Commercial Surrogacy and Social Norms

On the Legal and Moral Limits of the Free Market

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Abstract

Advances in reproductive technology raise new and interesting questions for legislators about what should and should not be for sale. For some, commercial surrogacy extends beyond the acceptable legal and moral limits of the marketplace. Such critics often claim that the practice should be banned on the grounds that it engenders harmful social norms like patriarchy and the pricing of human attributes. Through legal and moral arguments, I demonstrate that these claims rest on empirical and normative assumptions too tenuous to warrant a constriction of the free-market’s scope. Although I do not provide exhaustive solutions to the legal and moral problems surrounding the enforceability and regulation of CS contracts, my argument aims to lay the philosophical and legal groundwork for its legalization.

I: Introduction

Advances in reproductive technology raise new and interesting questions for legislators about what should and should not be for sale. In 1988, the state of Michigan determined that commercial surrogacy—the commodification of infants and women’s reproductive labor—extends beyond the free-market’s acceptable moral and legal limits. According to Section 7:2 of Michigan’s Surrogate Parenting Act, “a person […] who enters into, induces, arranges, procures, or otherwise assists in the formation of a [surrogacy] contract […] is guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.”

In an effort to justify Michigan’s ban, some argue that commercial surrogacy (CS) promotes harmful social norms like patriarchy and the pricing of human attributes. This paper defends CS from these claims by showing that they rest on highly tenuous normative and empirical assumptions. It first considers CS’s legality and its apparent benefits—the satisfied preferences of the contracting parties—and then turns to debunk the above criticisms. Although the paper does not provide exhaustive solutions to the legal and moral problems surrounding the enforceability and regulation of CS contracts, its argument aims to lay the philosophical and legal groundwork for CS’s legalization.

II: What is CS?

CS arrangements take one of two forms: a “traditional” surrogate contributes her own egg and is implanted with a donor’s sperm cells, whereas a “gestational” surrogate is implanted with sperm and egg cells that have been fertilized in vitro. In either case, the surrogate enters into an agreement in which she commits to forfeit her parental rights for a fee so that the contracting parents can adopt the baby. CS, therefore, presents legislators and judges with two critical questions: (a) the legal question of whether such agreements are valid and (b) the social policy question of whether such agreements ought to be considered valid. While my interest lies primarily in the latter, I appeal to some key judicial decisions and legal arguments to substantiate my position.

III: The Benefits of Voluntary Exchange and the Legal Right to Procreate

Like any voluntary exchange, CS’s most obvious benefit lies in the function it serves for the contracting parties—the parents who desire a biological child and the surrogate drawn to CS’s financial and/or moral benefits. For homosexuals, infertile couples, and women for whom pregnancy poses a medical risk, CS may serve as the exclusive means by which they can enrich their lives with their own biological children. Likewise, CS may be one

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1 Throughout the paper, I refer to commercial surrogacy in the shorthand as CS.
of the few, and perhaps the most lucrative, financial opportunities available to surrogacy candidates facing trying financial circumstances. Some poor women may even wish to engage in altruistic, i.e., pro bono, surrogacy but lack the financial stability to do so. Thus, wages not only incentivize surrogacy but also enable surrogates to act upon their altruistic motives. Taken together, the satisfied preferences of the contracting parties generate a powerful prima facie argument in favor of legalizing CS.2

Furthermore, some legal theorists make the compelling case that a ban on CS violates the contracting parents’ legal right to procreate. In Skinner v. Oklahoma (1942), for example, the court identified marriage and procreation as “basic civil liberties of man.”3 Seemingly, by enabling infertile and homosexual couples to reproduce, reproductive technology extends the scope of the procreative rights established in Skinner v. Oklahoma to include CS agreements. Thus, in the absence of compelling state interests, the law requires that judges protect CS agreements as expressions of the contracting parties’ basic civil liberties.4

IV: CS and Social Norms: Patriarchy

Critics of CS, however, attempt to locate a compelling state interest in sorts of social norms engendered by the laws governing CS agreements. One of the most creative, albeit conjectural, arguments in favor of a ban on CS appeals to the harmful patriarchal norms and attitudes promoted by the practice.

Championing this line of argument is feminist political theorist Debra Satz who believes that legalized CS promotes bigotry in three ways. First, “contract pregnancy gives others increased access to and control over women’s bodies and sexuality.”5 Second, CS reinforces the notion that women serve men as “baby machines.”6 And third, by dismissing the women’s “gestational contributions,” courts “reinforce an old stereotype of women as merely the incubators of men’s seed.”7 In Johnson v. Calvert (1993), for example, Judge Richard N. Parslow Jr. of the Orange County Superior court rejected the gestational surrogate’s plea for parental rights and likened her to a home rather than a mother vis-à-vis the fetus.8 Hence, Satz concludes that CS indirectly perpetuates female oppression and ought to be banned.

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Before assessing the merits of Satz’s argument, we first have to unearth its central premises. For her argument to succeed, she requires the twofold empirical assumption that (a) CS engenders patriarchy and (b) that a ban on CS is the most effective means of combating patriarchy. Second, she requires the normative assumption that legislators ought to ban practices that indirectly promote social inequality. However, none of Satz’s three core premises stand up to close scrutiny.

Satz’s second empirical assumption fails to consider the potentially patriarchal messages expressed by paternalistic legislation that curtails women’s contractual and reproductive freedoms. By denying women the right to enter into CS agreements, the law communicates the sort of condescension that lies at the foundation of patriarchy: lacking foresight and rationality, women must rely on the state to adjudicate between CS and their economic alternatives. Thus, even if CS

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4 Robertson, “Procreative Liberty,” 420.
engenders patriarchy, Satz’s alternative may achieve a similarly undesirable result. This pessimistic conclusion effectively neutralizes the role that feminist considerations about bad social norms should play in a legislator’s assessment of CS.

Seemingly, Satz’s normative assumption—that legislators ought to ban practices that indirectly promote social inequality—fares no better and is easily reduced to the absurd. Two untenable positions can easily be extrapolated from the assumption. First, if practices that reinforce patriarchal norms warrant coercion, then the law should block women’s entry to typically gender-segregated professions like housecleaning or nursing. Second, the government should combat social inequality by censoring popular television shows, movies, and novels that play a decisive role in shaping the social norms that promote inequality. In its quest to combat patriarchy, perhaps the state should ban AMC’s hit TV series Mad Men—a show about the advertising industry in Manhattan depicting the bigotry of the 1960’s—on the grounds that it might reinforce viewers’ latent gender biases. Because, in the name of egalitarianism, Satz’s government will exercise its coercive license to censor speech and invade women’s personal-professional lives, those committed to free speech and the right to privacy must reject Satz’s normative assumption.

The difficulty with the above reductio arguments is that they wrongly commit Satz to the view that equality categorically trumps liberty. But before banning a particular inequality promoting practice, Satz might make the following calculation: (a) she could determine which liberties are violated by the ban, (b) rank the different liberties, (c) quantify the amount of inequality promoted by the practice, (d) weigh the inequality lost against the liberty lost, and lastly (e) determine whether there are less coercive means available for rectifying the inequality.

In developing a contrast between housecleaning and CS, Satz can appeal to step (c) in her calculation process: the view of women as human incubators expressed by CS promotes more inequality than housecleaning and, therefore, warrants more coercion. Alternatively, Satz can appeal to step (e): while male entry can degender professions like housecleaning, it cannot modify the message expressed by intrinsically gendered professions like CS. The lack of a viable alternative, therefore, justifies Satz’s coercive ban on CS.

Additionally, the second reductio from censored speech fails to consider that while the inequality promoted by CS justifies an encroachment on freedom of contract, the inequality promoted by media and literature does not justify an encroachment on the higher ranking constitutional right to freedom of speech. Although none of the above calculations rest upon comprehensive empirical information, they demonstrate that one cannot run a reductio against Satz’s normative assumption without referring to the relevant data and Satz’s schedule of liberties.

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Still, the complexity involved with running a reductio against Satz’s normative assumption points to the “knowledge problem” underlying her first empirical assumption: that CS, in fact, perpetuates patriarchy.9 In order to assess the degree to which CS promotes patriarchy, the legislator who employs Satz’s calculation method must gather information about citizens’ attitudes toward gender. But the fact that information of this sort is neither fixed nor uniform undermines Satz’s legislative efforts.10 Even if Satz is right that presently a nation-wide ban on CS combats patriarchy, a shift in social attitudes might render the ban subversive.

In short, while Satz’s normative assumption—legislators ought to ban practices that indirectly

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9 Friedrich Hayek, “The Use of Knowledge in Society,” American Economic Review, Vol. 35, No. 4 (Fall, 1945): 519 (“[T]he knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.”)

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Promote social inequality—may prove defensible, her feminist argument fails to show that CS actually promotes patriarchy. Until feminist theorists can support Satz’s claim empirically, it lacks tenability and fails to topple the legislator’s legal and moral presumption in favor of CS agreements.

V: CS and Social Norms Continued: The Pricing of Human Attributes

While feminist theorists like Satz attempt to curb the scope of the free-market by appealing to a particular concern for female oppression, other theorists worry that commoditizing women’s reproductive labor will engender more universal forms of degradation. Law professors Alexander Capron and Margaret Jane Radin, for example, go so far as to claim that were we to legalize CS, “all personal attributes of ourselves […] would be given a dollar value by the market.”11 In other words, because CS rewards surrogates for certain naturally endowed qualities, it empowers the market to quantify the worth of particular human attributes.

Like Satz’s argument, Capron and Radin’s argument requires both an empirical prediction that surrogacy will, in fact, yield the pricing of human attributes and an implied normative judgment that such harmful pricing warrants a ban on CS. And like Satz’s premises, neither of their presumptions stands up to close sustain scrutiny.

Capron and Radin, along with their critics,12 implicitly accept that explicit pricing poses a normative problem. But why make such an assumption? Perhaps, Capron and Radin worry that explicit pricing causes psychological harm by shattering the self-esteem of those human beings with low market value. But social norms and expectations perform this function perfectly without the help of explicit pricing. Inevitably, society’s aesthetic, moral, and other evaluative judgments permeate its citizens’ psychologies and offer criteria for self-evaluation. The government might even regulate “attribute pricing” in the surrogacy market in order to promote its citizenry’s physical and psychological health.13 In short, if communal life inevitably yields implicit criteria by which citizen’s are ranked, then explicit pricing simply introduces transparency and a responsible means of regulating social values and expectations.

Still, Capron and Radin might insist that this response entirely misses their main point: the problem with explicit pricing is not simply that it makes people with low market value feel bad, but that it tarnishes our humanity by reminding us that, regardless of how deeply and profoundly we value our skills and attributes, any and all of our natural endowments can be quantified in terms of dollars and cents.

“Because CS rewards surrogates for certain naturally endowed qualities, it empowers the market to quantify the worth of particular human attributes.”

This claim, however, falls victim to an obvious counterexample: a professional ballerina’s dancing ability or a standup comedian’s sense of humor is probably invaluable to his or her self-conceptions. Yet, none would propose to ban these professions simply because the market monetizes a dancer’s or a comedian’s skill level. In order for the argument from explicit pricing to succeed, its proponents need to draw a morally relevant distinction between the way in which the CS market might price surrogates’ characteristics and the way in which the free-market already prices the attributes that enable us to do our jobs well. Unless Capron and Radin can demonstrate that such a distinction exists, their moral condemnation of explicit pricing rests on tenuous grounds.

12 Arneson, “Commodification,” 142.
13 Alternatively, free-market libertarians might launch a parallel argument but replace government intervention with spontaneous free-market order: by allowing for the market to explicitly price human attributes, the state incentivizes the most socially beneficial attributes. For, the best socio-economic outcomes lie in allowing the marketplace, even of human attributes, to take its course.
But even if critics of CS succeed in showing that explicit pricing is harmful, they cannot demonstrate the required empirical premise: that CS will inevitably result in explicit pricing. Because explicit pricing is not intrinsic to CS, it might be easily circumvented by regulations governing the CS market. For example, a state might legalize the surrogacy market but simply ban explicit pricing. Hence, Capron and Radin’s argument lacks the thrust necessary to challenge the morality of CS agreements.

VI: Conclusion

In short, a legalized CS market both respects citizens’ procreative rights and satisfies their deep desire to reproduce. Additionally, the above objections to CS from patriarchy and explicit pricing rest upon highly questionable normative and empirical assumptions and, therefore, fail to justify a ban on CS. Hence, states have good reason to legalize the CS market.

Certainly, critics of CS will argue that this conclusion has been drawn prematurely, for the above argument fails to consider the most obvious and powerful objection to CS: in certain cases, it invariably harms one of the two contracting parties. In cases like Johnson v. Calvert, for example, where the surrogate forges a maternal bond with the fetus, the court’s enforcement of specific performance degrades the surrogate and her relationship to the baby. Yet, were the court to allow the surrogate to opt-out of the agreement and maintain custody, it would then degrade the contracting parents in precisely the same way. Thus, in the event that both the surrogate and the parents forge a deep emotional bond with the fetus, CS agreements inevitably result in some profound psychological harm.

This objection, however, fails to consider that legislators cannot deliberate in a moral vacuum, but must reason counterfactually and weigh the consequences of every available course of legal action against one another. The morally attuned legislator must ask him or herself: “If CS were made illegal, what consequences would ensue?” Present research about the phenomenon of surrogacy outsourcing suggests that it is unlikely that a legal ban on CS will prevent people from satisfying their fundamental, evolutionary desire to have their own biological children. Lacking recourse to a legally regulated market, prospective parents will enter into contracts that might lack the governmental regulation critical for minimizing harm. Ultimately, even if surrogacy agreements harm one of the two parties to the contract, the counterfactual, coupled with the contracting parties’ legal rights, demonstrates that a regulated CS market proves to be the best available course of action.

It is worth noting that Satz’s argument from patriarchy is a particularly powerful tool for curbing the free-market’s scope precisely because it circumvents the above counterfactual. Although regulations might protect particular surrogates and contracting parents, regulatory details are far less likely to fundamentally alter the law’s expressive content. And if Satz is right that legalizing CS will certainly reinforce bigotry, then nothing short of a ban on CS can safeguard social equality.

But Satz’s claim is simply too far-reaching to provide a sound legal and philosophical foundation from which to criticize particular social practices. Murky and speculative judgments about the causal connection between a particular social practice and the social inequality that it might engender will not shake the legislator’s commitment to citizens’ well-founded moral and legal rights. The wide reach of Satz’s argument makes it seem so powerful, yet ultimately condemns it to legal and philosophical obsolescence.

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14 Arneson, “Commodification,” 142.
15 Anton van Niekerk and Liezl van Zyl, “The Ethics of Surrogacy: Women’s Reproductive Labour,” Journal of Medical Ethics, Vol. 21, No. 6 (Winter, 1995): 348 (“The contracting parents ‘were pregnant’ in the social and psychological sense of ‘expecting a child’[…] To deny their desire to raise the child would thus be to deny the legitimacy of their perspective on ‘their’ pregnancy, to alienate them from their evolving emotions concerning the child.”)
16 Satz, Why Some Things Should Not Be for Sale, 132 (“[B]anning [CS] drive[s] such contracts underground, leaving the parties more vulnerable to one another.”)