

**W**ITH THE ADVENT OF NEW SCIENTIFIC advancements in reproduction, women's reproductive labor can now be seen as part of the commercial labor market where labor is assessed, traded, bought, and sold. One such aspect of this reproductive labor is commercial surrogacy, which in practice, involves a woman being paid to bear a child for another person and who, after the birth of the child, gives up all rights to the responsibilities of that child. Commercial surrogacy can be either a half surrogacy (one in which the surrogate mother gives an egg, and is thus genetically related to the infant, and her reproductive labors of pregnancy and birth), and full surrogacy (one in which the surrogate mother is genetically unrelated to the infant and only provides the labors of pregnancy and birth). In half surrogacy, the surrogate mother is artificially inseminated by the father, carries and delivers the baby, and upon the birth of the baby, gives custody to the

natural father and his wife. In full surrogacy, the fertilized egg of the parents is implanted into the surrogate mother who "incubates" the baby until term. In both situations, the parents and the surrogate mother work through a brokerage, a legal firm which matches surrogate mothers to infertile couples and retains one-third of the money paid by the parents. The brokerage sets up a contract between the infertile parents and the surrogate mother for the surrogate mother's reproductive labors and its product, a healthy infant, in return for money; these contracts are similar to other contracts between employees and laborers in which labor is traded for money. The first commercial surrogacy occurred in 1978 in Britain, and approximately 4,000 children have been born in the United States already (Kasindorf 10). Though many surrogate contracts have run their course without legal troubles, a small number of cases in which the surrogate mother decided to renege on the contract and to keep the infant have inspired much public debate on the morality and thus legality of commercial surrogacy.

Presently no federal laws regulate commercial surrogacy, and the individual states have had to grapple with this issue. The next Congress has promised to discuss commercial surrogacy, and understanding the background of the subject is essential in setting the groundwork for Congressional debate. As recently as the March of this year, state legislation has been trying to regulate or completely ban commercial surrogacy (Brown 4). Already, several states have enacted legislation banning commercial surrogacy, while a small number of states have passed laws favorable to commercial surrogacy. In most states, however, the states' courts have had to decide whether commercial surrogacy contracts are enforceable, and thus legal. These courts' decisions are usually based upon family laws concerning adoption and contract laws, sections of law which many lawyers and public policy analysts think are inadequate for commercial surrogacy, and often produce contradictory out-

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comes. Two cases in particular have stimulated much debate in legal and philosophical circles, and ironically have had dramatically different outcomes. The now-notorious *Stern v. Whitehead*, or the Baby M case, in 1988 involves a situation of half surrogacy where Mary-Beth Whitehead, the surrogate mother, refused to give up the infant she surrogated for the Sterns. The New Jersey Supreme Court decided that commercial surrogacy contracts are illegal and granted visitation rights to the surrogate mother because it viewed commercial surrogacy under current adoption laws, which state that a transfer of a child cannot involve money transactions. In May of 1993, the California Supreme Court ruled on *Johnson v. Calverts*, a case involving full surrogacy, deciding to uphold the commercial surrogacy contract giving complete custody to the Calverts.

Like Mary-Beth Whitehead, Johnson also sought to keep the baby after birth. The California Supreme Court ruled in favor of the Calverts

## What price Motherhood?

*Commercial surrogacy: ultimate sacrifice or exploitation?*

By Anne Uyei

under contract laws, which state that contracts entered into freely and in good faith cannot be vitiated without proper cause (Kasindorf 10 ; Hirsch 1).

Under current adoptions laws, the parents of an infant cannot profit from the adoption, which means that they cannot receive any monetary compensation for giving up their child. This ban on baby-selling is stemmed in the belief that such practices go against public policy. Laws can be passed restricting certain practices by individuals if society believes that such practices severely impede the goals and norms of society. "The ability of individuals to contract is generally granted the utmost protection of the law...Public policy considerations, however can restrict the right to contract. A contract violates public policy if it is contrary to the best interests of citizen.". Baby-selling is considered against public policy because children become a commodity in the market, valued on their possession of desired characteristics. In a market where young, white infants are higher in demand than minority infants, white infants would demand a higher price for adoption. The norm of society views parents and children as a relationship not based on the desired properties possessed by the children, but an unconditional love between a parent and a child no matter what the child's characteristics may be (Anderson 71). Though Arneson argues, like Hobbes, that people are valued in the labor market and given a price, and so the valuing of infants is somewhat justified (132), this does not counter the belief that a child/parent relationship should be free from any commodification of the child. This view of the child/parent relationship can be seen in our society in custody battles where the child's best interests are prioritized over the parents' desires.

In the case involving Mary-Beth Whitehead, the New Jersey Supreme Court ruled that commercial surrogacy under adoption laws is considered baby-selling and thus illegal. Because money was offered to entice the severance of a child/parent relationship, and was in fact the main factor in the surrogacy adoption, commercial surrogacy countered New Jersey public

policy. Because of the strength in this view, the Court, in fact, denied full custody to Ms. Whitehead because it thought that any disruption in Baby M's life now would be detrimental to her. In the Kentucky Supreme Court, however, the opposite decision was made. The Kentucky Supreme Court ruled in *Surrogate Parenting Associates, Inc. v. Commonwealth of Kentucky* that commercial surrogacy did not violate adoption laws because the agreement was made before the child was born. It also stated that adoption laws do not explicitly cover commercial surrogacy (Recht). Though the contract may have been created before the child came into existence, the completion of the contract involves the exchanging of the child after it is born for money, and thus involves baby selling (Powers). Proponents and opponents of commercial surrogacy both agree that adoption laws do not adequately cover the whole range of issues of commercial surrogacy and new legislation pertaining particularly to commercial surrogacy needs to be passed. The ideas behind adoption laws in regards to the commodification of children still pertains to commercial surrogacy, however, and thus in cases where commercial surrogacy laws have not been enacted, adoption laws can be used with respect to this issue.

Other proponents of commercial surrogacy also argue that the money is being paid for the reproductive services of the surrogate mother only and not for the child. Several opponents have pointed out, however, that the commercial surrogate contracts reveal that this distinction is not the case. Contracts commonly have pro-rated fees in case of miscarriage, a drastic reduction in fees if the infant is born stillborn, and a forced abortion if the infant is deformed. All such stipulations suggest that the reception of the product and not just the labor is important in getting paid.

These Whitehead and Johnson cases are different in that Mary-Beth Whitehead was genetically related to the infant while in Anna Johnson simply bore the child for the Calverts. While both the New Jersey Supreme Court and the California Supreme Court ruled that the surrogate mothers were considered the "natural" mothers of the infants because of their reproductive labors, in *Johnson v. Calverts*, Crispina Calverts was equally considered the "natural" mother as Anna Johnson since her egg was used to create the infant. Thus, in the case of *Johnson v.*

*Calverts*, one set of "natural" parents was fighting for custody against the single "natural" mother, while in the Whitehead case, only William Stern, the natural father, was fighting for custody against the Mary-Beth Whitehead, the natural mother. Because in family courts, the genetic relation of a child is deemed a valuable criterion in deciding who gets custody, this factor of who is considered a "natural mother" highly influenced the differences in the Courts' decisions. The California court ruled

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that since both women had equal claim to be to mothers, it would look into the intent of the commercial surrogacy contract. Since this contract stipulated that Anna Johnson would give up custody of the child to the Calverts, the Court ruled that Crispina Calverts is the "natural" mother of the infant. "The parties' aim was to bring mark and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna," Panelli [one of the Justices of the Supreme Court] wrote. "No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother" (Hirsch 1). Because the Court viewed the Calverts as the natural parents and Johnson as the incubator for the infant, the case was removed from the realm of adoption law, which involves the parent of the child giving up custody, and only viewed the case looking at the agreements stated in the contract.

The California Supreme Court's ruling did not fully account for the claim to natural parenthood from giving birth by dismissing such claims so easily. Even in adoption laws where the custody of a child can be given up before the child's birth, the natural mother is the mother

that gives births to the child as well as being genetically related to the child. Adoption laws even allow for the natural mother to change her mind after the baby is born, giving natural mothers a way out of any agreements to give her baby away. Moreover, this attachment to the baby is not purely for genetic relations. Thus, in *Johnson v. Calverts*, the California Supreme Court ruled that genetic relations overrides the actual pregnancy and birth of the child in regards to natural parenthood (Satz 107; Hirschl). Opponents to this view argue that the relationship between the mother and the unborn child inside her is one where maternal feelings to the child can develop and is in fact is strongly encouraged by society. Obstetricians use ultrasounds not only for prenatal care, but for encouraging maternal bonds between the mother and the fetus (Anderson 71). One cannot deny the possible maternal bonds developed by the pregnancy simply because a contract stipulates for such conditions. Many people believe that such special bonds between a mother and her child during pregnancy should not be discounted simply because the mother and child are genetically unrelated. Proponents have argued that with careful selection of surrogates, surrogates who feel no special bond to the fetus would be chosen and thus prevent any maternal feelings from developing (Belkin 14). This measure does not deal with the fact that such mandates still goes against public policy by encouraging alienation of the pregnant woman to the fetus. Furthermore, screening of surrogates is never foolproof and if the surrogate mother does feel maternal bonds to the fetus, these feelings cannot be denied because of stipulations on a contract (Kasindorf 10).

Besides the practical issues raised regarding the application of existing laws to commercial surrogacy, many public policy and moral dilemmas arise from commercial surrogacy. Attempts have been made in both federal and state legislation to pass laws banning commercial surrogacy as well as legislation regulating and allowing commercial surrogacy, which have failed because of diverse opinions in the public and the unwillingness of legislators to tackle such a controversial subject. Legislatures do not want to appear as preventing infertile couples from having babies or to appear to support practices which are morally apprehensible to many people and possibly against public policy (Hirsch 1; St. Louis

Post 1C). One issue in which both sides of the commercial surrogacy battle are using to bolster their arguments is whether commercial surrogacy promotes already existing sexism and classism in our society, and if that is indeed the case, whether laws restricting people's freedom to enter into contracts and their rights to privacy are justified in preventing such practices.

Many feminists argue that because women have traditionally been denied equality in both domestic and professional life, commercial surrogacy promotes the continuance of gender stereotypes and allows other individuals to control women's reproductive labors (Anderson 71; Satz 107). Opponents to commercial surrogacy argue that such contracts allow other individuals to invade the privacy of surrogate mothers and strictly control their behavior since the production of a healthy child involves many aspects of a woman's life other than just the pregnancy and birth. Commercial surrogacy contracts often have agreements forcing surrogates to seek prenatal care, abstain from alcohol and smoking, listen to classical music, read to the fetus, abstain from unhealthy foods, sleep a certain amount a day, take any drugs the doctor recommends, and follow doctor's instructions. If a doctor recommends that the surrogate woman must quit her stressful job during the pregnancy and remain in bed for the last six months of pregnancy to achieve the terms of the contract, a healthy baby, this undue loss of control over one's body and the infringement of freedom is significant, and must be considered (Anderson 71; Satz 107). Furthermore, this control of women's bodies during the pregnancy is considered demeaning to women because the reproductive aspects of a woman are closely linked with the woman's identity and self especially in our society where have children is considered an important part of a woman's life, but not a man's life (Satz 107). Social mores still deems children as a woman's domain as seen in attitudes in the workplace where a woman having a child is considered a burden on a woman's ability to work, while a man having a child is considered to have no affect on the man's ability to work. In the United States, child-leave is still mostly considered for woman and not for a man.

Opponents to this argument state that our society allows for extreme invasion of privacy in certain professions such as

a professional athlete or a soldier, where some control over one's body is ceded by a contract (Satz 107). A professional athlete and a soldier often must be submitted to drug tests, have regimented exercise and training, and in the case of a soldier, have other aspects of their private life scrutinized. These people argue that the amount of control lost should not be assessed but the necessity of the control to achieve the terms of the contract (Arneson 132). There are key differences

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between the contract between a surrogate mother and the parents: the athlete and team, and the soldier and the state, however, which make such analogies invalid. In the case of the contract between the athlete and the team, the athlete gets an overwhelming amount of rewards to compensate any infringement of freedom upon him; he is equally rewarded as the other parties involved. The athlete from his relinquishment of his privacy and freedom from agreeing to random drug tests gets, in return, the chance for personal glory, deep admiration, as well as millions of dollars. The surrogate mother, on the other hand, oftentimes sees to receive little benefit from such a great usurpation compared to the other parties. The surrogate mother receives around \$10,000 for her services, or about \$1.54 an hour, for her labors (Belkin IB) which can include painful and demeaning artificial insemination processes, nine months of pregnancy which often involve sickness and discomfort, and a hard and painful labor. Furthermore, the surrogate mother is often left with great emotional trauma from the loss of the infant. Many surrogate mothers feel a deep sense of guilt and grief after giving up the child. Mary-Beth Whitehead describes in her book about the Baby M case the night

after she gave the baby away: "The room was dark, and I was lying in a pool of milk. The sheets were full of milk. I knew it was time to feed my baby. I knew she was hungry, but I could not hear her crying. The room was quiet as I sat up in bed, alone in the darkness, with the milk running down my chest and soaking my nightgown. I held out my empty arms and screamed at the top of my lungs, 'Oh God, what have I done! I want my baby'" (Miller).

The soldier's situation seems more equitable to the surrogate mothers' since her contractual ties can involve severe maiming and even death. Though there may be other grounds for objecting to voluntary soldiery, the infringement of rights to freedom and privacy are not considered serious objections, and are deemed necessary to have a good military. Like the athlete, the soldier gets substantial rewards from relinquishing his rights. In a well disciplined army where the militia are rigorously trained, a soldier will be less likely to be killed during battle than in an unorganized, haphazard army. Thus in forfeiting his rights, he gains a significantly better chance at survival. The surrogate mother gains little herself from her loss of rights; she is not any better from refraining from alcohol or work during the pregnancy. Since she is not supposed to feel any ties to the infant, the fact that the fetus may be harmed from alcohol would not be a concern of hers.

Besides the monetary gain, however, some surrogate mothers feel emotionally rewarded for their work. It has been reported that only one percent of applicants to surrogate agencies would become surrogate mothers for the money alone; the others have emotional as well as financial reasons for applying. "If I was doing this for the money I would have give up a long time ago, said Dawna, a 32-year old woman who insisted that her last name not be used. "I just like being pregnant and I like the idea of helping someone else have something so special" (Belkin IB). One-third of these surrogates feel guilty for a previous loss of a fetus, some from abortion, and want to rectify their guilty by becoming commercial surrogates (U.S. Office of Technology Assessment cited in Kasindorf 10). A surrogate broker, NoeM Keane, said that the surrogates, often times, are woman who are deeply insecure and feel inadequate; (Kasindorf 10, Anderson 82) commercial surrogacy for them is a way they feel valuable and

appreciated. Such benefits from commercial surrogacy for these women seem dubious at best. Commercial surrogacy does not seem like the best way for these women to fulfill their needs to feel worthy and special, feelings which often-times are stemmed from deep emotional problems and feelings of insecurity.

Proponents of commercial surrogacy state that banning commercial surrogacy because it promotes sexism and classism in our society is paternalistic and in fact sexist. In the majority opinions in the *Johnson v. Calverts* case, Justice Panelli wrote, "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevent women from attaining equal economic rights and professional status under the law" (Hirsch 1). Some feminists also argue that women should be free to enter into contracts and sell their reproductive labors in the market. They believe that woman's labor in general is being discriminated against in the market economy shown by the low wages of traditionally woman oriented jobs, and that the banning of commercial surrogacy is an extension of such discrimination. All

these argument assume that reproductive labor can be considered as any other kind of labor, and view contracts in reproductive labor the same way as other kinds of labor instead of closer to adoption proceedings where a woman is giving up her child. In equating the view that a woman's decisions about motherhood and reproductive labor are emotional with the stereotype that women are irrational and thus unable to make rational decisions in the workplace, Justice Edward Panelli ignores a distinction between motherhood and a career that many people hold. Most people do not view their private decisions of creating a child in the same light as making decisions in the workplace; the first issue is usual deeply personal and emotional while the second type of issues is not regarded in such a personal manner. Furthermore, surrogates often do not agree to enter commercial surrogacy contracts merely as a type of job. Most surrogates come into the contract with feelings of altruism and emotional problems which they think commercial surrogacy will remedy; the money seems like a secondary concern. The products of reproductive labor and ordinary labor also distinguishes the two types of labor. A

child is a human being which society deems valuable of itself and thus cannot be thought of as a car or a house. The production of a child has special meaning that ordinary production does not have, and as stated previously, should be thought of in such a way.

Opponents of surrogacy also believe that the disparity between the parents and the surrogate mother shows an unfair classism in surrogate practices. In both *Whithead v. Steems and Johnson v. Calverts*, the disparity between the two party's was noted, but was not a factor in the outcomes of the cases. Opponents express fears of wealthy women contracting economically disadvantaged women to bear their children, a practice which they find objectionable because of its exploitive nature. Another scenario is where woman from wealthier countries hire out Third World women to bear their children for significantly little money (Recht). An early commercial surrogacy case involved a poor, uneducated woman from Mexico who was forced to bear the child of her distant cousins in the US even though she did not want to continue the pregnancy after the first two weeks. Originally, she was only supposed to be artificially inseminated by the father. The embryo was then supposed to be flushed out of the surrogate and implanted in the father's wife. After the child was born, the woman fought for and was granted custody of the child (Recht). This possible exploitation of poor women is exacerbated by the brokerage firms. These firms purposely select poor, timid woman as surrogates who are less likely to know their rights as a surrogate and make a fuss. Handel, the surrogate broker, to whom the Calverts originally went boasts that he has not had one case where the surrogate tried to keep the baby. He was quoted as saying that he intimidates the surrogates if they seem to be changing their minds: "I scare the hell out of them," he said (Kasindorf 10).

Proponents of child surrogacy do not view commercial surrogacy as excessive exploitation of poor women. In Justice Edward Panelli's opinion of the *Johnson v. Calverts* case, he writes, "There has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment" (St. Louis Post 1C). Arneson, in his essay about commercial surrogacy, denounces such paternalistic



Cartoon by Raul Aviles

ideas. He states that the idea of the state needing to protect poor woman, and woman in general, from abuses of commercial surrogacy brokerage firms and their wealthy clients is elitist. He believes that it is presumptuous to think that poor women are not capable of making rational decisions and that they have the same views as the middle-class (154). Arneson's argument does seem to miss the point of paternalism. Paternalism makes no presupposition about the poor

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women other than that they are not on equal footing with the other members of the contract, and thus are at a disadvantage when they sign these contracts. This unequal power is not caused by the supposed irrationality of poor woman, but by their relative inaccess to information. Often times, they cannot afford to have any lawyers of their own, and have only the surrogate broker, a biased party, for guidance.

Even if commercial surrogacy practices were deemed demeaning to woman, Arneson argues that this reason is not a justifiable cause to ban its practice. He states that because society has irrational notions about the equality of the sexes does not mean that 'innocent' behavior should be punished because it perpetuates these thoughts. He uses the example of a woman who decides to stay at home instead of going to work. Though this behavior may perpetuate the idea that a woman's place is in the home, it should not be banned (Arneson 132). The freedom of action must be weighed with the consequences of the perpetuation of a particular nefarious belief, however. Prostitution is illegal in the States because it is believed to be detrimental to public policy. Thus, this reasoning does not support the legalization of commercial surrogacy, but stresses that the affects of commercial surrogacy on public policy must be scrutinized by the law-making bodies of the country.

This essay has discussed some of the reasons behind the decisions of the States' Courts in several cases, and also some of the issues of commercial surrogacy in regards to public policy. It should be apparent that commercial sur-

rogacy should be banned because it is harmful to much of our public policy regarding families, women, children, and the market. I think that reproductive labor cannot be thought of in the same vein as traditional labor markets because it consists of a very private aspect of people's lives which cannot be adequately explained through contracts and a market economy. Furthermore it goes against our ideas of commodification of children in the parent/ child relationship, and undermines the equality of women. With the increasing new biotechnology to stretch our ideas of parenthood, the evolving definition of family from the tradition family to more unconventional ones, and the changes in the role of women in our society, legislatures must keep up with these times and not shirk their responsibilities to update laws governing such realms, and because of this realization, members of Congress have said the issue will be discussed in the next session. We need to define what criteria are needed to be a parent, how our existing morals and practices fit into our changing circumstances, whether traditional nonmarket labors should be considered part of an economic market system, and if not, where these labors belong in society (Kymlicka 77). Such issues are not only applicable to commercial surrogacy, but to many other aspects of family law and public policy. El

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