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Exploitation and Commodification

Introduction

The biggest concern that people have about surrogacy is that, however it is organized, the practice itself is inherently exploitative of women and turns them, their bodies and the babies into commodities. No model of surrogacy could work if exploitation and commodification are the inevitable results of allowing women to carry babies for others. To determine whether surrogacy exploits women and turns them into commodities, it is important to be clear about what these terms mean. In the first part of this chapter, we look closely at the concept of exploitation. It is not immediately obvious what makes a practice exploitative. What often comes to mind when people worry about surrogacy is its similarity to sweated labour, which is exploitative. But what makes it exploitative? Is it the low pay, the bad conditions or the lack of alternatives for impoverished workers? These features tend to occur together, but do they have to in order for it to be exploitation? What if workers choose to work in those settings because they are better off than they would be in any of the meagre alternatives? Is exploitation ever acceptable? The answers to all these questions are complex and still much debated, even in the case

of sweated labour. In surrogacy, they have only begun to be addressed. Commodification is a separate issue that we discuss in the second part of this chapter. We will show that both objections apply to some aspects of contemporary surrogacy but argue that it need not be exploitative. Reforms can also remove the elements of commodification that are so often present, especially in transnational surrogacy. The professional model is specifically designed to prevent the exploitation of women and all forms of commodification.

Exploitation

Our first task is to define exploitation. Our discussion focuses on transnational surrogacy because it causes the gravest concerns about exploitation. However, the account of exploitation presented in this chapter can be applied to all surrogacy arrangements. Exploitation occurs in transactions between people. We will use a hypothetical set of intended parents and surrogate to explain the concept and explore the relevant nuances.

The Allbrights would like Bandini to act as their surrogate. The Allbrights are wealthy and Bandini is poor, and the Allbrights have chosen transnational surrogacy mainly because it is less expensive than domestic surrogacy. Bandini will not receive nearly as much as a surrogate in their home country would. She has little bargaining power and few options for improving her situation. Are the Allbrights exploiting her? That depends on whether the Allbrights are taking unfair advantage of Bandini. We will consider only scenarios where both parties benefit from the arrangement. If the Allbrights' share of that benefit is excessive compared with Bandini's, then they are taking unfair advantage of her and exploiting her. However, even if they are taking unfair advantage of her, Bandini could be better off as a result of being a surrogate for the Allbrights than she would have been from any of the alternative options available to her. Alan Wertheimer (1996: 16–21) refers to this as 'mutually advantageous exploitation'. That is, Bandini is better off as a result of entering the arrangement with the Allbrights but she does not receive as much from it as she should. This form of exploitation could be

justifiable. We address the issue of justification further on in the chapter, but it is important to make the point that exploitation can sometimes be justified. However, before we can assess whether it is acceptable to exploit Bandini, we have to have a way of determining whether the Allbrights are taking unfair advantage of her. To do this, we examine the price being offered and how the benefits are distributed.

Unfair Advantage

The Allbrights would have a maximum price that they were prepared to pay and Bandini would have a minimum price that she would accept. If the Allbrights managed to pay a lot less than their maximum, somewhere close to Bandini's minimum, they would receive a far bigger share of the benefit arising from the transaction and would gain it at her expense. If, by contrast, they paid a price somewhat lower than their maximum but somewhat higher than Bandini's minimum, then she would receive a fair share of the benefit generated by the transaction. For example, she might be lifted out of poverty instead of left financially precarious. Only then could we say that she had received fair payment and not been exploited. Yet, it could still make sense for Bandini to be their surrogate even if she is exploited, as long as she gains some benefit that she would not have had otherwise. It does not make the arrangement fair, it just means that it is rational of Bandini to agree to it. That is what makes mutually advantageous exploitation morally complicated, as we will show.

There is another way of looking at the Allbrights' wrongful gain at Bandini's expense. Although it is true that, in absolute terms, she is better off being their surrogate, she is not as well off as she would have been if the transaction had been fair. She has suffered an undeserved loss relative to what she would have received if the transaction had been fair (Mayer 2007b). Bandini is in a position analogous to that of sweatshop labourers whose exploiter does not benefit them enough (Mayer 2007b: 142).

Regardless of whether we interpret Bandini's loss in absolute or relative terms, the problem with transactions like these is that the benefits

are distributed unjustly. The weaker party, in our case Bandini, does not receive her fair share.

Invalid Consent

Not everyone agrees that the unfair (unjust) distribution of benefits is enough by itself to count as exploitation. Stephen Wilkinson (2015, 2003a, b) calls that the ‘disparity of value’ condition but adds that Bandini’s consent to the arrangement would also have to be invalid in order for us to say that the Allbrights had exploited her. Wilkinson argues that it is invalid consent that turns unfairness into exploitation because unfair distributions can be caused by ‘bad luck’ or ‘negligence’ or even generosity on the part of the disadvantaged party, a point we discuss in Chap. 3, but if there is valid consent it is not exploitation (Wilkinson 2015: 4). It is certainly important that Bandini gives her consent to the arrangement but it is not obvious why the Allbrights would escape the charge of exploitation just because she does so.

We think that Wilkinson adds the consent condition because of the way he regards altruistic surrogacy. Altruistic surrogacy is unpaid, and Wilkinson holds that it is not exploitative. On the contrary, he thinks it is ideal. This creates a problem for him. If we apply the ‘disparity of value’ test, then altruistic surrogacy emerges as the most exploitative of all surrogacy arrangements. Even the most unfairly paid commercial arrangement is less exploitative than one where the surrogate gets nothing. In order to avoid this conclusion, Wilkinson adds a second requirement: there must also be invalid consent.

Wilkinson would agree that it could be rational for Bandini to give consent to an unjust arrangement. In cases of mutually advantageous exploitation, it could make more sense for her to consent than to refuse. She will get some benefit and be better off in absolute terms. In order for her to give informed consent, she has to be competent, that is able to make decisions for herself, have enough information and be free from coercion. No one is allowed to pressure her into consenting. If she is given all the information about the surrogacy in her own language, has

a copy of the contract and understands what is in it, then the only real concern is whether she is being coerced.

If the Allbrights or the clinic they are using, or Bandini's husband were threatening her into agreeing, then that would be a very obvious case of coercion. But Wilkinson (2015) argues that there are other ways in which someone can be coerced. Bandini is poor and has few options because she lives in a poor country. These are her background conditions. If these conditions are caused by the actions of others or their failure to do something they should, for example poverty alleviation, then the conditions are themselves coercive and Bandini cannot freely consent to be the Allbrights' surrogate. It is not simply the fact that Bandini has few alternatives to surrogacy that makes her consent invalid. A lack of alternatives by itself does not invalidate consent. Quite ordinary situations requiring consent have no alternatives. Wilkinson suggests life-saving medical treatment but, much less dramatically in medical contexts, there is frequently only one treatment for a condition. Consent to a course of antibiotics for a 'strep throat' is not invalidated just because there are no other treatments and to leave it untreated would be risky.

On the face of it, the addition of the consent condition is plausible. Wilkinson compares a wealthy person volunteering to work for unfairly low pay to a poor person forced into working for unfairly low pay because his lack of alternatives is due to others' neglect of their duties towards him. Consent is indeed the crucial distinction in that example. However, the consent condition also leads to some less plausible outcomes. If a poor person is not coerced into working for unfairly low pay and gives valid consent, we are required to say that she is not exploited regardless of how unfairly low her share of the benefits is. This seems quite an odd conclusion. What goes wrong?

We think that Wilkinson is right to avoid taking a position where poverty and/or lack of alternatives is enough to invalidate consent because this would make it almost impossible for the poor to give valid consent to any transaction. He is also right to hold that the background conditions could be caused by the actions or omissions of another party who had a duty to prevent or alleviate poverty and provide better

alternatives. We also agree that this is morally significant. The Indian State for one is probably just such a party.

There is, however, a serious problem. According to Wilkinson, there has to be an unfair distribution of benefits and invalid consent for a transaction to be exploitative. While we can certainly find many cases in which the background conditions are coercive, there are many more where they are caused by bad luck or misfortune, and this is where the implausible outcomes of applying Wilkinson's consent condition arise. Consider the following:

1. Bandini faces destitution if she does not accept the Allbrights' unfairly low pay for the surrogacy arrangement. She is capable of giving informed consent, and her circumstances are caused by the state's neglect of its duties towards her. She is exploited.
2. Bandini faces destitution if she does not accept the Allbrights' unfairly low pay for the surrogacy arrangement. She is capable of giving informed consent and her circumstances are caused by misfortune. She is not exploited.

Bandini's actual situation is identical in each scenario, and it seems odd to describe one as exploitation and the other not. The cause of her background conditions seems irrelevant to whether she is exploited or not (Malmqvist 2013). And in each case, the remedy is the same: if we change the Allbrights' offer to a fair one, neither scenario involves exploitation. The state continues its neglect of its duties to Bandini, which is a serious concern, but she is no longer being exploited. It appears that the unjust distribution of benefits and harms is the condition that matters and that invalid consent is a separate issue.

Fair Price

If we want to say that the Allbrights' offer to Bandini is unfair, then we have to be able to say what would be a fair price. Fair pay is one aspect of justice and, if we are concerned only with that, we might say that the fair price is what Bandini would get in a competitive market where she

could charge according to the value of her services. If a couple is prepared to pay more than the Allbrights, then she would accept their offer. That could happen only if the market was genuinely competitive. We can compare the Allbrights' offer with this 'hypothetical market price' and, if it is lower, say that they are taking unfair advantage of her (Wertheimer 1996: 230). Of course, there are many ways to take advantage of people and to treat them unjustly. Paying a fair price would not solve those problems. But to determine a fair price for surrogacy arrangements is an important step forward, and we argue that it can be done.

Transactions are usually evaluated by assessing the contract and judging whether the terms and conditions are fair. If Bandini was working in a garment factory as sweated labour, it would be relatively easy to assess the contract. The value of her output and the pay she received could be directly compared in the same terms. Surrogacy is different. The Allbrights receive a baby and Bandini receives payment. The benefits are not the same kind of thing so they cannot be directly compared.

Vida Panitch's work on justice and exploitation is helpful in this regard. She argues that comparing the value of the surrogate's ability to provide benefits for her own family with the benefit that the intended parents receive goes some way towards assessing the fairness of the agreement. For example, if Bandini was able to send her own children to school as a result of the payment she received, that would be a benefit more similar to the Allbrights' benefit. However, it is not enough to look just at the contract between Bandini and the Allbrights. An important principle of justice is that there is equal pay for equal work. That means the pay and conditions for Bandini in India should be comparable to those of her counterparts in the US. If they are, then Bandini might not be exploited (Panitch 2013: 332). If the burden of pregnancy and childbirth is the same for surrogates in both countries, comparing the pay and conditions of a US surrogate and an Indian one provides a better way of judging whether the contract is exploitative. Panitch cautiously assumes that there is a reliable measure of purchasing power parity and concludes that Indian surrogates quite possibly are similarly remunerated. However, she thinks that the comparison of non-financial benefits is more robust and argues that the Indian arrangements are

unjust because US surrogates enjoy the following benefits that Indian surrogates do not:

The freedom to pursue other interests while under contract, health care, travel and dietary expenses, legal representation, a post-birth opt-out clause, and the potential for a rewarding relationship with the adoptive family. (Panitch 2013: 332–333)

It is also possible that pregnancy and childbirth are riskier for poor women in India than for women in the US so the injustice to them is even greater. If Panitch is right, then we can determine a fair price for surrogacy arrangements by looking across contracts. However, comparing contracts will only work if the better contract is not itself exploitative. It could be the case that US surrogates are exploited but less so than Indian surrogates. Our account of exploitation must be able to test that possibility as well.

Taking Advantage of Unfairness

The context in which a transaction takes place is important, as we have seen. However, there are also risks to focusing on the context instead of just on the transaction itself. If the principal fault is thought to lie elsewhere, it is easy to overlook the duties that individual exploiters have towards the exploited. Panitch correctly identifies the Indian State as the party that has the duty to rescue its people from poverty. She is also correct to say that the intended parents do not have a duty to rescue Indian women from poverty. The intended parents have no special responsibility towards Indian women because they have not caused the poverty. They have only the same general duty to alleviate poverty as the rest of the rich world. Many intended parents prefer to use Indian surrogates because it is less expensive to do so. That on its own is not wrongful. It is unfair that some countries are richer than others and there are many causes of that unfairness that have little to do with blameworthy actions. Taking advantage of unfairness is not wrong in itself. Low-income countries depend on high-income countries taking advantage

of that unfairness because it is what makes their economies competitive and enables them to trade their way out of poverty. They depend on the disparity of value in labour costs. Once labour costs go up, they find it difficult to compete. All that is true. But it is not the end of the story. A fair price is intended to prevent the *unfair* taking advantage of unfairness (to use Wertheimer's phrasing). For example, if the intended parents paid only the cheapest price they could get away with, this would be taking unfair advantage. But the fair price in transnational surrogacy will still be lower than it is in richer countries. It follows that intended parents *do* have a duty towards the surrogate: to pay the fair price just as corporations have a duty to pay their employees the fair price. The predicament corporations often find themselves in is that it is not possible to pay the fair price and stay in business (Mayer 2007a). This is instructive for evaluating surrogacy arrangements.

Mutually Advantageous Exploitation

The category of mutually advantageous exploitation is necessary precisely because agreeing to an exploitative arrangement can be the better option for Bandini. Bandini may be better off being exploited if the alternative is no job at all. How we evaluate the actions of the exploiters in these cases depends on whether the exploitation is avoidable or not. Suppose the clinic that recruited Bandini wants to pay her a fair price. It would charge the Allbrights accordingly. But if other clinics could charge less by paying their surrogates badly, they would have a competitive advantage that could lead to Bandini's clinic going bankrupt. That would leave Bandini destitute or working for another clinic where she will be paid an unfairly low price. Such situations arise in countries with poor regulation or regulation that is not enforced. With those background conditions, the clinics have a choice between paying their surrogates unfairly and going out of business, leaving the women destitute because there are so few alternatives. That kind of exploitation is unavoidable (or structural) exploitation (Mayer 2007a: 605–606).

The situation is different if the exploitation is avoidable (known as discretionary exploitation). If paying Bandini the fair price would

not put the clinic out of business, then the clinic and the Allbrights have a duty to pay it. If the background conditions in which the clinics operate are such that they would not go bankrupt if they paid their surrogates fairly, then they have no excuse for exploiting them and it is not permissible to do so. Given the difference it makes to the moral evaluation of exploitative practices, it is important to determine whether the exploitation is unavoidable (structural) and possibly permissible or avoidable (discretionary) and never acceptable.

To sum up:

1. Unfairly low pay in a transaction is enough for it to be exploitation.
2. A fair price can be determined.
3. Sometimes exploitation is mutually advantageous.
4. It is possible, and often reasonable, for the weaker party to consent to an exploitative transaction.
5. Sometimes exploitation is unavoidable and paying an unfair price is acceptable.
6. Avoidable exploitation is never permissible.

Permissible Exploitation

Although transnational surrogacy is often exploitative, in many cases it is also mutually advantageous. Banning it would, therefore, leave women worse off. Unless comparable alternative employment is available, mitigating exploitation through better regulation and improved legal protections is preferable to a ban. In what follows, we examine in detail the nature of the exploitation in transnational surrogacy and the responsibilities of the intended parents who use it. Mitigating exploitation involves all parties to the transactions, not just the clinics or the state.

While there is extensive (and justified) criticism of some intended parents, they are generally viewed positively. They see themselves and are seen by others as providing an opportunity for impoverished women to escape poverty, improve the life chances of their own children and avoid the much more hazardous low-paid occupations that are the only

alternative to surrogacy. If that were the case, then the Allbrights would not be exploiting Bandini because a payment that alleviated her poverty would not constitute taking unfair advantage of her.

If Bandini were somewhat better off but not so well off as she would have been, then it is a case of mutually advantageous exploitation. Permitting the practice might then be justified because Bandini would be worse off if it was banned. We suspect that transnational surrogacy is usually mutually advantageous exploitation. It is unfair but not as bad as the alternatives for Bandini.

If she was left in her financially precarious state, no better off than she would have been with any of the alternatives, then it would be exploitation with no redeeming features and its permissibility would be seriously questioned (Kirby 2014; Wilkinson 2015).

Although intended parents believe that they transform the lives of these women, recent research suggests that the benefits to the women are not, on the whole, life-changing, that they receive far less remuneration than is reported, have far lower quality of clinical care than the agencies state and that they face additional costs as a result of undertaking surrogate pregnancies, such as child care, while they are living in the clinics' accommodation (Rudrappa and Collins 2015; Reddy and Patel 2015; White 2014). The fact that some women act as surrogates more than once suggests that poverty alleviation is less common than it is widely held to be (Karandikar et al. 2014). Why do the intended parents persist in their mistaken beliefs? Sharmila Rudrappa and Caitlyn Collins (2015) report that this is partly due to the careful management of information by the agencies and clinics who often prevent the intended parents from meeting the surrogate and leave them with only the carefully crafted profiles to study. Those who attempt to find out the truth for themselves are blocked from doing so and most of the couples in their sample did not even try.

It is important to bear in mind that the intended parents exploit the surrogates even if they sincerely, but mistakenly, believe that the terms of the transaction are fair. Exploitation need not be intentional (Wertheimer 1996: 209). The intended parents' may be less culpable in such cases. We argue, however, that the intended parents are not entitled to hold their beliefs and are not free of moral responsibility for the exploitation.

Fair Compensation

If Bandini is being exploited, who is morally responsible for it? Again, that depends on whether the exploitation is avoidable or not. It does seem that many of the conditions that Bandini and her sister surrogates endure are avoidable. Although Panitch is open to the possibility that the payment is fair, we think that the payment tends to be unfairly low. If increasing payment to surrogates would put the clinics out of business, then the exploitation would be unavoidable, though mutually advantageous. The intended parents could not be held wholly responsible for it. However, that does not mean that the unjust conditions in which they live are unavoidable.

It is very clear from the studies of Indian surrogates that the conditions they endure are often unjust. The hostels they have to live in are often dirty, the quality of the food poor and the staff ill-treat them (Saravanan 2013). Yet the cost of providing clean accommodation, nutritious food and decent treatment would not be that much greater than the current inadequate fare. It costs nothing to treat someone with courtesy rather than hostility. Allowing more visits from family, especially the surrogates' own children, would not be difficult to organize and if the women were being well cared for there would be no reason to prevent their families from seeing them. The current failings are indicative of a general contempt for women, particularly poverty stricken ones, in that society. But if the conditions were improved—to the level that the intended parents are led to believe exist already—the change would eliminate a significant amount of ill-treatment.

The clinics would not go out of business if they treated the women well. However, surrogacy providers would object that clinics that continued with unjust practices would have a small competitive advantage that might make a difference to the profitability of 'good' clinics. And, because of poor regulatory oversight, the 'bad' clinics would continue their practices with impunity. In other words, they would claim that *all* the exploitation is unavoidable. No one disputes the claim that the Indian State neglects its duty to regulate surrogacy clinics nor that endemic corruption makes it difficult to eliminate abuses, but the State

is not the only powerful actor in the industry. We argue that the clients, people like the Allbrights, have enough power to influence the quality of the clinics significantly. Currently, they do not use it. To the extent that the exploitation is avoidable and within the power of intended parents to remove, we think they have a duty to do so.

When states fail in their duties to vulnerable citizens, everyone has a duty to help the destitute and desperate when they have the means and the opportunity to do so. For example, in natural disasters, if the state's response is inadequate, charities and individuals step in. We do not, as a general rule, let people die of starvation, cold or disease and say it is the state's responsibility and no one else's to provide emergency relief. People who are in a position to do something do it because the need is there. Emergencies are very visible and immediate. Chronic poverty is easier to overlook, especially when it is in distant countries. However, for people who use transnational surrogacy, the poverty of those providing the services is one of the dominant features of the arrangements and they are in a position to provide very direct and transformative assistance to those individuals if they choose to. So the Allbrights have a duty to Bandini and are much better situated than anyone else to act on it. If they do not alleviate her poverty as much as possible and ensure she is treated well, they have failed in their duty towards her.

Information about the actual conditions of Indian surrogates is readily available. Intended parents should also be aware of the way they are being managed by the clinics and prevented from seeing for themselves that the surrogates are properly cared for. Some common practices make the intended parents directly responsible for the ill-treatment of surrogates. Multiple embryo transfer, fetal reduction and unnecessary Caesarean sections are all harmful procedures, and they are all avoidable. Intended parents can say no to all of them. It raises their costs to do so and may be inconvenient but those are consequences they are morally obliged to accept.

In some cases, it will be difficult to determine whether the exploitation is avoidable or not but once it is clear, there is no doubt about what to do. However, we do not underestimate the difficulty of applying the remedies.

Unavoidable (structural) exploitation is harder to deal with. An outright ban on transnational surrogacy would leave Bandini worse off. If the exploitation is unavoidable, then attempts to improve her share of the benefits would put the clinic out of business and she would be worse off. That is what unavoidable exploitation means: there is no alternative that leaves Bandini better off. It appears that we would have to let the Allbrights continue exploiting Bandini. However, that does not make exploitation morally good. Nor does it mean that exploitation is the only wrong being done. The Allbrights may be the only ones directly responsible for the exploitation but other parties are complicit in the underlying injustice that makes the exploitation possible (Malmqvist 2013).

Being Complicit in Injustice

Transnational surrogacy in the developing world takes place against a background of widespread injustice to its most vulnerable citizens. To take advantage of those unjust conditions is to become complicit in the reproduction of injustice, a wrong that is distinct from exploitation (Malmqvist 2015: 7). It is not just the intended parents who are complicit. They may be the most directly involved parties because they keep the clinics in business, but others are part of the process that sends intended parents to the developing world in the first place.

To be complicit is to contribute causally and knowingly to the wrongdoing of others. If you know, or should have known, that your actions could assist others to do wrong, then you are complicit, whether or not you intended to contribute. And complicity does not require that the wrongdoing eventuates, just that it could do so (Malmqvist 2015: 8–9).

Complicit parties assist wrongful exploitation in two ways: by providing incentives to the exploiter to oppose structural reforms that would put her out of business and/or by legitimizing the injustice (Malmqvist 2015). We can see both of these in transnational surrogacy. For example, the eagerness of the intended parents to minimize the cost of surrogacy provides an incentive to clinics to oppose reform and regulation

that would protect surrogates and raise costs significantly. Also troubling is the way the intended parents' story about surrogacy hides the truth even from themselves. They have a 'rescue' narrative in which they take women out of poverty and give them lives they never could have achieved for themselves. The clinics, as we have seen, make sure they have no reason to doubt this 'fact'. The Allbrights could quite genuinely believe that they gave Bandini opportunities she would not have had but they are unlikely to ask themselves why Bandini needed rescuing in the first place. Poverty as a serious social justice issue does not figure in the story. Individuals saving individuals is what it is all about.

In our view, the home countries of the intended parents are also guilty of complicity in the reproduction of injustice in transnational surrogacy. The intended parents who use transnational surrogacy do so, by and large, because their home countries make domestic surrogacy extremely difficult for them. Domestic surrogacy arrangements tend to be illegal, prohibitively expensive, inefficiently regulated, unacceptably risky, or some combination of these. And governments *should* know that people will not simply abandon their plans to form a family through surrogacy, even when transnational surrogacy is banned as well. The practice simply goes underground where it is likely to be even more exploitative and dangerous for all parties.

Given that governments have considerably more power to change unjust conditions than individuals do, we think that the intended parents are less to blame than their home countries' governments for the reproduction of injustice in the case of transnational surrogacy. If it is not possible for a particular country to provide adequate domestic surrogacy services, then the government has the option of regulating the use of transnational providers by its citizens and should do so.

Domestic Surrogacy

Although we have focussed on transnational surrogacy, our account applies to domestic surrogacy as well. We think that domestic surrogacy is usually preferable to transnational surrogacy, which tends to be poorly regulated. However, that does not mean it cannot be exploitative. Some

people think that surrogacy is inherently exploitative, but this position is difficult to maintain if the surrogates' own views are taken seriously (Jadva et al. 2003, 2015). A more plausible concern is that domestic surrogacy tends to be only less exploitative than transnational surrogacy. One argument for the exploitative nature of domestic, commercial surrogacy is that the surrogate is usually from a lower socio-economic group than the intended parents, which puts her at a disadvantage. It need not do so, but that is a real risk in jurisdictions where surrogacy is solely governed by contract law and not subject to rigorous regulation. Recourse for either party when something goes wrong is to the courts and the surrogate is less able to afford that.

We think that altruistic surrogacy is also exploitative, especially when it is the only form of surrogacy permitted. It often takes unfair advantage of a woman's generosity to others and imposes costs on her that she should not have to bear. It cannot even be considered an example of mutually advantageous exploitation because the surrogate is not better off than she would have been had she not entered the arrangement. She is worse off: it is an additional pregnancy for her with all the attendant physical consequences. In gestational surrogacy, her body is put through risky and unpleasant procedures that she would not normally need in order to establish a pregnancy. Where someone is worse off than they would have been had they done nothing, the practice is extremely difficult to justify. However, we do not think that it should be banned, as there are cases where a surrogate genuinely prefers not to be paid. Respect for the autonomy of surrogates requires that the option be available but, for reasons we set out in Chap. 6, it should be rare. It should not be a test of a woman's motivation.

There is no reason to believe that domestic surrogacy in rich countries is unavoidably exploitative. However, there are opportunities for avoidable exploitation to occur. We suspect that these are common, and an important objective of the professional model is to remove them. If domestic surrogacy was more widely available and countries only permitted the use of accredited transnational clinics, the exploitation of surrogates would be greatly reduced.

Commodification

The other main objection levelled against surrogacy, commercial in particular, is that of commodification. There are four versions of the claim. Women are objectified and treated solely as means to an end (Saravanan 2010; Snow 2016; Tieu 2009); babies become commodities to be bought and sold (Baylis 2014; Fenton-Glynn 2016; Fronek and Crawshaw 2015; McLachlan and Swales 2009; Scott 2009); a woman's body parts and/or agency are being sold (Fenton-Glynn 2016; Fronek and Crawshaw 2015; Panitch 2015; Reddy and Patel 2015; Scott 2009); and finally, the special nature of the mother/child bond or motherhood itself is broken by commodifying women and babies (Snow 2016; Tieu 2009).

What Is Commodification?

A commodity has a monetary value and is fully interchangeable. For example, coffee is coffee and milk is milk. You might choose low-fat milk rather than full-fat milk but you will buy any bottle of that low-fat milk. To commodify persons is to treat them as having a monetary value and as being fully interchangeable.

According to Wilkinson (2003a: 27), commodification is a form of objectification. There are a number of ways to objectify a person. She can be treated as an instrument, have her autonomy denied, be treated as interchangeable with anyone else, have her bodily integrity breached, be treated as property or have her existence as a subject denied (Nussbaum 1995: 257; Wilkinson 2003a: 28). Persons should never be treated simply as a means to an end nor should they have their dignity denied. But, when someone is objectified, either or both of these things happen. Putting a price on someone is a denial of their dignity. They are being objectified and commodified (Wilkinson 2003a: 30). It is not wrong to treat people as means. What is wrong is to treat them merely as means, for example when their employer sees them only as instruments to be used without seeing them as people who have interests and desires of their own.

Surrogates as Commodities

How should we evaluate the claim that surrogacy involves commodification? There is enough evidence to show that some of the commodification claims are correct for surrogacy as it currently operates, especially in transnational surrogacy. Sheela Saravanan (2010) studied Indian surrogates and found that the women were expected to submit to all procedures without question, to accept the terms of the contract without negotiation, including a long list of rules regarding accommodation. A woman who objected to anything would be replaced. If attempts to establish a pregnancy for a couple failed, then another woman would be selected. There was no recognition of a surrogate's care for the baby she had carried and no concern over her welfare after relinquishment. While the feelings surrogates have for the intended baby are not maternal, there is a connection and most surrogates have an interest in how the baby gets on. Regrettably, one of the attractions of transnational surrogacy for intended parents is that the surrogate can be cut out of the picture as soon as they take the baby from her. These are all ways of objectifying the surrogate and treating her as a commodity, and pose a clear risk where the practice is poorly regulated. However, they are not inevitable in surrogacy and could be mitigated. The remedy is to regulate it better, with a clear understanding of the necessary ethical foundations to do so. That is what we hope to provide in this book.

Reproductive Organs as Commodities

Some critics of surrogacy worry about the commodification of women's reproductive organs, a form of body parts objectification, but this is difficult to support except in those cases where there is no valid consent to their use. The fact that people can validly consent to all the procedures that surrogacy involves suggests that more effort should be put into ensuring that surrogates are indeed giving valid consent. In the case of transnational surrogacy, there are significant concerns about consent but we should focus on the way the clinics operate rather than on the women themselves. They may be illiterate and impoverished but, clearly,

researchers regard them as able to give valid consent. If clinics used the same methods to gain consent, such as reading all the information to the women, including the terms of the contract, in their own language, giving them a copy of the contract, explaining the procedures in terms that they understand and ensuring that they are aware of the risks, then consent could be valid. Consent is not a substitute for regulation, however. Practices that are dangerous should be banned everywhere. We discuss these issues in Chap. 6.

Babies as Commodities

The other version of the commodification claim, namely that babies become commodities, is very difficult to substantiate. People assume that, because money changes hands, a baby is being bought and sold. However, neither babies nor parental rights can be sold (McLachlan and Swales 2009). The legal parentage of a child is a matter for the courts to determine. Arrangements that are found to involve payment for a child will be void and probably subject to criminal investigation. Both national and international laws come into play when babies are commodified. However, it could be argued that when a court upholds a commercial surrogacy arrangement by transferring parental rights, the baby has indeed changed hands for money because, without the money, there would have been no baby.

Let us assume that the arrangement would not have been possible without payment to the surrogate. In that sense, it is true that a baby exists as the result of a financial transaction. But whose baby it is, is not determined by that transaction. Even in places where most of a contract is enforceable, the transfer of parental rights is a clause that will not be. That is the point at which the exchange of money could count against the arrangement being upheld. Consider an altruistic arrangement and a commercial one where the only difference is the payment. The people are the same and the baby is the same. It happens in a state that permits both altruistic and commercial surrogacy. When the intended parents apply for legal parentage, the court will use exactly the same criteria to determine who the baby's parents should be. The money will either make no difference or count against it.

What if a surrogate repays the money so that she can keep the baby? Has she refunded its purchase price? No. In any jurisdiction where the surrogate is the legal mother, the only setting where transfers are required, she has the right to change her mind irrespective of what happens over the money. Nor does it guarantee that she will keep custody of the baby. If the court or welfare authorities have sufficient concerns over her parenting ability, they can remove the baby from her care. They can do this to any parent. The courts have the power to terminate anyone's parental rights and place a child for adoption. Children cannot be owned. The payments intended parents make to surrogates cannot give effect to parental rights.

Surrogates and intended parents are often ignorant of the legal status of the child and what they themselves can and cannot dictate. The professional model eliminates the transfer of parental rights so there can be no suggestion of a baby changing hands for money and no doubt for the people involved about where their rights and responsibilities lie with respect to the child.

Conclusion

The most serious objections to surrogacy are that it is inherently exploitative and commodifies women and babies. Although surrogacy can be exploitative, we argued that it is not necessarily so. Surrogates are exploited when they are unfairly paid, as frequently happens in commercial surrogacy, or not paid at all, as in altruistic surrogacy. Transnational surrogacy is often exploitative. However, when the background conditions are such that exploitation is unavoidable, it can still be advantageous for a woman to act as a surrogate because the alternatives would leave her worse off. Such exploitation is sometimes permissible. However, we argued that avoidable exploitation is never acceptable and that surrogacy should be reformed to minimize it. The conditions transnational surrogates endure could easily be improved.

Commodification occurs when women are regarded as interchangeable and having a monetary value. It is a form of objectification. Surrogates are commodified if they are treated as mere means, have

their autonomy denied or their bodily integrity breached. We argued that transnational surrogacy frequently does objectify women but that such commodification is not inevitable. Practices can and should be modified to eliminate it. Claims that commercial surrogacy necessarily commodifies babies by selling them cannot be substantiated because parental rights are determined solely by the legal system, not through the exchange of money. In fact, the attempted purchase of parental rights would normally result in being denied them, and possibly criminal charges as well.

At the time of writing, India has banned foreigners from using surrogacy clinics there, unless the couple is of Indian origin, but it has not implemented any regulatory policies to protect the surrogates' rights. The problem of exploitation remains, but the class of exploiters is smaller. Harm reduction or minimization is a valuable aim to have but good regulation could do a great deal more to end exploitation and commodification. They are the two biggest risks to women who act as surrogates but, as we have shown, not quite in the way people assume. However, they are not the only risks surrogates face. The following chapter explores the underlying nature of surrogacy relationships themselves, which have characteristics that leave surrogates vulnerable to a form of harm that neither altruistic nor commercial models of surrogacy acknowledge.

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