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## The problem with commercial surrogacy. A reflection on reproduction, markets and labour

Lorenzo Del Savio, Giulia Cavaliere\*

**ABSTRACT:** Moral arguments pertaining to commercial surrogate pregnancy have been framed as questions on the appropriate scope of markets. Should pregnancies be conceived and regulated as services that can be exchanged in markets? It has been argued that surrogacy is an exceptional form of labour, and hence inappropriately commodified, because of its nature. Commercial surrogacy involves the bodies and identities of women in a most invasive manner, it negatively affects motherhood and it inappropriately treats babies and surrogates as commodities. We find these arguments wanting: the nature of gestational surrogacy does not make it an exceptional form of labour, and indeed the commodification of pregnancy may disrupt oppressive conceptions of human reproduction. We argue instead that surrogacy does raise major moral concerns insofar as it may exacerbate extant patterns of domination and exploitation based on international inequities and gender-based discrimination. However, the moral problems of surrogacy extend to wage labour more generally. In other words, surrogate pregnancy is not an exceptional form of labour, but human labour is an exceptional commodity.

**KEYWORDS:** Surrogacy; Market; Labour; Commodification; Freedom.

**SUMMARY:** 1. Surrogacy and the future of human reproduction. - 2. Altruistic surrogacy vs. the market. - 3. The debate on the scope of markets. - 4. The pro-commodification presumption: welfare, knowledge, liberty. - 5. Pregnancy is special. - 6. Labour is special. - 7. Conclusions.

### 1. Surrogacy and the future of human reproduction

**F**ertilisations, pregnancies and upbringings are necessary activities for the continuation of human society through the production of new individuals, i.e. biological reproduction. Such reproductive activities have been organised in different manners in different times and places, and indeed, reproductive relationships have been a key topic of comparative anthropology ever since its foundation<sup>1</sup>. In several contemporary societies, institutions such as health systems, families and schooling orchestrate reproduction within human groups, including genetic relatives, broader kinship groups and the larger society. In some contexts, reproductive services have been, as

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<sup>1</sup> Systems of kinship are a major research topic of early anthropological studies starting with L.H. MORGAN, *Systems of consanguinity and affinity of the human family*, Vol. 218, Washington, 1871.

it were, outsourced: in societies that have abolished slavery this essentially means that reproductive services can be purchased and exchanged in markets. Along with families, schools and health systems, markets have become another institution that organises human reproduction. A relatively new development is the emergence of pregnancy markets.

Since the development of In Vitro Fertilization (IVF), it has become possible to disentangle sexual intercourse, genetic parenthood and pregnancy, thus opening up new venues to reshape reproductive institutions, including parenthood<sup>2</sup>. One of the new possibilities that assisted reproduction technologies have opened allows women to carry a foetus that is not their genetic offspring, or a foetus that resulted from the ectopic fertilisation of their gametes. A ‘surrogate’ is a woman that becomes pregnant, and carries and delivers a child on behalf of others<sup>3</sup>. ‘Surrogacy agreements’ establish that the pregnant woman will surrender her legal right of motherhood to a third party<sup>4</sup>.

Surrogacy agreements can take different forms, including: *gestational surrogacy* and *partial surrogacy*. Whereas in the former the child is genetically unrelated to the surrogate, in the latter the child is the genetic offspring of the surrogate and a donor. Despite some divergences, surrogacy can be compared to adoption, with the important difference that the future parents could be the partial or full genetic parents of the adopted child, thereby allowing couples that cannot conceive naturally, and homosexual couples<sup>5</sup>, to have genetically related children. This particular use of IVF challenges established conceptions regarding parenthood, and has hence attracted considerable attention in public debates. Legal cases have arisen concerning the enforceability of surrogacy agreements (e.g. The ‘Baby M’ case<sup>6</sup> and more recently the case of Baby Gammy<sup>7</sup>), as several pieces of legislation are based on the Roman law principle “*Mater semper certa est*”, which, until surrogacy, corresponded neatly with what was technically feasible<sup>8</sup>.

In addition, the technological separation of conception and pregnancy has facilitated the commodification of pregnancy. Partial surrogacy was possible before IVF, but IVF allows both gestational surrogacy and a thorough isolation of pregnancy from sexual intercourse, thereby easing its commodification. Those who find surrogacy unsettling, oscillate between condemning reproductive technologies

<sup>2</sup> C. PALACIOS-GONZÁLEZ, J. HARRIS, G. TESTA, *Multiplex parenting: IVG and the generations to come*, *Journal of medical ethics* 40/11, 2014, 752-758.

B. R. SHARMA, *Forensic considerations of surrogacy—an overview*, *Journal of clinical forensic medicine*, 13/2, 2006, 80-85.

<sup>3</sup> F. SHENFIELD, G. PENNING, J. COHEN, P. DEVROEY, G. DE WERT, B. TARLATZIS, *ESHRE task force on ethics and law 10: surrogacy*, *Human reproduction*, 20/10, 2005, 2705-2707.

<sup>4</sup> *Ibidem*.

<sup>5</sup> So far homosexuals can opt for partial surrogacy only, due to technological difficulties in producing artificial gametes. However, there have been advancements in cellular reprogramming that may make it possible, see D. CYRANOSKI, *Rudimentary egg and sperm cells made from stem cells*, *Nature News*, 24/12, 2004, doi:10.1038/nature.2014.16636.

<sup>6</sup> A.L. ALLEN, *Privacy, surrogacy, and the Baby M case*, *The Georgetown Law Review*, 76, 1987, 1759-1792.

D.L. HOFMAN, *Mama's Baby, Daddy's Maybe: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, *William Mitchell Law Review*, 35/2, 2008, 449-468.

<sup>7</sup> S. CALLAGHAN, A.J. NEWSON, *Surrogacy, motherhood and baby Gammy*, *Bionews*, 766, 2014.

<sup>8</sup> B.R. SHARMA, *op. cit.*

as such and condemning the resulting commodification<sup>9</sup>. It is, however, helpful to distinguish between these two sources of unsettlement. Surrogate pregnancies can be carried out in non-commercial forms, for instance by a volunteer, who may be a relative or a close friend of the prospective parents. This type of surrogate agreement is called “altruistic surrogacy”. However, it is surrogacy in its “commercial” form that stirs most controversy. Indeed, some legislation treats altruistic and commercial surrogacy very differently, and they are generally more restrictive in the case of commercial surrogacy<sup>10</sup>.

## 2. Altruistic surrogacy vs. the market

Italy and the United Kingdom represent interesting examples as Italian and British legislators have opted for different types of regulations of surrogate agreements. Whereas in Italy surrogacy is banned outright, in the UK altruistic surrogacy is tolerated. In Italy, assisted reproduction services are regulated by Law 40 (issued in February 2004)<sup>11</sup>. Before Law 40, surrogate services were unregulated. Paragraph 6 of Article 12 prohibits surrogacy (including altruistic forms of surrogacy) and the commercialisation of embryos and gametes. In addition, the Article establishes a penalty for engaging in surrogacy by organising, publicising or undertaking it. In Italy, the penalty amounts to detention from three to twenty-four months and a fee from € 600,000 to € 1,000,000<sup>12</sup>. This legislation echoes Article 42 of the Italian Code of Medical Deontology (1998). This Article prohibits, among other services, all forms of surrogate pregnancy and the commercialisation of gametes, embryos and fetuses. As a consequence, surrogate pregnancy agreements are not considered valid in court, i.e. they are void<sup>13</sup>. In the UK, the legal treatment of surrogate services differs from Italy. The *iter legis* of surrogacy in the UK started in 1982 with the establishment of a committee for the investigation of social, ethical and legal questions raised by the development of IVF and the progress of embryology science. The committee produced The Warnock Report, named after the committee chair Professor Mary Warnock. The Report was published two years later and provided legal basis for what later became the Human Fertilisation and Embryology Act (1990)<sup>14</sup>. The Report illustrates the ethical arguments in favour of and against surrogacy and questions concerning parenthood of a child conceived through surrogacy. It concludes that the risks for the surrogate mother and the children thus conceived outweigh the benefits of this service for infertile couples. Their recommendation at the time was to «render criminal the creation or the operation in the United Kingdom of agencies whose purposes

<sup>9</sup> See for instance the position of the Catholic church, which criticises reproductive biotechnologies «for failing of accepting and respecting the human condition as it was created» (Post-Synodal Apostolic Exhortation *Amoris laetitia* of the HOLY FATHER FRANCIS, 2016, §56).

<sup>10</sup> V. KRISHNAN, *Attitudes toward surrogate motherhood in Canada*, Health Care for Women International, 15/4, 1994, 333-357.

<sup>11</sup> L 40/2004 “Norme in materia di procreazione medicalmente assistita”.

<sup>12</sup> L 40/2004 Art. 12.6.

<sup>13</sup> A.B. FARAONI, *La maternità surrogata. La natura del fenomeno, gli aspetti giuridici, le prospettive di disciplina*, Milano, 2002.

R. MASTROIANNI IANNI, *La surrogazione di maternità: una questione controversa*, in *Tigor. Rivista di scienze della comunicazione e di argomentazione giuridica*, 7/1, 2015, 103-119.

<sup>14</sup> DEPARTMENT OF HEALTH AND SOCIAL SECURITY, Report of the Committee of Inquiry into Human Fertilisation and Embryology (“The Warnock Report”), July 1984, Cmnd 9314.

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» and to criminalise professionals and other people who «knowingly assist in the establishment of a surrogate pregnancy»<sup>15</sup>. The committee also maintained that all surrogate agreements should be considered illegal and thus unenforceable in court. These recommendations were eventually formalised in the Surrogacy Arrangements Act of 1985, which regulates gestational surrogacy practices in the UK. The Act criminalised any attempt by third parties to initiate, participate, advertise or facilitate payments for surrogate services<sup>16</sup>. In addition, the Act follows the initial position of the Warnock Report: no legally-binding agreements can be stipulated in the UK and the surrogate mother has the right to change her mind at any time during the pregnancy and after the birth of the child, even when she is not the child's genetic mother. Parenthood matters in surrogacy agreements are resolved by parental orders. Until the last update to the HFEA Code of Practice (October 2013), if the commissioning parents intended to become the legal parents of the child, they either had to adopt the child, or to apply for a parental order to reassign the parenthood of the child<sup>17</sup>. Despite the initial position of The Warnock Report and of the prohibition of commercial surrogacy in the subsequent Surrogacy Arrangements Act, surrogacy in its altruistic form is allowed in the UK.

Why would a country adopt different legislation for commercial and altruistic surrogacy? In treating altruistic and commercial surrogacy alike, the Italian legislator opted for a sharp condemnation of the practice of surrogacy itself. For the UK legislator it matters that in one case it is *markets* that organise surrogacies, and in the other case informal agreements that do not involve commodification. The significance of the distinction made by the UK legislation is the focus of this paper. What makes markets of surrogacy special? How is pregnancy different from other goods and services that are exchanged in the market? Is the market an appropriate institution to organise reproductive services?

Pregnancy markets affect human well-being for two reasons essentially. Firstly, they affect several human relationships that we may (or may not) want to preserve. These relationships include the couple, the family and parenthood. Secondly, pregnancy-related reproductive services have so far been (and in the immediately foreseeable future will be) essentially gendered: pregnancies can only be carried out by female human beings. Women have been suffering from discrimination and male domination in most extant societies. Such domination and discrimination can be affected by how reproduction is organised, and indeed, the control of reproductive capacities has always been instrumental for the continuation of patriarchal power<sup>18</sup>. With commercial surrogacy, pregnancies become a segment of the reproductive market, and a form of what has been called 'clinical labour': this is expected to affect women's liberty and well-being<sup>19</sup>.

<sup>15</sup> Ibidem. p. 47

<sup>16</sup> Surrogacy Arrangements Act 1985.

<sup>17</sup> Surrogacy Arrangements Act 1985; as of 1 October 2013, the HFEA updated the Code of Practice and the guidance notes of surrogacy agreements were affected. According to this updated version, the surrogate remains the legal mother upon birth, but if she is not married or in a civil partnership one of the intended parents can be the other legal parent of the child when born. CH(13)01.

<sup>18</sup> C. PATEMAN, *The Sexual Contract*, Cambridge, 1988.

<sup>19</sup> M. COOPER, C. WALDBY, *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*, Durham-London, 2014.

The aim of this article is to provide a new perspective on this debate. Following Satz, we argue that the moral questions of commercial surrogacy need to be framed as questions pertaining to the appropriate scope of markets (Section Three)<sup>20</sup>. In Section Four we review arguments in favour of commodification and explain why making commodification permissible ought to be taken as the default position. We then distinguish two different sets of challenges to the default position. Challenges based on *the nature of pregnancy* and the effects of its commodification on surrogates, babies and a number of social institutions that are allegedly worth-preserving are discussed in Section Five. Challenges based on issues of domination, exploitation and inequities towards women that depend on *contextual factors*, including economic inequalities and discrimination are the object of Section Six. In the same section, we argue that the first set of challenges fails to show that pregnancy should not be commodified. Instead, the second set of challenges captures some of the wrongs of commercial surrogacy of paramount moral importance. However, it is our intention to show that these wrongs do not apply solely to reproductive labour; and that although pregnancy is not an exceptional form of labour, its moral saliency is due to *labour* being an exceptional commodity. We conclude by explaining the advantages of this perspective in reasoning about policy, legislation and public debates on surrogate pregnancy.

### 3. The debate on the scope of markets

The moral issues surrounding gestational surrogacy have been discussed by a wide range of scholars, from philosophers<sup>21</sup> to sociologists<sup>22</sup> and legal experts<sup>23</sup>. A common framework adopted in English-speaking moral and political philosophy constructs the normative questions pertaining surrogacy as questions on the appropriate scope of markets, ie. whether gestations are *the sort of things* that are appropriately bought and sold<sup>24</sup>. A broad swath of social history in the last century can be interpreted as a struggle over the proper scope of commodification<sup>25</sup>. For instance, welfare states have been seen as de-commodification that makes a number of resources available to citizens irrespective of

<sup>20</sup> D. SATZ, *Markets in women's reproductive labor*, *Philosophy & public affairs*, 21/2, 1992, 107-131.

<sup>21</sup> E. S. ANDERSON, *Is women's labor a commodity?*, *Philosophy & Public Affairs*, 72/3, 1990, 71-92 a).

R.J. ARNESON, *Commodification and Commercial Surrogacy*, *Philosophy & public affairs*, 21/2, 1992, 132-164.

S. WILKINSON, *The exploitation argument against commercial surrogacy*, *Bioethics*, 17/2, 2003, 169-187.

<sup>22</sup> M. Cooper, C. Waldby, op. cit.

<sup>23</sup> M. CRAWSHAW, E. BLYTH, O. VAN DEN AKKER, *The changing profile of surrogacy in the UK—Implications for national and international policy and practice*, *Journal of Social Welfare and Family Law*, 34/3, 2012, 267-277.

E.S. SCOTT, *Surrogacy and the Politics of Commodification*, *Law and Contemporary Problems* 72/3, 2009, 109-146.

B.R. Sharma, op. cit.

<sup>24</sup> R.J. Arneson, op. cit.

C. PATEMAN, Op. cit.

M.J. RADIN, *Market-inalienability*, *Harvard Law Review*, 100/8, 1987, 1849-1937.

D. SATZ, Op. cit.

E.S. SCOTT, Op. cit.

<sup>25</sup> K. POLANYI, *The Great Transformation*, Boston: Beacon Press, 1970;

R.M. TITMUS, *The Gift Relationship: From Human Blood to Social Policy*, New York: Pantheon Books, 1971.

their means<sup>26</sup>. The debate on surrogacy can be considered as another instance of this broader debate. This is also the approach we take here.

For the purpose of this paper, we define "commodity" as any good or service that is exchanged in a market. The concept of a market describes an ideal situation in which actors bargain on the price of a commodity as either producers or consumers. The price generated by such negotiation mediates between the competing interests of several buyers and sellers. Crucially, buyers and sellers respectively know how much (utility) they would gain from the commodity, and how much effort it takes to produce it. While extant markets are approximations of such an ideal, it is helpful to bear the model in mind for the discussion of the virtues and vices of markets. Markets are just one of several conceivable distributive institutions: others include families, networks of friends, political institutions, firms, etc. The tendency of Western societies during the last centuries has arguably been towards an extended marketisation of goods and services that were once produced, exchanged and distributed in different manners<sup>27</sup>. The effects of marketisation on human well-being depend partly on the institutions that markets replace. Markets may replace undesirable institutions, and while this replacement is not a virtue of markets as such, commodification can sometimes be desirable in virtue of its disruptive effects<sup>28</sup>. In the case of surrogacy, its repercussions for the structure of family, for instance in terms of genetic parenthood for homosexual couples, need to be analysed.

In the next section, we will review several arguments in favour of commodification, explain their strengths and weaknesses, and show why making commodification permissible should be taken as the default position.

#### 4. The pro-commodification presumption: welfare, knowledge, liberty

Pro-commodification arguments in the debate on surrogacy closely reflect the general virtues that markets are thought to possess: their welfare-enhancing properties, their efficient employment of local knowledge, and the protection they guarantee to individual freedom.

*Welfare.* Prospective parents may find one of the few chances of parenthood and possibly the only chance of having genetically related offspring in surrogacy agreements. Homosexual couples and single people have the opportunity to become parents even in countries where adoption is restricted to heterosexual couples. Despite the risk of overstressing genetic parenthood, the practice of surrogacy seems to protect an important interest of prospective parents, their interest in being a genetic parent. At the same time, women of gestational age could benefit from this form of labour both socially and economically<sup>29</sup>. Surrogate labour is a uniquely female type of clinical labour, which may allow

<sup>26</sup> GOSTA ESPING-ANDERSEN, *Politics Against Markets: The Social Democratic Road to Power*, Princeton: Princeton University Press, 1985.

<sup>27</sup> K. POLANYI, op. cit.

<sup>28</sup> One, possibly uncontroversial, example of emancipation through the expansion of markets may be the entrance of women in labour market in rich countries in the last decades of the XX century. The commodification of women labour force (including the outsourcing of household services that women had been providing within families) has been an important determinant of women's liberty.

<sup>29</sup> B. PARRY, *May the surrogate speak?*, OpenDemocracy, 2015a, <https://www.opendemocracy.net/beyondslavery/bronwn-parry/may-surrogate-speak> (last visited 26/04/2016).

women to take active part in market exchanges. Both authors that are wary of welfarist arguments and those who argue in favour of them agree on one point: even if women chose surrogate labour due to the absence of valuable alternatives, prohibiting surrogacy on these grounds would unduly harm the surrogates<sup>30</sup>. Even if a person would not carry out a pregnancy were her background conditions better and her range of opportunities wider, prohibiting surrogacy inflicts a further harm upon her by barring a source of revenue which she finds attractive<sup>31</sup>. The mutual advantage of buyers and sellers is a general virtue of markets that pro-market theorists like to stress<sup>32</sup>. Although it does not trump other considerations, frustration of prospective parents and would-be surrogates' interests is a cost that should be imputed to banning commercial surrogacy.

*Local knowledge.* Bans on market exchanges frustrate buyers and sellers' preferences. However, buyers and sellers are often irrational, and they may fail to reflect on their real interests. Arguments for commodification based on welfare are not conclusive chiefly for this reason. Yet there is a further problem with prohibition of market exchanges: they impede the employment of useful local knowledge. A poor woman who decides to carry out a pregnancy for others is often depicted as a victim of circumstance who is unable to make a real autonomous choice<sup>33</sup>. According to this narrative, she acts under psychological pressures due to poverty, and her preferences are unduly influenced by her condition. However, she is better placed than regulators in the evaluation of her opportunity costs and the relevant alternatives she has, including labouring in «poorly regulated sectors such as domestic service, toxic industries, or sex work, all of which are less economically rewarding and potentially even more precarious and hazardous than surrogacy»<sup>34</sup>. This local knowledge would be wasted by the enactment of a ban on commercial surrogacy, i.e. such local knowledge will not be used to coordinate actions that may increase buyers and sellers' well-being.

*Freedom.* Markets leave ample sovereignty to individuals. Individual needs, wants and desires are what matters in market exchanges, and nothing more. Markets also satisfy the requirement of neutrality that prohibits fettering individual lives on the basis of partial views of what should be needed, wanted or desired. The exercise of individual sovereignty guaranteed by free markets is a further feature that appears in debates on surrogacy. The importance of preserving freedom of choice of surro-

<sup>30</sup> B. PARRY, op. cit, (a).

J.A. ROBERTSON, *Surrogate mothers: Not so novel after all*, Hastings Center Report, 13/5, 1983, 28-34 a).

S. Wilkinson, op. cit.

<sup>31</sup> A. WERTHEIMER, *Two questions about surrogacy and exploitation*, Philosophy & public affairs, 21/3, 1992, 211-239.

<sup>32</sup> Satz (1992) links pro-commodification arguments with fundamental theorems of welfare economics that show that markets are welfare-maximising. The clearing market-prices generate a distribution such that no other distribution can increase aggregate welfare without inflicting losses on at least some of the actors involved. The relationship between the theorem and virtues of real markets is however complex, as the theorem holds through for an all-encompassing market of goods and under very strict assumptions.

<sup>33</sup> E. BAUMHOFER, *Commodifying the Female Body: Outsourcing Surrogacy in a Global Market*, Thinking Gender Papers, UCLA Conference, 2012, 1-23.

E.S. Scott, op. cit.

<sup>34</sup> B. PARRY, op. cit, (a).



gate mothers has often been defended<sup>35</sup>. To illustrate, banning or criminalising surrogacy is seen as undue restriction on women's autonomy and an unjustified interference of the state on their reproductive decisions based on partial views of what counts as appropriate reproductive behavior and motherhood. Feminist scholars have contrasting views on surrogacy<sup>36</sup>. Some feminist thinkers who have engaged with the debate on the moral issues of surrogacy defend this practice on the basis of respecting women's rights to freedom and self-determination. The presumption in favour of freedom of choice of contemporary liberal societies and the struggles of feminist movements to grant women the freedom to dispose of their own bodies conflate here. These arguments are similar to those put forward in the context of assisted reproduction: procreative choices (including decisions of how, when and whether or not to reproduce) are considered by many to be among the most private choices that people make. For this reason, there exists a strong presumption in favour of liberty in this sphere, and against the limitation of this fundamental specification of freedom of choice<sup>37</sup>.

The third set of arguments in favour of surrogacy is arguably sufficient to establish that permitting commercial surrogacy is the default moral position, which can be abandoned only if stronger arguments are devised. The commitment to individual liberty poses a high justificatory burden on those who want to prohibit behaviours that do not harm others. In this case, while surrogacy is a pretty invasive form of contractual exchange, as long as it involves consenting parties, there must be solid justifications for prohibition, and indeed for any interference<sup>38</sup>. There are other cases of bans on potentially consensual commercial transactions: from the classical but somehow fanciful prohibition of selling oneself as a slave, to the prohibition of selling votes. However, these cases do not make other prohibitions any less problematic, and one reason they are 'classics' in normative reasoning is precisely the difficulty involved in their rational vindication. Such presumption in favour of liberty also explains why commodification, albeit lamented, is seldom prevented. Markets are the result of free exchanges between individuals, and those committed to the protection of individual sovereignty are

<sup>35</sup> R. MACKLIN, *Is there anything wrong with surrogate motherhood? An ethical analysis*, *The Journal of Law, Medicine & Ethics*, 16/1-2, 1988, 57-64.

C. Palacios-González, J. Harris, G. Testa, op. cit.

J.A. Robertson, op. cit. (a)

J.A. ROBERTSON, *Children of choice. Freedom and the new reproductive technologies*, Princeton, 1996b.

<sup>36</sup> L.B. ANDREWS, *Surrogate motherhood: the challenge for feminists*, *The Journal of Law, Medicine & Ethics*, 16/1-2, 1988, 72-80.

I. PETERSON, *Baby M. trial splits ranks of feminists*, *The New York Times*, 1987, <http://www.nytimes.com/1987/02/24/nyregion/baby-m-trial-splits-ranks-of-feminists.html> (last accessed: 26/04/2016)

E.S. SCOTT, op. cit.

R. TONG, *The overdue death of a feminist chameleon: Taking a stand on surrogacy arrangements*, *Journal of social philosophy*, 21/2-3, 1990, 40-56.

<sup>37</sup> J.A. ROBERTSON, op. cit. (a).

J.A. ROBERTSON, op. cit. (b).

C.T. SISTARE, *Reproductive freedom and women's freedom: Surrogacy and autonomy*, *Philosophical Forum*, 19/4, 1987, 227-240.

<sup>38</sup> J.S. MILL, *On liberty*, London: Penguin, 2010.

ipso facto committed to the expansion of markets, if no stronger arguments can be put forward for interference.

In the debate on surrogacy, there are two general strategies to argue for prohibition, or interference with surrogacy markets. One strategy rests on the effects of commodification of pregnancy on surrogates or other parties, which allegedly makes pregnancy special. This strategy aims to show that selling oneself as a surrogate is akin to slavery, or that it harms third parties: surrogate babies or, more unlikely, society at large. The second strategy aims to question the structural features of contemporary societies that make surrogacy undesirable as it sustains or worsens forms of discrimination, domination and exploitation against women. We will show that these two strategies are profoundly dissimilar. The first set of arguments strives to support the view that pregnancy is not the sort of thing that should be commodified (we argue that the arguments put forward to support this view fail). The second set of arguments strives instead to support the view that pregnancy belongs to a broader category of services whose commodification is necessarily a site of conflict (we argue that these arguments are successful).

### 5. Pregnancy is special

Pregnancy may be a special service that should not be commodified because of its effects on mothers, babies, society in general, or any combinations of the three.

*Surrogate mothers.* Surrogacy may be exceptionally harmful to the surrogate from a physical, emotional and existential point of view. One instance of emotional harm may be caused by the disruption of the relationship that the surrogate establishes with the foetus while it grows in her womb<sup>39</sup>. According to this view, the tie between the surrogate mother and the foetus she is carrying extends beyond the existence of genetic kinship and is part of a biological type of attachment to the future child. Moreover, emotional harm results from the repression of maternal feelings towards the foetus and from the disruption of the bond between the identity of a woman and her sexuality<sup>40</sup>. Some scholars employ the notion of alienation to describe the surrendering of the product of a surrogate's labour to someone else<sup>41</sup>. Without denying that such separation may indeed be extremely harmful, the argument seems unduly paternalistic: as long as the surrogate consents to such psychological costs, there seems to be no ground to prohibit surrogacy agreements<sup>42</sup>. People do make psychologically painful decisions, including decisions pertaining to their relationships with other human beings,

<sup>39</sup> M. AGNAFORS, *The harm argument against surrogacy revisited: two versions not to forget*, *Medicine, Health Care and Philosophy*, 17/3, 2014, 357-363.

<sup>40</sup> E.S. ANDERSON, op. cit. (a).

J. OKSALA, *Affective Labor and Feminist Politics*, *Journal of Women in Culture and Society*, 41/2, 2016, 281-303.

C. PATEMAN, op. cit.

<sup>41</sup> E.S. ANDERSON, op. cit. (a).

E.S. ANDERSON, *Why commercial surrogate motherhood unethically commodifies women and children: reply to McLachlan and Swales*, *Health Care Analysis*, 8/1, 2000, 19-26, b).

A. VAN NIEKERK, ANTON, L. VAN ZYL, *The ethics of surrogacy: women's reproductive labour*, *Journal of medical ethics*, 21/6, 1995, 345-349.

<sup>42</sup> G. DWORKIN, *Defining Paternalism*, in Coons and Weber (eds.), *Paternalism: Theory and Practice*, Cambridge: Cambridge University Press. 2013, pp. 25-39.

for reasons related to their jobs. Even admitting that particular biological mechanisms underpin the bond between (gestational) mother and child, this is hardly exceptional. Bonds between relatives or between partners are equally grounded on robust mechanisms, and what seems to matter is whether the bond is deeply felt or not, rather than the nature of the mechanisms that sustain it. The alienation of the product of personal work is a widespread feature of working life: scholars surrender their manuscripts' copyrights to editors, architects their projects to engineers and builders, and so on.

In addition to psychological harm and alienation, surrogate labour is considered exceptional because it causes physical harm to the surrogate due to the long term kind of commitment that a pregnancy necessarily entails. Prior to the beginning of the pregnancy, the surrogate has to take medications, and during the pregnancy she will have to modify her habits and comply with societal and legal behavioural requirements for pregnant women. However, practically every job has long term physical consequences, and requires compliance with socially sanctioned behaviours. Professional athletes who endure extremely severe and physically damaging training sessions and have to follow certain dietary and behavioural obligations set by their clubs, are an often quoted example in this context. Even if the case of athletes may indeed be a quite extraordinary case and as such prove nothing in the case of surrogacy, effects on long term health are known for most clerk jobs. For instance, there is evidence that the health of employees with low control over their working tasks is damaged by the stress that it causes, and that their life expectancy is shortened as a result<sup>43</sup>.

Moreover, there is a further problem with singling out reproductive work as a special kind of service, incomparable with other physical and psychological performances required in ordinary working life. Interferences with personal choices in the reproductive sphere may be more censurable than other paternalistic interferences, given the long standing harms to women that the patriarchal grip on female reproduction has generated. Feminist scholars have objected that it is unclear how one can be at the same time in favour of the legalisation of abortion, yet against surrogacy<sup>44</sup>. Indeed the argument that reproduction is a *sui generis* female service, and involves features of the female body that are of special concern for women's identity, seems to describe a societal judgement that in the past has conveyed harmful suppressions of women. If anything, it would be desirable that surrogacy *normalises* reproductive services. To repeat the point: such observations do not make surrogacy unproblematic, exactly as analogous observations regarding the non-exceptionality of sex work would not make prostitution unproblematic. They only show that the problem lies elsewhere or the focus must be directed elsewhere.

We have argued that there is nothing special in the psychological harms and alienation resulting from the severing of the surrogate-child tie, nor in the physical effects of pregnancy, nor in its particular relationship with women's identity. However, others may be concerned that the commodification of the human body in the form of surrogacy expresses an intolerable attitude towards human life. There are two sides to this concern: one side pertains to the surrogate's dignity, and is akin to the argument against slavery, the other pertains to the effects on society that such an attitude may have (and will be discussed below as it does not concern the surrogate as such).

<sup>43</sup> M. MARMOT, R. WILKINSON, eds. *Social determinants of health*, OUP Oxford, 2005, Ch.6.

<sup>44</sup> L.B. ANDREWS, op. cit.  
E.S. SCOTT, op. cit.

According to this view, surrogates lose their dignity and are transformed into paid breeders and incubators for men's sperm<sup>45</sup>. The dignity argument is also reflected in legislation and advisory documents<sup>46</sup> where surrogacy agreements are seen as harmful insofar as they violate the sacrality of pregnancy and reproduction, and transform women and reproductive labour in commodities. Most European countries such as Italy, France, Germany, Norway, etc. opted for a ban on surrogacy, mirroring the position taken on surrogacy in December 2015 in the Council of Europe's 'Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter'. In the report, the EU took stand on human rights and possible actions to promote them. Among other topics, the Report addresses the Rights of Women and Girls<sup>47</sup> and Article 114 condemns «the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments»<sup>48</sup>.

Article 114 mentions some of the wrongs of surrogacy that will be discussed below, including exploitation and the effects of vulnerability on the quality of personal choices. However, we have shown above that the use of the body and its reproductive functions as commodities is hardly unique, and treating it as such may indeed harm women. There are traces of instrumentalisation of human beings in surrogacy, but these are equally present in any other job where the capacity and physical powers of the worker are sold to other human beings that need them.

The argument from dignity may have another source, namely the idea that surrogacy is degrading in a moral sense, i.e. it fails to treat surrogates as human beings should be treated, which echoes the Kantian imperative to treat persons not as means, but as ends in themselves. However, why would surrogacy be degrading? Prejudices and taboos surrounding reproduction are not valid reasons, and indeed, they harm women. Controversies over moral stands regarding other allegedly degrading activities such as the so-called "dwarf tossing" show that it can be problematic to constrain one's freedom on the basis of a supposedly degrading behaviour<sup>49</sup>.

We believe that the harms discussed thus far do not single out surrogacy as a *sui generis* service that should be excluded from the market. As long as surrogacy agreements are voluntary, there are no reasons for prohibition. At the same time, prohibitions based on the alleged special nature of pregnancy may in turn damage women. However, if surrogacy harms third parties, the voluntary nature of such agreements is not enough to allow them. Surrogacy may, for instance, harm children.

<sup>45</sup> L.B. Andrews, *op. cit.*

<sup>46</sup> DEPARTMENT OF HEALTH AND SOCIAL SECURITY, *op. cit.*

EUROPEAN COUNCIL OF THE EUROPEAN UNION, Annual Report on Human Rights and Democracy in the World in 2014, 2014.

<sup>47</sup> EUROPEAN COUNCIL OF THE EUROPEAN UNION, *op. cit.* Art 98 to 114.

<sup>48</sup> EUROPEAN COUNCIL OF THE EUROPEAN UNION, *op. cit.* Art 114.

<sup>49</sup> G. DWORKIN, *Moral Paternalism*, *Law and Philosophy*, 2005, 24/3, 305–319.

*Children.* The same principle that is employed to condemn paternalism, the Millian Harm Principle, allows interference on the grounds of harms to third parties<sup>50</sup>. This may be another reason to ban surrogacy.

Some scholars indissolubly link the commodification of women's reproductive labour with the commodification of children<sup>51</sup>. Commercial surrogacy transforms children into commodities that can be bought and sold, thus losing their intrinsic value. In particular, English philosopher Anderson establishes a link between the commodification of children and the psychological distress that surrogacy agreements may inflict on them, as these agreements replace parental norms with market norms and property rights over children<sup>52</sup>. It is, however, helpful to keep the two issues distinct, i.e. commodification as such and the psychological consequences thereof.

To start with, it is unclear how surrogacy agreements could be described as commodification of *children*. Even if children are indeed bought and sold thanks to a surrogacy agreement, this does not necessarily make them a commodity in a morally objectionable sense. For instance, a surrogacy agreement does not make it possible for the adopting couple to resell the child. Whether or not a child is treated as property is not at stake here. Property is a complex concept, encompassing many different rights which any single property arrangement may or may not have (for instance, if one owns a listed building, one cannot tear it down). The question is whether or not the kind of rights that are given to surrogates and prospective parents over children are in any way harmful to them. To put it bluntly: even if surrogacy is a form of commodification of children, it does not equate with children being sold in supermarkets. The question is only whether replacing extant family norms (which again are themselves described as property norms by some theorists) with the particular property rights enshrined in surrogacy agreements harms children.

This is a serious concern. Yet it is, to a large extent, an empirical question. While it is beyond the scope of this article to review the complex literature on the matter, which includes empirical literature on adoption, a few words of caution are in order. The replacement of extant reproductive institutions based on families with surrogacy should be treated cautiously, just as any profound modification of established social habits and institutions should be treated cautiously. Established social habits and institutions may be profoundly defective and morally objectionable, however, they are at least stable and provide continuity which is much needed for human life and is threatened if everything is continuously to change<sup>53</sup>. This does not mean that extant institutions ought not to be questioned in virtue of their existence. The potential wrongs of family life are widespread and well-known, and a cautious experimentalism in these matters seems to be the most balanced approach we can take.

<sup>50</sup> J.S. MILL, *op. Cit.*

<sup>51</sup> E.S. ANDERSON, *op. cit.* (a).

E.S. ANDERSON, *op. cit.* (b).

M.J. RADIN, *op. cit.*

D. SATZ, *op. cit.*

<sup>52</sup> E.S. ANDERSON, *op. cit.* (b).

<sup>53</sup> G.A. COHEN, *A truth in conservatism: Rescuing conservatism from the conservatives*, In O. Kazuhiro, *Finding Oneself in the Other*, Princeton, 2012.

*Society*. Polanyi argued that the expansion of market institutions to larger spheres of human life generates a reaction based on the myriad social relationships and human motivations which do not lend themselves to commodification<sup>54</sup>. The countermovement of society against market expansion is motivated by these alternative social and psychological foundations of human sociality. Perhaps commercial surrogacy is just one step too far in the direction of commodification, as it pertains to a sphere of social life that human beings simply cannot bear to commodify.

A number of human relationships are simply not the sort of things that can be exchanged in markets<sup>55</sup>. A simple example is friendship: if you pay a person to be your friend, he is not your friend. In such cases, it is not just inappropriate to commodify a particular relationship: it is in a sense also impossible. Commodification erodes features of friendship relationships, especially gratuity, that are thought to be essential for its existence. One worry may be that the very existence of commercial surrogacy subtracts from the gratuitous quality of the majority of pregnancies that happen outside of commercial relationships.

It may be hard to rationally make sense of these sorts of worries about commodification. They seem to signal a fundamental bias against changing the status quo, and in this case to the marketisation of reproductive institutions. A more general resistance to change does not make this sort of resistance against commodification any less relevant, as it may interfere with implementation of good policies or, on the contrary, sustain the enactment of forms of containment that are appropriate. However, some words of caution are again necessary. The claim that commodification is questionable because it jeopardises other forms of social relationships is dubious not only because these relationships may not be worth-preserving, but also because it may be, to a large extent, an excessive diagnosis. Bronwyn Parry criticises those anti-neoliberal attitudes that depict commodification as a force that leaves behind «a social desert of atomistic individuals warring against each other»<sup>56</sup>. Such analyses often overlook what actually happens around market exchange. They may find rich and inventive ways in which humans reconstruct forms of sociality that make sense of their action. In the case of surrogacy, this extends to the informal and sometimes friendly bonding that may be established between the surrogate and the prospective parents. This is, in one sense, another form of the Polanyian countermovement.

Let us take stock of what we have argued, and what we have not argued, so far. We have shown that if there is anything that makes surrogacy special, it cannot be psychological and physical harm to surrogates. Moreover, arguments that single out surrogacy as degrading are suspicious as they fail to show that they do not rely on assumptions regarding women's sexuality and reproduction that have proven oppressive. Concerns with the well-being of children are of paramount importance and deserve further empirical scrutiny, and possibly experimentation. A good case for prohibition might be

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<sup>54</sup> F. BLOCK, *Polanyi's Double Movement and the Reconstruction of Critical Theory*, *Interventions Économiques*, 38, 2008.

<sup>55</sup> M.J. SANDEL, *What money can't buy: the moral limits of the market*, London, 2012.

M.J. RADIN, *op. cit.*

<sup>56</sup> B. PARRY, *Narratives of neoliberalism: 'clinical labour' in context*, *Medical humanities*, 41/1, 2015, 32-37, (b).

constructed were harm to children is evidenced<sup>57</sup>. But this would not make surrogacy special with regards to its commodification: the commercialisation of any social intercourse that harms third parties is a candidate for prohibition.

Finally, reactions to the commodification of spheres of life that were hitherto organised on a different basis do not offer guidance as such to the question whether pregnancy is the sort of thing that ought not to be commodified (albeit they are relevant for policy making). For these reasons we believe that there are no compelling arguments to make special exceptions to the default pro-commodification position for surrogacy.

What we did not argue, and what does not follow from our argument, so far is that surrogacy is morally unproblematic, that women cannot be seriously harmed by surrogacy, that the preferable legal and moral approach is its blanket liberalisation. All things considered, we believe that quite the opposite is true: surrogacy is not only a matter of moral disagreement, but it also represents a conflictual reality, with weaker parties at risk of being abused, exploited and dominated. Yet such issues extend more generally to waged labour: we will argue below that asymmetries between sellers and buyers are endemic to the labour market, as the long tradition of labour decommodification reminds us. This is not to say that all forms of labour expose workers to the same danger, nor that there are no specific challenges that surrogacy poses. Instead, this is to say that the sort of exceptionality that makes surrogacy morally problematic is the kind of exceptionality that makes labour a special commodity. There are goods and services whose marketisation intrinsically brings up conflict: human labour is this sort of thing. Again, whether or not marketisation in one place and at one point of history is considered emancipatory depends largely on what markets replace, but this does not exclude peculiar issues that labour commodification raises.

## 6. Labour is special

A long standing social critique tradition poses that *labour* should not be commodified. There are several interpretations of this claim, but they all stem from one concern about commodified labour, i.e. that labour markets are necessarily coercive. Indeed, the sale of labour has exceptional features that distinguish it from other market exchanges. Firstly, it always involves the very life of human beings, their bodies and their identity. This is peculiarly evident in the case of surrogate labour, but it is equally the case for other jobs. Secondly, most people *depend* on labour for their livelihood, i.e. they cannot sustain themselves without work. Such dependency places workers at a disadvantage with respect to the buyer of their work. The buyer, i.e. the employer, can exercise command on the worker as a result of this dependency. Some Marxist authors believe that such domination is the ultimate

<sup>57</sup> The case is however not straightforward. There is disagreement over whether individuals can be wronged by the actions that caused their existence (see for instance Derek Parfit's non-identity-problem in D. PARFIT, *Reasons and persons*, Oxford, 1984, Ch. 16 and its use in the context of the ethics of reproductive technologies in J.A. ROBERTSON, *Procreative liberty and harm to offspring in assisted reproduction*, *American journal of law & medicine*, 30/1, 2004, p. 7-40.

threat to freedom<sup>58</sup>. However, even if such domination is not a threat to freedom as such, it makes it possible for workers to be exploited and abused.

What is the purpose of questioning the commodification of labour? The political aim of labour de-commodification is to loosen the dependency of people from work. How this is achieved depends on the context, e.g. the technological framework or the available legal instruments. For instance, de-commodification policies have supported the creation of new jobs (which makes workers scarce, thereby ameliorating their bargaining position) or the expansion of universal and unconditional welfare services<sup>59</sup>. At present, the decommodification tradition has lost the widespread appeal that it once enjoyed. This happened partly due to an ideological decline, caused by the spread of different movements that actively campaigned for the equation of labour and other assets one may want to sell. Indeed, these movements claimed that labour is not exceptional after all<sup>60</sup>. But it is also a result of past victories of the decommodification camp. Still, the problem with work re-emerges as decommodification policies are torn apart, and in cases that capture the public imagination. We argue that commercial surrogacy is one of these cases.

Legislations that make it unlawful to engage in commercial surrogacy, while allowing altruistic surrogacy, seem to be guided by the intuition that there is an intrinsic tension in surrogate labour. This tension does not lie within the practice of surrogacy itself, as we argued above, as is manifested in the permission of its altruistic form. The problem must be commodified labour, i.e. the concern that a woman may decide to carry out a pregnancy because she has no other valuable sources of subsistence. This is an instance of the problem with work, i.e. the exceptionality of labour markets due to the fact that what is for sale is ultimately human power, and the dependency of workers from labour. There is a long standing tradition of feminism that is sensitive to the entanglement of gender issues and labour. One instructive argument is offered by Kathi Weeks and by her interpretation of the Italian feminist movement that campaigned for a salary for housework in the '70s. Weeks argues that such campaigns targeted the gendered distinction between reproductive and productive work rather than advocating expansion of the labour market to affective, care, and reproductive work. These feminists were contesting the distinction between the reproductive and productive sphere in order to question labour. By requesting a salary for housework, they were rather calling for detaching the means of subsistence from work: i.e. decommodification of work<sup>61</sup>. The distinction between reproductive and productive works has since then subsided. Markets have expanded into spheres of social reproduction, affective work<sup>62</sup>, and mature economies switched to services. The question of work

<sup>58</sup> C. PATEMAN, *The Sexual Contract*, Stanford, California: Stanford University Press 1988, cit. In K. WEEKS, *The Problem With Work: Feminism, Marxism, Antiwork politics, and postwork imaginaries*, Duke University Press, Durham and London: 2011.

<sup>59</sup> The decommodification nature of welfare states refer is due to the fact that, by subtracting basic services from markets, they permit workers to survive independently from their salary, at least partially. Conditionality, i.e. the provision of services dependent on employment status, suspends such decommodification (see GOSTA-ANDERSON, op. cit.).

<sup>60</sup> P. MIROWSKI, *Never Let a Serious Crisis Go To Waste*, London, 2014.

<sup>61</sup> K. WEEKS op. cit., Ch. 3.

<sup>62</sup> M. HARDT, *Affective Labor*, *Boundary 2*, 1999. J. OKSALA, op. cit.



has hence re-emerged as patterns of working, not working, and receiving a salary changed, but it also re-merged because technology now permits the outsourcing of parts of reproductive labour<sup>63</sup>.

We argue that the problem of surrogacy is a manifestation of the more general problem with work. Challenges to the commodification of pregnancy and reproduction based on the exceptional nature of pregnancy do not capture the most problematic issues of surrogate labour. On the contrary, questions of domination of women, their exploitation and global inequalities should be the focus of the debate on the ethical issues of surrogate labour. However, in order to grasp how these contextual inequalities play out as morally problematic features of commercial surrogacy, it is of paramount importance to engage with the more general problem with work, i.e. that workers are dependent upon labour, and the more so the more they are disadvantaged.

International surrogacy epitomises such contextual inequalities, and countries worldwide have adopted different legislation to regulate this practice. States that have more liberal legislation in terms of assisted reproduction, such as the UK, Canada and Australia, allow the practice of altruistic surrogacy while banning its commercial version. Among the few countries that permit commercial surrogacy, such as India, Russia, South Africa, and a few US states (e.g. California, Massachusetts), some have opted for the prohibition of international surrogacy, limiting this market to their own citizens. The recent decision of the Indian government is telling in this respect: as of October 2015 the Indian government followed the request of two Supreme Court justices and banned commercial surrogacy services to foreign nationals<sup>64</sup>. In countries where surrogacy is banned, travelling to benefit from the more liberal legislation of other states has become a known phenomenon. For instance, many Italian couples turn to other countries such as the United States, India or the United Kingdom in which surrogate services are not prohibited<sup>65</sup>.

Advocates to liberal approaches to international surrogacy maintain that the prohibition of this practice is counterproductive and may even be vain. It is counterproductive because it prevents some women, and their families, from accessing a reliable source of income. It is vain because a restrictive legislation in country A would likely result in the migration of sellers to the more liberalised country

<sup>63</sup> M. COOPER, C. WALDBY, op. cit.

<sup>64</sup> B. PARRY, Op. cit. (a).

Express News Service, *No commercial surrogacy, only for needy Indian couples*, Govt tells SC, The Indian Express, 2015, <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/> (last accessed: 26/04/2016).

A. RABINOWITZ, *Paying for the baby: the trouble with renting a womb*, The Guardian, 2016 [http://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india?CMP=Share\\_iOSApp\\_Other](http://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india?CMP=Share_iOSApp_Other) (last accessed: 28/04/2016).

<sup>65</sup> This form of medical tourism was firstly named by Knoppers and LeBris “procreative tourism” (see B.M. KNOPPERS & S. LEBRIS, *Recent advances in medically assisted conception: legal, ethical and social issues*, American Journal of Law & Medicine, 17, 1991, 329-360) and describes a phenomenon whereby citizens travel from one country where a reproductive service is not available to another with less restrictive legislations in order to obtain the kind of reproductive service they desire (G. PENNINGS, *Reproductive tourism as moral pluralism in motion*, Journal of medical ethics, 28/6, 2002, 337-341).

In a recent survey (2012) the Italian institute “Osservatorio sul turismo procreativo” (“Reproductive tourism watch”) has found that only in 2011 over 30 Italian couples travelled to countries in which surrogate agreements are permitted (see G. SERUGHETTI, *Mamme mie!*, *Leggendaria*, 115, 7-10).

B<sup>66</sup>. Interestingly, the rhetoric employed by the opponents of robust regulations of labour markets echoes this position. Such strategic arguments, however, do not resolve the problem with commodified labour: in the extant conditions, these may well be the best policy solutions, but they do not make surrogacy a win-win solution that equally promotes the interests of all parties. Moreover, depicting it as such is counterproductive in policy-making as it may harm the weaker parties.

One such depiction is sociologist Bronwyn Parry's contention that «many of the gendered and racialised accounts that we encounter regarding surrogates also act to prevent marginalised or poorer women from occupying the role of benefactor to women of a more privileged class»<sup>67</sup>. The view of surrogacy contracts as mutually advantageous and even philanthropic is indeed a refreshing alternative to paternalist accounts of surrogacy, which Parry calls "narratives of neoliberalism" (i.e. anti-neoliberal accounts). However, the philanthropic account of surrogate labour hides the conflictual nature of commodified work, and in fact it does not stand in this case when extrapolated to other jobs: all privileged employers are in need of benefactors of one kind or another, that is, they need to hire employees.

In what sense is this perspective different from paternalistic narratives of neoliberalism? Many social scientists have pointed out the contextual inequalities that affect commercial surrogacy. However, without reference to the general problem of work, their normative assessment has to rely on the view that poorer women who decide to become surrogates are victims whose agency is curtailed by social circumstances, and whom should be protected by enlightened legislators or social activists. Bronwyn Parry argues that such approaches fail to treat women appropriately, and disregard their capacity for agency. On the basis of her fieldwork (interviewing surrogate mothers in India), she argues that poor women are capable of autonomous agency and that the ways in which surrogates make sense of their choices are of paramount importance and should not be dismissed as false consciousness<sup>68</sup>. However, such a critique does not apply to the perspective advanced here. Any minimally sophisticated gendered and racialised account of surrogate labour is not merely a philanthropic cry of pain for the condition of vulnerable groups, but a description of structural inequalities that play out to affect the liberty and well-being of women in labour markets, including the surrogacy market.

## 7. Conclusions

We have argued that the exceptionality of commercial surrogacy lies not so much on its surrogacy side, i.e. pregnancy, but on its commercial side, i.e. labour. Legislation that prohibits commercial surrogacy but permits altruistic surrogacy implicitly endorses free labour over commodified labour. What makes altruistic surrogacy unproblematic is that which would make any work uncoerced, i.e. the independency of workers from their salary. Altruistic surrogacy would be better addressed as free surrogacy: a form of labour that is not coerced because survival is not among the motivations for carrying it out.

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<sup>66</sup> See supra note 65.

<sup>67</sup> B. PARRY, op. cit. (a).

<sup>68</sup> B. PARRY, op. cit. (b).

This perspective is not meant to vindicate prohibitions of commercial surrogacy. Whether such legislation is desirable is largely an empirical question, which should also address whether altruistic surrogacy would become a cover for what is, in the end, commercial surrogacy in disguise. Despite such indeterminacy with respect to policy, our perspective has several distinct advantages in comparison to other analyses. Anti-commodification exceptionality arguments based on the nature of pregnancy may feed attempts to re-naturalise reproduction, thus lending legitimacy to oppressive conceptions of the social role of women. Whereas pro-commodification non-exceptionality arguments may instead foster an undue optimism towards reproductive labour markets, thus concealing the conflictual nature and the wrongs of reproductive labour. Our argument, that what makes commercial surrogacy morally problematic is what makes any commodified work problematic, avoids these two pitfalls. It recognises the liberating aspects of markets, which equalise the sphere of human reproduction to other spheres, thereby disrupting views on the sacrality of reproduction that have beset women's freedom in patriarchal societies. But it also does not buy into the narratives according to which surrogacy is just one of the many types of market exchange, explaining wrongs to women due to inequalities and discrimination without reference to paternalistic accounts of what makes such structures questionable. That is, it explains why contextual inequalities matter morally in discussions about surrogacy, without committing to the view that surrogates are victims, that their agency is curtailed, that they are not in a position to make choices that correspond with their life plans and promote their interests.

Within feminist thought, there are harsh discussions on commercial surrogacy. Some activist groups are vehemently opposed to it. In their opinion, surrogacy may well liberate women from the patriarch, but it delivers them to the market<sup>69</sup>. Others caution that such opposition, if conducted on the basis of the exceptional nature of pregnancy and the special significance of pregnancy for women, might reinforce oppressive conceptions of the role of women. Our perspective cuts through these views: they are both partially right, but the problem lies elsewhere, namely in the manners in which contextual inequalities impact on labour markets, any labour market.

The labour decommodification perspective also enlightens broader social debates pertaining to the proper scope of markets. There has been a post-economic crisis revival of reflections on the foundations, values and consequences of coordinating an ever larger number of social exchanges through markets. Critiques come from disparate traditions, and merge political discourses that are often thought of as fiercely opposed. The debate on surrogacy offers a telling instance of these mergers. Conservatives and communitarians, preoccupied with the subversive effects of marketisation, pair up with socialists concerned with domination; liberal progressives that may oppose neo-liberalism in social policy find themselves with right-libertarians under the banner of individual sovereignty. The position of the Catholic Church on surrogacy is perhaps paradigmatic in blending the two strands of anti-commodification arguments as it claims that such practice is unnatural, while cautioning against «the exploitation and commercialization of the female body»<sup>70</sup>. The labour decommodification perspective separates these different strands of anti-commodification arguments, thereby highlighting the strategic risks incurred by activists concerned with the effects of markets on domination and ex-

<sup>69</sup> See: <http://www.cheliberta.it/2015/10/29/utero-in-affitto-noi-diciamo-no/> (last accessed: 24/04/2016).

<sup>70</sup> *Amoris laetitia*, op. cit. §54.

ploitation that believe anti-commodification sentiments based on communitarian or conservative beliefs can be employed without committing to their oppressive sides.

One final noteworthy feature of the perspective that we have presented pertains to its reach. The argument that labour, not surrogacy, is exceptional, entails that these issues are encountered wherever there are structural inequalities and commodified labour. Whether this is a useful perspective is, necessarily, going to be controversial.

*Surrogacy*