COMMERCIAL SURROGATE MOTHERHOOD AND THE ALLEGED COMMODIFICATION OF CHILDREN: A DEFENSE OF LEGALLY ENFORCEABLE CONTRACTS

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I

INTRODUCTION

Commercial surrogate-motherhood contracts should be legally enforceable, despite the vociferous and prevalent opposition to them. We shall, in particular, argue here that they do not involve the commodification of children, nor in other ways are they contrary to the interests of the children concerned. Our case is developed in response to criticisms of arguments we have made before in defense of commercial surrogate motherhood, particularly those criticisms made by Elizabeth Anderson, who is probably the most influential, eloquent, and forceful opponent of commercial surrogate motherhood or, as it is sometimes called, "contract pregnancy."[1]

II

THE NATURE OF SURROGATE MOTHERHOOD

A surrogate-motherhood arrangement is one in which a woman agrees to bear a child for a commissioning couple.[2] She carries the child through

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1. *See, e.g.*, Elizabeth Anderson, *Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales*, 8 HEALTH CARE ANALYSIS 19 (2000) (Neth.) [hereinafter Anderson, *Reply to McLachlan and Swales*] (responding to Hugh V. McLachlan & J.K. Swales, *Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood*, 8 HEALTH CARE ANALYSIS 1 (2000), *reprinted in* HUGH V. MCLACHLAN & J. KIM SWALES, FROM THE WOMB TO THE TOMB: ISSUES IN MEDICAL ETHICS); Elizabeth Anderson, *Is Women's Labour a Commodity?*, 19 PHILO. & PUB. AFFAIRS 71 (1990), *revised version reprinted in* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS, ch. 8 (1993).

2. For authority substantiating information in this section, see generally Rachel Cook et al., *Introduction* to SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 1 (Rachel Cook et al. eds., 2003).

pregnancy and subsequently surrenders the child to the commissioning couple. There are two sorts of surrogate motherhood: genetic and gestational. In the former, the male member of the commissioning couple impregnates—usually via artificial insemination—the surrogate mother, who is the genetic mother of the child. In the latter, the male member of the couple fertilises, *in vitro*, an egg from the female member of the couple. The fertilized egg is placed, for development and delivery, into the womb of the surrogate mother, who is not genetically related to the child she carries, bears and, in an obvious, anatomical sense, of whom she is the biological mother. With genetic surrogate motherhood, the male of the commissioning couple is usually the genetic father. With gestational surrogate motherhood, the commissioning couple are the genetic parents of the child. "Gestational surrogacy creates the new situation in which a child has not one, but two biological mothers—one genetic and the other gestational."[3] In the past, a child might have had multiple social mothers—adoptive, foster, step.[4] What is new is having multiple *biological* mothers.

So-called "altruistic surrogate motherhood" refers to an agreement in which the surrogate mother receives either no payment at all, or payment to cover only expenses. Altruistic surrogate-motherhood arrangements are generally made between relatives or friends. A commercial surrogate-motherhood arrangement involves payment to the surrogate mother over and above expenses, although which items can be appropriately categorized as expenses is sometimes a contentious issue.

III

GENERAL LEGAL BACKGROUND

In most countries, gestational surrogacy is legally prohibited.[5] Where it *is* allowed, it exists in the form of altruistic surrogacy, which is itself heavily regulated or restricted; contracts between parents and the surrogate mother are, in most cases, unenforceable.[6] In federations like the United States or the European Union, the unevenness of legal restriction or regulation by individual states or countries compounds the problem.[7]

The United Kingdom sets an example regarding public policy and debate about surrogate motherhood that has been widely copied. In the United Kingdom, although it is not a crime to be a surrogate mother or to be a

3. Bryn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 J. PHIL. SCI. & L., February 2002, *available at* http://www6.miami.edu/ethics/jpsl/archives/papers/comsur_williamsjones.html.

4. *Id.*

5. Aristides N. Hatzis, *"Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts*, *in* PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 412, 415–16 (Katharina Boele-Woelki ed., 2003).

6. Most countries in the European Union do not enforce such contracts. *Id.*

7. *Id.*

commissioning parent (whether or not money changes hands in the arrangement), "commercial" surrogate agencies and the "commercial" actions of surrogacy agents are prohibited.[8] No surrogacy arrangement whatsoever is enforceable in law.[9] When a disagreement arises concerning handing over the child, the surrogate mother has the legal right to retain the child whether she is a genetic or gestational surrogate mother.[10] Married couples who have commissioned a surrogate mother to carry a child for them may apply for and be granted a parental order, which will declare them the legal parents of the child, provided that one or both of them supplied the gametes for the embryo.[11] The court also must be satisfied that no money or equivalent benefit, other than "for expenses reasonably incurred," has been given or received by the husband or wife pertaining to the arrangement unless authorized by the court.[12]

IV

CONVENTIONAL OBJECTIONS TO COMMERCIAL SURROGATE MOTHERHOOD

A. The Best Interests of the Child

In both Canada, where surrogacy agreements are void and have no legal status, and in the United States, where the situation is variable, the best interests of the child is the predominant consideration in the debate over surrogacy. "In general, judges have chosen to ignore surrogacy agreements for public policy reasons and have ruled in the best interests of the child. Ethicists also agree in general that the child's best interests trump any other considerations."[13]

Whatever most ethicists might say, it is far from obvious that such matters should be settled solely on the basis of the best interests of the child concerned—even if it could be established what those best interests are. In any case, there is no reason to think that surrogacy agreements, commercial or not, are likely to be at variance with the best interests of the children concerned. After all, were it not for the relevant surrogacy agreements, many children

8. The Surrogacy Arrangements Act, 1985, c. 49, § 2, states that "no person shall on a commercial basis," among other things, "initiate or take part in any negotiations with a view to the making of a surrogacy arrangement," but that it is not illegal "for a woman, with a view to becoming a surrogate mother herself," to do any of the actions prohibited to be done on a commercial basis.

9. The relevant pieces of legislation are § 2 of the Surrogacy Arrangements Act and the Human Fertilisation and Embryology Act, 1990, c. 37, §§ 30, 36(1). The latter section renders surrogate-motherhood contracts unenforceable.

10. *See* Human Fertilisation and Embryology Act § 30(1) (declaring that "the court may make an order providing for a child to be treated in law as the child of the parties to a marriage" if the surrogate mother was artificially inseminated with either (1) the biological mother's eggs or (2) both biological parents' genetic material).

11. *Id.*

12. *Id.* at § 30(7).

13. Dan R. Reilly, *Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers*, 176 CAN. MED. ASS'N J. 483, 484 (2007).

would not be born: they would have been denied the chance of having a life, a life that might have turned out to have been worth living. It can hardly, in general, be in one's interest not to have such an opportunity.[14]

Why should the welfare of the child be paramount? When formulating public policies, people would not normally say that the best interests of children should be paramount, even if they had a way of knowing what these interests were. What policies should we adopt regarding, say, global warming? Do we ask the particular question of what the best interests of children *as children* are? Even with laws and policies pertaining to family matters such as divorce, we do not in practice—whatever rhetoric we might use in other contexts—settle the issues as if we thought that the best interests of the children involved were paramount. The interests of other people are of equal, or sometimes of more, importance. Consider the central figure in Puccini's opera *Madama Butterfly*.[15] Her baby is taken from her and given to the biological father and his wife. All three then sail from Japan to the United States, leaving Madama Butterfly behind. This might well be in the interests of the child. In economic terms, it certainly is. However, many in the audience feel that a great wrong has been done. Madama Butterfly has been cruelly and unfairly treated. As a matter of ethics, it is far from clear that it is a mistake so to think. It is not manifest that, ethically, the welfare of the child should be considered to be paramount, although it is clearly of importance that he is not ill-treated.

Do judges tend to ignore surrogacy agreements for the sake of the children involved? It is not clear how the question should be answered. In the United Kingdom, and we imagine generally, the legal presumption is that the woman who carries and delivers a particular child will legally be the mother of the child and the bearer of any attendant rights, favors, duties, and responsibilities.[16] Is this arrangement in the interests of children in general (or of particular children)? How could one know? There is no reason to suppose that judges know. The relevant laws and conventions gained acceptance because they are workable and, by and large, produce decisions to which there is not an unduly hostile reaction. The custody and care of particular children can be granted to various mothers and fathers. Laws and conventions have the practical usefulness of helping to answer pressing questions related to which parent(s) might be more suitable. For instance, laws and conventions help solve custody disputes in such a way that, by and large, the claims and interests of all parties who are directly or indirectly involved are, at least to an extent, attended to. Women who bore children and the men who impregnated them would be enraged if their children were removed from them and placed in the custody of

14. *See* John Harris, *The Welfare of the Child*, 8 HEALTH CARE ANALYSIS, 27, 29 (2000). *See generally* Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood*, 272 CONTEMP. REV. 113 (1998).

15. GIACOMO PUCCINI, MADAMA BUTTERFLY (1904).

16. Human Fertilisation and Embryology Act, 2008, c. 22, §§ 33(1), 48(1).

other people who could give them far happier, healthier, and more-prosperous lives. It would be unfair. It would be socially disruptive.

The interests of the children concerned do not deserve exclusive or paramount consideration. In any case, children grow up. People have various interests throughout their lives. The interests that they have as children are not the only ones that matter to them. Consideration should be given to balancing the interests of people at different stages in their lives, as well as to balancing the interests between people with different interests. The mothers and fathers concerned were once children. Would it be in the best interests of people in society to frame our laws and policies in terms of what were their best interests when they were children? A policy of taking children from their parents, supposedly in their own best interests, would hardly be in those children's best interests if, when they became parents, their children were taken from them.

There has been dissatisfaction with the rationale for the United Kingdom's legislation regarding surrogacy. This legislation was greatly influenced[17] by the Report of the Committee of Inquiry into Human Fertilisation and Embryology,[18] chaired by Dame Mary Warnock. It was commissioned by the Department of Health and Social Security in July 1982, and reported in June 1984.[19] Concerning surrogate motherhood, the Warnock Committee made two majority recommendations. One was that all surrogate motherhood agreements—not only commercial ones—should be illegal contracts and therefore unenforceable in the courts.[20] The other was that the creation and operation of agencies (both "profit making" and nonprofit ones) "whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother" should be criminal offenses.[21] The rationale given by Warnock for these recommendations is as follows: "That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved."[22]

It might be wrong to treat people merely as means to one's own ends but it is not always wrong to treat them as means to one's ends, whether or not money changes hands as when one purchases the services of, say, a dentist or a chiropodist. The term "exploitation" is not defined by Warnock. However, since exploitation as such is not a crime, it is not clear that commercial surrogate motherhood should be made illegal because of its supposed exploitative nature.

17. ROBERT H. BLANK, REGULATING REPRODUCTION 143 (1992).

18. DEP'T OF HEALTH & SOC. SEC., REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, Cmnd. 9314 [hereinafter WARNOCK REPORT].

19. BLANK, *supra* note 17, at 143.

20. WARNOCK REPORT, *supra* note 18.

21. *Id.*

22. *Id.* at § 8.17.

The Warnock Committee's conclusions "appear to have been based on public opposition to the practice rather than any considered philosophical position."[23] There has been unease too about how the legislation has been implemented. In practice, commissioning couples often pay surrogate mothers, without prior authorization by the courts, more than "reasonable expenses."[24] Under the law, courts should deny these couples the relevant parental orders.[25] Yet the courts are authorizing the payments retrospectively and granting the commissioning couples the parental orders, anyway.[26] This, in effect, honors the surrogacy agreement for the sake of the commissioning couples and the children involved rather than ignores the agreement for the supposed sake of the children.[27]

Imagine what would happen were the law to be dispassionately enforced. Couples who were the genetic parents of particular children could be turned down when they requested to become the legal parents because they had paid the gestational surrogate mothers too much money. This would defy common sense—particularly since the surrogate mothers requested that they themselves should cease to be regarded as the legal mothers of the children concerned. There is no reason to suggest that such a bizarre outcome would have been in the best interests of the children. If the same couple had paid the same surrogate mother less money, or paid her no money at all—even in breach of a surrogacy agreement—they would have been granted a parental order without any legal difficulty. An irrational preference for so-called altruistic surrogate motherhood regardless of the interests of the children concerned is manifest here.

B. Commodification

Commercial surrogate motherhood is commonly attacked on the grounds that it involves the buying and selling of children. The tone of this condemnation can be savored in the New York State Task Force on Life and the Law's conclusion that "the exchange of money for possession or control of children . . . threatens to erode the way that society thinks about and values children, and by extension all human life."[28] This echoes the thoughts of the Warnock Committee, which stated, "[A] surrogacy agreement is degrading to

23. JEAN V. MCHALE, MARIE FOX & JOHN MURPHY, HEALTH CARE LAW: TEXT, CASES AND MATERIALS 636–37 (1997).

24. *Contra* Human Fertilisation and Embryology Act, 1990, c. 37, § 30(7).

25. *See id.*

26. *See* DEP'T OF HEALTH, SURROGACY: REVIEW FOR HEALTH MINISTERS OF CURRENT ARRANGEMENTS FOR PAYMENTS AND REGULATIONS, 1998, Cm. 4068, at 27–28.

27. *See generally* Hugh V. McLachlan & J. Kim Swales, *Surrogate Motherhood: Beyond the Warnock and the Brazier Reports*, 11 HUM. REPROD. & GENETIC ETHICS 12 (2005), *reprinted in* HUGH V. MCLACHLAN & J. KIM SWALES, FROM THE WOMB TO THE TOMB: ISSUES IN MEDICAL ETHICS 147 (2007).

28. N.Y. STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (1988), *described in* Cook, *supra* note 2, at 233.

the child who is to be the outcome of it, since, for all practical purposes, the child will have been bought for money."[29]

Even if babies could be and were bought and sold, it does not follow that they would subsequently and consequently be maltreated as "commodities." It is not wrong to treat people or their bodies as objects are sometimes treated. It *is* wrong to treat people merely as objects. Some commodities are cherished, cleaned, and insured. It is not wrong to cherish, clean, and insure babies. Not all treatment that would be appropriate for some commodities would be appropriate for people. "Consider, for example," as we have urged before, "cats."

> Even if they are not due the same respect as human beings are, it would be wrong, in some contexts, to treat them in ways in which it might be proper to treat some particular commodities. For instance, in some contexts, it would be proper to set fire to a piece of coal but improper to set fire to a cat. However, it is not wrong to purchase both pieces of coal and cats. It is not wrong to treat cats and coal in the same way in some respects: it depends on the respects. Do people who pay money to purchase, as kittens, expensive pedigree cats treat them worse than those people treat their cats who acquire them, say, as strays or as gifts? Of course not. They often treat them better.[30]

But babies are not commodities. Babies are not anyone's property. They cannot be bought or sold. Similarly, parenthood and the custody of children cannot be bought or sold, even though they can be brought about indirectly by monetary transactions involving the transfer of goods and services. For instance, one might pay for the services of a matrimonial agency and thereby meet one's future spouse. But that is not the same as purchasing a husband or buying matrimony. Likewise, with commercial surrogate motherhood, one does not buy a baby. Rather, one might be thought to buy the services of the surrogate mother in carrying the baby, which is the genetic child of the buyers of the service in the case of gestational surrogate motherhood.[31] One might also buy the services of a commercial surrogacy agency, which can be useful in facilitating and supervising the surrogacy arrangement. But neither of these service purchases is equivalent to actually buying a baby.

Ordinarily, the commissioning couple wants to bring up the child; they would like to become the legal parents of the child and to be given custody rights. But they cannot buy parenthood or custody. Even if parenthood or custody could, somehow, be bought from someone or something, it is manifest that neither could be bought from either the surrogate mother or from the commercial surrogacy agency The commissioning couple's payment to a surrogate mother might be conditioned on her agreement to refrain from pursuing a claim for parental status or custody of the child. But this is a very different matter.

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29. WARNOCK REPORT, *supra* note 18, at § 8.11.

30. McLachlan & Swales, *supra* note 1, at 97.

31. *See, e.g.*, R.J. Kornegay, *Is Commercial Surrogacy Baby Selling?*, 7 J. APPLIED PHIL. 45, 49 (1990).

In a commercial surrogacy agreement, the commissioning couple could be thought of as buying particular services from the surrogate mother. But it is not necessary to suppose that anything at all is bought or sold. The point of a contract is that both parties come to an agreement on the obligations of each. With commercial contracts, it is typical that one party will agree to give the other party money if certain things are done by the other party. This might, but need not, involve the transfer of property. In the fulfillment of a commercial surrogate-motherhood contract, it might be the case that nothing at all is bought or sold.

In our view, there is no good reason for making such contracts illegal. There is a difference between an illegal contract and one which is merely legally unenforceable. For instance, in some jurisdictions, of which the United Kingdom is one, although it is not illegal to gamble, such agreements are legally unenforceable and gambling debts are not recoverable via the courts.[32] Commercial surrogate-motherhood contracts should be not only legal, but legally enforceable. Parties should be able to seek legal redress if such contracts are breached.

V

CONTROVERSIES CONCERNING SURROGACY CONTRACTS

A. Commercial Contracts and the Transfer of Property

According to Blyth and Potter:

> McLachlan and Swales provide the most elaborate claim yet that commercial surrogacy is not buying and selling children. Somewhat disingenuously, they note that, while commissioning parents may expect to receive something other than the knowledge that a baby has been carried and "might even imagine that they have purchased a particular baby . . . what they have paid for is not necessarily the same as what they think they have paid for." Thus, while they assert that the participants themselves may not know what is being sold and purchased, McLachlan and Swales claim to do so. In addition to purchasing the surrogate mother's services for carrying the child, the commissioning parents should also be considered as "buying from the surrogate mother her refraining from pursuing her claim for the legal custody and parenthood of the child in addition to her physical surrendering of it."[33]

We do not claim to know what the commissioning couple have bought better than they do. In different jurisdictions, what precisely commissioning couples could, and actually do, buy from a surrogate mother might well vary. Until courts have issued judgments in particular cases, the question of what has been bought in the transactions at issue might be unanswerable. Even in a comparatively straightforward transaction, such as buying a house, buyers and

32. *See, e.g.*, A.B.A. GUIDE TO CONSUMER LAW: EVERYTHING YOU NEED TO KNOW ABOUT BUYING, SELLING, CONTRACTS AND GUARANTEES 28 (1997) (noting that American "courts will not help someone collect an illegal gambling debt" because such contracts are illegal).

33. Eric Blyth & Claire Potter, *Paying for It?*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES, *supra* note 2, at 227, 234 (quoting McLachlan & Swales, *supra* note 1, at 6, 11) (citations omitted).

sellers can be mistaken about what they have bought and sold. For instance, if there is a partially shared driveway with specific rights of access, does this mean that parking in it is permissible? The answer to that question might be unclear. It might change over time in the light of different interpretations and changing laws.

The precise and particular conditions of commercial surrogacy agreements could be, and should be, open questions. We do not seek to close them. We want, rather, to show that it is a mistake to disallow beforehand the legality of such agreements. That the commissioning couple contracts for more than the surrogate mother's gestational services is obvious (if not necessarily so to the contracting parties):[34] The surrogate mother's agreement to refrain from pursuing a custody claims is one condition of the agreement that she be paid for carrying the child. That she surrenders the child is another condition. As with any commercial contract, if you do *A* while avoiding doing *B*, you will be entitled to receive payment. Otherwise, you will not be entitled to receive payment, and you will be required to return any money that you might already have received in anticipation of your fulfillment of the agreement. Hence, the question *what*, if anything, is bought in a commercial contract can be avoided. The pivotal question is what are the parties required to *do* under the contract?

B. Altruistic and Commercial Surrogate Motherhood

Any valid argument against commercial surrogate motherhood based on the failure to consider the child's best interests applies equally to altruistic surrogate motherhood.[35] The "best interests" argument is about formal surrogate-motherhood agreements as such, not merely commercial ones. Whether money changes hands in the deal is beside the point. Some distrust the surrogacy arrangement only when it is a commercial one and urge that we "accept the responsibility and necessity of state intervention to protect the interests of all participants and of society as a whole."[36] To say that commercial surrogate-motherhood contracts should be legally enforceable, or that commercial surrogate-motherhood agencies should be legal, is not to deny that they should be legally regulated and controlled. Indeed, such regulation and control is needed to protect the interests of the parties involved and those of society as a whole. Consider, for instance, Prohibition. Precisely because it was illegal, the production and sale of alcohol was beyond state regulation and control.

But how, to what extent, and according to what principles should the state regulate surrogacy? Should such regulation depend upon the altruistic or

34. *See id*. The authors describe this contractual condition as "*buying* from the surrogate mother her refraining from pursuing her claim for the legal custody and parenthood of the child in addition to her physical surrendering of it." (emphasis added). So phrased, the agreement seems strange and contrived. This is simply one condition of the contract.

35. *See id.* (making this argument).

36. *Id.* at 239.

commercial nature of the agreement? Suppose that a friend, out of love, carries and delivers a baby for another couple and then, in accordance with their agreement and to honor her promise, relinquishes the child. Should the courts allow her to do so? If they do, why should they not also allow a commercial surrogate mother to do the same? It might actually be the case that it would be in the best interests of the child to remain in the custody of the surrogate mother, whether or not she is a commercial surrogate. But the courts are unlikely to be able to force such an arrangement, and it would be strange if they tried to do so—particularly for gestational surrogates who do not want to bring up the child. Suppose that the friend, the altruistic surrogate mother, reneges on her formal agreement. If the issue of custody is contested and the case comes to court, there will be no difference in principle between it and a contested custody case in which the surrogate mother is a commercial one.

It is the job of the courts to interpret and to apply the laws that they are authorized to deal with. Such laws might or might not have been formulated with the goal of meeting the best interests of children as children. Laws that have been so formulated might or might not have been successful in that aim. The general application of a law should be distinguished from its application in particular cases.

Nonetheless, suppose that a court is required to decide who will receive custody of a child and that, somehow or other, it is required to judge solely on the basis of the best interests of the child. Under the assumption that custody must be given either to the commissioning couple or to the surrogate mother, the court must make a choice. The formal agreement between the commissioning couple and the surrogate mother does not restrict the court in coming to a decision. Whether the agreement has been broken and what, if anything, should be done as a remedy might be a matter for another court at another time, but it does not concern this one. The surrogate mother might or might not be the genetic mother of the child. She might still be given custody of the child. If we assume that the courts can correctly judge what is in the best interests of the child (and this is of course a good deal to assume), such custody disputes cannot harm the children and might in some circumstances benefit them. Yet, since such disputes will come about only when there are contested, formal surrogacy agreements, it would follow that such formal agreements are in the best interests of the children concerned.

C. Commodification and Property Rights

Elizabeth Anderson writes,

> McLachlan and Swales dispute my arguments against commercial surrogate motherhood. In reply, I argue that commercial surrogate contracts objectionably commodify children because they regard parental rights over children not as trusts, to be allocated in the best interests of the child, but as like property rights, to be allocated at the will of the parents. They also express disrespect for mothers, by

> compromising their inalienable right to act in the best interest of their children, when this interest calls for mothers to assert a custody right in their children.[37]

This argument is unconvincing. Commercial surrogate contracts—just like noncommercial surrogate contracts—are not about the buying and selling of parental rights. They do not involve treating parental rights like property rights.[38] Nor do such contracts imply disrespect for mothers insofar as their "inalienable right to act in the best interest of the children" is compromised in their "[having to] assert a custody right in their children."[39]

The arrangement is that if the surrogate mother does *X*, the commissioning couple will do *Y*. The commissioning couple will give the surrogate mother money if she does certain agreed things. That she transfers her parental rights over the child to the commissioning couple need not be part of the mutually agreed obligations. The moral and legal rights associated with parenthood cannot be transferred by contractual agreement. For instance, one can sell or give away one's house, and the bundle of rights and duties associated with ownership of that particular property will thereby be transferred to the buyer or recipient. But the statuses of parent and custodian are not property. They cannot be transferred by contractual agreement. Some people might think that they are buying parenthood and the custody of a child when they pay a surrogate mother. They are mistaken, just as people are often mistaken about what they think they are getting when they buy a particular house. A commissioning couple and a surrogate mother might *agree* to the transfer of custody of the child from the surrogate mother to the commissioning couple—and they might all think that payment is made and accepted partly for such a transfer. They would be wrong so to think. But the courts cannot, will not, and should not enforce such imagined conditions of a commercial surrogate-motherhood contract. It does not follow, though, that commercial surrogate-motherhood contracts as such cannot or should not be enforceable. Other aspects of the contract can be enforceable. Legal enforcement of a civil contract does not mean the mobilization of coercion to ensure compliance. It means that if there is a breach, there is the possibility of legally authorized and supported redress.

Moreover, an "inalienable right [of surrogate mothers] to act in the best interest of their children," is questionable: First, the children could also be thought of as those of the commissioning couple.[40] Second, inalienable rights should be respected no more (or less) than any other rights. Furthermore, if the rights are inalienable they are inalienable—nothing which the courts might do

37. Anderson, *Reply to McLachlan and Swales*, *supra* note 1, at 19.

38. *See* Hugh V. McLachlan and J. Kim Swales, *Surrogate Motherhood, Rights and Duties: A Reply to Campbell*, 9 HEALTH CARE ANALYSIS 101, *reprinted in* HUGH V. MCLACHLAN & J. KIM SWALES, FROM THE WOMB TO THE TOMB: ISSUES IN MEDICAL ETHICS 140, 141 (2007).

39. *See* STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE 175–78 (2003) (explaining why commercial surrogacy does not objectify women).

40. Anderson, *Reply to McLachlan and Swales*, *supra* note 1, at 19.

can alter their existence. After all, "[i]t is the child's right to claim care and protection from . . . its parents. [It] is not [theirs] to voluntarily relinquish."[41]

Parental rights aside, the surrogate mother, whether she is a gestational or a genetic one, has *moral* obligations toward the child she delivers and so too does the commissioning couple, one of whom is the genetic father of the child and one of whom may be the genetic mother. Such moral obligations cannot be abandoned wantonly. However, these obligations could be discharged by ensuring, as far as possible, that the child is placed in the care of people who will look after him or her. It is not essential, nor will it often be possible, that each person involved takes care of the child him- or herself. The child has no right to be taken care of personally by all three parties to the agreement.

Some mothers, surrogate or not, might think, quite correctly, that it would be in the best interests of their children to be adopted by kind, intelligent, and wealthy people. But it does not follow that the mothers concerned are morally obliged to try to ensure that their children are so adopted. However, in various circumstances, it might be morally permissible for them to place their children for adoption. Biological mothers, whether they are genetically related to their children or are solely their carriers, have neither an inalienable right nor an inalienable duty to bring up the children concerned themselves.

D. Commercial Transactions and Market Relationships

How do market norms fit into a commercial agreement that has such a moral component? Market norms, which "structure relations among the people who produce, distribute, and enjoy" the commodity, have been characterized as being driven by self-interest:

> [I]n market transactions the will and desire of the parties determines the allocation between them of their freely alienable rights. Each party is expected to look after her own interests, neither party is expected to look after the interests of the other, or of third parties, except to the minimal extent required by law.[42]

"[Should] norms like this," the author asks, "be extended to cover the allocation of parental and custodial rights to children[?]"[43]

The question at issue in surrogate agreements is quite different from this one. The effects of particular contractual agreements must be distinguished from the conditions of them. Parental and custodial status are conferred by social and legal convention and by the decisions of particular courts in particular instances. These statuses are not property. They are not transferrable by contractual agreement.[44]

Furthermore, this characterization of market relationships is grossly oversimplified: self-regard is not peculiar to market relationships and commercial transactions. Nonmarket relationships, such as when car drivers

41. *Id.* at 21.
42. *Id.* at 19–20.
43. *Id.* at 20.
44. *See supra* V.C.

interact in traffic or when pedestrians walk around crowded cities, can be just as self-regarding as this depiction of markets. But even in these spheres, there can be courtesy, kindness, and regard for anonymous other persons. Even with totally impersonal transactions, regard for the thoughts, feelings, opinions, and interests of other people can intrude. Not all commercial transactions are so impersonal.

Self-regard does not preclude the mutual satisfaction of those people who are parties to transactions. Mutual benefit can result from some commercial arrangements. People have commercial transactions in various contexts for a variety of motives, some of which might conflict with each other. Some transactions are fleeting. Some are part of ongoing relationships or systems. Agents and agencies have an interest in having good reputations. To act fairly, honestly, and generously is a good means of obtaining a good reputation. Tricks that serve the itinerant charlatan well are not so effective for the settled, established tradesman. Commercial surrogate-motherhood agencies, for example, have a long-term interest in having a good reputation.[45]

Nor is the pursuit of one's self-interest always selfish or otherwise wrong. Indeed, if one did not ensure that one's own needs were met, one would often be unable to fulfill one's moral duties, including one's duties to act, when appropriate, in an altruistic manner. Nor is doing things for money wrong. Furthermore, actions can be both altruistic and done for monetary reward as, say, when someone works to meet the needs and wants of his children. Altruism and the desire for pecuniary reward are not dichotomously related.[46] As Adam Smith observed, self-interested, pecuniary actions are not necessarily selfish nor need they be harmful to other people. On the contrary, when people transact out of financially motivated self-interest, the actions can be mutually beneficial.

> [M]an has almost constant occasion for help from his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self love in his favour, and show them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have what you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. . . . It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own self interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.[47]

45. Mhairi Galbraith, Hugh V. McLachlan & J. Kim Swales, *Commercial Agencies and Surrogate Motherhood: A Transaction Cost Approach*, 13 HEALTH CARE ANALYSIS 11, 25 (2005).

46. *See* Hugh V. McLachlan, *The Unpaid Donation of Blood and Altruism: A Comment on Keown*, 24 J. MED. ETHICS 252, 253 (1998). *See generally* Hugh V. McLachlan, *Altruism, Blood Donation, and Public Policy: A Reply to Keown*, 25 J. MED. ETHICS 532, 532–56 (1999).

47. ADAM SMITH, THE WEALTH OF NATIONS 20 (Andrew Skinner ed., Penguin Books 2007) (1776).

E. Two Imaginary Legal Regimes

Are surrogacy agreements exclusively legal agreements with validity and enforceability concerns? Or are they (or should they be) exclusively moral and cultural, concerned exclusively with the child's best interests? According to Anderson,

> Commodification is an ethical and cultural concept, not a legal one. Even if the pregnancy contract does not involve a transaction that is legally defined as a sale, it may still commodify children if it replaces parental norms with regard to rights and custody of children with market norms. I argue that the pregnancy contract does this, because it moves away from regarding parental rights over children as trusts, to be allocated in the best interests of the child, toward regarding parental rights as like freely alienable property rights, to be allocated at the will of the parents. To see how this is so, compare two legal regimes: (1) that in which pregnancy contracts are null and void; (2) that in which pregnancy contracts are valid and enforceable. I advocate the first regime, McLachlan and Swales the second.[48]

Anderson views our position as untenable and as conclusively refuted: "McLachlan and Swales are caught in a contradiction: either the child has no right to have its best interests determine the outcome whenever custodial and parental rights are terminated, or else the pregnancy contract is null and void. They can't have it both ways."[49]

However, her argument fails. We could, so to speak, have it both ways. Even if it were the child's right that parenthood and custody disputes be settled solely by reference to its best interests, such a right would not be infringed by the existence of legally enforceable, commercial surrogate agreements. Nonetheless, children do not have such a moral right, and they should not be accorded such a legal right even if they sometimes appear to be. Anderson attempts to preempt our response:

> Perhaps [McLachlan and Swales] would take a fallback position: that the mother does not relinquish her parental rights in the contract, but that these rights are to be balanced against the father's rights as defined in the contract. This amounts to the view that the child's best interests are no longer to be regarded as the sole factor in a custody dispute, since they may be traded off against the interests of the parents as defined in their contract. They want us to believe that this way of regarding children is better for them than when their interests are preeminent in custody disputes.[50]

Anderson is right in saying that we do not think that the child's best interests should be regarded as the only important factor in a custody dispute. Such disputes are often dilemmas. We offer no formula for their resolution other than the claim that the interests and requests of the other parties to the issue, and of the general public, should also be considered. We do not say, however, that a system in which a child's best interests are not regarded as paramount is better for children than a system in which they are. We say, rather, that "contract pregnancy" is not against the best interests of the children

48. *See* Anderson, *Reply to McLachlan and Swales*, *supra* note 1, at 20 (arguing that the two are mutually exclusive).

49. *Id.* at 22.

50. *Id.* at 26 n.3.

involved. Furthermore, a system in which the best interests of children as children are held to be paramount in disputes over custody would not, in our view, be in the interests of people as people.[51]

Consider Anderson's account of the differing legal regimes:

> What happens when the mother and father who have signed a pregnancy contract disagree about who should have custody of the child, once it is born? Under the first regime, this is treated as a custody dispute between unmarried parents. In the U.S., such disputes are resolved by considering the best interests of the child. The soundness of one parent's claim to custody is always established relative to the other parent, taking the best interests of the child as the sole standard of judgment. One parent is not allowed to pay another parent to go away, and expect such a voluntarily contracted agreement to be upheld by the courts. . . . Contrast this situation with a legal regime in which the relinquishment clause of a pregnancy contract is enforced. This would amount to the court denying the mother legal standing to bring a claim that the child would be better off in her custody, in virtue of the fact that the other parent acquired a right in the pregnancy contract to keep her out of any custody dispute. This is the only thing it could mean to *relinquish* one's "right to claim legal parenthood of the child." If this isn't literally selling a child, it is selling the child out.[52]

This account distorts the way courts can and do operate. The legal enforcement of a surrogate-motherhood agreement would not and need not involve what Anderson suggests. Depending on the particular conditions of the agreement, enforcement of the contract in the context of breach might merely mean the repayment of money that has already been received. Suppose a custody dispute over a child, who, let us say, is the genetic daughter of the female member of a commissioning couple who wants custody of her; suppose that the surrogate mother who carried her now wants to keep her. Suppose that the court is expected to settle the matter with sole regard to the best interests of the child. The existence of a surrogate-motherhood agreement, whether commercial or not, would be irrelevant. No legally enforceable, mutually agreed terms of the agreement need conflict with the aims of the court in its decision over custody, far less bind the court in any way.

Suppose that in another disputed case, the court awards custody of the child to the surrogate mother. The commissioning couple might consider the surrogate mother to be in breach of her contract and seek legal redress. If this particular dispute reaches court, it will be a different dispute and a different hearing from the one discussed in the previous paragraph. The question of the custody of the child will not be at issue. This particular court has the job of examining the question, did the surrogate mother do what she and the commissioning couple agreed she should do in return for payment from the commissioning couple? A well-framed commercial surrogate-motherhood contract might also specify the penalties should one or both parties fail to fulfill their sides of the bargain. The court might decide that the contract has been breached and specify a remedy. However, it will not be within the competence of this particular court to alter or confirm the prior ruling of another court

51. *See supra* IV.A.

52. *See* Anderson, *Reply to McLachlan and Swales*, *supra* note 1, at 20–21 (footnote omitted).

concerning the custody of the child. The legal custody of the child is not an issue about which a recognizable, legally enforceable agreement could have been reached in the surrogacy contract. What has been done? What has been left undone? What should be done to redress that which was not done? These are the questions that this particular court is competent to deal with.

Furthermore, Anderson quite wrongly asserts that

> [a]nother way to see how children are commodified in the process is to see how the status of the child differs in the two legal regimes. Where the pregnancy contract is null and void, the child is the preeminent party in the custody dispute, whose interests govern the allocation of parental and custodial rights. Where the pregnancy contract is valid, the child is not a party to the suit over breach of contract. It is merely the object over which possession is disputed. If the pregnancy contract is enforceable, then custody of the child is awarded according to its terms, without an independent inquiry into the child's best interests.[53]

The child could be thought to be the preeminent party in a custody dispute whether or not commercial surrogate-motherhood contracts are legally enforceable. The child need not be so considered, whether such contracts are legally recognized or not. To recognize and enforce such contacts is not to award custody in terms of them.

F. Law and Ethics

How, if at all, does the enforcement of surrogacy agreements affect the norm of parental love? Is such enforcement tantamount to a legal endorsement of the surrogate mother's moral dilemma: keep the child (and so honor the norm of her parental love) or her fee?

Law and ethics, however, are separate. To say that something is legal is not to say that it is ethically permissible. To say that a particular sort of contract should be legally enforceable is not to say that it is ethical to enter into it. Various morally wrong actions are, quite properly, legal. For instance, adultery might often be immoral but it does not follow that it should be a criminal offense. Various actions that are not inherently morally wrong are, quite properly, crimes. If there were no laws or conventions regarding which side of the road motorists should drive on, there would be no moral preference for driving on the right- or the left-hand side. Nonetheless, there are good reasons for establishing—arbitrarily—a legal preference for one side or the other. Whether one should be a surrogate mother and whether one should relinquish the custody of a child one has carried are quite different questions from whether commercial surrogate-motherhood contracts should be legally enforceable.

Similarly, whether one may or should love a child and how such love might be manifested are different questions from whether commercial surrogate-motherhood contracts should be legally enforceable. Furthermore the motives,

53. *See id.* at 21 (arguing that the child (and her best interests) is the preeminent party in the custody dispute but "merely the object over which possession is disputed" in a suit on the pregnancy contract).

intentions, contexts, and outcomes of commercial surrogate-motherhood contracts are so variable that it would be inadvisable to associate them exclusively with one specific principle. In any case, the consequences of applying principles can be different from the principles themselves. For instance, applying principles that are acceptable can (as with divorce) lead to unfortunate consequences, such as the separation of children from one of their parents. To say that the law endorses the misery of children and parents because divorce can produce such a result would be absurd.

VI

CONCLUSION

Markets are not infallible, nor are they sacrosanct. Not all commercial transactions should be legal. Not all contracts should be enforceable in law. It is reasonable to say, though, that transactions should be legal unless there is a justification for making them illegal. Similarly, contracts should be enforceable unless their nonenforcement can be justified. Bans are often justified. But the onus is on the banners to justify them. Commercial surrogate motherhood should be legal, and commercial surrogate contracts should be enforceable because the suggested arguments for banning them are defective. To say that commercial surrogate-motherhood contracts should be unenforceable on the grounds that they are against the interests of children and involve their commodification is not reasonable.

Resistance to commercial surrogate motherhood is based on an irrational prejudice against monetary transactions and a groundless general preference for services that are offered without a financial fee. If people want to use the services of a surrogate mother, they might well consider that there are advantages and disadvantages of altruistic and of commercial surrogacy. Let both systems exist and let the potential users decide which one they prefer to use.