

Surrogacy is Never Ethical nor Justifiable

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Whether paid or “altruistic,” there can never be anything ethical about surrogacy. It doesn’t matter if a woman herself is not healthy enough or capable of physically bearing a child, that doesn’t give her, or any other man she might wish to have a child with, the right to exploit and use another woman’s body any more than it gives two homosexual men the right to procure and use a woman to do what they, as well, are biologically incapable of doing themselves.

Pregnancy and childbirth are inherently and deeply intimate and sexual. A woman’s body is filled, invaded, overcome, and even changed in the deepest of ways. Her hormones and emotions change, her breasts, womb, and abdomen swell. Birth itself involves the filling, stretching, and opening of her private and intimate body to the maximum (and sometimes even beyond). It’s not hard to have flashing thoughts and see the direct correlation between a woman lying beneath a man in the sex act and her lying in the exact same way to bear a child. In both instances everything down to even the female’s very arms and legs become sexual instruments, helpless in the act of being taken and overtaken. It’s also not hard to see in both instances- one (sex) naturally leading to the other (birth)- that, when natural and unadulterated, the woman has been overtaken by a *man*.

Both the woman and the life that she carries are supposed to be precious. The woman’s sexuality and body are supposed to be precious. Her sexuality, her preciousness, and her life-giving functions should be reserved only for her husband. They should be reserved solely for the man whose legal and moral duty it is to provide for her, guard her, protect her, and shield her from any and all physical and emotional harm. It is nothing short of absolutely horrifying, repulsive, repugnant, degrading, and dehumanizing to live in a society that allows the bodies of women to legally be sold or otherwise contracted away in such a manner. (And if the woman- the “surrogate”- wishes to back out and not go through the ordeal of pregnancy, labor, and birth for the benefit of the other party to the contract?¹) Even worse is that fact that so-called “conservative” states (in the United States- other countries do not allow surrogacy, with some outlawing it under *any and all* circumstances²) have long tended to be the most liberal at allowing and even facilitating surrogacy.³

Surrogacy turns both women and children into nothing more than mere commodities. The woman, whether paid or for free, and typically in great pain and tribulation, and at a grave risk to her own life and well-being,

performs a deeply intimate and intense *sexual* function for a third party, and surrogacy renders the resulting children, as well, to nothing more than mere pets that couples (or whoever else) procure from some third-party because they are just so cute and cuddly, or because they really want an extra addition to their household or lives that they can't- or perhaps simply don't want- to bring into the world themselves.

Regardless of whatever conflicting feelings of even women themselves about this issue, and regardless of whatever "feminists"⁴ have to say, surrogacy is never justifiable nor ethical under any circumstances. No exceptions. It should always be illegal regardless of whether the woman receives monetary compensation for it or not. It is a form of slavery of women and human trafficking of both women and children that comes at a price too high to ever be quantified. Women, and young women in particular, should understand, as well, that another couple's private and personal dramas or fertility struggles are neither their business, concern, nor their responsibility. There is no ethical duty nor obligation to stand in as a substitute womb for another. Women, especially young women, should understand and be taught that their sole and *only* duty is to preserve, guard, and save their wombs exclusively for their husbands.

I would propose, as a simple rough draft here of provisions, that the law should impose severe criminal penalties on any person- excepting the woman (the "surrogate" or would-be "surrogate") who, *whether or whether not*, for the promise of, or actual exchange of, any type of good, service, bargain, trade, or legal tender:

- a) is knowingly involved in either procuring or soliciting, or helping to procure or solicit, a woman for the purpose of bearing a child through gestational surrogacy, or who
- b) knowingly donates either a human egg(s) (if such human egg(s) is (are) not the actual genetic material of the intended "surrogate") or sperm with the intent and purpose of using such biological material for the purpose of gestational surrogacy, or
- c) assists in any part, at any stage, of the IVF (in-vitro fertilization) process, when such party, or parties, have knowledge that the intended end result is to transfer an embryo(s), into the body of a woman for the purpose of gestational surrogacy,
- d) no licensed physician, practitioner, assistant, or any other authorized individual shall in any way be subject to criminal or civil penalties under this provision for the providing of appropriate medical care to, and with the sole intent to preserve the life, health, or well-being of, a woman and/or unborn or born child

I would propose, in addition, that the law should bite in further and allow for civil penalties, unencumbered by any statute of limitations (after all, there is no statute of limitations on what has been done to the women and children involved in surrogacy), with the sole right to sue any or all of the forementioned parties, who are subject to criminal sanctions, and excepting the woman (“surrogate”) herself, being granted to the woman’s (“surrogate’s”) future husband, or, to the woman’s (“surrogate’s”) current husband if, and *only* if, a) the woman (“surrogate”) is legally separated from and not residing with the husband, and b) there was no finalized divorce between the parties (the “surrogate” woman and her husband) at the time of the execution of the surrogacy contract.

A provision allowing for a private right to sue exclusively to a woman’s future husband would undoubtedly aid in having a severe “chilling effect” on anyone who attempts to solicit any woman for the purpose of surrogacy. Even if the parties can evade the criminal justice system (which is likely), they could still be called to answer by way of private justice in a civil suit. Especially without any statute of limitations for which a suit could be brought, any parties involved in the using of a “surrogate” would then have the constant and ongoing fear hanging over their heads that the woman could, at any point, marry, which would then leave all parties vulnerable to a legal face-off, at any point in the future, with a man in which they probably do not know, and with whom they might not have ever met. Instead of dealing only with a woman (who is more likely probably young, vulnerable, in need of money, or simply naïve to the true value and worth of her sexuality), the parties would now be potentially having to deal with a man, as well. It would no longer be simply a woman’s issue, but a men’s issue as well. Making the husband the injured party would foster a form of male guardianship over, and protection of, women and women’s sexuality, and also go a long way to protecting children and families overall. It would put a higher worth on female sexuality as it would then be something worth protecting, guarding, and honoring by society and the law. Though it might be limited only to surrogacy in this instance, it could set a precedent and foundation that could later be expanded to other areas of law, as well.

And it would not be too difficult for the husband to establish the necessary elements of causation and injury sufficient for a justiciable suit. A woman’s sexuality should be reserved for her husband. Her body should be exclusively his to view, to touch, to enjoy, and to have in all ways. If she is to become pregnant and bear children, nobody short of the husband should ever have any “right” to impregnate her. A wife is supposed to belong to her husband, whose job it is to guard, love, honor, care for, provide for and protect her.

Yet, as the result of another's illegal act- as a result of his wife's former pregnancy that was the result of surrogacy-, a woman's body might change. She might suffer, both in the short-term and long-term, physically or psychologically. She might have enduring medical, benign or not-so benign physical, or even psychiatric problems. Her future ability to bear healthy children- or even conceive and bear children at all- might also be affected. Everything that should have been reserved solely for her future husband was robbed as a result of the surrogacy. Even if the woman didn't suffer, or claims that she didn't, her body was still invaded already by the seed of another in an illegal transaction. She still has inevitably changed physically and psychologically, if only in the way that her womb was used by another who had no right to it.

As the husband should have the exclusive right to have and protect the wife, so should he have the exclusive right to private retribution against the wrong-doers, the law-breakers and tortfeasors in this scenario. It would be the re-establishment of a guardianship, and also a re-establishment of a form of coverture, over the wife by her husband. These are my thoughts and suggestions on the matter, but no matter how it is done, surrogacy- whether "altruistic" or paid- should never under any circumstances be legally allowed. It is never justified, and it is always unethical, immoral, abusive, an exploitative of *both* women and children.

As a sort of side-note or post-script, it should also never be assumed that all women really desire to be "liberated" from pregnancy. As in, just the same as it is not accurate to state that all, or even most, women identified with the first-wave feminists and their advocating for "women's rights" and female suffrage, or the second-wave of feminism and "women's liberation," it is also not accurate to assume that all women really desire to be able to become parents (note the gender-neutrality here), or mothers, without having to actually bear children. This would- and does for those who do it- render women into nothing more than the mere androgynous equals of their husbands, stripping away everything that is unique and precious about being female, stripping away the feeling and the need to be provided for and protected, the feeling of being a weaker and precious and important being, and the psychological and physical satiation of being completely filled and invaded by the male she loves, desires, and depends on. For many women, myself included, the greatest desire for having children is in physically being pregnant and carrying a child of the man she loves. Many of us, I'd wager, would say that true fulfillment and contentment is simply not there inside otherwise. Neither adoption, nor surrogacy, nor IVF or even artificial wombs, can or ever will be able to replace the intimacy, closeness, and bonding of natural procreation with the child's father.

¹ In no other scenario can bodily organs be sold or even rented for profit. In all but select jurisdictions in the United States, and though laws vary somewhat from jurisdiction to jurisdiction, a woman cannot even sexually “rent” or “sell” her mouth, vagina, or even her breasts to a man- or anyone else (prostitution, also considered a form of human trafficking)- in exchange for money. But apparently a woman’s uterus is the exception. Is it not a sexual organ? As for the subject of enforcement of contracts, it’s even doubtful that hardly any court, in any jurisdiction, would even enforce something so basal and ridiculous as BDSM contracts out of public policy concerns over “human trafficking, forced labor, sexual assault, the sale of human organs, consent to bodily injury...” Andrea E. White, *The Nature of Taboo Contracts: A Legal Analysis of BDSM Contracts and Specific Performance*, 84 *UMKC L.REV.* 1163, at 1165 (2016). Along with refusal to order specific performance for BDSM contracts, neither will courts order specific performance of contracts for personal services in other instances, as that would be akin to slavery and involuntary servitude in violation of the 13th Amendment to the Federal Constitution, as well as be in violation of both federal and state statutes, and oftentimes require undue and excessive court supervision. Even English court cases dating back centuries have refused to order specific performance when it involves the personal presence, labor and services of the individual. *See, e.g., Lumley v. Wagner*, 1 *De C.M.&G.* 604, 42 *Eng. Rep.* 687 (1852) (“It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant Johanna Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty’s Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement...in continuing the injunction, I disclaim doing indirectly what I cannot do directly...”). The best courts typically give to the non-breaching party- at least where performance of the contract is concerned, other damages might still be awarded- is an injunction to enjoin the breaching party from performing elsewhere- and this typically depending upon the “uniqueness” or irreplaceability of the individual. For some background on this subject, *see* Sharon F. Carton, *Damning with Fulsome Praise: Assessing the Uniqueness of an Artist or Performer as a Condition to Enjoin Performance of Personal Service Contracts in Entertainment Law*, 5 *VILL. SPORTS & ENT. L.J.* 197 (1998) (“The most interesting, idiosyncratic, and yet consistent aspect of these contract cases is the nature of the remedy pursued and accorded. Traditionally, specific performance is not available in personal service cases.”) But, again, women’s wombs appear to be an exception. We might very well ask ourselves as a society why this is. Because the law cannot regulate our sexual preferences, choices, or behavior? Because a woman can “do what she wants” with her body and her uterus and give either to whomever she pleases or bear children under any circumstance that she chooses? Because it doesn’t matter if children are born to married parents, unmarried parents, gay parents, cohabiting parents, three parents, or no parents at all? Because it no longer matters if a woman is pregnant with the biological child of a man she is not legally married to?

This argument of surrogacy as forced labor and slavery needs to be contrasted from the argument that anti-abortion legislation (or in some ideological circles, the availability of abortion) is akin to slavery, however. This is an entirely separate context and scenario and completely distinguishable. What is at stake here is a woman forced to undergo labor and childbirth, whether or not she faces a risk to her own life, health, and wellbeing, in order to fulfill a private contract with another private citizen(s). Even if she wishes to breach the contract, she cannot. She must labor and then hand over the fruits- a live human being- of what she produces. *See e.g., Katie O’Reilly, When Parents and Surrogates Disagree on Abortion*, *THE ATL.* (February 18, 2016), <https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/>.

The very fact that a woman cannot opt out of labor and childbirth, and must continue on with a pregnancy (with laws varying at what stage she does or does not have a right to opt out), and that she is undertaking the “service” of carrying a child and the burden of laboring to deliver it into this world in order to fulfill a private contractual obligation to another private citizen(s), should render *all* such surrogacy contracts illegal and void from the outset. Even the mere *possibility* that the woman might wish to back out of the deal for even *one minute*, yet be unable to, and thus be forced into a most inhumane form of involuntary servitude for the benefit of another private citizen, or citizens, should render all such contracts void and illegal. (And this isn’t even touching on the

issue of when the “parents” who contracted with her wish to back out and abandon the resulting child that they ordered like a Happy Meal.) And especially when the surrogacy is “altruistic,” there has not even been so much as a consideration at all given to the woman that would even create a valid and enforceable contract in the first place. And this latter argument is bolstered all the more under a legal system that refuses under any circumstance to protect mothers. There is no other equivalent in our law where this would be allowed. A court of law would never so much as even enforce a prenuptial agreement where a promise is exchanged that the wife will bear her husband three children, or even one child, or even cook his dinner for him one week out of every year- yet courts will nonetheless enforce a surrogacy contract where a woman agrees to undergo IVF, even continuing to undergo the same procedure in spite of pain, distress or failure, and become pregnant. It’s ironic that our society and culture would hate tradition and “patriarchy” to such an extent that third-parties in private contracts who view a woman as expendable and disposable are given more legal rights than a husband, who presumptively should love and provide for his wife for a lifetime. This speaks volumes about our culture’s values.

Also, many women appear to be poorly informed about the consequences of surrogacy. Even the IVF procedures used can arguably be called unethical in many ways. First, women can, and do, face substantial health risks from these procedures, including the risks that come along with being “implanted” with multiple embryos. *See, e.g., Carolyn Barber, The Business of Renting Wombs is Thriving- and Surrogates Don’t Always Understand the Risks*, FORTUNE (November 17, 2022), <https://fortune.com/well/2022/11/17/business-thriving-surrogates-risks-reproductive-ethics-debate-america-carolyn-barber/> (“There’s a paucity of data regarding the physical and mental health outcomes of gestational carriers. Though fertility centers must submit newborn outcomes to the CDC, surrogate maternal morbidity and mortality figures are not mandated, nor are potential long-term risks to the surrogates’ health.”); *See also Mary Rose Somarriba, The Overlooked Risks of Surrogacy for Women*, IFS (November 22, 2017), <https://ifstudies.org/blog/the-overlooked-risks-of-surrogacy-for-women> (discussing the exploitation of women who become “surrogates,” as well as the emotional and mental and physical health risks faced by these women).

On top of all of this, countless embryos are purposely discarded in the process, and some who hire “surrogates” wish to “selectively abort” one or several of the resulting fetuses, setting up potential conflict between the “surrogate” and those who have hired her. But, in the end, all of these issues surrounding surrogacy are all the inevitable consequences of a society that has entirely severed the links between sex and procreation, and between sex, marriage and procreation, and that has abolished at the highest levels of law the necessity of establishing legal bonds via marriage with the natural mother for the establishment of paternal rights. Surrogacy and all of its related dramas are the inevitable consequences of a society that has fully absorbed the once radical idea that any and all family arrangements are equal to one another, and that no one family arrangement should necessarily be preferred over the other, and that it doesn’t matter where, how, or with and by whom children are born and raised.

² For a brief overview, *see Which Countries Allow Commercial Surrogacy*, REUTERS (April 5, 2023), <https://www.reuters.com/world/which-countries-allow-commercial-surrogacy-2023-04-05/>. Even those countries that ban commercial surrogacy while still allowing “altruistic” surrogacy appear to still impose limits. For instance, Canada, Denmark, New Zealand, Brazil, Britain, and Australia. Bulgaria, France, Germany, Italy, Portugal, Taiwan, and Spain are countries that completely ban all forms. *See Id.* Other countries have targeted surrogacy agencies under human trafficking laws, and some countries, such as Sweden, have appeared to disapprove of all forms of it. Though surrogacy itself is not technically regulated in Sweden, the birth mother is considered the legal mother, and it is illegal for any healthcare provider to use assisted reproductive technology (ART) when the purpose is for a surrogacy arrangement. *See e.g., Anna Arvidsson et. al, Being Questioned as Parents: An Interview Study with Swedish Commissioning Parents Using Transnational Surrogacy*, 8 REPROD. BIOMEDICINE & SOC’Y ONLINE 23 (2019) (“It is currently illegal in Sweden for healthcare providers to help with ART where there is a surrogacy arrangement, but surrogacy is otherwise unregulated.”). It has been suggested to the Swedish government in recent years, as well, that all forms of surrogacy- whether “altruistic” or commercial/paid- should be expressly banned. *See e.g., Michael Cook, Sweden Could Ban Surrogacy*, BIOEDGE (February 27, 2016), <https://bioedge.org/beginning-of-life-issues/surrogacy/sweden-could-ban-surrogacy/>. The legality of homosexual marriage, with homosexual men seeking surrogates, appears to be a major

issue in Sweden. It is also interesting to note that Left-wing journalists in Sweden, in complete contrast to the United States, have some of the loudest voices in speaking out against surrogacy. *See, e.g., Id.* For another good article on this subject, *see* Kajsa Ekis Ekman, *All Surrogacy is Exploitation- the World Should Follow Sweden's Ban*, THE GUARDIAN (February 25, 2016), <https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban> (“In reality, ‘altruistic’ surrogacy means that a woman goes through exactly the same thing as in commercial surrogacy, but gets nothing in return. It demands of the woman to carry a child for nine months and then give it away. She has to change her behaviour and risk infertility, a number of pregnancy-related problems, and even death. She is still used as a vessel, even if told she is an angel.”).

³ This assertion is somewhat an overgeneralization, but regardless, nearly all states in the United States allow completely for surrogacy, which means that even “conservative” states have done nothing to try to halt the practice or even give the issue any attention at all. Interesting of all is that New York, often considered a very liberal and “progressive” state, has only recently joined the fray in allowing for commercial surrogacy. *See e.g.,* Madeline Fry Schultz, *Where Gloria Steinem and Conservatives Can Agree: Commercial Surrogacy is Harmful to Women*, THE WASH. EXAM’R, (June 14, 2019), <https://www.washingtonexaminer.com/opinion/where-gloria-steinem-and-conservatives-can-agree-commercial-surrogacy-is-harmful-to-women>.

⁴ Many prominent feminists, including even “women’s libbers” such as Gloria Steinem, have actually come out vocally against the practice of surrogacy. *See, e.g., Id.:* “Commercial surrogacy carries with it the potential for trafficking and the commodification of women, a problem that both feminists and conservatives can agree is important to fight.”

But does anyone really listen to what feminists have to say anymore? Or, for that matter, does anyone really care about or even listen to women themselves? Women have long been stripped of their protections under patriarchy, and now increasingly women no longer even have (what I would call, on the basis of the stripping away of patriarchal protections) the compensatory promises and protections of feminism. What comes next? What happens to women now? And surely, as the surrogacy issue should demonstrate loud and clear, whenever a society abandons its women, it also inevitably abandons its children, as well as marriage and family altogether. Who, if anyone, will step in to protect or speak up for women now?