

Surrogacy: beyond the commercial/altruistic distinction

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ABSTRACT

In this article, I critique the commonly accepted distinction between commercial and altruistic surrogacy arrangements. The moral legitimacy of surrogacy, I claim, does not hinge on whether it is paid ('commercial') or unpaid ('altruistic'); rather, it is best determined by appraisal of virtue-abiding conditions constitutive of the surrogacy arrangement. I begin my article by problematising the prevailing commercial/altruistic distinction; next, I demonstrate that an assessment of the virtue-abiding or non-virtue-abiding features of a surrogacy is crucial to navigating questions about the moral legitimacy of surrogacy; in the final part, I reject other moral heuristics that might be proposed as alternatives to the commercial/altruistic dichotomy, and reiterate that a virtue-ethical framework is the most suitable way forward.

INTRODUCTION

Surrogacy is a form of third party-assisted reproduction in which an agent other than the *intended* parent(s) agrees to provide gestational labour and to give birth to a child on behalf of the intended parent(s).¹ Surrogacy can take several forms. In a *traditional* surrogacy, the surrogate provides the egg, making them genetically related to the child; in a *gestational* surrogacy, the surrogate does not provide the egg, but is impregnated with an already fertilised embryo, thus bearing no genetic link to the child. Additionally, we may distinguish surrogacy arrangements by differentiating between *paid* and *unpaid* surrogacy. Paid surrogacies are usually referred to as 'commercial', whereas unpaid surrogacies are called 'altruistic'.²

The commercial versus altruistic distinction has often served as a locus of dispute in the bioethical literature when it comes to questions about the moral legitimacy of surrogacy. For instance, commercial surrogacy arrangements are frequently morally objected to in the bioethical literature. Scholars worry especially about transnational surrogacies, claiming that 'reproductive tourism' may be a 'new face of neocolonial exploitation'.³ Altruistic surrogacies, on the other hand, are less ethically problematised in the literature, though scholars have also pointed out that it comes with challenges of its own. For example, altruistic surrogacy may put pressure on a family member to become a surrogate for a relative who is otherwise unable to conceive.⁴

It is also true that the moral legitimacy of surrogacy does not necessarily depend on whether it is paid or unpaid. My contribution in this article will be to say that the ethics of surrogacy depends on context-sensitive, virtue-ethical conditions that make up the

surrogacy arrangement in question. I recommend a virtue-ethical approach both as a conceptual and practical point of departure for debates about the moral permissibility of surrogacy. I will begin my article by motivating, in greater detail, the need to move beyond the commercial/altruistic distinction. Next, I lay out my virtue-ethical framework for the moral assessment of surrogacy, illustrating along the way that my account is well-equipped to navigate questions about the moral legitimacy of surrogacy. In the final part of my paper, I critically reflect on some alternative moral heuristics, and reiterate that my account remains an attractive way to move beyond the commercial/altruistic distinction.

COMMERCIAL/ALTRUISTIC DISTINCTION IN SURROGACY

Policy-setting and moral reflection about surrogacy turn on the issue of paid versus unpaid surrogacy; that is, the question of whether a surrogacy is commercial or altruistic. While there are no internationally recognised surrogacy laws, the prevailing manner by which various countries implicitly distinguish permissible surrogacies from impermissible ones is through the legal differentiation of paid and unpaid surrogacies. While places like Germany, Italy and Spain ban all forms of surrogacy, other countries, such as the UK, the Netherlands and Denmark, only legally allow altruistic surrogacy arrangements. India, which until recently was known as a global hub for transnational commercial surrogacy,⁵ has now prohibited all commercial surrogacy arrangements, leaving open the altruistic surrogacy option only for certain domestic, heterosexual married couples.⁶ These days, Ukraine and Georgia have emerged as the areas where commercial (and transnational) surrogacy is permitted, and in the USA, surrogacy is allowed without specific regulation in most states, with some exceptions.⁷

It is important to note here that the commercial versus altruistic formulation of surrogacy does not *merely* mark out what is legally permitted or prohibited, even if in practice its objective is to be a legal placeholder. The distinction itself in fact imports value-laden assumptions about what should be considered morally desirable or undesirable. The differentiation made between the two terms act as a kind of proxy for morally acceptable surrogacies versus morally unacceptable ones. The narratives around these two categories clue us into that value-ladenness. Commercial surrogacies are often framed around worries to do with commodification and exploitation, with the surrogate's 'economic and educational vulnerability'⁸ being a primary worry. These worries have in the past



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few decades tended to target non-Western commercial surrogates like Indian women, who are often thought of as ‘victims of poverty’, navigating their financial deprivation through paid surrogacy, though many question this conceptualisation.⁹ Others go as far as to say that commercial surrogacy is a form of baby-selling.¹⁰

Altruistic surrogacy, on the other hand, carries with it mostly positive connotations, or at least is often treated as less ethically problematic relative to commercial surrogacy.¹¹ It implies that the arrangement is selflessly and generously gifted. Indeed, some scholars characterise altruistic surrogacy by stipulating ‘altruistic concern’,¹² implying that it is ‘motivated mainly by a desire to help an infertile couple to have a child of their own’.¹³ As Arneson points out, not many endorse the view that surrogacy is degrading if motivated ‘by altruism or other friendly noncommercial aims’,¹⁴ presumably on the grounds that the labour of surrogacy is an intimate, special one that can be given but not bought. However, altruistic arrangements have also been critiqued on the basis that it is not free of the power dynamics seen to plague commercial surrogacy; altruistic arrangements could involve ‘domination’¹⁵ and ‘emotional coercion’.¹⁶

The commercial/altruistic distinction has various limitations. One concern, for instance, has to do with whether this distinction relevantly captures the variable motivations for surrogacy. A paid surrogate may just as well be motivated to help others or to provide for their own children.¹⁷ An unpaid surrogate may be motivated by a desire for redemption, perhaps from the guilt of having previously given up a child.¹⁸ Thus, altruistic motives are not incompatible with commercial ones and vice versa. Moreover, not only is the distinction not useful for appreciating the complexity of motives for surrogacy, it also reifies certain kinds of maternal motives as desirable. As Anleu argues, the commercial/altruistic dichotomy is based on ‘powerful gender norms... held by the medical profession, the mass media, and many men and women who perceive social roles as deriving from nature’.¹⁹ Such norms emphasise, for instance, loving motherhood as a natural desire for women. Thus, a woman’s maternal rights ‘are abrogated’ if she agrees to ‘...relinquish her child at birth for financial remuneration’.¹⁹ Associating the commercial with what is *bad* and the altruistic with what is *good* reinforces the notion that payment for gestational labour should *not* be desired by surrogates in the first place.

I am sympathetic to these critiques of the commercial/altruistic distinction. I take these critiques to be instantiations of a more general concern: that while the distinction purports to capture the moral permissibility of surrogacy, it does not in fact quite capture the relevant moral considerations about surrogacy. When we doubt the usefulness of the dichotomy’s ability to distinguish between commercial versus altruistic motives, for example, we are, I think, questioning whether the categories do enough to set apart motives we think are morally desirable from ones that are morally undesirable. Moreover, when we complain that this dichotomy reinforces problematically gendered norms about women, we are signalling that problematically gendered norms should not be morally valued in surrogacy. While there may indeed be ethical differences between various types of surrogacy arrangements, my point is that such differences are not well tracked by the categorisations of commercial versus altruistic, despite the treatment of this distinction as a kind of proxy for moral relevance. Instead, we ought to seek out a less morally arbitrary way to distinguish between different surrogacy arrangements. I will outline one such approach—which I call a virtue-ethical approach—in the next section.

VIRTUE-ETHICAL APPROACH

In the previous section, I criticised the commercial/altruistic distinction in surrogacy, pointing out that while it purports to have legal and moral meaning, it fails to capture the relevant, morally non-arbitrary features which make a surrogacy arrangement permissible or impermissible. I propose, instead, what I call a virtue-ethical approach to surrogacy arrangements, which looks at the virtue-abiding or non-virtue-abiding features of a surrogacy arrangement, rather than whether it is or is not monetarily rewarded. As a highly interpersonal and complex process of interaction, my view is that the terminology of virtues is better suited to capture the details of each individual arrangement. The interests of all the relevant parties involved, such as the intended parents, and the surrogates themselves, can be represented under this view, unlike the commercial/altruistic distinction which largely focuses on the *surrogates’* motives and as well as how they are treated by others.

In recent years, virtue-ethical approaches to bioethics have garnered plenty of attention. As Begley says, the neo-Aristotelian approach to virtue ethics is favoured partly in response to a concern that ‘the attempt to articulate principles of right has failed’.²⁰ The idea is that this sort of principlism—as is present in deontology and consequentialism—does not take into account the *character* of the individual behind any moral decisions, whereas virtue ethics would recognise that individual character is an important part of our moral experience and decision-making.²¹ As Holland says, virtue ethics is well suited to discussion about professional conduct in healthcare and medicine because it ‘lends itself well to consideration of individuals’ professional character and conduct’.²² What I draw from this concept of virtue ethics is the idea that morality involves particulars, rather than just general or universalisable principles. Those particulars are mediated by the moral dispositions of the persons involved, taking for granted that human beings are persons whose characteristics and preferences have been shaped by their socialisation.

The point I am simply articulating here is that surrogacy arrangements are also highly personalised arrangements. As such, surrogacy is appropriate to subject to this virtue-ethical lens. Surrogacy is not the kind of phenomenon that could be compared with routine visits to the general practitioner; each scenario may involve radical differences that cannot be dealt with through a standardised and universalised frame of principles. As Payne *et al* discuss in their critical review of surrogacy experiences, four kinds of complex surrogacy relations can be identified which go beyond the commercial/altruistic typology: *open*, *restricted*, *structured* and *enmeshed*. These relationship-types take into account the frequency and character of contact prebirth and postbirth, the expectations of participating parties, the kinds of exchange engaged in by them, and the cultural, legal and economic backgrounds against which the surrogacy takes place.²³ This research is very much in line with my view that surrogacy arrangements are morally rich in a way that would make it inappropriate for their moral permissibility or impermissibility to be reduced to the matter of whether the surrogate is paid or unpaid.

How would a virtue-ethical approach be implemented? Theoretically, by asking whether the parties involved in the arrangement are virtue-abiding or non-virtue-abiding, we might orient ourselves to morally relevant characteristics of the agreement. What would it mean to *abide* by virtue or to fall short of that, in the context of surrogacy? In light of the concerns that the commercial/altruistic distinction is purported to address, such

as exploitation concerns related to compensation, I would argue that moral issues can easily be translated to something like the following focal ‘virtues’: compassion, generosity and justice. While I do not propose here some exhaustive list of virtues relevant for surrogacy, focusing on specific virtues that are exhibited or not exhibited may be highly informative for spelling out the moral implications of each surrogacy arrangement.

Consider, say, a quality like compassion. Compassion might involve something like being deeply empathetic to one’s difficult circumstances or predicament. It may be, for example, that compassion is what motivates people to become surrogates. Whether or not they are offered compensation, a surrogate may have been moved to offer their gestational labour by realising that involuntarily childless people have a really difficult time. By gleaning this compassion-driven disposition, we have no need to treat whether surrogates are paid or unpaid as a proxy for their moral motivation. Detecting for this virtue may have the added benefit of also helping us analyse whether commissioning parents also abide by good practice. Suppose a surrogate experiences distress at the prospect of parting ways with the child that is intended for the commissioning parents. Compassion may help commissioning parents understand and negotiate with the surrogate about how to move forward. This type of explanation is much more useful than just looking at whether the commissioning parents gave enough money to the surrogate, the latter of which decontextualises the highly relational features of the arrangement, simplifies the psychological leaning of the surrogate and fails to address which values are either aligned or in conflict for the relevant parties.

Of course, questions remain as to what counts as virtuous in this context, how we are supposed to measure it, and so on—the typical questions raised by objectors to virtue ethics. Further, the virtue-abiding or non-virtue-abiding features of the relevant parties in the context of the surrogacy are not sufficient to determine whether the surrogacy arrangement is morally acceptable *overall*. We must ensure that other safeguards are in place, like proper medical care during the pregnancy. Be that as it may, a virtue-ethical approach plausibly remains a much more sophisticated way to gain insight into the moral permissibility of a surrogacy arrangement as compared with the commercial/altruistic framework, with the caveat that there are indeed further factors about the surrogacy (eg, health and safety concerns) which require assessment.

BEYOND THE ALTRUISTIC/COMMERCIAL DISTINCTION

I will now consider why *other* approaches are not preferable to the virtue-ethical approach, reiterating that my virtue-ethical account is a robust way to move beyond the commercial/altruistic dichotomy for a more nuanced and practical ethics of surrogacy.

One alternative approach to nuancing the ethics of surrogacy is to perhaps go with a consent or autonomy-based model of surrogacy that focuses on the surrogate’s consent and autonomy. We could liken this to a deontological approach which focuses on the conditions that would enable fully rational, consenting adults to uphold a contractual agreement. Such an approach might address the commonplace concern levelled at, for example, commercial surrogacy arrangements, which is that it targets a ‘woman’s poverty and not her will’.²⁴ Ensuring that surrogates can obtain informed consent and are autonomous in their choice would target the ‘coercive dimensions of surrogacy practice’²⁵ and the ‘quasi-coercive acts and omissions of other people’.²⁶ Ryman and Fulfer have proposed a patient–worker model which would recognise surrogates’ vulnerability as ‘both workers and

patients’²⁷ and thereby enable their autonomy to be prioritised. Others like van Zyl and Walker highlight a need for a professional regulatory body that oversees the selection and training of surrogates as well as ethical standards, to make sure that surrogates give their consent freely, that they are aware of their rights and responsibilities, and that contractual restraints on them are legitimate.²⁸ These suggestions certainly present a better alternative to the commercial/altruistic dichotomy. However, a consent-based or autonomy-based model remains problematic. First, fully informed and autonomous consent is difficult to obtain in many surrogacy scenarios, including scenarios where participating agents encounter socioeconomic obstacles or where there are power disparities between contracting parties. Further, consent does not quite capture the changing and uncertain nature of surrogacy and the labour of gestation. For example, a surrogate may experience unanticipated bodily incapacitation from the pregnancy itself that they may not have consented to experience, if they had known beforehand. In this way, fluctuations of their physical condition, preferences, life circumstances, etc, make them *more* autonomous at certain times and *less* autonomous in others. Despite these challenges and potential detriments to autonomy, however, it may still be that a surrogacy arrangement is overall acceptable (perhaps *trust* rather than autonomously given consent is a greater priority to some). Thus, a consent or autonomy-based model is too restrictive for a dynamic phenomenon like surrogacy.

Another approach is a welfare-based account. On this approach, the way to ensure surrogacy is morally acceptable is by making sure that surrogates are well and taken care of, *despite* being temporarily indisposed or compromised in their bodily autonomy. While this is not an objectionable goal, this approach would also fail to capture the fact that surrogacy is too complicated to give us an easy way to account for *everyone’s* welfare. For example, ensuring surrogates’ welfare might involve closely monitoring their health and invasively controlling it to make sure that they can give birth to a healthy baby and that the surrogates are also ‘psychologically’ well (ie, are not unhealthily attached to the baby, etc). It is unclear *whose* welfare ought to be prioritised here and in what sense. If we presume that the best possible outcome is simply the successful delivery of a healthy baby that is handed over to the intended parents, we may undercut some surrogates’ evolving values and interests. On the other hand, it would also be wrong to *only* consider the surrogate’s interests, given that there is often more than one intended parent whose welfare hinges on whether they acquire a healthy child, not whether all of the surrogate’s interests are served. Besides the issue of *whose* welfare matters most, the welfare-based account may also obscure some of the exploitation concerns that the consent model aims to locate. Because the surrogacy is supposed to be acceptable so long as it is consistent with people’s welfare, it may fail to detect cases where economic exploitation is indeed a concern. It is, overall, difficult to use a welfare-based approach to declare what a morally acceptable surrogacy would look like, given that surrogacy is a dynamic process involving evolving relationships with potentially conflicting interests between different parties.

As such, these principle-based frameworks often oversimplify and reduce reality through abstraction.²⁹ This is where the virtue-ethical approach can be sensitive to the issues. Because it is a particularised approach as opposed to a universalised approach, it can tolerate and provide great latitude for negotiation of *all* the factors mentioned previously. It can, for example, allow for trust-based rather than consent-based surrogacies, so long as such an arrangement makes sense for the parties involved

and enable them to be virtue-abiding. It also allows for there to be discomfort and some losses of welfare (eg, if the surrogate has a miscarriage) as part of the surrogacy process, without focusing only on welfare gains or losses as determining the moral permissibility of going through with the arrangement. There is no reason a virtue-theoretical approach could not subsume the attractive features of the more unidimensional ‘principlist’ approaches. We may, especially, further adopt the idea of *practical wisdom*, or *phronesis*, which involves decision-making wisdom built through previous encounters of ethical dilemmas.³⁰ The point of using a virtue-ethical framework is not to come up with a one-size-fits-all heuristic by which to judge the moral permissibility of surrogacy arrangements but to illustrate why any such arrangement is acceptable or unacceptable in the *unique* cases and contexts in which the arrangement presents itself.

CONCLUSION

In this article, I critiqued the commercial/altruistic dichotomy prevalent in surrogacy-related discussions, on grounds that the dichotomy fails to adequately capture the morally relevant elements of surrogacy arrangements. The alternative I proposed was a virtue-ethical approach, which I claimed *does* pick out what makes a surrogacy morally permissible or impermissible and better attends to the complex relational particularities of surrogacy arrangements.

In closing, I would add that my account has the potential to critically inform, as well as reform, the varied landscape of surrogacy laws and policies around the world. For example, in case of conflict between the intended parent(s) and the surrogate over the child’s custody, some jurisdictions in the USA grant maternity in the courts based on the *child’s* best interests.³¹ In these *existing* legal frameworks, it is already imperative to ask the kinds of questions that would be relevant for a virtue-ethical approach, such as the virtue-abiding motivations and intentions of the surrogate and intended parent(s). These details enrich understanding about the relationship between the relevant parties, thereby making the virtue-ethical approach a philosophy that complements the processes in place for the fair adjudication of these parties’ interests.

Furthermore, my insight that the commercial/altruistic distinction fails to capture the morally salient features of a surrogacy arrangement should, hopefully, speak in favour of reforms to authorise *diverse* kinds of virtue-abiding surrogacy arrangements. By drawing on virtue-ethical considerations, instead of the commercial/altruistic distinction, it would be possible to continue serious dialogue over precisely what conditions *should* be required for a surrogacy contract to be acceptable and workable for all relevant parties. For example, one may argue that imposing blanket bans on commercial surrogacy arrangements in a pre-emptive way to protect surrogates in low-income positions³² is both unhelpful as well as unrepresentative of the more nuanced reality of the relations between aspiring parents and surrogates. A virtue-ethical approach would encourage us to resist an oversimplified moralisation of these variables at the policy level and to pay closer attention to ways that the ethics between the participating agents could be improved and subsequently formalised.

Though the virtue-ethical account I offer herein is a broad one, I hope the idea will serve as a useful point of departure for further discussion—especially for the task of challenging the

existing conceptual and legal surrogacy frameworks which do not reflect the moral subtleties of surrogacy.

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