often-overlooked part of contract theory in order to find a model for surrogacy contracts that protects the interests of all parties.

The second major contribution of my work is related to the feminist perspective on contract theory. Most of the feminist literature on the surrogacy contract debate assumes that surrogacy contracts would only plausibly be morally permissible under ideal conditions, where gender, class and race equality can be obtained.<sup>29</sup> My case, in contrast, aims to be applicable in current non-ideal conditions. However, as I mentioned in the Chapter Overview above, my case is a pro tanto argument, so further empirical considerations need to be considered, such as whether surrogacy contracts would produce negative externalities, and if they do, whether the negative externalities outweigh potential positive ones.

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<sup>29</sup> See for example, Carole Pateman, *The Sexual Contract* (Polity Press, 1988); Susan Moller Okin, 'A Critique of Pregnancy Contracts: Comments on Articles by Hill, Merrick, Shevory, and Woliver', *The Politics and the Life Sciences*, 8 (2) (1990), 205-210; and Cécile Fabre, *Whose Body is it Anyway?*

## CHAPTER ONE

### The Nature of Surrogacy Contracts

Traditionally, surrogacy contracts have been characterized as exchanges of money for a child<sup>30</sup> or as contracts for gestational services.<sup>31</sup> According to these understandings, surrogates and intended parents act as traders and consumers respectively who exchange goods or services for money.<sup>32</sup> Popular and scholarly debates uncritically assume the view that a particular contractual framework governs commercial surrogacy practices: *the consumer contract framework*.

The consumer contract framework is based on two values: market efficiency and the promotion of the consumers' interests. On the one hand, the contracting parties are held to be acting in their own interests: the surrogate gains money and increases her income, while intended parents fulfil their desire to become parents. The contract concerns the point where the interests of the parties coincide and they both have something to win from the transaction. On the other hand, the consumer contract framework presupposes that consumers are vulnerable to specific types of abuses from traders such as fraud, misleading information, coercion or extortion. Therefore, justice requires some specific safeguards that need to be integrated into the consumer contract framework in order to protect the interests of the weaker party and thus correct said imbalance, such as information, education, voice, privacy, and so on. These two values — market efficiency and the promotion of consumers' interests — are connected in the sense that consumers protections may generate trust in consumers which, in turn, increases market efficiency.

While the consumer contract framework is fair when utilised in ordinary commercial transactions, it is not when utilised in surrogacy. In the context of surrogacy, the consumer

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<sup>30</sup> While surrogacy has been strongly criticised on the grounds that it amounts to baby-selling or that it is tantamount to the commodification of parental rights over a particular child, some authors have argued that these charges are not decisive objections against commercial surrogacy. See for example, Cécile Fabre, *Whose Body is it Anyway?*, p. 191.

<sup>31</sup> Some authors resist the conclusion that surrogacy consists of transferring babies and/or parental rights in exchange for payment. They rather argue that surrogacy is about selling the surrogate's services for carrying and delivering the baby rather than for the baby itself, and argue that it would be unacceptably paternalistic to prevent women from working as surrogates (see for example, R. JO Kornegay, 'Is Surrogacy Baby Selling?', *Journal of Applied Philosophy*, 7 (1) (1990), 45-50; Hugh. V. McLachlan and J. Kim Swales, 'Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood', *Health Care Analysis*, (8) (2000), 1-18).

<sup>32</sup> Martha Field, *Surrogate Motherhood, The Legal and Human Issues*, (Harvard University Press, 1990), p. 18.



contract framework assumes that intended parents (that is, the consumers) are vulnerable to specific types of abuses from surrogates (that is, the sellers) such as fraud, misleading information or concealment of relevant information, extortion, and negligence. Hence, the integration of consumer protections might appear as justice-respecting. On the one hand, consumer protections aim at protecting intended parents from potential market abuses; on the other hand, consumer protections may generate confidence in intended parents and thus facilitate trade, which benefits both parties.

However, the consumer contract framework distributes rights and duties between the parties in a disproportionate manner, which can significantly affect the reproductive autonomy of surrogates when interacting with intended parents. The consumer contract framework imposes duties on surrogates qua sellers, such as disclosure and transparency, fair and equitable treatment, and to not to pose unnecessary risks of harms on intended parents, but does not grant surrogates any rights. In this chapter, I argue that the asymmetric distribution of rights and duties between the parties is not justice-respecting because it harms the surrogates' reproductive autonomy in many ways. The task of this chapter is thus to dismantle the consumer contract framework in the context of surrogacy contracts.

In the existing philosophical literature surrounding the surrogacy contract debate, many arguments have been deployed to condemn some features of the consumer contract framework in the context of surrogacy, such as the nature of what is sold and purchased,<sup>33</sup> the underlying conditions of the transaction,<sup>34</sup> or the outcome of the transaction.<sup>35</sup> These

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<sup>33</sup> Many authors have argued that surrogacy contracts are tantamount to baby selling or to the sale and purchase of women's reproductive labour services. See for example, Mary Warnock, *A Question of Life: Warnock Report on Human Fertilisation and Embryology*; Margaret Brazier et.al., 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulations'; Elizabeth Anderson, 'Is Women's Labor a Commodity?', *Philosophy and Public Affairs*, 19 (1) (1990), 71-92; Margaret J. Radin, 'Market-Inalienability', *Harvard Law Review*, 100 (1988), 1849-1937; Anton van Niekerk and Liezl van Zyl, 'The Ethics of Surrogacy: Women's Reproductive Labour', *Journal of Medical Ethics* 21 (6) (1995), 345-349; Ekis K. Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self* (Melbourne: Spinifex Press, 2013).

<sup>34</sup> Many authors have argued surrogacy markets are inappropriate because they lead to the exploitation of vulnerable people. See for example, Debra Satz, 'Markets in Women's Reproductive Labor', *Philosophy and Public Affairs*, 21 (2) (1992), 107-131.

<sup>35</sup> Many authors are concerned with the question of whether the surrogate has a right to change her mind and keep the child or whether the contract should be treated as enforceable against the surrogate. See for example, Martha Field, *Surrogate Motherhood*; Emily Jackson, *Regulating Reproduction* (Oxford: Hart Publishing, 2001); Cécile Fabre, *Whose Body is it Anyway?*; Anne Phillips, *Our Bodies, Whose Property?* (ch. 3); John Lawrence Hill, 'The case for enforcement of the surrogate contract'; Richard A. Epstein, 'Surrogacy: the case for full contractual enforcement', *Virginia Law Review*, 81 (1995), 2304-41; Hugh V. MacLahan and J. Kim

arguments uncritically assume that it is inherent to surrogacy contracts that the intended parents' interests in parenting and their financial interests are prioritised at the expense of the interests of surrogates and that surrogacy contracts are organized towards a specific end: *consumer satisfaction*. Furthermore, some of these arguments have been used to support wider conclusions such as that surrogacy contracts in general are morally impermissible and should be prohibited or that surrogacy practices as a whole should be treated as illegal.

In this chapter, I extend existing critiques of surrogacy as it is currently practised with a particular focus on procedural fairness. My case should not be understood as an argument in favour of the prohibition of surrogacy practices as a whole. Rather, I propose that we should look at more imaginative contractual frameworks that have the capacity to incorporate fairer procedures. The aim of this chapter is not to promote an alternative contractual framework, though it is important to note that alternative understandings have been proposed<sup>36</sup> (and I myself will propose one later in the thesis). Rather, by analysing the use of the consumer contract framework in the context of surrogacy, I aim in this chapter to show that the uncritical adoption of this framework constrains and distorts our moral analysis of commercial surrogacy arrangements.

The dominance of the consumer contract framework in the academic literature has allowed the intended parents' special responsibilities towards the surrogate to be overlooked, and has resulted in discussions of surrogacy which uncritically apply moral considerations built on the presumption that a fair procedure is based on the asymmetric allocation of rights and obligations between the parties, where the interests of consumers trigger greater obligations on sellers. Interestingly, such discussions uncritically assume that the consumer contract framework is the only mechanism that could plausibly govern surrogacy. However, this assumption is mistaken. There are alternative ways of thinking about surrogacy contracts. For instance, we can plausibly understand surrogacy contracts as

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Swales, 'Commercial surrogate motherhood and the alleged commodification of children: a defense of legally enforceable contracts', *Law and Contemporary Problems* (2009), 91-108.

<sup>36</sup> For example, Christine Straehle suggests that the nature of surrogacy contracts is that of *employment contracts*, according to which the relationship between the surrogate and the intended parents is that of employers (the intended parents) to employees (the surrogate) (Christine Straehle, 'Is There a Right to Surrogacy?', *The Journal of Applied Philosophy* 33 (2) (2016), 146-159).

employment contracts as has been recently suggested by Christine Straehle,<sup>37</sup> or we can understand surrogacy contracts as contracts of rewards as I will argue for later on in Chapter Four.

In the existing philosophical literature, there is a paucity of arguments that discuss whether the procedure utilised in surrogacy transactions is itself fair and how it has been used in practice to assign the distribution of rights and duties among the contracting parties. I argue that the use of a procedurally unfair consumer contract framework harms the surrogate's reproductive autonomy in many ways. I begin by outlining the main tenets of the consumer contract framework and argue that while this framework is procedurally fair when utilised in ordinary commercial transactions, it is procedurally unfair when utilised in surrogacy.

Procedural fairness refers to the fair allocation of rights and obligations between the parties in certain transactions. It has been addressed in the philosophical literature in the context of exploitation.<sup>38</sup> 'A transaction is exploitative due to procedural unfairness when A utilizes or creates a defect in the process of the transaction with B in a way that benefits A at B's expense'.<sup>39</sup> Thus, for instance, if A misleads B about the nature of the good A is selling, in a way that leads B to pay more for that good than B would have paid otherwise, we can say that A has taken unfair advantage of B.<sup>40</sup> Whether we describe this type of wrongdoing as 'exploitative' or we use more specific terms such as 'misleading' or 'fraudulent', we can agree that procedural injustice refers to the unfair benefit of A at B's expense due to a defect in the process.

Procedural unfairness differs from other forms of unfairness that relate to an existing defect in the background conditions of the transaction. If A and B are stranded in the desert and A sells water to B at an excessive price, we can say that A took unfair advantage of an existing defect, but we cannot say that the exchange process itself is unfair or defective. On the other hand, procedural fairness is different from fairness in outcomes. The fairness of a procedure cannot be reduced to the fairness of the results produced by applying it. A fair

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<sup>37</sup>C. Straehle, 'Is There a Right to Surrogacy?'

<sup>38</sup>Lynn A. Jansen and Steven Wall, 'Rethinking Exploitation: A Process-Centered Account', *Kennedy Institute of Ethics Journal*, 23 (4) (2013), 381-410.

<sup>39</sup>Matt Zwolinski and Alan Wertheimer, 'Exploitation', *The Stanford Encyclopedia of Philosophy*, (2017).

<sup>40</sup>Zwolinski and Wertheimer, 'Exploitation'.

result could be achieved by an arbitrary procedure. For example, my winning the lottery is the result of an arbitrary process and not the result of a claim of justice.

For many philosophers, the fairness of a procedure is largely a function of the fairness of the outcomes that it is likely to produce when applied. For example, the series of procedures that together form a fair trial are usually justified because they are likely to produce results in which the guilty are punished and the innocent are exonerated.<sup>41</sup> However, even in these cases, we cannot assume that the procedure itself does not have an independent value. Procedures matter both as a means to a specific end and in themselves. Continuing the previous example, we can say that fair trial procedures suppose that people are treated fairly regardless of the outcome of the case. For example, if they are informed about their rights and procedures; if the process is transparent and applied equally, regardless of age, sex, race and other factors; if they have the opportunity to tell their side of the story; and if they are treated with dignity and their rights are respected. If individuals were treated in procedurally fair ways, we can say that the procedure was fair, regardless of the outcome.

The focus of this chapter on procedural fairness allows us to assess whether the rights and obligations of the parties are fairly distributed and set aside concerns related to the justice of the outcomes, the justice of the underlying conditions of the transaction, and the justice of the nature of what is sold and purchased. My approach has two advantages. First, it enables us to consider issues related specifically to the interaction between the surrogate and the intended parents (and the surrogacy firm, if any) and set aside issues related to parenting and structural injustices (such as poverty or race and gender inequality). Second, my approach is novel in the philosophical literature on the surrogacy debate because it offers an argument about procedural injustice in current surrogacy practices. I argue that the use of the consumer contract framework in the context of surrogacy masks the unfairness of the procedures commonly utilised in current surrogacy practices. The principles underpinning the consumer contract framework are organized in such a way that the allocation of rights and obligations between consumers and sellers is

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<sup>41</sup> For example, Wertheimer's account of exploitation stresses the connection between exploitation and unfair-distributive outcomes. On this account the process is a means for the fairness of the outcomes. If the process is fair, then the outcome is *likely* to be fair (Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1996)).

asymmetric so that consumer protections and the corresponding obligations of the sellers appear to be justice-respecting. While the consumer contract framework is procedurally fair in most commercial exchanges, it is procedurally unfair when applied to surrogacy transactions. The use of the consumer contract framework in the context of surrogacy masks many harms to the surrogate's reproductive autonomy.

This chapter is divided into four sections. The first section describes the evolution of the consumer contract framework and highlights its main tenets. I argue that there are good reasons to support the enhancement of consumer's rights and their corresponding obligations to sellers. In the next two sections, I argue that the use of the consumer contract framework masks the procedural injustice in current surrogacy practices. To support my argument, I explore two consumer rights: the right to information and the right to redress. I demonstrate that the asymmetric allocation of rights and obligations between the parties imposes disproportionate burdens on surrogates that harm their reproductive autonomy in many ways. In section four, I conclude.

### **1.1 The evolution of the consumer contract framework**

Surrogacy contracts have traditionally been understood as contracts for the sale and purchase of goods or services. Accordingly, it is assumed that surrogacy contracts are supposed to belong to the same category as other commercial contracts such as car sales, air transportation services or restaurant services. In this section, I will outline the history of the consumer contract framework. Then, in the following two sections, I will argue that the application of this framework into the context of surrogacy is morally impermissible because it unacceptably harms surrogates' reproductive labour.

Consumer law is an extension of contract law applied to a specific relationship: buyers and sellers. Laws protecting buyers against fraud have existed for a long time in society. For instance, Roman law introduced the principle that the seller had to be in good faith in seeking not to cause damage to the buyer.<sup>42</sup> In the medieval age, among the principles utilised to protect consumers are the prohibition of fraud, actions derived from hidden

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<sup>42</sup> José de Jesús Ledesma-Urbe, 'Bases Romanísticas de la Legislación Protectora del Consumidor', *Revista de Investigaciones Jurídicas UNAM*, (UNAM: Mexico, 1985), p. 340, n. 1.

defects, the alleviation for eviction cases and limitations on usury.<sup>43</sup> At that time, markets were relatively small and the good reputation of the seller and the personal relationship between tradespeople were deemed sufficient to protect buyers from any potential abuse or harm.<sup>44</sup> Consumer law was not recognised as a separate legal category from general contract law because the buyer was not believed to be in need of special protection.<sup>45</sup> It was only in the middle of the twentieth century that consumer law developed in its own right as a separate branch of rules and principles. This evolution was part of a deep transformation in the attitude of people and governments, triggered by an increase in goods and services in larger markets that, without adequate regulation, could be hazardous for consumers.<sup>46</sup>

Scholarly works typically distinguish three stages in the evolution of consumer law. The first stage is before and during the nineteenth century. With the Industrial Revolution, the progress in transport and infrastructure facilitated exchange between diverse cities and states. As a result, the market expanded from a regional, to a national and worldwide exchange. With the arrival of mass production, producers and distributors became anonymous entities for the buyer and trade became more complex. Consequently, regulation was necessary to organize the relationship between consumers and sellers in order to prevent market abuses.

In the nineteenth century, in line with Adam Smith's 'invisible hand', it was assumed that the market was sufficient to ensure consumer welfare.<sup>47</sup> As a result, specific protection to the weaker party was deemed pointless and a focus on contractual autonomy was predominant.<sup>48</sup> This perception changed with the emerging consumer mobilization, which first became visible in Britain, aimed at overcoming the information deficit through the development of consumer protection measures.<sup>49</sup> Driven by consumer movements, this trend was followed in a number of countries, eventually leading to international recognition of consumer law.

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<sup>43</sup> Ibid., p. 340.

<sup>44</sup> Iris Benör, *EU Consumer Law and Human Rights* (Oxford: Oxford University Press, 2013), p. 12.

<sup>45</sup> Michelle Everson and Christian Joerges, 'Consumer Citizenship in Postnational Constellations?', *EUI WP Law* (2006), p. 4-7.

<sup>46</sup> Ibid., p.8.

<sup>47</sup> Michelle Everson, 'Legal Construction of the Consumer', in F. Trentmann (ed.), *The Making of the Consumer: vol 1, Knowledge, Power and Identity in the Modern World* (Oxford- New York: Berg, 2006), p. 100-1.

<sup>48</sup> Ibid., p. 100-3.

<sup>49</sup> See the 'Molony Report' of the Committee on Consumer Protection issued in the UK, 14 of November, 1962.

The second stage began with the emergence of consumer policy. The birth of consumer policy is historically associated with the 1962 President John F. Kennedy's speech to the United States Congress in response to public anger over the Thalidomide scandal.<sup>50</sup> <sup>51</sup> Thalidomide was introduced in 1956 by a German pharmaceutical company as a medication for anxiety, trouble sleeping, stress, colds, flu, and morning sickness for pregnant women. While initially considered safe during pregnancy, worries about birth defects were noted in 1961, and the drug was subsequently eliminated from the market in many countries.<sup>52</sup> This scandal was widely taken to show that the interests of consumers, particularly their health and safety, had been neglected. In his speech, President Kennedy emphasized the need for legal consumer protection that required new laws and administrative measures. The ensuing Consumer Bill of Rights stressed the importance of protecting the consumer per se, enumerating four different rights: (a) the right to safety; (b) the right to be informed; (c) the right to choose; (d) and the right to be heard.<sup>53</sup> Following this, the consumer movement gained global recognition and, from the 1970s onwards, many countries adopted protective consumer regulations.<sup>54</sup>

Finally, the third stage began at the end of the 1970s when President Gerald Ford provided a renewed stimulus and the International Organization of Consumer Unions (IOCU) added four more rights to the Consumer Bill of Rights. In 1989, the United Nations Assembly, through the United Nations Guidelines for Consumer Protection (UNGCP), adopted the set of eight rights that underpinned the general principles for consumer protection. These guidelines later expanded by the Economic and Social Council (1999),<sup>55</sup> and were recently revised by the General Assembly in resolution 70/186 (2015),<sup>56</sup> resulting in a set of eleven consumer rights. The eleven principles as they stand in the UNGCP are:

(a) Access by consumers to essential goods and services;

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<sup>50</sup> Gretchen Larsen and Rob Lawson, 'Consumer Rights: An Assessment of Justice', *Journal of Business Ethics*, 112 (3) (2013), 515-528.

<sup>51</sup> President Kennedy discussed how consumers faced new situations, such as chemicals in their food and required special expertise to be able to make sensible calls about the many choices they faced.

<sup>52</sup> <<https://www.sciencemuseum.org.uk/objects-and-stories/medicine/thalidomid>>

<sup>53</sup> John F. Kennedy (March 15, 1962) 'John F. Kennedy: Special Message to the Congress on Protecting the Consumer Interest'.

<sup>54</sup> Robert W. Kolb, (ed.) *Encyclopedia of business ethics and society* (Sage Publications, 2007), p.439.

<sup>55</sup> <[https://unctad.org/en/PublicationsLibrary/UN-DESA\\_GCP1999\\_en.pdf](https://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf)>

<sup>56</sup> <[https://unctad.org/meetings/en/SessionalDocuments/ares70d186\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ares70d186_en.pdf)>

- (b) The protection of vulnerable and disadvantaged consumers;
- (c) The protection of consumers from hazards to their health and safety;
- (d) The promotion and protection of the economic interests of consumers;
- (e) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (f) Consumer education, including education on the environmental, social and economic consequences of consumer choice;
- (g) Availability of the effective consumer dispute resolution and redress;
- (h) Freedom to form consumer organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
- (i) The promotion of sustainable consumption patterns;
- (j) A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce;
- (k) The protection of consumer privacy and the global free flow of information.

Consumer rights, in turn, generate a set of six obligations on traders that mirror these rights.<sup>57</sup>

- (a) **Fair and equitable treatment:** Business should deal fairly and honestly with consumers at all stages of their relationship. They should avoid practices that harm consumers.
- (b) **Commercial behaviour:** Businesses should not subject consumers to illegal, unethical, discriminatory or deceptive practices, such as abusive marketing tactics, abusive debt collection or other improper behaviour that may impose unnecessary risks or harms on consumers.
- (c) **Disclosure and transparency:** Businesses must provide complete, accurate, and non-misleading information about goods and services, terms, conditions, applicable fees, and final costs so that consumers can take informed decisions. Companies must guarantee easy access to this information, especially to key terms and conditions, regardless of the means of technology used.

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<sup>57</sup><[https://unctad.org/meetings/en/SessionalDocuments/ares70d186\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ares70d186_en.pdf)>



(d) **Education and awareness-raising:** Businesses should, as appropriate, develop programs and mechanisms to help consumers develop the knowledge and skills necessary to understand risks, including financial risks, take informed decisions and access competent and professional advice and assistance, preferably from an independent third party, when necessary.

(e) **Protection of privacy:** Businesses should protect consumers' privacy through a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of their personal data;

(f) **Consumer complaints and disputes:** Businesses should make available complaints-handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution without unnecessary cost or burden.

These guidelines represent an aspiration rather than a binding obligation: with them, a universally recognized institution set forth general principles and guidelines, inviting governments to propose policies for consumer protection. The gradual recognition of consumer protection law, both at the local and transnational level, has changed the focus of the welfare state, which now has a more protective role with respect to consumers and the general public, by establishing a broader set of economic and social rights and environmental protections.

The use and social value of consumer protection laws can be observed in contracts governing the sale and purchase of goods and services, such as mandatory labelling, product safety, product recall, extended warranty, service complaints and so on. Consumer protection laws ensure that the procedures used in business transactions are fair regardless of the outcome, but, at the same time, make the fair outcome likely. To illustrate these points, consider the following example.

In 2013, the IATA (International Air Transportation Association) set a number of principles that consumer protection rules should follow. These principles are aimed at striking the right balance between protecting passengers and letting the industry compete. Some of these principles are that passengers have a right to access information about the fare including taxes and charges prior to purchasing a ticket; airlines should employ their

best efforts to keep passengers regularly informed in the event of a service disruption; airlines have to establish and maintain efficient complaint handling procedures that are clearly communicated to passengers; airlines have to refund or compensate passengers affected by delays or cancellations where circumstances are within the airline's control.<sup>58</sup> These principles cannot, by themselves, guarantee a fair result, but they can ensure that the procedure is fair and make it likely that the outcome will also be fair.

The consumer contract framework does not necessarily imply the improvement of consumer rights and the corresponding duties of sellers. However, in the particular social and political context in which the consumer contract framework has developed, we can say that it is more important to protect the interests of consumers over the interests of sellers. In the example above, we can see that the series of principles integrated by the IATA aim at enhancing the rights of consumers to fairly balance the bargaining power of the parties and facilitate fair trade. With the integration of consumer protection laws into the consumer contractual framework buyers of goods and services and the general public can be protected against unfair practices in the market.

While the consumer contract framework is procedurally fair in most commercial exchanges, it is not in the surrogacy context. The use of the consumer contract framework has pernicious effects on the surrogate's reproductive autonomy. The consumer contract framework facilitates a view of intended parents as the vulnerable party to a transaction and the view of surrogates as potentially abusive sellers. This understanding significantly affects the reproductive autonomy of surrogates. In the following two sections, I will argue that the use of the procedurally unfair consumer contract framework harms the surrogate's reproductive autonomy in many ways. I discuss how the set of consumer rights and their corresponding obligations to sellers, as described in the literature, are utilised in current surrogacy practices. I elaborate on two consumer's rights as examples: the consumers' right to information and the right to redress. This will be enough to show how the distribution of rights and obligations between the parties harms the reproductive autonomy of surrogates. I will use evidence from surrogacy websites, blogs, forums, and ethnographic studies as empirical support for my argument.

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<sup>58</sup> <<https://www.iata.org/en/pressroom/pr/2013-06-03/>>

## 1.2 Surrogacy contracts and the right to information

The consumer contract framework presupposes that there is a situation of information asymmetry between sellers and consumers, so that in order to correct this asymmetry, the right to information of consumers should be enhanced. This, in turn, generates duties for sellers of disclosure and transparency.

To see the relevance of the right to information in ordinary commercial transactions, consider the following example. A company that sells cars has a duty to disclose information to consumers so that they can make an informed choice before buying them: the company could simply list or advertise some of the features; it could also illustrate these features by adding a description of the car's performance in ordinary tasks; or it could even allow consumers to test drive the car for a period. If the company uses an opaque policy, we can say that consumers' rights are not respected because consumers would have no initial idea of how much the car might be worth to them and, therefore, they would not be in a position where they can make an informed choice.

In the context of surrogacy, the consumer contract framework presupposes that surrogates have access to information relevant to the transaction, while prospective intended parents do not. This situation of information asymmetry justifies that the intended parents' right to information has to be enhanced. Therefore, intended parents have a right to access to complete, accurate, and non-misleading information about the goods or services surrogates offer to them in order to make an informed choice.

The intended parents' right to information, in turn, generates a duty on surrogates of disclosure and transparency. It may seem sensible that surrogates must disclose key information to prospective intended parents, such as a description of the surrogacy service including how long any commitment by the consumer will last; the total price of the surrogacy service or how the price will be calculated if it cannot be determined; specify the way in which the intended parents will pay for the surrogacy service and when the service will be provided; all potential additional charges that cannot be calculated in advance; details of the intended parents' right to cancel the service; information about the surrogate and the surrogacy firm (if any), such as geographical location, contact details, identity; updates about the pregnancy; etc. Furthermore, surrogates must guarantee easy access to

this information, especially to key terms and conditions. The consumers' right to information is designed to place intended parents, who are about to embark on the surrogacy transaction, in a position where they can make a free and responsible choice that supports their own ethical frameworks and to be protected against fraudulent or misleading advertising.

The consumer contract framework makes it seem like the right to information of the intended parents and their corresponding duties of transparency and disclosure of the surrogate could seem sensible and morally justifiable. However, the processes by which information is obtained and how disclosure is handled in current surrogacy practices entail many harms to the reproductive autonomy of the surrogate. I will show that while it is plausible that these procedures can be corrected in such a way that the reproductive autonomy of the surrogate is better respected, this would not solve the underlying problem. The underlying problem, I will argue, is that the asymmetric distribution of information rights and duties of transparency and disclosure disproportionately affect surrogates.

In current surrogacy practices, information-gathering and disclosure-management are usually administered by surrogacy firms. We can say that surrogacy firms act as intermediates between sellers and consumers. The type of information surrogacy firms gather from surrogates and how they administer this information varies from surrogacy firm to surrogacy firm. Nevertheless, it is common that surrogacy firms follow similar procedures.

Generally, candidate surrogates voluntarily disclose personal information to surrogacy firms usually through the submission of on-line application forms, which are available in the surrogacy firms' websites.<sup>59</sup> These forms collect personal details of candidate surrogates such as their names, address, phone number, age, height and weight. Some surrogacy firms ask further information from candidate surrogates such as the number of pregnancies resulting in live births, number of miscarriages, number of

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<sup>59</sup> The recruitment process varies greatly according to the particular context in which prospective surrogates live. For example, in her ethnographic studies of surrogacy in India, Amrita Pande describes cases in which former surrogate and midwives become surrogacy brokers. One example she uses is the case of Nirmala, a former midwife who came into the surrogacy clinic to donate eggs, but was refused because of her age. So she started recruiting women from her hospital to become surrogates. At that time, she charged the surrogates up to Rs 10,000 (around \$200) for the service provided (Amrita Pande, 'Commercial Surrogacy in India: Manufacturing the Perfect Mother-Worker', *Signs*, 35 (4) (2010), p. 975).

caesareans, whether they take medicines, smoke, drink or use drugs, and if they have undergone sterilisation procedures.<sup>60</sup>

This procedure is sometimes used to automatically disqualify candidate surrogates because they do not meet marketable expectations. Some surrogacy firms unfairly disqualify applicants on the basis of age, marital status or racial heritage. For instance, applicants who belong to certain groups such as Native Americans, Asians or Latinos, may not be selected on the basis of their racial heritage; or, on the contrary, it may be the case that recruiters select surrogates from these groups because they consider that it will be more difficult for them to claim the child as theirs, as typically intended parents are white and it will be evident that the child is not genetically related to the surrogate.<sup>61</sup>

Another example is when candidate surrogates are disqualified on the basis of age. Women are generally considered to have higher fertility and less risk in their pregnancies if they are in their twenties or early thirties. This practice automatically excludes all women over 35 failing to consider their particular biological or anatomical condition, which could possibly be ideal to achieve pregnancy with help from ART.<sup>62</sup> A case-by-case analysis of each candidate surrogate's situation avoids excluding women on an unjustifiable basis without prior evaluation. It should be noted that some basis for exclusion are not the generalized criterion in all surrogacy procedures, but it is common to come across these type of information requirements and to hear back from rejected applicants that failure to meet these criteria was the reason for being automatically excluded.<sup>63</sup>

One could argue, however, that application procedures can plausibly be corrected, so that they can only collect information from the surrogate that does not harm their privacy rights and their reproductive autonomy could be protected. For example, on-line application forms could collect only contact information from candidate surrogates and surrogacy firms could assess candidate surrogates case-by-case through interviews.

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<sup>60</sup>[http://www.surromomsonline.com/articles/sm\\_questionnaire.htm](http://www.surromomsonline.com/articles/sm_questionnaire.htm)

<sup>61</sup> For an interesting analysis of the role of race in surrogacy arrangements see Anita L. Allen, 'The Black Surrogate Mother', *Harvard BlackLetter Journal* (8) (1991), 17-31.

<sup>62</sup> For example, according to the Latin American Assisted Reproduction Registry, in 2012 69% of women accessing ART were over 35 years old. See Fernando Zegers-Hochschild, et.al., 'Assisted Reproductive Techniques (ART) in Latin America: The Latin American Registry', in *JBRA Assisted Reproduction*, 18 (4) (2014), 127-135.

<sup>63</sup> See for example, <https://www.circlesurrogacy.com/blog/circle-surrogacy/health-history-may-impact-your-surrogate-application/> and <https://www.fertilitysourcecompanies.com/i-applied-to-be-a-gestational-surrogate-and-was-rejected/>

However, even if these procedures were corrected, the consumer contract framework would still affect the surrogate disproportionately.

Prospective intended parents often have access to early information that guides their decision to pursue surrogacy through the surrogacy firms' websites and blogs.<sup>64</sup> For example, the information regarding surrogates is usually available in the main pages of the website and/or in the FAQ section, indicating that there is a demand for information on selection, screening, and management of surrogates.<sup>65</sup> In surrogacy blogs, surrogates usually introduce themselves with profiles of their accomplishments. For example, there are videos of surrogates themselves in the blog of West Coast Surrogacy Agency where they mention their motivations to act as surrogates and share personal information such as how many children they have and their ages, whether they are married or not and for how long, and they show pictures of their families.<sup>66</sup> In addition, surrogacy firm's websites often include a section where former intended parents share their experiences and success stories. Some surrogacy firms, such as New Life Czech Republic, offer the possibility for prospective parents to speak with successful parents.<sup>67</sup> While this information comes from former customers and not from the trader herself, it is the surrogacy firm who makes this information available to potential customers. In this way, prospective intended parents can gain information not only of the surrogate with whom they might embark into surrogacy, but also gain 'word of mouth' information that may aid their decision whether to embark in surrogacy. By contrast, surrogates have a limited access to information from the intended parents they will work with.<sup>68</sup> The consumer contract framework is used to justify the intended parents acquiring more information from prospective surrogates than the prospective surrogates can get to know from them before embarking in surrogacy. This asymmetry affects disproportionately the surrogate.

Once surrogacy firms have short-listed candidate surrogates, they usually use services of extensive screening of prospective surrogates and their families. Screening services ensure the selected prospective surrogates are safe to work with and ready to

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<sup>64</sup> Kristin Lozanki and Irene Sankar, 'Surrogates as risk or surrogates at risk?', p.45

<sup>65</sup> Ibid.

<sup>66</sup> <<https://www.westcoastsurrogacy.com/>>

<sup>67</sup> <[https://surrogacyczechrepublic.com/?gclid=Cj0KCQjw0YD4BRD2ARIsAHwmKVmfuncuMecgOolLxeGjEX6w-MmXdgxfgNYviLILa0tVyNmvl\\_ADHCkaAsZAEALw\\_wcB](https://surrogacyczechrepublic.com/?gclid=Cj0KCQjw0YD4BRD2ARIsAHwmKVmfuncuMecgOolLxeGjEX6w-MmXdgxfgNYviLILa0tVyNmvl_ADHCkaAsZAEALw_wcB)>

<sup>68</sup> <[http://www.surromomsonline.com/articles/ip\\_questionnaire.htm](http://www.surromomsonline.com/articles/ip_questionnaire.htm)>

commit to surrogacy. Surrogacy firms often require prospective surrogates have financial security, a supportive environment, and are able to handle the physical and emotional issues of pregnancy.<sup>69</sup> Many agencies do not work with women who have not given birth or who are not raising children of their own. It is believed that these practices help select surrogates who are more likely to hand over the child at shortly after birth and limit the potential that the surrogate will be physically or emotionally threatened by the pregnancy, or will be exploited or treated unfairly.<sup>70</sup>

Medical and psychological screenings can be sensible and morally permissible procedures. On the one hand, they help protect candidate surrogates from foreseeable risks of harm, as they prevent prospective surrogates who are unlikely to have a safe pregnancy and who might struggle to hand over the child from entering surrogacy. Of course, these procedures cannot ensure candidate surrogates did not lie to and deceive their recruiters. However, deceiving recruiters could be detrimental to their own health and safety. On the other hand, medical and psychological screenings minimise the probability of fraud to prospective intended parents and help them make an informed decision. While it is true that these procedures cannot ensure that candidate surrogates did not lie about their genuine intentions (for example, they may wish to enter surrogacy to keep the child *and* the money), these procedures do decrease the likelihood.

The surrogate selection process suggests that surrogacy firms act as certifying institutions that guarantee that the good or service that intended parents are buying meets marketable standards. However, this process usually utilises mechanisms that harm the surrogate's reproductive autonomy in many ways.

Medical screenings typically require candidate surrogates to undergo a series of invasive and painful procedures such as hysteroscopy without any compensation or the guarantee that they will be selected for the enterprise. Furthermore, medical screenings are not used exclusively to evaluate the surrogate's health but also her partner's (if any) and their children. Surrogate's partners are usually screened for infectious diseases like HIV or hepatitis, and their children are evaluated by a paediatrician to ensure the surrogate is capable of bearing healthy children.

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<sup>69</sup> June Carbone and Jody Lyneé Madeira, 'The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices', *Washington Law Review* 90 (7) (2015), p. 25-26.

<sup>70</sup> *Ibid.*, p. 26.

On the other hand, psychological evaluations assess surrogates' personality and mental health. Psychological evaluations can help increase the chances that the surrogate will get along with the intended parents (and therefore minimize the risk of a conflict) and minimize the risk that a surrogate who does not meet a minimum threshold of mental health enter surrogacy. However, the psychological evaluations that are often used in the surrogates' selection process can be too invasive, intimidating and discriminatory. Usually, psychological evaluations include one-on-one interviews. The surrogate meets with a psychologist or other mental health specialist who asks her specific questions about her history and background. They ask questions such as 'why do you want to be a surrogate?' and 'what does surrogacy mean for you?'. They may also ask questions about the surrogate's family life, what are their opinions on abortion, multiple embryos or other scenarios that deal with complications in pregnancy. Sometimes, the psychologist interviews the surrogate's partner and their children under the excuse that this guarantees that the surrogate has the support of her significant others.<sup>71</sup>

Psychological interviews are common in job applications procedures. They are utilised by employers to make good hiring decisions. However, psychological interviews need to meet ethical standards. Employers run the risk of litigation if a selection decision is contested and found to be discriminatory or in violation of state or federal regulations.<sup>72</sup> In the context of surrogacy, prospective surrogates can be rejected on the basis of their views on abortion or because her partner does not support her choice to work as a surrogate.

Medical screenings and psychological evaluations could be redesigned in such a way as to better respect the reproductive autonomy of the surrogates. For example, prospective surrogates could be compensated for medical screenings and psychological evaluations could be designed in a way that they meet ethical standards. Although helpful, however, this will not solve the underlying problem. The asymmetric distribution of rights and duties between intended parents and surrogates disproportionately affect prospective surrogates.

The consumer contract framework assumes that intended parents are expected to avoid potential risks by making responsible choices. However, it presupposes that a

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<sup>71</sup> <<https://ascsurrogacy.com/surrogacy-psychological-evaluation/>>

<sup>72</sup> SHRM, 'Screening by Means of Pre-Employment Testing' (2018)  
<https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/screeningbymeansofpreemploymenttesting.aspx>



situation of asymmetric information hinders the autonomy and freedom of intended parents and thus their capacity to act rationally in response to an objective evaluation of risks and benefits. Medical, psychological and financial screenings on surrogates are therefore organised to give peace of mind to prospective intended parents and to facilitate them making responsible choices. While some surrogacy firms screen prospective intended parents in three areas — they check their criminal records, do psychological tests, and home evaluations (if necessary)—, this information, however, is almost never disclosed to the surrogate with whom they will enter into contract.<sup>73</sup> Moreover, these procedures are not as rigorous as with the prospective surrogate's assessments. Surrogates, therefore, have to assume that intended parents always act in good faith, while they themselves are viewed as suspicious.

The unequal distribution of information rights and duties of transparency and disclosure between the parties harm the surrogate's reproductive autonomy. Information-gathering and disclosure-management are organised in a way that prospective intended parents can access information relevant to them in order to protect their interests, while prospective surrogates are not justified to access information that may be crucial to protecting their reproductive autonomy. This asymmetry can be found in contexts where surrogacy firms work with anonymity policies and in those that work with open policies.

In contexts of anonymity policies, while the parties may never share a word to each other, prospective intended parents nevertheless usually have the opportunity to know relevant information about the surrogate with whom they are working. Surrogacy firms often offer prospective intended parents a 'catalogue' of prospective surrogates, so they can review their profiles, compare and choose the surrogate with whom they would like to engage in surrogacy without the need to know their names or identity.<sup>74</sup> Furthermore, surrogacy firms typically make available the medical records of the prospective surrogate to prospective intended parents. In contrast, prospective surrogates have declared that they

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<sup>73</sup> Many surrogacy firms tend to obstruct any communication among surrogates and intended parents. Sometimes, under the excuse that the other party has no interest in establishing contact. In this way, surrogacy firms prevent parties from meeting and perhaps discovering irregularities, especially with respect to payments. GIRE, 'Surrogacy in Mexico: the consequences of poor regulation' (2017) <<https://gestacion-subrogada.gire.org.mx/en/#/>>.

<sup>74</sup> See for example, Dean A. Murphy, *Gay Men Pursuing Parenthood Through Surrogacy: Reconfiguring Kindship*, (Sidney: UNSW Press, 2015).

never come to know the intended parents' names, identity, where they live, what is their occupation, or whether they are financially and psychologically stable.<sup>75</sup>

Surrogacy firms that operate with open policies often use 'mutual-matching services' where prospective intended parents and prospective surrogates can get to know each other through face-to-face interviews or via facetime or skype and match them based on each party's surrogacy goals and preferences. Surrogacy matching services usually involve a mutual matching process. Prospective intended parents and surrogates each create their own surrogacy plan and profile, which gives a brief introduction of who they are and what they are hoping to gain from the surrogacy process. Prospective surrogates get the opportunity to review the prospective intended parents' profiles and vice versa. When a prospective surrogate and prospective intended parents reciprocate interest in one another, they have the opportunity to get to know each other before moving forward in an official match. While this mechanism may enable prospective surrogates to gain relevant knowledge of prospective intended parents, the consumer contract framework is used to justify placing the burden of the proof on the side of the surrogate.

Prospective surrogates must respond to all the queries of prospective intended parents and prove they are suitable for the enterprise. For instance, on the website Surrogate.com there is a list of questions that they recommend prospective intended parents ask prospective surrogates before embarking a surrogacy journey. Here are some examples: 'how do you feel about carrying multiples?'; 'how do you feel about termination and selective reduction? Under what circumstances would you consider these procedures?'; and 'what are your expectations from us as intended parents? How involved would you like us to be in this process?'.<sup>76</sup> However, Surrogacy.com warns prospective intended parents that some specific questions from prospective surrogates are red flags because they reveal that surrogates may not be exclusively motivated by altruistic reasons. For example, when prospective surrogates ask questions focused on their financial compensation or when prospective surrogates mention the need for a contract and attorney's legal services. These questions are considered inappropriate or rude.

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<sup>75</sup><<http://www.surromomsonline.com/support/showthread.php?247954-What-do-you-wish-you-would-have-known&p=2615891#post2615891>>

<sup>76</sup><<https://surrogate.com/intended-parents/how-to-find-a-surrogate-mother/getting-to-know-your-surrogate/>>

We could say that surrogacy firms that work with open policies seem to better respect the reproductive autonomy of surrogates than those that work with closed policies for four reasons. First, open policies give surrogates the opportunity to meet the intended parents with whom they could engage into the surrogacy journey. Second, they let surrogates express their concerns and desires. Third, they allow the surrogates' interests to be taken into account at the time of drafting the contract. Fourth, they give surrogates greater independence from the surrogacy firm because if at certain point a surrogate wishes to go without the surrogacy firm and continue her contractual relationship with the intended parents, she can do so. However, the procedures utilised by surrogacy firms that work with open policies still place prospective surrogates in a position where they have less bargaining power than prospective intended parents. While prospective intended parents are in a position where they can clarify any doubts or concerns with respect to engaging in the contract, prospective surrogates run the risk that if they ask questions deemed rude or suspicious, they will not be selected, even if such questions are crucial to the protection of their reproductive autonomy.

The consumer contract framework is utilised as a justification for overlooking the surrogates' right to information. The surrogates' right to information is very rarely respected or guaranteed. For example, it is common that the same surrogacy firm's legal personnel that explain the contract to the surrogate (if it is explained at all) are also the intended parents' legal advisors. This situation represents a significant conflict of interest. Many surrogates do not possess a copy of their contract, are not familiar with it, and were never offered the opportunity to negotiate its terms. Amrita Pande's ethnographic studies of surrogacy in India reveal that the contracts are written in English, a language almost none of the surrogates can read.<sup>77</sup> However, some essential points of the contract are translated for them: in the words of one of the surrogate's Pande interviewed, 'The only thing they told me was that this thing is not immoral, I will not have to sleep with anyone, and that the seed will be transferred into me with an injection. They also said that I have to keep the child inside me, rest for the whole time, have medicines on time, and give up the child'.<sup>78</sup> While these points might be important for the surrogate given her social background, they provide little information about difficult situations that could arise during the pregnancy

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<sup>77</sup> Amrita Pande, 'Commercial Surrogacy in India', p. 976-7.

<sup>78</sup> *Ibid.*, p. 976-7.

such as whether she will be forced to undergo a foetal reduction procedure or forced to continue the pregnancy against her wishes, or whether she will receive any payment if she loses the pregnancy.

The law firms representing surrogacy cases often contribute to a lack of clarity and incomplete information in the types of responsibilities and requirements that intended parents must fulfil upon signing a contract. Whether surrogates can negotiate the terms and conditions of the contract depends largely on whether they have access to independent legal advice. However, it is common that the personnel providing legal and medical assistance to surrogates are usually financed by intended parents, so their support is not always professional or impartial.

However, these mechanisms could plausibly be corrected. For example, surrogates could have access to the contract and it could be translated into their own language. Moreover, surrogates could plausibly have independent legal and medical advisers. However, even if these mechanisms were corrected, the surrogacy transaction would still be procedurally unfair. In the outset of this chapter, I described procedural unfairness as follows: A transaction is procedurally unfair when A utilises or creates a defect in the process of the transaction with B in a way that benefits A at B's expense.<sup>79</sup> Intended parents (and the surrogacy firm, if any) utilise the unfair asymmetric allocation of the right to information of consumers and the duties of disclosure and transparency of sellers in a way that intended parents are unfairly benefited at the surrogate's expense. The consumer contract framework masks the unfair allocation of rights and duties between the parties in a way that surrogates would have to provide information that potentially violates certain rights (such as their right to privacy), while intended parents do not. On the other hand, surrogates would not have access to relevant information from intended parents, which, in turn, potentially harms surrogates' reproductive autonomy.

### **1.3 Surrogacy contracts and the right to redress**

I will now turn to discuss the right to redress. This right refers to the consumers' availability of the effective consumer dispute resolution and redress and the corresponding

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<sup>79</sup> Zwolinski and Wertheimer, 'Exploitation'.

duty of sellers to address and respond to consumer's suggestions and complaints. The consumers' right to redress generates a duty on sellers to make available complaint management mechanisms that provide consumers with expedited, fair, transparent, affordable, accessible, prompt and effective dispute resolution without unnecessary cost or burden. The right to redress is closely associated with the protection of consumers from hazards to their health and safety and the promotion and protection of the economic interests of consumers.

I chose to analyse the right to redress because it gives us the opportunity to consider a right of consumers that can plausibly be enforced by law in both legal and illegal markets. The applicability of the right to redress in illegal contexts shows that the consumer contract framework can be used in the context of surrogacy independently of substantive considerations. While the right to be informed becomes irrelevant in the context of illicit markets, there are good reasons to think that consumers have a right to redress even in illegal markets and that it can plausibly be enforced by the law via tort law or criminal law. Many jurisdictions do not protect consumers of illegal products or services by any consumer-oriented regulation and safeguards. For example, illicit drugs are often highly adulterated and potentially dangerous for consumers. Many people believe that if a person, knowing and understanding the danger, voluntarily exposes herself, she is considered to have taken the risk and cannot recover from injury resulting from damage. However, participating in an illegal transaction should not deprive individuals of their right to safe products and services or compensation. For example, a woman's consent to an illegal abortion does not cancel recovery from compensation if she sustains injuries as a result of unsound surgical procedure;<sup>80</sup> for example, using non-sterile instruments. We can agree that to deprive injured parties of the right to redress is further injustice. The recognition of this right is not only in the best interests of consumers but also in society as a whole.

Consumers have a right to redress when the product or service they bought fails to meet their expectations (for example, they are below standard, shoddy goods, unsatisfactory services), or when the trader misleads them or engages in aggressive commercial practice (for example, harassment, coercion or undue influence). According to consumer protection law, the goods and services that consumers buy must match the

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<sup>80</sup> Shaheen Borna. 'Illegal Products and the Question of Consumer Redress'. *Journal of Business Ethics* 8 (6) (1989), p. 502.

description given during the sales contract and must conform to the purpose for which they were purchased. When this is not the case, there are many remedies available to consumers that can be chosen, such as repair or replacement, a partial or full refund, price reduction, vouchers, and so on.

In the context of surrogacy, some surrogacy firms offer 'guaranteed surrogacy plans' with the promise that said plans reduce the emotional and financial risks of intended parents typically associated with surrogacy procedures. For instance, the US surrogacy firm Circle Surrogacy offers a 'Journey Protection Guaranteed Program' that includes unlimited transfers for a fixed price. They promise that they will refund 100% of the agency fee plus unused third party funds if intended parents do not bring home a baby.<sup>81</sup> Similarly, the surrogacy firm New Life Mexico offers a 'guaranteed baby program' that offers intended parents a 100% guarantee that they will have a healthy baby within a promised time frame. This program includes the following: 'a healthy baby for intended parents to call their own or a full refund; guaranteed satisfaction; unlimited IVF/ICSI (In Vitro Fertilization/ Intracytoplasmic sperm microinjection) procedures and a number of new egg donors, if required; coverage of all new IVF and Egg Donation program expenses and involved costs, in the event of a miscarriage, until successful pregnancy and healthy baby delivery is achieved; and unlimited coverage of all associated medical service fees'.<sup>82</sup>

These programs are very attractive to intended parents because they ensure their financial interests and their interests in parenting will be protected. However, surrogacy firms that offer guaranteed programs generally avoid detailing what would happen if certain unfortunate events occur. For example, surrogacy firms do not explain what would happen in cases where babies are born with genetic or non-genetic abnormalities. Will the money be returned to the intended parents? Could compensation for damages be issued? Will a new attempt be made? Who will take responsibility for the child? Or what if the surrogate changes her mind and wants to have an abortion? Will all of the money be returned to the intended parents, or only partially? Will a new attempt be made with a different surrogate? Or what would happen if the process continues for two or three years without success and the intended parents may not want to continue waiting? Will they have their money returned in full?

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<sup>81</sup><<https://www.circlesurrogacy.com/parents/how-it-works/programs-costs>>

<sup>82</sup><<https://www.newlifemexico.net/guaranteed-surrogacy-baby/>>

The consumer contract framework is wrongly taken as justification for the intended parents' right to redress including cases where they did not pay for guaranteed plans. Just as I have a right to redress when purchasing a defective computer despite not having paid extra for a warranty (for example, I have a right that my computer is repaired or I have a right to get a partial refund), so do intended parents have a right to compensation or reimbursement when the good or service they bought does not match their expectations. For example, when the child is born with unwanted traits or when pregnancy is unsuccessful.

Because usually surrogacy firms act as intermediaries between intended parents and surrogates, it is unclear who should bear the costs of the intended parents' redress and on what grounds. Even if we assume that surrogacy firms should absorb the financial costs (either in part or in full), the right to redress of the intended parents would still impose unbearable burdens on surrogates.

Surrogates have to bear disproportionate physical and emotional burdens when pregnancy is unsuccessful. While pregnancy itself carries health risks, including gestational diabetes and preeclampsia, surrogacy involves increased medical interventions, creating a greater chance for health complications.<sup>83</sup> Surrogates must undergo a complex series of procedures used in IVF or embryo implantation procedures. Besides being invasive and painful, these procedures pose risks to the surrogate's health such as stress, egg-retrieval procedure complications, multiple births, miscarriage, ectopic pregnancy, ovarian hyperstimulation syndrome (OHSS), , and ovarian cancer.<sup>84</sup> The right to redress of intended parents increases these risks of harm because surrogates may be required to undergo repeated times these health-threatening procedures until pregnancy is achieved, or else risk not be paid or be replaced by another surrogate. Likewise, the intended parents' right to redress overlooks the many physical and emotional risks of harm that might affect surrogates who would be placed in a position where they have to decide between having an abortion or taking parental responsibilities over a child she fully intended to give up.

This analysis exposes further fundamental problems for the procedures utilised in current surrogacy practices. As we have seen, the right to redress of intended parents imposes unbearable burdens on surrogates. We can say that intended parents utilise the

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<sup>83</sup> Kristin Lozanski and Irene Shankar, 'Surrogates as risk or surrogates at risk?', p.49.

<sup>84</sup> Ibid.

unfair allocation of rights and duties between the parties in such a way that benefits the intended parents' financial interests and interests in parenting at the surrogate's expense. The use of the consumer contract framework in the context of surrogacy masks the procedural injustice in current surrogacy practices. It assumes the intended parents are the vulnerable parties to a contract and it justifies the use of unfair procedures that are organised to promote the intended parents' interests and increase obligations to surrogates. The many emotional, physical and social risks of harm that significantly affect the surrogates' reproductive autonomy are downplayed and the intended parents' *special responsibilities* towards the surrogates are obscured.

#### 1.4 Conclusion

In analysing the right to information and the right to redress of consumers in the context of surrogacy, I have exposed different ways in which the consumer contract framework is used to deny moral significance to the surrogate's reproductive autonomy. The dominance of the consumer contract framework in surrogacy practices obscures the fact that the surrogate is the one at greater risk in the enterprise and overlooks the *special responsibilities* of intended parents towards the surrogate. It assumes the intended parents are the vulnerable parties to a contract and it justifies the use of unfair procedures that are organised to promote the intended parents' interests at the expense of the surrogate.

At the beginning of this chapter, I mentioned that alternative models of surrogacy contracts have been proposed; for example, we might understand surrogacy contracts as employment contracts, as recently suggested by Christine Straehle,<sup>85</sup> or as contracts of

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<sup>85</sup>A full exploration of the employment contract framework goes beyond the purposes of my thesis. However, I will mention only briefly here two advantages of the employment contract framework and three considerations that must be taken into account when thinking about the limitations of the employment contract model. The first advantage is that it can better explain the intended parents' *special responsibilities* towards the surrogate. Just as employers have duties towards employees, such as providing a safe workplace, paying fairly and do not discriminate against age, sex, race, or other; so too would intended parents have these and similar duties towards the surrogate. The second advantage is that the employment contract framework can better explain why the surrogacy contract should not be enforceable against the surrogate under certain circumstances. Just as it would be unconscionable to force an employee to undertake an activity that would place her in a position where her prospects of a minimally decent life could be destroyed, so too it would be unconscionable to force a surrogate to complete specific performance when her prospects of a minimally decent life are at stake. Besides these two advantages, there are three considerations that are worth asking when considering the employment contract framework as a plausible candidate to govern surrogacy arrangements. First, it is worth asking whether surrogacy contracts can meet the minimum wage requirement.



rewards (in Chapter Four, I argue for the plausibility of this model). Whether or not we agree with such frameworks, active consideration of the complex interactions involved in surrogacy practices can help us steer clear of the unfair procedures and harmful practices often utilised in current surrogacy practices, which the application of the consumer contract framework has facilitated. The analysis I have presented in this chapter should motivate us to consider more imaginative frameworks of surrogacy contracts that can integrate procedural fairness norms organised to protect the surrogate's reproductive autonomy and produce fair outcomes. In Chapters Three and Four, I undertake this task. In the following chapter, I turn to the commercial aspect of surrogacy contracts. I defend that there is nothing specifically immoral about the introduction of money into surrogacy transactions.

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Second, it is worth asking whether surrogates would have the right to strike, form unions, or form cooperatives. Third, it is worth asking what circumstances would justify the dismissal of surrogates. As we will see in Chapter Three and Chapter Four, my model of unilateral surrogacy contracts can accommodate the advantages of the employment contract framework without having to deal with these complexities.

## CHAPTER TWO

### The Commodification Objection

We have now seen that there are good reasons not to model surrogacy contracts under the consumer contract framework. In the previous chapter, I extended existing criticisms of current surrogacy practices. I argued that the consumer contract framework is procedurally unfair in the context of surrogacy. As I have pointed out, this, however, should not be taken as a reason to condemn surrogacy contracts altogether, but rather we should explore more imaginative contractual frameworks that can better protect the reproductive autonomy of surrogates. In the next three chapters, I make my case for modelling commercial surrogacy contracts on unilateral contracts. I begin in this chapter by arguing that it is morally permissible for surrogates to receive payment in exchange for their reproductive services.

A common concern about surrogacy is whether and why it is morally wrong to pay for women's reproductive labour. While it is not inherent in a surrogacy arrangement that intended parents should pay the surrogate, commercial surrogacy has traditionally brought forth deeper concerns than so-called altruistic surrogacy. Indeed, it is quite common for people to endorse 'altruistic' or 'gift' surrogacy, while condemning its commercial form.<sup>86</sup> Many countries such as the United Kingdom, Canada (except the province of Quebec), Australia (except Northern Territory), Belgium, Denmark, Hungary, and The Netherlands tolerate altruistic surrogacy, but prohibit its commercial form. Nevertheless, what (if anything) justifies the idea that commercial surrogacy and altruistic surrogacy should occupy polar normative spaces?

Philosophical discussions on this issue often fall within what Viviana Zelizer terms the 'hostile worlds' dichotomy.<sup>87</sup> This term is used to refer to the view that the market must be kept separated from intimate, sacred, and otherwise important spheres if they are to retain their value and importance; when these two spheres are mixed, moral contamination is produced.<sup>88</sup> One interpretation of this view is the so-called *commodification objection*.

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<sup>86</sup> Anne Phillips, *Our Bodies, Whose Property?*, p. 70.

<sup>87</sup> Viviana Zelizer, *The Purchase of Intimacy*, (Princeton: Princeton University Press, 2005).

<sup>88</sup> Viviana Zelizer, *The Purchase of Intimacy*, p. 22.

Broadly, the commodification objection asserts that it constitutes a harm to buy and sell some goods or services *or* that their trade produces negative effects on third parties.

In this chapter, I explore the question of why payments for women's reproductive labour services are morally impermissible, at least assuming that cases of paid surrogacy are otherwise indistinguishable from permissible altruistic surrogacy. I argue that the commodification objection is not a decisive objection against paid surrogacy contracts.

This chapter provides a case against the commodification argument when applied to paid surrogacy arrangements that is partial in two ways. First, it focuses on the discussion of the commodification of women's reproductive labour rather than the commodification of parental rights or babies. Secondly, it advances a partial account of the moral permissibility of paid surrogacy by examining the arguments available in the contemporary literature on the topic, which I take to be both the most interesting and sometimes the less explored.

One way to argue for the moral impermissibility of commercial surrogacy may be to say that it treats children and parental rights as commodities that can be bought and sold for a price.<sup>89</sup> A different way to argue for the moral impermissibility of commercial surrogacy may be to say that the sale and purchase of women's reproductive labour services constitutes a harm to the surrogate and produces bad effects on third parties.<sup>90</sup> In this chapter, I engage with the latter type of argument. In the Introduction of the thesis, I indicated that my argument assumes that surrogacy contracts can be treated as bipartite arrangements where contract law can govern the part dealing with the childbearing part of the arrangement and family law (presumably) can govern the part dealing with issues related to the transfer of the child. This thesis focuses on the first part and sets aside issues related to the second part. Therefore, giving full consideration to the commodification objection in relation to the part that deals with the transfer of the child is outside the scope of this thesis. In this thesis I do not consider whether the first way to argue for the moral impermissibility of surrogacy is a knockout argument. I acknowledge that in surrogacy discussions issues related to gestation and childbirth cannot be treated as completely

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<sup>89</sup> See for example, Elizabeth Anderson, 'Is Women's Labor a Commodity?'; Margaret Radin, 'Market-Inalienability'; and Mary Warnock (ed.), *Question of Life: The Warnock Report on Human Fertilisation and Embryology*.

<sup>90</sup> See for example, Elizabeth Anderson 'Is Women's Labor a Commodity?'; Andrea Dworkin, *Right-Wing Woman: The Politics of Domesticated Females*, (London: Women's Press, 1983); and Gena Corea, *Man-made Women: How New Reproductive Technologies Affect Women* (Indiana University Press, 1987).

separate from issues related to the transfer of the child – because the product of gestation and childbirth is, of course, the child. However, by focusing on the childbearing-part of surrogacy we can address questions that have been routinely overlooked in surrogacy debates. Some examples of these questions are whether paying a woman to carry a child to term treats women’s reproductive labour in a wrongful manner regardless of whether or not exclusive parental rights are to be assigned to the person who pays her; or whether monetary gain wrongfully induces women to offer their reproductive labour to those who need them; or whether the introduction of money into the reproductive sphere produces negative effects on children or the society at large.

This chapter identifies three major problems facing the commodification objection when applied to commercial surrogacy. The first problem is that there are more cases of commercial surrogacy in practice than we normally consider in theory. The second problem relates to the low *explanatory* power of the commodification objection, or its inability to explain why buying and selling women’s reproductive labour is specifically morally objectionable. Finally, the third problem relates to *autonomy* concerns, or its inability to account for the idea that commercial surrogacy impermissibly restricts the autonomy of the surrogate. Contra the commodification objection, I argue that, under some conditions, the payment for women’s reproductive labour is morally permissible. I end by offering two reasons for the moral permissibility of paid surrogacy contracts: the first has to do with fairness-based reasons; the second has to do with welfare concerns.

## **2.1 What is commodification?**

In this section, I outline a general understanding of the commodification argument. I narrow down and analyse the key features of the commodification argument I will use throughout this chapter and elucidate some conceptual and normative complexities, including the distinction between morally permissible and morally impermissible commodification.

In its most basic form, the commodification objection states that the sale and purchase of goods and services that are not apt for sale and purchase are morally problematic. This general understanding captures many authors and traditions, but it is not

committed to any strong claim made by particular authors. In this sense, the basic idea of the commodification argument I advance in this section is conceptually rather modest. In particular, this conceptualization does not advance any particular account; rather, it aims at capturing the fundamental features of the commodification argument and offering a basic understanding of the commodification objection. In this sense, this basic conceptualization plays largely a diagnostic role; that is, the term 'commodification' might indicate that something is wrong with the trade of some goods or services, but does not, in itself, offer an explanation of, or suggest a solution to, these problems.

In point 2.2, I discuss Elizabeth Anderson<sup>91</sup> and Margaret Radin's<sup>92</sup> accounts of the commodification argument because discussions of commodification are especially, but not uniquely, associated with this literature. In sections 2.3 and 2.4, I distinguish this basic idea of commodification from other adjacent concepts, such as 'objectification' and 'alienation'. Finally, in section 2.5, I sketch some guidelines to restrict the range of morally problematic commodifications.

## **2.2 The commodification objection**

The commodification argument can be interpreted as an instance of the Hostile Worlds dichotomy argument. The Hostile Worlds dichotomy argument suggests that intimate social relations and monetary transfers form two incommensurable spheres and any contact between them inevitably leads to moral contamination or degradation. While the Hostile Worlds dichotomy runs in both directions,<sup>93</sup> the commodification argument refers to the intrusion of monetary values into the domain of the intimate, sacred, or otherwise important to the self or human flourishing, so the territory of the non-monetary sphere is corrupted.

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<sup>91</sup> Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press, 1993).

<sup>92</sup> Margaret Radin, 'Market-Inalienability'; and Margaret Radin, 'Justice and the market domain', *Nomos* (31), in: Chapman JW and Pennock Jr (eds.), *Markets and Justice*, (New York: New York University Press, 1989), 165-197.

<sup>93</sup> One example of the integration of love or intimacy into the monetary sphere can be the integration of intimacy or love into the work sphere.

In the existing philosophical literature on the commodification argument, the accounts of Elizabeth Anderson<sup>94</sup> and Margaret Radin<sup>95</sup> are particularly developed. Both accounts aim at explaining *why* it is morally problematic to buy and sell some goods and services. While these accounts differ in their focus, both follow a similar structure: they consist in the combination of a non-contingent argument (a theory of value) combined with a contingent argument (an argument about its bad effects).

Anderson offers a pluralistic theory of value, according to which it is appropriate to use different modes of valuation for different types of goods.<sup>96</sup> She distinguishes between two types of goods: '*intrinsic goods*, which are the immediate objects of our valuations; and *extrinsic goods*, which are things that have value only because one values some other thing'.<sup>97</sup> According to Anderson, the goods that have *use value* are a type of extrinsic goods, in the sense that they are only valued as a means to some extrinsic end. Some examples of things that have use value are 'money and many of the things that are bought and sold on markets'.<sup>98</sup> Anderson argues that when some goods are sold and bought, their intrinsic value is corrupted and their seller is degraded, *and* trading that good in the market debases its intrinsic value for third parties. Anderson states that a good can properly be deemed a commodity when 'the norms of the market are appropriate for regulating its production, exchange, and enjoyment'.<sup>99</sup> She asserts that prostitution<sup>100</sup> is the 'classical example' of commodification.<sup>101</sup> She claims that selling sex corrupts its intrinsic value and is degrading for the prostitute, *and* affects how women's sexuality is valued by men in both the personal and the market spheres.<sup>102</sup>

Radin's account takes a different approach. She states that some goods and services are an integral part of the self, they are important for our *personhood*<sup>103</sup> and human

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<sup>94</sup> Elizabeth Anderson, *Value in Ethics and Economics*.

<sup>95</sup> Margaret Radin, 'Market-Inalienability' and Margaret Radin, 'Justice and the market domain'.

<sup>96</sup> Natalie Gold, 'The limits of commodification arguments: Framing, motivation crowding, and shared valuations', *Politics, Philosophy & Economics* 18 (2) (2019), p. 167-168.

<sup>97</sup> *Ibid.*, p. 168.

<sup>98</sup> *Ibid.*, p. 168.

<sup>99</sup> Elizabeth Anderson, *Value in Ethics and Economics*, p. 72.

<sup>100</sup> I use the term 'prostitution' because it is the term that is commonly used in these discussions.

<sup>101</sup> Elizabeth Anderson, *Value in Ethics and Economics*, p. 154.

<sup>102</sup> *Ibid.*, p.155.

<sup>103</sup> Margaret Radin understands 'personhood' as the way in which we constitute ourselves as continuing personal entities in the world (Margaret Radin, 'Property and Personhood', *Stanford Law Review* 34 (5) (1982)).

flourishing. Therefore, to understand these goods and services as completely separable from the self and monetizable 'is to do violence to our deepest understanding of what it is to be human'.<sup>104</sup> Radin states that 'once something has a price, money must be part of the interaction, and the reason or explanation for the interaction, when that something changes hands. A sale cannot be simultaneously a gift'.<sup>105</sup> According to Radin, the commodified version of a good or service destroys its non-commodified version. She asserts that commodification is a 'slippery slope'. She uses the metaphor of dominos, where pushing over the first domino causes the rest to topple, so the commodification of some goods and services must lead to a total degradation of the value of other instances of that thing.<sup>106</sup> She uses the example of markets of blood to illustrate her argument. She says that if \$50 is the price of a pint of blood, then giving a pint of blood turn out to be like giving \$50 of money.<sup>107</sup> Therefore, when money becomes part of the interaction what was special about giving blood is destroyed.<sup>108</sup>

The accounts of Anderson and Radin offer a more or less plausible understanding of the commodification objection and advance particular strong claims, such as Radin's idea that the sale of a good or service will displace or reduce altruism or Anderson's idea that commodification degrades the seller. However, the basic idea of commodification I defend in this chapter is not necessarily committed to these, or similar, strong claims that might sometimes be found in the literature. Henceforth, I will understand the commodification argument broadly and I will refer to the accounts of Anderson and Radin only when necessary.

Having said this, an initial general understanding of the commodification argument can now be stated as follows:

A good or service X is commodified when

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<sup>104</sup> Margaret Radin, 'Market-Inalienability', p. 1906.

<sup>105</sup> Margaret Radin, 'Justice and the market domain', p.175.

<sup>106</sup> Margaret Radin, 'Market-Inalienability', p. 1912.

<sup>107</sup> Margaret Radin, 'Justice and the market domain', p.170.

<sup>108</sup> Radin's account echoes Richard Titmuss theory of *the gift relationship*. Titmuss argued that the blood market in the United States discourages voluntary donation. According to his study, less blood was supplied in a hybrid system than would have been the case in a purely voluntary system (Natalie Goldman, 'The limits of commodification arguments', p.168). He concluded that with the introduction of payment something valuable was lost in the donor's motivations, such as a sense of community or an expression of altruism (Ibid). In his words, "private market systems deprive men of their freedom to give" (Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London: George Allen and Unwin, 1970), p. 239).

1. X belongs to the non-monetary sphere, which is typically related to the types of things that are intimate, sacred, integral to the self, or otherwise important to personhood or human flourishing.

2. X is sold and bought, or turned into or treated as though it were a good or service that we can legitimately trade for a price.

3. The commodification of X causes harm or degradation to some things involved in the process, or produces bad effects on third parties.

This general statement does not specify exactly the marks and features of the term 'commodification' nor does it describe what specific instances of commodification are morally objectionable but give us a sufficient understanding of what is the commodification argument. In 2.5 I will offer an improved version of this general statement where I tease out the details of morally problematic commodification.

I will now turn to distinguish briefly the term 'commodification' from other philosophical notions, such as 'objectification' and 'alienation'. Disambiguating the relationship between these terms can help to clarify the general shape of 'commodification'. I also discuss these concepts because particular accounts of commodification are sometimes said to conflate commodification either with objectification<sup>109</sup> or with alienation.<sup>110</sup> In point 2.5, I will elucidate some normative complexities, including the distinction between morally permissible and morally impermissible commodification.

### **2.3 Commodification and objectification**

The concept of 'objectification' can be roughly defined as 'seeing and/or treating a person, usually a woman, as an object'.<sup>111</sup> Although this concept has been used loosely to refer to a wide range of cases,<sup>112</sup> the notion of objectification involves, in some way or another, the value of a person as a means to someone else's end or the treatment of a

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<sup>109</sup> See for example, Margaret Radin, 'Market-Inalienability'; Martha Nussbaum, 'Objectification', *Philosophy and Public Affairs*, 24 (4) (1995), 249-291.

<sup>110</sup> See for example, Carolyn McLeod, 'Mere and Partial Means: The Full Range of Objectification of Women', *Canadian Journal of Philosophy*, Supplementary Volume 28 (2003), 219-244.

<sup>111</sup> Lina Papadaki, 'Feminist Perspectives on Objectification'. In Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2019).

<sup>112</sup> See Martha Nussbaum, 'Objectification'.



person, usually a woman, as an object.<sup>113</sup> Some particular treatments of commodification equate this concept with the notions of *instrumentality*,<sup>114</sup> *fungibility*,<sup>115</sup> or the *denial of subjectivity*.<sup>116</sup> These notions have been defined as instances of the term *objectification*.<sup>117</sup> The term '*instrumentality* refers to the treatment of a person as a tool for the objectifier's purposes'.<sup>118</sup> The term '*fungibility* refers to the treatment of a person as interchangeable with other objects'<sup>119</sup> and it implies perfect substitutability.<sup>120</sup> The term '*denial of subjectivity* refers to the treatment of a person as something whose experiences and feelings (if any) need not to be taken into account'.<sup>121</sup> However, the phenomena the concepts of objectification and commodification describe are different. *Objectification* refers to treating as an object what is not really an object, typically a person.<sup>122</sup> In contrast, *commodification* refers to the process whereby entities that belong to the non-monetary sphere are treated or turned into monetary entities.

In light of the basic idea of commodification outlined above, equating commodification to objectification fails to appreciate that certain forms of commodification have nothing at all to do with the treating of a person as an object. For instance, a consecrated religious artefact might be commodified when it is sold in the market, but it cannot be said it has been objectified. Although some forms of commodification and objectification might overlap (for example, slavery, sex trafficking, and wife selling), these concepts are not synonyms, neither one is reducible to the other. Furthermore, some forms of commodification can be used to avoid objectification. For instance, we can use money to avoid taking someone as a mere means, such as when we pay them fairly for goods or services rendered.<sup>123</sup> I will return to this point in the last two sections.

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<sup>113</sup> Ibid.

<sup>114</sup> Stephen Wilkinson, 'Commodification arguments for the legal prohibition of organ sale'. *Health Care Analysis*, 8 (2) (2000), 169-187.

<sup>115</sup> For example, Margaret Radin 'Market-Inalienability'; Margaret Radin 'Justice and the market domain'; Stephen Wilkinson, 'Commodification arguments for the legal prohibition of organ sale'.

<sup>116</sup> Stephen Wilkinson, 'Commodification arguments for the legal prohibition of organ sale'.

<sup>117</sup> Martha Nussbaum, 'Objectification', p. 257.

<sup>118</sup> Ibid., p. 257.

<sup>119</sup> Ibid., p. 257.

<sup>120</sup> Richard Epstein, 'Surrogacy: the case for full contractual enforcement', p. 2327.

<sup>121</sup> Martha Nussbaum, 'Objectification', p. 257.

<sup>122</sup> Ibid., p. 257.

<sup>123</sup> Vida Panitch offers a strategy to correct the exploitative context of surrogacy arrangements and empower women's agency and bargaining power (Vida Panitch, 'Global Surrogacy: exploitation to empowerment', *Journal of Global Ethics* 9 (3) (2013), 329-343).

## 2.4 Commodification and alienation

The notion of ‘alienation’ involves, in some way or another, the capacity for a of property or a property right to be transferred from one party to another, either through a commercial exchange or through donation.<sup>124</sup> Some authors have claimed that alienation is a crucial feature of the commodification argument because for something to be sold and bought it is necessary to treat it as disposable property. However, although alienation and commodification sometimes might be connected, these two concepts are not identical. Some forms of commodification do not involve alienation and vice-versa. For instance, we might say that the talents of an opera singer are commodified when she is being paid for her performance, but we cannot say her talents have been alienated when her performance involves self-realisation. Conversely, if I transfer you my right to vote as a gift, we can say that the transfer involves the alienation of a form of self-expression, but we cannot say that it involves commodification.

Furthermore, alienation is not a decisive element for the moral valuation of commodification. Some authors argue that malign commodification depends in part on whether the thing that is being transferred or relinquished is *normatively alienable* to persons.<sup>125</sup> Consider for instance Radin’s account of market-inalienability. She defends the idea that the dividing line between permissible and impermissible commodification lies in core aspects of human flourishing. She claims that something is wrongly commodified when its purchase and sale alienate important personal attributes and relationships.<sup>126</sup> However, there are forms of commodification that are morally problematic for reasons other than alienation. For example, markets in citizenship might be morally wrong not because citizenship is treated as a property that can be sold and bought, but because the sale of citizenship expresses wrong message about the nature of the value of citizenship, or

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<sup>124</sup> There are two ways in which the notion of ‘alienation’ has been defined in the literature. One way is the Marxist notion of alienation or the idea that the separation between a self and another that properly belong together (David Leopold, ‘Alienation’. In Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2018)). The second way has been defined in property law as the transfer of entitlements over something. Throughout the chapter, I use the latter definition because I consider it is more neutral than the former and more useful for my purposes.

<sup>125</sup> See Carolyn McLeod, ‘For Dignity or Money: Feminists on the Commodification of Women’s Reproductive’. In: Bonnie Steinbock (ed.), *The Oxford Handbook of Bioethics*, (Oxford: Oxford University Press, 2009).

<sup>126</sup> Margaret Radin, ‘Market-Inalienability’, p. 1904.

because it is unfair for states or citizens to profit from luck-based advantages. In the following subsection, I will say more about the role of alienation in the moral valuation of commodification.

## 2.5 Morally permissible and morally impermissible commodification

A common concern about the morality of commodification is whether the commodification of a particular good or service is intrinsically morally problematic. Traditionally, pinpointing which types of commodification are morally problematic has been done by appeal to what Debra Satz terms the 'essentialist thesis'.<sup>127</sup> The essentialist thesis states that some goods or services are *essentially* something that should not be bought and sold. Some versions of the essentialist thesis focus on what is *integral, inherent, fundamental* or *natural* to certain goods or services. However, some theorists have strongly criticised the essentialist thesis. They have argued that the market exchange of some goods and services are not morally wrong per se, but they are morally wrong only under some conditions and in a particular context.<sup>128</sup> However, both intrinsically morally problematic commodification and contingently morally problematic commodification are plausible. The paradigmatic example of intrinsically morally problematic commodification is the sale and purchase of friendship or love. Purchasing friendship or love debases their intrinsic value. Other examples available in the literature on the topic are the sale and purchase of wedding toasts or the purchase of a Nobel Prize.<sup>129</sup> The sale and purchase of wedding toasts to the bride and groom is an instance of intrinsically morally problematic commodification because a wedding toast is an expression of friendship and outsourcing wedding speeches changes their character and diminishes their intrinsic value.<sup>130</sup> Purchasing a Nobel Prize undermines the honorific good that gives the prize its value.<sup>131</sup>

One example of a contingently morally problematic type of commodification can be the commodification of blood. The sale and purchase of blood might be morally wrong not

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<sup>127</sup> Debra Satz, 'Markets in Women's Reproductive Labor'.

<sup>128</sup> See for example, Debra Satz, *Why some things should not be for sale: the moral limits of markets*, (Oxford University Press, 2010); Jason Brennan and Peter Jaworski, *Markets without limits: Moral virtues and commercial interests*, (Routledge, 2015).

<sup>129</sup> Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin, 2012).

<sup>130</sup> Michael Sandel, *What Money Can't Buy*, p. 96-98.

<sup>131</sup> *Ibid.*, p. 94.

because blood per se has an intrinsic value, but it might be morally wrong because the seller sells her blood as a result of coercion so full and informed consent could not be obtained or because selling blood might displace or reduce altruism.<sup>132</sup> A satisfactory account of the moral valuation of commodification should be able to capture both contingent *and* non-contingent considerations.

Some theorists of commodification have sought a comprehensive criterion by which candidate commodification might be assessed as problematic. For instance, Carolyn McLeod and Françoise Baylis have offered three criteria to evaluate whether the commodification of a good or service is morally problematic:<sup>133</sup>

- (i) The intrinsic value of the thing commodified is incompatible with its being commodified;
- (ii) The existence of any moral constraints on alienating the things from persons;
- (iii) The favourable or unfavourable consequences of commodifying the object.

In McLeod and Baylis's analysis, these criteria may run together or may not, but, on their view, fulfilling any of one of the criteria makes the commodification problematic. For example, the commodification of a certain good or service might be morally problematic because it produces unfavourable consequences, but not because its intrinsic value is corrupted. This account has the benefit that it offers a moderate interpretation of the ethical status of commodification that is not necessarily dependant on essentialist assumptions. It can capture both contingent and non-contingent considerations. It has the potential benefit that it might provide a better sense of the diversity of available theories of commodification, including those centred on contingent considerations. As we will see below, an ameliorate version of this conceptualisation of commodification will be useful to utilise when considering the commodification objection to surrogacy.

Although attractive, however, McLeod and Baylis's account has some limitations. One limitation is that their account equates the moral valuation of commodification to alienation. For McLeod and Baylis alienation is a crucial element for the moral assessment of

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<sup>132</sup> Margaret Radin, 'Justice and the market domain', p. 170.

<sup>133</sup> Carolyn McLeod and Françoise Baylis, 'Feminists on the inalienability of human embryos', *Hypathia* 21 (1) (2006), p. 3.

commodification. According to their analysis, a certain good or service is wrongly commodified when it is normatively inalienable to us.<sup>134</sup> In other words, the moral assessment of commodification rests on whether a particular good or service is separable from us without causing us harm or degradation.<sup>135</sup> However, as we saw in section 2.4, alienation is not a necessary element for the moral valuation of commodification. Some forms of morally problematic commodifications do not involve alienation, such as, for example, markets in citizenships. For the sake of the argument, I will adopt McLeod and Baylis's criteria for the moral valuation of commodification, but I will not take on their strong claim about alienation as a decisive element for the moral valuation of commodification. While it is true that alienation and commodification overlap in some instances, the harm or degradation produced in morally problematic commodifications should not be understood solely as the result of alienation.

We are now in a position where we can sketch an improved general formulation of the commodification objection:

Some good or service X is wrongfully treated as commodity when

1. X belongs to the sphere of the types of goods that belong to the non-monetary sphere.
2. X is bought and sold, or turned into or treated as though it were a good or service that we can legitimately trade for a price.
3. Then, the commodification of X (a) corrupts the intrinsic value of X; or (b) causes harm or degradation; or (c) is normatively inalienable; or (d) produces negative externalities.

The following example illustrates each of these premises:

In a liberal democratic system, it is morally wrong for us to sell our votes to the highest bidder because

1. Voting is an expression of civic autonomy and public responsibility.
2. When votes are sold and bought, they are treated as if they were private properties and are used for narrow self-interests, but not as public responsibilities.

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<sup>134</sup>Carolyn McLeod and Françoise Baylis, 'Feminists on the inalienability of human embryos', p.4.

<sup>135</sup>Ibid., p.4.

3. Then, vote-selling (a) corrupts the value of voting because it threatens democracy itself as it interferes with the ability to count on popular vote as a measure of people's support for potential government's policies; (b) the autonomy of voters is undermined because they do not cast the vote that they genuinely want; (c) alienates individuals from a form of self-expression; and (d) perpetuates corruption in the system because the highest bidder is likely to fail to promote the right ends of government.

The plausibility of the commodification objection ultimately relies on the truth of the premises established above *and* on its capacity to exclude non-monetary versions of the good or service at stake from its application. For example, the commodification objection should exclusively apply to the sale and purchase of kidneys, but not to their donation. It is important to note, however, that the commodification objection does not imply that the altruistic version of some goods and services is *ipso facto* morally permissible or benign. The altruistic version of a particular good or service could be morally wrong, but for different reasons. For example, in a liberal democratic system is morally wrong for me to transfer my vote to you as a gift. The problem in this case is not the commodification of votes, but the alienation of a form of self-expression.

So far, I have outlined a general understanding of the commodification objection. I have narrowed down and analysed the key features of the commodification argument and I have disambiguated the relationship between commodification and adjacent concepts, such as objectification and alienation. I have argued that even if some particular treatments of commodification do equate the relevant concepts with each other, commodification is better understood as not synonymous with either objectification or alienation. I have also offered some guidelines for the moral assessment of commodification. I will now proceed to explore how the commodification objection can be applied to women's reproductive labour in undergoing commercial surrogacy.

## **2.6 Commercial and non-commercial surrogacy**

The commodification argument gives rise to particular concerns when it comes to the moral status of commercial surrogacy. Some of the questions that arise are whether paying fertile women to carry a child treats women's reproductive labour in a wrongful

manner; or whether women who offer their reproductive labour in exchange for money are wrongfully motivated by monetary gain; or whether the integration of money into women's reproductive labour reinforces gender inequality or produces negative externalities for the children who are born as a result of these agreements. These questions are both important and ongoing concerns and, over the last thirty years, they have been sources of intricate debates.

Indeed, payment is one of the most controversial issues in surrogacy debates. Usually, the distinction between altruistic or 'gift' surrogacy and commercial surrogacy has largely informed the moral valuation and public policies of surrogacy practices; altruistic surrogacy is often deemed morally permissible and legally tolerable, while commercial surrogacy is frequently deemed both morally and legally impermissible. However, the distinction between altruistic and commercial surrogacy has not been adequately defined and sometimes their moral and legal justifications are far from clear. For example, in the United Kingdom<sup>136</sup> and Canada,<sup>137</sup> the law establishes that any type of payment or reimbursement for an expenditure incurred by acting as surrogates should be banned. In practice, however, both jurisdictions tolerate monetary compensation for expenses incurred during the pregnancy, which has led some people to identify these cases as implicit forms of commercial surrogacy. To cite another example, in the Netherlands, surrogacy laws prohibit any type of public advertisement requesting and offering surrogacy services, but they tolerate private arrangements where large sums of money may change hands.<sup>138</sup>

Because the commodification argument rests in part on the distinction between commercial and non-commercial surrogacy, it is important to elucidate what this distinction is about. In what follows, I outline three different views available in the contemporary literature for this distinction and highlight some limitations they face. I show that these limitations reveal the first problem of the commodification objection when it is applied to surrogacy: that there more instances of commercial surrogacy in practice than we normally think. A satisfactory account of the commodification objection should be able to explain what is the difference between these two types of surrogacy and why the integration of

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<sup>136</sup>< <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors>>

<sup>137</sup><<https://laws-lois.justice.gc.ca/eng/acts/a-13.4/page-2.html>>

<sup>138</sup><<https://www.government.nl/topics/surrogate-mothers/surrogacy-legal-aspects>>

money into surrogacy transactions is specifically morally problematic. I argue that the lack of consensus on this distinction diminishes the force of the commodification objection.

### **2.6.1 Payments beyond compensation for pregnancy-related expenses**

The first way to distinguish between commercial and altruistic surrogacy is the idea that payment in altruistic surrogacy should be considered as a form of compensation or reimbursement for ‘reasonable expenses’, while payment in commercial surrogacy should be considered as payment to the surrogate beyond expenditure for acting as surrogate, such as financial reward or wage labour.<sup>139</sup> However, it has been pointed out that this distinction becomes somewhat murky in practice. For example, Emily Jackson stresses that this distinction is false because in altruistic surrogacy it is common that intended parents reward the surrogate beyond pregnancy-related expenses as recognising the significance of the surrogate’s donation.<sup>140</sup> We can imagine cases where intended parents buy the surrogate a car or a holiday or they pay the school fees for the surrogate’s children as a means to show their appreciation for the person ‘who made their dreams come true’.

Jackson’s point simply shows that there is far less altruistic surrogacy in practice than what could be thought in theory, so many of these transactions are in fact commercial. She then goes further and argues that the amount of money that surrogates who perform altruistically usually receive as mere compensation for pregnancy-related expenses can end up being the same or similar to the amount of money a surrogate can earn through a commercial arrangement. For instance, according to the Surrogacy UK Working Group, in 2015 more than two-thirds (68.2%) of UK-based surrogates were paid between £10,000 and

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<sup>139</sup> While there are subtle differences between ‘salary’, ‘wage’, ‘compensation’ and ‘reward’, all of these terms refer to performance-related pay. In some cases, the payment of the surrogate may be conditional on the satisfaction of the intended parents with her performance. From this point of view, intended parents would not have the obligation to pay the surrogate a salary or reimbursement, but would have similar obligations to those that a person has when offering money as an expression of gratitude or as a recognition of the services that someone else lent them (for example, the tip that a customer pays in a restaurant for the service received). We could say that in cases like these, intended parents do not have the obligation to pay the surrogate, however, it is worth wondering whether the surrogates have any justified expectation of receiving payment as an expression of gratitude for their services and whether said expectation triggers moral obligations in the intended parents.

<sup>140</sup> Emily Jackson, ‘UK law and international commercial surrogacy: “the very antithesis of sensible”’, *Journal of Medical Law and Ethics*, 4 (3) (2016), 197-214.



£15,000 in expenses.<sup>141</sup> The payment they received for their altruistic services was only £2,000 below the average that surrogates normally receive for a commercial transaction.<sup>142</sup> Another study reveals that UK intended parents had spent more money on surrogacy in India (Median=£50,000) compared to those having surrogacy in the United Kingdom (Median= £25,000). However, the amount the surrogates received was 2.4% higher in the United Kingdom (Median=£13,000) than in India (Median=£5,500).<sup>143</sup> In commercial surrogacy, the money paid by the intended parents is usually distributed among the agencies' fees, the surrogate's expenses, the gamete donor's expenses, medical fees, psychological services and legal fees. It is common that the amount of money the surrogate is paid is not the highest among this distribution.<sup>144</sup>

We can agree with Jackson that payments beyond pregnancy-related expenses is not a useful mark to distinguish between altruistic surrogacy and commercial surrogacy, especially in practice. However, there is in fact a distinction. We can say that a surrogate who received no compensation or payments is engaged in altruistic surrogacy. These cases are rare and frequently occur among family members or friends. We can conclude from this analysis that many of the cases people think of as falling within the altruistic sphere are actually in the commercial side of the distinction. I will come back to this point later.

### **2.6.2 Financial motivations of surrogates**

The second way to distinguish between commercial and altruistic surrogacy is based on the primary motivations of the surrogates. Surrogacy firms and intended parents often distinguish between 'good' surrogates and 'morally suspect' surrogates based on their

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<sup>141</sup> Ibid, p. 205.

<sup>142</sup> This average includes surrogacy arrangements in India, where surrogates receive significantly less money than in the United States (Surrogacy UK Working Group on *Surrogacy Law Reform, Surrogacy in the UK: Myth busting and Reform* (Surrogacy UK, 2015), para. 3.1).

<sup>143</sup> Vasanti Jadvā, Helen Prosser, and Natalie Gamble, 'Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making', *Human Fertility* (2018), p. 8.

<sup>144</sup> To illustrate this point, consider the following detailed breakdown of costs of surrogacy that the Youtubers Bart and Dave in their channel 'Two men and a baby' share in a video. The total cost of the surrogacy was \$171,361 USD. From this total, the surrogate was paid \$39,400 USD, which was below the agencies' fees (\$42,500 USD) and the medical fees (\$53,200 USD), and above legal fees (\$17,500 USD), egg donor expenses (\$11,900 USD) and psychological services (\$5,500 USD). <<https://www.youtube.com/watch?v=S6XjHq3Tshg>>

motivations.<sup>145</sup> Some jurisdictions use this distinction to draw a line between commercial surrogacy and altruistic surrogacy. For example, the Brazier Report establishes that commercial surrogacy is modelled on the business relationship whereby both parties are motivated by individual gain, while altruistic surrogacy is based on the 'gift-relationship', similar to that of blood and organ donation,<sup>146</sup> where surrogates are primarily motivated by the selflessness desire to help others in need.<sup>147</sup>

However, this distinction is not useful to mark a clear distinction between altruistic surrogacy and commercial surrogacy. First, the motivations of the parties may change during the surrogacy process. Ethnographic studies of commercial surrogacy have revealed that although surrogates who engaged in commercial surrogacy accepted their initial motivations were financial, they often develop an altruistic rhetoric during the process of surrogacy, such as 'gift-giving', 'sisterhood', or 'mission',<sup>148</sup> which ultimately downplay the pecuniary aspect of the transaction.<sup>149</sup>

Second, altruistic motivations and economic motivations are not mutually exclusive and both can play an equally important role for the parties. We can imagine standard professionals, such as lawyers, physicians, or teachers who at the same time are motivated by both monetary remuneration *and* the desire to help others in need or by the desire to care for their well-being. It seems that the same types of considerations that apply to standard professions could plausibly apply to commercial surrogacy.

This distinction may have pernicious implications for those working as surrogates. The perception that the surrogates who are primary motivated by financial gain are immoral or untrustworthy, while the surrogates who are primary motivated by purely altruistic reasons are good and trustworthy, may discriminate unfairly on the basis of economic need and earning opportunities available to prospective surrogates. Furthermore, these

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<sup>145</sup> April Hovav, 'Producing Moral Palatability in the Mexican Surrogacy Market', *GENDER & SOCIETY* 33 (2) (2019), p. 281.

<sup>146</sup> See Margaret Brazier, et.al. 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulations', par. 4.36.

<sup>147</sup> To cite an example in the literature that uses this distinction, see Liezl Van Zyl and Ruth Walker, 'Beyond Altruistic and Commercial Contract Motherhood: The Professional Model', *Bioethics*, 27 (7) (2013), 373-381.

<sup>148</sup> See for example, Helena Ragoné, *Surrogate Motherhood: Conception in the Heart* (Westview Press, 1994); Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (University of California Press: 2010); Amrita Pande, 'Transnational Commercial Surrogacy in India: Gifts for Global Sisters', *Reproductive BioMedicine Online* (23) (2011), 618-625; April Hovav, 'Producing Moral Palatability in the Mexican Surrogacy Market'.

<sup>149</sup> Amrita Pande, 'Transnational Commercial Surrogacy in India: Gifts for Global Sisters'.

associations reinforce pernicious gender stereotypes about gestation and pregnancy, because it presupposes that sacrifice and self-denial are inherent values in pregnancy.

### 2.6.3 Market-driven practice

The third way to distinguish between commercial and altruistic surrogacy has been proposed by Anne Phillips.<sup>150</sup> Phillips asserts that although this distinction might become somewhat murky in practice, the main rationale that underpins the idea that these two forms of surrogacy occupy polar normative spaces is sufficiently coherent. In her view, the difference is not whether payment is involved, but whether payment contributes to the development of a market.<sup>151</sup> In her view, commercial surrogacy is a profit-making arrangement, which contributes to the development of a market in reproductive services. In contrast, altruistic surrogacy cannot properly be classified as a *de facto* occupation or as a market-driven practice.<sup>152</sup> Phillips' distinction can be observed in some regulatory frameworks that prohibit commercial surrogacy and tolerate its altruistic version. For instance, in the United Kingdom, it is an offence to facilitate surrogacy, or advertise a willingness to participate in surrogacy, or publish such advertisements.<sup>153</sup> This policy implies that the supply of surrogates does not meet the demand of intended parents, and thus hinders the market. Moreover, in the United Kingdom, surrogacy can only be observed by non-for-profit organizations and only the reimbursement for pregnancy-related expenses is permitted. This policy prevents the growth of surrogate supply by restricting economic incentives.

However, Phillips' distinction has two limitations: the first, theoretical; the second, practical.

The theoretical limitation is related to the definition of a market or what does a market entail. 'Markets are institutions in which individuals or collective agents exchange goods and services'.<sup>154</sup> Typically, markets are characterised by the norm of supply and demand. This norm refers to the relationship 'between the quantity of a commodity that

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<sup>150</sup> Anne Phillips, *Our Bodies, Whose Property?*

<sup>151</sup> *Ibid.*, p. 95.

<sup>152</sup> *Ibid.*, p. 95.

<sup>153</sup> Emily Jackson, 'UK law and international commercial surrogacy', p. 200.

<sup>154</sup> Lisa Herzog, 'Markets'. In Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2017).

producers wish to sell and the quantity that consumers wish to buy'.<sup>155</sup> In basic economic analysis, the price of the commodity is determined by the interaction of supply and demand. If the quantity of the supply of X is much more than the quantity that consumers wish to buy, then the price of X is low so it can attract enough consumers to meet the supply. Conversely, if the quantity of the supply of X is much lower than the demanded quantity, then the price of X increases. The resulting price is called 'the equilibrium price' and represents an agreement between sellers and consumers of the good or service. In equilibrium, the quantity of a good demanded by consumers equals the quantity supplied by sellers. It is the function of a market to match demand and supply through the price mechanism.

However, the integration of money into the transaction is not necessary for the existence of a market. There are altruistic markets, such as charities, where some people donate food, blood, or clothes to those in need. Charities are governed by the norm of supply and demand, and some non-monetary incentive may be introduced to maintain this equilibrium, such as the awareness of the shortage crisis or the benefits for the donee's well-being. On this understanding, altruistic surrogacy markets are plausible. Surrogates can be motivated by non-monetary incentives, such as the idea that they will help someone in need.

A second interpretation of Phillips' distinction might be that the difference she identifies is a difference of scale and not a difference of type. Hence, she might want to say that commercial surrogacy is the type of surrogacy that develops in an industrial scale or factory-like fashion, similar to what some authors have called 'surrogacy farms', where large number of poor women are kept under supervision in surrogacy hostels in order to produce as many children as possible for rich intended parents. This image has been depicted in the literature in the fiction books *The Farm* by Joanne Ramos<sup>156</sup> and *The Handmaid's Tale* by Margaret Atwood.<sup>157</sup> Both books depict a dystopia in which some women are designated as living incubators. However, this interpretation begs the question. What is wrong in these scenarios is not that the surrogates' reproductive capacities are commodified, but rather

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<sup>155</sup> <<https://www.britannica.com/topic/supply-and-demand>>

<sup>156</sup> Joanne Ramos, *The Farm* (Random House, 2019).

<sup>157</sup> Margaret Atwood, *The Handmaid's Tale* (McClelland & Stewart Limited, 1985).

that these women are coerced into surrogacy and treated as mere objects. Perhaps, payment would be the most defensible part of these scenarios.

Now, I shift to the practical limitation of Phillips' distinction. The practical limitation is that in practice, some intended parents and some surrogates have found a way to reverse the restrictions imposed in jurisdictions that prohibit commercial surrogacy and tolerate its non-commercial version. Some intended parents and some surrogates connect with each other on busy on-line surrogacy forums and social networking pages. For instance, the non-for-profit organisation Surrogacy UK provides its members with a variety of ways to meet their potential surrogacy teammates, such as social events or on-line profiles and they charge money for membership.<sup>158</sup> To cite another example, the not-for-profit British agency, Brilliant Beginnings, charges £15,300 to match prospective parents with surrogates. The fees cover costs such as psychological assessment, screening and counselling and legal advice.<sup>159</sup> Furthermore, there is little evidence that there has been prosecution for advertising.

As we have seen, these three distinctions do not serve to make a clear difference between commercial and non-commercial surrogacy. This analysis shows that there are more cases of commercial surrogacy than is commonly thought. For example, cases in which the surrogates receive payment for expenses related to the pregnancy, or receive money or gifts in recognition of their effort or as a way in which the intended parents express their gratitude to them would count as instances of commercial surrogacy. We can say that the commodification argument has more scope than it might initially appear. Cases where surrogates have purely genuinely altruistic motivations are rare. Cases where surrogates do not receive any type of payment for their gestational services are also rare.

In the following three sections, I consider three objections that might target surrogacy that has features which may be considered commodifying. More specifically, I investigate three different sets of harms that are often employed in the literature to argue against commercial surrogacy: First, harm to the surrogate's identity or sense of self. Second, harm to the surrogate's autonomy. Third, harm to women's interests in gendered societies. The first two sets of harms have been traditionally used to argue that commercial

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<sup>158</sup> <<http://surrogacyuk.org/aboutus/membership-benefits/>>

<sup>159</sup> <<https://www.bbc.co.uk/news/health-51148421>>

surrogacy is intrinsically morally problematic and the third to argue that it is contingently morally problematic. I show that neither of them are convincing arguments against the introduction of money into women's reproductive labour.

## 2.7 Harm to the surrogate's sense of self

The first harm is that to surrogate's identity or sense of self. This particular worry relates to the kind of work surrogacy demands. Carole Pateman articulates an argument of this sort.<sup>160</sup> Pateman asserts that a woman's sense of self is intimately connected to her body in its reproductive function because the work of pregnancy involves physiological, emotional, and creative experiences and understandings of her sense of self as a woman. Therefore, when a woman sells her reproductive labour, she sells herself.<sup>161</sup>

Pateman argument has been strongly criticised by many authors. One important critique has been posited by Debra Satz.<sup>162</sup> She offers two possible interpretations of Pateman's argument. The first interpretation is that Pateman is making a general claim: it is morally impermissible for individuals to acquire money for performing an activity that is central to their sense of self. Satz observes that this claim involves too much. It would imply that it is morally impermissible for rabbis or priests to be paid for performing religious services,<sup>163</sup> or it would be morally impermissible for artists to sell their paintings. The second interpretation is that women's reproductive capacities are more central or more directly connected to their sense of self as women than other productive capacities.<sup>164</sup> This interpretation is more attractive because it specifically targets commercial surrogacy. However, contra this interpretation, Satz argues that it is deeply problematic for our understanding of *womanhood*. According to Satz, this interpretation suggests that the ability to carry a child to term is central to *womanhood*, and so it mistakenly equates *womanhood* with the ability to gestate. While it might be true that for some women reproduction is something central to their sense of self, it might not be the case for *all* women. Satz asserts that when this particular understanding of *womanhood* is extended to all

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<sup>160</sup> Carole Pateman, *The Sexual Contract*.

<sup>161</sup> *Ibid.*, p. 207.

<sup>162</sup> Debra Satz, *Why Some Things Should Not Be for Sale*, p. 117-120.

<sup>163</sup> *Ibid.*, p. 120.

<sup>164</sup> *Ibid.*, p 119.

women, it might reinforce pernicious stereotypes of woman as 'baby makers' or might suggest that infertility or childlessness is the worst thing that can happen to a woman.<sup>165</sup>

Satz's critiques show that Pateman's account for the harm to the surrogate's identity is unconvincing. However, Kajsa Ekis Ekman has recently offered a persuasive argument that supports the claim that commercial surrogacy harms the surrogate's sense of self.<sup>166</sup>

Ekman argues that pregnancy is important to the sense of self of the pregnant woman because she is in a physical interrelationship with the child she is carrying. Her argument is particularly attractive for two reasons. First, it can avoid the objections Satz raises against Pateman's account. In Ekman's account, pregnancy is integral to the sense of self of the pregnant woman *only* when she is pregnant, and pregnancy can be compatible with *other* capacities of the pregnant woman which are also important to her sense of self. In this sense, Ekman's account does not need to distinguish between which activities are more central to persons from those that are not, neither it needs to defend a view of why women's reproductive labour is particularly essential to women. Rather, her account lies on the temporary physical connection the pregnant woman has with the foetus in virtue of her pregnancy. The second reason is that it has been suggested that the metaphysical underpinnings of Ekman's account are compatible with a metaphysical model of pregnancy that has been gaining attention in the last years within the surrogacy debate: the 'parthood' model<sup>167</sup> of pregnancy.<sup>168</sup> The 'parthood' model states that the foetus is a *part* of the pregnant woman's body in the same sense that a part belongs to the whole.<sup>169</sup> In Ekman's account, both the foetus and the pregnant woman are physically intertwined; the foetus is a *part* of the pregnant woman's body.<sup>170</sup> She writes, 'It is her breasts, her skin that will bear

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<sup>165</sup> Ibid., p. 120-1.

<sup>166</sup> Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self*.

<sup>167</sup> The 'parthood' model of pregnancy has been promoted by Elselijin Kingma. This model presents the foetus as a part of the gestator or 'gravida'. According to Kingma, foetuses are a proper part of the pregnant organisms. Kingma compares the foetus with organs like the heart, kidneys, or tissue like nails hair (Eselijn Kingma, 'Were you part of Your Mother?', *Mind* 128 (511) (2019)). However, the 'parthood' model does imply that the foetus has the same moral status to limbs or organs. It considers that the foetus could have a special moral status. However, the foetus is part of the pregnant organism, in the same sense that limbs and organs happen to be too (Suki Finn, 'The Metaphysics of Surrogacy', in *The Palgrave Handbook of Philosophy and Public Policy* (Palgrave Macmillan, 2018), p. 651).

<sup>168</sup> Teresa Baron, 'Nobody Puts Baby in the Container: The Foetal Container Model at Work in Medicine and Commercial Surrogacy'; Suki Finn, 'The Metaphysics of Surrogacy'.

<sup>169</sup> Elselijin Kingma, 'Were You a Part of Your Mother?'; Iris Marion Young, 'Pregnant embodiment: Subjectivity and alienation', *Journal of Medicine and Philosophy*, 9 (1) (1984), p. 50.

<sup>170</sup> Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self*, p.173.

the marks of the child. The child's navel is the eternal reminder that it was once connected to her body'.<sup>171</sup> The 'parthood' model of pregnancy has the potential benefit that it can offer a coherent explanation of why women's reproductive capacities are central to the sense of self of pregnant women qua pregnant. It should be noted, however, that this interpretation depends on a particular understanding of what shapes the identity or sense of self of an individual. For example, if our identity is defined exclusively by our mental capacities, then there would be no point in conceiving our reproductive capacities as part of our identity. But if our sense of self or our identity is defined, at least in part, by our body, then this interpretation of the 'parthood' model may explain why pregnancy is important to the sense of identity of pregnant women. For the sake of the argument, I will assume that our sense of self is defined, at least in part, by our body.

Ekman claims that surrogacy harms the surrogate's sense of self because it overlooks the maternal-foetal physical relationship and presupposes that the foetus is a distinct entity simply contained within the body of the surrogate. Ekman argues that surrogacy harms the surrogate's sense of identity in two ways. First, surrogacy alienates the surrogate from her sense of self because it presupposes that pregnancy is something separable from the body and, therefore, from the Self. Second, surrogacy turns pregnancy into a mere function for the use of intended parents and hence, the surrogate is treated as an object. I will refer to the first argument as 'the alienation-argument' and to the second as 'the objectification argument'. I will examine these two arguments and defend that none of them succeed in showing why the commodification of women's reproductive labour is morally problematic.

Ekman's alienation argument suggests that surrogacy involves treating the surrogate's body or a part of her body (that is, the foetus) as disposable property. While Ekman recognises that all jobs require a degree of alienation because in all jobs we relinquish part of our autonomy, she points out that in surrogacy the worker's Self is not distinct from the product of her labour but it is her body itself. As she writes, 'few workers would say that their hands or feet are not their own, as prostitutes or surrogates insist that parts of their body are not themselves'.<sup>172</sup> In surrogacy, however, the worker's detachment from the product of her labour cannot be complete. While the waitress or the prostitute can escape from this alienation in their leisure time or find refuge in the drugs or alcohol, the

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<sup>171</sup> Ibid., p. 153.

<sup>172</sup> Ibid., p.173.



surrogate must live for the child and think of the well-being of the child in every daily action, she simply cannot numb her body.<sup>173</sup> The surrogate cannot take a break from her work because her own body *is* the workplace. Ekman asserts that because the child and the surrogate are physically intertwined, therefore, 'surrogacy is not something one *does*, it is something one *is*: a being who can be bought'.<sup>174</sup>

Ekman's point might apply to other paid works such as the participation in clinical research trials. She could plausibly argue that the embodiment aspect of the nature of these types of labour make them of special concern. However, Ekman's alienation argument does not carry the unattractive implications of Pateman's account that other bodily-involving professions, such as footballers, would be morally problematic for exactly the same reasons that she claims surrogacy is morally problematic. While Ekman's alienation argument could plausibly be extended to other types of 'embodied labours', we cannot say that it is overly inclusive.

However, Ekman's alienation argument fails to explain why the commodification of women's reproductive labour is specifically morally objectionable. As we saw in section 2.4, commodification and alienation describe two different phenomena and while in some instances they might overlap, one is not reducible to the other. In Ekman's account, surrogates who engaged in unpaid surrogacy agreements may experience the same type of alienation as those who engaged in paid surrogacy contracts. The case of Diane can illustrate this point. In 2011 in Australia, Diane (not her real name) offered to help a couple with whom she had been friends for 20 years and agreed to act as their surrogate without any type of monetary charge or monetary expectation. The arrangement ended with legal action and physical confrontation between the intended mother and Diane. Diane declared, 'I said, "I've looked after your baby for nine months, the least you can do is look after my kids for four days while I'm in hospital". That's what caused us not to talk for four weeks of the pregnancy'.<sup>175</sup> From the moment of conception, Diane considered the foetus as belonging to the couple and not to her. Diane's reproach was based, in part, on the perception that the foetus was something that did not belong to her, but to the couple. She considered the foetus as something separable from herself and her gestational work as a

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<sup>173</sup> Ibid., p. 176.

<sup>174</sup> Ibid., p.174.

<sup>175</sup> <<https://www.smh.com.au/national/when-altruistic-surrogacy-goes-wrong-20140807-101bo5.html>>

property that others may dispose of. Diane's case illustrates that Ekman's alienation argument can be applied to both instances of commercial surrogacy and instances of unpaid surrogacy.

I will now turn to Ekman's objectification argument. Ekman's objectification argument states that surrogacy makes the pregnancy into a *function* to the intended parents' ends. According to Ekman's account, surrogates do not *have* a child, but merely 'utilise' their bodies to deliver a service.<sup>176</sup> She points out that when it comes to commercial surrogacy, we can find descriptions of surrogates as 'bearers', 'provider', 'a suitcase', or 'an incubator'.<sup>177</sup> Ekman claims that the language used in the surrogacy industry is dehumanising; it reflects that fact that the process of surrogacy turns the surrogate into a tool for the intended parents' ends. Surrogacy harms the surrogate's sense of self because it treats the surrogate as a mere object.

Ekman's objectification argument introduces a difference in degree between unpaid surrogacy and paid surrogacy. She states that 'altruistic surrogacy *functionalizes* motherhood even if it does not *commercialize* it'.<sup>178</sup> In her view, functionalization precedes commercialization because to be sold, 'it must first be *constituted as a separate function* of the seller'.<sup>179</sup> While Ekman considers both types of surrogacy to be morally problematic because they both reduce the surrogate to a mere object, in her view, paid surrogacy is worse than its unpaid version. However, Ekman says nothing to explain why it is worse. Ekman's objectification argument fails in explaining what is specifically troubling about integrating money into women's reproductive labour.

As we have seen, existing arguments in support of the claim that paid surrogacy is inherently morally problematic because it harms the surrogate's identity or sense of self are not persuasive. They fail to explain why the integration of money into women's reproductive labour is specifically morally problematic. Either because these accounts are too encompassing or would involve unattractive implications (such as in Pateman's account), or because they collapse into objections of alienation or objectification (like in Ekman's account).

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<sup>176</sup> Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self*, p. 140.

<sup>177</sup> *Ibid.*, p. 154.

<sup>178</sup> *Ibid.*, p. 162 (her emphasis).

<sup>179</sup> *Ibid.*, p. 162 (her emphasis).

## 2.8 Harm to the surrogate's autonomy

I will now shift to the claim that the commodification of women's reproductive labour harms the surrogate's autonomy. Some authors have argued that the integration of money into women's reproductive labour is inherently morally problematic because it wrongfully restricts the autonomy of surrogates to ensure that they maintain a non-parental relationship with the child they are gestating. They claim that surrogates are not free to develop an autonomous perspective of their pregnancies, because they are contractually bound to conform their emotions to the interests of the surrogacy industry.<sup>180</sup>

While this claim has been criticized on the grounds that it would be unacceptably paternalistic to prevent willing surrogates from entering into surrogacy contracts,<sup>181</sup> the harm-to-autonomy argument further asserts that the surrogate's autonomy would be harmed as a consequence of such entry because the surrogacy process will not respect their autonomy.<sup>182</sup>

To illustrate this harm, consider, for example, Amrita Pande's ethnographic studies of surrogacy in India.<sup>183</sup> She claims that the surrogate is expected to be a disciplined contract worker who will hand over the baby immediately after birth without creating any trouble.<sup>184</sup> She observes that surrogates are regularly told in counselling sessions that 'their role is only as a vessel, that they have no genetic connection with the baby, and that it will be taken away from them immediately after delivery'.<sup>185</sup> Moreover, she observes that surrogacy hostels control the day-to-day activities of pregnant women who sign surrogacy contracts. Surrogates can find their bodily autonomy limited in regard to everyday activities and diet, and must undergo any physical examinations or interventions considered

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<sup>180</sup> See for example, Elizabeth Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachan and Swales', *Health Care Analysis* (2000), 19-26; Anca Gheaus 'The normative Importance of pregnancy challenges surrogacy contracts', *Analyze. Journal of Gender and Feminists Studies* 6 (20) (2016), 20-31.

<sup>181</sup> See for example, Hugh V. McLachan and J. Kim Swales, 'Babies, Child Bearers and Commodification'; and Hugh V. McLachan and J. Kim Swales, 'Commercial surrogate motherhood in the alleged commodification of children: a defense of legally enforceable contracts'.

<sup>182</sup> Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children'.

<sup>183</sup> Amrita Pande, 'Commercial Surrogacy in India'.

<sup>184</sup> *Ibid.*, p. 976.

<sup>185</sup> *Ibid.*, p. 977.

necessary by the doctors of surrogacy firm, or else risk a lawsuit for breach of contract.<sup>186</sup> Surrogacy contracts, Pande observes, include clauses where surrogates are bound to undergo foetal reduction surgeries at the request of intended parents or the surrogacy firm.<sup>187</sup>

The harm-to-autonomy argument suggests that surrogacy contracts are potentially exploitative and coercive, and wrongfully require surrogates to waive certain moral claims regarding their pregnancy and the child. This argument, however, is largely rooted in the consumer contract framework I criticised earlier in Chapter One. As I showed in Chapter One, the consumer contract framework presupposes that the interests of the intended parents should be prioritised over the interests of the surrogate. However, I argued that it is not inherent in surrogacy contracts that the surrogate's autonomy should be undermined; but rather that we should strive to find more imaginative contractual frameworks that can better protect the autonomy of those working as surrogates. For instance, we can imagine a surrogacy contract where surrogates can choose the intended parents with whom they want to enter into a contract. The interests of the surrogate can be taken into account when drafting the contract, so the surrogate can specify what actions she is willing to carry out and in exchange for how much money and what actions or pregnancy-related behaviours she is not willing to perform, no matter how much money they offer to her. Likewise, we can imagine non-enforceable surrogacy contracts where the surrogates can comply to the terms of the contract at their discretion. Whether alternative contractual frameworks for surrogacy can be immune to the harm-to-autonomy argument need to be examined individually. As we may see later on, the contractual framework that I propose in Chapter Three and Chapter Four can mitigate many autonomy-related worries.

## **2.9 Harm to women's interests in gendered societies**

I will now examine the claim that the commodification of women's reproductive labour harms the interests of women in gendered societies. Debra Satz develops a persuasive argument of this sort.<sup>188</sup> She draws attention to the adverse consequences of

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<sup>186</sup> Teresa Baron. 'Nobody Puts Baby in the Container', p. 499.

<sup>187</sup> Amrita Pande, 'Commercial Surrogacy in India', p. 987.

<sup>188</sup> Debra Satz, *Why Some Things Should Not Be for Sale*.

markets in women's reproductive labour, such as the idea that the commodification of women's reproductive labour reinforces gender hierarchies. She suggests that surrogacy is not inherently problematic, but rather that it is morally problematic in the context of the current division of labour, to which racial and socio-economic aspects play an important role.<sup>189</sup>

She argues that some markets are noxious in a given political and social context, and identifies four considerations along which markets can be evaluated and which underlie their problematic nature: vulnerability; weak agency; harmful outcomes for individuals; and harmful outcomes for society.<sup>190</sup> She observes that markets in women's reproductive services, as they currently exist, support objectionably hierarchical relationships between women and men.<sup>191</sup> The fact that *only* people with uteruses can become surrogates assumes particular significance. Her argument is that the surrogate's election to engage in a commercial surrogacy arrangement is largely shaped by the background context of profound social, political, and economic inequalities that characterize the relationship between women and men. And, in turn, commercial surrogacy contributes to perpetuating gender inequality in two ways: first, it gives others considerable access and control over the surrogate's bodies for the sake of the child in a society that has historically subordinated women's interests to those of men, primarily through its control of sexuality and reproduction.<sup>192</sup> Second, commercial surrogacy reinforces pernicious stereotypes about women as 'baby machines' and home-makers.<sup>193</sup> Satz concludes that surrogacy should be banned because in the current gender unequal contexts, surrogacy would entrench stereotypical gender structures and increase women's vulnerability.

Satz is right in stressing that the socio-economic contexts in which commercial surrogacy tends to take place should not be overlooked. She asserts that the unequal conditions in which commercial surrogacy usually takes place affect the surrogate's ability to

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<sup>189</sup>Debra Satz's argument is compatible with the view that commercial surrogacy responds to the overlap or intersectionality between gender, race, class and religion. According to this view, women of colour are disproportionately poorer than white women, and poor women are more likely to become surrogates. Some authors have further argued that the intersection between gender, race, religion, and class is what makes commercial surrogacy especially troubling. See for example, France Winddance Twine, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market* (Routledge, 2011).

<sup>190</sup> Debra Satz, *Why Some Things Should Not Be for Sale*, p.4.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid., p. 125.

<sup>193</sup> Ibid., p.127.

consent to such arrangements. In her view, given the lack of economic opportunities for women, especially for women from developing countries, payment for surrogacy services can constitute a form of undue enticement for poor women. For already deprived women there would be no rational way to reject payment for surrogacy services because remuneration is too high compared to what they could earn doing another activity.<sup>194</sup>

In the context of current non-ideal conditions, there seem to be numerous considerations that weigh in favour of discouraging surrogacy arrangements. However, these considerations are not strong enough reasons to justify a ban on paid surrogacy contracts. While I am sympathetic to Satz's concern that in current non-ideal contexts paid surrogacy might jeopardise the prospects of some already vulnerable women for a minimally flourishing life, prohibition would not protect them from the risks of harm. Prohibition might drive surrogacy arrangements underground and many of the harms that frequently accompany this practice would not be addressed. Moreover, prohibition would deprive women of one way in which they can gain money and increase their income in a context where they already have few economic opportunities. In other words, prohibition itself would not address the kind of vulnerability that Satz identifies. If women's vulnerability derives from the subordinate socio-economic status women have in many societies, it seems that prohibition would further this vulnerability by foreclosing one means available for them to elevate their socio-economic status or, alternatively, could drive surrogacy to the black market. Rather, the current context of non-ideal circumstances is a reason in favour of revising and correcting women's labour opportunities.

Adequately regulated surrogacy contracts are better able to protect those women acting as surrogates from many of the harms Satz identifies than informal agreements in so-called 'altruistic surrogacy'. We can agree with Satz's concern that the introduction of money in surrogacy transactions may unduly induce some prospective surrogates.<sup>195</sup> However, surrogacy contracts are compatible with the integration of mechanisms for the selection of surrogates whose prospects of a minimally decent life would not be at risk as a result of participating in the enterprise. In addition, surrogacy contracts could plausibly integrate safeguards to better protect the reproductive autonomy of surrogates. Payment to surrogates affirms that respect for their agency means recognising and compensating

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<sup>194</sup> I will return to the undue inducement objection in Chapter Four.

<sup>195</sup> I will expound on this issue in Chapter Four.

them for their reproductive services. Paid surrogacy arrangements have the potential benefit that they can subvert numerous social norms that hinder gender equality, such as the belief that the integration of money into the domestic sphere corrupts what is valuable about it.

In the previous three sections I have discussed three different sets of harms that are frequently used in the literature to argue against the commodification of women's reproductive labour: harm to the surrogate's identity or sense of self; harm to the surrogate's autonomy; and harm to women's interests in gendered societies. I have shown that neither of them is persuasive argument against paid surrogacy. In the next two sections, I elaborate two arguments in favour of paid surrogacy contracts. The first has to do with fairness-based reasons and the second with welfare concerns.

### **2.10 Fairness-based reasons**

The first consideration in favour of paid surrogacy contracts is that surrogates have a fairness-based claim that they should not be prevented from receiving money from intended parents if it is offered to them.

In this section, I discuss two different questions:

(1) Do surrogates have a moral duty to help intended parents to become parents of a particular child?

(2) Is surrogacy of the type of bodily labour that ought not to be paid, but that might permissibly be performed altruistically?

Fairness-based considerations can explain why it is fair for surrogates to receive money from the intended parents in exchange for their gestational services.

Consider the first question. When determining how much individuals owe each other on the basis of their conception of the good, many theorists of justice believe that no one can be retained under the duty of helping the needy at the expense of their freedom or at the expense of losing their prospects of a minimally decent life, but that can be kept under such duty at a lower cost. Accordingly, we could say that healthy individuals are under a duty to donate blood to the sick or we are under a moral duty to rescue a drowning person

from the quiet sea. However, we cannot say that a fertile woman is under a moral duty to help childless individuals to become parents by offering her reproductive capacities because in helping those in need, her prospects of a minimally decent life could be destroyed.<sup>196</sup>

Indeed, surrogacy is not a cost-free enterprise, but it involves many risks and costs that cannot be shared with others but only the surrogate herself has to bear. Within these risks and costs are the risk of death and the risk of permanent injury or disability.<sup>197</sup> Furthermore, even if surrogacy might involve some joys and benefits for the surrogate, such as increased attention and care that pregnant women in general often received or the emotional joy of thinking that they are helping someone in need, these benefits and joys do not cancel all the risks and costs the surrogate herself has to undergo.<sup>198</sup> Nevertheless, it would be unacceptably paternalistic to prevent willing surrogates from entering into surrogacy agreements, although risky and costly for them.

So, in short, the answer to the first question is 'no'. Surrogates do not have a moral duty to help intended parents; but nor do they have a moral duty to refrain from helping. It should be up to them to decide whether or not to offer their reproductive capacities to those who need them.

I will now turn to the second question: is surrogacy of the type of bodily labour that ought not to be paid, but that might permissibly be performed altruistically? There are some types of bodily services that, although we have no moral duty to perform, if we offer them to others, it would be morally wrong to do so in exchange for money. For example, if I offer myself to rescue a drowning person from the agitated sea, even if I have no moral duty to

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<sup>196</sup> I import this framework from Cécile Fabre, *Whose Body is it Anyway?*.

<sup>197</sup> To mention some of the physical risks associated to the pregnancy in general, and to the IVF process in particular, consider gestational diabetes, damage to reproductive organs, ovarian hyperstimulation syndrome, egg-retrieval procedure complication, multiple pregnancies, miscarriage, post-partum depression, and the risk of death. Moreover, surrogacy often involves the use of C-section in order to guarantee the time of birth and allow the intended parents to plan. To mention some of the emotional risks and costs associated with surrogacy, consider the great deal of emotional pressure that the surrogate might experience for carrying a child that will be handed over to another couple. For example, she might experience fear of miscarriage and the anxiety of deciding whether to continue with a pregnancy with significant health risks, or fear of delivering a child with injuries or disabilities. The grief and loss following the birth of the baby sometimes because the surrogate had formed an emotional attachment with the child, or sometimes because she bonded with the intended parents, and usually their relationship reaches an end once the baby is handed over. Moreover, surrogacy might also trigger conflicts within the surrogate's family members because usually they have to shoulder her throughout the pregnancy, and sometimes she (and her partner, if any) has to bear the difficulties of explaining to her own children why she is carrying a child that will be handed over to other parents.

<sup>198</sup> Anca Gheaus, 'The normative Importance of pregnancy challenges surrogacy contracts', p. 25.



help her (because in doing so I might lose my prospects of a minimally flourishing life), it would be morally wrong to offer my help in exchange for money. It would be inhumane to rescue a drowning person only if she promises to pay me. This attitude would violate the requirement of basic human compassion because her right to be rescued would be unfairly circumscribed to her ability to pay.

However, the analogy between the drowning person and surrogacy services is imperfect. For example, it sets aside that the drowning person and the intended parents are in different positions of need. The drowning person is in a position where she would lose her life if she is not rescued. In contrast, intended parents need the surrogacy services to further their specific conception of the good. The drowning person has a moral claim against humanity in general, and in particular against those who have the resources to rescue her. In contrast, intended parents lack a moral claim against humanity in general and against fertile women in particular to help them become parents. Although caring, the intended parents' desire for a particular child is not strong enough to ground a right-claim against willing surrogates to help them altruistically. The desire of the intended parents to become parents might supply willing surrogates with a *reason* to help them, but it is not in itself sufficient to hold them under a *moral duty* to help them (in general) nor under a *moral duty* to help them without payment.

The question now is: Do willing surrogates have a moral right to offer their reproductive services to intended parents against payment? Consider the following scenario. Suppose you had promised your recently deceased wife that her ashes will be spread from the top of Mount Everest. However, you lack the training and the special equipment to climb Mount Everest. You also suffer from high blood pressure, so climbing Mount Everest represents an imminent risk of death for you. Now, suppose I have both the training and the special equipment to climb Mount Everest. Moreover, suppose I have climbed Mount Everest before. Knowing this, you ask me to climb Mount Everest and spread the ashes of your recently deceased wife on your behalf. Three different questions cross my mind:

- (1) Would I have a moral duty to help you altruistically?
- (2) Would it be morally permissible to help you in exchange for money?

(3) Would I have a moral right to help you in exchange for money?

The first question can be answered with what I have already stated above. The answer is 'no'. I have no moral duty to help you scatter the ashes of your late wife altruistically. While it is morally permissible for me to do it without payment, it would be an act of generosity on my part, but not a response to a moral obligation.

The last two questions require consideration of other issues at stake in this transaction. On the one hand, I have the right to have my effort, my time, my training, and the use of my mountaineering equipment recognized. In this way, we can say that I am entitled to compensation or financial remuneration for the expenses that I may incur to help you fulfil the promise you made to your late wife.

On the other hand, helping you would imply that I am taking risks that could put me in a position where my prospects for a minimally flourishing life can be destroyed. By climbing Mount Everest, I am putting my life and physical integrity at risk. Possibly, it could also involve risks of harm to third parties, assuming, for example, that I was married and had a family. These risks of harm are always present no matter how many times I have climbed Mount Everest before.

Therefore, in response to the last two questions, we can say that it is morally permissible for me to help you in exchange for money and that I have a right such that no one should stop me from receiving payment if offered. To reiterate, if I help you altruistically, it would be an act of generosity on my part, but it is not something that you can demand of me. The same types of considerations would apply in the case of surrogacy. Willing surrogates have a moral right to offer their reproductive capacities to intended parents and not to be interfered from receiving payment in exchange. Whether they can help them altruistically, would be an act of generosity on their part, but it is not something that intended parents can demand of them.

Now, would the same type of considerations apply if the surrogate were close friends or relative with the intended parents? Many people take it for granted that we should sacrifice for our friends or family members in ways that we need not for strangers. Moreover, many people hold that our moral duties towards our family members or friends are not grounded on reciprocity but gift relationships. However, although we assume that

we have special obligations towards close friends or relatives, it is unclear how demanding and stringent these duties may be. Moreover, although our special relationship might supply me with reasons to help you altruistically, it is unclear whether I would have a moral duty to do so.

### **2.11 Welfare considerations**

The second reason in favour of the moral permissibility of surrogacy arrangements is a welfare-based argument. This argument is based on a basic principle in welfare economics: there are gains from trade that lead to an optimum.<sup>199</sup> Both parties benefit from an exchange when one party prefers to exchange what she has for what the other party offers her, and vice versa. In the case of commercial surrogacy, intended parents prefer losing money and increase the chance to parent a particular child, and the surrogate prefers receiving the money and offer her reproductive capacities to those who need them. Hence, trading women's reproductive services increases overall welfare.

This welfare-based argument assumes that there are no negative externalities. However, in the existing literature, it is common to come across three lines of arguments that have been used to support the idea that the commodification of women's reproductive labour produces negative effects on third parties. The first line of argument refers to the negative effects that commercial surrogacy can have on children born from these agreements. The second refers to the negative effects that it could cause in the pre-existing children of the surrogate. Finally, the third is that paid surrogacy would reinforce inequalities of gender, class and race.

In this section, I briefly outline these lines of argument and argue that none of these is conclusive. I conclude that it is plausible that commercial surrogacy does not produce negative externalities and that the positive externalities that commercial surrogacy produces may be sufficient to justify the permissibility of paid surrogacy under certain conditions.

Before I begin, it is important to point out two assumptions that this welfare-based argument does not make. First, the argument does not assume that the context in which the

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<sup>199</sup> Amartya Sen, 'The moral standing of the market', *Social Philosophy and Policy* 2 (2) (1985), p. 9-14.

exchange takes place excludes poverty or any other form of distributive injustice. Even if the distribution of resources between the contracting parties arose from a long history of injustice, there are welfare gains from trade.<sup>200</sup> Second, even if the surrogate elects to act as surrogate as a result of undue inducement, given the lack of economic opportunities for her, she would still be better off after all. From this perspective, the welfare-based argument is applicable to current non-ideal conditions. Having said this, I will now proceed to outline the three lines of arguments.

The first is that surrogacy harms the children thus created because the knowledge that their gestational mother relinquished them in return for money shortly after birth may produce emotional trauma.<sup>201</sup> To date, little research has been conducted on the long-term impact of commercial surrogacy on children born through this process. Interviews with children born through paid surrogacy arrangements reveal polarized responses. While some children declare that they feel treated as objects that can be bought and sold, others declare that they are grateful to the surrogates who brought them into the world and do not show any type of psychological damage derived from the economic aspect of the surrogacy agreement for which they were born.<sup>202</sup> Apparently, much of the psychological impact on children born through commercial surrogacy arrangements depends on how intended parents articulate their experiences and understandings of the surrogacy process and convey it to the children.

A related concern to this line of argument is that paid surrogacy does not take into account the interests of children born through surrogacy, but only the interests of adults. However, this objection is not insurmountable. The bipartite approach to surrogacy arrangements has room to protect the best interests of children. As I mentioned in the Introduction, (paid) surrogacy contracts are compatible with the integration of safeguards to protect the best interests of children. For instance, surrogacy contracts are compatible with the view that intended parents should be screened in order to ensure they will make at least good parents. Moreover, the part dealing with the transfer of the child could plausibly be

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<sup>200</sup> We can say that the transaction is not wrongfully exploitative when both parties walk away better off than *ex ante*. See Alan Wertheimer's account of the idea of exploitation, in his *Exploitation* and David Miller 'Exploitation in the Market', in A. Reeve (ed.), *Modern Theories of Exploitation* (London: Sage, 1987).

<sup>201</sup> See for example, Elizabeth Anderson, 'Is Women's Labor a Commodity?'; Michael Sandel, *What Money Can't Buy*.

<sup>202</sup> See Susan Golombok, et.al. 'Families created through surrogacy'.

governed by family law (and not by contract law), so the best interests of children could be taken on board.

The second line of argument is that paid surrogacy harms the pre-existing children of the surrogate.<sup>203</sup> There are concerns about how children within the surrogate's own family might be feeling about their mother carrying a pregnancy and then witnessing that baby been given to another couple to raise.<sup>204</sup> So far as I have been able to find, the only empirical work which explicitly attempts to examine the psychological impact on the pre-existing children of the surrogate is Susan Imrie and Vasanti Jadva's<sup>205</sup> study of the long-term experiences of the surrogates and their families. They conclude that there is no conclusive evidence to assert that the pre-existing children of surrogates are harmed.

Finally, the third line of argument refers to the negative effects that paid surrogacy could produce on class and race equality. With few exceptions, it is common that intended parents are wealthier than surrogates. Likewise, with few exceptions, it is common that intended parents are white while surrogates are women of colour. However, it is a mistake to assume that paid surrogacy reinforces class and racial inequality only because most surrogates who enter into paid surrogacy contracts belong to less privileged social classes than the intended parents or that they belong to stigmatised racial groups. While it is problematic that in current non-ideal conditions most surrogates belong to less privileged groups than intended parents, it is not an intrinsic feature of surrogacy arrangements. Furthermore, it is not unsolvable. Surrogacy contracts could change in an attempt to accommodate and challenge racial and class dynamics, or society could change and be less racist and classist.<sup>206</sup>

As I have shown, the presupposition that there might be no negative externalities to commercial surrogacy seems plausible. In fact, there might be positive externalities to tolerating paid surrogacy contracts. By permitting paid surrogacy services, the surrogates contribute to their family income and to the economy of their community. Furthermore,

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<sup>203</sup> See for example, Amy Zuckerman Overvold, *Surrogate Parenting* (New York: Pharos, 1988); Elizabeth Kane, *Birth Mother* (New York: Harthcourt Brace Javanovich, 1988).

<sup>204</sup> Alan Wertheimer, *Exploitation*.

<sup>205</sup> Susan Imrie and Vasanti Jadva, 'The long-term experiences of surrogates: Relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements', *Reproductive BioMedicine Online* (29) (2014), 424-435.

<sup>206</sup> For a defense of this type of argument see Stephen Wilkinson, 'The Exploitation Argument Against Commercial Surrogacy', *Bioethics*, 17 (2) (2003), 189-201.

even if the negative externalities could be proven, it is not clear that they outweigh the potential positive ones or that the possible negative externalities justify the prohibition of surrogacy. We may conclude that paid surrogacy contracts increase not only the welfare of the parties but, through positive externalities, they also rise the welfare of third parties.

## **2.12 Conclusion**

In this chapter, I have argued that the commodification objection is not a decisive objection against paid surrogacy contracts. I have identified three major problems facing the commodification objection. First, there are more cases of commercial surrogacy in practice than what we normally consider in theory. Second, the commodification objection has low explanatory power. Third, the commodification objection's inability to account for the idea that paid surrogacy contracts impermissibly restrict the autonomy of surrogates. I have argued that the payment for women's reproductive labour is morally permissible, at least under some conditions. I considered two reasons for the moral permissibility of commercial surrogacy arrangements. The first one has to do with fairness-based reasons and the second one has to do with welfare concerns.

I noted that the welfare-based argument is not conclusive. Further empirical research and argumentation are needed to evaluate whether potential negative externalities could outweigh the positive externalities or whether potential negative effects could be sufficient to justify prohibition of surrogacy practices as a whole. However, exploring these issues requires much work than a thesis of reasonable length can offer.

Before I proceed to Chapter Three, I want to say a few words about a potential objection to my case. In section 2.7, I addressed the claim that commercial surrogacy harms the surrogate's sense of self. I argued that this objection is misleading in part because it collapses into objections of alienation or objectification. Then, one could counter that my strategy is inefficient because it only transfers the problem of commodification to other problematic areas.

Whether surrogacy is an instance of objectification is debatable. But assuming that it is, whether surrogacy would be a morally problematic type of objectification or not would

depend on whether it has devastating consequences for a person's humanity.<sup>207</sup> In many cases, the difference between an objectionable and a benign objectification depends on the general context of the human relationship.<sup>208</sup> Objectification is negative when it occurs in a context where equality, respect and consent are absent. However, as Panitch holds, we can use money to avoid treating someone as a mere means, such as when we pay them fairly for goods or services rendered.<sup>209</sup> In Chapter One, I argued that the consumer contract framework contributes to the surrogate's humanity being potentially harmed in many ways. This, however, should not imply that all types of surrogacy contracts are vulnerable to the same type of objection. As I proposed in Chapter One, we should look for alternative contract models that can better respect the autonomy of surrogates.

In relation to the question of whether surrogacy is morally problematic because it is an instance in which the normatively inalienable aspects of the surrogate's humanity are alienated, it largely depends on how we understand surrogacy contracts. If we understand surrogacy contracts as implicating treating core aspects of the humanity of the surrogate as disposable property, then we can say that surrogacy alienates the surrogate. However, there are alternative ways in which we can understand surrogacy contracts that do not implicate alienation. In the next two chapters, I propose a model of autonomy-respecting surrogacy contract that do not implicate the alienation of core aspects of the surrogate's humanity, but rather that the reproductive autonomy of surrogates can be enhanced.

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<sup>207</sup> Martha Nussbaum, 'Objectification'

<sup>208</sup> *Ibid.*, p. 271.

<sup>209</sup> Vida Panitch, 'Global surrogacy: exploitation to empowerment'.

## CHAPTER THREE

### A Case for the Asymmetric Enforceability of Surrogacy Contracts<sup>210</sup>

Over the next two chapters, I present my argument for autonomy-respecting surrogacy contracts. In this chapter, I argue that autonomy-respecting surrogacy contracts can be made through asymmetrically enforceable contracts. In the next chapter, I argue that asymmetrically enforceable contracts can be modelled on unilateral contracts as agreements in which a promise is given for an act. Most of the feminist literature on the surrogacy contract debate assumes that whether surrogacy contracts might be morally permissible would only be plausible under ideal conditions, where gender, class and race equality can be obtained. My case, on the contrary, aims to be applicable under current non-ideal conditions.

Many people believe that ‘contracts are contracts’ and that it is permissible for a beneficiary of a contract that meets standard conditions of validity to enforce that contract. However, when it comes to surrogacy contracts it is contentious whether specific performance<sup>211</sup> ought to be treated as enforceable. The fact that in surrogacy specific performance involves pregnancy, gestation and the creation of a baby<sup>212</sup> gives rise to many pressing issues that bring the enforceability of the agreement into question. Within the surrogacy contract debate, three positions are available: (1) The total prohibition of the contract;<sup>213</sup>(2) the enforceability of the contract;<sup>214</sup> and (3) the non-prohibition and non-enforceability of the contract.<sup>215</sup> All these positions presuppose, in some way or another,

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<sup>210</sup>A version of this chapter was published in the *Journal of Political Philosophy* (2020). I am grateful to the editor and the two anonymous referees for the *Journal of Political Philosophy* for valuable comments and suggestions.

<sup>211</sup> The term ‘specific performance’ refers to the realization of the specific act the contracting parties promised to undertake.

<sup>212</sup> I would like to thank one of the anonymous reviewers for asking me to clarify what I mean by ‘performance’.

<sup>213</sup> Some supporters of this stance are Andrea Dworkin, *Right-Wing Women*; Carole Pateman, *The Sexual Contract*; and Elizabeth Anderson, ‘Is Women’s Labor a Commodity?’.

<sup>214</sup> Some defenders of this position are John Lawrence Hill, ‘The Case for Enforcement of the Surrogate Contract’; Richard A. Epstein, ‘Surrogacy: The Case for Full Contractual Enforcement’; and Hugh V. MacLahan and J. Kim Swales, ‘Commercial surrogate motherhood and the alleged commodification of children: a defense of legally enforceable contracts’.

<sup>215</sup> Some advocates of this view are Barbara Cohen, ‘Surrogate Mothers: Whose Baby Is It?’, *American Journal of Law and Medicine*, 10 (1984), 192-198; Martha A. Field, *Surrogate Motherhood*; Emily Jackson, *Regulating*



the consumer contract framework. As we saw in Chapter One, the consumer contract framework permeates cultural practices surrounding surrogacy arrangements.

Supporters of the total prohibition of the contract position often assert that surrogacy contracts should be outlawed because they usually involve exploitation; depend on and reinforce gender inequality; entail the commodification of children; and objectify women because surrogates are seen merely as a 'womb'. Defenders of surrogacy commonly argue that adequate regulation can overcome these worries. They stress that prohibition is not an effective method to discourage or eliminate surrogacy; that surrogacy could be driven to the black market and many of the harms that frequently accompany this practice left unattended. Defenders of surrogacy often further claim that surrogacy contracts are means for expressing the autonomy and personal interests of the contracting parties; thus, it would be a transgression to their autonomy (and an objectionable form of paternalism) to prevent individuals from entering into contract. This approach, however, is divided between those who defend the enforceability of the contract and those who do not.

Supporters of the enforceability position often claim that insofar as surrogacy contracts are voluntary agreements, the contract is binding and can permissibly be enforced. This position grounds its arguments in a number of rights and freedoms, such as the individual's freedom to contract, the right to procreation, the right to privacy, and the surrogates' right to choose their work. Sharing these grounds but reaching different conclusions, advocates of the non-prohibition and non-enforceability position claim that surrogacy contracts should be legally valid but, under some conditions, specific performance should not be enforced by the law. In contract law, specific performance is used as a remedy for the breach of contract whereby the defaulting party is required by the court to perform a specific act, such as to complete a previously established transaction.

In recent years, the non-prohibition and non-enforceability position has become more and more appealing for defenders of surrogacy contracts, mainly because it promises to accommodate two things: firstly, the individuals' right to contract and, secondly, the surrogate's right, under some conditions, to withdraw from the contract and have an abortion or keep the child. This position presumes to deal with many problematic issues

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*Reproduction*, ch. 6); Cécile Fabre, *Whose Body is it Anyway?* ch. 8; and Anne Phillips, *Our Bodies, Whose Property?*, ch. 3.

that the total prohibition position and the enforceability position cannot. Although attractive, however, this position has been strongly criticised by supporters of the enforceability view. An important objection asserts that the non-enforceability of the contract cannot strike a fair balance between the contracting parties' rights and interests; rather, it unfairly favours the surrogate. Defenders of the enforceability view often stress that, under the terms of an *unenforceable contract*, when the surrogate changes her mind and decides to terminate the pregnancy or to keep the child, the intended parents lose out twice over: the child *and* the money they have paid to the surrogate.

In dealing with this issue, Cécile Fabre's case for the non-prohibition and non-enforceability position offers a persuasive solution.<sup>216</sup> Fabre argues that, although non-enforceable, the contract would not be entirely non-binding at the option of the surrogate. She asserts that within the *reasonable norms* of the contract, the surrogate would transfer to the intended parents some rights over her body, so they can impose *reasonable restrictions* on her body for the sake of the foetus. Failure to conform to any of these restrictions would be deemed breach of contract, and the surrogate would have an obligation to (monetarily) compensate the intended parents for (some of) their losses.

This chapter advances an autonomy-based account of surrogacy contracts realized through asymmetrically enforceable contracts (as proposed by Cécile Fabre). However, I argue that Fabre's framework is inadequate to protect those working as surrogates, and that a better model is that of unilateral contracts, such as the offer of a reward, according to which the party who makes the offer (that is, the intended parents) is bound to perform, but the person who is offered the money (that is, the surrogate) is not. I argue that unilateral contracts can also further the autonomy of intended parents, but that they are appropriately weighted towards the interests of the surrogate, who bears the greatest risk in the enterprise. My work is novel in this regard because it involves a detailed exploration

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<sup>216</sup> See Cécile Fabre's *Whose Body is it Anyway?*, ch. 8. I focus my discussion on Fabre's case of *voidable surrogacy contracts* because it furthers the surrogacy contract debate by offering a specific framework of surrogacy contracts and addresses a number of core debates in the ethics and politics of surrogacy. Some defenders of the non-prohibition and non-enforceability position offer guidelines on how unenforceable surrogacy contracts could be integrated into the existing bodies of the law. For example, Martha Field argues in *Surrogate Motherhood: The Legal and Human Issues* that there are good reasons for surrogacy contracts to be explainable under the standard contract doctrine that personal service contracts are not enforceable by specific performance. However, Fabre goes further by offering a specific framework of surrogacy contracts as *voidable contracts* that can deal with many objections raised by defenders of both the total prohibition of the contract and the enforceability of the contract.

of this often-overlooked part of contract theory in order to find a model for surrogacy contracts that protects the interests of all parties.

The language used in Fabre's account in describing surrogacy contracts is not certainly explicit of the consumer contract framework. However, her account presupposes features which may be considered relevant of the consumer contract framework. Fabre's account presupposes the view that a fair procedure should prioritise the interests of the intended parents (qua consumers) over the interests of surrogates (qua sellers). In contrast to Fabre's account, I defend the view that autonomy-respecting surrogacy contracts should prioritise the interests of those working as surrogates over the interests of intended parents. Hence, my model of surrogacy contracts stands in stark contrast to the consumer contract framework.

The focus of this chapter is on paid contractual surrogacy. As Fabre asserts, the intended parents are not only paying the surrogate merely for creating the child, nor are they only paying for being given joint parental rights with the surrogate; rather they are doing both. However, Fabre suggests that these payments should be treated differently: the surrogate should be paid a decent wage for gestational labour *and* a reasonable fee to relinquish her rights over the child. My discussion centres on the first of these: the childbearing part of the contract and not on the part that deals with the transfer of the child.

Many authors worry about the part of the arrangement which deals with the relinquishing of parental rights, but few focus on what happens during gestation.<sup>217</sup> The focus of my work on the childbearing-part of the agreement is novel to the existing literature on the surrogacy debate. This approach has the benefit that it enables us to focus our attention on the first part of the contract (the childbearing) and set aside issues that commonly arise in relation to the second (the handing over child), such as objections about baby-selling, the commodification of parental rights, and the like.

The structure of the chapter is as follows: I begin by outlining Fabre's case for voidable surrogacy contracts and I highlight four limitations of her model. Next, I set up my model for asymmetrically enforceable surrogacy contracts (henceforth, AESC) and show

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<sup>217</sup> I am grateful to an anonymous referee for stressing this point.

how this model can overcome the limitations of Fabre's account. The next two sections discuss two lines of arguments in favour of AESC. The first is that the asymmetric distribution of risks and benefits between the contracting parties is a reason in favour of enforcing specific performance on the intended parents but not on the surrogate. The second argument suggests that the context of profound inequality where most surrogacy contracts tend to take place is a further reason in favour of AESC. I end by considering four potential problems for AESC and argue that none of these problems is insurmountable: fraud; extortion; negligence; and the diminution of the market. In the last section, I conclude.

### **3.1 A case for voidable surrogacy contracts**

Fabre's model of voidable surrogacy contracts hinges on two premises: on the one hand, intended parents should have a right to enter into contract with willing surrogates as a means to further their autonomy and pursue their specific conception of the good by becoming parents. On the other hand, surrogates should have a right to further their autonomy by gaining money and increase their income when offering their reproductive capacities to those who need them.

Fabre argues that autonomy-respecting surrogacy contracts should be legally valid but *voidable*. According to Fabre, a voidable contract would be one in which both contracting parties are equally bound to comply with the *reasonable provisions* of the contract. Therefore, if all parties conform to the terms of the contract, the surrogate would be awarded full payment and the intended parents would be accorded (by the state) full parental rights over the child (so long as it is not against the child's best interest). Within the reasonable provisions of the contract, Fabre argues that the surrogate should retain the right to change her mind and decide whether to abort or whether to keep the child (especially when she has formed an emotional attachment with it). Fabre asserts that a contract that enforces specific performance on the surrogate against either of these two

wishes would impose on the surrogate unbearable emotional costs that would place her in a position where she would be living a less than *minimally flourishing life*.<sup>218</sup>

However, Fabre notes that the fact that voidable surrogacy contracts are not enforceable against the surrogate does not mean that the contract is entirely non-binding. Fabre suggests that in order to protect the intended parents' right to further their autonomy by becoming parents, the surrogate should confer to them some rights over her body (against payment) so they can place *reasonable restrictions* on her body for the sake of the foetus, and she would be bound to comply with these restrictions. Fabre suggests that some examples of these restrictions can be that the surrogate should only drink reasonably and should attend antenatal appointments once a month from the second trimester onwards<sup>219</sup>. When the surrogate fails to conform to any of the reasonable restrictions of the contract, she would be breaching the contract, and although specific performance would not be enforced as a remedy for the surrogate's breach of contract, another remedy available in the law may be invoked to compensate the intended parents (monetarily) for (some of) their losses. This strategy enables voidable surrogacy contracts to deal with the difficult issue of protecting the surrogate's right to change her mind and, under some conditions, withdraw from the contract *and*, at the same time, integrate some safeguards to protect the intended parents' financial interests and their interests in parenting a particular child.

However, although attractive, this framework of surrogacy contracts has limitations when trying to account for the surrogate's reproductive autonomy. In what follows, I will highlight four limitations of voidable surrogacy contracts.

The first problem is that voidable surrogacy contracts would have to deal with the difficulty of defining the type of pregnancy-related behaviour that could be regarded as *reasonable* (and *non-reasonable*). It seems like defining a clear set of *reasonable* (and *non-reasonable*) pregnancy-related behaviours is a condition *sine qua non* for setting up the type of *reasonable restrictions* with which the surrogate would be bound to perform. However,

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<sup>218</sup> Although Fabre does not provide a specific definition of what a *minimally flourishing life* is, she suggests that we can recognize a threshold above which individuals should be allowed to maximize their autonomy and below which individuals would be living a *less than minimally flourishing life* (Cécile Fabre, *Whose Body Is It Anyway?*, p. 32).

<sup>219</sup> *Ibid.*, p. 212.

this is a difficult task. Different sources – such as public policies, research papers, medical advice given to prospective parents, and the mainstream media – put forward competing norms of what should be considered *reasonable* (and *non-reasonable*) pregnancy-related behaviour. In the context of gestation, pregnant women who elected to carry their children to term are often seen as having an extremely strong duty to protect their children from risks of harm (even very small risks of harm), or as having an extremely strong duty to benefit their children, or as having both (even at extremely substantial costs to themselves).

<sup>220</sup> These competing norms can be exacerbated when it comes to surrogacy because what may be reasonable from the perspective of the surrogate might not be reasonable from the perspective of the intended parents, and vice versa. Because Fabre's view of what is enforceable in the contract rests on an understanding of which restrictions are reasonable, her view cannot be persuasive unless a commonly accepted standard of reasonableness in this area could be found.

Setting this issue aside, I will proceed with the second problem. Voidable surrogacy contracts would require some mechanism that may enable the intended parents (and the surrogacy firm, if any) to tell whether the surrogate has complied with the *reasonable restrictions* of the contract she is bound to perform. Fabre notes that it would be impossible to ensure that the surrogate performs according to the restrictions of the contract without unacceptably invading her privacy: for example, the intended parents and the surrogacy firm (if any) would need to have access to the surrogate's medical records.<sup>221</sup> In dealing with this issue, Fabre proposes that contracts imposing such restrictions should be regarded, not as grounding a right to invade privacy during the process of gestation, but rather as imposing a duty that could give rise to action for damages after the birth of the child. To illustrate this point, Fabre considers a case where a surrogate who drinks excessively might be liable for damages should the child be born with foetal alcohol syndrome.<sup>222</sup>

In Fabre's analysis, damages would be an appropriate remedy for the surrogate's breach of contract because it would protect the surrogate's right to privacy *and*, at the same

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<sup>220</sup> For an interesting analysis on the ethical debate around pregnancy-relating behaviours conflicting views, see Fiona Woollard, 'Motherhood and Mistakes about Defeasible Duties to Benefit', *Philosophy and Phenomenological Research* 97 (2018), 126-49.

<sup>221</sup> Cécile Fabre, *Whose Body is it Anyway?*, p. 212

<sup>222</sup> *Ibid.*, p. 213.

time, compensate the intended parents for (some of) their losses. However, this strategy is defective.

One problem is that invoking damages as a remedy for the surrogate's breach of contract may come with the distasteful idea that we could quantify 'how bad' is a particular pre-birth disability or injury and translate that into monetary terms. This, in turn, may reinforce many demeaning stereotypes of disabled people and, of course, might undermine the children's sense of self because they might perceive themselves as defective. However, even setting that problem aside, a serious concern remains. For a surrogacy contract that gives rise to action for damages overlooks the fact that, for most injuries and disabilities in children, it is virtually impossible to conclusively prove a close or direct causal connection with gestational behaviour. Fabre's example of a baby who is born with foetal alcohol syndrome might be an exception, but such cases where a causal question can be proven will be few.

If a surrogacy contract could give rise to action for damages, this would place unacceptable burdens on the surrogate when the child is born unhealthy. Consider a case where a surrogate was not monitored, but was deemed liable for damages because the child was born with cleft lip and palate. According to advice from the UK National Health Service, the causes of such birth defects are often associated with the genes the child inherits from its parents or with the mother's pregnancy-related behaviours, such as smoking, drinking alcohol, obesity during pregnancy, a lack of folic acid during pregnancy, or medicine intake in early pregnancy such as some anti-seizure medications or steroid tablets.<sup>223</sup> Yet the causal connection between the outcome and these associations is not conclusive. A surrogacy contract that gives rise to action for damages opens the possibility for a surrogate to be liable for damages because her gestational behaviour was only a partial or minor causal contributor to the child's condition. Moreover, the fact that many pre-birth disabilities or injuries appear in different degrees (for example, partially deaf or completely deaf) and the fact that babies can be born with one or multiple congenital defects (in different levels) opens the possibility for the surrogate to be deemed liable for damages for any minor congenital defect of the child.<sup>224</sup> Likewise, Fabre's model may also open the possibility for the surrogate to be held liable for damages years after the birth of

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<sup>223</sup> See <<https://www.nhs.uk/conditions/cleft-lip-and-palate/>>

<sup>224</sup> I owe this point to Maria-Jose Gomez-Ruiz.

the child: for instance, because some mental or physical injuries or disabilities or some syndromes are impossible to detect at birth but can be diagnosed years later, perhaps in childhood (for example, some kinds of autism).

Due to the lack of certainty in the link between the surrogate's gestational behaviour and the child's condition, it is an important question who of the contracting parties should bear the burdens of proof and on what grounds. This ambiguity, in turn, could cause the contracting parties to engage in (a series of) legal proceedings that, besides being economically and emotionally exhausting for both parties, may be detrimental to the child's interests. What is more, damages would not be an effective strategy to protect the surrogate's privacy rights. The risk of having to pay breach of contract damages or the risk of engaging into legal contestation might act as coercive pressures on the surrogate (especially on poor surrogates) to agree to be monitored by the intended parents (or the surrogacy firm, if any).

Now, in her defence, Fabre might point out that voidable surrogacy contracts are not necessarily committed to a type of contract that imposes action for damages. Voidable surrogacy contracts might have room to accommodate cases where the surrogate would not be liable to being monitored (so her privacy rights would be protected), but if she is discovered to be at fault (for example, if the surrogate is discovered drinking excessively), she would be liable for breach of contract monetary remedies, such as monetary compensation or the return of any amounts of money paid. However, as we will now see, this strategy is also defective, because it could place unacceptable burdens on some surrogates.

The third problem of voidable surrogacy contracts is that monetary remedies could be impossible to pay for some surrogates, especially for poor surrogates. Fabre locates her account of surrogacy contracts in ideal theory and she assumes that surrogates, although in need, are not in fact poor.<sup>225</sup> Although this approach might be true for some cases, it is not true for all. Many surrogacy contracts take place in contexts where the surrogates come from already deprived backgrounds and are frequently driven into surrogacy by economic need (a point I return to in 3.4 below).

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<sup>225</sup> Cécile Fabre, *Whose Body is it Anyway?*, p.187.



The fourth problem is that monetary remedies – the return of the money or monetary compensation – may place disproportionate burdens on the surrogate. Assuming that the surrogate is not poor, monetary remedies would significantly affect the surrogate's reproductive autonomy. Consider a case where a surrogate who is in the third trimester of her pregnancy fails to attend one antenatal appointment. Fabre takes it to be a *reasonable restriction* that the surrogate would then be deemed in breach of the contract and could be deemed liable for monetary remedies. However, monetary remedies could be disproportionate to the surrogate in the sense that she would not only lose her entitlement to the money for which her performance was accorded, but she would also be under a duty to pay (or re-pay) the intended parents for her failure to comply. This strategy would double the burdens for the defaulting surrogate. It seems like a more sensible contract should be able to capture the parts of the contract the surrogate performed and award her remuneration for labour *in proportion* to the parts of the agreement she accomplished. In this fashion, the surrogate would lose her entitlement to the money for which specific performance was accorded when she fails to perform, but she would retain her entitlement to the money in respect of the parts of the contract she has performed. Therefore, a more sensible surrogacy contract would not need to compel the surrogate to return any moneys paid or to monetarily compensate the intended parents in order to protect (some of) the intended parents' financial interests.

These four problems show that voidable surrogacy contracts are not adequate to properly protect the surrogate's reproductive autonomy, but rather would place disproportionate burdens on the surrogate. From the next section onwards, I argue in favour of an alternative model of surrogacy contracts grounded in autonomy. I will put forward a *pro tanto* argument for surrogacy contracts to be asymmetrically enforceable. I will argue that AESCs can better protect the surrogate's reproductive autonomy than voidable surrogacy contracts.

### **3.2 What would AESCs look like?**

I take AESC to be a type of contract in which specific performance would be enforceable against the intended parents but not against the surrogate. This type of

contract has the benefit that it can overcome the limitations I flagged in the previous section for Fabre's model of voidable surrogacy contracts, while building on its strengths.

Under the terms of an AESC, the intended parents would be bound to perform and, if defaulting, specific performance would be enforced as the remedy for their breach of contract. It is important to note, however, that AESCs are not aimed at regulating the intended parents' relationship with the child they took part in creating, but only their contractual relationship with the surrogate. Thus, issues related to parental rights and parental obligations go beyond the capacity of the model of contract I am presenting here. An AESC would bind the intended parents to pay the surrogate what they agreed upon for her gestational labour *and* to comply with their *special responsibilities* to the surrogate (I will expound on this issue in the next section).

By contrast, the surrogate would not be bound to perform. Thus, the AESC model can avoid the issue of having to deal with the difficulties of defining *reasonable* (and *non-reasonable*) pregnancy-related behaviours, precisely because there would be no need to make the surrogate's duty to comply with the contract precise. AESC is compatible with the idea that intended parents have a power to set the terms of the contract according to their specific conception of good pregnancy-related behaviours and, simultaneously, are compatible with the idea that the surrogate retains the right to decide at her discretion whether (and to what extent) to comply with the intended parents' terms. Hence, the terms of an AESC might work as a set of recommendations or guidelines for the surrogate's performance. Of course, the contract would need to meet standard conditions of validity for it to be permissible, such not being unconscionable or against public policy, or that the parties did not enter into it by mistake. However, the standard conditions of validity of the contract are not tantamount to *reasonable restrictions*. For example, an amniocentesis test might be deemed unjustified for some people, but this test is not unconscionable nor against public policy. Moreover, the standard conditions of validity of the contract, per se, would not impose on the surrogate a duty to comply with the contract, but would only serve as pre-conditions for the permissibility of the transaction. Under the terms of an AESC, when the surrogate fails to perform, she would not be breaching the contract and, therefore, she would not be liable for breach-of-contract remedies; rather, she would only

lose her entitlement to payment for the specific parts of the contract that she did not perform.

In Chapter Four, I will argue that AESC can be modelled on unilateral contracts. The Anglo-American common law of contracts recognizes unilateral contracts as agreements in which a promise is given in return for an act.<sup>226</sup> Paradigmatic examples of unilateral contracts are rewards and a classic example is 'I will give you \$100 if you walk across the Brooklyn Bridge'.<sup>227</sup> If this offer amounts to a contract, the recipient of the offer has no obligation to walk across the bridge, but the person offering the reward is under an obligation to pay if they do. A unilateral surrogacy contract can be compared to other types of unilateral contracts in which a person gains some money for her performance, such as when an individual is rewarded for engaging into an on-line psychological trial, or when a salesperson is being paid on commission for the number of encyclopaedias she sells, or when a person is offered money for engaging in a medical trial to develop a vaccine. Unilateral surrogacy contracts enable the surrogate to be paid in proportion to the parts of the contract she complies with, and encourage her to perform through a system of positive incentives. But they leave her free not to comply with the contract without making her liable for damages for the violation of 'reasonable' restrictions on her conduct.

Whether unilateral surrogacy contracts can be integrated into the existing bodies of the law, would depend on the flexibility of the mechanisms of the specific jurisdictions at issue. My case is a philosophical work and, as such, I aim to deliver general normative guidelines and not prescriptions for specific jurisdictions, which would require empirical consideration. For the particular purposes of this chapter, it would be enough to have a general picture of what AESC would look like and see why unilateral surrogacy contracts are preferable than voidable surrogacy contracts. In the following two sections, I present two independent arguments in favour of AESC, which justify the asymmetry of the rights that the contract would award to the intended parents and the surrogate. While these points are related to Fabre's discussion, they again build on considerations that are not taken into

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<sup>226</sup> See Arthur Linton Corbin, *Contracts*, (St. Paul: West, 1950-64); Maurice Wormser, 'The True Conception of Unilateral Contracts', *Yale Law Journal*, 26 (1916), 136-142; and *Carlill v Carbolic Smoke Ball Co.* (1893).

<sup>227</sup> Maurice Wormser, 'The True Conception of Unilateral Contracts', p. 136.

account by her view. In section 3.5, I consider four potential problems for AESC and argue that none of these problems is insurmountable.

### **3.3 The asymmetric distribution of risks and benefits between the parties**

We have already seen that the AESC model avoids some of the problems of Fabre's account while building on its strengths. The first reason in favour of AESC is grounded on the asymmetric distribution of the risks and benefits between the contracting parties. Surrogacy is extremely demanding on the body of the surrogate. It requires the surrogate to make her body available for (more than) nine months and to accept the risks of harm attendant to the pregnancy and childbirth. Surrogates can be required to, for example, receive daily hormone injections to increase the chances for the pregnancy (through artificial insemination), and to take all required tests, medicines, and vitamin supplements before and during the pregnancy. As cases of multiple pregnancies are common in surrogacy, this increases the risks of harm and the chances for the surrogates to have a C-section (which carries its own complications).

Childbearing affects the women adversely (in various degrees) and always presents a risk of serious harm or disability. Childbearing can be very dangerous for the pregnant woman and, itself, always involves a risk of death. Pregnancy almost always affects (in various levels) the digestive, muscular, cardiovascular, and urinary functions of the pregnant woman. It can also cause high blood pressure, trigger gestational diabetes, anaemia, severe and persistent nausea and vomiting (especially in the first months of the pregnancy); it can cause (long-term) physical and emotional stress (including post-partum depression), and may involve restrictions on mobility and in the activities of daily living of the pregnant woman. Moreover, pregnancy is a process that cannot be guaranteed to be successful however careful the pregnant woman is in relation to the child; and the loss of a child in a pregnancy can cause deep and lasting damage to the pregnant woman. This is another risk of entering into pregnancy.

By entering into contract, the surrogate agrees to perform a (series of) risky acts. To illustrate some of these risks, consider Victoria's case. Victoria (not her real name) worked as a surrogate between 2015-16 in the Mexican state of Tabasco for a US citizen. She was

diagnosed with gestational diabetes in the fourth month of her pregnancy. Due to poor medical care, she lost her pregnancy in the eighth month and she was obliged to deliver the dead child by vaginal delivery. Victoria did not receive the promised compensation for her work, nor was she refunded for the expenses she incurred when she went to the hospital for a gynaecological emergency related to her pregnancy.<sup>228</sup> Victoria's case illustrates many of the dangers to which surrogates are subject when surrogacy is practised within contexts of deep structural problems with respect to the access and quality of maternal health services that affect not only surrogates, but all gestating women in general. These problems are exacerbated when it comes to surrogacy, especially when medical practitioners act in the interests of the (richer) intended parents over those of (poorer) surrogates. Victoria's case shows why it is especially important to integrate safeguards to mitigate or eliminate (when possible) the risks of harm the surrogates could incur.

Due to the particular risks of harm attendant to the childbearing, the surrogate rather than the intended parents should have the right to manage these risks. What is more, the particular risks attendant on childbearing can trigger *special responsibilities* for the intended parents (and the surrogacy firm, if any) in order to minimize or eliminate (when possible) the risks of harm the surrogate could incur. Thus the intended parents (and the surrogacy firm, if any) should be required, for example, to ensure that the surrogate is aware of the risks of harm before entering into contract; to pay life insurance; to facilitate all medical and psychological assistance that the surrogate could need to protect her well-being, including the post-partum period; and (especially) to pay the surrogate what they have agreed upon for the pregnancy-related expenses and the remuneration of labour. It is especially important for a contract that aims to protect the surrogate's reproductive autonomy to make the intended parents' *special responsibilities* enforceable.

Furthermore, childbearing itself places the contracting parties in a position where they have asymmetric freedom of action: the intended parents are isolated from the physical risks of harm attendant on childbearing. This asymmetry can be aggravated when the intended parents change their minds and want to modify the terms of the contract or back out from it. Consider the (in)famous case of Baby Gammy that I introduced earlier in

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<sup>228</sup> GIRE, 'Surrogacy in Mexico, The consequences of Poor regulation' (2017), p.30, <<http://gestacion-subrogada.gire.org.mx/en/#/>>

the Introduction of the thesis. In 2013, an Australian couple hired a Thai surrogate, and she became pregnant with non-identical twins. In the seventh month of the pregnancy, the male twin was diagnosed with Down syndrome. The intended parents urged the surrogate to abort the male twin, but she refused on religious grounds. After the twins were born, the intended parents only took the healthy female child and abandoned baby Gammy to the surrogate. When the intended parents changed their minds and did not want to continue with the surrogacy, the surrogate was placed in a position where she had to make decisions about her pregnancy and the future of the child she did not foresee when entering into contract. This situation harmed the surrogate's reproductive autonomy.

When a surrogacy contract fails, the unequal distribution of risks of harm between the contracting parties makes it especially important for the contract to be enforceable against the intended parents. Enforcing specific performance against the intended parents is not unconscionable for them and may not be to the detriment of the child's best interests. On the contrary, this is a reason in favour of restricting the access of prospective parents to enter into surrogacy contracts. Perhaps intended parents can be screened by the state *prior* entering into contract in order to ensure that they will be able to pay the surrogate for labour *and* to comply with their *special responsibilities* towards the surrogate.<sup>229</sup> On the other hand, even though there are good reasons to think that issues related to the custody of the child should be governed by family law and not by contract law, an AESC backs up the view that unwanted parenthood cannot extinguish the parental obligations towards a particular child. It seems like the same types of considerations that support this view in ordinary pregnancies should apply to surrogacy. If the intended parents change their minds and decide that they do not want to raise the child they took part in creating, this would not extinguish their obligation to support (financially) the child.

### **3.4 Contexts of profound inequality**

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<sup>229</sup> Perhaps within their *special responsibilities* the intended parents can be required to contract an insurance policy that may enable them to pay for pregnancy-related unforeseeable costs so they can share the costs of the risks of the surrogacy process with other intended parents. The thought behind this idea is that individuals who are located in the same advantaged position and who would be benefited from individuals who are placed in (the same) less advantaged position, should share the costs of the risks of harm incurred by the less advantageously placed individuals.

The context of profound inequality where many surrogacy contracts tend to take place is a further reason in favour of asymmetrically enforceable surrogacy contracts. Many surrogacy agreements tend to occur within contexts of profound inequality: the intended parents are often wealthier than the surrogates,<sup>230</sup> and transnational surrogacy often occurs in developing countries (for example, Cambodia, India, Mexico, Nepal, Thailand, and Ukraine).<sup>231</sup> The context of deprivation where many surrogates live often forces them to agree to terms and conditions that may destroy their opportunities of self-respect. Recall Victoria's case. This case reveals many rights violations of which surrogates in Mexico are victims, such as being subjects of misinformation from the surrogacy firms, or the impossibility of claiming compensation for labour when the contract fails. Surrogates from contexts of deep inequality, especially surrogates from developing countries, are placed in a double bind position between inducement and exploitation: on the one hand, the payment they can earn from surrogacy is far higher compared to what they can earn from doing other jobs they have access to, such as house cleaners, waitresses, babysitters, or receptionists. Thus, from their perspective, there is no rational way for them to reject the offer. On the other hand, the amount of money they often get paid through surrogacy is too low and does not reflect all the hardships attendant on the surrogacy (or at least, does not reflect a decent wage for a nine-months of 24-hours a day work). From this perspective, surrogacy can be tantamount to exploitation.

To illustrate this point, consider Amrita Pande's research on commercial surrogacy in India.<sup>232</sup> Pande's studies reveal that many surrogates in India agree to submit their body under complete control and vigilance of the surrogacy hostels in exchange for money. The hostels control the surrogates' food, medicines, hormonal injections, and daily activities, which include a prohibition to have sex until the surrogacy process is completed. They can also be required to undergo 'selective reductions', to have a C-section, and sometimes they

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<sup>230</sup> Helena Ragoné's study of surrogacy in the U.S. revealed that intended parents as a group frequently are upper-middle-income, educated professionals, in their late thirties and early forties. According to her interviews, the average family income was in excess of \$100,000 usd. which contrast enormously with the educational background and income level of the surrogates (ranging from \$16,000 to \$38,000 usd. family income). Helena Ragoné, *Surrogate Motherhood: Conception in the Heart* (Boulder, Colorado: Westview Press, 1994).

<sup>231</sup> Recently (c.2012), Thailand and India have introduced prohibitions on transnational surrogacy, causing the market to move to neighbouring countries, such as Cambodia, or to other countries where surrogacy is not regulated or is poorly regulated, such as Mexico.

<sup>232</sup> Amrita Pande, 'Commercial Surrogacy in India'.

can be required to breastfeed the baby. These conditions violate the surrogates' rights to control what happens to and with their bodies. However, Pande notes that for most of the surrogates she interviewed and for their families, the money surrogates earned through surrogacy was equivalent to almost five years of total family income, especially because many of the surrogates' husbands were either in informal contract work or unemployed. Thus, from the surrogates' perspective, it would be irrational for them to reject the surrogacy contract offer.

Women from already deprived groups agree to *further their vulnerability* when they enter into contract with the hope of improving their living conditions. Besides the series of risks of harm that accompany surrogacy, the surrogates' vulnerability can be buttressed by the contract itself. Even if we can imagine a contract that conforms to reasonable norms in order to mitigate (or eliminate, when possible) the surrogates' risks of harm, the contract itself cannot isolate the surrogates from other realities of their lives. Many surrogates, especially surrogates from developing countries, face a great deal of stigma, for example, as 'motherhood-sellers', 'baby-sellers', or 'prostitutes'<sup>233</sup>, and they can be ostracised from their families and communities. In dealing with this issue, Pande observes that many surrogates in India agree to move to surrogacy hostels to resist the stigma because in this environment they can hide from their communities during their pregnancies. However, Pande stresses, this decision comes with a cost: the surrogates agree to be under the complete control and vigilance of the staff of the surrogacy hostel.

The contexts of profound inequality where many surrogacy contracts take place makes all the more important that surrogates enter into contracts that respect their autonomy, where the intended parents (and the surrogacy firm, if any) are bound to pay them for their labour and to comply with their *special responsibilities*. Furthermore, the surrogates' context of deprivation makes especially important the need of not imposing monetary remedies when they fail to perform with the contract; monetary remedies would be impossible to pay for some surrogates, especially for surrogates from already deprived groups, and can be exploitative. The context of profound inequalities provides a further justification of the asymmetry in AESCs.

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<sup>233</sup> See *Ibid.*, p. 979.



### 3.5 Four potential problems for AESCs

What would happen if we use AESCs to govern surrogacy? One might object that AESCs cannot protect the intended parents' interest, but rather would place the intended parents in an unfairly disadvantageous bargaining position. Further, one might worry that AESCs may facilitate cases of fraud, extortion and negligence from the surrogate, which, in turn, might hinder the development of surrogacy as a practice. Despite being genuine sources of concern, however, none of these apparent problems is insurmountable.

I will begin with fraud. Consider the following case:

*A fraudulent surrogate decides to enter into a surrogacy contract with the secret intention of faking the pregnancy and keeping the money. The fraudulent surrogate can claim she changed her mind in the course of the pregnancy and had an abortion, or claim she had a miscarriage.*

Under the terms of an AESC the fraudulent surrogate would not be bound to perform; as a result, she would not be under a duty to provide evidence of her pregnancy or to make her medical records available to the intended parents. However, the intended parents would be bound by contract to pay the fraudulent surrogate from the moment she takes specific steps to become pregnant regardless of the outcome. While cases of fraud cannot be completely eradicated, some deterrents might be incorporated into AESCs to prevent fraud or to mitigate its potential effects. It would be wise to distribute the payment in a way that the fraudulent surrogates cannot be awarded full remuneration for labour. In addition, to prevent potential cases of fraud, candidate surrogates could be interviewed and licensed (by the state or by surrogacy firms, if any).<sup>234</sup>

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<sup>234</sup> Although these mechanisms may not give us certainty about the prospective surrogates' motivations, they could be an effective method to reduce cases of fraud, extortion, and negligence. These mechanisms can be compatible with the surrogates' consent and would not necessarily involve impermissible access to their privacy. They may be comparable to a job interview or seen as an occupational licensing, similar to that of physicians and lawyers.

I will now turn to a case of extortion:

*A surrogate threatens the intended parents with abortion or to put the child in undesirable risks of suffering or death unless they meet her (unreasonable) demands.*

The first thing to say is that the possibilities of extortion will always be available in the context of surrogacy because the surrogate would have something that the intended parents want very much: first, fertility; later, a foetus; and then, a particular baby whom the intended parents very much want to be theirs to parent. However, AESCs can integrate some deterrents. It is compatible with AESCs that the contract can make clear that any demand that would benefit the surrogate beyond a certain threshold would constitute extortion and, if discovered, the surrogate would be prosecuted vigorously. The surrogate would then run the risk that the intended parents, rather than agreeing to her demands would report her to the authorities. However, this deterrent would not be enough to eliminate all possibilities of extortion. Some surrogates might bet on the probability that some intended parents would prefer to pay for any (unreasonable) demand, so they can increase the chances of having a child. Yet, even if cases of extortion cannot be eliminated, this is a cost that surrogacy contracts have to bear if they want to protect the surrogate's reproductive autonomy.

Now, consider the following case of negligence:

*A surrogate is negligent with her pregnancy and takes a drug that will make her feel great pleasure but will put the foetus in avoidable and foreseeable risk of death or suffering, or will increase the chances for the child to be born with some injury or disability.*

One might worry that under the terms of AESCs, the intended parents would be bound to cooperate (indirectly) with the negligent surrogate's wrongdoing because they would be bound to pay her for gestational labour regardless how well she conforms to the terms of the contract. It is clear that intended parents would be highly unlikely to entrust their surrogacy arrangement to a surrogate who has a history of drug abuse. Most intended

parents have a deep concern about the health and the wellbeing of the child who will be born from the surrogacy contract. However, although cases of negligence would not be completely eradicated, especially if we care about the surrogate's privacy, AESCs are compatible with the integration of some safeguards to protect potential intended parents from negligent surrogates. For example, as I suggested above, candidate surrogates could be interviewed and licensed, so prospective parents can come to know some of the candidate surrogates' intentions and desires. Although these mechanisms might not be enough to bring certainty to prospective parents about the surrogates' genuine intentions, these mechanisms would give prospective parents the opportunity to choose the candidate surrogate they consider the most suitable for the enterprise. Moreover, these mechanisms may facilitate the mutual understanding between both parties, so the interests, desires and intentions of both sides could be taken on board when phrasing the terms and conditions of the contract. This strategy, in turn, would translate into a careful and sometimes extensive mutual selection process. Now, in the event that the already selected surrogate misbehaves and takes some drug that could harm the child,<sup>235</sup> she would then run the risk that, if discovered, the intended parents can invoke the standard remedies available in the law of contract for fraud and misinterpretation. So, for example, the negligent surrogate would run the risk getting negative reviews and, therefore, it would make it harder for her to work as a surrogate in the future.

Finally, the fourth worry is that AESCs might not be appealing for prospective parents because their interests (financial interests and interests in parenting a particular child) will not be guaranteed. This situation might cause a decline in the market where AESCs are implemented. However, the diminution of the market is a cost that any model of surrogacy contracts that wants to protect the surrogates' reproductive autonomy has to bear. It seems unrealistic to think that the surrogacy market will be terminated any time soon, so there is a need for good regulation that can protect the surrogates' reproductive autonomy and the children's best interests. The implementation of AESCs might cause the market to move to other contexts where the prospective parents' interests can be better protected at the expense of the surrogate's reproductive autonomy. This makes it all the more important to

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<sup>235</sup> I am grateful to an anonymous referee for urging me to consider this further objection.

seek a coordinated policy between countries to protect the surrogate's reproductive autonomy. AESC, if unappealing, might lead, in the long term, to a reduction on the women's option to gain money by offering their reproductive capacities to those who need them. However, this is a reason in favour of revising and correcting the working opportunities of women in general, and of women in poorer countries in particular. Moreover, although AESC might curtail the intended parents' options to fulfil their desires to become parents, it might encourage them to prefer other options such as adoption, or to invest in research for artificial wombs or for uterus transplant.

### **3.6 Conclusion**

Fabre rightly asserts that the idea that surrogacy contracts should be unenforceable is not a reason for rendering the agreement entirely non-binding. However, voidable surrogacy contracts can raise as many problems as they solve. In this chapter, I have shown that the opportunity for the intended parents to claim breach of contract monetary remedies – damages, the return of the money, or monetary compensation– is unfair to surrogates in various ways, especially to already vulnerable surrogates. I have argued in favour of an alternative autonomy-based model of surrogacy contracts that can better protect the surrogate's reproductive autonomy. I have put forward a *pro tanto* argument for preferring AESCs, under the terms of which the intended parents would be bound to complete performance, but not the surrogate. I have shown that potential objections to AESCs – fraud, extortion, negligence, and market diminution – are not insurmountable, but rather that AESCs have room to integrate some deterrents and safeguards to mitigate these problems. Moreover, voidable surrogacy contracts would not be immune to these problems either and, although they might be able to appeal to similar strategies to those I have deployed to mitigate them, voidable surrogacy contracts would still place disproportionate burdens on the surrogates for the sake of the intended parents' interests.

## CHAPTER FOUR

### Unilateral Surrogacy Contracts

This chapter teases out the details of the regulatory framework I introduced in the previous chapter, which advances an autonomy-based account of surrogacy contracts realized through asymmetrically enforceable surrogacy contracts (AESCs). Continuing the previous discussion, in this chapter I argue that AESCs can be translated into a model of *unilateral contracts* such as the offer of a reward. I argue that unilateral surrogacy contracts are capable of avoiding many objections that are routinely deployed to condemn surrogacy contracts, such as objectification and alienation worries and objections related to exploitation of the vulnerable. In short, Chapter Four crystallises what has been argued throughout the previous three chapters: the view that a framework of surrogacy contract can be autonomy-respecting.

The model of unilateral surrogacy contracts I propose in this chapter is based on the model of unilateral contracts of the Anglo-American common law of contracts. Contract law recognises the concept of contracts that are enforceable at the option of one of the parties in the form of unilateral contracts. The party who makes the offer is bound to perform, but the person who is offered the money is not.<sup>236</sup> The Anglo-American common law of contracts defines unilateral contracts as agreements in which a person makes an offer to another in exchange for an act.<sup>237</sup> Its paradigmatic case is a reward. Two classic examples that describe this type of contracts are: ‘I will give you \$100 if you walk across the Brooklyn Bridge’<sup>238</sup> and ‘If you paint my house, I’ll pay you \$1,000’.<sup>239</sup> If these offers amount to contracts, then the recipient of the offer has no obligation to walk across the bridge or has no obligation to paint my house, but the person offering the money has an obligation to pay if they do.

The Anglo-American model of unilateral contracts contrasts with the civil law model of unilateral contracts. The civil law model states that a person makes a promise to give

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<sup>236</sup> I use a neutral terminology to describe what unilateral contracts are. This definition is broad enough to capture both the Common Law and the Civil Law traditions.

<sup>237</sup> See Arthur Linton Corbin, *Contracts*; Maurice Wormser, ‘The True Conception of Unilateral Contracts’; and *Carlill v Carbolic Smoke Ball Co.* (1893).

<sup>238</sup> Maurice Wormser, ‘The True Conception of Unilateral Contracts’, p. 136.

<sup>239</sup> American Law Institute, *Restatement (Second) of Contracts*, (1979), §§30, 32.

another something of value but does not require anything in exchange from the recipient of the promise.<sup>240</sup> Its paradigmatic case is a donation or a gift. Because of this difference, I consider that the civil law model can better accommodate so-called altruistic surrogacy arrangements or non-paid surrogacy arrangements whereas the common law model can better govern paid surrogacy contracts, which is the focus of my work. Henceforth, I will use the term 'unilateral contract' to refer to the model of contract that belongs to the Anglo-American common law of contracts.

Unilateral contracts are different from the consumer contract framework I identified and critiqued in Chapter One. Recall that the consumer contract framework governs the interactions between sellers and consumers who trade goods or services for money. This model presupposes that intended parents (that is, consumers) are vulnerable to market abuses from surrogates (that is, sellers). So, it integrates specific protections to intended parents and enhances the duties on surrogates. In contrast to the consumer contract framework, unilateral contracts impose greater obligations on the intended parents and grant more rights to surrogates. In this sense, my model of unilateral surrogacy contracts tip the balance to the opposite side: it prioritises the reproductive autonomy of surrogates over the interests of intended parents.

One important difference between these two frameworks is that the consumer contract framework typically undertakes a bilateral form. In other words, it typically takes the form of reciprocal promises and thus assumes that both parties are equally bound to perform. The following example illustrates this feature: if I sell you my bike, you would have the obligation to pay me for my bike and I will have the obligation to give you my bike. If I regret it and I no longer want to give you my bike, you can sue me and I will have the obligation to give you my bike or I will have the obligation to return you your money. Alternatively, if you change your mind and you no longer want my bike, I would not have the obligation to refund your payment, unless there is a clause in the contract that protects you in the event of cancellation. By contrast, unilateral contracts do not require a reciprocal exchange of promises, but rather the offer of something of value (in this case, money), in exchange for an act (in this case, to become pregnant, carry and deliver a child). The party who makes the offer is bound by the contract and the recipient of the offer is not. Consider

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<sup>240</sup> See for example, the articles 1835 and 1836 of the Federal Civil Code of Mexico.

Wormser's example cited above to illustrate this feature: 'I offer you \$100 if you walk across the Brooklyn Bridge'. If this offer amounts to a contract, you will not have the obligation to walk across the bridge, but I will have the obligation to pay you if you do.

In the scholarly literature surrounding contract theory, some authors consider that the distinction between bilateral contracts and unilateral contracts is fundamental.<sup>241</sup> However, some authors have brought into question this distinction and argued that the difference is not radical.<sup>242</sup> Whether these two models are fundamentally different or not is an issue that is outside the scope of this chapter. For the sake of the argument, I will assume that these two models are sufficiently different to mark a clear distinction between two ways in which surrogacy arrangements can plausibly be regulated: they place the parties to a contract in different normative situations. Moreover, they have different potential implications for law and public policy.

Unilateral surrogacy contracts are compatible with AESCs in two respects. First, under the terms of a unilateral contract, the recipient of the offer (that is, the surrogate) would have no obligation to perform. Second, unilateral contracts consider that the party who makes the offer (that is, intended parents) is bound to perform. I will briefly explain these two respects.

First, in Chapter Three, I argued that there are strong reasons for not treating the contract as enforceable against the surrogate. Contract theory is largely based on the idea that obligations are created by acts of reasonable reliance.<sup>243</sup> A promise to complete gestation and deliver a healthy child cannot be enforced: no matter how careful a pregnant woman is with her pregnancy, several things can go wrong in the course of the pregnancy. Therefore, a person cannot make a promise which is impossible to perform.<sup>244</sup> Likewise,

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<sup>241</sup> See for example, Samuel Williston, *Contracts* § 13 (Baker, Voorhis & Company, 1920); Maurice Wormser, 'The True Conception of Unilateral Contracts'; Christopher Columbus Langdell, *Summary of Contracts* 2418-53 (2<sup>nd</sup> ed. 1880); and John Austin, *Lectures in Jurisprudence* 107-08 (5<sup>th</sup> ed. 1885).

<sup>242</sup> See for example, Henry W. Ballentine, 'Acceptance of Offers for Unilateral Contracts by Partial Performance of Service'. *Minnesota Law Review* 94 (98) (1921), pp. 94-99; and Samuel J. Stoljar, 'The False Distinction Between Bilateral and Unilateral Contracts' *Yale Law Journal* 64 (1954), 515-536.

<sup>243</sup> In contract law, 'impossibility' is an excuse for the breach of contract duties, based on a change of circumstances or the discovery of pre-existing circumstances, the non-occurrence of which was the underlying assumption of the contract, that makes the performance of the contract literally impossible. For example, if I promise you to paint your house on December 19, but your house burns to the ground before the end of November, I will be excused from my obligation to paint your house. We can agree that there is no way for performance to actually be accomplished.

<sup>244</sup> It is sometimes thought that the impossibility of performance also involves cases in where performance is extremely difficult or unexpectedly costly for one party. However, it has been argued that this argument

contract theory recognizes that promises that would impose unsustainable burdens as a result of the contract are unconscionable promises and, therefore, do not meet the minimum standard conditions of validity of a contract.<sup>245</sup> In the previous chapter, I argued that promising to carry a child to term can impose unsustainable burdens on the surrogate that could destroy her prospects for a minimally decent life. Moreover, because the surrogate bears the greatest risks in the enterprise, there are good reasons to think that it is she rather than the intended parents who should have the right to manage the involved risks.

The moral analysis of the conditions under which being held under a promise to become pregnant, carry and deliver a healthy child would be unreasonable reliance or excessively burdensome gives us a criterion by which to map the moral constraints on surrogacy transactions. A minimum condition which such transactions would have to meet is not to enforce specific performance on the surrogate, with no disincentives for not performing. In this chapter, I argue that unilateral contracts can accommodate this condition. Under the terms of a unilateral surrogacy contract, the surrogate would not be bound to carry the child to term. Therefore, unilateral surrogacy contracts can capture instances in which the surrogate has a miscarriage or an abortion or delivers a dead child, without the implication that she would be in breach of the contract.

The second respect in which unilateral contracts are compatible with AESCs is that unilateral contracts consider that the party who makes the offer is bound to perform. Unilateral surrogacy contracts are compatible with the idea that the intended parents have an obligation to comply with the terms of the contract and, if they default, they would be liable for breach of contract remedies: for example, they would have the obligation to pay the surrogate what was agreed. If during the course of the pregnancy they change their minds and abandon the agreement, they would be in breach of the contract and it would be appropriate for them to pay contractual breach remedies. Likewise, as we will see later,

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overlooks one of the purposes of contracts, namely that they are sometimes designed as risk-allocation exercises. So, the person who makes the promise to do X, promises to compensate the recipient of the offer if she fails to do X. (See Patrick S. Atiyah, 'Promises and the Law of Contract', *Mind* 88 (1979), p. 412). My case distinguishes between the impossibility of performance, risk-allocation and unconscionable promises.

<sup>245</sup> 'Unconscionability' describes terms of a contract that are excessively unfair, or overly one-sided in favour of the party who has the greatest bargaining power, in such a way that they are contrary to good conscience. Typically, an unconscionable contract is deemed non-enforceable because no reasonable or informed person would otherwise agree to it.



unilateral surrogacy contracts are compatible with the idea that intended parents have *special responsibilities* towards the surrogate, such as to ensure that the surrogate is aware of the risks of harm before entering into contract; to pay for life insurance; and to facilitate all medical and psychological assistance that the surrogate could need to protect her well-being.

The model of unilateral surrogacy contracts proposed in this chapter has no implications for parental rights. To reiterate what I said at the beginning of the thesis, the bipartite approach of surrogacy arrangements on which my argument hinges is compatible with the integration of unilateral contracts to regulate the childbearing part of the arrangement and sets aside issues related to parenting. The part related to the transfer of the child could be governed by a different branch of law such as family law, and in this way, the interests of children would not be left unprotected. My model of unilateral surrogacy contracts does not dictate arrangements for the transfer of the child but only for issues related to the pregnancy, gestation and the creation of a baby. The task of this chapter is to offer a detailed model of surrogacy contracts that can fairly distribute the rights and obligations between the contracting parties realised through unilateral contracts. I will argue that a regulation aimed at legitimising surrogacy arrangements must provide adequate protections to those working as surrogates without imposing on them the obligation to perform. I will show that unilateral contracts can account for these conditions.

This chapter is organised as follows: section one provides an overview of unilateral contracts as they stand in the common law of contracts. In section two, I address two apparent problems stemming from the application of the terminology used in the existent literature and argue that these problems can be avoided. Section three takes up the question of what unilateral surrogacy contracts would look like. Sections four and five show that unilateral surrogacy contracts can avoid objections related to alienation and objectification. Section six discusses one potential problem derived from the implementation of unilateral surrogacy contracts, which is that some surrogates would be unduly induced to participate in unilateral surrogacy contracts, or the idea that surrogates may face economic pressures to consent to higher-paid offers which pose significant risks of harm. The last section concludes.

## 4.1 Unilateral contracts

The offer and acceptance formula is a traditional approach in contract law. This formula identifies the moment of contract formation when the parties are of one mind. While many theorists have argued for a view of contracts as acceptance by promise,<sup>246</sup> contract law recognises the view of contracts as acceptance by actual performance, realised through the form of unilateral contracts.<sup>247</sup>

The Anglo-American common law of contracts defines unilateral contracts as agreements in which an offer of something of value is given in return for an act.<sup>248</sup> What is wanted in a unilateral contract is not a reciprocal promise, but rather an act in return for a reward. Only the party who makes the offer has obligations, but not the recipient of the offer. A classic example is 'I will give you \$100 if you walk across the Brooklyn Bridge'<sup>249</sup> or 'If you paint my house, I'll pay you \$1,000'.<sup>250</sup> The party who makes the offer is not asking the recipient of the offer for her promise to walk across the Brooklyn Bridge or for her promise to paint the house, rather she is asking for the act of walking across the Brooklyn Bridge or painting the house. Only when the terms of the reward have been met, the recipient of the offer will be entitled to the reward.

However, historically, contract law theorists have questioned the desirability of using unilateral contracts to govern legal agreements.<sup>251</sup> Many people believe that one essential function of contracts is that they afford guarantee of the performance of some interaction in such a way that the guarantee can be legitimately enforced. Contracts are largely a

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<sup>246</sup> See for example, Charles Fried, *Contract as promise: a theory of contractual obligation*, 2nd ed (New York: Oxford University Press, 2015); Seana Valentine Shiffrin, 'The Divergence of Contract and Promise', *Harvard Law Review* 120 (3) (2007), p. 710.

<sup>247</sup> See for example, Maurice Wormser, 'The True Conception of Unilateral Contracts', 1961; Arthur Linton Corbin, *Contracts*; Henry W. Ballantine, 'Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested', *Minnesota Law Review* 1452 (1921), 94-99.

<sup>248</sup> See Arthur Linton Corbin, *Contracts*; Maurice Wormser, 'The True Conception of Unilateral Contracts'; and *Carlill v Carbolic Smoke Ball Co* (1983).

<sup>249</sup> Maurice Wormser, 'The True Conception of Unilateral Contracts', 1961.

<sup>250</sup> American Law Institute, *Restatement (Second) of Contracts*, §§30, 32.

<sup>251</sup> See for example, Karl N. Llewellyn, 'On Our Case-Law of Contract: Offer and Acceptance' (pts. I and 2). *The Yale Law Journal* 48 (5) (1939), 779-818; John D. Calamari and Joseph Perillo, *The Law of Contracts*, 2d ed. (West Publishing Company, 1977), 92-96; Friedrich Kessler, Grant Gilmore and Antony T. Kronman, *Contracts: Cases and Materials* (Wolters Kluwer, 1986), p.p. 290-92; John E. Murray, 'Contracts: A New Design for the Agreement Process', *Cornell Law Review* 53 (1968), p.p. 785, 785-86, 802, 805-06.

deliberate attempt to deal with uncertainty.<sup>252</sup> Where an interaction is called off at the option of one party, the defaulting party has an obligation to restore the injured party for the damages caused. In this interpretation, both parties are equally bound to the contract and both parties should know in advance what to expect in the event of non-compliance. The presence of uncertainty would vitiate the agreement. Critiques of the unilateral contract doctrine have pointed out that a major problem of unilateral contracts is that they are incapable of ensuring predictability and, therefore, they are unreliable structures for distributing risks between the contracting parties. They warn that unilateral contracts can lead to unfair outcomes in particular cases.<sup>253</sup> More specifically, they worry that the application of the terminology of unilateral contracts gives rise to three normative difficulties in protecting the interests of the parties.

The first problem is that if a court determines that an offer requests acceptance by performance, the rule that the party who makes the offer can revoke her offer at any time before acceptance, means that she can revoke up until the time that the recipient of the offer completes performance. Therefore, if the recipient of the offer cannot perform the desired act immediately or instantaneously, she would be unprotected from the revocation of the party who makes the offer while she is expending effort and expense in carrying out her performance or she has performed partially the task.

The second problem is that if the recipient of the offer withdraws from the offer after she has commenced to perform, she would be entitled to the reward neither in part nor in full even though the party who makes the offer has benefited as a result of the incomplete performance. Therefore, the party who makes the offer would be unfairly benefit at the expense of the recipient of the offer.

The third problem is that if the recipient of the offer withdraws from the offer after she has commenced to perform, the party who makes the offer could have sunk losses as a result of the incomplete performance. Under the terms of unilateral contracts, the party who makes the offer would lack a claim-right to compensation or restitution for the damages incurred as a result of the incomplete performance. This would be unfair to the

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<sup>252</sup> See Charles Fried, *Contract as promise: a theory of contractual obligation*, p. 59.

<sup>253</sup> See for example, Karl N. Llewellyn, 'On Our Case-Law of Contract: Offer and Acceptance', p.p. 788, 790, 807; Samuel Stoljar, 'The False Distinction Between Bilateral and Unilateral Contracts', pp. 517-19.

party who makes the offer because she can be placed in a worse position than she would have been if she had not entered into contract.

The power to withdraw from the offer is one of the more cumbersome points in the unilateral contract theory. However, these three potential problems arising from the power to withdraw are can plausibly be avoided. In the following two sections, I propose two avenues in which these problems can be avoided. First, we should reject the principle of mutuality of withdrawal defended by Wormser. This strategy would be enough to avoid the first problem. Second, we should strive to find a way in which the risks and costs could be fairly balanced between the parties. This strategy would help to avoid the second and third problems.

#### **4.2 The principle of mutuality of ‘mutuality of withdrawal’**

In ‘The True Conception of Unilateral Contracts’, M. Wormser claims that unilateral contracts imply mutuality of withdrawal.<sup>254</sup> On the one hand, the recipient of the offer can withdraw from the offer at any time because she is not bound to perform. On the other hand, the party who makes the offer can withdraw at any time before the recipient of the offer has completed performance, Wormser says, because the offer has not been accepted yet.<sup>255</sup> On Wormser’s view, at the moment the recipient of the offer has completed performance, she has accepted the offer and, therefore, the contract is formed.<sup>256</sup>

The following case illustrates the principle of mutuality of withdrawal. Suppose I lost my cat and I offer you a reward if you find my cat and hand it back over to me. You will not have any obligation to find my cat, but if you do, I therefore will have to pay you the reward. Now, suppose that before you find my cat, I change my mind and consider that my cat is no longer important to me, so I revoke my offer. According to the principle of mutuality of withdrawal, I can revoke my offer without the implication that I would breach the contract or without the implication that I will have the obligation to pay you the reward.

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<sup>254</sup> Maurice Wormser, ‘The True Conception of Unilateral Contract’, p.138.

<sup>255</sup> Ibid., p.137. See also *Carr v Mahaska County Bankers Association* (1936); and Patrick S. Atiyah, *An Introduction to the Law of Contract*, (Clarendon Press, 4<sup>th</sup> ed. 1989), p. 82 ff.

<sup>256</sup> Maurice Wormser, ‘The True Conception of Unilateral Contract’, p.137.

The principle of mutual withdrawal leads to two normative problems that show a more adequate interpretation of unilateral contracts to be necessary.

The first problem is that the principle of mutuality of withdrawal overlooks the consideration given by the recipient of the offer. The consideration in a contract is typically thought to be something of value, such as a good, money, or an act that supports one's side of the bargain. However, the law establishes that the consideration of a contract is not exclusively a right, an interest, a profit, or a benefit, but rather it can also be a forbearance, a detriment, a loss or a responsibility.<sup>257</sup> It is inappropriate to revoke the offer at the will of the party who makes the offer because it would overlook the consideration provided by the recipient of the offer. In the above case, you have spent your time, money and effort in looking for my cat. We can say that this amounts to consideration that supports your side of the bargain. The consideration you have provided triggers an obligation on me to acknowledge your consideration and respond in return. Therefore, it would be appropriate that I should respect the terms of my offer and not revoke my offer at will. However, this should not imply that the offer cannot be terminated on some other basis before you completed performance. For example, we can say that the offer can be automatically terminated if you didn't meet the terms of the reward within the specified time limit or because something external to our agreement arises and the conditions of the offer turn out to be irrelevant. For instance, if my cat returns home by itself before you find it, we can say that my offer expires automatically.

The works of Corbin<sup>258</sup> and Ballantine<sup>259</sup> provide some basis for the view that the consideration provided by the recipient of the offer triggers an obligation on the party who makes the offer to not revoke her offer at will. They assert that when the recipient of the offer has started to take specific steps aimed at complying with the terms of the offer, the party who makes the offer cannot revoke the offer.<sup>260</sup> This understanding of unilateral

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<sup>257</sup> *Currie v Misa* (1875).

<sup>258</sup> Arthur Linton Corbin, *Contracts*, 170, 185.

<sup>259</sup> Henry W. Ballantine, 'Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested'..

<sup>260</sup> Some authors have argued that it is necessary for a contract to be binding that the person who makes the offer needs to be notified that someone has started to take specific steps aimed at completing the terms of the offer. However, it seems that it is not a necessary condition. For example, in the paradigmatic case of unilateral contracts *Carlill v Smoke Ball Co.*, the defendant claimed that Mrs. Carlill failed to accept the offer because she never notified her intentions to them. However, the court considered that the performance of the conditions of the offer was sufficient (see section 54 of the Restatement). The advertisement was not a

contracts contrasts with Wormser's in the sense that acceptance of the offer is not given upon completing of performance, but rather upon providing consideration.<sup>261</sup>

However, one might worry that Corbin's and Ballantine's interpretation may lead to a view of unilateral contracts that produce unfair outcomes to the party who makes the offer. One might say that if the party who makes the offer is bound to the contract even if the recipient of the offer has not completed performance, then, the party who makes the offer would have the obligation to pay the reward even though he or she did not benefit as a result of the transaction. However, this concern is misleading.

We may agree that you have provided consideration in looking for my cat (such as your time, effort and inconvenience), but it seems unfair that I should have an obligation to pay you the reward if you did not find my cat. The idea that the party who makes the offer is contractually bound does not imply that she has an obligation to pay the reward no matter what. The party who makes the offer has the obligation to pay the reward only if the recipient of the offer has completed performance. Corbin's and Ballantine's interpretation suggest that if the recipient of the offer has provided consideration that supports her side of the bargain, then the contract is formed and the party who makes the offer is bound by contract. What may count as consideration might be difficult to determine in some specific cases. However, it is typically taken as consideration that the recipient of the offer has started to take specific steps directed towards fulfilling the terms of the offer.

The second problem is that the principle of mutuality of withdrawal, if correct, would in some instances justify the unfair benefit of the party who makes the offer at the expense of the incomplete performance of the recipient of the offer. For example, suppose I offer you \$1,000 if you paint my house. When you have painted half of the house, I revoke my offer. We can say that I was unjustly benefited from your incomplete performance. If the 'mutuality of withdrawal' understanding of unilateral contracts is correct, then we can say that unilateral contracts produce unfair outcomes because they may disproportionately benefit the person making the offer at the expense of the recipient of the offer.

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unilateral offer to all the world, but an offer restricted to those who acted upon the terms contained in the advertisement. Unilateral contracts invite acceptance by performance, it does not need a notification or a reciprocal promise.

<sup>261</sup> Henry W. Ballantine, 'Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested', p. 99; Arthur Linton Corbin, *Contracts*, 170, 185.

Although significant, however, the second normative problem of the mutuality of withdrawal is not insurmountable. We can say that this problem can be solved in part using the same strategy that I used to respond to the first potential problem. If you have purchased all the products you will need to paint my house and if you have also spent your time, effort and inconvenience to paint my house, then we can say that you have provided consideration to support your side of the bargain. Therefore, I would be bound by contract, so I will have the obligation not to withdraw my offer.

However, this strategy is not adequate to fairly distribute the costs and benefits between the parties. It is one thing to say that the person making the offer is bound by contract because the recipient of the offer has given consideration. It is another thing to say that the person making the offer has an obligation to pay the reward to the recipient of the offer no matter what. In the next section, I offer an avenue we can take to show that unilateral contracts can fairly distribute the costs and benefits between the parties in instances of incomplete or partial performance. Setting this issue aside for now, I will proceed to show how that the strategy I have deployed in this section can be used to solve the first potential problem of unilateral contracts I identified in the previous section.

The first supposed problem with unilateral contracts arises from the view that the offer is not accepted up until the time the recipient of the offer completes performance. This problem states that before that moment, the contract has not yet been formed. If the recipient of the offer cannot perform the desired act immediately or instantaneously, she would be unprotected from the revocation of the party who makes the offer while she is expending effort and expense in carrying out her performance or she has performed partially the task.

This problem can be avoided. If the recipient of the offer has provided consideration, then the party who makes the offer is bound by contract and cannot revoke her offer at will.

As we will see in section 4.4 below, my model of unilateral surrogacy contracts considers that the intended parents would be bound by contract from the moment the surrogate begins to take specific steps in relation to fulfilling the terms of the contract. I argue that the series of procedures the surrogate has to undertake aimed at becoming pregnant count as consideration that supports her side of the bargain. This, in turn, would bind the intended parents to the contract, so they cannot revoke their offer. However, this

would not imply that they have the obligation to pay the surrogate full reward, but *only if* she completes performance.

### **4.3 Fair distribution of risks, costs and benefits**

The second avenue we can take to respond to the second and third supposed problems with unilateral contracts identified in section 4.1 is to consider that one function of contracts is that they allocate risks and costs between the parties to the contract, so it may be plausible that unilateral contracts can strike a fair balance of the costs and benefits in the event of partial or incomplete performance.

In unilateral contracts, it is often thought that just as the person making the offer runs the risk that the task might not be completed, it seems fair that the recipient of the offer should bear the risk that she may fail to complete the task. For example, just as I run the risk that you might not find my cat, so too you run the risk of absorbing the costs of failure if you are not successful in finding my cat. In other words, we can say that just as it is fair that I should bear the costs of not having my cat back to me if you don't find my cat, so too it is fair that you should assume the losses of your time, money, effort, and inconvenience if you are not successful finding my cat.

However, does the same conclusions hold for all cases of partial completion of unilateral contracts, or are these special cases? I consider and argue that in certain circumstances those who partially complete unilateral contracts do indeed have a right to obtain a partial reward.

In order to ensure that unilateral contracts would produce fair outcomes, I would like to suggest that two caveats need to be introduced.

The first caveat I would like to suggest is that if the party who makes the offer has been benefited as a result of the partial or incomplete performance of the recipient of the offer then fairness requires that the beneficiary should compensate the benefactor in proportion to the benefit obtained. The following case illustrates this caveat:

*Case 1:* Suppose I offer you \$1,000 if you paint my house. You start to paint the house, but before you finish painting you realize that the task I asked of you is



much more difficult than what you foresaw when you accepted my offer. So, you change your mind and refuse to continue painting. Would fairness require that you should bear the costs of failure when you have performed partially and I have benefited as a result of your partial performance?

We can say that I unfairly benefited as a result of your incomplete performance, or we can say that I took unfair advantage of you by asking you to perform a difficult task that you be unlikely to complete, but that I would benefit from, even if you had performed partially. Therefore, we could say that fairness requires that I should compensate you in proportion to the benefit obtained. This caveat responds to the second problem identified in section 4.1. Recall, the second supposed problem with unilateral contracts is that refers to instances in which the party who makes the offer unfairly benefited as a result of the partial performance of the recipient of the offer.

Now, In order to see the limits of the first caveat, consider a more complex case:

*Case 2:* Suppose I offer you a reward if you recover the black box from a plane that has sunk to the bottom of the sea. You have invested in equipment to find the black box but then have to abandon the operation because it is too risky.

You have used your special equipment, time, effort, and risked your life to find the black box. We can say that this amounts to consideration that supports your side of the bargain and, therefore, fairness requires that I should be bound to the contract. However, as we have seen before, consideration does not impose an obligation on me to pay you the reward. We can say that from the moment you considered my offer, you knew that you would have to assume the risk of not being able to complete the task and the correspondent costs associated to failure.

However, as in *case 1*, we could say that I might have been unfairly benefited as a result of your partial performance, so I might have a duty to compensate you in proportion to the benefit obtained. For example, suppose you located exactly where the black box is, but realize that it is impossible to retrieve it. In this case, I gained the knowledge of exactly where the black box is that I wouldn't have got otherwise if it hadn't been as a result of your

partial performance. Alternatively, suppose you searched for the black box in a demarcated area of the sea, but you did not locate it. In this scenario, I would have obtained the knowledge of where the black box is not. I could not have obtained this knowledge had it not been for your incomplete performance. Therefore, fairness requires that I (that is, the beneficiary) should compensate you (that is the benefactor) in proportion to the benefit obtained. We can conclude that whether the party who makes the offer has been benefited as a result of partial or incomplete performance, would depend on empirical considerations.<sup>262</sup>

However, it is important to note that the same types of considerations that support the claim that those who partially complete unilateral contracts do indeed have a right to obtain a partial reward cannot be invoked to support instances in which the party who makes the offer has not obtained a benefit (such as the example of my lost cat above) or in cases where she has been worsened as a result of partial performance. Therefore, we cannot use the same strategy that I used to solve the second apparent problem of unilateral contracts to solve the third apparent problem identified in 4.1. Recall, the third problem refers to instances in which the party who makes the offer is worsened as a result of the incomplete performance of the recipient of the offer.

The following scenario illustrates this apparent problem: Suppose you found the black box that fell to the bottom of the sea, but when you tried to bring it to the surface, it slipped, collided with a stone and was completely destroyed. Would it be appropriate for you to demand compensation for your partial services when they led to the complete destruction of the black box? Would fairness require that you compensate me for the damages incurred as a result of your actions? You did not act in bad faith, but certainly your actions worsen my situation.

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<sup>262</sup> There is an example that supports my case related to the Palomares Incident. In 1966, Francisco Simó Orts, a fisherman from Murcia, helped to recover a hydrogen bomb that fell to the sea as a result of the Palomares B-52 crash. Simó Orts witnessed the bomb fall into the water at a certain location and was hired by the U.S. Air Force to assist in the search operation (Moody, D.H. '40<sup>th</sup> Anniversary of Palomares' *Faceplate*. Naval Sea Systems Command (2006), pp. 15-19). Once the bomb was located, Simó Orts claimed salvage rights on the recovered hydrogen bomb. According to the customary maritime law, 'the person who identifies the location of a ship for salvage is entitled to a salvage award if that identification leads to successful recovery'. But the thing salvaged off by Palomares was not a ship but a hydrogen bomb, which according to the U.S. secretary of defense was worth \$2 billion. The Air Force eventually settled out of court for an undisclosed sum (Long, T. 'Jan. 17, 1966: H-Bombs Rain Down on a Spanish Fishing Village', *WIRED*, 2008).

One potential solution to this problem might be to invoke the pre-conditions of a contract. The law of contracts establishes that a standard condition of validity of a contract is that both parties should be 'of one mind' before entering into contract. That is, both parties must share the same understanding about what is involved in the contract, otherwise, the contract could be deemed null and void. We can say that a pre-condition of a contract is that both parties must be sufficiently informed about the type of action that will be carried out. For example, they should be aware that it is a risky task and that it is probable that you might not be able to bring the black box to the surface in one piece. However, when there is a situation of asymmetric information, we can say that the party from whom the relevant information was withheld should not bear the costs of the damages that occurred. For example, if I didn't know that the black box was likely to slip out of your hands and be destroyed, but you did, we can say there are good reasons to think that I should not bear the costs of the damage. Furthermore, if you withheld relevant information on purpose, we can say that you lied to me and I could sue you for fraud. Alternatively, if we are both informed about the potential risks and, knowing this, I proceed to ask you to recover the black box, there seems to be good reason to think that you should not bear the costs of damages in the event that the black box is accidentally destroyed.

Now, in order to see the need of the second caveat, we have to consider that there is something troublesome in *case 1* and *case 2* that necessitates further consideration, namely that the tasks to be performed involve risks of (serious) harm to the recipient of the offer. The second caveat that refers to instances in which unilateral contracts produce unfair outcomes because the task to be performed is highly dangerous or life-threatening, so that the risks of harm outweigh the potential benefits.

When we consider activities that involve risks of serious harm to the recipient of the offer, it is important to consider under what conditions it would be morally permissible to tolerate these types of contract. Many people think that it would be unacceptably paternalistic to prevent willing individuals undertaking risky activities when, all things considered, they will not harm third parties. However, it would not be unacceptably paternalistic to prevent people from undertaking morally optional activities that are *certain* to lead to great harm. And it is also not unacceptably paternalistic to require the person

offering the reward to undertake a responsibility to safeguard against the risks undertaken by those seeking to fulfil the terms of the reward.

The second caveat is therefore that either some offers should be prohibited because we do not have a moral right to perform the tasks that they involve *or* the party who makes the offer has *special responsibilities* to integrate safeguards to minimise or eliminate (when possible) serious or life-threatening risks of harm. We can say that *case 1* and *case 2* are the types of activities that can impose *special responsibilities* on the party who makes the offer in order to mitigate or eliminate (when possible) the risks of harm.

These caveats, however, do not apply to all cases of unilateral contracts. There might be some cases in which the level of the reward is set so high that it makes it worth undertaking the risk (for the parties who already have the relevant equipment and training), and in which cases the person making the offer might reasonably refuse to take on these extra responsibilities.

So far, I have identified the conditions under which it may be morally permissible to use unilateral contracts to govern voluntary agreements, as well as the considerations that determine how the rights and obligations should be distributed among the parties in order to produce fair outcomes. It is true that the use of unilateral contracts is not desirable to govern some particular interactions. For example, it would be inappropriate for an employee-employer interaction to be governed by unilateral contracts or a seller-customer interaction. However, there are other instances where it is appropriate to use unilateral contracts, such as the offer for a reward. In the next section, I argue that it is appropriate for AESCs to be translated into a model of unilateral contracts.

The model of unilateral contracts I have outlined so far is consistent with the rejection of the consumer contract framework I introduced and criticised in Chapter One. In Chapter One, I considered that the consumer contract framework is based on two values: market efficiency and the promotion of consumer's interests. I argued that the use of the consumer contract framework in the context of surrogacy masks the procedural injustice in current surrogacy practices. It assumes the intended parents are the vulnerable parties to a contract and it justifies the use of unfair procedures that are organised to promote the intended parents' interests and increase obligations to surrogates. The many emotional, physical and social risks of harm that significantly affect the surrogates' reproductive autonomy are

downplayed and the intended parents' *special responsibilities* towards the surrogates are obscured. Unilateral contracts can avoid these conclusions. As we may see now, unilateral contracts have the capacity to recognise that the activity performed by the recipient of the offer may be highly risky and life-threatening which, in turn, can trigger *special responsibilities* on the party who makes the offer. Likewise, unilateral contracts have the capacity to fairly distribute the costs and benefits between the parties in the event of partial or incomplete performance. In the next section, I argue that unilateral contracts can facilitate the integration of procedural fairness norms and produce fair outcomes in surrogacy contracts.

#### **4.4 What would unilateral surrogacy contracts look like?**

I take unilateral surrogacy contracts to be a type of contract in which the intended parents (that is, the party who makes the offer) would be bound to perform, but the surrogate (that is, the recipient of the offer) would not. The offer could be phrased as follows:

'I (intended parents) offer you (surrogate) money if you become pregnant through artificial insemination or embryo implantation, carry and deliver a child'.

The offer would not cover the part of the surrogacy agreement that deals with the transfer of the child, but only the part that deals with the creation of the child, pregnancy and childbirth. To reiterate, my case hinges on the presumption that surrogacy arrangements can be treated as bipartite arrangements, where one part of the surrogacy arrangement deals with the childbearing part and the other deals with the transfer of the child. The first part can be governed by contract law and the second part by family law. Hence, my account of unilateral surrogacy contracts does not dictate arrangements for the transfer of the child.

Under the terms of unilateral surrogacy contracts, the intended parents would be bound to perform and, if defaulting, specific performance would be enforced as the remedy for their breach of contract. By contrast, the surrogate would not be bound to perform, so

she would not have an obligation to complete gestation, but she would have an entitlement to full reward *only if* she satisfies the terms of the offer. To put it differently, the intended parents would have the obligation to pay the reward up until the surrogate has met the terms of the offer, but not before.

The contract would be enforceable to the intended parents from the moment the surrogate begins to take specific steps in accordance with the terms of the offer. Based on how surrogacy practices currently operate, we can say that it constitutes consideration that supports the surrogate's side of the bargain that she undergoes the necessary procedures to achieve pregnancy, such as artificial insemination (in partial surrogacy) or implantation of embryos into the uterus (in gestational surrogacy). Likewise, the surrogate's time, travel and inconvenience constitute consideration that supports her side of the bargain. For example, attending medical appointments, submitting to medical examinations that the doctor deems necessary, or moving to a surrogacy hostel. This consideration, in turn, would bound the intended parents would to contract, so they cannot revoke their offer.

The procedures involved in current surrogacy practices, in turn, involve a series of risks of harm, such as multiple births (which carry their own complications); development of ovarian hyper-stimulation syndrome (in the case of partial surrogacy); infections; damage to surrounding structures such as bowel and bladder; ectopic pregnancy; gestational diabetes; having a miscarriage; or the risk of death or permanent disability. There are also risks of social harm, such as that some surrogates might have to isolate themselves from their community because surrogacy is stigmatized. And risks of psychological harm, such as that some surrogates who develop a bond with the child they are carrying have to bear the psychological burdens of carrying a child in their womb knowing that they will transfer it to the intended parents shortly after birth.

The (series of) risks of harm trigger *special responsibilities* on the intended parents to integrate adequate safeguards to mitigate or eliminate (when possible) the potential harms. For example, to ensure that the surrogate is aware of the risks of harm before entering into contract; to pay for life insurance; and to facilitate all medical and psychological assistance that the surrogate could need to protect her well-being. Likewise, due to the asymmetric distribution of the (series of) risks and benefits, it is the surrogate, rather than the intended parents, who should have the right to manage these risks.

Furthermore, if the surrogate has a miscarriage or an abortion as consequence of these risks, we can say that she would not have an obligation to redress the intended parents. For example, she would not have an obligation to return the money the intended parents have invested in the surrogacy, nor would she have an obligation to try again until the intended parents have a surrogacy child. However, if the surrogate performs partially or incompletely, she would lose part of the reward, so the financial interests of the intended parents could be protected.

We now may ask whether the surrogate is entitled to compensation in the event of partial or incomplete performance. We could say that fairness requires that the surrogate does have a right to compensation in proportion to the benefits the intended parents obtained as a result of her partial or incomplete performance. At first sight, it might seem that intended parents would gain no benefit as a result of partial or incomplete performance because what they want is a baby for them to parent, which may only be achieved as a result of the full performance of the surrogate. However, we could say that intended parents may gain many benefits from the incomplete or partial performance of the surrogate, which they would not have obtained if they had not entered into contact with the surrogate.

One benefit could be that intended parents might have gained the benefit of having the chance to become parents of a particular child (formed out of a particular genetic combination). Second, they might have gained the benefit of having someone other than themselves who will carry all the risks of harm attendant to childbearing. Third, they might have gained the benefit that they could have some input in designing the guidelines for the pregnancy-related behaviours of the surrogate. For example, they might have agreed together with the surrogate the type of food she will intake during pregnancy, vitamins, supplements, whether she will refrain from some sports, attend to antenatal appointments, whether she will undergo C-section or vaginal delivery, etc. Fourth, intended parents might have gained the benefit that they could accompany the surrogate during the pregnancy. For example, they might be able to attend to antenatal appointments, see the ultrasounds, and attend to childbirth.

These benefits vary according to how the terms and conditions of the surrogacy contract are phrased and implemented. For example, some contracts would better protect

the privacy of the surrogate so the intended parents would not have access to the medical records. Nevertheless, this would not imply that the intended parents are not benefited from the contract, even if the surrogate performs incompletely.

In this section, I have outlined what unilateral surrogacy contracts would look like. I will now proceed to show that my model can deal with three objections I identified in Chapter Two: the objectification objection; the alienation objection; and undue inducement. I argue that none of these worries is a decisive objection against my model of unilateral surrogacy contracts.

#### **4.5 The objectification objection**

In Chapter Three, I left open the question of whether commercial surrogacy is morally problematic because it objectifies the surrogate in a wrongful manner. I will now take up this question and show that while current surrogacy practices are vulnerable to the objectification objection, my model of unilateral surrogacy contracts is not.

In Chapter Two, I defined the concept of 'objectification' as 'seeing and/or treating a person, usually a woman, as an object'.<sup>263</sup> The notion of objectification involves, in some way or another, to value a person as a means to someone else's end or the treatment of a person (usually a woman) as an object.<sup>264</sup> While it is contentious whether objectification is always morally problematic,<sup>265</sup> for several decades, philosophers and sociologists have criticised the surrogacy industry in these terms, often describing surrogacy as dehumanising. They assert that surrogacy firms treat the reproductive labour of those working as surrogates as mere vehicles for the child.<sup>266</sup> Likewise, ethnographic studies reveal that surrogates are often treated as something whose experiences and feelings need not be taken into account,<sup>267</sup> so their subjectivity is denied.

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<sup>263</sup> Lina Papadaki, 'What is Wrong About Objectification?', *Current Controversies in Political Philosophy* (Thom Brooks (ed.), London: Routledge, 2015), 87–99.

<sup>264</sup> Martha Nussbaum, 'Objectification'.

<sup>265</sup> *Ibid.*, p. 251.

<sup>266</sup> Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self*; Suze G. Berkhout, 'Buns in the oven: Objectification, surrogacy, and women's autonomy', *Social Theory and Practice* 34 (1) (2008), 95-117.

<sup>267</sup> See for example, Amrita Pande, 'Commercial surrogacy in India'.



While many surrogacy contracts are phrased and implemented in ways that the humanity of the surrogate is undermined (as we saw in Chapter One), it is not inherent to the surrogacy contract to objectify those working as surrogates. My model of unilateral surrogacy contracts is compatible with the idea that the interests of those working as surrogates can be taken on board when drafting and implementing the terms of the contract. Likewise, it is compatible with the respect of the surrogates' reproductive autonomy: the surrogate is free to not comply with the terms of the reward without making her liable for damages. My model of unilateral surrogacy contracts not only can avoid the objectification objection, but also helps to overcoming it: it protects those working as surrogates and grants them more freedom of action than the surrogacy contracts framed under the consumer contract model.

#### **4.6 Alienation objection**

I will now turn to the alienation objection. In Chapter Two, I defined 'alienation' as something that involves, in some way or another, the capacity to be transferred from one party to another. . Philosophers and sociologists often claim that surrogates treat their reproductive capacities as disposable property. In the eyes of critics, reproductive capacities are normatively inalienable because they are connected with important attributes of the person,<sup>268</sup> so their prospects for a minimally decent life would be destroyed as a result of their participation in the surrogacy contract.

Although this might be true in some instances, we cannot say it is true in all cases. For example, Elly Teman's ethnographic studies on commercial surrogacy in Israel reveal that some surrogates see surrogacy as a form of self-definition, self-recognition, and self-worth.<sup>269</sup> She asserts that while for some surrogates, surrogacy can be a devastating experience, other surrogates describe their surrogacy experience in terms of empowerment.<sup>270</sup>

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<sup>268</sup> For example, Margaret Radin states that some goods and services are integral to the self, they are so important for our 'personhood' and human flourishing that to understand them as monetizable and completely detachable from the self 'is to do violence to our deepest understanding of what it is to be human' (Margaret Radin, 'Market-Inalienability', p. 1906).

<sup>269</sup> Elly Teman, *Birthing a Mother*, p. 270.

<sup>270</sup> *Ibid.*, p. 271.

Unilateral surrogacy contracts would have the benefit that they would increase the bargaining power of those working as surrogates. Therefore, surrogates would have the opportunity to perform the terms of the contract according to their own conception of the good with no disincentives that potentially could destroy their prospects of a minimally decent life.

#### 4.7 Undue inducement

The third problem is related to exploitation worries. The problem of undue inducement suggests that the offer of money might be so attractive that it could seduce some prospective surrogates to accept it against their better judgement. The offer might influence some prospective surrogates in such a way that either renders their consent involuntary or renders them insufficiently competent to give valid consent.<sup>271</sup> Allowing those who have not given their valid consent to participate in surrogacy contracts would be a terrible moral wrong. Therefore, undue inducement must be avoided.<sup>272</sup>

In the context of paid surrogacy, the problem of undue inducement is not that offers become undue inducements because there is some fixed value at which no prospective surrogates could refuse. The fact that some prospective surrogates might be unduly induced does not imply that the same offer is an undue inducement for *all* prospective surrogates. Even though participating in paid surrogacy contracts is not in the interests of some prospective surrogates (for example, those who engage in so-called altruistic surrogacy), it may be in the interests of some prospective surrogates to accept the monetary offer. Furthermore, the monetary offer may not cloud the judgement of some other prospective surrogates who engage in paid surrogacy. Rather, the problem of undue inducement, as Ruth Macklin puts it, is that 'the greater the monetary payment, the more potential subjects are unduly influenced to participate'.<sup>273</sup>

The worry of undue inducement in surrogacy contracts (in general) has provoked the following response for some scholars and public policy makers: to restrict the size of the

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<sup>271</sup> Eric Lee. 'Our flawed approach to undue inducement in medical research'. *Bioethics* 11 (1) (1997), p. 13.

<sup>272</sup> Ibid.

<sup>273</sup> Ruth Macklin, 'The Paradoxical Case of Payment as Benefit to Research Subjects', *IRB: Ethics & Human Research* 11 (1989), p. 1.

offer so that payment must not be so large as to induce prospective surrogates to consent to enter into surrogacy contracts against their better judgement. This solution bans excessively alluring inducements; it does not ban all monetary offers to engage into surrogacy contracts. It may be permissible to compensate surrogates for their time, effort, and inconvenience. 'The problem of undue inducement is not that offering any amount of money is wrong. Rather, the problem is that offering too much money is wrong'.<sup>274</sup>

However, this solution is flawed. I consider briefly three reasons that weigh against this solution.

First, non-monetary benefits can also be unduly inducing. For example, some surrogates may not receive any monetary payment and yet may be unduly induced by emotional incentives. Most of the academic discussion of undue inducement focuses on monetary inducements, but there are other types of incentives that unduly induce.<sup>275</sup> For instance, in the context of so-called altruistic surrogacy the potential emotional benefit of helping someone in need can be an undue inducement for some prospective surrogates to help their friends or family members at the expense of their own welfare.

Second, the size of the offer is relative to the valuations of the recipient of the offer. An offer of £100,000,000 may be alluring to a point that it impairs my better judgement while the same offer might not affect the judgement of Bill Gates.

Third, an offer to help someone in need with whom I have a personal relationship, such as my sister or my best friend, may be alluring to a point that it impairs my judgement while an offer to help someone in need with whom I do not have a personal relationship, such as a stranger, may be not independently of the amount of money they offer.

In the context of surrogacy contracts, we cannot say that there is a standard threshold above which the offer counts as seductive indefinitely and below which the offer counts as fair compensation for the task performed. Whether the offer is unduly inducing is context-related.

These considerations apply to all surrogacy contracts in general. However, my model of unilateral surrogacy contracts might be particularly vulnerable to the problem of undue inducement. Some intended parents who make seductive money offers may take unfair advantage of pre-existing defects or structural injustice and target prospective surrogates

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<sup>274</sup> Eric Lee, 'Our flawed approach to undue inducement in medical research', p. 14.

<sup>275</sup> Ibid.

who are already in a vulnerable position. As a result, the surrogates who accept the offer would be in a position where they will have less bargaining power than the intended parents due to pre-existing defects in the transaction. For example, when designing the terms and conditions of the contract, already vulnerable surrogates would be more likely to accept potentially unfavourable terms and conditions, in such a way that the unilateral surrogacy contract would place them in a position where they either adhere to the demands of the prospective parents or risk losing the reward or a substantial part of the reward.

The problem of undue inducement is not that monetary inducements themselves are unacceptable.<sup>276</sup> The problem is that monetary inducements can become so attractive that they distort judgement, especially of those who are already in a vulnerable position. Some prospective surrogates would accept the monetary offer even if they know that surrogacy is a life-threatening task and their prospects of a minimally decent life might be at stake because they are in a position of vulnerability, created by structural injustice. For example, because some prospective surrogates have few earning options and surrogacy is a better option for them than other earning options available to them, they prefer to transact rather than not to transact.

While my model of unilateral surrogacy contracts might be vulnerable to this objection, unilateral surrogacy contracts are compatible with the integration of specific strategies that may increase the bargaining power of prospective surrogates who already are in a vulnerable position. First, my model is compatible with the integration of prevention strategies such as screening and licensing procedures to ensure that the selected surrogates are well equipped (physically and psychologically) to undertake the task, so the risks that their prospects of a minimally decent life could be destroyed as a result of engaging into unilateral surrogacy contracts may be mitigated (or eradicated, when possible). In addition, unilateral surrogacy contracts are compatible with the integration of *special responsibilities* of intended parents, which may mitigate or eliminate (when possible) the risks of harm to surrogates. Moreover, my model of unilateral surrogacy contracts is compatible with the view that the terms and conditions of the contract must meet standard conditions of validity. For example, both parties should be equally informed about the potential risks and potential harms involved in the surrogacy. Likewise, it should be prohibited that the

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<sup>276</sup> Ibid., p.15.

contract stipulates an offer of money in exchange for the surrogate to undertake tasks that would destroy her prospects of a minimally decent life. For example, it should be prohibited that the intended parents increase the reward if the surrogate has an abortion.

Furthermore, my model of surrogacy contracts is subject to state regulation that fixes minimal and maximum amounts, and which enforces particular terms and conditions, in order to make unfair bargaining positions less problematic.

#### **4.8 Conclusion**

In this chapter, I have outlined my model of unilateral surrogacy contracts. I have argued that unilateral contracts are a useful framework to govern certain types of voluntary agreements, including surrogacy arrangements. I have shown that my model can deal with three objections that are frequently raised against surrogacy: the objectification objection, the alienation objection, and undue inducement. Furthermore, I have argued that unilateral surrogacy contracts can strike a fair balance between the rights and obligations of the parties and produce fair outcomes.

As we may see now, my model of unilateral surrogacy contracts can better protect the reproductive autonomy of those working as surrogates than the consumer contract framework. However, it is important to note that there might be alternative models of contracts that could also better protect the reproductive autonomy of surrogates. However, since no thesis of a reasonable length could hope to provide a satisfactory analysis of these potential models, I have limited my focus to consider and defend the unilateral contract model.

## CHAPTER FIVE

### The Bipartite Approach to Surrogacy Arrangements

We have now completed the main argument of the thesis. We have seen that there are good autonomy-based reasons (a) to use contracts to regulate surrogacy arrangements, and (b) to model surrogacy contracts on unilateral contracts rather than consumer contracts (or employment contracts). We have also seen some of the details about how surrogacy arrangements would work as unilateral contracts. As I have argued, it is profitable to adopt a bipartite approach in dealing with surrogacy arrangements, separating the issues to do with gestation from the issues to do with parental rights. However, in this chapter I would like to conclude the thesis by considering a further question, to wit: on what grounds intended parents acquire parental rights over the resulting child? Responding to this question will allow me to explore the broader normative basis of the position that I have been defending in the thesis: that it is plausible to separate, both morally and conceptually, surrogacy contracts from parenting.

In this chapter, I argue that it is plausible to consider intended parents as procreators. Therefore, whether legal and moral parental rights are assigned to intended parents will not be as a result of the contract, but rather as consequence of their presumptive right to parent the resultant child. I suggest that a promising candidate to ground the intended parents' presumptive parental rights is the *ownership account*. The ownership account suggests that, assuming that intended parents have legitimately acquired the reproductive gametes or the embryo from which the child develops, they stand in a privileged right position with respect to the resultant child.

Before I begin, two caveats need to be introduced. First, this chapter does not attempt to provide a comprehensive defense of the ownership account, nor to substantiate the claim that we have ownership-like rights (or something closely resembling ownership rights) over our reproductive gametes or embryos, but rather to show that the ownership account is a promising candidate to ground the intended parents' presumptive right to parent the surrogacy child. A full exploration of the ownership account is beyond the scope of this thesis, though I hope to show its potential in explaining why intended parents have a presumptive right to parent the child that developed from their reproductive gametes or

embryo, assuming that they meet a minimum threshold of parental competency. This explanation depends on a number of debatable assumptions about whether ownership rights resemble parenting, and so is presented rather cautiously, though if coherent, it has significant advantages over alternative accounts of what grounds parental rights in the context of surrogacy.

The second caveat is that this chapter does not deal with issues related to the adjudicatory power of the ownership account. The ownership account provides a sufficient basis for the acquisition of parental rights, but it may not suffice to explain why intended parents should be assigned *exclusive* parental rights. I will argue that intended parents can count as procreators. Therefore, they have a presumptive right to parent the surrogacy child. However, more argumentation is needed to show that intended parents do not share this right with surrogates. As I will consider later, someone could argue that surrogates have a presumptive right to parent the resultant child, perhaps based on gestation. For the sake of the argument, I will assume that the ownership account is compatible with a pluralistic view of parental rights.

Understanding the intended parents as procreators has the benefit that it can explain why the intended parents have parental rights and parental obligations with respect to the child that results from surrogacy. This understanding can better protect the interests of the resulting children and the reproductive autonomy of surrogates than alternative accounts: if the intended parents change their mind and refuse to take the child, this will not nullify their parental obligations regarding the child they took part in creating. Therefore, even if they do not end up rearing the child, they would have an obligation to support the child financially.<sup>277</sup>

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<sup>277</sup> In the existing literature about the morality of parenthood, many theorists assume that the kinds of considerations that serve to ground parental rights are the same kinds of considerations that serve to ground parental obligations (see for example, Tim Bayne and Avery Kolers, 'Toward a Pluralistic Account of Parenthood', *Bioethics*, 17(3) (2003), 221-242). However, this view has been strongly criticised (See for example, David Archard, 'The Obligations and Responsibilities of Parenthood' in David Archard and David Benatar (eds.), *Procreation and Parenthood: The Ethics of Bearing and Rearing Children* (Oxford: Oxford University Press, 2010)). One counterexample is the case of an abusive parent who may forfeit their right to make important decisions on behalf of their child but retain an obligation to provide financial support to their child. It should be noted, however, there are not parallel cases in which someone can lose parental obligations and retain parental rights. My case for the intended parents' presumptive right to parent the surrogacy child assumes that while it is possible for them to lose parental rights, but retain certain parental obligations, they cannot lose parental obligations, but retain parental rights. Hence, the parental rights of intended parents are always accompanied by parental obligations, even if the latter can sometimes be maintained independently.

My argument proceeds as follows: the first section explores two dominant accounts available in the contemporary literature of the right of adults to parent a particular child that may shed light on what is the basis of the intended parents' presumptive right to parent the resultant child –the *genetic* account, and the *intentional* (or voluntarist) account. According to the genetic account, parents have a right to parent a particular child on the basis of their genetic contribution to the formation of the child.<sup>278</sup> This account is often supported by claims about the importance of the genetic material from which the child develops. According to the intentional account, parents have a presumptive right to parent a particular child in light of the parental intentions they have formed with respect to the future child.<sup>279</sup> This account is frequently supported by claims about the series of actions and decisions in which intended parents embark to achieve their childrearing projects. The genetic account and the intentional account are not mutually exclusive. Moreover, they overlap in some instances. However, treating them as two separate accounts will help to highlight what is needed for a promising account of the basis of the intended parents' presumptive right to parent the resultant child that can be compatible with paradigmatic cases of procreation. Although suggestive, however, I argue that these two accounts are limited to substantiating the intended parents' presumptive right to parent the resultant child. In the second section, I introduce the *ownership* account. I argue that a more cohesive and integrated account of the intended parents' right to parent the resultant child may be grounded on ownership-like rights over the reproductive gametes or embryo from which the child develops. In section three, I show that the ownership account is capable of avoiding two standard objections raised against the proprietary view of parental rights: one that claims that it has unacceptable normative implications, and the other that claims that it is conceptually incoherent. Having explained the plausibility of the ownership account as the basis of the intended parents' presumptive right to parent the resultant child, I shift

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<sup>278</sup> Some authors that support this view are Barbara Hall, 'The Origin of Parental rights', *Public Affairs Quarterly*, 13 (1) (1999), 73-82; and Norvin Richards, *The Ethics of Parenthood* (Oxford: Oxford University Press, 2010).

<sup>279</sup> Some authors that support this view are John Lawrence Hill, 'The Case for Enforcement of the Surrogate Contract'; Phillip J. Parker, 'Surrogate motherhood: The interaction of litigation, legislation and psychiatry', *International Journal of Law and Psychiatry* (1982), 341-354; Marjorie M. Shultz 'Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality', *Wisconsin Law Review* (1990), 297-398; and Andrea Stumpf 'Redefining Mother: A Legal Matrix for New Reproductive Technologies', *The Yale Law Journal* (1986), 187-208.



in section four to outline three implications for the bipartite approach. Finally, in section five, I conclude.

### **5.1 Two candidate accounts for the intended parents' presumptive parental rights**

The existing philosophical literature on what grounds the moral right to parent a particular child often distinguishes between three general views: genetic; intentional (also called voluntarist account); and labour-based (also called investment account) accounts.

Traditionally, the genetic account and the intentional account have been used by scholars and legal theorists to substantiate the view that intended parents have a presumptive right to parent the resultant child. In contrast, the labour-based account has been used to support the claim that it is the surrogate who has a presumptive right to parent the resultant child, and not the intended parents.<sup>280</sup> The labour-based account<sup>281</sup> asserts that 'people who play or have played a parental role in a child's life thereby become parents'.<sup>282</sup> In the existing literature, the labour-based account has been used to support the claim that it is the gestator who has the primary claim to parental rights and responsibilities toward a particular child in virtue of 'the significance of the relationship that is established between her and the child during the process of gestation'.<sup>283</sup>

However, it has been argued that this line of argument can be expanded to include intended parents because they can participate in many of the relationship-building activities that women often undertake during the course of their pregnancies, at least in some contexts. For example, in open surrogacy arrangements, it is common that intended parents accompany the surrogate to the ultrasound scans and witness the development of the foetus. Some intended parents form an emotional attachment to the foetus, in the same fashion that non-gestating parents can form emotional bonds with the foetus their partner is carrying.

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<sup>280</sup> See for example, Anca Gheaus, 'The Right to Parent One's Biological Baby'.

<sup>281</sup> Some supporters of the labour-based account are Joseph Millum 'How Do We Acquire Parental Rights?', *Social Theory and Practice*, 36 (1) (2010), 71-93; and Anca Gheaus, 'The Right to Parent One's Biological Baby'.

<sup>282</sup> Elizabeth Brake and Joseph Millum, 'Parenthood and Procreation'. In Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2018).

<sup>283</sup> Anca Gheaus, 'The Right to Parent One's Biological Baby', p. 450.

However, using the labour-based account to ground the intended parents' parental rights would be problematic. First, the intended parents' right to parent the resultant child would be derived on the grounds of mere closeness to the surrogate qua gestator. So, we could not say that intended parents have a *prima facie* right to parent the resultant child, but rather their right is derived from the surrogate's. Second, it would rule out cases where intended parents do not participate in the relationship-building activities that pregnant women often undertake. For instance, in contexts where the intended parents and the surrogate live geographically apart or in contexts where the surrogate's privacy rights limit the access of intended parents to the pregnancy.

In what follows, I do not consider the labour-based account as a plausible candidate to ground the claim that intended parents can acquire parental rights over the resulting child. It should be noted, however, that I do not reject the labour-based account as a plausible candidate to ground the right to parent a particular child in ordinary cases of procreation or even in the context of surrogacy. It might be true that the labour-based account may ground the surrogate's presumptive right to parent the resultant child. However, I remain agnostic about the question of whether a child can have more than two moral parents.

Having said this, I will proceed in the following two subsections to address the genetic account and the intentional (or voluntarist) account respectively. I will argue that while these accounts have relevant features that can help explain why intended parents might have presumptive parental rights over the resultant child, they are **only** partially successful in explaining why intended parents can count as procreators.

### **5.1.1 The genetic account**

Consider the following case:

*Baby Switching:* In 2015, Mercedes Casanellas and Richard Cushworth had a baby in a hospital in El Salvador (Casanellas' home country). Shortly after birth, they took baby Jacob with them to their home in Texas. A few months later, they began to notice that baby Jacob did not look like either of them and suspected a possible 'baby swap'. After taking a DNA test, they discovered that the baby they had been

caring and bonding with for the past four months was not genetically related to them. They immediately contacted the hospital and located the couple who had been caring for their genetically-related baby. Afterwards, both babies were quickly returned to their genetically-related parents.<sup>284</sup>

Many people would be shocked if a hospital made such an error, but they would be relieved if the fault were quickly corrected.. What is noticeable is the generalised belief that such case actually requires solution. That is, after taking care of a baby for a number of months, establishing sentimental bonds with it but finding out they are not genetically related, babies should be switched and that the genetically-related parents are the *legitimate* parents. But why bother returning the babies? Each parent had a healthy baby boy, and so far they seem to get along well. Would we share the same intuitions if the two embryos were mixed up and implanted into genetically different parents than those who intended to bring them into existence? Why should the parents, or anyone, care about the presence or absence of mere genetic connectedness?

We might agree that a terrible wrong was done to Casanellas and Cushworth when their biological child was given to another couple without their consent. When biological parenthood has been neither waived nor forfeited by being clearly incompetent or by abusing, neglecting, or abandoning their child, many people believe that biological parents have a presumptive right to parent their children. The same type of reasoning seems to apply to cases where prospective parents who resort to in vitro fertilization (IVF) but whose embryo is accidentally transferred to another woman's uterus instead of their own (I will return to this point in point 5.1.2). If the 'embryo switch' is discovered before birth, it seems plausible that many couples would want to switch their babies back after birth. While some people claim that it would be terribly wrong to take away the babies from their gestators when they have formed an emotional bond during the pregnancy (regardless of genetic connectedness),<sup>285</sup> we can agree that there is something significant about genetic connectedness that should not be overlooked. Nevertheless, why does genetic connectedness may ground Casanellas and Cushworth's presumptive right to parent their biological child?

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<sup>284</sup>< <https://www.bbc.co.uk/news/uk-36432343>>

<sup>285</sup> Anca Gheaus, 'The Right to Parent One's Biological Baby', p. 452.

One might argue that procreators have a presumptive right to parent their biological children because they are their own ‘flesh and blood’.<sup>286</sup> Procreators have a right to raise their biological children because they created those children out of their own bodies.<sup>287</sup> ‘Every cell of the child’s body contains a unique genetic endowment derived from its progenitors that determines many of its characteristics and affects most others’.<sup>288</sup>

This argument may be derived from a more general right to bodily self-ownership.<sup>289</sup> However, this line of argument has been proved controversial,<sup>290</sup> mainly because it is thought to implicate a proprietary view of parental rights.<sup>291</sup>

The significance of direct genetic derivation may also stem from other rights that are less contentious. For example, as Erik Magnusson asserts, ‘insofar as the right to procreative autonomy includes both a right to procreate and a right not to procreate, the right to control the use of one’s reproductive gametes can be plausibly derived from the right to procreative autonomy’.<sup>292</sup> (I will elaborate on this point in section 5.2 below). However, although suggestive, the genetic account faces two limitations.

The first problem is that it would rule out cases where the intended parents have no genetic connection to the child. Technological advances have made it possible for a child created through surrogacy to have more than two prospective parents. Consider the following scenario of a five-person surrogacy arrangement involving two persons who intended to rear a particular child (the intended parents), two gamete donors, and a woman who will gestate the foetus (the surrogate).<sup>293</sup> To complicate matters further, we can imagine that the nucleus of a second donor egg is inserted into the cytoplasm of a recipient egg (the first donor egg) from which the nucleus has been removed (perhaps, due to

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<sup>286</sup> Norvin Richards, *The Ethics of Parenthood*, p.20.

<sup>287</sup> *Ibid.*, p. 20.

<sup>288</sup> Stephen G. Gilles, ‘On Educating Children: A Paternalist Manifesto’. *University of Chicago Law Review* 63 (3) (1996) p. 961.

<sup>289</sup> For example, Barbara Hall uses the Lockean notion of self-ownership to defend geneticism. She argues that because biological parents own the genetic material from which the child develops, they have a *prima facie* right to parent the child (Barbara Hall, ‘The origins of parental rights’). For a critique of this argument see Avery Kolers and T. Bayne, ‘“Are You My Mommy?” On the Genetic Basis of Parenthood’, *Journal of Applied Philosophy*, 18 (3) (2001), 273-285.

<sup>290</sup> For an interesting critique to the ownership account see Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

<sup>291</sup> I will come back to this point in section 5.2 and argue that the ownership account can avoid this implication.

<sup>292</sup> Erik Magnusson, ‘Can Gestation Ground Parental Rights?’, *Social Theory and Practice* 46 (1) (2020), p. 131 n.46.

<sup>293</sup> John Lawrence Hill, ‘The Case for Enforcement of the Surrogate Contract’, p. 415.

mitochondrial abnormalities), hence forming a hybrid egg which is then fertilized with the donor sperm, thereby adding an extra genetic contributor to the formation of the resultant child. If direct genetic derivation *per se* is what grounds parental rights, therefore, cases like the above suggest that gamete donors would have a presumptive right to parent the resultant child. However, if the genetic account is derived from the right to procreative autonomy, then we cannot say that gamete donors count as procreators because they forfeited their presumptive right to parent the child who resulted from their donated gametes. Therefore, in cases like the above, the resultant child would be orphaned.

The second problem of the genetic account is that it does not apply in cases where the intended parents partly provide the genetic material from which the child develops. To illustrate this problem, consider the following case:

*Traditional Surrogacy:* In 1988, William and Elizabeth Stern contracted Mary Beth Whitehead to act as the surrogate of their child. Whitehead became pregnant through artificial insemination with William Stern's sperm and months later she gave birth to 'Baby-M'. When the baby was born, Whitehead refused to transfer the child to the Sterns on the basis that she was Baby M's birth mother. After a long and exhausting custody trial, the Supreme Court of New Jersey declared the contract null and void and granted parental rights to Baby M's biological related parents, that is to Mary Beth Whitehead and William Stern. No legal parental rights were assigned to Elizabeth Stern, the intended mother.<sup>294</sup>

The idea that direct genetic derivation grounds the presumptive right to parent a particular child might be well-suited to accommodate cases where the reproductive gametes from which the child grows are all provided by the intended parents (that is, instances of so-called *gestational surrogacy*). However, the genetic account is ill-equipped to accommodate cases such as the *Traditional surrogacy* case above, where part of the reproductive gametes is not provided by one of the intended parents but by someone else, such as the surrogate or gamete donors. It seems unfair in assigning unequal moral parental rights to parties who have equal decision-making power over whether or not a child is

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<sup>294</sup><<http://www.kylewood.com/familylaw/babym.htm>>

brought into existence. While William Stern contributed with the genetic material from which Baby M grew and Elizabeth Stern did not, it was their joint childrearing project the reason why William Stern used his sperm in that particular way.

The view that the genetic account can be supplemented by the right to procreative autonomy (that is, the right to reproduce and the right not to reproduce) will not suffice to explain cases such as the *Traditional surrogacy* case. The right to procreative autonomy can explain why William Stern acquired parental rights in virtue of the particular use he gave to his sperm from which Baby M partly developed. However, the right to procreative autonomy cannot explain why Elizabeth Stern should have a presumptive right to parent Baby M.

Furthermore, we could say that the right to procreative autonomy in the context of the genetic account may produce counterintuitive implications. William Stern used his sperm with the specific purpose to jointly parent the resultant child with his wife, Elizabeth Stern. The fact that the Sterns jointly decided to parent the child who develops from William's sperm places them in a symmetric position of decision-making power over the specific use of William's sperm. Therefore, denying the Sterns equal moral rights to parent Baby M would be unfair to Elizabeth and William Stern. It would be unfair to Elizabeth because it will deny her the opportunity to pursue her specific conception of the good by parenting Baby M. It would be unfair to William because it will undermine his reproductive freedom.

A plausible account of the intended parents' presumptive right to parent a particular child should be capable of accommodating *all* instances of surrogacy for two reasons. First, a comprehensive account of the intended parents' parental rights will provide great explanatory unity to the question of *why* intended parents count as parents of the resultant child. The second reason is that an account that covers *all* instances of surrogacy (including that in which the intended parents do not provide the genetic material from which the child results or partly provide those materials), will be consistent with considerations of fairness. It will avoid the implication of assigning unequal moral parental rights to parties who have equal decision-making power over whether or not a child is brought into existence. Therefore, a plausible account of intended parents' presumptive right to parent the resultant child must explain why intended parents have a presumptive right to parent a

particular child in any case in which all the relevant moral aspects are present that ground such a right for an adult who meets a minimum threshold of parental competency.

The genetic account seems to be getting at something important in its insistence that direct genetic derivation is morally significant for the right to parent a particular child. However, as I have shown, mere genetic links are neither necessary nor sufficient to account for the intended parent's presumptive right to parent a particular child. A compelling account for the intended parents' presumptive parental rights needs to be capable of accommodating cases such as the *Baby Switch* case and cases where the intended parents lack a genetic tie with the child, such as the *Traditional Surrogacy* case.

### **5.1.2 The intentional (or voluntaristic) account**

I will now turn to the intentional account. Surrogacy arrangements establish that a woman becomes pregnant with the *intention* and *on the condition* to hand over the resultant child to the individual or couple who commissioned the pregnancy. Therefore, it is implicit that intention-formation has moral significance for the acquisition of parental rights in the surrogacy context. If intended parents have the intention to parent the resultant child and the surrogate does not have the same intention, the intentional account establishes that intended parents are in a better-justified position to parent the resultant child.

The intentional account can be reflected in paradigmatic cases of procreation, where two consenting adults combine their reproductive gametes and reproductive labour intentionally and consciously to achieve their childrearing projects. Paradigm procreators engage in a series of actions and decisions that reflect their commitment to that project and harden their position as moral parents of the future child. The intended parents' intention-formation is similar to the intention-formation of paradigm procreators in the sense that intended parents, like paradigm procreators, embark in a project which includes planning, projection, expectation, and other preparations necessary in anticipation of a particular child. Intended parents prepare themselves financially, emotionally and psychologically for the arrival of the child. They rely on the initial promise of the surrogate to gestate a child for them to parent by furnishing a room, buying clothes and accessories, and making other

preparations, which reflect their strong interest in parent the resultant child.<sup>295</sup> Like paradigmatic cases of procreation, the intended parents' intentions and initial actions, which have brought a particular child into being, can explain why they, and not others, have the exclusive right to parent the resultant child.<sup>296</sup>

The process of intention-formation morally relevant regardless of genetic connectedness per se. In paradigmatic cases of procreation, individuals who form parental intentions with respect to the child who grows from those gametes are assumed to stand in a privileged right position to parent that particular child. 'They, and not others, have engaged in a process of intention-formation with respect to the child they have created, so they, and not others, should have a presumptive right to carry out those intentions by parenting the child upon birth'<sup>297</sup>. The intentional account has the advantage that it is consistent with paradigmatic cases of reproduction and it would rule out gamete donors.

The intentional account seems a plausible account to substantiate the intended parents' presumptive right to parent the resultant child: it seems to have the resources needed to resolve cases where the reproductive gametes are not provided by one of the intended parents, such as the *Traditional Surrogacy* case above. According to the intentional account and using the example cited above, Elizabeth and William Stern would be equally qualified to have the presumptive right to parent Baby M in virtue of their intention-formation. Likewise, the intentional account seems to have the resources needed to explain why the multiple parties who causally contributed to the creation of a particular child, such as the gamete donors, the embryologist who inseminates the ovum, the clinician who performs the embryo transfer, the obstetrician who administers the pregnancy lack a right to parent the resultant child, the surrogate who gestated the child, and the surrogacy firm (if any) who brought together the intended parents with the willing surrogate do not have a presumptive right to parent the child. As J. L. Hill puts it, the involvement of those who have assisted bringing that particular child into existence is *secondary* to that of the intended parents:<sup>298</sup> if the intended parents had not had the intention to bring that particular child into being, that multitude of people would have not contributed in creating that particular

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<sup>295</sup> See John Lawrence Hill, 'The Case for Enforcement of the Surrogate Contract', p.157.

<sup>296</sup> See *Ibid.*, p.157.

<sup>297</sup> Erik Magnusson, 'Can Gestation Ground Parental Rights?', p. 131.

<sup>298</sup> *Ibid.*, p. 157.



child. Hence, the intentional account can explain why in cases like the five-person surrogacy arrangement the intended parents have a presumptive right to parent the resultant child.

The following case illustrates the explanatory power of the intentional account:

*Embryo mix-up*: In August 2018, Anni Manukyan had an embryo transfer in a fertility clinic in Los Angeles, but the pregnancy was not successful. Eight months later, Anni and her husband learned that the fertility clinic accidentally mixed up their embryo and a woman in New York had given birth to two male babies, one of whom was genetically related to them and the other to an Asian couple.<sup>299</sup>

Can the intentional account explain whether the Manukyans have parental rights with respect to their genetically-related baby? The intentional account is compatible with the attractive features of the genetic account in the sense that it can incorporate the moral significance of direct genetic derivation to substantiate the intended parents' right to parent the resultant child when they provide the genetic material, but without the implication that non-genetically-related intended parents would lack this right (as in the *Traditional Surrogacy* case). It was the Manukyans' intentions and initial actions that made possible the existence of the child who grew from their embryo. Had the Manukyans not combined their reproductive gametes to create an embryo, that particular child would have never existed. Of course, the woman in New York contributed with her reproductive labour to the creation of that particular child, but her contribution would not have occurred had it not been as a consequence of the intention-formation of the Manukyans *and* the actions of the clinic of fertility. Had the fertility clinic not (accidentally) mixed-up the embryos, the woman in New York would not have given birth to those particular children. In this case, we could say that the woman in New York acted (by accident) as a surrogate for the Manukyans.

Although suggestive, however, the intentional account faces three problems that ultimately bring into question its tenability to ground the intended parents' presumptive right to parent the resultant child. The first problem is a general problem to the intentional account as the basis for parental rights: it fails to set a clear distinction between legitimate

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<sup>299</sup> <<https://www.theatlantic.com/science/archive/2019/07/ivf-embryo-mix-up-parenthood/593725/>>

and illegitimate means of procreation. The second problem is that it is overly inclusive; it would imply that non-progenitors have a presumptive right to parent a particular child (for example, adoptive parents or stepparents). The third problem is that it is not explanatorily strong enough to accommodate the resultant child's interests. I will now discuss these problems.

The first problem is that intention-formation per se seems to be vulnerable to a specific type of objection that highlights some of the limits of the intentional account (in general). To illustrate this potential problem, consider the following case.

*Embryo Creator:* Unhinged Guy has long desired to create a child using the unique genetic combination of Famous Rock Star and Famous Philosopher. When Unhinged Guy learns that Famous Rock Star and Famous Philosopher have frozen their reproductive gametes and stored them in the same gamete storage facility for future use, Unhinged Guy sees the opportunity to steal the gametes in order to fulfil his procreative project. After breaking into the gamete storage facility and stealing the gametes, Unhinged Guy combines the gametes *in-vitro* and has his partner gestate the resulting embryo.

If intention-formation in and of itself is what grounds parental rights, then it seems plausible that Unhinged Guy may acquire the right to parent the resultant child. However, this conclusion seems intuitively wrong. We might agree that Unhinged Guy's presumptive parental rights are illegitimate, but why? It was his intention and his initial actions what brought that particular child into being. One might object by pointing out that Unhinged Guy's intention-formation was *contingent* on the initial actions and intention-formation of Famous Rock Star and Famous Philosopher: had Famous Rock Star and Famous Philosopher not frozen and stored their gametes for future use, Unhinged Guy would not have stolen them and used them to create an embryo out of that unique genetic combination. However, this objection seems inadequate because it would imply that Famous Rock Star and Famous Philosopher have rights over a project they have not yet initiated. Famous Rock Star and Famous Philosopher might not have the intention to combine their reproductive gametes and create a child out of that unique genetic combination, or it could be plausible that they

chose never use their gametes to produce children for them to parent, but rather they might destroy their gametes or donate them to a friend. Freezing and storing one's reproductive gametes in a storage facility may be an expression of one's reproductive freedom, which includes the right to reproduce or the right not to reproduce, but it does not tell us whether Famous Rock Star and Famous Philosopher have formed a procreative project, which most likely is not the case.

To appreciate the difference between reproductive freedom and intention-formation as the ground of the acquisition of parental rights, compare the *Embryo Creator* case against the *Embryo mix-up* case. In the latter, the Manukyans have formed the intention to create a particular child out of their embryo before the embryo was accidentally implanted in the uterus of the woman in New York. Therefore, the Manukyans' intention-formation would ground their moral rights to parent the resultant child. In contrast, we cannot say that, in the *Embryo Creator* case, Famous Rock Star and Famous Philosopher have formed the intention to create a particular child out of their unique genetic combination before Unhinged Guy stole their reproductive gametes. Therefore, we can say Unhinged Guy has violated the reproductive freedom of Famous Rock Star and Famous Philosopher, but we cannot say that he has interfered with their procreative projects.

The *Embryo Creator* case shows that intention-formation per se is not enough to ground parental rights (in general), but rather a caveat is needed. It seems intuitively correct that in pursuing one's personal projects one has a general right to continue these projects as long as we violated no rights in beginning them and violate none in continuing.<sup>300</sup> In the *Embryo Creator* case, Unhinged Guy violated Famous Rock Star and Famous Philosopher's rights because he infringed their future projects by stealing the reproductive gametes they otherwise could have used as they see fit. This caveat suggests that Famous Rock Star and Famous Philosopher have a right not to have their future projects interfered with when exercising this right (whatever these projects could be). Nevertheless, conceiving parental rights as liberty rights does not suffice. This caveat can explain why Famous Rock Star and Famous Philosopher have a right not to be interfered with in their future projects, which may include, but are not limited to procreative projects. However, it does not explain why

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<sup>300</sup> Norvin Richards, *The Ethics of Parenthood*.

Famous Rock Star and Famous Philosopher could be thought of as having a *presumptive* right to parent that particular child.

The intentional account highlights the significance of consent and voluntary acceptance for the right to parent a particular child. However, as we may see now, it does not suffice to rule out illegitimate cases of procreation. Apparently, the genetic account might be better equipped to solve the *Embryo Creator* case: Famous Rock Star and Famous Philosopher have a right not to have their procreative projects interfered with because they have an entitlement to use and control their genetically-related reproductive gametes. Therefore, they would have a right to parent the resultant child in virtue of direct genetic derivation. Nevertheless, as we have already seen, the genetic account is ill-equipped to accommodate all instances of surrogacy arrangements. It seems that a theory of legitimate access or a theory of just acquisition of the reproductive materials from which the resultant child grows is needed to breach the gap between intention-formation and legitimate means of procreation. In the next section, I argue that the ownership account can provide such a theory and, at the same time can integrate the attractive features of the genetic account and the intentional account.

The second problem of the intentional account is that it may be overly inclusive. The intentional account can explain why non-genetically related intended parents have a presumptive right to parent a particular child. In other words, the intentional account can accommodate the *Traditional surrogacy* case and the five-person surrogacy arrangement example. Though, it does so at a cost, for it seems to imply that adoptive parents and stepparents would have a presumptive right to parent a particular child in virtue of their intention-formation. This implication is inconsistent with paradigmatic cases of procreation whereby only procreators can be thought of holding a presumptive right to parent a particular child.

Finally, the third problem is that the intentional account is not explanatorily strong enough to accommodate the resultant child's interests. For instance, when intended parents change their minds and refuse to take the child they had intended to bring into existence, the child would be orphaned.

These three problems show that the intentional account is not adequate to ground the intended parents' presumptive right to parent the resultant child. In the next section, I

argue that the ownership account can avoid the problems that the genetic account and the intentional account face when trying to substantiate the claim that intended parents' have a presumptive right to parent the resultant child.

## **5.2 The ownership account**

The ownership account provides a plausible explanation of why intended parents stand in a privileged right position with respect to the resultant child, and thus provides a plausible basis of the intended parents' presumptive though defeasible right to parent the resultant child. As I mentioned at the beginning of this chapter, the ownership account is compatible with a pluralistic view of how individuals acquire the right to parent a particular child. Therefore, the ownership account does not rule out the possibility that the surrogate can acquire parental rights, perhaps grounded on gestation. At the beginning of the chapter, I mentioned that I will not engage on the discussion about the adjudicatory function of the ownership account in cases where there are multiple conflicting claims over who gets to parent the surrogacy child. The ultimate decision about which right-bearer should be the parent is left to the second part of the bipartite approach, which should not be governed by contract law, but rather by some other branch of the law (presumably, family law).

In this chapter, I do not provide a full defense of the ownership account, but rather I only show its plausibility and that this is sufficient to block the objection to the bipartite view. I argue that the intended parents acquire the right to parent the surrogacy child not as a result of the contract, but rather from some other basis. I defend that the ownership account is a good candidate to ground the intended parents' presumptive right to parent the resultant child.

The ownership account holds that because intended parents have ownership-like rights (or something closely resembling ownership rights) over the reproductive gametes or the embryo from which the child grows, therefore, they have a presumptive right to parent the resultant child. Within these ownership-like rights, individuals may have the right to access to their reproductive gametes or embryos and the right to control what happens to

and with their reproductive gametes or embryos.<sup>301</sup> Assuming that intended parents have legitimately acquired ownership-like rights over the reproductive gametes or the embryo from which the child results, they stand in a privileged right position with respect to the resultant child.

The ownership account relies on the more general concept of self-ownership, which holds that individuals have ownership rights, or something closely resembling ownership rights, over their bodies that entitle them to determine what happens to and with their own bodies, and set limits on what others can justifiably demand on them. If these claims apply to one's bodily services, organs, and tissue, then it would seem consistent that the same personal jurisdiction should extend to one's reproductive gametes as well.

However, the view that we have ownership-like rights over our bodies has been proven controversial.<sup>302</sup> One of the most contentious issues about this view is the concern that individuals have the right to sell their organs or blood, or the right to sell oneself into voluntary slavery. However, this concern is not inherent in the ownership account. The ownership account may explain the transfer of such resources through voluntary donations or it may be compatible with moral constraints on what kinds of resources can be permissibly be transferred to others and which ones cannot.<sup>303</sup> In this chapter, I do not defend the self-ownership account, but rather I only assume it. The self-ownership account is an extensive topic and I cannot hope to provide a satisfactory treatment of it in this thesis.

The ownership account has four considerable advantages over competing accounts of the intended parents' presumptive right to parent the surrogacy child.

First, the ownership account can explain why individuals have an *initial* entitlement to their genetically-related reproductive gametes: because individuals are the sources of

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<sup>301</sup> Property rights are frequently described in academic literature as a 'bundle of rights', which may include, but is not limited to, the right to control, the right to possess, the right to transfer, the right to destroy, the right to derive income, etc. The ownership account may not include all the incidents traditionally associated with property rights. However, for the sake of the argument, it will be sufficient to understand the ownership-like rights over reproductive gametes and embryos as including (but not limited to) the right to access and the right control what happens to and with these resources.

<sup>302</sup> See for example, Anne Phillips, *Our Bodies, Whose Property?*; Michael Sandel, *What Money Can't Buy*; Donna Dickenson, *Property in the Body, Feminist Perspectives*, (Cambridge University Press: 2007); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); and Gerald Allan Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995).

<sup>303</sup> For a defense of this type of argument, see Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Massachusetts: Harvard University Press, 1990), p. 339. I will say more about the limits of ownership rights in point 5.3 below.

those gametes (that is, the gametes come from their own bodies), therefore they have an initial ownership-like rights over those resources. If individuals own their bodies, it seems to follow that the same personal jurisdiction should extend to one's reproductive gametes and its products. Given that individuals own their reproductive gametes, it seems to follow that individuals own, or part-own, the fruit of their property. Therefore, if an individual owns her own body, she must own or part-own the embryo that develops from her reproductive gametes. This reasoning can explain why in the *Embryo mix-up* case, the Manukyans stand in a privileged right position with respect to the child who grew out of the embryo formed out of the combination of *their* reproductive gametes. If the Manukyans have an *initial* entitlement to their reproductive gametes, this entitlement should extend to the embryo formed out of their reproductive gametes.

Second, the ownership account can explain why individuals have a right to transfer their ownership-like rights over their genetically-related reproductive gametes or genetically-related embryos to another individual(s) by means of voluntary transfers, such as donation or sale (assuming these are legitimate means of transfer of those resources), and why the recipient of those rights now stands in a legitimate right position with respect to the reproductive gametes and/or embryos in virtue of the legitimate transfer. The ownership account is consistent with more general principles of property ownership and access: just as you can acquire property rights over my car by means of voluntary commercial exchange, in the *Traditional Surrogacy* case, William and Elizabeth Stern legitimately acquired ownership-like rights over Whitehead's egg (and its products) by means of the voluntary commercial exchange. Conversely, just as I forfeited my property-rights over my car when I sold it to you and I cannot demand you to give me back my car in the future, Whitehead forfeited her ownership-like rights over her egg when she sold it to the Sterns and cannot legitimately demand that the Sterns give her ovum (or its products) back to her in the future.<sup>304</sup> However, it is worth noting that the ownership account doesn't need to be committed to the view that one's rights over *all* body parts (or even one's body) can be transferred. It might be the case that some rights must be inalienable. However, for the sake of the argument, I assume that, under some conditions, it is morally permissible that the rights over one's reproductive material can be alienable.

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<sup>304</sup> My case assumes that at least some reproductive materials can be definitely transferred, not just lent out for use on a temporary basis.

Third, the ownership account can explain why illegitimate means of acquisition, such as theft, non-consensual transfers or illegitimate transactions, nullify the presumptive ownership-like rights of the recipient of these means of acquisition. In the *Embryo Creator* case, Unhinged Guy's presumptive ownership-like rights over the reproductive gametes of Famous Rock Star and Famous Philosopher would be nullified because the means of the acquisition was illegitimate. Therefore, Unhinged Guy has no presumptive right to parent the resultant child because the child was created from gametes to which he had no legitimate access. Similarly, in the *Embryo mix-up* case, the woman in New York has no presumptive right to parent the children who resulted from the embryos she carried because she had no legitimate access to those embryos. The fertility clinic accidentally transferred those embryos to the wrong woman without the permission of the Manukyans and the Asian couple.

Fourth, the ownership account has the benefit that it can integrate mechanisms of compensation or restitution (when possible) to compensate the injured party in the event of wrongdoing. For instance, the ownership account can explain why the fertility clinic owes compensation to the Manukyans and the Asian couple for transferring their embryos to the wrong woman's uterus without their permission. It can also explain why the fertility clinic owes compensation to the woman in New York for implanting in her uterus two embryos that did not belong to her without her consent. Likewise, the ownership account can explain why in the *Embryo Creator* case Unhinged Guy owes compensation to Famous Rock Star and Famous Philosopher for stealing their reproductive gametes and using them in a way that they did not consent to.

The ownership account offers a cohesive and integrated account of why intended parents have a presumptive right to parent the resultant child. First, it is capable of integrating the attractive features of the genetic account and the intentional account. Second, it is consistent with paradigmatic cases of procreation.

The ownership account is capable of accommodating *all* instances of surrogacy: whereas the genetic account can only account for the intended parents' presumptive parental rights in cases where the resultant child is genetically related to them, the ownership account can include non-genetically related intended parents. On the other hand, whereas the intentional account does not suffice to set clear limits between



legitimate and illegitimate means of procreation, the ownership account provides a theory of legitimate means of acquisition that can set those limits.

What is more, the ownership account offers a clear and plausible explanation of why intended parents stand in a privileged right position with respect to the resultant child, which is compatible with paradigmatic cases of procreation. In paradigmatic cases of procreation, it is assumed that individuals who have an initial entitlement to their reproductive gametes or embryos stand in a privileged right position with respect to the children who develop from those resources. In the same vein, the ownership-like rights over the reproductive gametes or embryos of intended parents can explain why they stand in a privileged right position with respect to the child who develops from those resources. This justification contrast with standard cases of adoption, where adoptive parents don't have a pre-existing entitlement over the reproductive gametes from which a particular child develops.

Although suggestive, however, there are a couple of points that require further consideration in order to weight properly the explanatory power of the ownership account.

The first concern is that it is not evident how the presumptive right to parent (in general) is acquired from the ownership-like rights one has over her reproductive gametes or embryos, since parenting is quite different from owning. In order to respond to this concern, a distinction must be introduced: questions about the content of role-based rights and obligations can be separated from questions about their acquisition. For instance, the right of a lawyer to practice law in a given jurisdiction might be derived from a particular qualifying procedure, such as having graduated from a qualified law school and passing the bar examination (in some jurisdictions). However, the particular means by which the lawyer has acquired her license to practice law does not necessarily influence the content of the rights and obligations that are attached to her license to litigate. The cases the lawyer litigates in her capacity as a barrister are not necessarily conditional on her passing a written exam. Similarly, the fact that the right to parent can be acquired through a claim of ownership-like rights over one's reproductive gametes or embryos does not necessarily imply any particular view about the content of the rights or obligations of parents.

The second concern is that the ownership account might not suffice to explain why intended parents have a presumptive right to parent a particular child. It has been

suggested that women's reproductive labour is a legitimate means of the acquisition of parental rights and that it can override the intended parents presumptive right to parent the resultant child.<sup>305</sup> In her *Justice, Gender and the Family*, Susan Moller Okin addresses this issue in the context of self-ownership. She claims that if we think of women as self-owning creatures, then it seems to follow that women have an *initial* ownership-like rights over their eggs (because their bodies are the sources of those gametes) and a *prima facie* right over the product of their reproductive labour, namely the children, which ultimately overrides men's presumptive right to parent those children.<sup>306</sup>

Okin's argument would imply that the presumptive parental rights of Whitehead, the woman in New York, and the partner of Unhinged Guy over the children they gestated and gave birth would nullify the presumptive parental rights of the Sterns, the Manukyans and the Asian couple, and Famous Rock Star and Famous Philosophers, respectively. However, this conclusion seems intuitively incorrect. The ownership account has the resources to avoid this conclusion. As mentioned earlier, the ownership account is consistent with more general principles of property ownership and access: the history of the things is important, how ownership came about. For example, in the *Traditional Surrogacy* case, Whitehead transferred her ownership-like rights over her egg to the Sterns and her access to the foetus formed out of her reproductive gamete was legitimate only in virtue of the contract she signed with the Sterns. Moreover, William Stern did not wave his ownership-like rights over his sperm from which Baby M grew. Therefore, we cannot say that the Sterns' presumptive right to parent Baby M was nullified by Whitehead's reproductive labour. In the *Embryo Creator* case, the partner of Unhinged Guy's had illegitimate access to the embryo because Unhinged Guy created that embryo out of reproductive gametes to which he did not have legitimate access in the first place. Therefore, we cannot say that the partner of Unhinged Guy's reproductive labour nullifies the ownership-like rights of Famous Rock Star and Famous Philosopher over their reproductive gametes. Finally, in the *Embryo mix-up* case, the woman in New York had illegitimate access to the embryos because they were transferred to her uterus by accident and without the permission of the Manukyans and the Asian couple. Therefore, we cannot say that her reproductive labour nullifies their presumptive right to parent their genetically-related children.

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<sup>305</sup> Anca Gheaus, 'The Right to Parent One's Biological Children'.

<sup>306</sup> Susan Moller Okin, *Justice, Gender and the Family*, 74-88.

More argumentation is needed to demonstrate that the intended parents' presumptive right to parent the resultant child can be nullified by the surrogate's gestationally-based rights (if any). Likewise, further argumentation is needed to demonstrate that the ownership account is sufficient to override gestationally-based parental rights, especially when the gestator gestated in good faith. However, giving full consideration to the adjudicatory function of the ownership account is outside the scope of this thesis. From what I mentioned in the previous paragraph, we can conclude that the intended parents' presumptive right to parent the surrogacy child, cannot be nullified by gestational-based rights (if any) in instances of illegitimate acquisition. This would be enough to show that the ownership account has great explanatory power, or it has the ability to account for the intended parents' presumptive right to parent the surrogacy child.

So far, I have argued that the ownership account is successful in explaining why intended parents stand in a privileged right position with respect to the surrogacy child. Assuming that intended parents have legitimately acquired the gametes or embryo from which the child grows (either they already own them or they have acquired them through legitimate transfer), they have a presumptive right to parent the child. Furthermore, I have shown that the ownership account is compatible with paradigmatic cases of procreation and it can better ground the intended parents' presumptive right to parent the resultant child than the genetic account and the intentional account.

### **5.3 Two potential objections**

Despite the advantages of the ownership account outlined in the section above, it rests in the more general concept of self-ownership, and this concept is by no means unproblematic or immune to criticism.<sup>307</sup> The ownership account seems to be vulnerable to two types of criticisms steaming from the concept of self-ownership: one normative and the other conceptual.

On the normative side, the worry is that extending ownership rights entails absolute or near-absolute decision-making power over what is owned. Conceiving children as

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<sup>307</sup> The concept of self-ownership has been accused of being self-contradictory or too indeterminate to serve any useful normative purpose. These and many other central problems to the concept of self-ownership are discussed in Gerald Allan Cohen in *Self-Ownership, Freedom, and Equality*, ch. 9.

property seems inconsistent with recognising their independent moral status.<sup>308</sup> As Okin puts it, parents would have a right to do as they will with their children, such as 'keeping them in cages to amuse them, kill them, eat them, or enslaving them'.<sup>309</sup>

On the conceptual side, the worry is that conceiving children as property conflicts with the very idea of self-ownership that gives rise to the parental right-claim in the first place. If I have an ownership claim over the product of my reproductive gametes, then this must be because I own my reproductive gametes; and if I own my reproductive gametes, then this must be because I own the body that produces them. However, if human beings are self-owning creatures, then having an ownership claim over one's offspring seems paradoxical either because children are human beings, and so are themselves self-owning creatures, or because procreators are someone's children, and so are themselves owned.

However, the ownership account can avoid these two problems. Using a property model for thinking about how parental rights are acquired does not necessarily lead to either of these problems, or at least not directly.

In response to the normative problem, one might point out that it is not always the case that ownership rights entail absolute or near-absolute decision-making powers over what is owned. Rather, there are certain instances in which one's ownership rights can be limited by the moral standing of the things that are owned, as in the case of non-human animals or historically significant artefacts or intrinsically valuable works of art.<sup>310</sup> There are many cases where we own an object, but we lack some of the rights ordinarily associated with ownership. To illustrate this point, consider Judith Jarvis Thomson's example: 'a person who owns a house in a historic district lacks authority over some aspects of the house's appearance, being forbidden from painting it without permission'.<sup>311</sup> A proprietarian view of parental rights is consistent with the inclusion of restrictions on the moral rights that parents have towards their children, such as that parents might not have a right to destroy their children, sell them, or enslaving them. Likewise, it is consistent with the view that ownership might ground obligations. Continuing with Thomson's example, we can say that a person who owns a house in a historic district has the obligation to keep the house in good

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<sup>308</sup>Samantha Brennan and Robert Noggle. 'The Moral Status of Children: Children's Rights, Parent's Rights, and Family Justice', *Social Theory and Practice*, 23 (1) (1997), p. 11.

<sup>309</sup>Susan Moller Okin, *Justice, Gender and the Family*, p.84.

<sup>310</sup> See Edgar Page, 'Parental Rights', *Journal of Applied Philosophy*, 1 (2) (1984), p. 192-193.

<sup>311</sup> Judith Jarvis Thomson, *The Realm of Rights*, p. 339.

condition. Therefore, a proprietary view of parental rights is consistent with the inclusion of moral obligations that parents have towards their children, such as feeding, clothing, and education.

Alternatively, one's ownership rights can be limited by the type and weight of the interests that are at stake. Having a strong interest in something is sometimes sufficient to generate a right in that thing and to hold some other person(s) to be under a duty.<sup>312</sup> It seems reasonable to think that the intended parents' parental rights ought to be constrained in light of the interests of the resultant child, so the welfare and life prospects of the resultant child must be taken into account. This reasoning seems consistent with more general principles of property ownership: just as my ownership-like rights over my cat are constrained in light of its interests which, in turn, place me under a duty to feed it and take it to the vet when it gets sick, parental rights should be constrained in light of the interests of children, to the effect that parents are under a duty not to jeopardise the prospects of a minimally flourishing life of their children.

In response to the conceptual problem, one might posit a gradualist account of self-ownership wherein children gradually become self-owning creatures as they develop the capacities for autonomy and rationality that are constitutive of moral personhood.<sup>313</sup> This line of argument would imply that infants are self-owners in a lesser degree or minimal degree because their moral agency capacities are minimal and the ownership rights of the progenitors would decrease over time, for example, as children reach the moral age of majority. However, this solution would entail the unattractive implication that procreators would own their children (at least in part) when their moral agency capacities are below the threshold needed for self-ownership. So, for example, it would imply that procreators own their fetuses or their new-born children.

An alternative solution to the conceptual problem might be to say that children are self-owners from the moment of birth because they have the potentiality properties of moral agency capacities, regardless of how well they exercise those properties or their degree of development. This solution holds that an individual either has the potentiality

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<sup>312</sup> In Joseph Raz: 'X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty' (Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 166).

<sup>313</sup> For an interesting account of this solution, see Barbara Hall, 'The Origin of Parental Rights'.

properties to become moral agents or not. So, it would imply that those individuals who lack the potentiality properties to become moral agents would never acquire self-ownership, such as people with permanent cognitive impairment, and would be owned by their progenitors.

Thinking about children in terms of property might cause discomfort to some people. However, the claim that intended parents have ownership-like rights over the reproductive gametes or embryos from which the resultant child develops (assuming they have legitimately acquired them either because they already own them or because they have acquired them through legitimate means of transfer) does not need to implicate a proprietary view of parental rights, although they can be compatible. The intended parents' ownership-like rights over the reproductive gametes or embryos might explain why they have a presumptive though defeasible right to parent the children that develop from those gametes or embryos. As I mentioned earlier, questions about the content of role-based rights (and obligations) are different from questions about their acquisition. The ownership account offers a plausible explanation of how intended parents acquire the presumptive right to parent the resultant child, but it does not necessarily dictate the content of this right.

To conclude, I have argued that the ownership account is a promising candidate to substantiate the claim that intended parents have a presumptive though defeasible right to parent the surrogacy child. I have shown that the ownership account is explanatorily stronger than the genetic account and the intentional account. Furthermore, I have argued that the ownership account is compatible with paradigmatic cases of procreation. I have shown that the presupposition that intended parents stand in a privileged right position with respect to the resultant child relies, at least in part, on the assumption that they have pre-existing ownership-like rights (or something closely resembling ownership rights) over the reproductive gametes or embryo from which the child develops. Assuming that the intended parents have legitimately acquired the reproductive gametes or the embryo from which the child results, they have a presumptive though defeasible right to parent that particular child. Furthermore, I have defended that the ownership account is capable of avoiding two standard objections raised against a proprietary view of parental rights.

#### 5.4 Three implications for the bipartite approach

In the Introduction of the thesis, I pointed out that the bipartite approach is not new to surrogacy arrangements. One example is the regulatory model that governs surrogacy arrangements in the United Kingdom, which uses a combination of the provisions related to health and infertility treatments and family law.<sup>314</sup> However, I argued that this regulation has limitations in protecting the interests of surrogates and the interests of intended parents. For example, it cannot protect the interests of intended parents because they cannot be certain that the child will be ultimately theirs to parent and they cannot avoid the significant financial, legal, and logistical costs of adoption. On the other hand, if the intended parents change their minds and refuse to take the child, the surrogate would be left in a position where she has to take parental responsibilities over a child she did not plan to raise.

Throughout the thesis, I have defended an alternative view of the bipartite approach that can be used to govern paid surrogacy arrangements. My model of the bipartite approach suggests that the part dealing with childbearing should be governed by contract law and the part dealing with the transfer of the child by family law. In the Introduction of the thesis, I highlighted the advantages of using contract law to govern the first part of the arrangement. In Chapter Three and Chapter Four I proposed a particular contractual framework under the terms of unilateral contracts that can strike a fair balance between the interests of intended parents and the interests of those working as surrogates. In this section, I will outline three implications of my case for the bipartite approach and argue that it can better protect the interests of all parties involved in the arrangement, namely the surrogate, the intended parents, and the resultant child.

The first implication is that legal and moral parental rights can be assigned to intended parents independently of the contract. In other words, intended parents would have a presumptive right to parent the resultant child independently of whether they have engaged in a surrogacy contract or in a non-contractual surrogacy agreement (also called 'informal surrogacy agreement'). In the event of multiple conflicting claims over who gets to

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<sup>314</sup> See Margaret Brazier, et.al. 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulations'.

parent the surrogacy child, the same considerations that are used in family law to resolve custodial conflicts can be used to resolve which right-bearer should parent the child, so the best interests of the children can be protected.

The second implication is that in the event that intended parents change their mind about parenting and refuse to take parental responsibilities over the child they took part in creating, they may lose their right to parent the child (because it is not in the child's interest to be raised by parents who wish it had never existed), but their parental obligations would not be extinguished.

In the existing literature surrounding the morality of parenthood, many theorists consider that parental rights and parental obligations are two sides of the same coin. They assume that the same kinds of considerations that serve to ground parental rights are the same kinds of considerations that serve to ground parental obligations.<sup>315</sup> However, in some cases, parental rights and parental obligations can come apart: one can have parental obligations, but not the parental right to parent a particular child, for example, when one does not meet a minimum threshold of parental adequacy. If intended parents change their minds and refuse to parent the child, they would nevertheless have the obligation to support financially the child or the obligation to protect the welfare of the child by securing that it will be parented by suitable parents.

My account of the bipartite approach can better protect the interests of the resultant children than alternative accounts. If the surrogacy contract is undermined, this would not extinguish the parental obligations of intended parents towards the child they took part in creating. What is more, in the event that exclusive legal parenthood is assigned to the surrogate, the bipartite approach has room to integrate mechanisms available in the law that can fairly distribute the childrearing costs between the intended parents and the surrogate, for example, via family law.

The third implication is that the bipartite approach can better protect the reproductive autonomy of those working as surrogates. The bipartite approach is compatible with the idea that the presumptive right to parent a particular child does not

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<sup>315</sup> For example, Tim Bayne and Avery Kolers assume that 'insofar as parenthood brings rights and responsibilities, it brings them *together*—that is, one does not get all the rights and none of the responsibilities, and vice versa'. (See Tim Bayne and Avery Kolers, 'Towards a Pluralist Account of Parenthood', p.p. 221-242, 223).



justify that intended parents have the right to impose restrictions on the body and lifestyle of the surrogate. The childrearing desires of intended parents may provide *reasons* to the surrogate to behave in a certain way with regards to her pregnancy, but do not impose a *duty* on the surrogate to adhere to these restrictions. Whether or not intended parents can dictate restrictions on the body and lifestyle of the surrogate is not as a consequence of their presumptive right to parent the resulting child, but rather an implication of their particular type of contractual relationship. Under the terms of unilateral surrogacy contracts, surrogates would not have the obligation to perform.

## 5.5 Conclusion

In this chapter, I have addressed a potential objection to the bipartite approach, which is that intended parents acquire parental rights as a result of the contract. I have argued that the ownership account is sufficient to block this conclusion. Assuming that the intended parents have legitimately acquired the reproductive gametes or embryo from which the child develops, they stand in a privileged right position with respect to the resultant child. I have argued that the ownership account can better substantiate the intended parents' presumptive right to parent the resultant child than competing accounts, such as the genetic account and the intentional account. Furthermore, I have defended that the ownership account can avoid standard objections that have been raised against proprietary views of parental rights: one conceptual, and another normative. I have showed that my account of the bipartite approach is better equipped than alternative regulatory frameworks to protect the interests of the parties involved in the surrogacy arrangement, namely the intended parents, the surrogate and the resultant child.

Questions about whether the ownership account can effectively adjudicate cases where there are conflicting claims over who gets to parent the resultant child, or whether the ownership account is relevant when considering the content of the rights and obligations of parents, are beyond the scope of this thesis, though might provide avenues for future research.

## CONCLUSIONS

In this thesis, I have advanced a partial account of commercial surrogacy contracts by addressing a series of core debates in the ethics of surrogacy. I began in Chapter One by investigating the nature of surrogacy contracts. I argued that a particular model of contracts governs current surrogacy practices: *the consumer contract framework*. I extended existing critiques of the use of the consumer contract framework in surrogacy transactions with a particular focus on procedural injustice. I showed that the use of the consumer contract framework in the context of surrogacy masks the unfairness of the procedures commonly used in current surrogacy practices. While the consumer contract framework is fair when utilised in ordinary commercial transactions, it is not when utilised in surrogacy. The consumer contract framework imposes greater duties on surrogates *qua* sellers, such as disclosure and transparency, fair and equitable treatment, and to not pose unnecessary risks of harms on intended parents, but does not grant surrogates any rights. Moreover, it obscures the *special responsibilities* of intended parents (and surrogacy firms, if any) towards surrogates. The uncritical adoption of this model constraints and distorts our moral analysis of surrogacy. I concluded that we should look at more imaginative contractual frameworks that can better respect the reproductive autonomy of those working as surrogates.

In Chapter Two, I turned to the commercial aspect of surrogacy contracts. I explored the objection that payments for women's reproductive labour services are morally impermissible, assuming all things being equal with permissible cases of altruistic surrogacy. I argued that the so-called commodification objection is not a decisive objection against paid surrogacy. I identified three major problems facing the commodification objection when applied to paid surrogacy and argued that under some conditions, payment for women's reproductive labour services is morally permissible. I concluded the chapter by offering two reasons for the moral permissibility of commercial surrogacy contracts. The first has to do with fairness-based reasons and the second has to do with welfare concerns.

In Chapter Three, I considered reasons in favour of asymmetrically enforceable surrogacy contracts (henceforth, AESC). I advanced an autonomy-based account of commercial surrogacy contracts through asymmetrically enforceable contracts (as proposed

by Cécile Fabre). However, I argued that Fabre's framework is inadequate to protect those working as surrogates, and that a better model is that of unilateral contracts, such as the offer of a reward. I argued that unilateral contracts can also further the autonomy of intended parents, but that they are appropriately weighted towards the interests of the surrogate, who bears the greatest risk in the enterprise. I ended Chapter Three by considering four potential problems for AESCs — fraud, extortion, negligence, and the diminution of the market — and argued that none of these problems is insurmountable.

In Chapter Four, I elaborated in detail the model of unilateral surrogacy contracts. I argued that AESCs can be translated into the Anglo-American model of unilateral contracts, according to which a person makes an offer to another in exchange for an act. I showed that unilateral surrogacy contracts have the capacity to deal with the many worries frequently raised against surrogacy contracts. I considered two potential problems to unilateral surrogacy contracts and argued that these problems are not insurmountable.

Finally, in Chapter Five I considered a further question to the bipartite approach, to wit: on what grounds (if any) do intended parents acquire parental rights? I argued that the ownership account is a promising candidate to ground the intended parents' presumptive right to parent the surrogacy child. My case shows that parental rights can be assigned to intended parents regardless of the contract, but rather intended parents acquire parental rights because they have ownership-like rights over the reproductive materials from which the resultant child develops. Assuming that intended parents have legitimately acquired the reproductive gametes or the embryo from which the child grows, they stand in a privileged right position with respect to the resultant child.

In closing, let me note two limitations of the approach I have pursued in this thesis. The first concerns the status of my argument for the bipartite approach, in particular the underpinnings of the ownership account. In Chapter Five, I argued that a promising candidate for the intended parents' presumptive right to parent the surrogacy child can be found in the ownership account. However, the plausibility of the ownership account depends on a number of contestable assumptions, such as whether reproductive gametes and embryos can be transferred on a definitive basis (sometimes in exchange for money; or whether individuals can acquire parental rights derivative of their ownership-like rights over the reproductive gametes or embryos from which the child grows. More argumentation is

needed to establish the plausibility of the ownership account. However, though if sound, it has considerable advantages of avoiding the major problems facing the genetic account and the intentional account.

The second limitation concerns my focus on asymmetrically enforceable surrogacy contracts (AESCs). The account of unilateral contracts that I developed in Chapter Four is intended to address many concerns raised about the reproductive autonomy of the surrogate. However, it is not the only plausible candidate. Employment contracts may seem like a good legal framework to translate AESCs. The employment contract framework has many attractive features for enacting AESCs. I briefly mention two of its attractive features.

First, the employment contract framework assumes that the employer cannot be forced against her will to carry out a specific task. For example, it would be unconscionable to force an opera singer to sing a concert against her will even if she has an employment contract stipulating that she would sing it. However, this feature has limitations. It might imply that the opera singer breached her contract when refusing to sing the concert. So, it would be appropriate to invoke standard remedies for the breach of contract.

The second attractive feature is that the employment contract framework assumes that the employer has duties to her employee, such as providing a safe workplace, paying fairly and do not discriminate against age, sex, race, or other.

However, while we can say that the employment contract framework is partially attractive, there are three considerations that are worth asking when considering this framework as a plausible candidate to govern surrogacy contracts. First, it is worth asking whether surrogacy contracts can meet the minimum wage requirement. Second, it is worth asking whether surrogates would have the right to strike, form unions, or form cooperatives. Third, it is worth asking what circumstances would justify the dismissal of surrogates. These considerations do not necessarily weigh against the employment contract model, but rather they indicate new lines for future research. My decision not to consider the employment contract framework was a response to practical limitations of time and space, though I intend to pursue this in the future. It is reasonable to assume that considering an alternative legal framework would highlight different aspects or characteristics of the AESCs. I suggest that this step should not be viewed as a simple

application of a fixed account to alternative legal frameworks, but as a process that will feed back into our general understanding of AESCs.

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