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Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales

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Abstract. McLachlan and Swales dispute my arguments against commercial surrogate motherhood. In reply, I argue that commercial surrogate contracts objectionably commodify children because they regard parental rights over children not as trusts, to be allocated in the best interests of the child, but as like property rights, to be allocated at the will of the parents. They also express disrespect for mothers, by compromising their inalienable right to act in the best interest of their children, when this interest calls for mothers to assert a custody right in their children.

Key words: commodifiication, Commercial Surrogate Motherhood, surrogacy, Brazier Report, medical ethics

In "Babies, Child Bearers, and Commodification," McLachlan and Swales (2000 this issue) reject my critique of commercial surrogate motherhood, or contract pregnancy. They correctly argue that contract pregnancy does not amount to a complete commodification of children or their mothers, and that some ways people treat commodities (e.g., cherishing them) are not objectionable ways of treating people. Thus, a sound ethical critique of contract pregnancy cannot rest on the claim that this practice is exactly the same as turning children and their mothers into literal commodities, nor can it rest on just any parallel between the ways contract pregnancy treats children and their mothers and the ways some people treat some commodities. Instead, commodification objections to contract pregnancy must (1) precisely specify the respects in which this practice treats children and their mothers as commodities, and (2) explain why such treatment is objectionable.

A practice treats something as a commodity if its production, distribution, or enjoyment is governed by one or more norms distinctive to the market. Market norms structure relations among the people who produce, distribute, and enjoy the thing in question. For example, in market transactions the will and desire of the parties determines the allocation between them of their

freely alienable rights. Each party is expected to look after her own interests, neither party is expected to look after the interests of the other, or of third parties, except to the minimal extent required by law. The question at stake in contract pregnancy is whether norms like this, governing the sphere of market transactions, should be extended to cover the allocation of parental and custodial rights to children.

Contract Pregnancy Commodifies Children

Because they agree with me that the nature of children demands that they not be sold, McLachlan and Swales go to great lengths to deny that contract pregnancy amounts to the literal sale of parental and custodial rights over children. They argue that from a legal point of view, the mother is paid not to transfer her parental and custodial rights over the child to the father, but merely to "relinquish her right to claim legal parenthood of the child, and to relinquish her [de facto] custody." Because her right is not transferred but relinquished, the pregnancy contract does not literally involve a legal sale of parental rights.

Commodification is an ethical and cultural concept, not a legal one. Even if the pregnancy contract does not involve a transaction that is legally defined as a sale, it may still commodify children if it replaces parental norms with regard to rights and custody of children with market norms. I argue that the pregnancy contract does this, because it moves away from regarding parental rights over children as trusts, to be allocated in the best interests of the child, toward regarding parental rights as like freely alienable property rights, to be allocated at the will of the parents.

To see how this is so, compare two legal regimes: (1) that in which pregnancy contracts are null and void; (2) that in which pregnancy contracts are valid and enforceable. I advocate the first regime, McLachlan and Swales the second. What happens when the mother and father who have signed a pregnancy contract disagree about who should have custody of the child, once it is born? Under the first regime, this is treated as a custody dispute between unmarried parents.[1] In the U.S., such disputes are resolved by considering the best interests of the child. The soundness of one parent's claim to custody is always established relative to the other parent, taking the best interests of the child as the sole standard of judgment. One parent is not allowed to pay another parent to go away, and expect such a voluntarily contracted agreement to be upheld by the courts, because parents do not have the right to alienate their rights over their children at will. Their rights over their children are held as trusts. Parents have rights over their children because such rights are a necessary means to discharge their obligations to their children. Since parents

can't bargain away their obligations to their children, they can't bargain away the necessary means to discharging their obligations, either. It is the *child's* right to claim care and protection from both of its parents. This right is not either parent's to voluntarily relinquish.

Contrast this situation with a legal regime in which the relinquishment clause of a pregnancy contract is enforced. This would amount to the court denying the mother legal standing to bring a claim that the child would be better off in her custody, in virtue of the fact that the other parent acquired a right in the pregnancy contract to keep her out of any custody dispute. This is the only thing it could mean to *relinquish* one's "right to claim legal parenthood of the child."

If this isn't literally selling a child, it is selling the child out. To enforce pregnancy contracts is to legally endorse the principle that mothers are entitled to profit economically from relinquishing their parental rights to the child, and that others are entitled to induce her to do so. This is to treat her parental rights as hers to give away, out of regard for her own interests (or, if "altruism" was her motive, out of regard for the interests of the other parent). In treating them as freely alienable, the pregnancy contract endorses a way of regarding these rights not as to be exercised out of love for the child, but as to be exercised out of regard for the interests of the adults who have them. Moreover, it introduces a conflict of interest between the mother and her child: she risks losing her fee if she acts on her judgment that the child would be better off remaining with her.[2] Contrary to McLachlan and Swales' assertion, this is to exclude a norm of parental love for children – namely, the norm that the mother may express her love for her child by asserting her right and duty to care for it as its parent.

Another way to see how children are commodified in the process is to see how the status of the child differs in the two legal regimes. Where the pregnancy contract is null and void, the child is the preeminent party in the custody dispute, whose interests govern the allocation of parental and custodial rights. Where the pregnancy contract is valid, the child is not a party to the suit over breach of contract. It is merely the object over which possession is disputed. If the pregnancy contract is enforceable, then custody of the child is awarded according to its terms, without an independent inquiry into the child's best interests.

McLachlan and Swales want us to believe that the child's interests are protected just as well in a legal regime that automatically awards custody to one parent and terminates the other's parental rights according to a prior contractual agreement between the parents (regardless of who would now be the best parent), as in a legal regime that decides custodial and parental rights by comparing the case of each parent to be better able to promote the

best interests of the child. Or do they? Putting it this starkly, their position is implausible, although it is logically entailed by the view that pregnancy contracts should be held valid and enforceable.

No wonder McLachlan and Swales waver. They don't want to be thought of as advocating a brutal scene, in which a baby is "dragged from [its mother's] breast by burly policemen." They hold out the "risk" that the commissioning parents might not win custody of the child. "Contracts can be broken," they say. On what grounds? They don't say. Suppose they take the reasonable view that a sufficient ground to break the contract is that it would be in the child's best interests to remain with its mother. How is this ground to be submitted to the court, if the commissioning father has an enforceable right to keep the mother from asserting her parental rights, because she accepted his payment to relinquish those rights? If this ground is to be heard, then the mother must retain the "claim to assert her parental rights" in court. *But this is to say that she must never be regarded as having relinquished this claim in the pregnancy contract, which is to say that this clause of the contract must be regarded as null and void.* McLachlan and Swales are caught in a contradiction: either the child has no right to have its best interests determine the outcome whenever custodial and parental rights are terminated, or else the pregnancy contract is null and void. They can't have it both ways.[3]

Contract Pregnancy Commodifies Women

Let us now turn to the commodification of the mother's reproductive labor. McLachlan and Swales make two main arguments against my view that pregnancy contracts objectionably reduce women's reproductive labor to a commodity. First, there is nothing inherent in treating a woman as an incubator for a child that precludes also treating her with respect. Therefore, if a given mother is disrespectfully treated by the other parties to a pregnancy contract, this is a problem with the particular people who treat her that way, not a problem inherent in the surrogacy arrangement. Second, contracts are, in general, vehicles for expressing the autonomy and personal perspective of the parties to it. Pregnancy contracts are no different from any contract in opening up some opportunities by foreclosing others. Therefore, as long as the pregnancy contract is voluntarily accepted by the mother, it is no violation of her autonomy or dignity to enforce it. Rather, it would be a violation of her autonomy and personhood – an objectionable form of paternalism – to prevent her from entering such a contract.

The second argument proves too much: namely, that all voluntary contracts whatsoever, even contracts into slavery, express and uphold the autonomy of the parties. The error in this argument is its failure to recognize

that some rights in one's person are so essential to dignity and autonomy that they must be held inalienable. This is not a paternalistic claim. The claim is not that individuals must be protected from their own bad judgment. The claim is rather that there are some ways of treating people that are morally objectionable, even if they consent to being treated those ways. One cannot turn physical or emotional abuse of another person into respect for their autonomy and dignity just by saying, "you consented to be treated this way" – *even if the other person did consent.* Some obligations to others are not conditional on their consent. McLachlan and Swales are therefore in no position to argue, from the supposedly general nature of contracts as devices for expressing autonomy, to the particular conclusion that pregnancy contracts respect the mother's autonomy. One must examine the details of such contracts to see whether they treat inalienable rights as if they were alienable commodities.

McLachlan and Swales' first argument is also mistaken. It does not meet the objection to argue that in many pregnancy contracts the commissioning parents and contracting agency do treat the mother decently. This is like saying: there is nothing inherent in a slave contract that violates the dignity and autonomy of the slave. After all, many slave owners treat their slaves decently and permit them a wide range of freedoms. Therefore, if a given slave is disrespectfully treated by the slave owner, this is a problem with the character of the slave owner, not a problem inherent in the slave contract. This argument is flawed, because slave contracts give slave owners a *license* to disrespect their slaves, and an *incentive* to do so. Even if slaveowners did not act on their incentive, the mere license to abuse the slave is enough to render the slave contract an objectionable form of commodification, because it treats the slave's inalienable rights as alienable.

I am not trying to argue that pregnancy contracts reduce women to slaves. Rather, my point is that both pregnancy contracts and slave contracts wrongly treat someone's inalienable rights as if they were freely alienable. Pregnancy contracts treat the mother's inalienable right to love her child, and to express that love by asserting a claim to custody in its own best interests, as if it were alienable in a market transaction. One might wonder how this could be a violation of her autonomy, given that her right to care for her child is grounded not in her own interests but in her obligation to her child. How does alienating this right in a contract constitute an unjust commodification of her as well as of her child? The answer is, as Kant argued (Kant, 1964) that people express their autonomy in fulfilling their duties, not just in carrying out optional personal projects.

The terms of the pregnancy contract demand of the mother not merely certain behaviors, but engagement in the emotional labor of distancing herself

from her child. Standard pregnancy contracts require her to agree not to form or attempt to form a parent-child relationship with her child. What if, despite her initial intentions, she finds herself coming to love her own child? The commercial surrogate mother industry and the commissioning parents assert the authority to interpret this development as an immoral act – a broken promise, a betrayal, and a threat to the commissioning parents – and to insist that the mother view her love for her child in this way as well. This is a violation of her autonomy.

McLachlan and Swales think this is not so, because the content of a pregnancy contract is not that different from the content of a marriage contract. The marriage contract also restricts the freedom of marriage partners to develop love relationships (those outside the marriage), and interpret such love relationships that might take place as betrayals and threats to the other party to the marriage contract. However, there is a great moral difference between expecting a spouse not to develop extramarital love relationships and expecting a parent not to develop a loving relationship with her own child.

McLachlan and Swales also argue that pregnancy contracts should be drawn in analogy to prenuptial agreements, which specify in advance what is to happen if the parties subsequently change their minds. This is an attempt to soften what would otherwise be a rigid enforcement of the relinquishment clause of the pregnancy contract, which they properly sense would constitute a violation of a reluctant mother's autonomy (remember those "burly policemen"). However, while prenuptial agreements may specify the division of property in the event of divorce, it is notable that no valid prenuptial agreements are allowed to specify ahead of time the allocation of child custody rights. This is proper, because that determination must be made with the best interests of the child in mind, and it is impossible to stipulate what these would be in advance.[4]

Pregnancy Contracts Should be Illegal

So far I have argued that pregnancy contracts are unethical, and that the law should regard them as null and void. In the event of breach, the ensuing custody dispute should be viewed as any custody dispute between unmarried parents is viewed in the law. If custody is to be awarded to the father in a dispute, this conclusion should be based not on the contract, but on a determination of the best interests of the child. We have seen that McLachlan and Swales, despite their official view that pregnancy contracts are morally innocent, even "laudable", flinch at the suggestion that they should be, as a rule, enforced against the will of the mother. I give them credit for feeling,

if not quite seeing, that such a rule would disrespectfully disregard the rights and interests of both the mother and the child. Indeed, any rule that gave any legal weight to the contract would do so.

It does not follow from this, however, that pregnancy contracts should be illegal. In my book (Anderson, 1993), I argued that they should be illegal, and that the brokers to such deals be subject to criminal penalties. I advocate taking this extra step for two reasons. First, as we have seen, the brokers' actions are morally on a par with baby selling. Second, there is no feasible way to prevent brokers from bullying and exploiting mothers in a regime that holds such contracts legal but unenforceable.

The father in a pregnancy contract tends to be desperate. His wife has typically undergone years of futile infertility treatments. The father and his wife either regard adoption as unthinkable or have been deemed ineligible to adopt a child. The broker represents the interests of the father in its dealings with the mother, and therefore will do what it can to ensure that the mother will relinquish custody of the child and terminate her parental rights. If pregnancy contracts lack legal force, this gives the broker and the desperate father a powerful incentive to resort to bullying and abusive extralegal means to get what they want from the mother. There is no effective way to regulate the brokers' behavior, since it is so difficult to monitor. It is better, then, to try to eliminate the industry by making it illegal.

Against my view that commercial surrogate brokerage should be illegal, McLachlan and Swales draw analogies to the failures of Prohibition and anti-prostitution laws. The analogies are inapt. Prohibition failed because almost everyone drank alcohol. Contract pregnancy is an option only a tiny number of people would ever seek. Laws against prostitution are objectionable because they effectively give police, pimps, and customers a license to treat prostitutes as outlaws, a license they use to grievously abuse and exploit prostitutes. In addition, some women need to resort to prostitution just to survive. Thus, while prostitution as currently practiced constitutes a degrading traffic in women, making it illegal puts women in an even worse position. By contrast, laws against commercial surrogate brokers would not subject surrogate mothers themselves to criminal penalties. Nor would they foreclose any woman's means of survival. Brokers and fathers do not deem women on the edge of survival to be suitable "surrogate" mothers of their children.

Free markets are wonderful institutions in their place. But they are objectionable when allowed to govern spheres of life that should not be commodified. In a world in which market norms have been lauded as cure-alls for every social ill, the time has come to draw some limits to their authority.

Here is one: market norms should not be allowed to come between a mother and her love for her child.

Notes

[1] In the usual case of a parenting contract, the "surrogate" mother is the mother, both genetically and gestationally. If the "surrogate" mother gestates another woman's donated egg, it is arguable that she should not be regarded as the legal mother of the child. Thus, she may have no parental rights to relinquish, and any contractual arrangements concerning transfer of custody would not involve commodification of the child. Her reproductive (gestational) labor would still be objectionably commodified, but the reasons for thinking so would be closer to those articulated by Debra Satz (Satz, 1992) (arguing that contract pregnancy is objectionable because it reinforces a traditional gendered division of labor that underwrites women's inequality).

[2] To avoid this conflict of interest, the other half of the contract – promising payment to the mother in return for her giving up custody and parental rights – should also be held null and void.

[3] Perhaps they would take a fallback position: that the mother does not relinquish her parental rights in the contract, but that these rights are to be balanced against the father's rights as defined in the contract. This amounts to the view that the child's best interests are no longer to be regarded as the sole factor in a custody dispute, since they may be traded off against the interests of the parents as defined in their contract. They want us to believe that this way of regarding children is better for them than when their interests are preeminent in custody disputes. Or maybe just that a little commodification of children at the point of acquisition is of no consequence, if this will afford them better (or merely adequate?) treatment by the parents who acquire them. But how are we to assure this, if the best interests of the child do not govern the termination of parental rights and allocation of custody at the outset?

[4] This means that even a pregnancy contract that specified that the mother would keep custody of her child if she changed her mind should not be enforceable. At the time of dispute, the relevant question concerns the best interests of the child, and this may mean that the father should get custody. Fathers also have inalienable rights and duties with respect to their children that pregnancy contracts should not be allowed to treat as alienable.

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