

SURROGACY AND PROSTITUTION: A COMPARATIVE ANALYSIS

JEAN M. SERA*

INTRODUCTION

Many scholars have written about commercial surrogacy, which involves a contract in which a woman agrees to carry a child for another person to whom she will relinquish the child when it is born.¹ The typical case involves a married couple who cannot have their own biological child because the wife is infertile.² Therefore, the couple enters into an agreement with a woman (the surrogate) who will carry a child for them; the man (the father) provides the sperm which will be used together with the surrogate's egg to produce a child.³ The surrogate will carry this child to term and subsequently relinquish it to the father and his partner (the recipient woman).⁴ This is known as partial surrogacy; however, the recipient woman may also donate her eggs, rendering the arrangement a "full surrogacy."⁵ There are cases where friends or family members carry children for each other without charging a fee; however, commercial

* Boston University School of Law, J.D., 1996. The author would like to thank Jane Maslow Cohen and the participants of the Life and Death seminar at Boston University School of Law for ideas, materials, and comments. Thanks also to Bridget Crawford.

1. NEW JERSEY COMMISSION ON LEGAL AND ETHICAL PROBLEMS IN THE DELIVERY OF HEALTH CARE, AFTER BABY-M: THE LEGAL, ETHICAL AND SOCIAL DIMENSIONS OF SURROGACY v-vi 1992 [Hereinafter NEW JERSEY COMMISSION]; see MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 4-7 (1990).

2. FIELD, *supra* note 1, at 5.

3. FIELD, *supra* note 1, at 4-5. Field notes that the term "surrogate mother" is a misnomer. The "surrogate mother" is actually the natural mother since she gives the egg and bears the child. Field suggests that a more accurate term would be "surrogate wife." *Id.*

4. FIELD, *supra* note 1, at 4-6. Of course, a surrogate may carry for two men or two women. For simplicity, this paper will focus on the case where a man and woman contract with a surrogate to have a child.

5. "Full surrogacy" is also known as gestational surrogacy. NEW JERSEY COMMISSION, *supra* note 1, at v; see also FIELD, *supra* note 1, at 184 n.14 (defining "gestational surrogate" as a woman who carries the developing fetus but provides neither egg nor sperm); MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION & EMBRYOLOGY 42 (1985) (explaining several different forms of surrogacy).

surrogacy generally involves a broker who brings the parties together for a fee and both the broker and the surrogate are paid.⁶

The existing literature surrounding the commercial surrogacy debate shows that there is a tendency, by those on both sides, to compare surrogacy to prostitution.⁷ This paper will show that this analogy is sufficiently weak to undermine the arguments for which the authors intend it to stand. First, the analogy minimizes the harms of prostitution, an act that can present many problems, and at the same time, makes surrogacy—an act which has less potential for harm—seem worse than it actually is by hiding the benefits and exposing only tenuous harms. Thus, the analogy does a disservice to both surrogacy and prostitution.⁸ Second, the analogy suggests, for some, that surrogacy should be prohibited because a woman cannot rationally “choose” surrogacy because of the negative connotations and stigma involved.

Commodification⁹ of the female’s uterus and/or eggs has further been used to argue against both surrogacy and prostitution.¹⁰ This

6. See generally FIELD, *supra* note 1, at 4-7, 19-20; WARNOCK, *supra* note 5, at 42.

7. See *infra* Part I. For one of the more expansive discussions, see ANDREA DWORKIN, RIGHT-WING WOMEN 181-88 (1983) (explaining that reproductive technologies separate the womb from the woman the way the vagina (or sex) is separate from the woman); see also FIELD, *supra* note 1, at 28-30 (arguing that surrogacy is like prostitution in its coercive aspects); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMB 231, 275 (1985) (equating the act of surrogacy to prostitution and characterizing a surrogate as a “reproductive prostitute”). For articles which refer to this comparison, see Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein’s Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2396 (1995) (referring to surrogacy as “baby brokering”); Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 211 (1992) (stating that most feminists see surrogacy as a form of slavery or prostitution). But see Susan Ferguson, *Surrogacy Contracts in the 1990s: The Controversy and Debate Continues*, 33 DUQ. L. REV. 903, 918 & n.95 (1995) (noting the California Supreme Court’s rejection of the proposition that surrogacy contracts violate public policy by exploiting and dehumanizing women); Margaret Jane Radin, *What, If Anything, Is Wrong with Baby Selling?*, 26 PAC. L.J. 135, 140-41 (1995) (explaining the feminist “market liberation argument,” which would legalize abortion, prostitution, and surrogacy); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2313 (1995) (arguing for the legalization of surrogacy in the same way that prostitution ought to be legalized).

8. Accord Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL’Y 139, 141-46 (1990) (arguing that comparing surrogacy to slavery tends to make one think that slavery was not as bad as its reality). Allen concedes that slavery and surrogacy are similar in the sense that all slave women who bore children did so with the understanding that those children would be owned by others, and women who serve as surrogates also have this understanding. *Id.* at 144. However, Allen explains that significant differences exist, such as the fact that slaves lacked self-ownership, and that slave owners exerted enormous control over a slave. *Id.* at 142. These characteristics are not found in a surrogacy agreement. *Id.*

9. Margaret Radin defines commodification in two ways. One is the legally permitted buying and selling of something. Second, commodification also includes market rhetoric, “the practice of thinking about interactions as if they were sale transactions,” and market methodology, such as rational actions with a cost-benefit analysis. See Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1859-60 (1987).

10. Allen, *supra* note 8, at 142-45 (opposing the commodification of women because it

paper will touch briefly on the fact that commodification, while existent in both surrogacy and prostitution, should not be viewed negatively. Further, this paper will counter the argument that as a policy matter, both surrogacy and prostitution should be prohibited or regulated because they both involve coercion and/or exploitation. This paper will conclude that while this proposition may be true for prostitution in some circumstances, it is not true for surrogacy.

Part I of this article will describe the arguments that have been made analogizing prostitution to surrogacy. Part II will then compare prostitution to surrogacy as it exists today in order to draw a factual distinction. This section will conclude that the benefits of surrogacy are hidden by associating surrogacy with prostitution and its harms, and thus, the analogy without further explanation should be avoided. Part III will examine arguments made regarding the coercion and exploitation involved in prostitution and surrogacy to show further why the analogy is tenuous. Part IV will respond to the arguments identified in Part I in light of the evidence presented in Parts II and III.¹¹ This paper will conclude by explaining why exploitation and coercion, which may exist in prostitution, are absent in surrogacy.

I. ARGUMENTS COMPARING SURROGACY TO PROSTITUTION

This section will first address the views of those who believe that surrogacy is similar to prostitution, and thus should be prohibited. The section will then discuss the view that surrogacy is akin to prostitution because it degrades women, and the belief that regulation is needed due to the similarities between prostitution and surrogacy. Finally, the section will show the arguments at the other end of the surrogacy debate which also analogize surrogacy to prostitution.

One should note that while many have written that "most feminists" see surrogacy as akin to prostitution, there are in reality few who have written about the analogy and adopted it as their own belief; yet these same few people are cited over and over for the view of "most feminists."¹² In addition, it is useful to note that while the ar-

denigrates humans into fungible, tradable objects, and decreases the respect of women as individual persons).

11. Some scholars argue that because surrogacy is unlike prostitution, surrogate contracts should therefore be enforceable. This issue is beyond the scope of this paper and will not be addressed. For arguments in favor of the enforceability of surrogate contracts, see generally CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989). For arguments that surrogate contracts should be legal but unenforceable against the surrogate, see generally FIELD, *supra* note 1, at 28-30, 79.

12. For example, "[M]ost feminist writers see surrogacy as a form of slavery or prostitution in which the surrogate is exploited through the enticements of money, the social expectation of

guments below have been made, there is little more by way of full analysis than what is presented in this article.

A. Since Surrogacy Is Like Prostitution, It Should Be Prohibited Because No Woman Can Rationally Choose It

1. Andrea Dworkin & Catharine MacKinnon

Surrogacy, like prostitution, is said to be the payment of a fee for the use of the body.¹³ Andrea Dworkin argues that surrogacy is like prostitution because the surrogate has no choice.¹⁴ She argues that surrogacy raises questions regarding the legality of prostitution, such as whether a woman has a right to enter into contracts involving her body, where "the state has constructed the social, economic, and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of women; and yet the selling is seen to be an act of individual will."¹⁵ Dworkin argues that in the surrogacy scenario, the pimps are the doctors and the brothels are the

self-sacrifice, or both." Lieber, *supra* note 7, at 211 (cited in Brinig, *supra* note 7, at 2380 n.9). Lieber is cited for the same proposition by Erika Hessenthaler, *Gestational Surrogacy: Legal Implications of Reproductive Technology* 21 N.C. CENT. L.J. 169, 177 & n.74 (1995)). However, Lieber cites Andrea Dworkin and Gena Corea for this proposition. See Lieber, *supra* note 7, at 211 & n.56. Another scholar, Abby Brandel, states that "others view surrogacy as a form of slavery or prostitution," (citing DWORKIN, *supra* note 7, at 181-88), and that "[s]till others see surrogacy as part of a patriarchal conspiracy to control women's bodies and reproduction and seek to prohibit surrogacy in order to protect women," (citing COREA, *supra* note 7, at 314). Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 492 (1995). See also R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 394 n.34 (1993) (stating that "some critics view surrogacy as akin to prostitution") (citing Andrea Dworkin and Christine Overall); Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 633 (1991) ("[S]ome view paying a surrogate for her services as akin to prostitution") (citing Dworkin, *supra* note 7, at 181-88). Duane Valz, without citing authority for his proposition, states that "many critics argue that donating gametes or providing surrogate services in exchange for money is exploitative and akin to prostitution." Duane R. Valz, Book Review, 10 HIGH TECH. L.J. 201, 207 (1995) (reviewing JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994)).

13. Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1657 n.85 (1984).

14. DWORKIN, *supra* note 7, at 181-88.

15. DWORKIN, *supra* note 7, at 182. Dworkin states:

The state denies women a host of other possibilities, from education to jobs to equal rights before the law to sexual self-determination in marriage; but it is state intrusion into her selling of sex or a sex-class-specific capacity that provokes a defense of her will, her right, her individual self—defined strictly in terms of the will to sell what is appropriate for females to sell. This individual woman is a fiction—as is her will—since individuality is precisely what women are denied when they are defined and used as a sex class.

Id.

hospitals.¹⁶ The broker in the surrogacy context, who brings the contracting parties together for a fee, has also been analogized to a pimp.¹⁷ Dworkin argues that surrogacy, like prostitution, allows society to equate women with sex and nothing more.¹⁸

Dworkin also argues that a surrogacy arrangement is not one in which a woman can enter into by her own free will¹⁹ because in both prostitution and surrogate motherhood, the state has created the social, economic and political situation in which the sale of some sexual or reproductive capacity is necessary to a woman's survival.²⁰ What follows from this argument regarding free will, according to Dworkin, is the notion that no woman could "want" to be either a surrogate or a prostitute.²¹

Another author agrees that the absence of free choice in prostitution is the same as the absence of free choice in surrogacy.²² She explains:

[e]ven though an individual woman may chose to pose nude, to sell her sexual services, or to rent her womb, the abuses and exploitation inherent in these practices suggest that the decision is hardly one of choice. That women chose to be vulnerable to risks such as AIDS, degradation, rape, and health risks associated with pregnancy (in order to bear another couple's child) proves that many women are desperate, not that they are free to choose.²³

Catharine MacKinnon seems generally to concur in Dworkin's view on women's lack of choice in joining these professions, although she does not specifically say so on the issue of surrogacy. Both MacKinnon and Dworkin believe that sometimes women act against their

16. DWORKIN, *supra* note 7, at 182.

17. Elizabeth Seale Cateforis, *Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas*, 4 WTR-KAN. J. L. & PUB. POL'Y 101, 108 (1995).

18. DWORKIN, *supra* note 7, at 184.

19. COREA, *supra* note 7, at 227 (quoting an interview with Andrea Dworkin). Dworkin noted:

The bitter fact that the only time that equality is considered a value in this society is in a situation ... where some extremely degrading transaction is being rationalized. And the only time that freedom is considered important to women as such is when we're talking about the freedom to prostitute oneself in one way or another.

Id.

20. COREA, *supra* note 7, at 228 (summarizing Dworkin's point made in RIGHT-WING WOMEN); see DWORKIN *supra* note 15 and accompanying text.

21. COREA, *supra* note 7, at 232 (criticizing men's characterization of a woman's desire to be a surrogate as the "Happy Breeder" which is comparable to the "Happy Hooker" justification for prostitution).

22. Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29 (1993).

23. *Id.* at 52.

own self-interest because they have internalized as a part of their consciousness male norms and standards.²⁴ This argument has been called "false consciousness."²⁵

MacKinnon sees enforceable surrogate contracts as an instance of male control over women's bodies.²⁶ Surrogate contracts have been said to be akin to prostitution because women's bodies are taken and paid for, then used by men.²⁷ Another author, concurring with MacKinnon, explains that objections to surrogacy arise from objections to control of the body by another person or out of social policy concerns.²⁸ MacKinnon also sees surrogacy, like prostitution, as evidence of the inequality between men and women.²⁹ This is attributed to the fact that men are in control of women and view them in terms of what their bodies can do.

2. Gena Corea

Another similarity between surrogacy and prostitution has been noted by Gena Corea. Corea argues that while prostitutes sell the use of the vagina, rectum or mouths, surrogates sell the use of other body parts such as wombs, ovaries, and eggs.³⁰ Just as prostitutes line up to await a john's selection, agencies line up surrogate's dossiers.³¹ Corea envisions a scenario where some women are kept together as a class of breeders, just as prostitutes are kept together in brothels.³² Corea also anticipates a time when women will be kidnapped and

24. See, e.g., CATHARINE MACKINNON, *Consciousness Raising*, in TOWARD A FEMINIST THEORY OF THE STATE 83-105 (1989); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 116-17 (1987) (suggesting that both MacKinnon and Dworkin believe in false consciousness). See also MARY BECKER, CYNTHIA GRANT BOWMAN, MORRISON TORREY, CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 59 (1994) [Hereinafter FEMINIST JURISPRUDENCE].

25. FEMINIST JURISPRUDENCE, *supra* note 24, at 59 (noting that although MacKinnon never uses the words "false consciousness," her analysis of "consciousness raising" may be similar).

26. MACKINNON, *supra* note 24, at 244-49.

27. Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303, 307 (1993) (citing MACKINNON, *supra* note 24, at 248).

28. See Susan E. Looper-Friedman, "Keep Your Laws Off My Body": Abortion Regulation and the Takings Clause, 29 NEW ENG. L. REV. 253, 278-79 (1995) (stating that objections to surrogacy do not grow out of the characterization of a woman's body as property, but out of the unpopular notion of "baby selling").

29. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 847-48 & n.259 (1994) (citing Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1299 & n.85 (1991)).

30. COREA, *supra* note 7, at 275. See also RICHARD T. HULL, ETHICAL ISSUES IN THE NEW REPRODUCTIVE TECHNOLOGIES 153 (1990) ("[C]ontracting for the use of one's uterus is perilously close to contracting for the use of one's vagina; the parallel with prostitution strikes many as compelling ...").

31. COREA, *supra* note 7, at 275.

32. COREA, *supra* note 7, at 276.

forced to be surrogates.³³

B. Surrogacy Is Like Prostitution and Thus Should Be Prohibited Because It Commodifies a Woman's Body and Is Degrading

Margaret Jane Radin has argued that there are certain services that are inalienable or unsalable predominantly because they promote commodification and thus hinder a woman's possibility to obtain "human flourishing."³⁴ For Radin, both surrogacy and prostitution should be prohibited. She concedes, however, that since we do not live in a perfect world, in the case of prostitution this may not be possible.³⁵ Another author, Barbara Kopytoff, explains that those who have an economic/moral concern that economically disadvantaged women will be induced to serve as surrogate mothers and will therefore be degraded, view paid surrogacy as analogous to prostitution.³⁶ Kopytoff further explains that the payment in surrogacy commodifies something that should not be sold and thereby degrades the participants.³⁷ Both children and life essentially become commodified through surrogacy.³⁸ Cass Sunstein has furthered this argument by finding that surrogacy and prostitution result in an improper way of valuing human beings.³⁹

C. Surrogacy Is as Coercive and Exploitative as Prostitution, and Therefore, Should Be Regulated

In order to show that surrogacy contracts should be unenforceable, Martha Field suggests that surrogacy is like prostitution in its exploitative and coercive aspects.⁴⁰ Field uses the laws against prosti-

33. COREA, *supra* note 7, at 276.

34. Radin, *supra* note 9, at 1849.

35. Radin, *supra* note 9, at 1923-25 (proposing to decriminalize prostitution in order to protect poor women from the danger and degradation of the black market).

36. Barbara Kopytoff, *Explorations in the Law of Surrogacy*, 28 U.S.F. L. REV. 593, 596-97 (1994) (citing Radin, *supra* note 9, at 1928-31).

37. Kopytoff, *supra* note 36, at 596-97.

38. Kopytoff, *supra* note 36, at 596-97. See J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 352 (1984) (explaining the concerns of those against surrogacy, namely that putting a price on children denigrates them, and that life should not be treated as a commodity).

39. Sunstein, *supra* note 29, at 847-48 & n.266 (citing Elizabeth Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990)).

40. FIELD, *supra* note 1, at 28-30 (explaining that historically, it was the poor woman who had to sell her body and her charms to survive. Similarly, it is poor women who often are driven by financial need to sell their child-producing services); see Harry D. Krause, *Artificial Conception: Legislative Approaches*, 19 FAM. L.Q. 185, 200 (1985) (arguing that commercial surrogacy should be illegal because it is analogous to prostitution); MACKINNON, *supra* note 24, at 248 (characterizing surrogacy as prostitution, as social discrimination, and exploitation by men against women).

tution to show how we can regulate surrogacy, and to show that we, as a society, somehow feel that sex and commerce should be separate.⁴¹ Specifically, Field states that because many women do not know whether or not they will ultimately be able to give up their child when they enter into a surrogacy arrangement, to the extent the contract forces a woman to give up the child it can be coercive.⁴² Consequently, surrogacy contracts should be unenforceable at the option of the surrogate.⁴³ Arguing for regulation, Lori Andrews suggests that poverty specifically coerces women into surrogacy and prostitution.⁴⁴ Fleshing out this argument further, Katherine Lieber maintains that surrogates are said to be exploited through the "enticement of money, the social expectation of self-sacrifice or both."⁴⁵ Finally, John Hill summarizes the analogy that has been drawn between surrogacy and prostitution on the basis of exploitation:

The allusion to prostitution is particularly telling. Both the prostitute and the surrogate mother are frequently perceived as victims of exploitation. Both are (usually, in the case of prostitution) women. Both may have chosen their roles as a response to economic exigency. And both have chosen roles which require the exercise of traditionally limiting, feminine functions—sex and procreation.⁴⁶

41. FIELD, *supra* note 1, at 79 (proposing that even if a state decriminalized prostitution, it would not enforce contracts to engage in prostitution when the prostitute had changed her mind). See DWORKIN, *supra* note 7, at 187. Dworkin concedes that sex has been commodified but argues that reproduction, through surrogacy, will obtain the same status of commodification because the reproductive technology makes "the womb the province of the doctor, not the woman; all [of the many types of technologies] make the womb extractable from the woman as a whole person in the same way the vagina (or sex) is now," and reproduction will be controllable by men even more than ever before. DWORKIN, *supra* note 7, at 187; COREA, *supra* note 7, at 219 (arguing that the children produced by surrogate arrangements are viewed as commodities). As an example, Corea cites the case of a man who contracted for a baby and later rejected the infant when the baby was born with mental retardation. COREA, *supra* note 7, at 219. The husband of the surrogate stated that the man asked the hospital to let the child die without treatment, and asked the surrogate to try again. COREA, *supra* note 7, at 219.

42. FIELD, *supra* note 1, at 73-74 (explaining the effects of denying a woman, particularly a poor woman, the right to raise her own children). The effects include loss of self-worth and identity, depression, and life-long grief. *Id.*

43. FIELD, *supra* note 1, at 90.

44. Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists* 16 L., MED. & HEALTH CARE 76 (1988).

45. Lieber, *supra* note 7, at 211.

46. John L. Hill, *Exploitation*, 79 CORNELL L. REV. 631, 641 (1994) (arguing that his analysis of exploitation does not include surrogate mothers and prostitutes primarily because the latter group is known to make a choice as to their decision).

D. At the Other End of the Debate

Some argue that surrogacy should be legal *because* it is like prostitution, which should also be legalized. The argument revolves around the theory that women should be able to enter into contracts to use their bodies.⁴⁷ This argument, based on freedom of contract, is exactly the one rejected by Dworkin.⁴⁸ It has also been said that the taboo that surrounds prostitution also surrounds surrogacy.⁴⁹

II. FACTUAL DIFFERENCES BETWEEN SURROGACY AND PROSTITUTION

In this section, both surrogacy and prostitution will be described as current literature and studies portray them. In addition, it will be argued that surrogacy has benefits that are often overlooked. This section will conclude with an analysis showing that surrogacy and prostitution are factually different.

A. Surrogacy

1. Surrogacy in the United States Today

Surrogacy can take four major forms: (1) the recipient woman may be the genetic mother, in that she provides the egg; (2) the recipient woman may make no contribution to the pregnancy; (3) the genetic father may be the husband of the recipient woman or of the surrogate; or (4) the genetic father may be an anonymous donor.⁵⁰

Generally, a surrogacy arrangement involves an infertile married couple⁵¹ that has sought out a woman to have a child for them.⁵² Typically the man's sperm is injected into the surrogate; however, the woman who will raise the child may also contribute her eggs.⁵³ In order to find a surrogate, the couple may employ a broker/agency

47. Epstein, *supra* note 7, at 2313; Horsburgh, *supra* note 22, at 52 (noting the existence of the argument that women should be permitted to enter into contracts to use their own bodies as a fundamental freedom in both surrogacy and prostitution situations).

48. See DWORKIN, *supra* note 7, at 181-88.

49. Judith Grant, *Intimate Work: The Regulation of Female Sexuality and Reproduction* 1 S. CAL. REV. L. & WOMEN'S STUD. 225, 234 (1992) (arguing that laws prohibiting surrogacy and prostitution both curtail women's freedom when it comes to sexuality and reproduction).

50. WARNOCK, *supra* note 5, at 42.

51. An infertile couple is defined as a man and a woman who has been trying unsuccessfully to conceive a child for more than one year. This definition is derived from the requirements established by some hospitals for couples seeking to engage in fertility treatments. UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 37 (1988).

52. *Id.*

53. NEW JERSEY COMMISSION, *supra* note 1, at v.

that locates and tests the surrogate and draws up the contracts.⁵⁴ The couple generally pays approximately \$15,000 to the agency and \$15,000 to the surrogate and often pays for any costs incurred by the surrogate pursuant to the pregnancy.⁵⁵ In addition to infertile married couples, fertile married couples have also hired surrogates; and it is possible that unmarried people as well as persons in homosexual or lesbian relationships have hired surrogates as well.⁵⁶ There is currently no legislation prohibiting the hiring of surrogates for fertile married couples, unmarried people, or people in gay or lesbian relationships.⁵⁷ However, some agencies may have policies that determine who can hire a surrogate through their respective agencies.⁵⁸

Most surrogates are in their late twenties and hold a high school degree.⁵⁹ Most are from lower-middle or middle-class families with annual incomes between \$15,000 and \$50,000.⁶⁰ Less than fifty percent of all women who have applied to be surrogates are unemployed or on financial assistance.⁶¹ Lori Andrews reports that only one percent of surrogate mothers regret their decision.⁶² While the financial incentive motivates many women to surrogacy, some women do not enter into surrogate arrangements only for the money. Incentives have ranged from the desire to help infertile couples, to the desire to experience pregnancy without having to raise the child.⁶³

54. NEW JERSEY COMMISSION, *supra* note 1, at vii-viii.

55. See generally FIELD, *supra* note 1. Field bases some of her arguments on the fee of \$10,000 to the surrogate and \$10,000 to the broker, but these figures may be outdated. At Surrogate Parenting in California the figure is \$35,000 for the surrogacy arrangement total.

56. COREA, *supra* note 7, at 216.

57. FIELD, *supra* note 1, at 356.

58. COREA, *supra* note 7, at 217 (stating that an example of such policy would be to limit surrogacy to heterosexuals).

59. Hill, *supra* note 46, at 691 (noting also that about one-third of surrogate mothers have college degrees and a small percentage have attended graduate school).

60. Hill, *supra* note 46, at 691 (stating that this figure is in terms of 1987 dollars).

61. Hill, *supra* note 46, at 691.

62. Andrews, *supra* note 44, at 74.

63. Hill, *supra* note 46, at 691. Some have expressed an altruistic desire "to give an infertile couple a baby." *Id.* Others would like to "experience pregnancy without having to raise the child." *Id.* Still others "find themselves drawn to surrogacy after working in 'nurturing' fields such as health care and early childhood education." *Id.*

2. Benefits of Surrogacy⁶⁴

a. Contracting Party Benefits

On occasion, the morning program of the Today Show features the "Hero of the Week" segment.⁶⁵ The "hero" chosen by the Today Show for one week was a surrogate mother whose name had been submitted because of the joy she brought two people who could not otherwise have a child. They were particularly grateful due to the fact that she had to go through numerous procedures to finally conceive the child. Surrogacy would therefore seem very different from prostitution in that a program such as Today Show would unlikely recognize a prostitute for her (or his) heroic acts of engaging in intercourse with anyone. This example tends to show that by comparing prostitution to surrogacy the benefits to third parties in surrogacy arrangements are downplayed since the benefits to parties in prostitution seem to be fewer.

The bearing of a child for another can be a deliberate and thoughtful act of generosity on the part of one woman to another.⁶⁶ Surrogacy, in fact, offers some couples their only chance of having a child genetically related to one or both of them.⁶⁷ In addition, surrogates may feel that they are helping people in need.⁶⁸ In interviews conducted by Lori Andrews, many women who had been surrogates described "tremendous psychic benefits they received from the feeling that they were helping someone meet a joyous life goal."⁶⁹ Many viewed themselves as feminists who were exercising a reproductive choice and an ethic of care.⁷⁰ Moreover, by engaging in surrogacy ar-

64. This paper does not address the harms to third-party children because while these harms admittedly are important to a policy on surrogacy, they do not enter the coercion/exploitation/commodification debate or the surrogacy/prostitution analogy. For an analysis of this issue, see generally FIELD, *supra* note 1; Cateforis, *supra* note 17, at 104.

65. *The Today Show: Hero of the Week* (NBC television broadcast, February 16, 1996). The "Hero of the Week" is chosen amongst entries of viewers regarding persons they feel worthy of national recognition for their heroic acts.

66. WARNOCK, *supra* note 5, at 45. This point is made particularly well by Amber Eck in the context of organ donation. She writes, "We permit organ donation because it permits the donor to be altruistic—to do something that makes him feel good about himself." Amber Eck, *Organ Donation on Death Row*, at 6, May 24, 1994 (unpublished paper on file with Boston University School of Law). Even though organ donation cannot presently be compensated in the United States, the purpose of this comparison is to show the altruistic side of surrogacy that can be absent in prostitution, that surrogacy can make the surrogate feel good about herself because she is helping others.

67. WARNOCK, *supra* note 5, at 45.

68. Hill, *supra* note 46, at 691.

69. Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2354 (1995).

70. *Id.*

rangements women were able to earn the equivalent of the minimum wage for one year, enabling them to stay at home to care for their own children or to work part-time or full-time for at least a portion of the pregnancy.⁷¹

b. Empowerment to Women as a Whole

Today, studies show that women bear the burden of domestic labor.⁷² They are the primary care-takers of the home and their children.⁷³ It has been argued that women are, and should be, the primary care-takers of children because they carry their children for nine months and therefore have a "maternal bond" with their child.⁷⁴

Should surrogacy become more wide-spread, the argument that women should be the primary care-takers of their children could no longer hold true. As more couples use surrogates and other forms of reproductive technologies, both partners would be equally responsible for child-rearing. It would then become more difficult to argue that because women carry their children for nine months they are better suited for the child-rearing responsibilities. This could change current societal views of women as the primary caretakers of children, and result in the realization by men that they are just as responsible for child-rearing as women.⁷⁵ Surrogacy could also elevate child-bearing, which is traditionally not economically compensated, to labor that is valued monetarily.⁷⁶

In addition, women today face problems in the traditionally male-dominated workplace.⁷⁷ Often they are denied promotions, crucial

71. The analogy to the minimum wage compares the lump-sum amount one would receive at year's end after engaging in a surrogacy arrangement to the salary received in a minimum wage job. This analogy, however, may be misleading. First, minimum wage jobs are sometimes stepping stones whereas surrogacy is not. A woman who is pregnant, however, is not "working" at the pregnancy every hour she is pregnant. Thus, she can engage in other work either part time or full time for a good portion of the pregnancy. Andrews, *supra* note 69, at 2355.

72. ARLIE HOCHSCHILD, *THE SECOND SHIFT* 33-39 (1989) (describing what life is like for many married women with children who work outside the home. Often, they come home after an eight hour day to a great deal of housework. The husbands help little with raising the children and with domestic work).

73. FEMINIST JURISPRUDENCE, *supra* note 24, at 562, 597 n.2.

74. FEMINIST JURISPRUDENCE, *supra* note 24, at 562.

75. See SHALEV, *supra* note 11, at 12-13; SHALAMUTH FIRESTONE, *THE DIALECTIC OF SEX* 188-89 (1970).

76. SHALEV, *supra* note 11, at 150. By "value" I mean that women have not traditionally been recognized for the "work" they do in the home. For example, women are not taxed on the value of their work, they are not entitled to healthcare and are not eligible to receive a pension when they "retire." While many do not want to put a monetary value on child birth because it could devalue its worth (i.e., it is priceless), money is the way we value many things in this society. By not placing a dollar value on time spent on domestic labor, it can be argued that we undervalue it.

77. SHALEV, *supra* note 11, at 150.

training, and better assignments because their employers are afraid they may leave their jobs to have children and never return.⁷⁸ As a result of their biological capability to have children, some women end up in part time jobs⁷⁹ or jobs traditionally held by women. Jobs traditionally held by women, although requiring the same level of education, skill, and hours, typically pay less than jobs traditionally held by men.⁸⁰ Women with the same level of education as their male counterparts encounter discrimination in the workplace specifically because they are biologically capable of having children and are expected to leave or request time off mid-way through their careers, or may ask to work part-time.⁸¹

Surrogacy, together with other reproductive technologies, may serve to change the attitudes of employers. As more reproductive options become available to women, the assumption that they will leave their jobs to have children may become less prominent. Perhaps employers would then stop making generalizations about women in the workplace. This could allow women to more easily obtain and hold power-positions⁸² in greater numbers and not have to sacrifice having a family. They could have children that are biologically theirs, but not have to carry them.

There are, however, a few counter-arguments to this suggestion. First, some have taken the position that surrogacy should not be offered to fertile women.⁸³ Second, it seems that employers discriminate against women because of their biological capability to reproduce.⁸⁴ In fact, some women may never have children, or may be infertile. But, since the employers do not know who is going to have children (the women themselves may not even know), they discrimi-

78. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 63 (1988) (stating that this fear is especially prevalent in traditionally male-dominated professions).

79. Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J. L., ETHICS & PUB. POL'Y 393, 405-06 (1992).

80. *Id.* at 449-52. Statistics today, however, show that this gap is closing. RUTH SIDEL, *KEEPING WOMEN AND CHILDREN LAST* 77 (1996).

81. FEMINIST JURISPRUDENCE, *supra* note 24, at 808-09 (noting the disparity of wages of women and men over the past 40 years); MARY JO FRUG, *WOMEN & THE LAW* 115-19 (1992).

82. For example, it is my opinion that it is difficult for women to successfully lobby in Congress where few women are CEO's of companies and do not have the political power that can accompany economic power. It will take women in power-positions to obtain real change in the work-place. In my opinion, however, until women can get out of their roles as child-bearers and child-rearers, this will be difficult.

83. COREA, *supra* note 7, at 216, 245 & 272 (stating that some agencies will not allow a surrogacy arrangement where a man is married to a fertile woman, but noting that some agencies have advocated for this possibility for career women. Corea argues that such a possibility will result in the trafficking in women from underdeveloped countries for this purpose).

84. FUCHS, *supra* note 78, at 65.

nate against all women.⁸⁵ Third, the many services that have been offered to working women, such as child-care and housekeeping, are mostly offered by other women.⁸⁶ Thus, taking the duties of housekeeping and childcare away from some women could result in the transfer of such duties to other women. Professions dominated by women such as domestic and child-care services are typically lower paid and are considered of low status in our society.⁸⁷ Some, however, believe that the real burden in bringing up a child is not the carrying of the child, but the raising of the child. Yet, as stated above, this latter burden may be shared more equally once we realize that the bearing of children is not such a private matter that women cannot or should not seek assistance. In addition, once the burden of carrying a child is removed, there is a lesser likelihood that a woman will have to take more maternity leave than a man. The power that women gain as a whole as they become better able to control reproduction and their careers may outweigh the arguments that counsel against fertile women entering into surrogacy arrangements.⁸⁸

B. Prostitution

"In its simplest formulation, prostitution is the sale of sexual services for a fee; however, in practice, prostitution is a complex institution."⁸⁹ It has been stated that "prostitutes are among the most exploited and abused groups of women."⁹⁰ Prostitutes in general face much danger in their profession, especially in the United States, which may flow from the illegality of the profession.⁹¹ Prostitution, generally, is said to be abusive in nature.⁹² The average age of entry has been reported to be fourteen for women.⁹³ Studies have shown that there are extremely high levels of violence against prostitutes on

85. FUCHS, *supra* note 78, at 65.

86. SIDEL, *supra* note 80, at 77.

87. Child-care workers are the lowest paid workers in the country. FEMINIST JURISPRUDENCE, *supra* note 24, at 610.

88. SHALEV, *supra* note 11, at 146-66.

89. Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 89 N.Y. INT'L L. REV. 23 (1995).

90. *Id.* at 25.

91. ARLENE CARMEN & HAROLD MOODY, WORKING WOMEN: THE SUBTERRANEAN WORLD OF STREET PROSTITUTION 137 (1985) (stating that prostitutes are frequently raped, in some instances by police officers).

92. Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 67-69 (Dorchen Leidholdt & Janice G. Raymond eds., 1990).

93. *Id.*

the job.⁹⁴ Studies have also shown that men are the highest consumers of prostitution by a large proportion.⁹⁵

Prostitution can be broken down into four categories: (1) forced prostitution either through kidnapping or preventing someone from ceasing prostitution through force or threat of force;⁹⁶ (2) prostitution due to extreme poverty;⁹⁷ (3) prostitution as the best alternative amongst a very small range of choices;⁹⁸ and (4) prostitution as a profession of choice.⁹⁹

The first category, forced prostitution, is an international problem.¹⁰⁰ People have been known to entice women from developing countries to leave their homes for well paying jobs in restaurants or nightclubs in an industrialized nation.¹⁰¹ Once they leave, however, their passports are taken and they live in the custody of their captors and are forced to prostitute themselves. They often do not speak the language of the country they have been brought to and are subject to

94. See Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAVIOR, 395, 397-98 (1981). Supporting this conclusion, Silbert and Pines indicate that over 70% of the prostitutes surveyed revealed they were victimized by forced prostitution and customer rape. In addition, 65% of the prostitutes surveyed reported they were beaten by customers and 66% were beaten by their pimps.

95. See Christine Overall, *What's Wrong with Prostitution? Evaluating Sex Work*, 17 SIGNS 705, 719 (1992) (concluding that it is men, not women, who buy the services of prostitution).

96. See generally KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY*, 165-98 (1995) (explaining that often women who are forced into prostitution are forced to change their names, move far from home, are denied money, and are subject to verbal abuse, starvation, drugging, beatings, rape and sodomy, having all means of escape cut off); see also JEAN D'CHUNA, *THE LEGALIZATION OF PROSTITUTION* 125-26 (1991) (stating that forced prostitution accounts for 10% of prostitution in western countries).

97. See BARRY, *supra* note 96, at 41-44 (indicating that some women resort to prostitution in order to support their drug addiction).

98. See BARRY, *supra* note 96, at 161-64 (explaining that some women in Third World countries can earn more money through prostitution than by working as laborers in manufacturing).

99. See KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 21 (stating that some escort girls are educated and therefore make an intelligent choice to become prostitutes). Barry also discusses how some women are proud to be prostitutes. *Id.* at 10.

100. This is evidenced by the "Conference on Traffic in Persons" held in Utrecht and Maasricht in the Netherlands in 1994 organized by the Department of the Law of International Organizations and the Netherlands Institute of Human Rights of Utrecht University and the Centre of Human Rights of the University of Limburg. <http://www.creative.net/~penet/utrecht.html>. The 1995 Beijing Women's Conference also took up this issue. "The effective suppression of trafficking in women and girls for the sex trade is a matter of pressing international concern." Unedited Final Draft Platform for Action, Sept. 15, 1995. <http://www.creative.net/~penet/pros.html>.

101. BARRY, *supra* note 96, at 165-98 (demonstrating the situation where women are essentially kidnapped and forced into prostitution). See U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, *STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION* 4-5, U.N. Doc. St./SOA/SD/8, U.N. Sales No. 59.IV.5. For further analysis, see Hauge, *supra* note 89, at 26-27; Nora V. Demleitner, *Forced Prostitution, Naming an International Offense*, 18 FORDHAM INT'L L.J. 163 (1994) (illustrating the worldwide problem of forced prostitution and international neglect of the issue).

violent attacks by their captors.¹⁰² Forced prostitution accounts for ten percent of prostitutes in the United States.¹⁰³

Prostitution, through pimping, can also look very much like the situations facing women who are kidnapped and then forced to prostitute themselves.¹⁰⁴ In many cases, women are enticed by pimps to start prostituting themselves.¹⁰⁵ Pimps often befriend vulnerable women and offer them food and shelter, convince them to prostitute themselves and then threaten them with force if they do not continue.¹⁰⁶ This type of prostitution is what this author would call forced prostitution because the prostitute seems to face a choice between prostitution or death (or at the minimum severe bodily harm). This form of prostitution benefits only men "socially, economically, and sexually."¹⁰⁷

In the second category are women who are prostitutes or become prostitutes due to extreme poverty and prostitution is the best way for them to survive.¹⁰⁸ Although poverty is essentially compelling them to be prostitutes because they may have no other alternative, I would not call this forced prostitution.

The third category includes women who are prostitutes not because it is the profession of their choice, but because a life of prostitution appears to be the best alternative in a spectrum of very few choices based on their economic situation.¹⁰⁹ They can engage in prostitution and make a fair amount of money or they can take a low-paying job. Such women engage in prostitution because, amongst their choices, this seems to be the best alternative.¹¹⁰

The fourth and final category comprises women who engage in prostitution as their profession of choice.¹¹¹ This means that women

102. BARRY, *supra* note 96, at 165-97 (noting that in several Asian countries, women are trafficked from one country to another and are raped and beaten by their captors).

103. Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in *SEX WORK: WRITING BY WOMEN IN THE SEX INDUSTRY*, 184, 196-97 (Alexander & Frederique Delacoste, eds. 1987).

104. D'CHUNA, *supra* note 96, at 125.

105. BARRY, *supra* note 96, at 198 (reporting that 53% of prostitutes in one survey were brought in by pimps).

106. BARRY, *supra* note 96, at 198-202.

107. See Hauge, *supra* note 89, at 27 (arguing that men reap the sexual and economic rewards of prostitution).

108. D'CHUNA, *supra* note 96, at 28.

109. Hauge, *supra* note 89, at 27.

110. Street prostitution in the United States accounts for 10% to 20% of all prostitution in the big cities such as Los Angeles, and 50% in some smaller cities. See The Prostitutes' Education Network, <http://www.creative.net/~penet> (a sex workers rights organization). The other portions of prostitution are off-street (sauna, massage parlor, in call-outcall escort). See Hauge, *supra* note 89, at 27; Overall, *supra* note 95, at 717.

111. See SHANNON BELL, *READING, WRITING AND REWRITING THE PROSTITUTE BODY* 77

who have many choices, including higher education and professional career options, select prostitution because, on balance, they earn the most money for the least effort, or find the profession to be enjoyable.¹¹²

C. The Factual Comparison

The potential harms of surrogacy are fewer than the potential harms of prostitution. First, surrogates generally contact an agency to express their interest in becoming surrogates and are generally not solicited in a face to face transaction.¹¹³ Furthermore, they are not required and do not need to have intercourse with a man in order to carry out their agreement.¹¹⁴ In addition, this transaction is not one that only involves one man and one woman. In the case of full surrogacy, two women will generally be involved.¹¹⁵ Moreover, this author is not aware of any reports of women being enticed or abducted to work as surrogates.¹¹⁶ Generally, a woman performs a surrogacy arrangement as much for a man as for a woman even if in a partial surrogacy the recipient woman's name may not be on the contract.¹¹⁷

It is questionable whether surrogacy has yet obtained the level of a "profession" in the same way that prostitution has. For example, prostitution is something that people can do to earn a living. In cur-

(1994) (stating that liberal feminists define this type of prostitute by contract theory. They state that the prostitute is a "free worker" possessing property in her own body, and "contracts" not "sells" her body for a limited use.). Some would disagree that this type of category could, should or ought to exist. See Hauge, *supra* note 89, at 29 (stating that some women's rights activists see prostitution as an institution "which is inherently oppressive to women regardless of any reforms which might result from the lobbying efforts of prostitutes' rights groups"); see also Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 18-19 (Nannerl O. Keohare, Michelle Z. Rosaldo and Barbara C. Gelpi eds. 1982).

112. For example, women who work in men's clubs in the Netherlands are often university educated. See The Prostitute's Education Network. <http://www.creative.net/~Penet> (a sex workers rights organization). See, e.g., NORMA JEAN ALMODÓVAR, *COP TO CALL GIRL: WHY I LEFT THE LAPD TO MAKE AN HONEST LIVING AS A BEVERLY HILLS PROSTITUTE*; DELORES FRENCH & LINDA LEE, *WORKING: MY LIFE AS A PROSTITUTE* (1988); NICKIE ROBERTS, *WHORES IN HISTORY: PROSTITUTION IN WESTERN SOCIETY* (1992).

113. NEW JERSEY COMMISSION, *supra* note 1, at vii (stating that commercial surrogacy arrangements ordinarily involve payment to both the surrogate and the broker).

114. NEW JERSEY COMMISSION, *supra* note 1, at vi-vii.

115. NEW JERSEY COMMISSION, *supra* note 1, at v. This is because one woman will give her eggs and another will carry the baby. *Id.*

116. While this does not mean that such a situation is nonexistent, I have not found in my research reports where women have been forced into surrogacy. Cases where women are forced into prostitution, on the other hand, are easy to find. See generally BARRY, *supra* note 96, at 146 (reporting that forced prostitution is seen as a world-wide problem).

117. NEW JERSEY COMMISSION, *supra* note 1, at v (stating that the surrogate agrees to transfer the child to his or her natural father and his wife).

rent circumstances, a woman could not depend on surrogacy for her livelihood in that the pay is not high enough (providing about \$15,000 for each nine month period that she is pregnant)¹¹⁸ and this author has found no cases reporting women who engage in numerous surrogacy contracts.¹¹⁹

Moreover, some have worried that surrogacy could become what prostitution is, involving the trafficking of women, unsafe and unsanitary conditions, and violence.¹²⁰ While such conditions are a reality in some forms of prostitution,¹²¹ it is dubious that such conditions could exist in surrogacy since one would assume that most people entering into a surrogacy arrangement would want to ensure that their surrogate has the means to take care of herself. As a contracting person, it would seem that one would want to ensure that his or her child was properly nourished during the gestational period and that the woman carrying the child was not abused in any way.

In addition, while levels of poverty may make a difference in a woman's choice to become a surrogate, a woman who is homeless, and cannot afford to feed herself, or is addicted to drugs or alcohol almost certainly does not have surrogacy as an option. She will most likely be rejected from the surrogacy market because she is not someone any parent would want to have contact with their child, let alone carry it for nine months.

Furthermore, the likelihood that an agency (which has been compared to a pimp) can treat surrogates in the same violent way that pimps treat prostitutes is again doubtful based on the factual situation. For example, women who become surrogates are not going to be in such a vulnerable position as some prostitutes, and they will generally have the security to be able to walk away from the transaction.¹²²

Finally, there is the lack of benefit in prostitution. In surrogacy one person gives one or two other people a lifetime of joy, not just a few moments of physical enjoyment. This is a benefit both to society and to individuals. In surrogacy, one woman gives the gift of a child to one or two people who otherwise would not be able to have one. The surrogate herself gains money; she may also gain intrinsic bene-

118. See *supra* note 55 and accompanying text.

119. NEW JERSEY COMMISSION, *supra* note 1, at 12D (stating that surrogacy is a short term contract, rarely entered into a second time, and not a profession).

120. COREA, *supra* note 7, at 27-28 (expressing fear that surrogacy may take the form of "reproductive brothels" assuming all the problems associated with prostitution).

121. D'CHUNA, *supra* note 96, at 20-21.

122. See Hill, *supra* note 46, at 695 (reporting that there have been many cases where the parties to a surrogacy contract change their minds).

fit knowing that she has helped someone. Lori Andrews reminds us of the inherent benefit of two persons from different worlds meeting in order to strike a bargain, in that both women can learn from each other.¹²³ In addition, surrogacy can bring child bearing outside the home where it has tended to be undervalued in the past.¹²⁴

Comparing surrogacy to prostitution degrades surrogacy to a level where all we envision is drugs and violence. At the same time, it can make us forget about the real problems of prostitution as we know it today, namely trafficking and forced prostitution.

IV. THEORETICAL DIFFERENCES: COERCION AND EXPLOITATION

Not only do the authors who compare surrogacy to prostitution try to show that the two are factually similar, they also try to show that women who engage in either prostitution or surrogacy do so against their will.¹²⁵ The authors argue that women are coerced and/or exploited, however such terms are rarely well-defined.¹²⁶ The words exploitation, coercion, and even commodification have become "buzzwords" in the literature for persons who want to argue against a particular practice.¹²⁷ However, in using these terms as "buzzwords" their effect is diminished. Such terms can be used to give negative connotations to a wide range of economic agreements whenever one party is at a disadvantage with respect to another. The words lose their force by this practice as it becomes possible to argue, essentially, that anyone is coerced and/or exploited when they engage in an economic agreement that is less than ideal.

This section attempts to define coercion and exploitation and argues that while coercion and/or exploitation may be present in some forms of prostitution, under the definition posited in this paper, neither is present in surrogacy. In addition, this section touches briefly on the concept of commodification to show that while surrogacy and prostitution do in fact commodify certain aspects of human activity, it does not necessarily seem to follow that such activities should be outlawed or portrayed in a negative light.

123. Andrews, *supra* note 69, at 2353-54 (noting that the relationship that develops between the surrogate and the couple benefits all parties).

124. See generally FUCHS, *supra* note 78.

125. See *supra* Part I (indicating belief by some that both prostitution and surrogacy have elements of coercion and exploitation from social, economic, and political forces).

126. See *supra* Part I (stating that Dworkin, MacKinnon, Corea, and Field refer to the concept of coercion without fully identifying or defining these terms).

127. Janet Radcliffe Richards, *Organs for Sale* 16 (Jan. 1996) (unpublished paper on file with Boston University School of Law).

A. Coercion¹²⁸

The problem with applying traditional legal coercion analysis to both surrogacy and prostitution is that often coercion arguments are employed to absolve one from responsibility from acting.¹²⁹ For example, coercion arguments are used to absolve criminals of guilt¹³⁰ or contracting parties of liability.¹³¹ In a public policy debate, however, we can assume that authors mean to argue that because there is coercion by the state or a party to the agreement, the state should prohibit or regulate the bargain.

1. Definition

Coercion is not frequently fully defined in the surrogacy debate, whereas it has almost been over-defined in the philosophical field. For the purposes of this paper, we could say that coercion means threat: one is coerced when one is "forced" into doing something. Pure coercion tends to be illustrated by a simple example: a gunman proposes, "your money or your life."¹³² Philosopher Alan Wertheimer tells us that in a capitalist society, generally, we assume that market transactions are voluntary "even if they are made against a background of economic necessity."¹³³ There are those who argue specifically that poverty cannot coerce.¹³⁴ Generally speaking, we could say that neither pressure nor price alone is ever enough to coerce someone.¹³⁵ The focus, for a determination of coercion, is on the one to

128. Coercion is a very complex concept and much could be said about it. In fact, it may be difficult to do it justice in this short paper. For a more in-depth analysis and examples, see generally ALAN WERTHEIMER, *COERCION* (1987) (setting out a theory of coercion, focusing primarily on the legal and moral responsibility of those coerced by others or by circumstances). Wertheimer correctly notes that scholars and philosophers do not agree on the definition of coercion. *Id.* at 307-09 (stating the major objections to his own theory). This is the reason for which scholars who want to object to practices based on coercion, exploitation and commodification must define the terms. That a definition is important and difficult to reach is illustrated by *Lee v. Weisman*, 505 U.S. 577 (1992) where Justice Kennedy defines coercion for the purposes of the Establishment Clause of the First Amendment as peer pressure, and Justice Scalia in a dissenting opinion argues that there must be sanction of law as a consequence to action or inaction in order for coercion to exist.

129. WERTHEIMER, *supra* note 128, at 3 (relating instances where actions which are coerced are not enforceable).

130. See MODEL PENAL CODE § 2.09 Duress (1995) (indicating that one may raise an affirmative defense against a charged offense if they were coerced into such activity).

131. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § § 4.16 - 4.20 (1990).

132. WERTHEIMER, *supra* note 128, at 4.

133. WERTHEIMER, *supra* note 128, at 4-5.

134. WERTHEIMER, *supra* note 128, at 4-5 (citing JOHN RAWLS, *A THEORY OF JUSTICE* 201-05 (1971)).

135. WERTHEIMER, *supra* note 128, at 4-5.

whom the proposal is made.¹³⁶ Wertheimer further identifies a distinction regarding what will legally absolve one of responsibility; this is *legal coercion*.¹³⁷ He then defines two other theories of coercion to be used outside of the legal realm. One could be called *empirical* and the other *moralized*.¹³⁸ Voluntariness also enters the equation. Generally, we say that people do things voluntarily unless they are insane, suffer from a condition that causes a reflex or twitch, or act due to torture.¹³⁹ Likewise, when coercion enters the picture, it seems that voluntariness can also be somewhat "restrained."¹⁴⁰ In fact, that coercion causes the offeree to act involuntary is said to be the point of a coercion claim.¹⁴¹

For the purposes of this paper, however, Wertheimer's analysis is almost too complex to allow us to analyze whether there are coercive aspects in surrogacy that render it analogous to prostitution. A more workable definition for the purposes of this article may fall somewhere between Justice Kennedy's peer pressure version of coercion¹⁴² and Justice Scalia's definition of legal sanctions, as discussed by the Justices in *Lee v. Weisman*.¹⁴³ We could posit that coercion is essentially unfair advantage.¹⁴⁴ Professor Jane Maslow Cohen notes that "the philosophical literature on coercive and exploitative agreements looks to ... an unjust material outcome."¹⁴⁵ She argues that "the material unfairness of the exchange commonly grounds the analysis."¹⁴⁶ A concern which does not seem to be included automatically in the

136. WERTHEIMER, *supra* note 128, at 5-6 (defining the parties as the "coercer" and the "subject" of the coercion).

137. WERTHEIMER, *supra* note 128, at 4-5.

138. WERTHEIMER, *supra* note 128, at 6-7 (defining the "empirical" category as being "value free." Employing this category, the truth of a coercion claim "rests on ordinary facts." In contrast, the "moralized" view requires a more substantive analysis, whether one "has a right to make his proposal") *Id.*

139. WERTHEIMER, *supra* note 128, at 9.

140. WERTHEIMER, *supra* note 128, at 9-10 (stating that when subject to external pressure, such as threat or torture, the action of the individual is not voluntary as his will is "overborne").

141. WERTHEIMER, *supra* note 128, at 304. Wertheimer believes that people act voluntarily when they act in accordance with their moral principles even if they act reluctantly or if the action is unpleasant. *Id.*

142. See *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992) (stating that coercion may take the form of peer pressure, compelling the student to stand or remain silent, signifying his or her adherence to the view being expressed).

143. *Id.* at 642 (expressing the view that the definition of coercion should not extend to situations where there is no penalty attached).

144. Jane Maslow Cohen, *Legal Claims of Coercive and Exploitative Agreement: Introducing Coercion-Feel*, 94 AMER. PHIL. ASS'N NEWSL. ON PHIL. & L. 99, 102 (1994).

145. *Id.*

146. *Id.*

term coercion is injury defined as "insult to personhood,"¹⁴⁷ described as "demeaning to the personhood of the offeree."¹⁴⁸ In these types of arrangements "a person is reasonably likely to feel embarrassment and even shame in striking such a 'bargain.'"¹⁴⁹ The problem then becomes defining unfair advantage. This article will assume that where neither party to the bargain receives an unfair advantage over another, a fair bargain will result, and coercion will not.

2. Surrogacy and Prostitution Compared in Terms of Coercion

In forced prostitution, category (1), we need look no further than the simple definition of coercion as "your money or your life" to find that this type of prostitution is coercive. In category (2) cases, women engaging in prostitution due to extreme poverty, we know that the women have little bargaining power because of their desperate need. Thus, it could be argued that coercion exists in category (2) prostitution as well. Yet, the same does not seem to hold true for categories (3) and (4) where arguably these women can find a way to survive without prostitution but that they choose to engage in it as the best alternative amongst their options.

In a coercion analysis, surrogacy arrangements look more like categories (3) and (4) prostitution than like category (1) or (2). The surrogate, depending on how many people request her service, may have quite a bit of bargaining power. She will therefore rarely find herself in a "take-it-or-leave-it" situation because she "sits" down at the bargaining table before she agrees to sell her services so she can bargain for better conditions, and perhaps even more money.¹⁵⁰ She receives an amount of money that can be used to supplement her present income. She is not sought after in a face-to-face transaction but through a source such as an advertisement.¹⁵¹ It does not seem that a glamorous life is promised when a life of violence and abuse is actually what is in store for the victim.¹⁵²

Yet, if one were to define coercion as peer pressure, as Justice

147. *Id.*

148. *Id.* For example, sexual favors for job promotions as well as blackmail fall into this category.

149. Cohen, *supra* note 144, at 102.

150. See *supra* Part II (arguing that surrogacy could aid in equalizing women economically with men).

151. See *supra* Part II (stating that surrogacy is not akin to prostitution, where a woman is solicited in a face-to-face transaction).

152. See *supra* Part II (stating that one who contracts a surrogate will likely seek to ensure she is provided for, so as to protect one's future child).

Kennedy did in *Lee v. Weisman*,¹⁵³ the analysis might look different. In the case of surrogacy, however, the definition should be clearly stated so that the reader does not picture physical force, but peer pressure.

*B. Exploitation*¹⁵⁴

1. Definition

Exploitation occurs when one person takes advantage of another person when making an offer.¹⁵⁵ Wertheimer tells us that exploitative offers are not threats.¹⁵⁶ The focus, with exploitation, switches from the offeree to the offeror.¹⁵⁷ Wertheimer's hypothetical explaining exploitation is that of a person who charges a "scalper's price" for a ticket to a rock concert.¹⁵⁸ A high price and the absence of a reasonable alternative is one way to describe exploitation.¹⁵⁹ While it is possible to encounter exploitation in prostitution, the same does not hold for surrogacy.

2. Surrogacy and Prostitution Compared in Terms of Exploitation

It seems that exploitation is possible in prostitution where a woman engages in the practice because she is extremely poor. In these situations we assume that she is not "forced" by traffic or pimp (if she has a pimp) and therefore she is offered a benefit, namely

153. *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (explaining that in a school prayer situation, peer pressure may operate as sufficient coercion for non-religious students to feel compelled to participate).

154. I would make the same disclaimer I made for coercion apply to exploitation. Many have devoted entire articles to the concept of exploitation.

155. Hill, *supra* note 46, at 683-84. Hill's definition is as follows:

The putatively exploitative proposal must: 1) consist of an offer of benefit, never a threat; 2) which is made intentionally, knowingly or recklessly on the part of the offeror, such that it is likely to involve, implicate or take advantage of; 3) a psychologically recognized vulnerability or weakness on the part of the offeree; 4) where the vulnerability or weakness characteristically results in a significant impairment of the rational-emotional capacity of the individual; 5) that the offer actually has the effect of impairing the rational-emotional capacity of the offeree; 6) such that, but for the impairment of this capacity, the offeree would not have accepted the offer.

Id.

156. WERTHEIMER, *supra* note 128, at 225-26 (explaining some scholars' views that some offers can be non-exploitative but coercive, such as when the offeror coerces the offeree into doing something to his or her benefit but not to the offeror's benefit).

157. WERTHEIMER, *supra* note 128, at 226 (arguing that the offeror must derive benefit from the offer for it to be exploitative).

158. WERTHEIMER, *supra* note 128, at 226.

159. WERTHEIMER, *supra* note 128, at 226 (showing an offer can be exploitative but non-coercive).

money. However, in the case of extreme poverty, the offeror (john or pimp) would, one would assume, know that the prostitute is entering into the agreement because of her dire situation. The evidence of a dire situation can be seen if the woman seems malnourished, sick, or generally in need of some basic necessities of life. Thus I would say that some women prostitutes are exploited.

The same is not true for surrogacy.¹⁶⁰ As stated above, most surrogates are above the poverty level and do not always engage in surrogacy for the money.¹⁶¹ As Hill explains, since financial "payment is usually deferred until after the completion of pregnancy, surrogacy does not provide a viable economic alternative for women with immediate financial needs."¹⁶² Moreover, the price is not so high to entice someone in a dire situation to accept. The price, in fact, has been reported to average out to the equivalent of minimum wage for one year.¹⁶³

Some would argue, however, that despite this women still choose to become surrogates due to false consciousness.¹⁶⁴ The argument is that women, due to socialization, choose to become surrogates because they are taught to believe that this is what they should want.¹⁶⁵ If we take this to be true, however, women can never make decisions because any decision they make will be due to socialization; women are then not free to make choices because no choice they make will ever be free.

Moreover, surrogates, unlike prostitutes, often undergo extensive screening before they are hired.¹⁶⁶ They meet with the couples who hire them and the surrogates may have counseling made available to them.¹⁶⁷ In addition, they receive health care during their contracts,

160. Hill, *supra* note 46, at 692 (stating that some surrogates have children for others out of altruism, or to experience birth).

161. Hill, *supra* note 46, at 691-92 (explaining that surrogates come from diverse backgrounds, that about one-third have college degrees, and that most come from lower-middle and middle-class households).

162. Hill, *supra* note 46, at 692.

163. See Hill, *supra* note 46, at 692 (stating also that surrogacy may have other unattractive aspects, such as the obvious physical infirmities).

164. MACKINNON, *supra* note 24, at 83-105 (arguing that since society is male-dominated, and women's status is defined in relation to men, women's consciousness must be raised in order for them to realize their true self interest).

165. MACKINNON, *supra* note 24, at 83-105.

166. NEW JERSEY COMMISSION, *supra* note 1, at 43-45 (detailing the information surrogates are asked to provide, such as education level, pregnancy and child birth history, medical history, smoking and alcohol use, problems in their families, stability in their homelife, health, appearance, age, income, and data on any of their children). The screening process includes written applications, telephone and personal interviews. *Id.*

167. NEW JERSEY COMMISSION, *supra* note 1, at 41-61 (describing the surrogacy programs at four different centers).

and are in touch with the intended parents.¹⁶⁸ Many surrogates speak with counselors before they enter into any agreement.¹⁶⁹ Therefore, I submit that exploitation is not inherent in surrogacy as it is in prostitution.

C. Commodification

Henry Hansmann defined commodification as something traditionally governed by morality that becomes governed by markets.¹⁷⁰ Many argue that "commodifying" something is not a good thing.¹⁷¹ For example, Margaret Radin argues that commodifying some things prevents human flourishing and that this is the case with surrogacy and prostitution.¹⁷² In addition, it has been argued that commodification can drive out altruistic motives.¹⁷³ Hansmann, however, has a response to these arguments. He argues that many human acts have become commodified in the past few decades.¹⁷⁴ The list ranges from dating services, sperm donation, and nursing care for the elderly, to day care for children.¹⁷⁵

Thus, it seems that whenever there is a proposal for taking something out of the traditional realm, for example, the home, as in the case of care for children or the elderly, and a market is created for it, opposition will likely follow. People may have an intuitive reaction against changing tradition. In the long run, however, if there are benefits, necessity or demand, this opposition will fade. This may be the case for surrogacy. Once the demand begins to rise and people begin to see the benefits, the opposition, on the basis of commodification, would, under Hansman's analysis, subside.¹⁷⁶ The argument is both more difficult and easier for prostitution. A market for prostitution has existed for quite some time; at the same time, opposition has not subsided. Once people realize, however, that the demand

168. NEW JERSEY COMMISSION, *supra* note 1, at 41-61.

169. NEW JERSEY COMMISSION, *supra* note 1, at 41-61.

170. Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57, 75 (1989) (arguing that nonmarket transactions, which are socially valuable, like organ transplantation, often become market transactions).

171. Radin, *supra* note 9, at 1855.

172. Radin, *supra* note 9, at 1930.

173. This argument has frequently been made with respect to a market for organs. Some argue that if we create a market for organs then people will be unwilling to donate and therefore will no longer act altruistically. See, e.g., Hansmann, *supra* note 170, at 78. This argument can be seen in the context of surrogacy. If women accept payment for surrogacy no one will become a surrogate for purely altruistic motives.

174. Hansman, *supra* note 170, at 75.

175. Hansman, *supra* note 170, at 77.

176. Hansman, *supra* note 170, at 77.

will not subside and that, as Margaret Radin herself concedes, we do not live in a utopia, people should understand that commodification in itself is not the evil.

D. Theoretical Comparison of Prostitution and Surrogacy Summarized

Figure 1—Prostitution

Category	1	2	3	4
Description of the category	Street Prostitution (pimp and traffic)	Prostitution due to extreme poverty	Prostitution as best alternative among few	Prostitution as profession of choice
Coercion	X	X		
Exploitation	X	X	X	
Commodification	X	X	X	X

Figure 2—Surrogacy

Category	1	2
Description of the Category	Surrogacy as the best alternative among few	Surrogacy as profession of choice
Coercion		
Exploitation		
Commodification	X	X

V. RESPONSE TO SCHOLARS WHO HAVE ANALOGIZED PROSTITUTION TO SURROGACY

A. Surrogacy Is Like Prostitution; Therefore, It Should Be Prohibited Because Surrogates Cannot Rationally Choose Surrogacy

The problem with this argument begins with a basic response to the false consciousness argument—it proves too much. If women indeed suffer from false consciousness, how can women ever make a “free” choice about anything and how do we know false consciousness is not just a product of false consciousness itself? Another problem with the argument is that we see a “parade of horrors” displayed, where, based on sketchy factual bases, the image of enslaved women making babies emerges.¹⁷⁷ The response to this argument is that the benefits to surrogacy actually outweigh the possibility of these harms, harms which can be addressed when realized.

B. Surrogacy Is Like Prostitution; Therefore, It Should Be Prohibited Because It Commodifies Child-Bearing

The problem with Radin’s argument and those who support her is a real lack of definition.¹⁷⁸ The reader does not know how Radin defines human flourishing and what she feels degrades women. We can use prostitution, surrogacy and baby selling as examples, but this does not help us define what contributes and what does not contribute to human flourishing.

Taken to its logical end, the human flourishing argument could be an over-inclusive theory on which to base policy decisions as activities such as waitressing or working in a factory could also qualify as a hindrance to human flourishing. In addition, even if we see human flourishing as a type of commodification, it is possible that surrogacy can be more readily compared to child-care which is something that we have grown accustomed to. We could also compare surrogacy to services provided, such as day care, that used to be provided solely within the home and is now available on the market.¹⁷⁹

177. COREA, *supra* note 7, at 272 (analogizing Nazis in Germany and slaveowners in the United States South who turned women into breeders by selling their bodies for reproductive purposes—either to establish a pure race of Germans or more slaves to sell in the U.S.).

178. For a critique of Radin’s views, see John L. Hill, *What Does it Mean to be a “Parent?” The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 410-13 (1991) (arguing that his position – that intended parents should have superior parental rights claims to those who assert rights based on “biological or gestational relation” – is most consistent with current constitutional law, moral theory, and scientific evidence).

179. See Hansmann, *supra* note 170, at 77.

C. Surrogacy Should Be Regulated Because It Is Like Prostitution

If, as scholars like Martha Field believe, it is true that women who enter into surrogacy arrangements are coerced by enforceable contracts, since they cannot know whether or not they will be able to give up the child once it is born,¹⁸⁰ then this author would support a policy allowing partial surrogates to opt out of the surrogate contract for up to five days after the child is born. While this may be a valid consideration, the analogy between prostitution and surrogacy is not convincing. Moreover, as shown above, the definition this paper proposes for coercion does not embrace surrogacy arrangements as examples of basic unfairness.

CONCLUSION

This article has shown that surrogacy provides benefits that are often hidden in writings that oppose the arrangement. In addition, it has been suggested that the coercion, exploitation, and commodification arguments can be somewhat overstated. While regulation for surrogacy agreements may indeed be needed, analogizing prostitution to surrogacy is not appropriate.

The article's aim is to show that the analogy between prostitution and surrogacy is weak and has the effect of minimizing the real harms inherent in prostitution, while hiding the benefits of surrogacy. The benefits of surrogacy should be revisited in light of today's technological developments without the shadow of prostitution cast upon it.

180. FIELD, *supra* note 1, at 93.