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PAYING FOR PREGNANCY:
An Ethical and Legal Analysis of Commercial Surrogacy in New Zealand

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ABSTRACT

Commercial surrogacy is a valuable practice with the potential to benefit many people. Restricting it interferes with person's rights of procreational liberty, autonomy and freedom of contract. Arguments that it harms children, exploits women, commodifies women and children and reduces altruism in the community do not stand up to scrutiny, and do not provide justification for the interference with those rights. Any risks associated with commercial surrogacy can be adequately dealt with by sufficient regulation. Thus the prohibition on commercial surrogacy in New Zealand should be lifted, and New Zealanders should be able to access commercial surrogacy if they so wish.
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Chapter 1: Introduction

The wish to have children is a basic human desire.\textsuperscript{1} For this reason, infertility can have a devastating impact on many people.\textsuperscript{2} For those couples whose infertility is due, at least in part, to the woman not being able to carry a pregnancy to term (whether because she was born without a uterus or has had a hysterectomy, or because medical reasons such as diabetes, heart disease or hypertension make it impossible or highly dangerous for her to have a baby) surrogacy is an option. The Human Assisted Reproductive Technology Act 2004 defines a “surrogacy arrangement” as an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy.\textsuperscript{3}

There are at least four models of surrogacy. One model is partial surrogacy where the surrogate’s own egg is used. Partial surrogacy has been around for perhaps thousands of years, as is suggested by references in the bible.\textsuperscript{4} This type of surrogacy pregnancy may come about by using the sperm of the commissioning father to fertilise the surrogate’s egg. Conception may occur through artificial insemination, either in a fertility clinic or at home, or through natural conception.

A second model of surrogacy uses the egg of the commissioning mother (if she is fertile but unable to carry to term). The egg is artificially fertilised and placed into the surrogate. If gametes from both the commissioning parents are artificially placed in the

\begin{thebibliography}{9}
\bibitem{1} This is recognised by article 16 of the Universal Declaration of Human Rights: “1. Men and women of full age… have the right to marry and found a family… 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”
\bibitem{2} One study of infertile couples asked what was the primary problem in their lives. 80\% said it was their inability to conceive. Most of the remaining 20\% ranked it second after financial difficulties. The rest ranked it third after financial problems and marital strife. Geoffrey Sher, Virginia Marriage Davis, Jean Stoen, \textit{In Vitro Fertilization: The ART of Making Babies}, Facts on File Inc, New York, 1998, p 2.
\bibitem{3} Human Assisted Reproductive Technology Act 2004, section 5.
\bibitem{4} “Now Sarai Abram’s wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.” (\textit{Genesis} 16:1-2)
\bibitem{5} “And Jacob’s anger was kindled against Rachel: and he said, Am I in God’s stead, who hath withheld from thee the fruit of the womb? And she said, Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her.” (\textit{Genesis} 30:2-3)
\end{thebibliography}
surrogate, then the baby is entirely genetically connected to them. Where the egg does not belong to the gestating woman the situation is described as full surrogacy.

A third model is where donor sperm or eggs are used in combination with gametes from one of the commissioning parents. In this case only one commissioning parent will have a genetic connection to the child. The other genetic parent will be the donor.

A fourth model is where both the sperm and eggs come from donors. If both donor sperm and eggs are used then the resulting baby has no genetic connection to the birth mother or commissioning parents.

Full surrogacy arrangements mean there may be up to two biological parents (the donors), two gestational parents (the surrogate and her partner), and two social parents (the commissioning parents). Alternatively one person may fall under multiple categories, for example if the commissioning mother provides the egg, she will be both the biological and social mother of the resulting child. Full IVF surrogacy first occurred in the United States in 1985. Some arguments about surrogacy apply differently to these different scenarios; I will elaborate as this arises.

The term “surrogate mother” actually means substitute mother. Some people see this as a misnomer as really the surrogate acts as a substitute spouse. They argue the gestational mother is the real mother, while the commissioning mother is actually the substitute. Nevertheless common usage of the term describes the gestational mother as the surrogate, and this is how I will use the term. The “commissioning parents” plan to take custody of the child in any surrogacy arrangement. This term tends to cover married,

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non-married, and same-sex couples, or an individual. My use of the term is intended to be read in this way.7

Surrogacy of all kinds is generally thought of as acceptable only in situations where its use is necessary for medical reasons, such as where it is impossible or dangerous for a woman to carry a child herself. It is thus thought of as a last-resort measure for infertile couples.8 This is to guard against using surrogacy for convenience, as people worry such use could lead to different societal classes being used for childbegetting, childbearing and childrearing.9 I agree that surrogacy should not be used merely for convenience, as shifting the burden of risk—which attends any pregnancy—from one woman to another, is intuitively unappealing and will be harder to justify. That said, if we accept commercial surrogacy we may be committed to it for even trivial reasons. However, that is not a position I wish to defend here. It is understandable for one woman, for whom pregnancy is impossible or highly dangerous, to ask another woman to act as a surrogate for her. However it is less than admirable for a woman to hire another to carry a child for her, merely because being pregnant would interfere with her routine or give her stretch marks. This kind of use of commercial surrogacy could possibly lead to a class-like system for reproduction, reminiscent of the dystopia in Margaret Atwood’s *The Handmaid’s Tale*.10

Surrogacy can be classified as either compassionate or commercial. Compassionate surrogacy is when the surrogate does not receive a fee for her involvement. She may receive compensation for the costs related to her pregnancy. These costs may include medical bills, travel costs, healthy food and keeping records of the

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7 The use of surrogacy by individuals or same sex couples may raise separate issues to those raised by heterosexual couples and are beyond the scope of this dissertation.
8 The NECAHR Guidelines for compassionate surrogacy state, “The intended mother must have a medical condition (or a medical diagnosis of unexplained infertility that has not responded to other treatments) that prevents her from becoming pregnant or makes pregnancy potentially damaging to her or the child.” NECAHR homepage www.newhealth.govt.nz/necahr/guidelines/surrogacymarch2002.htm accessed 15/02/05.
pregnancy, among other things. Costs sometimes include compensation for time off work. However New Zealand law prevents the surrogate from receiving compensation for carrying and delivering the child, or as compensation for time off work.11

Compassionate surrogacy is generally accepted as a positive and permissible arrangement, because the surrogate’s actions are seen as selfless and generous, and it provides childless couples with the baby they desperately desire. It is permitted in New Zealand, though situations requiring the help of a fertility clinic (for artificial fertilisation and insemination etc) have certain (flexible) conditions attached and must be sanctioned on a case-by-case basis by NECAHR - the National Ethics Committee on Assisted Human Reproduction that deals with reproductive technology.12

Commercial surrogacy is where a fee is paid to the surrogate above and beyond the costs of the pregnancy. It is prohibited in most countries, including New Zealand, because the fee is seen as the purchase price for the child. There is a dispute as to whether such a fee is in exchange for the baby that is handed over, or for the service the surrogate provides to the commissioning parents. I shall argue that this fee should be viewed as compensation for the service provided, rather than as proof of baby-selling, and that therefore commercial surrogacy should be legalised.13

Chapter two will provide a brief history of surrogacy in New Zealand. I will review the current legal status of both commercial and compassionate surrogacy in New Zealand. I will also consider the approach that other countries have taken to commercial surrogacy.

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11 Human Assisted Reproductive Technology Act 2004 s14.
13 It is difficult not to see this fee as an exchange for a baby in those commercial surrogacy contracts that state the fee will not be paid if the baby is born dead. After all, the surrogate has performed the service and the only failure is in handing over a living baby. I do not believe commercial surrogacy, or any surrogacy, should be unregulated, and I believe regulation should restrict clauses like this from commercial surrogacy contracts.
In the next chapter I will deal with the major arguments in favor of commercial surrogacy. These include: freedom of contract; procreational liberty; and autonomy. In chapter three I will assert that these arguments are not only sufficient to justify permitting commercial surrogacy, but that allowing commercial surrogacy is necessary in order to uphold these values.

Chapter four focuses on the primary arguments against commercial surrogacy. I will explore the notion that commercial surrogacy: harms children; exploits women; commodifies human beings; and reduces altruism. In chapter four I will dismiss these arguments as insufficient to justify prohibiting commercial surrogacy.

In chapter five I will discuss legal recommendations for surrogacy in New Zealand. I will address the appropriateness and difficulties of using a contract model to regulate commercial surrogacy, including a discussion of the possibilities for dealing with the breakdown of such arrangements. Furthermore I will look at other difficulties of the current law, including the instability of the status of a child born through surrogacy, and the appropriateness of the current law's penalties and restrictions on who may participate in surrogacy arrangements. I will conclude that a system of regulation proposed by the Law Commission is the most suitable way of dealing with surrogacy in New Zealand.

I will conclude that while regulation of surrogacy is necessary to ensure the safety of all parties, especially the child, prohibiting commercial surrogacy goes too far. New Zealand law should permit payments to surrogates for loss of income and for procreational services provided, and should make improved provisions for the status of children of surrogacy arrangements.
Chapter 2: Legal Status of Surrogacy in New Zealand

Before analysing the ethical issues raised by commercial surrogacy, it is important to place it in its real world context. Therefore it is essential to outline the legal status of surrogacy in New Zealand. In this chapter I will discuss the history of surrogacy in New Zealand, and review the current legal status of both commercial and compassionate surrogacy in New Zealand. I will also provide a brief overview of the approach adopted in some other countries. I will review some of the legal problems that arise in commercial surrogacy. I will conclude that there are good reasons why commercial surrogacy should be legal in New Zealand.

2.1 Regulation in New Zealand

2.1.1 Legislation

Until very recently, New Zealand had no law specifically regulating surrogacy. That changed as of November 21st 2004, when the Human Assisted Reproductive Technology Act (hereafter the HART Act) was enacted. Section 14 of the HART Act provides that surrogacy arrangements, though not illegal, are not enforceable. The relevant section of the HART Act in full reads:

14 Status of surrogacy arrangements and prohibition of commercial surrogacy arrangements

(1) A surrogacy arrangement is not of itself illegal, but is not enforceable by or against any person.

(2) Subsection (1) does not affect the Status of Children Amendment Act 1987.

(3) Every person commits an offence who gives or receives, or agrees to give or receive, valuable consideration for his or her participation, or for any other person’s participation, in a surrogacy arrangement.

(4) Subsection (3) does not apply to a payment –
(a) to the provider concerned for any reasonable and necessary expenses incurred for any of the following purposes:

(i) collecting, storing, transporting, or using a human embryo or human gamete:

(ii) counselling 1 or more parties in relation to the surrogacy agreement:

(iii) insemination or in vitro fertilisation:

(iv) ovulation or pregnancy tests; or

(b) to a legal advisor for independent legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement.

(5) Every person who commits an offence against subsection (3) is liable on summary conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding $100,000, or both.

Subsection 3 of the Act provides that any payments made in relation to a surrogacy arrangement, other than those set out in subsection 4, constitute an offence. Subsection 4 only allows payments to be made to a provider\(^1\) or a legal advisor. Payments to a provider may be for collecting, storing, transporting, or using a human embryo or gamete; for counseling the parties to the surrogacy arrangement; for insemination or in vitro fertilization; or for ovulation or pregnancy tests. Payments to a legal advisor may be for giving independent legal advice to the surrogate. This means payments for things such as doctors' visits for things not covered in subsection 4, maternity clothes, healthy food, travel expenses, and time off work, are illegal, as is paying the surrogate for the service she provides.

Thus the HART Act not only makes surrogacy agreements unenforceable, it also makes commercial surrogacy illegal. In doing so recommendations from the Bioethics

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\(^1\) Section 5 of the HART Act defines a provider "(a) means a person who, in the course of a business (whether or not carried on with a view to making a profit), performs, or arranges the performance of, services in which donated embryos or donated cells are used; and (b) includes a successor provider."
Council that more public consultation was needed, and from a Ministerial Committee that there should be no criminal offences in relation to surrogacy, were ignored.²

2.1.2 NECAHR

While specific legislation relating to surrogacy is new in New Zealand, regulation by other means has occurred via the National Ethics Committee on Assisted Human Reproduction (NECAHR). NECAHR was established by the Minister of Health under section 46 of the Health and Disability Services Act 1993, as a response to a perceived need for specialist advice on issues raised by providers of assisted human reproduction (AHR) services. While its primary role was to process applications for new AHR treatment and research, NECAHR was also to provide advice to the Minister of Health on AHR issues and develop guidelines for fertility providers on ethical issues relating to AHR.

In July 1997 NECAHR gave ethics approval in principle for compassionate surrogacy using IVF, subject to guidelines to be developed. NECAHR has since been re-established under section 11 of the Public Health and Disability Services Act 2000, retaining the same functions.³ Until recently, NECAHR’s most current guidelines relating to surrogacy were their Guidelines for Non-commercial Altruistic Surrogacy using IVF as Treatment, developed over almost ten years and revised in March 2002.⁴ However in April 2005 new Guidelines on IVF Surrogacy were released. The Guidelines are self-imposed by providers of AHR in NZ. However, for accreditation reasons, clinics are bound to act with ethical approval. Acting against the guidance of NECAHR could

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² In their Submission to the Health Select Committee on the Human Assisted Reproductive Technology ("HART") Bill SOP No. 80, the Bioethics Council recommended that commercial surrogacy arrangements not be prohibited before there had been sufficient time to elicit the views of the public on the topic. http://www.bioethics.org.nz/publications/hart-submission-jul03/ accessed 23/02/05. A 1994 Ministerial Committee recommended that apart from certain changes regarding providers and potential providers of assisted reproduction and surrogacy services, "no criminal offences in relation to surrogacy should be created." Bill Atkin & Paparanga Reid, "Assisted human Reproduction: Navigating Our Future" Report of the Ministerial Committee on Assisted Reproductive Technologies, July 1994, Crown Copyright, Wellington, Summary of Options pp 1, 4.
³ NECAHR homepage www.newhealth.govt.nz/necahr/history.htm accessed 15/02/05.
therefore result in professional disciplinary actions and loss of accreditation.\textsuperscript{5} The Guidelines thus have more power than might usually be assumed of self-imposed guidelines. Since the Guidelines were issued in 1997 NECAHR has received 36 surrogacy applications, 27 of which have been approved, two provisionally approved, three declined and three withdrawn or discontinued. NECAHR is aware of four births, one including twins, resulting from those arrangements.\textsuperscript{6}

The key requirements taken into account when NECAHR considers an application for compassionate surrogacy using IVF are as follows. At least one of the intended parents should be the potential child’s genetic parent. There must be a medical condition that precludes pregnancy. The birth mother must be a family member or close friend. Pregnancy and childbirth expenses may be paid but there cannot be payment in lieu of employment. The birth mother and her partner should have completed their own family. Both parties must have independent legal advice regarding legal issues. Both parties must have independent counseling dealing with the emotional and legal risks.

NECAHR points out that the language of the Guidelines reflects graduated levels of expectation. Therefore language such as ‘should have’ indicates areas where negotiation is possible, whereas ‘must have’ shows terms that are mandatory.\textsuperscript{7} Under the previous Guidelines, the only requirements to have this mandatory language were those for independent legal advice and counseling. The new Guidelines are significantly more restrictive, as now several more requirements are all mandatory. Those are: that there must be a medical condition precluding pregnancy; the birth mother must be a family member or close friend; and there cannot be payments made in lieu of employment.

The requirements that there must be a medical condition precluding pregnancy, and that all parties receive independent legal advice and counseling, are understandable,

\textsuperscript{7} Idem 4.
and indeed, I will argue, necessary. The preference that the birth mother will have completed her own family is to decrease the likelihood that the surrogate will want to keep the child, and is in consideration of the risks that could potentially prevent the surrogate having more children following the surrogate pregnancy. These reasons are sensible, and being only a preference, this requirement is appropriately negotiable on a case-by-case basis. The preference that one of the intended parents also be a genetic parent is understandable considering there has not been a wide amount of discussion regarding the use of surrogacy by couples where both parties are infertile. However as this situation is likely to be far less common than that where at least one intending parent can produce fertile gametes, I assume NECAHR would consider fairly those couples who were unfortunate enough to both be infertile. As for the tightening of those rules requiring the surrogate to be a friend or family member, and restricting payments beyond mere costs of pregnancy, I believe New Zealand policy is moving in the wrong direction.

2.1.3 Discrepancies between NECAHR and the law

NECAHR’s guidelines permit recompense to be made to the surrogate for expenses related to pregnancy and childbirth, but state that the intended parents “cannot make payment to the birth mother in lieu of employment.” However, even allowing payment to the surrogate for expenses related to pregnancy and childbirth would appear to contravene the HART Act’s requirements that no valuable consideration be made for participation in a surrogacy arrangement other than under subsection (4).

I believe NECAHR’s current approach to surrogacy is overly restrictive; however it appears that even NECAHR is advocating practices outside the law as set down by the HART Act. NECAHR’s approach is more realistic than that of the HART Act, in that it recognizes that forcing the surrogate to bear the costs of pregnancy and childbirth is an undue burden. I will argue that it is important to go even further, since there is no inescapable problem with surrogates making a profit from their involvement in a surrogacy arrangement; however this idea is highly contested. But at the very least a surrogate should not be unduly burdened by the costs of a pregnancy that is for the
benefit of persons other than herself. That would amount to a punishment for her act of altruism.

2.1.4 Considerations Specific to New Zealand

In New Zealand, policy must take account of Tikanga Maori. Ken Daniels writes that Maori, in terms of customary practice, have no objections to the concept of surrogacy in that it is very similar to the customary practice of whāngai where a child is given into the care of a relative (sometimes because the matua whāngai (adoptive parents) do not have a child of their own). However views on whāngai may not necessarily extend to commercial surrogacy because of perceived fundamental differences between the two practices. Whāngai placements are usually arranged between members of the same hapū or iwi, rather than between strangers; also they are not necessarily seen as permanent, it being not uncommon for the child to later return to the birth parents. It is thus unclear whether there are any objections to commercial surrogacy arising from Tikanga Maori. It is clear however, that there is objection to the notion of anonymous donation of gametes, due to the concept of whakapapa. As it is important to know one’s genealogy, knowledge of genetic heritage should be available even when one’s genetic material has been donated.

2.2 Regulation in Other Countries

In the United Kingdom the Surrogacy Arrangements Act 1985 prohibits commercial surrogacy, but in practice surrogacy is increasingly practiced on a commercial basis. In

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10 Supra 8. Daniels notes that NECAHR “also seeks to take account of the fact that there are many Maori who have distanced themselves from traditional values and practices and that there are a variety of viewpoints among Maori in relation to AHR.”
the United States the law varies greatly between states, but in general it appears legislation tends to discourage commercial surrogacy. However, despite this, the US is the primary place where commercial surrogacy arrangements occur. Most Australian States outlaw commercial surrogacy, and Queensland prohibits even non-commercial surrogacy. Other countries that completely prohibit the use of surrogacy include Germany, Austria, Sweden and Norway.

2.3 Legal Difficulties of Commercial Surrogacy

Separating out reproduction into biological, gestational, and social roles has created problems for the law in defining the legal parents of a child born of a surrogacy arrangement. Different jurisdictions have dealt with this problem in different ways. UK law unequivocally defines the woman who gives birth to the baby as its mother. As the legal mother, the gestational mother has an absolute right to decide whether to keep the child or hand it over to the commissioning couple. The common law presumption of paternity within marriage, and the provisions of the Human Fertilization and Embryology Act 1990, grant paternity to the husband of the surrogate mother, unless he did not consent to the insemination.

Law varies in the United States. In California, motherhood is allocated to the genetic and gestational mother in partial surrogacy arrangements. However in the more

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14 Supra 11, pp 262, footnote 9.
15 Ibid, pp 283, footnote 90.
16 Human Fertilisation and Embryology Act 1990, s27(1) "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."
17 Supra 11, p 266.
18 Human Fertilisation and Embryology Act 1990, s28(2) "...the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).
19 Jackson notes that paternity is here granted to the man least expecting to be the child’s father. Supra 11, p 272.
complex full surrogacy arrangements, where genetic and gestational motherhood are separated, a distinction has been made. In some states priority for legal motherhood has been given to the woman who provided the genetic material and/or the woman who intended to become the mother, rather than the gestational mother. This is more aligned with the way legal paternity is determined, which comes down to whom the genetic father is. A US court has suggested it might be discriminatory to use this genetic standard for determining the legal father but not mother.

New Zealand law, via section 5(1) of the Status of Children Amendment Act 1987, regards the birth mother and her male partner (if he consented to the procedure) as the legal parents of a child conceived using donor semen and/or ovum. That covers the situation of surrogacy using IVF, and artificial insemination performed at home. If the surrogate’s partner does not consent to the procedure, or she has no partner, the commissioning father (if he is also the donor) is the legal father, but he has no legal rights or responsibilities. This will change on July 1st 2005 when the Status of Children Amendment Act 2004 comes into force. From that time the donor of any sperm used to artificially conceive will not be deemed a parent of the resultant child, nor have any rights or responsibilities of a parent, unless the woman has no partner at the time of conception and the donor later becomes the woman’s partner. While in the past, parties to some surrogacy arrangements have listed the surrogate mother and intended father as the parents on a child’s birth certificate, the Law Commission has noted that the Status of Children Amendment Act 2004 will make it unlawful to do that.

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20 In Johnson v Calvert (1993) 851 P 2d 776 (Cal) the Californian Supreme Court indicated that either a genetic or gestational relationship was sufficient for a declaration of maternity under Californian law. As both components were split in this case, intention was the determinative factor and the intending mother, who was the genetic mother, was deemed the legal parent.

21 Supra 11, p 268.

22 “In Soos v. Superior Court of Maricopa 897 P.2d 1356 (Ariz App Div 1 1994) the Appellate Court found that an Arizona surrogacy statute which provided that the gestational surrogate is the legal mother of the child to be born violated the biological mother’s equal protection rights.” Quoted by Emily Jackson, Regulating Reproduction: Law Technology and Autonomy, Hart Publishing, Oregon, 2001, p 268, footnote 25.


25 “The changes introduced by the Status of Children Amendment Act 2004 combined with section 89(1)(a) of the Births, Deaths, and Marriages Registration Act 1995 will make it unlawful to register the father in those situations.” Supra 6, para. 7.23 footnote 276.
The situation is different where natural intercourse has been used to conceive. If the surrogate has a husband, he will be presumed the legal father by virtue of section 5 of the Status of Children Act 1969. Evidence of intercourse with the commissioning father can be used to rebut this presumption in order to have a declaration of paternity granted to the commissioning father. Such evidence may need to consist of blood and DNA tests. However while a declaration of paternity will make the commissioning father the legal father, it will not give him guardianship and therefore custody rights; for this he would have to apply to the Family Court. Opinion is divided over whether the Status of Children Act presumption of fatherhood currently applies to a de facto partner of a surrogate; and it will not apply when the new Act comes into force. It must be noted however, that there does not appear to be many instances of natural intercourse being used in surrogacy; it appears that more often insemination is achieved artificially at home with the use of equipment such as a turkey baster. Therefore, in nearly all cases, the commissioning parents cannot become the legal parents except by acquiring the parental rights and responsibilities via adoption.

Transferring parental rights and responsibilities to the commissioning couple is done through adoption. Once the adopting parents have been screened and deemed acceptable by Child Youth and Family Services, the process will be relatively straightforward so long as the legal parents do not object. Custody is transferred in an interim

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26 Supra 5, p 104.
27 Guardianship Act 1968 s6A Declaration as to guardianship of father.
28 Section 2 of the Status of Children Amendment Act 1987 states that a reference to a married woman includes a relationship in the nature of marriage. This would appear to cover section 5 of the Status of Children Act 1969 which assumes that a child born to a woman during her marriage shall be the child of its mother and her husband, thus including a de facto partner, but this has been debated (see para 4.2 Law Commission Report 88). However the Status of Children Amendment Act 2004 will repeal the Status of Children Amendment Act 1987 without replacing section 2 with a similar interpretation section. Therefore a de facto partner will not be assumed the father of a child born through natural conception, but will be assumed the father of a child conceived by artificial means unless he explicitly makes it known he does not consent to the procedure (s27 2004 Act). Changes to the Status of Children Act 1969 by the Relationships (Statutory References) Act 2005, which come into force 1 July 2005, only affect Part 2: Status of children conceived as a result of AHR procedures, and therefore do not remedy this anomaly. The Law Commission has recommended that the presumption of fatherhood be extended to de facto partners, Law Commission, New Issues in Legal Parenthood, Report 88, Wellington, April 2005, Recommendation 3 p 32.
29 Adoption Act 1955 ss 6 and 7.
order made by the court, and six months later the intending parents may apply to the court for a final adoption order. However, if a dispute arose in a commercial surrogacy arrangement in New Zealand, it would be difficult to enforce the pre-arranged contract. Even if commercial surrogacy were not illegal under the HART Act, the courts would likely hold commercial surrogacy contracts void as trumped by public policy. This is because placement of a child is decided according to what is best for that child’s welfare, so this decision cannot be made by private bargaining between the parties. A contract to pay the surrogate might also be illegal in contravention of the Adoption Act 1955.

If commercial surrogacy were to be made legal in New Zealand, further thought would need to be given to the current law that deals with the transfer of paternity. Suggestions for such changes and for the regulation of commercial surrogacy will be discussed in chapter five.

2.4 Why Commercial Surrogacy should be Legal in New Zealand

The recent passing of the HART Act has made commercial surrogacy illegal in New Zealand. I argue that this law is problematic and unsound, and that New Zealand should permit commercial surrogacy provided there is sufficient regulation to safeguard against potential harms to women, children and society.

New Zealand’s position on commercial surrogacy is inappropriate for several reasons. Firstly the restriction by the HART Act against any compensation being made to a surrogate places an unfair burden on a surrogate. Also the policy of NECAHR allowing reimbursement of general costs, but not of loss of income, appears arbitrary. NECAHR

30 Adoption Act 1955 s 5 and s 15(2)(a).
31 Adoption Act 1955 s 13.
32 Supra 5, pp 105-6.
33 Adoption Act 1955 s25(1) “Except with the consent of the Court, it shall not be lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption.”
34 Section 14 Human Assisted Reproductive Technology Act 2004, which came into force 22nd November 2004.
objects to compensation for time off work, arguing it amounts to payment for being a surrogate.  

35 This dissertation argues that such payment for being a surrogate is appropriate. But at any rate, time taken off work in order to be a surrogate should be considered a general cost; it is compensation rather than profit. Not compensating for loss of income may be prohibitively expensive for women who would like to act as surrogates.

Secondly this policy is not in line with NZ policy in other areas. Commercial surrogacy is sometimes compared to or associated with prostitution. Though the NZ Government does not condone it morally, it has decriminalized prostitution. 36 While I argue that it is inappropriate to compare commercial surrogacy to prostitution, the Government is no more justified in prohibiting commercial surrogacy than prostitution. Prohibiting either is too great an interference with the liberty of its citizens, and far from preventing harm, can actually have detrimental effects on vulnerable people in society. Driving a practice underground is rarely a good way to protect people. Another policy area that can be seen as similar in certain regards to commercial surrogacy is payments to living kidney donors. The same arguments against paying surrogates have traditionally been made against paying living organ donors. However the Government has recently announced its intention to change its policy on compensating living kidney donors. It proposes compensating donors for time off work with payments of between $100 and $300 a week. 37 Surrogates should be treated similarly as it is equally valid for surrogates to be at least compensated for time off work.

Thirdly, as I shall argue further below, there are no valid reasons for restricting payments to surrogates. This includes payment that constitutes compensation for time off work, and payment for the service they provide to a commissioning couple. Any element of inducement that results from such payments is not necessarily problematic.

35 Supra 9, p 206.
36 Prostitution Reform Act 2003, s7.
37 "Government Pays Organ Donors" http://www.xtramsn.co.nz/health/0,7998-4058689,00.html, accessed 21/02/05.
And lastly, restrictions against payments to a surrogate other than for costs (which exclude compensation for loss of income) are easily circumvented and difficult to police. Payments to surrogates for permitted costs may easily be fleshed out to get around the prohibition against paying a fee or compensating for loss of income. Or payments may be made secretly and discretely.

2.5 Conclusion

The recent legislation of commercial surrogacy, and the tighter regulation of compassionate surrogacy demonstrate a tightening of policy regarding surrogacy in New Zealand. Despite this, there seem to be some discrepancies in regulation, between the legislation set down in the HART Act and the Guidelines established by NECAHR. There are legal problems created by the practice of surrogacy, and commercial surrogacy in particular, that would need addressing if commercial surrogacy were legalized. Some law, particularly adoption law, would need adjusting in order to minimize these problems. The current restriction against compensating a surrogate for loss of income is arbitrary considering compensation for other costs is allowed, and places an unfair burden on surrogates. The restriction against commercial surrogacy in general is not in line with New Zealand policy in other comparable areas. Additionally there are no valid reasons for preventing a surrogate from being paid for the service she provides, and it will be very difficult to ensure these types of payments are not being made.

In the next chapter I will argue that commercial surrogacy should be permitted, so as to protect persons’ rights of procreational liberty, autonomy, and freedom of contract. Then in chapter 4 I will dismiss the major arguments against commercial surrogacy, thus expanding on why it is not problematic to pay surrogates for the service they provide. In chapter 5 I will discuss other possibilities for the regulation of commercial surrogacy.
Chapter 3: The Benefits of Freedom in Commercial Surrogacy: A Defence of Commercial Surrogacy

The HART Act currently prohibits commercial surrogacy by making it an offence to give or receive consideration for participation in a surrogacy arrangement (other than for specific, narrow purposes). The objections to commercial surrogacy are outlined in the next chapter. As explained there, those arguments can be overcome or accommodated. But there are also strong reasons in favour of legalising commercial surrogacy. The major arguments in favour of commercial surrogacy rely on procreational liberty, autonomy and freedom of contract. While some of the arguments only defend the rights of certain parties to a commercial surrogacy contract, all three arguments together provide an adequate defence of its permissibility.

3.1 Procreational Liberty

Procreational liberty is a right to decide whether or not to reproduce. This right is important because reproduction is a meaningful and important experience, central to the identity and dignity of human beings, and a right that is generally intuitively accepted. Carson Strong argues that procreative freedom is valuable not only because freedom in general is valuable, but also because reproduction is important to many people’s ideas of self-identity and self-fulfilment. Indeed, the right to found a family is a right under the Universal Declaration of Human Rights.

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1 HART Act, s 14(3): “Every person commits an offence who gives or receives, or agrees to give or receive, valuable consideration for his or her participation, or for any other person’s participation, or for arranging any other person’s participation, in a surrogacy arrangement.” Section 14(4): “Subsection (3) does not apply to a payment – (a) to the provider concerned for any reasonable and necessary expenses incurred for any of the following purposes: (i) collecting, storing, transporting, or using a human embryo or human gamete; (ii) counselling 1 or more parties in relation to the surrogacy agreement; (iii) in vitro fertilisation or in vitro fertilisation; (iv) ovulation or pregnancy tests; or (b) to a legal advisor for independent legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement.”


4 Universal Declaration of Human Rights 1948, article 16, paragraph 1: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.”
Strong defines procreation as involving begetting, gestating and rearing, and recognises that procreators need not participate in all three components. Whether the right to procreate is a positive right is debatable; a positive right would impose obligations on others to provide the means to procreate. That the right is a negative one is a much stronger argument. Strong says this implies the right is only a prima facie right. This means the right is not absolute, but can only be overridden for very important reasons.

The Brazier Report agreed that “procreative autonomy [is not] an absolute right, especially since it can come into conflict with the rights of others.” On the other hand, cases in which sterilisation has been sought for mentally incompetent women for the purposes of contraception, have upheld that the right to procreate is not easily overridden. In *KR v MR* and *X v Y*, it was held that sterilisation had such profound implications, that without consent of the person, it could only be permitted when it was in the best interests of the person and was the least restrictive option. It could never be done merely for the convenience of others. Viewing the right of procreation as a negative one does not necessarily impose a duty on others to uphold and provide opportunities for that right to be utilised. Rather it implies that others cannot interfere with the taking advantage of this right. Thus in the same way that sterilising a person against their will interferes with their right to decide whether or not to reproduce, so does prohibiting them from utilising commercial surrogacy if it is the only means possible for them to reproduce.

John Robertson discusses whether procreative liberty exists and starts by examining rights not to procreate. In most countries the right to avoid procreation by the use of contraceptives or abortion has received explicit legal recognition. Robertson says

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5 Supra 3, p 13.
10 In New Zealand the relevant act is the Contraception, Sterilisation, and Abortion Act 1977.
the absence of similarly explicit law concerning the right to procreate (which is regarded as equally or more important), "shows how widespread and deep is the social understanding of the right to reproduce through sexual intercourse."\textsuperscript{11} This right to reproduce coitally comes from the fact that "creating and rearing biological descendants is immensely meaningful for individuals and society."\textsuperscript{12} Because there is such meaning involved, reproduction is not generally an area that a state can become involved in, or put restrictions on (without very good reason that is).\textsuperscript{13} Due to technology, reproduction is now an option for many people for whom it was not an option before. This raises the question of whether reproductive liberty also applies to noncoital reproduction. Strict definitions of reproduction usually make reference to conceiving and bearing offspring as a result of sexual activity. However John Robertson believes procreative liberty should also apply to noncoital reproduction because it may be the only way for the person to reproduce.

The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present. Both coital and noncoital conception enables the couple to unite egg and sperm and thus acquire a child of their genes and gestation for rearing. Aside from religious views that see coitus and reproduction as inextricably linked, the particular technique used to bring egg and sperm together is less important than the resulting offspring.\textsuperscript{14}

He thus concludes that noncoital techniques such as AID (artificial insemination by donor) should also be protected along with the rights to coital protection. Again, as what is being argued for is a negative right to procreative liberty, this protection does not amount to a right to have services, such as AID, provided free of charge. A choice by a State to subsidise particular services is admirable, but not necessary. Their only

\textsuperscript{11} Supra 9, pp 249-50.
\textsuperscript{12} Ibid, p 250.
\textsuperscript{13} Extreme overpopulation in China may or may not be an example of a good reason for the state to interfere in reproductive liberty.
\textsuperscript{14} Supra 9, pp 250\&52.
responsibility is to not interfere with people’s accessing of these services. If a State does not subsidise particular services this may mean that elements of procreational liberty, such as commercial surrogacy, are not affordable to everyone. This does not equate to an argument against commercial surrogacy, as in general more liberty comes with having more money. This is a fact of our society rather than a problem specific to commercial surrogacy.

3.1.1 Does Procreational Liberty Imply A Right to Commercial Surrogacy?

However, in looking at the rights of others, such as donors or surrogates, to participate as third parties in reproduction, “participating in partial reproductive roles...may have less of the meaning that gives reproduction its significance, and therefore not be as fully protected.”15 Yet the need for a third party to provide assistance in order to help a couple achieve reproduction could fall within the couple’s reproductive rights, as they cannot fulfill their right without this third party help. Robertson thus suggests state interference with a couple’s right to contract with a third party in this situation would need compelling justification. This includes interference with the couple’s right to pay a surrogate, as such prohibition might prevent a couple from finding a willing surrogate, thus preventing them from obtaining the assistance they need.16

Melissa Lane has a slightly different approach. For her, procreational liberty, or as she describes it, reproductive freedom, protects the right of women or men to contract with surrogates, this contractual right being a corollary of the fundamental interest in reproductive freedom. The fundamental interest means a right to use whatever technology is available, which leads to a right to contract a surrogate. However, she believes it also protects the right of women to act as birth mothers through surrogacy.17

15 Ibid, p 250.
While Lane sees a woman’s right to reproduce as a surrogate as independently protected by procreational liberty, Robertson only sees it as a part of the commissioning parents’ right to reproduce. Robertson’s view seems to provide a stronger argument against opponents of surrogacy such as Bonnie Steinbock. Steinbock believes the right to reproduce only means “a right to have one’s own children.” She says the fundamental right to reproduce does not exist where there is no intent or ability to rear, such as in surrogacy. In surrogacy arrangements (at least where some gametes from the commissioning couple are used), procreational liberty would therefore protect the couple’s right to use surrogacy. Robertson’s argument also appears to be the stronger one because the underlying values of procreational liberty – that it is valuable to create and rear offspring – seem to exist more obviously in the commissioning couple’s case (who would choose to both create and rear the child if at all possible), than in the surrogate’s case (who intends to gestate the child but has no intention of rearing it).

3.1.2 Is the Lack of Genetic Connection Relevant?

I turn now to the distinction between surrogacy arrangements where the intending parents are genetically related to the child, and where they are not because both are infertile and require donated sperm and eggs. Like Steinbock, Robertson limits his definition of procreational liberty by describing it as a freedom to take steps that result in the birth of biologic offspring. This definition means procreative liberty protects the right to create a child through partial or full surrogacy where gametes from at least one of the commissioning parents are used. It does not protect using surrogacy where both the eggs and the sperm are donated, as the commissioning parents have no genetic connection to the child. This seems an arbitrary distinction when all variables otherwise remain the same. This differentiation seems to rely on an outdated idea of parenthood that places primary importance on genetics. Emphasis on genetics harks back to ideas of a parent’s ownership of a child; an idea, as I will discuss in chapter four, we are trying to

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18 It could still be argued a woman has the right to act as a commercial surrogate under the arguments of autonomy and freedom of contract, if not procreative liberty.
20 Supra 2, p 447.
move on from. If procreative liberty protects the right of a couple to use AID to conceive, therefore using donor gametes, the right does not belong only to the parent who will have a genetic connection to the child, but to both intending parents. Also the fact that the law gives legal parentage to a birth mother, whether or not the child is genetically hers, is evidence of a societal emphasis moving away from genetics and towards social relationships.

Robertson argues that a right to rear children not genetically related is not covered by procreative liberty because this occurs “only after reproduction has occurred and [is not] determinative of whether reproduction will occur.” I argue this is not so in the case of surrogacy where both gametes are donated, as without initiation of the process and an intention to rear by the commissioning parents, the non-genetically related child that results would never have been born. Robertson himself queries the importance of a genetic connection when looking at what constitutes reproduction. He questions whether a woman can be said to be reproducing when she is merely gestating, and has no genetic connection to the child. He thinks strictly speaking she is not, but the egg donor is. In the case of a donor who intends no contact with a child, however, Robertson believes the other interests that make reproduction so highly valued are missing, so as not to merit the practice of donating gametes with the same protection that we otherwise wish to accord reproduction. Robertson adds, however, and I agree, that in the case of gestating and rearing without a hereditary link, those other valued interests might exist anyway, and thus still be justifiably protected by procreative liberty. This protection should be extended to cases where intending parents will have no genetic link to their child, but as the ones who have brought together all genetic and gestational elements and intend to rear the child, are responsible for bringing the child into being. In such cases their actions are obviously evidence of them having those interests we deem worthy of protection. The State has recognised this in supporting the provision of AID and IVF services.

21 The Status of Children Amendment Act 1987, s 5(1).
22 Supra 2, p 448.
23 A right to donate gametes would thus fall under a couple’s right to procreate through receiving gametes.
24 Supra 9, p 258.
3.1.3 Is the Lack of Gestational Connection Relevant?

A difference between traditional uses of AID and IVF, and surrogacy is that with surrogacy the couple will have no gestational connection to the child. Opponents of surrogacy may see this as relevant. In arguing for the priority of gestational connection over genetic connection, Sara Ann Ketchum notes that to stress a genetic connection as the essential criterion for parenthood, implies adoptive parents are not real parents.²⁵ I would add that to stress a gestational connection over all others would also marginalise a father’s role, as a father is never capable of gestation. Rosemarie Tong believes that the gestation of a child is evidence of the gestating mother’s commitment to the child, in that she was committed enough to bring it to term. For this reason she sees the gestational mother as having more right to the child than any genetic or intentional parent. These types of argument will prima facie always give a mother more rights than a father.²⁶ Any argument that appears to show women as having special connections or rights in relation to their children, runs the risk of allocating them special responsibilities. If we are to diminish the rights of a father because he lacks the gestational relationship to the child, we may find this also diminishes any responsibilities the father has to that child. This is a dangerous direction for society to move in, as it would likely erode rather than promote gender equality. It is also ironic that a gestating mother, who has intentions of handing over the child at birth, is automatically assumed to be more committed to the child than the parents who have gone to such great lengths and intend to raise the child for at least the next 18 years. The commissioning parents show more than “mere intention”, they show a powerful desire for and commitment to the child they have collaborated in creating. Therefore they equally deserve the protection of the right of procreative liberty.


Procreational liberty protects people's rights to reproduce using those technologies that are necessary. This includes a right to use surrogacy, and to contract with others in order to do so. As restrictions against paying surrogates may interfere with finding a willing surrogate, such restrictions would constitute an unacceptable interference with people's procreative liberty. This argument holds because any harm caused by commercial surrogacy (as will be discussed in chapter four) is not significant enough to justify interfering with procreational liberty.

3.1.4 Limits on Procreational Liberty

One limit on procreative liberty arises when the involvement of a third party, such as a doctor, becomes necessary in order to bring about conception. It is said above that for the state, or anyone else, to be able to interfere with a person's rights of reproduction, a very compelling justification would be necessary. Doctors and clinics occasionally refuse to provide noncoital reproductive facilities to some persons citing just such a compelling justification. This reason is the law, which provides that the interests or welfare of the (future/potential) child must be taken into consideration when deciding whether to provide such services. Therefore consideration must be given to the suitability of the potential parents. What the law says does not in itself justify effectively setting a test, which infertile persons must pass to become parents, but fertile persons need not. A better reason is needed to discriminate against some infertile couples, and justify the law behind the discrimination. Donald Evans suggests that this reason is third party responsibility. When AID is used, the assisance of third party medical personnel is required.

Doctors are accountable for foreseeable consequences of their actions and ...it would be as irresponsible to ignore the interests of the not-yet-

27 The HART Act 2004 s 4(a) provides: "the health and welfare of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure." Note that the words "an important consideration" replaced the intended word "paramount" on the recommendation of the Select Committee that reviewed the HART Bill, http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/195bar2.pdf, accessed 10/03/05.
conceived child as of the prospective mother. A doctor would be entitled to refuse to offer such treatment to a woman if, in his judgement, the treatment constituted an overwhelming threat to the health or survival of the woman. Similarly it would be improper to expect him to proceed with an intervention which would stand an overwhelming chance of producing unacceptable suffering or danger to the child whose conception and birth was the intent of the action.  

Though it may be hard to identify what the needs of the child are, it is nevertheless something that must be given consideration. It can be seen as similar to the process of adoption, where the persons placing a child have some responsibility to said child to place them in a safe environment. Care must be taken however to make judgements only based on the safety and welfare of the child. Those persons making the decisions must take care not to let their own prejudices get in the way. If a clinician is inclined to deny AID to a couple seeking to use surrogacy, he/she must do so only if he/she can discover some real and serious risk to the potential child from this situation, so that going ahead with AID would amount to ignoring the health and welfare of any child that might result. It should be kept in mind that without the surrogacy arrangement the child may never even exist; therefore the decision is not between a good life and a bad life for the potential child, but rather between a life and no life at all.

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30 The HART Act 2004 s 4(a) provides: “the health and welfare of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure.” Note that the words “an important consideration” replaced the intended word “paramount” on the recommendation of the Select Committee that reviewed the HART Bill, http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/195bar2.pdf, accessed 10/03/05.
31 This is a huge issue, and is outside the scope of this dissertation. For more on this area see Tim Mulgan & Andrew Moore, “Surrogacy, Non-existence and Harm”, New Zealand Family Law Journal, volume 2, number 7, pp. 165-171.
3.2 Autonomy

The defence of commercial surrogacy in terms of promotion of autonomy relates to a woman's right to act as a surrogate for money, which as noted above, may not be separately covered by procreational liberty. It is irrelevant what reasons a woman has for wanting to be a surrogate. Whether it is for the financial reward or because she finds the joy her actions bring to the commissioning parents to be immensely meaningful. Whether it is due to the fact it allows her to experience gestation (which some women enjoy) without the responsibility of rearing, or for a combination of these reasons. Allowing a woman to decide for herself whether to act as a commercial surrogate recognises that she has bodily autonomy; prima facie control over what happens to her body. Autonomy is generally regarded as "the pre-eminent value in contemporary medical ethics." Yet its position as such is not uncontested. The present importance accorded to autonomy in medical ethics is currently being challenged from several directions. Gerald Dworkin, a theorist of autonomy, admits that autonomy is not the only or the supreme value. He acknowledges a person's autonomy is equal in importance to their welfare, liberty or rationality. In that case, autonomy must only be valued to the extent that in making use of it one does not injure or limit the freedom of others. As I will discuss in the next chapter, commercial surrogacy does not cause significant harm to the participants of commercial surrogacy, or any other persons, and nor does it limit their freedom (in fact it increases the freedom of infertile couples). As such, preventing women from making their own choices about acting as commercial surrogates is an unjustifiable limit on their autonomy, and amounts to inappropriate interference with their bodily integrity.

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33 Ibid, p 284. Taylor acknowledges challenges to the pre-eminence of autonomy in medical ethics from feminists and communitarians among others in footnote 8.
3.3 Freedom of Contract

The freedom of contract defence relies on the general liberal presumption that people should be free to contract with others, as long as that practice does not cause any significant harms. The doctrine of freedom of contract states that people have the right to bind themselves legally. The concept includes the idea that contracts should not be hampered by external (for example governmental) control, as they are based on mutual agreement and free choice. 36 This restriction against interference is limited only by public policy, which will constrain contracts that deal with illegal matters or would cause significant harm. What this means for commercial surrogacy is that people should be able to make contracts with women for them to act as surrogates in exchange for money, and women should be free to contract to act as surrogates for money, in the absence of these contracts causing significant harm. The harms commonly asserted to be caused by commercial surrogacy will be dismissed in the following chapter. Additionally the Government has not prohibited compassionate surrogacy, which implies surrogacy in general is not against public policy. It could thus be assumed that the difference between compassionate and commercial surrogacy - that is the payments made to the surrogate - are against public policy. However as these payments are for services rather than a baby, it is difficult to see how they could be. Therefore commercial surrogacy contracts should be permitted.

3.3.1 Problems for the Freedom of Contract Argument

Melissa Lane acknowledges several problems that must be overcome in order for the freedom of contract argument alone to justify commercial surrogacy. One argument is that commercial surrogacy contracts as they currently exist (in those countries where they do exist) do not usually conform to the central requirements of contract law. This argument elaborates that a woman’s consent to act as a surrogate is not freely given, as no-one is able to consent in advance to giving up a child they have gestated; this is because they will not know until after the birth whether they want to keep the child or

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Without valid consent, the contract is not legitimate. However the idea that a person cannot consent to something that they do not know in advance how they will feel about would preclude anyone consenting to anything for the first time. In addition, Lane points out that refusing to hold women responsible for their actions or able to act freely, as we do when we say they are not capable of consenting in this situation, infantilizes, and thus disrespects them. Jackson questions why it is presumed a woman can give valid consent to an abortion or adoption, yet not surrogacy, and Andrews warns us away from the presumption that hormonal changes in pregnancy affect rational choice.

The next issue Lane notes must be overcome in order to use freedom of contract to defend commercial surrogacy, is the argument that even real consent cannot serve to legitimise commercial surrogacy. This argument sees commercial surrogacy as something that is not legitimised by consent, in the same way that we do not allow people to consent to being sold into slavery. Lane suggests this argument is based on the belief that commercial surrogacy is exploitative, commercialising, and degrading. The dismissal of these arguments in the following chapter finds this challenge lacking.

The other challenge that Lane finds against using freedom of contract as a justification for commercial surrogacy, is that surrogacy is a structure more appropriately dealt with by family law than contract law. Because surrogacy involves the welfare of a third party – the child – family law insists that the best interests of the child must be the primary consideration on the occasion of assigning custody. Strict contract law, on the other hand, is unable to consider the child’s best interests if custody has previously been decided by a contract. This overriding element of family law means the contract cannot be enforced to decide who should get custody of the child. Because of this, the contract

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37 Supra J7, p 129.
38 Idem.

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can at best be used to demonstrate the intentions of the parties. Lane argues that the fact that contracts cannot strictly conform to traditional contract law (as policy prevents them being enforced) means it is hard to see freedom of contract alone as a sufficient justification for commercial surrogacy.

However the fact that a contract will not necessarily be enforced does not imply that it is worthless. In the New Zealand case *P v K*, an agreement was made between a lesbian couple and a homosexual couple over custody of a child. The child was the result of artificial insemination of one of the women with the sperm of one of the men. As a donor, the male had no statutory right as a father because of the Status of Children Amendment Act. However the Court was of the opinion it did not follow that the agreement should be ignored, provided that it was in the best interests of the child. In *Re Evelyn*, Australia's first litigated surrogacy case, Jordon J found that although an agreement for surrogacy was void and unenforceable, this did not require him to disregard the terms of the agreement altogether. He decided it was appropriate to take into account the intentions and expectations of the parties. While such considerations were secondary to the child’s best interests, he saw “the circumstances surrounding her creation [as] pertinent to such an assessment.” These cases thus show that a contract might still have some worth, despite not being strictly enforceable.

It therefore cannot be said that a commercial surrogacy contract does not conform to traditional contract law, as freedom of contract is always subject to public policy. The cases above show that while public policy requires a child’s best interests to be the primary determinant of custody, a contract that is in the child’s best interests will be considered. Therefore freedom of contract is a viable argument for allowing commercial surrogacy.

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42 Status of Children Amendment Act, s11(1)(b): “The man who produced the semen transferred into the fallopian tubes shall, for all purposes, not be the father of any child of the pregnancy whether born or unborn.” & s5(2)(b): “The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, whether born or unborn, unless at any time that man becomes the husband of the woman.”


3.4 Conclusion

The right of procreational liberty is a strong argument for allowing couples to contract with surrogates for money, in order to fulfill their reproductive needs. This right however, does not independently protect women's rights to act as surrogates for money, as that right only falls under the couples' rights. Rather, the defense of autonomy provides sufficient argument for allowing women to act as commercial surrogates. The ideal of freedom of contract supports allowing commercial surrogacy contracts. Even though such contracts will not always be enforceable, this is in line with the idea that public policy may interfere with freedom of contract when significant need arises. Thus when these three arguments are taken together, we find sufficient justification for removing the current prohibition on commercial surrogacy. In fact a prohibition on commercial surrogacy amounts to an unjustifiable interference with some persons' rights in relation to one or more of these values. In order to uphold these values, it is necessary for New Zealand law to allow commercial surrogacy to exist.

In the next chapter I will discuss the arguments that are most commonly used against allowing commercial surrogacy. It is claimed that commercial surrogacy causes harm to children, the exploitation of women, the commodification of women and children, and the loss of autonomy in society. It is argued that these reasons are sufficient justification for interfering with the rights of procreational liberty, autonomy and freedom of contract. I disagree that these risks are significant, and certainly do not see that they amount to good reason for interfering with the rights discussed in this chapter.
Chapter 4: Commercial Surrogacy Not So Harmful After All: A Response to Arguments against Commercial Surrogacy

In addition to the arguments for commercial surrogacy that rely on procreational liberty, autonomy and freedom of contract, there are other arguments against commercial surrogacy. I will deal with four of the major arguments in this chapter. The first is that commercial surrogacy can harm children in several ways. I argue that most of these alleged harms are avoidable or insignificant, and that where commercial surrogacy does present a risk of harm to children, the risk is no more significant than other risks to children that we accept. The second argument is that commercial surrogacy exploits women. While many of the arguments for exploitation are unconvincing, I argue that evidence of exploitation is not grounds for prohibition anyway. I acknowledge this is an unusual stance, as usually exploitation is something to avoid. Opponents of commercial surrogacy have a valid argument if they show it to be irrevocably exploitative and harmful. However the truth is that relationships can be exploitative while still benefiting both parties, and thus harm will not always follow exploitation. The third argument is that commercial surrogacy commodifies children and women’s labour. I disagree that it commodifies children, and question why the commodification of women’s labour is problematic. The fourth argument is that commercial surrogacy reduces altruism in society. While this claim would be significant if it were true, I argue that regulation does not stop altruism diminishing, that this argument has not prevented change in some other areas, and that commercial surrogacy can in fact be altruistic.

An argument that is more difficult to articulate seems to be primarily an emotional objection to commercial surrogacy. This argument condemns all surrogacy, but particularly commercial surrogacy, as morally wrong for reasons besides those of harm, exploitation, commodification, and loss of altruism. The argument, often put forward by religious groups, appears to be that commercial surrogacy severs the relationship between mother and baby; and it involves a third party intruding on and splitting the unity of
marriage. These concerns are widespread and must be respected. We can respond to these arguments in a rational manner: a new relationship is created to replace the severed one; AID is collaborative reproduction, not adultery; surrogacy appears to be accepted even in the bible. However a reasoned response is unlikely to be sufficiently convincing to those who hold deep-seated emotional concerns about surrogacy. Respect for and consideration of these concerns is necessary; banning commercial surrogacy in response to them is not. For the State to interfere with individual liberty by banning commercial surrogacy, more justification is required than emotional responses that have not been reflected on. As John Harris says, "In so far as the decisions to reproduce in particular ways or even use particular technologies constitute decisions concerning central issues of value... the state would have to show that more was at stake than the fact that a majority found the ideas disturbing or even disgusting." That said, State policy that completely ignored public intuition would be equally problematic. However, society ought not to morally condemn people who require other people’s assistance in having children, when it has not similarly condemned parents for soliciting or accepting help in otherwise raising their children, for example through social arrangements such as adoption, step-parenting, foster-parenting, wet-nursing and baby-sitting.

4.1 Harm to Children

A common argument against commercial surrogacy is that it is harmful to children in various ways. These supposed harms include: psychosocial harm from being separated from a birth parent, and discovery one’s birth was the result of a commercial transaction; harm from the reactions and intolerance of outsiders; harm from the breakdown of an

2 "Now Sarai Abram’s wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.” (Genesis 16:1-2)
arrangement; and harm to other children who might have been adopted but for the birth of the surrogate child. These supposed harms are due to several different elements of commercial surrogacy arrangements and some are claimed to even affect children not involved in commercial surrogacy arrangements. Harm to children would certainly appear to be a sufficient reason to prohibit a practice, however the question is whether the harms we are talking about are significant and inevitable. I argue that the alleged harms are speculative, uncommon, avoidable or not substantial enough to justify prohibition of commercial surrogacy. In addition, most of these arguments apply equally to compassionate surrogacy. As we have legalised compassionate surrogacy in New Zealand, subject to regulation, these arguments have obviously not been found to be persuasive. Commercial surrogacy should be acknowledged to be as safe and valuable as compassionate surrogacy.

4.1.1 Psychosocial Harm due to Separation of Genetic/Gestational/Social Parents

Risk of psychosocial harm to surrogate children is one suggested harm, suggested by Herbert T. Krimmel among others. With surrogacy, as with adoption and artificial insemination by donor (AID), genetic, gestational and social parentage is separated. For the child that discovers this background there may be a desire to establish a relationship with the absent "parent". Inability to do so may affect self-esteem and create feelings of rejection and rootlessness. Krimmel is talking specifically about surrogacy where the birth mother is also the genetic mother, and the commissioning father is also the genetic father, however this argument can apply equally to the other types of surrogacy. However John A. Robertson points out, and I agree, that these risks are tolerated in the situations of AID and adoption, and the fact that the adoption is planned pre-conception in surrogacy does not increase these risks. In fact Emily Jackson suggests that as research regarding

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6 Moves worldwide to encourage openness and honesty with children in such relationships suggest these risks are capable of being lessened. Additionally donors are more often being encouraged to be accessible to their donor offspring if the offspring wish to get in touch.

adopted children appears to show that the younger children are at time of adoption, the less chance there is of social difficulties arising, there might be comparatively little impact on children of surrogacy arrangements who are generally handed over at birth. Additionally provisions such as openness with the child can counter these potential problems. In their third review of surrogacy in 1995, the British Medical Association concluded that "although little evidence is available, the risk of serious psychological harm to the child is considered low if open acknowledgement is made from an early stage in the child’s life." At any rate, this argument is one that applies equally to commercial and compassionate surrogacy, and despite this, compassionate surrogacy has been found acceptable in New Zealand law.

4.1.2 Psychosocial Harm due to Birth being Part of a Commercial Transaction

There is further speculation that psychological harm to a child may arise from discovering that his or her birth was the result of a commercial transaction. However, "unlike many children conceived naturally, these children may have the psychological advantage of knowing that their birth was planned and wanted" as "people who engage in surrogacy arrangements only do so because they have a strong desire to have a child." In fact in the comparable realm of AID, it has been suggested that some children appreciate the lengths to which their parents went to conceive them. Similar arguments have not been raised over IVF, despite the fact that couples pay a third party sometimes great sums of money effectively in order to obtain a child. While opponents may argue that this is reason to ban all such practices, such a response shows little understanding of the devastation many infertile couples feel at not being able to have children, and ignores the significance human beings attach to reproduction.

10 Supra 8, p 296.
11 Ibid, p 297.
4.1.3 Adoption as Premeditated Impairment

While we may accept the risks associated with adoption and AID, Krimmel questions parents’ rights to “premeditatedly create a child with planned and intended impairments.” The suggestion that adopted children are automatically impaired due to the circumstances of their birth must offend many adopted children and their parents, and Krimmel offers no evidence of such impairment. Jackson points out that any argument against surrogacy based on risk of psychosocial harm to children is largely speculative (Krimmel admits he is speculating) due to there being little information about the long-term impact of surrogacy arrangements on children. At any rate potential harm to children must be put into perspective. If we are going to prioritize potential harm to potential future children over the very real distress of involuntary childlessness to infertile couples, we need to show that the harm to such children is more than merely speculative, and morally more important than the harm to those couples. While opponents might argue that this appears to be treating the child as a means to an end rather than an end in itself, a similar accusation could be made against all parents who planned their pregnancy.

Additionally, it cannot be seriously argued that the potential harm outweighs non-existence, bearing in mind that, “but for the surrogate contract, this child would not have been born at all.” With few exceptions wrongful birth claims (claims that one would have been better off never having been born) have been rejected. The two major reasons

13 Supra 5, p 64.
14 Ibid, pp 65-6, footnote 1.
15 Supra 8, p 295.
16 Ibid, p 296.
17 Jackson notes an unqualified application of the Kantian imperative would forbid the donation of sperm, eggs, embryos, non-vital organs, human tissue, and blood, among other things; all actions we currently accept. Jackson, idem, p 298. She also cites John Harris’ claim that the Kantian imperative “is so vague and so open to selective interpretation and its scope for application is consequently so limited, that its utility as one of the ‘fundamental principles’ of modern bioethical thought ... is virtually nil.” John Harris, “Clones, Genes and Human Rights” in Justine Burley ed. The Genetic Revolution and Human Rights, Oxford University Press, pp 61-94, p 68.
18 Supra 7, p 47.
given by courts have been: that to legally recognize birth as an injury undermines the
sanctity of life; and that damages would be impossible to determine as it would require
comparing life and non-existence.\textsuperscript{20} Additionally, there is risk of harm to every child
born. In general this is a risk we are prepared to tolerate, and it would be discriminatory
to focus only on the risks to children of surrogacy arrangements, without examining the
circumstances of every child’s birth. This is another argument that applies equally to
commercial and compassionate surrogacy, and has therefore not been found to be
convincing in New Zealand law.

\textbf{4.1.4 Harm from Intolerance}

Some argue there is harm to children from the reactions of outsiders. William
Pierce thinks this is a sufficient reason to prohibit surrogacy, as surrogacy children “are
being made fun of. Their lives are going to be ruined.”\textsuperscript{21} Though he aims his comments at
surrogacy in general, I can imagine critics might think this argument applies even more
strongly to commercial surrogacy.\textsuperscript{22} However, Lori Andrews rightly responds, “It
would seem odd to let societal intolerance guide what relationships are permissible.”\textsuperscript{23} We
should be encouraging societal tolerance rather than putting restrictions on people’s
liberty for fear of intolerance. At any rate, lifting the legal prohibition on commercial
surrogacy is likely to soften some people’s reactions to it.\textsuperscript{24} Additionally, as one judge
responded to the argument that children are harmed by stigma, “It is just as reasonable to
expect that they will emerge better equipped to search out their own standards of right
and wrong, better able to perceive that the majority is not always correct in its moral

\textsuperscript{20} Anne Morris & Severine Saintier, “To Be or Not to Be: Is That The Question? Wrongful Life and
\textsuperscript{21} In The Matter of a Hearing on Surrogate Parenting before the N.Y. Standing Committee on Child Care
(May 8, 1987) [statement of William Pierce at 86].
\textsuperscript{22} I can imagine critics suggesting more intolerance may be directed at the child born of a commercial
transaction, than of a supposedly more altruistic compassionate arrangement. Therefore I will not assume
this argument has been overcome by the acceptance of compassionate surrogacy in NZ.
\textsuperscript{24} Other examples of this happening are the legalisation of homosexuality, and the decriminalisation of
prostitution.
judgments..." We thus cannot assume that the risk of intolerance from others that comes with commercial surrogacy, outweighs the benefits to the surrogate child and his/her family.

4.1.5 Harm from Breakdown of Arrangement

Another harm it is feared commercial surrogacy would risk posing to children is the harm arising from the breakdown of the arrangement. It must be admitted that custody disputes and legal battles are not in the best interests of children. However it is believed that only about 1% of commercial surrogacy arrangements break down. This is not a concern limited to commercial surrogacy, or surrogacy generally, as all families are at risk of breaking down and resulting in custody disputes. The risk also exists in relation to adoption. The birth parents may change their minds after the adoptive parents have been informed they can adopt a particular child. That risk has not been sufficient to outlaw adoption. Additionally, regulation and adequate preparation prior to arrangements being made (in terms of counseling, screening, legal advise, and parties being made aware of all possible circumstances that may arise) can significantly reduce such risks. It is also interesting that failure rates for surrogacy arrangements in the US, where commercial surrogacy is the norm, are much lower than in the UK, where only unpaid surrogacy arrangements are legal. It is plausible to argue that disputes may be more

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27 Supra 8, p 284.
common when surrogates are unpaid, and therefore allowing commercial surrogacy may lead to even lower numbers of arrangement breakdowns.\textsuperscript{28}

\subsection*{4.1.6 Harm to Others who are not Adopted}

An additional harm that commercial surrogacy arrangements are accused of relates to children other than those that result from the arrangement. Martha Field has suggested that commercial surrogacy creates babies at the expense of other children who already exist and need a home; children who are available for adoption.\textsuperscript{29} It is even suggested that devoting energy or resources to producing more babies is immoral given unwanted and disadvantaged children already exist. This argument would also apply to all other infertility treatments, yet Field does not seem to aim similar attacks against them. Couples who desire a child genetically related to one or both of them are also accused of being narcissistic or egotistical.\textsuperscript{30} However, the increasing availability of abortion and contraception has dramatically lowered infertile couples’ chances of adopting. Jackson also sensibly points out that infertile individuals bear no more responsibility for the world’s neglected children than anyone else, and questions why the preference of fertile individuals to have their own biologically related children is not similarly condemned.\textsuperscript{31} Again this is an argument that could be equally aimed at compassionate surrogacy, yet has not apparently been deemed strong enough to prohibit that in New Zealand.

Thus the risk of harm to children born of surrogacy agreements is not significantly higher than the risk to any child born. Most of these arguments have already been dismissed in New Zealand, as evidenced by the acceptance of compassionate surrogacy. As they have not been accepted as reasons to make compassionate surrogacy

\textsuperscript{28} Michael Freeman, "Does Surrogacy Have a Future after Brazier?" Medical Law Review, vol. 7 no.1, 1999, pp 1-20, p 7. Freeman suggests a surrogate who has been paid may feel more of an obligation to hand over the baby, than one who has not.


\textsuperscript{30} Supra 8, p 294.

\textsuperscript{31} Ibid, p 295.
illegal, nor can they amount to a case against legalising commercial surrogacy. The remaining arguments aimed solely at commercial surrogacy are equally unconvincing.

4.2 Exploitation

It is commonly argued that commercial surrogacy should be prohibited because it is exploitative to women, particularly poor women. This exploitation is attributed to: a lack of consent in commercial surrogacy agreements; coercion; inducement; the transference of the burden of risk of a pregnancy; the incommensurability of reproduction; commodification; and reinforcing inequalities of gender. However commercial surrogacy is not necessarily exploitative. Additionally, as an arrangement can be exploitative and yet still be mutually beneficial for both parties, the presence of exploitation does not automatically justify prohibition.

4.2.1 Lack of Consent

Marxist feminists are one group who argue commercial surrogacy is exploitative because poor women can not give real consent to being commercial surrogates. The choice to become a commercial surrogate is not a real ‘choice’ they argue, when one is choosing between poverty and exploitation, because one is just choosing the lesser of two evils.32 But if desperate need undermines consent then many contracts, including some for employment, do not have valid consent. People often enter into contracts to sell property or services when they desperately need money. Such need does not make one incapable of weighing up the positives and negatives of various options. Admittedly people who are poor may be more vulnerable than others, and so regulation should be used to prevent such vulnerable people being taken advantage of. But regulation is as far as we should go as we should not assume that poor people necessarily have less autonomy than others. We do not want autonomy and consent to become the realms of

the wealthy. Individuals must still be allowed to make their own choices about what is the best option for them.

4.2.2 Does More Money Mean More or Less Exploitative?

Some Liberal feminists, such as Lori B. Andrews, argue that commercial surrogacy is only exploitative if surrogates are paid too little. Andrews questions, as do I, why surrogacy is regarded as exploitative when a surrogate is paid, but not when she is not paid.\(^{33}\)\(^{34}\) Prohibiting payment risks reinforcing stereotypical notions that women are inherently altruistic,\(^{35}\) which pressures women into thinking they must be altruistic (even at their own expense) and encourages others to take advantage of these supposedly natural altruistic tendencies. Expecting women to labour for others for free is unjustified exploitation.

However while the Liberal feminist solution to exploitation is higher compensation, the Marxist feminist argument is that high sums of money coerce women, particularly poor women, into becoming surrogates, thus making their consent defective. Usually adding more choices to a person’s options is freedom enhancing, but this is not always the case. Paul Hughes suggests that adding certain choices to a person’s set of

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\(^{33}\) Lori B. Andrews as cited in Tong, ibid.

\(^{34}\) This argument against commercial surrogacy focuses on the pressure exerted by financial inducements, but ignores that equally strong pressure of a social or emotional kind may exist in compassionate arrangements. Emily Jackson has pointed out that it may be very difficult to refuse a request to be a surrogate from a close friend or relative. She quotes Kim Cotton, a surrogate mother and founder of COTS (Childlessness Overcome Through Surrogacy) as saying that her experience has shown “surrogacy within families can be more problematic than with strangers... family members can feel pressured and obliged to help.” Even the Brazier Report on surrogacy acknowledge that the pressure on a family member or friend to help may be extreme, yet still considered this kind of altruistic arrangement to be preferable to those involving payment. Kim Cotton, “Surrogacy Should Pay” British Medical Journal, vol. 320, pp 928-9, p 928. Margaret Brazier, Alastair Campbell & Susan Golombok (1998) Surrogacy: Review for Health Ministers of Current Arrangements for Payment and Regulation (London HMSO) Cm 4069. As cited in Emily Jackson, Regulating Reproduction: Law Technology and Autonomy, Hart Publishing, Oregon, 2001, p 304. As these groups attacking commercial surrogacy on exploitation grounds are not usually aiming similar attacks at compassionate surrogacy, it would appear that their problem with commercial surrogacy stems more from the involvement of money than issues of exploitation. The matter then falls under the area of commodification, which is dealt with below.

options may in fact compromise their autonomy rather than be freedom-enhancing. The example he gives is, “the legal option of refraining from pressing charges against one’s assailant”, which fear of retaliation may press victims into using. He describes this as a constraining option, and lists the ability to sell one’s organs for money as another example. The explanation is that the utilization of this added option may leave the person in a worse-off position, which undermines their autonomy.36

However Hughes’ argument is less convincing when you get down to the details. Imagine a mother cannot feed her children and the state will not give her adequate help, so she chooses to donate a kidney for money, or become a paid surrogate. Though it may appear that she had little choice, if we prohibit her from even making that decision then we may leave her with no choice at all. Who is society to make that judgment as to what is best for that mother and her family if it is unwilling to offer any other help? We must consider the morality of banning life-saving options while failing to provide societal relief. For if society refuses to adequately help those in poverty, then it should at least stop blocking them from helping themselves.37 While the situation in New Zealand may not be quite this extreme (our society does provide aid to a mother trying to feed her children) there may be many reasons why a woman might choose to become a surrogate, such as paying off debts, or paying for her children’s educational costs. As Richard Arneson says, people should be left to make their own decisions on what is an acceptable compromise.38

4.2.3 Coercion

Additionally, surrogacy cannot be seen as coercive if we look at one dominant philosophical view of coercion. This view is that threats coerce whereas offers do not. Threats limit freedom while offers enhance it. A threatens B by proposing to make B

worse off relative to some baseline. A makes an offer to B by proposing to make B better off relative to some baseline. Refusing a threat will leave B worse off, refusing an offer will leave him no worse off. Therefore a threat reduces a person’s baseline while an offer increases it.39 On this account, the surrogate is not coerced by the option of surrogacy because she is not threatened to be worse off if she does not do something. Surrogacy might be preferable to all her other options, but so are all offers we decide to accept. And while she may prefer not to be a surrogate but for the compensation, so might many people prefer not to work but for the compensation.40 Burrow’s, Finn and Todd on contract law explain that coercion is a necessary element to show that an illegitimate threat constitutes duress. Thus, also in law is coercion linked to threats not offers.41

Gerald Dworkin suggests that one way offers can make us worse off is psychologically. The more choices we are given, the higher risk there is for fretting over the decision-making process and regretting the decisions we make.42 Refusing an offer may therefore make B worse off if he worries that he made the wrong choice. It is what S. A. Kierkegaard calls the “despair of possibility.”43 However while an offer can in this way make someone worse off, the harm is not such that it provides an argument against increasing people’s choices, and nor does it show that offers can be coercive.

A surrogacy proposal thus looks like an offer, and therefore cannot coerce. But it is also suggested that some potential surrogates are still coerced by their background conditions, which are so bad as to make accepting a surrogacy proposal their only real option. In this situation the background conditions, rather than the offer, are the problem.44 While the surrogate may have a right against society to improve her background conditions, that right is not against the intended parents. Therefore if we

44 Supra 40, p 111.
want her to be able to improve her conditions, she must be allowed to accept the offer.

"From B's perspective, the only thing worse than an exploitative agreement would be no agreement at all." It seems unlikely that a potential surrogate is coerced by an offer that she would like to receive. Any general prohibition to protect against possible coercion in some cases is a choice to protect one group from exploitation by preventing others from making non-coercive and mutually beneficial transactions.

4.2.4 Inducement

Another argument against commercial surrogacy is that the surrogacy fee induces women into becoming surrogates. However it is not obvious that inducement is a bad thing. A common view of inducement is one where people who are desperately short of money agree to do things that are not in their best interests, thus suggesting they have not given informed consent. But acting as a surrogate is not necessarily against a woman’s best interests. If acting as a compassionate surrogate is safe enough to be accepted in New Zealand, then doing the same thing for money is no more risky. In fact the money may make it more in a woman’s best interests. As Martin Wilkinson and Andrew Moore have said, “Many people would not work if they were not paid; in that sense wages are inducements. Few people think that, as a result, it is wrong to offer wages.” It therefore cannot be suggested that people act without giving informed consent each time they respond to such inducements. By participating in a commercial surrogacy arrangement, the commissioning parents receive the service they require, and the surrogate gets the monetary reward (among other rewards) that she wants. As inducement has resulted in everyone getting what they want, it can be seen that inducement can be a good thing.

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45 Supra 39, pp 237.
46 Ibid, pp 239-41.
48 Idem.
4.2.5 Economic Status of Surrogates

It is interesting considering the emphasis put on arguments that surrogacy will exploit poor women, that an American study\textsuperscript{49} showed most surrogate mothers to be educated and middle class, and a UK study\textsuperscript{50} showed no surrogate mothers in dire financial circumstances. Andrews suggests most women become commercial surrogates because they want the money for things such as children’s education, redecorating or a second car.\textsuperscript{51} This casts further doubt on the claim that commercial surrogacy is exploitative, as these statistics suggest surrogates are generally not forced into commercial surrogacy due to poverty.

4.2.6 Transferring Burden of Risk

It is also argued that surrogacy is exploitative because it involves one woman taking on the burden and risk of pregnancy for another. Indeed even with modern advances in technology and medicine, pregnancy is still a risky pursuit. However transfer of burden happens more often than we realise in everyday life. Laura Purdy notes several examples: house cleaning, hairdressing, dry-cleaning, agriculture, public works – where there are elevated risk rates from exposure to toxic chemicals or dangerous materials.\textsuperscript{52} The truth of the matter is that poor women already often have to choose between many elevated-risk jobs. While it would be preferable to improve those women’s options, reducing their need to make such choices, it would in the mean-time be irrational to prevent them choosing contracted surrogacy which may be less risky and more enjoyable than their other options.\textsuperscript{53} The risks attached to pregnancy only strengthen the argument that surrogates should be adequately paid.

\textsuperscript{51} Supra 23, p 284.
\textsuperscript{53} Supra 40, pp 109-10.
4.2.7 *Incommensurability*

It is sometimes argued that commercial surrogacy involves exchanging values that are incommensurable; in other words that the goods or services involved in the transaction have no common measure. However this sort of incommensurability does not necessarily show a transaction to be wrong. The example given by Wertheimer is that a “priceless” painting can be sold without claiming that the amount paid is commensurate with its value. Additionally, even if evidence of incommensurability does suggest a transaction is wrong, it does not prove a party is negatively affected by the transaction. There are some things, such as human beings, that are rightly believed to be truly incommensurable. This is why slavery and baby-selling are considered to be wrong. However, in most cases a thing’s value will be largely subjective. Therefore ultimately it is up to individuals as to what amount they decide to accept as payment for the services they provide. Thus incommensurability alone does not show surrogacy to be exploitative.\(^{54}\)

4.2.8 *Reinforcing Inequalities of Gender*

If it is decided that surrogacy is in fact exploitative, it is not suddenly obvious that the practice should be prohibited. “A liberal democracy is not justified in prohibiting transactions just because the transactions are morally suspect or fail to incorporate the best conception of human flourishing.”\(^{55}\) According to John Stuart Mill, there needs to be harm to others.\(^{56}\) It has been argued that even if surrogacy is not harmful overall to surrogates, it is harmful to women as a class as it reinforces inequalities of gender. This argument says commercial surrogacy will harm not just those who participate in it, but like prostitution, will oppress all women, by reinforcing certain prejudices and treatment of women. Richard J. Arneson summarizes the oppression of women argument in two ways. One variation of this argument states that tolerance of commercial surrogacy risks reinforcing the belief still held by some that domestic service is the only appropriate

\(^{54}\) Ibid, p 102.

\(^{55}\) Ibid, pp 113-14.

sphere for women, and therefore they should not participate fully in the public world of paid employment. The other variation argues that those who believe commercial surrogacy, like prostitution, is morally wrong, will see some women participating in it as evidence that women are inherently less virtuous than men, justifying the denial to women of some rights not denied to men.\(^{57}\) However I agree with Arneson’s response to these arguments - that we do not, and would not want to, banish other freedoms that are used by some people to reinforce the ideology of separate spheres for men and women. Arneson gives some examples:

“When some teenaged women in America who face bleak life prospects choose to have babies, go on welfare, and drop out of school and the labor market, their choices may tend to reinforce the belief of many people that women’s proper role is childbearing and childrearing. When women take part-time jobs rather than full-time jobs out of concern for their children or follow the “Mommy track” in their careers for the same reason, the ideology of separate spheres is reinforced in the minds of many men and women. But these possible negative effects of women’s exercise of the freedom to control one’s own reproductive life and the freedom to choose one’s own career path do not constitute a prima facie case to abolish or curtail these liberties.”\(^{58}\)

We should not restrict the freedoms of some for the sake of the narrow-mindedness of others.

4.2.9 Regulation not Prohibition

Even if commercial surrogacy is exploitative to surrogates, it is not inevitable that the exploitativeness of a transaction justifies interfering with a transaction that the

\(^{57}\) Supra 38, pp 162-3.

\(^{58}\) Ibid, p 163.
exploited party benefits from.\textsuperscript{59} At any rate, the worst exploitation could be curbed by setting a minimum wage. Despite the above argument, there is no empirical evidence to suggest surrogacy does reinforce social inequalities. Even if there was, prohibiting surrogacy would merely be burdening one class of women in order to benefit a larger class of women. Wertheimer points out that though we are often justified in imposing costs on one group in order to benefit another, it is harder to justify putting this burden on the least well-off among us, particularly when the costs are in the present and the benefits are in the future (and not even assured). Prohibiting surrogacy merely hides problems. Wertheimer summarizes, “suppressing mutually advantageous exploitative relationships may be akin to removing the homeless from public places; we may feel better, but the problem persists.”\textsuperscript{60}

4.3 Commodification

A third major objection that is commonly voiced against surrogacy is that it commodifies women and children. A commodity is something the exchange of which can be regulated by the market. Commodification is therefore the movement of something traditionally not thought to be subject to market norms, into the realm of the market. We may object to certain things being subject to market norms, or to being commodified. For example commodification of people through slavery is not accepted in today’s society. Likewise judicial decisions and votes are generally regarded as things that should not be for sale. Elizabeth Anderson says one problem with allowing certain things to be regulated by the market is that the market fails to value these things in an appropriate way. The appropriate way to treat a person, for example she says, is as being worthy of respect rather than merely worthy of use. A slave is treated as being of use, rather than worthy of respect. She describes this kind of respect as Kantian respect\textsuperscript{61} as it conforms to Kant’s idea that we should treat human beings never only as a means to an end, but rather as an end in their own right.

\textsuperscript{59} Supra 40, pp 113-4.
\textsuperscript{60} Ibid, pp 120-1.
4.3.1 Degrading to Women and Children

Anderson extends this line of argument to claim that commercial surrogacy treats women’s labour in pregnancy and childbirth as a commodity, and as such degrades those women. She also claims the children that result from these arrangements are degraded by being reduced to the status of commodities because they are sold by the surrogate mother.\(^{62}\) Degradation occurs, claims Anderson, “when something is treated in accordance with a lower mode of valuation than is proper to it.”\(^{63}\)

I disagree that commercial surrogacy agreements reduce children to commodities, as such arrangements do not involve the buying or selling of children. As for the commodification of procreational labour, I do not see this as necessarily a problem and the concern is born out of romanticised notions of women’s experience of reproduction rather than the reality of it.

4.3.2 Commercial Surrogacy does not constitute Baby-Selling

The claim that children of commercial surrogacy agreements are reduced to commodities implies that these children are being bought and sold, and otherwise treated like commodities. This argument is often aimed against commercial surrogacy with different wording; it is claimed that commercial surrogacy is baby-selling because a fee is given to the surrogate, in exchange for which she hands the baby over. Baby-selling is contrary to Article 35 of the UN Convention on the Rights of the Child,\(^{64}\) and it is generally agreed that baby-selling is a bad thing. One reason is that of Anderson’s listed above regarding slavery. The claim that it treats the person sold with inappropriate respect is equally relevant here. The selling of babies implies that the buyers may treat the baby as property, and this is an inappropriate value to be given to a human being.

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63 Ibid, p 77.
64 UNCROC (UN Convention on the Rights of the Child) ratified by NZ in 1993, Article 35 states: “State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”
Another reason baby-selling is generally abhorred is the instability it creates for the involved children. Once sold, if treated like property, they may be sold again, thus not providing a secure and stable environment for the child.

However commercial surrogacy is not baby-selling because the baby is not able to be treated in the same way as other things we buy and sell. The baby cannot be on-sold and cannot be treated as property. If we say that what is happening is baby-selling, the result must be that the commissioning parents may treat the child as they do any other thing they pay for. They can act as though they own it and may do with it as they please. They may mistreat it, not provide for it, or on-sell it to the highest bidder. The fact that in reality commissioning parents may do none of these things is proof that commercial surrogacy is not baby-selling. Though there are some categories of things we may own and not treat any way we please – animals, historic buildings, trees – parents of a surrogate child (like all parents) are subject to far stricter moral and legal rules. Most notably the parents cannot transfer ownership of the child, as we may do with animals, historic buildings and trees. The parents are still subject to all laws regarding the welfare of children and may not treat the child as their property. The Care of Children Act 2004 is evidence of New Zealand law moving away from property type relationships when it comes to children. The replacement of custody and access orders by parenting orders shifts the emphasis from parental rights to parental responsibilities. Consequently the lack of evidence for the child being a commodity suggests that the money a surrogate mother receives when she hands over the child is for her labour rather than any transference of ownership. In other words, the fact that the commissioning parents do not receive a commodity is evidence that the surrogate did not sell them a child, but rather sold them her labour.

The fee paid in commercial surrogacy arrangements can thus be seen as nothing other than payment for the service the surrogate provides. It is compensation for the conception, pregnancy and childbirth, that results in the commissioning parents gaining a

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65 Commentary on the Care of Children Act 2004 from Brookfields Lawyers, http://www.brookfields.co.nz/property_law/latest_plcn_nov04.html#1, accessed 21/02/05.
baby. I say that results in the commissioning parents gaining a baby, because this is the point at which it is confirmed the surrogate was in fact performing the service for them. The parents should not have to pay the fee to the surrogate if she refuses to hand over the baby, despite her having performed the service of pregnancy. This is because while at the time she may have appeared, or even truly intended, to be performing a service for them, declining to relinquish the child proves that she was not. Keeping the baby gives her the benefit of the service rather than the commissioning parents.

This does not apply to the situation where a child is stillborn, as this is due to no fault of the surrogate; she has fulfilled her duties as far as she is able, she has taken the time and endured the discomfort and risks, therefore she should still be paid. Contract clauses that exempted commissioning parents from paying a surrogate if the child was stillborn would make the payment look more like consideration for the baby than for a service. I argue that such clauses should be prohibited from commercial surrogacy contracts, as the surrogate should be paid, so long as she has provided the contracted service.

Anderson argues, "That the mother regards only her labor and not her child as requiring compensation is also irrelevant. No one would argue that the baker does not treat his bread as property just because he sees the income from its sale as compensation for his labor and expenses and not for the bread itself, which he doesn't care to keep."66 However she uses an inappropriate example; commercial surrogacy cannot be compared to a baker selling loaves because the loaf is a commodity while the baby is not. Therefore the distinction in what is being paid for is legitimate when made by the surrogate, but not when made by the baker. Since the fee in a commercial surrogacy arrangement is not a payment for the baby, there is no way that commercial surrogacy can be said to commodify children. The payment is for the service provided by the surrogate – conception, pregnancy and childbirth – therefore this is the thing, if any, which is being commodified. But is this even a problem?

66 Supra 61, p 78.
4.3.3 Does Commercial Surrogacy Commodify Reproduction?

Anderson claims that women are degraded when they act as commercial surrogates because the parental norms which are usually attached to gestation are replaced by economic norms common to the market. Anderson’s problem with commercial surrogacy is that in the surrogacy contract, the surrogate “agrees not to form or to attempt to form a parent-child relationship with her offspring.” Forming an attachment to the child—an act of parenthood—is thus replaced by an agreement to form no special emotional ties, which Anderson describes as a norm of commercial production. Anderson claims “The demand to deliberately alienate oneself from one’s love for one’s own child is a demand which can reasonably and decently be made of no one.”

I have three objections to Anderson’s argument. She seems only to object to commercial, not compassionate surrogacy. Yet surrogates involved in either type of arrangement are likely to engage in the behavior of attempting not to form significant ties to the child they are gestating, as a measure of self-protection. That this might be a difficult part of being a surrogate should be obvious to all who consider the option. Those who decide to become a surrogate despite this must believe the benefits (which may include giving an infertile couple the child they desperately desire, feelings of goodwill for helping others, and perhaps some kind of monetary benefit) outweigh this, and other risks. What Anderson seems to be concerned with is the commercial element; that in a commercial arrangement, this behavior is more than self-protection, it is a contractual requirement. I however do not see the morality of the behavior changed by its formalisation in a contract. Whether in a commercial or compassionate arrangement, an attempt not to form the same attachment to the child as one would one’s own child, is beneficial to the surrogate and perhaps necessary for the arrangement to work. It is perhaps not something every woman could do, but then not all women should become surrogates. Believing oneself capable of handing over the baby at the end of the pregnancy is a necessary characteristic for potential surrogates, and is one that is sometimes (and should always be) screened for. Additionally, as Carson Strong points

67 Ibid, p 82.
out, repressing one's feelings towards others is not necessarily degrading. Doctors and nurses caring for dying patients commonly distance themselves emotionally to preserve their own psychological health, without us considering their actions degrading.\textsuperscript{68} My objections therefore are: that the requirement to attempt not to form a strong bond to the child is a protective measure beneficial to surrogates, and one they need only agree to if they decide to become a surrogate (it is not just randomly demanded of any pregnant woman); that it is not a requirement particular to commercial surrogacy, nor does its formalisation in a contract change its nature significantly; and that repressing one's feelings toward others is not considered degrading in other contexts. Richard Arneson also points out, and I agree, that the contract does not require the surrogate to feel a certain way, but rather to act in a certain way,\textsuperscript{69} something common to most contracts.

Despite rejecting Anderson's argument, we might still view commercial surrogacy contracts as commodifying reproduction and women's labour. After all, the surrogate's labour is being exchanged for a fee. But why is this a problem? Is it because they are putting a value on, and charging for, the labour of their bodies? It cannot be, because this is what all human beings do when they go to work and get paid to do it. They agree that their labour is worth a particular amount, and sell it to their employer. To differentiate between gestational labour and other forms of physical or mental labour, more is needed than to argue that women have not traditionally been paid for this labour. It is convenient to a patriarchal society, and not a coincidence, that labour traditionally thought of as appropriate to the realm of altruism – reproduction, childcare, care of elderly, housework – is generally work done by women. If commercial surrogacy commodifies reproduction and women, then so does exchanging our physical or mental labour for a salary or wage commodify to a certain extent each of us who works. One must show the difference between reproduction and other forms of labour is more than merely symbolic or emotional in order to show commodification as problematic here.

\textsuperscript{69} Supra 38, p 132.
4.3.4 Is Reproduction Different to Other Types of Labour?

One argument that does attempt to distinguish reproduction from other forms of labour is that which likens commercial surrogacy to prostitution. It is argued that while prostitution is sex without reproduction, surrogacy is reproduction without sex. However at times opera singing, acting and dancing have also been compared to prostitution (“agreeable and beautiful talents” exploited for financial gain). This devaluing of physical labour is ironic considering all forms of employment involve payment for the use of some part of a person’s body. It is argued that what is problematic, if this analogy is correct, aside from the moral distaste with which some regard prostitution, is the consequences that may result for society. Margaret Radin has argued that if sex were fully and openly commodified, “A change would occur in everyone’s discourse about sex... The open market might render subconscious valuation of women (and perhaps everyone) in sexual dollar value impossible to avoid.”71 This slippery slope argument can, she says, equally be applied to commercial surrogacy; if commercial surrogacy becomes commonplace, all women might want to charge to reproduce, or start to value themselves according to what they think they could charge. As I am arguing that commercial surrogacy is not a bad thing, it would be unproblematic for it to become a prolific practice. But at any rate, this argument, like most slippery slope arguments, is both silly and alarmist. Since the decriminalisation of prostitution in New Zealand, I have had no desire to charge money for sexual services, nor has the thought crossed my mind as to how much I might be worth if I did so desire. Additionally, a thing is typically valued more when gifted if there exists a choice to have sold it instead; it is more altruistic to gift something one might alternatively sell. On top of that, allocating a commercial value to women’s labour may be one way to ensure equality. The Property Relationships Act commodifies, in a sense, having and caring for children, because it is treated as the equivalent of financial contribution in the context of a marriage partnership, thereby justifying the equal division of a couple’s accumulated assets.72

70 Supra 52, p 105. Obviously there are exceptions in both situations.
72 Property (Relationships) Act 1976 s 18: “(1) For the purposes of this Act, a contribution to the marriage or de facto relationship means all or any of the following: (a) the care of (i) any child of the marriage or
The comparison of commercial surrogacy to prostitution does nothing for the argument against commercial surrogacy. Firstly a definition that embraced prostitution and commercial surrogacy would likely also include some marriages. Secondly slippery slope arguments for either are not credible. And finally, as New Zealand has in fact decriminalized prostitution, the comparison suggests that we are being overly cautious in prohibiting commercial surrogacy.

Another argument that attempts to distinguish procreational labour from other sorts of labour takes the opposite approach by elevating it, describing it as noble labour. To perform noble labour for pay is supposedly degrading and should therefore be banned. Arneson points out, and I agree, that “many kinds of work thought by many of us to be noble labour are nevertheless regarded as appropriately done for money.” Nursing is one such example. He questions why noble women’s labour should be treated differently.

As for the argument that selling such services is degrading, putting a value on one’s own reproductive capabilities is not necessarily degrading as, “degradation very much depends on one’s own perception of what is degrading.” A notion of bodily integrity which suggests that in putting a value on the use of our body we are giving up what is human about us - our pricelessness - is just one opinion of humanity, and one that cannot justifiably be pressed onto all despite whether they believe this or not. An opinion by some that an activity is degrading is not justification for its prohibition. Dominic Wilkinson rightly claims that “laws that aim to restrict our ability to govern our

child of the de facto relationship: ...(b) the management of the household and the performance of household duties: ... (2) There is no presumption that a contribution of a monetary nature ... is of greater value than a contribution of a non-monetary nature.”

73 Sexual or reproductive favours exchanged for compensation of some sort (perhaps financial support or the suggestion of an improved relationship).
74 Prostitution Reform Act 2003, s 7.
75 Supra 38, p 153.
76 Supra 37.
77 Katharine McDonald, Could It Ever Be Ethical To Commodify Organs? BITC 401, Theories of Bioethics, 2004, unpublished.
own moral integrity are in themselves demeaning.”\textsuperscript{78} Even if we did view some practices, such as commercial surrogacy, as demeaning or degrading, this would not justify prohibition of such practices in a liberal society. Laws preventing individuals from demeaning or degrading themselves are paternalistic, whereas in a liberal society we should be adhering to John Stuart Mill’s harm principle: “The only purpose for which power can rightly be exercised over any member of a civilized community against his will is to prevent harm to others.”\textsuperscript{79} We allow paternalism to interfere with people’s liberty occasionally when their actions may harm themselves, but such paternalism is not justified merely to prevent a person being demeaned or degraded.

4.4 Altruism

Another way it is claimed commercial surrogacy harms those other than its participants is through its contribution to the deterioration of altruism in society. It is assumed that the legalization of commercial surrogacy will decrease the likelihood of women acting as surrogates in compassionate surrogacy arrangements, as most surrogates will choose to charge for their services. This argument is similar to the argument against allowing the selling of blood products. Peter Singer notes that even if a voluntary program for giving blood existed along side commercial blood banks, “The fact that blood is a commodity, that if no one gives it, it can still be bought, makes altruism unnecessary, and so loosens the bonds that can otherwise exist between strangers in the community.”\textsuperscript{80} Thus it is argued that as having the option to be commercial surrogates will see fewer people choosing to be compassionate surrogates, this will decrease altruism in the community in general and therefore the option of commercial surrogacy should not be allowed. This argument for prohibiting commercial surrogacy can be countered in three ways.

\textsuperscript{79} Supra 56.
4.4.1 Artificial Altruism

Firstly, while it is generally agreed that altruism is a good thing, its ‘goodness’ does not justify manipulation to bring it about. Imposing restrictions on people to stop them selling their reproductive services does not stop them wanting to sell these services. Therefore an artificial culture of altruism is set up. People refrain from getting involved in commercial surrogacy arrangements not because of feelings of altruism, but rather due to legal restrictions. The overall result may be that only altruistic compassionate surrogacy occurs, but numbers of surrogacy arrangements drop drastically. Altruism is a good thing, but it is not an appropriate thing for governments to manipulate. Is altruism not more genuine and meaningful when it occurs naturally?

4.4.2 Loss of Some Altruism an Acceptable Loss

My second objection to using altruism to justify prohibiting commercial surrogacy is that many other areas that previously existed in the realm of altruism have become market based. A.S. Daar notes that these include day care for children and nursing homes for the elderly. He also points out that incentives exist in other areas, for example tax breaks for donations to charities and the monetary reward that comes with Nobel prizes, without removing all elements of altruism that have traditionally been found in these areas. Forcing reproduction to remain purely altruistic exploits those women who do not wish it to remain as such.

4.4.3 Unrecognized Altruism

My third objection is that this argument ignores the fact that altruism can and does exist in commercial surrogacy arrangements. While financial incentives are usually one reason listed by commercial surrogates for their becoming a surrogate, a desire to help childless couples is another reason. One commercial surrogate explained her motivation with these words: “I’m not going to cure cancer or become Mother Theresa, but a baby is

one thing I can sort of give back, something I can give to someone who couldn’t have it any other way.”82 Another commercial surrogate had similar reasons: "I don’t do anything that changes the world. You know I’m not a doctor or a nurse, I don’t do anything that’s important but I feel I’ve achieved something with my life and I’ve done it very well.”83 A recent surrogate mother decided not to take the arranged $20,000 fee when she found out she was pregnant with quintuplets, all boys. She felt that the new parents would need the money more.84 Financial compensation may in fact make it easier for many surrogates to perform the altruistic act of giving the gift of a child. Surrogacy is a good and generous act; involving money does not dissolve this good.

That commercial surrogacy weakens altruism in society is not an argument that can justify prohibiting commercial surrogacy. This is because altruism is only meaningful when it is not forced and manipulated; we have not stopped other activities traditionally associated with altruism moving to a more market based structure; and this argument totally ignores the elements of altruism that do exist in commercial surrogacy.

4.5 Conclusion

This chapter has shown that the major arguments against commercial surrogacy: harm to children; exploitation; commodification; and loss of altruism, are insufficient to justify prohibition of commercial surrogacy. Many of the harms to children it is claimed that allowing commercial surrogacy would risk are either insubstantial risks, or are untrue. The remaining risks apply equally either to all children, or to children born of compassionate surrogacy arrangements. As we do not deem those risks that apply to all children sufficient to ban reproduction, nor are they a satisfactory argument for banning commercial surrogacy. Additionally those arguments that apply to compassionate

83 Carole Horlock after her eighth surrogate pregnancy. “Britain’s Busiest Surrogate Mother” screened channel one, TVNZ, 13th December 2004.
84 American surrogate Theresa Anderson, in a news article screened on One News, TVNZ, 14th April 2005.
surrogacy, which is legal in New Zealand, have not been seen as a justification for banning the practice, and nor should they here.

In regard to the argument that commercial surrogacy is exploitative, I have disputed that the practice is necessarily exploitative. I have also shown that even where exploitation does exist, it is not necessarily problematic when the agreement still benefits both parties. As I believe that within the protection of regulation, commercial surrogacy will usually benefit both parties, any evidence of exploitation does not justify prohibiting this kind of surrogacy.

As for the argument that commercial surrogacy commodifies children, I have disagreed that this is true because the practice does not amount to baby-selling. This is because the fee that the commissioning parents pay to a surrogate is purely for the service she provides them with, rather than as consideration for the child. I have accepted that commercial surrogacy might validly be viewed as commodifying women's labour, however I have argued that this is not problematic. That is because slippery slope arguments resulting from this belief are not realistic, and any idea that commodification of the body is degrading ignores the fact that most people commodify their bodies in some way, and it is up to the individual to decide if she is being degraded.

The argument that commercial surrogacy reduces altruism in the community does not recognize that prohibition would only boost altruism in an artificial way. Additionally it does not acknowledge that altruism exists in other areas that have been commodified, and particularly that altruism can and does occur in commercial surrogacy arrangements.
Chapter 5: Regulation not Prohibition: Legal Recommendations for Surrogacy

Having shown the reasons why commercial surrogacy is a good thing, and then dismissed the arguments against it, I shall in this chapter examine the legal changes that would need to be made if commercial surrogacy were made legal in New Zealand. I shall discuss the legal problems that arise specifically in commercial surrogacy arrangements. I will scrutinize the options for enforcing (or not enforcing) commercial surrogacy contracts, and examine what restrictions there should be on such contracts. I shall also look at the possibilities and necessities for regulation, including a regulatory proposal from the Law Commission that I favour.

5.1 Enforcing Contracts

If New Zealand law were to make commercial surrogacy legal, the status of commercial surrogacy contracts would have to be established. Surrogacy agreements are currently unenforceable. That includes compassionate surrogacy arrangements. Commercial surrogacy arrangements are not only unenforceable they are illegal. The giving or receiving of valuable consideration is an offence punishable by up to a year in prison or a $100,000 fine. If commercial surrogacy were to be legalised, this law would have to be amended. At the very least the prohibition on valuable consideration would have to be removed. The status of surrogacy contracts is most relevant where the contractual agreement breaks down. While this seldom happens,¹ it can be a very difficult situation when it does, as evidenced by the two cases discussed below. I will discuss the possibilities for what kind of legal status such a contract might have, including its current illegal status, and explore the advantages and/or disadvantages that pertain to each one.

These possibilities are: criminalisation; unenforceability; assimilation into adoption law; enforceable with specific performance; and enforceable with damages.

Contracts for compassionate surrogacy, while not illegal in New Zealand, are not enforceable.² So while the payments allowed under the HART Act 2004 may be legitimately paid, and the transfer of the child is permissible, neither the payments nor the transference of custody can be legally enforced if either party reneges on the agreement. If commercial surrogacy were to be allowed, commercial surrogacy contracts might be given the same unenforceable status. I believe some terms of a commercial surrogacy contract should be enforceable, in order to provide some security to the parties. However, making the contract enforceable would imply that the term specifying that the surrogate will hand over the child to the commissioning parents may be enforced even if the surrogate changes her mind. Along with the idea that payments commodify women and children, the idea that women may be forced, due to a contract, to give up a child they love, is one of the primary issues concerning people over commercial surrogacy. I have dismissed the arguments relating to payments, and will discuss the options for the legal status of a commercial surrogacy contract in light of whether those options will uphold contractual promises to pay. However, I will also point out that making the contract enforceable does not necessarily imply that an agreement’s terms, for things such as giving up a child, are strictly enforceable. I will conclude that perhaps the only way for commercial surrogacy to work, is if some terms are enforceable and others are not, with legislation specifying accordingly.

5.2 What Can Go Wrong

Two well-known cases are examples of what can go wrong in a commercial surrogacy arrangement. The Baby M & Malahoff cases show commercial surrogacy at its worst, and demonstrate the need for legal guidance in relation to commercial surrogacy contracts.

² HART Act 2004 s14(1) "A surrogacy arrangement is not of itself illegal, but is not enforceable by or against any person."
5.2.1 When Everyone Wants the Child

The Baby M case occurred in New York in the mid 80's. Mrs Whitehead agreed to be artificially inseminated with Mr Stern's sperm. She was to receive $10,000 in addition to all the costs of the pregnancy. Mrs Whitehead gave birth to a healthy baby girl, but decided not to give her up. The Stems obtained a court order for temporary custody but the Whiteheads evaded police for three and a half months. When found they were forced to hand over "Baby M", as she had become known, while permanent custody was determined by the Courts.

Just after Baby M turned one, a judge of the New Jersey Superior Court held the surrogacy contract valid and enforceable. Mr Stern was awarded permanent custody, Mrs Whitehead’s parental rights were completely terminated, and the judge processed Mrs Stern’s adoption of the child without the Whiteheads’ knowledge. The judge ruled that specific performance of the contract was appropriate as long as it was in the child’s best interests. On appeal the New Jersey Supreme Court reversed the lower court’s decision regarding the validity of the contract and the complete termination of Mrs Whitehead’s parental rights. The custody order was not overturned, based on the best interests of the child, but Mrs Whitehead remained the legal mother and gained weekly visitation rights.\(^3\)

It has been suggested that Mrs Whitehead was not selected as a surrogate for the Stems’ because of her capability to be a surrogate, but rather due to her physical resemblance to Mrs Stern.\(^4\) It later became known that a psychologist had raised concerns regarding Mrs Whitehead’s ambivalence about giving up the child prior to the surrogacy proceeding, but this information was not passed on to the Stems. Also Steinbock notes


“the case seems to have been mismanaged from start to finish and could serve as a manual of how not to arrange a surrogate birth.”

5.2.2 When No-one Wants the Child

The Malahoff case occurred in New York in the early 80's. Mrs Stiver agreed to be artificially inseminated with the sperm of Mr Malahoff. It was agreed Mrs Stiver would receive $10,000 in addition to medical costs for her role. After the birth of a baby boy Mrs Stiver and Mr Malahoff signed the birth certificate as legal parents. It became apparent that the boy was microcephalic, a condition that often indicates mental retardation. He also had a severe strep infection, which threatened to cause loss of hearing and eyesight and further mental retardation. The Stivers were paid their $10,000, but before they cashed the cheque, blood tests suggested Mr Malahoff was not the child’s father. The cheque was returned and dispute arose over custody and responsibility for the child.

Both sets of parents refused responsibility for the child. It was then revealed on the Phil Donahue Show that tests established conclusively that Mr Malahoff was not the father. It emerged that while the Stivers had abstained from sexual intercourse for the 30 days post-insemination, they had not been told, or did not understand, that intercourse shortly before insemination could result in a pregnancy that would not necessarily be revealed by the pre-insemination pregnancy test. When it was proved the child was biologically theirs, the Stivers accepted him. When he was three he was entered into a therapy centre as his capabilities would never proceed past that of a two to four month old. Several suits were filed against physicians, in part for improper instructions before insemination. It was reported Mr Malahoff thought a child would repair his marriage. He separated from his wife shortly after the birth of the child.6

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It appears inadequate preparation and advice, and questionable motives were the catalysts for the breakdown of these commercial surrogacy agreements. While regulation, including requirements for screening, counselling and adequate advice, may have prevented these situations, there will always be a risk of disputes. Therefore an effective regulatory scheme setting out the status of commercial surrogacy contracts and aimed at resolving disputes will be necessary if commercial surrogacy is permitted.

5.3 Possibilities for Contract

5.3.1 Criminalisation – the Current Approach

Criminalisation is the current New Zealand approach to commercial surrogacy. Section 14 of the HART Act makes it an offence to give or receive payment for participation in a surrogacy arrangement (other than for reasonable and necessary expenses as are listed). Committing such an offence can result in imprisonment for up to a year, or a fine of up to $100,000, or both. This option goes against the advice of the Bioethics Council, a Ministerial Committee on Assisted Reproductive Technologies and the Law Commission, and runs against the trends of other countries. For example, the UK has decided it is not in the best interests of children, born of commercial surrogacy arrangements, to “be subject to the taint of criminality”. I cannot see where the benefit is

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to a child in imprisoning their parents for up to a year (whichever persons end up being
their parents), or crippling their family with a $100,000 fine, thus making it harder for
them to support a child. These penalties seem excessive and against the best interests of
the child. While they are clearly intended to have a deterrent effect, they would only be
imposed after a child had been born. Jackson notes that the threat of criminal prosecution
has had little deterrent effect in Australia.⁹ In New Zealand it would not be difficult for
some commercial surrogacy arrangements to be carried out in secret, thus getting around
the law.¹⁰ This option pushes commercial surrogacy underground or forces couples
overseas, therein denying them, and other parties involved the protection and safety of
regulation.¹¹

One negative result of couples being forced overseas to access commercial
surrogacy is that it will make it harder for surrogate children to know their genetic or
gestational origins. New Zealand has traditionally encouraged openness in situations
where sperm donation is used. However such openness in surrogate relationships will be
hindered if there is great geographical distance between the family and the donor(s)
and/or surrogate.¹² A negative of driving commercial surrogacy underground, is that
participants may feel the illegality of their actions makes it too risky to consult medical or
legal professionals for advice or assistance. This may result in anything from badly
organised agreements, which might cause tension or conflict, to the safety of the child or
the surrogate being endangered.

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⁹ Emily Jackson, Regulating Reproduction: Law Technology and Autonomy, Hart Publishing, Oregon,
¹⁰ Artificial insemination at home would be difficult to detect, as would payments to the surrogate. Formal
adoption by the commissioning couple would be more problematic, but this would not stop the child from
living with the couple. The Law Commission has noted the occurrence of a surrogate mother registering
under the commissioning mother’s name on the birth certificate, Law Commission, Report 65, “Adoption
and Its Alternatives: A Different Approach and a New Framework” Wellington, September 2000, p 203,
¹¹ Restrictions on surrogacy in Australia have resulted in growing numbers of infertile Australian couples
going to the US in order to enter surrogacy arrangements. Margaret Otlowski, “Re Evelyn: Reflections on
Ministerial Committee on Assisted Reproductive Technologies, July 1994, Crown Copyright, Wellington,
pp 110-11.
The UK approach has been to punish the middlemen involved in commercial surrogacy arrangements, such as lawyers, doctors, and social workers, rather than the primary participants. As I believe commercial surrogacy is a legitimate action, I do not believe those who assist the commissioning couple and the surrogate should be punished. Particularly when they are the persons most able to provide the necessary advice and assistance to those involved in the arrangement. Therefore while regulation is necessary, making commercial surrogacy illegal is not advantageous.

5.3.2 Unenforceability

If the prohibition was lifted on commercial surrogacy, one option would be to leave commercial surrogacy contracts unenforceable, as is currently the case for compassionate surrogacy contracts. In the case of a breakdown between the parties this option would mean the State would leave the parties as it found them (except for the child that is, whose situation would be decided by the best interests test). This option means there is no security for either party. There is nothing to stop the surrogate changing her mind and keeping the baby, nor the commissioning couple changing their minds and rejecting the baby (of which there is a higher risk if the child is not healthy), or not paying the surrogate the agreed fee. This option just does not seem fair as it may leave the commissioning couple without a child, and out of pocket, or it may leave the surrogate unpaid, and/or with a child she never had any intention of raising; leaving her either with the burden of raising an unwanted child, or the responsibility for arranging adoption (which might be difficult if the child is not healthy). For these reasons this option is certainly not favourable.

5.3.3 Assimilation into Adoption Law

Another option is to assimilate commercial surrogacy into the area of adoption law. Compassionate surrogacy is currently dealt with under adoption law. This option would permit the payment of reasonable expenses to the surrogate, but would be less

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13 Supra 4, p 278.
open to the paying of fees, as the Adoption Act 1955 does not allow payments in consideration of adoption.\textsuperscript{14} What this option would also allow is a “change of heart period” for the surrogate, meaning she could change her mind about conferring parenthood, even after handing over the child, but before signing the adoption papers.\textsuperscript{15} Under the Adoption Act, the mother’s written consent to adoption is not admissible unless the child is at least 10 days old at the time the mother gives that consent.\textsuperscript{16} The equivalent law in the UK gives a surrogate six weeks to change her mind.\textsuperscript{17} This element of adoption law might perhaps be useful to commercial surrogacy (as I will discuss below), but total assimilation into adoption law would not remedy all problems in commercial surrogacy, and would be inappropriate in so far as adoption law rejects payments being made.

5.3.4 Enforceable with Specific Performance

Another option is to hold the contract enforceable, and let the court grant either party specific performance. This means the party attempting to break the contract would be forced to fulfill their contractual obligations, thus providing more certainty for the contractual parties. It is not an uncommon argument that specific performance should be the ordinary remedy for surrogacy contract disputes.\textsuperscript{18} Much of the public opinion in the Baby M case felt that this was the clear-cut remedy for the breach of contract.\textsuperscript{19} However specific performance as a remedy is at the discretion of the Court, and the Court will consider several things in deciding whether to grant it. Specific performance was

\begin{itemize}
  \item \textsuperscript{14} Adoption Act 1955, s25(1): “Except with the consent of the Court, it shall not be lawful for any person to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making arrangements for an adoption or proposed adoption.”
  \item \textsuperscript{15} Supra 4, p 280.
  \item \textsuperscript{16} Adoption Act 1955, s7(4)(7).
  \item \textsuperscript{17} Adoption and Children Act 2002 s47(4)(b): a condition of an adoption order being made is “the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old.”
  \item \textsuperscript{18} Marjorie Shultz, for example, argues that failing to give effect to the intentions of the parties “is to disregard one of the most distinctive traits that makes us human ... To disregard such intention with reference to so intimate and significant an activity as procreation and child-rearing is deeply shocking.” She believes that “specific performance of agreements about parenthood in some sense confirms core values about the uniqueness of life.” Shultz, “Reproductive Technology and Intention-based Parenthood: An Opportunity for Gender Neutrality” Wisconsin Law Review vol. 2, pp297-398, pp 377-8, 364. As cited in Jackson, Supra 9, p 313.
  \item \textsuperscript{19} Supra 3, p 319.
\end{itemize}
traditionally considered if damages were unlikely to be adequate, however the appropriateness of the remedy in the particular circumstances is more often considered now, rather than just viewing specific performance as a secondary alternative.\(^{20}\)

The best interests of the child are always the primary consideration. Therefore as noted above, for public policy reasons a contract could not be the sole determinant for the placement of the child. However, if the court decided placement with the commissioning couple was in the child’s interests, they could go ahead with considering a remedy of specific performance. If the child’s best interests were obviously favoured by granting custody to the commissioning parents, then it would appear that the contract had nothing to do with the decision; it would merely seem that the best interests test happened to give the same result as the contract. However, in a situation where the child’s best interests seemed equally favoured by granting custody to either set of parents, specific performance of the contract could be the deciding factor.

One thing that the Court considers, when deciding whether to grant specific performance, is whether the contract is for personal services. Based on the idea that it is undesirable, and usually impossible, to compel an unwilling party to maintain continuous personal relations with another, specific performance will normally not be granted for a contract for personal services.\(^{21}\) A commercial surrogacy contract is a contract for personal services. However it is different to most personal service contracts in that the child is separable from the contracted mother.\(^{22}\) Because of this, the surrogate would be able to uphold her part of the contract without having to maintain continuous personal relations in the future.

Another consideration is the principle of mutuality. Under this principle, the possibility of specific performance is based on whether the other party could also demand specific performance.\(^{23}\) This would be relevant, as if the surrogate could be forced to

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\(^{21}\) Ibid, p 768.

\(^{22}\) Supra 4, p 279.

\(^{23}\) Supra 20, p 771.
relinquish the child against her will, so could the commissioning couple be forced to receive a child they no longer wanted. Forcing a couple to adopt a child they no longer wanted would obviously not be in the best interests of the child. A Court would therefore be unlikely to make such an order, and for this reason, specific performance would not appear to be appropriate for resolving commercial surrogacy contract problems.

The other major factor for a Court considering specific performance in these circumstances would be hardship to the defendant (the person who has broken the contract). Specific performance will not be ruled out merely because it would be disadvantageous to the defendant, rather it must cause him/her severe hardship. An example is where the cost of performance to the defendant is out of all proportion to the benefit the plaintiff will receive.\(^{24}\) The harm to a surrogate mother who must unwillingly give up her child is not necessarily out of proportion to the joy of a couple who receives their long-desired-for child. Equally the harm to a couple who are forced to adopt a child they do not want is not necessarily out of proportion with the harm to a surrogate mother forced to keep a child she never intended to raise. However despite not being out of proportion, these hardships would still be considered significant. Thus for this reason as well, specific performance does not seem a suitable relief for a broken commercial surrogacy contract.

5.3.5 Partially Enforceable with Damages

Upon the breaking of a contract, the other available remedy is for the court to award damages. Such damages should reflect what the plaintiff has lost due to the failure of the defendant to perform the contract.\(^{25}\) This option would give the surrogate a choice. She could choose to break the contract and keep the child, knowing that she would then likely have to pay damages to the commissioning couple. This could not remain an option for the surrogate indefinitely; she could not change her mind years later and demand the return of the child. This is where a “change of heart period” could come in. There would

\(^{24}\) Ibid, p 767.

\(^{25}\) Ibid, p 774.
be a set number of days or weeks, before which any consent to adoption would not be valid. After that period, consent to adopt given by the surrogate would be valid and binding, and she would no longer be able to renege on the contract.

One of the biggest problems many people have with commercial surrogacy is the idea that a contract can force a surrogate to hand over a child she has unintentionally become attached to and no longer wants to give up. Larry Gostin argues that “the rights of a gestational mother to make future decisions about her body, lifestyle and an intimate future relationship with her child are so important to her dignity and human happiness that they should be regarded as inalienable.”

A “change of heart period” would solve this issue. Whether it would be 10 days before a consent to adoption be deemed valid, as per current New Zealand adoption law, or six weeks as in the UK, or somewhere in between, the surrogate would only have to hand over the child if she was still sure about doing so, after having given birth. Specific performance would no longer be an option for enforcing the contract, thus also avoiding the public policy issue. An adoption would only go ahead if the surrogate still wanted it to, therefore placement of the child would be according to the mother’s wishes, rather than the terms of a contract. The best interests of the child would therefore only be relevant in deciding the fitness of the adopting couple to be parents, as is the case with any adoption, as there would be no argument about which of two sets of parents would be more suitable. If a dispute arose after consent had been given, the mother would no longer have an absolute right to change her mind. Instead her right would be qualified by the best interests test, and placement of the child would likely depend on whether it had bonded with the new family. British case law on mothers who initially consent to adoption and later change their mind shows that the court’s overriding concern will be to protect the welfare of the child by avoiding disruption.

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Jackson notes that allowing the surrogate to change her mind about giving up the child would not require the entire contract to be unenforceable. The contract could remain enforceable in terms of paying money owed to parties upon fulfilment of contractual terms, and responsibilities of the parties. Thus the court could grant damages to the commissioning couple, as a result of not receiving the child. These damages would return to them any money already paid to the surrogate, and compensate for any other costs incurred in relation to the broken arrangement.

The court could enforce the payment of a fee to a surrogate who had fulfilled her role, or order the return of payments that had been made to her, if she decided to keep the child. The court could also order the commissioning couple to pay damages if they changed their minds about adopting, or hold them responsible for arranging an alternate adoption. If the child were not able to be adopted out, perhaps due to disability, the couple might have to pay damages to cover the cost of raising the child. In relation to wrongful birth claims (where the birth of a child results from medical negligence), it has not been decided in New Zealand whether to follow the English approach of no liability for the ordinary costs of rearing a child, or the Australian approach, which does allow such claims. Therefore it is unclear what the New Zealand response on this issue would be in relation to commercial surrogacy. As foreseeability is relevant in determining the extent of responsibility of the negligent doctor in medical negligence cases, I believe there may be more reason to hold commissioning parents liable for the costs of raising a child they decide to reject, as surely it is more foreseeable that their actions would amount to this unexpected cost for the surrogate.

29 Supra 9, p 308.
30 In McFarlane v Tayside Health Board [1999] 4 All ER 561, it was held that damages for the cost of raising a healthy child can not be recovered. In Parkinson v St James and Seacroft University Hospital NHS Trust [2001] 3 All ER 97, damages were awarded for the child’s special needs and care relating to his disability, but this did not extend to the basic costs of his maintenance.
If the commissioning parents changed their minds about becoming parents of a child, the damages they would be ordered to pay could be significantly higher than those a surrogate would be expected to pay if she changed her mind about handing over the child. This comes down to the need to provide for the upbringing of the child, and the motivations of the parties for changing their minds. A surrogate is likely to have changed her mind because she has become attached to the child and does not feel emotionally able to part with it. The commissioning parents are more likely to have changed their minds about becoming parents, which at this late stage of proceedings is highly irresponsible, or have rejected the baby perhaps due to a disability, which is far less admirable than the surrogate’s reasons. I recognise of course that there may be exceptions to these assumptions (for example a surrogate may threaten to keep the child unless she is paid more money), and of course a Court would consider the actual circumstances when deciding damages.

Tong notes the practical disadvantages of a damages approach. She suggests that as surrogates are generally less wealthy than contracting couples, they will have difficulties paying the damages the Court orders them to pay. While surrogates are generally less wealthy than the contracting couple, Tong is assuming that surrogates are usually poor, a claim that I noted in chapter three is often not true. Additionally adequate counselling before entering a surrogacy agreement would necessarily cover these sorts of risks, so that a potential surrogate would be forced to consider this. Tong also asserts that money will not adequately compensate the childless commissioning couple, or the surrogate left with a child she never intended to keep. While this is true, it may just have to be accepted that this is an element of commercial surrogacy that people will have to risk if they want to become involved in the practice.

This option would avoid the problems of forcing a surrogate by contract to give up a child she wanted to keep. It would also circumvent the public policy issue. At the same time it would provide more security for the contracting parties, as the other

33 Supra 4, p 279.
34 Idem.
contractual elements, such as payments, would be guaranteed, and damages would be a remedy. Though this remedy might seem less ideal to the parties than specific performance, it would be significantly better than leaving the contract completely unenforceable. For these reasons I see this option as most suitable for dealing with commercial surrogacy contracts in New Zealand. This approach would also be suitable for compassionate surrogacy, so that where there was an agreement to pay expenses, the agreement could be enforced, but the surrogate could still change her mind about giving up the child.

5.4 How Far Can a Contract Go?

Another issue relating to commercial surrogacy contracts is just what kind of terms it is permissible to include. Is it acceptable to set terms that require the surrogate to eat only healthy foods and refrain from drinking or smoking? What about requiring that the surrogate will breastfeed the child for a certain time after birth? May the commissioning couple require the surrogate to have prenatal testing, and if the result is unsatisfactory, may they force her to have an abortion?

One argument against the enforceability of surrogacy arrangements is that contracts are overly restrictive of individual liberty. Mary Lyndon Shanley has argued that “pregnancy contracts might ... usefully be compared to contracts for consensual slavery.” However Jackson rightly notes that this parallel is a weak one, as the commissioning couple cannot be said to own the surrogate. She also notes that John Stuart Mill’s objection to a person selling themselves into slavery was that, in that one action of exercising autonomy, a person precluded any future capacity for exercising autonomy. The difference with a contract for commercial surrogacy is that the contract is for a finite period of time, not unlike many other contracts for services where a person surrenders some portion of their liberty in return for something they consider more

valuable (after all, that is the point of a contract). This shows that contractual terms, which limit the surrogate’s liberty in some way, are not automatically unacceptable.

Nevertheless, some clauses could amount to an undue restriction on a surrogate’s autonomy. A requirement that a surrogate undergo prenatal tests, or have an abortion if the foetus proved abnormal would interfere with the bodily integrity of the surrogate if she did not consent, and could not be enforced. As with the requirement to hand over the baby, specific performance of such terms would be inappropriate, not to mention illegal, as they would amount to assault and battery.

Other contractual terms for things such as taking care of health needs (to a reasonable extent) and agreeing to breastfeed, do not seem such significant interferences of bodily autonomy, as long as they are clearly consented to when the contract is first set out. Once again, breach of any terms that required the continuation of a personal service would likely be remedied by damages rather than specific performance. Statutory guidelines could set out in general terms what sort of arrangements a commercial surrogacy contract could permissibly entail, with the finer points settled between the parties. Guidelines could also require a minimum wage to be paid to the surrogate, as a protection against exploitation, and clauses stating that payment is contingent on a live birth could be restricted in order to protect the surrogate and prevent elements of babyselling.

By accepting that some contractual terms could at least be remedied by damages, some certainty in commercial surrogacy contracts would be obtained. At the same time, limiting the validity of particular terms, which unduly restricted the surrogate’s bodily integrity, would satisfy those who feared surrogates losing control over their own body.

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36 Ibid, p 312.
37 Ibid, p 313.
5.5 Regulation

Even if my preferred option for a partially enforceable contract was accepted, for a commercial surrogacy arrangement to come to its intended conclusion, the child must still be adopted by the commissioning parents. The Law Commission has noted that this may pose some conceptual difficulties, as “the purpose of adoption should be to provide an option for children whose families cannot or will not care for them, whereas surrogacy involves deliberately creating a child to be handed over to another couple.”\textsuperscript{38}

The Law Commission acknowledges surrogacy cannot be treated in totally the same way as adoption. Surrogacy, and commercial surrogacy in particular, involves issues additional to those that arise with adoption. As I have repeated throughout this dissertation, there is a strong need for regulation in commercial surrogacy. It is important that all parties are screened prior to attempting conception. This is so as to deal with matters such as ensuring the potential surrogate feels she is capable of giving up a child; determining the reasons for the commissioning couple trying surrogacy (e.g. to ensure it is not for convenience etc); and medically screening all participants, including the surrogate’s partner, for infections and conditions such as AIDS. Additionally it is important that all parties receive counselling and independent legal advice. They all need to know what to expect, what the other parties expect, and what could go wrong.

While it should be obvious how important it is that such screening and counselling occurs before the conception and birth of a child, it is less obvious that parties to a commercial surrogacy agreement will seek out such assistance of their own accord. Additionally, as many surrogacy arrangements can be initiated in secret, it is difficult to see how such regulatory requirements could be enforced at this early stage of an arrangement. The Law Commission suggests a structure to regulate before the baby is

conceived. Once the baby is conceived, the regular adoption procedures could be followed.\textsuperscript{39} I will discuss this suggestion for regulation below.

The Law Commission has also said that commissioning parents often do not apply to adopt the child until it has already been living with them for some time. This presents the court with a fait accompli, as although the couple have breached the requirements regulating the placement of children for adoption, the child may have bonded with the commissioning parents.\textsuperscript{40} So while the courts do not want to encourage breaches of regulation, it may not be in the child’s best interests to be taken from a family it has bonded to. This was the situation in the Baby M case. Legally what the commissioning couple should do is be screened by Child Youth and Family Services (CYFS) before taking custody of the child. Unless the surrogate is related to the commissioning couple, not letting CYFS screen them is a breach of s6 of the Adoption Act.

Some people argue against the need for commissioning parents to be screened for suitability, particularly when the child will often be genetically related to them. Similar screening is not required of parents who reproduce in the traditional way, or of consumers of fertility services who may use donor eggs and sperm, and thus may not be genetically related to their child. However I find compelling, as does the Law Commission, the argument that “because care of the child is being transferred from the birth parent to a person unrelated at law, the State has a legitimate interest in ensuring the suitability of the proposed parents to care for the child.”\textsuperscript{41} As the process governing the transference of custody is sanctioned under the law, the State becomes responsible for ensuring the transfer is responsible. If transference of custody, without screening, ultimately harmed the child, the State would be partially responsible.

Even if the commissioning parents apply for adoption immediately, several aspects of commercial surrogacy amount to breaches of the Adoption Act 1955. In two

\textsuperscript{39} Ibid, p 200.
\textsuperscript{40} Ibid, p 201.
\textsuperscript{41} Idem.
New Zealand cases, *Re Adoption of P* and *Re Adoption of G*, advertising, paying money to the birth mother, and assuming care of the child without approval from CYFS, were all breaches of the Adoption Act. However orders for adoption were made on the basis that the commissioning parents were suitable and that the payments were for surrogacy and not adoption. While these breaches of the Adoption Act did not bar adoption orders being made, the court’s approach may be different now that commercial surrogacy has explicitly been made illegal.

If the prohibition against commercial surrogacy were to be lifted, adjustments to adoption law would need to be made, in order for commissioning parents to feel more secure in applying for adoption. Applying for an adoption order, knowing they have breached the Act they are applying under, must be nerve-racking for commissioning parents, as they can only hope the court will not find the breach sufficient to bar an adoption order. This is only likely to cause commissioning parents to shun formal adoption. However if the commissioning parents just take the child home, they have no legal rights or responsibilities for the child, thus the situation of the child is far from secure. While the parents may apply for guardianship through the Family Court, this will give them the legal rights and responsibilities, but not the status of parents, and will not affect the rights and responsibilities of the legal parents. It has been recommended to the Law Commission that there be a fast-track procedure for adoption by commissioning parents to ensure stability for the child.

So with commercial surrogacy we face three problems: it will be difficult to enforce regulatory requirements that parties go through screening and counselling prior to conception; it will be difficult to ensure that commissioning couples are screened by CYFS for suitability before they take custody of the child; and there is no encouragement for adoptive parents to go through the formal adoption process. A proposal by the Law Commission that there be a fast-track procedure for adoption by commissioning parents to ensure stability for the child.

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Commission, regarding surrogacy in general, would solve all these problems. I suggest their proposal is an excellent way to regulate commercial surrogacy arrangements.

5.5.1 Law Commission’s Proposal

The Law Commission proposes that a pre-conception assessment of the commissioning couple should be carried out by CYFS. The assessment would determine whether the commissioning parents were acceptable applicants for an adoption order, and would require that the appropriate screening and counselling had taken place. The benefit to the commissioning couple would be certainty that their application for adoption would not be stalled or rejected once the child was born. The benefit to the child of this pre-conception assessment would be that their future would be more certain. The Commission also suggests that to persuade those involved in surrogacy arrangements against presenting the court with a fait accompli (as discussed above) a disincentive be put in place. This disincentive would be that those persons failing to comply with the above requirements would face a rebuttable presumption that they are not suitable parents for that child, thus making their application for adoption more difficult.45 The Commission adds that medical practitioners should be forbidden to assist with surrogacy arrangements that have not received pre-approval.46 I would extend this restriction to include legal professionals who assist with surrogacy arrangements past the point where pre-approval should be obtained.

I would also extend this restriction to include commercial surrogacy brokers. Brokers are those persons who bring willing surrogates and hopeful couples together, charging a fee for this service. Such persons are occasionally exploitative, charging almost as much as the surrogate gets paid, if not more, without even ensuring that appropriate screening, counselling and legal advice takes place. American Lawyer and surrogacy pioneer Noel Keane arranged the surrogacy arrangements in both the Baby M case and the Malahoff case, discussed above. Both of these infamous examples of

45 Supra 38, p 202.
46 Ibid, p 203.
surrogacy agreement break-downs appear to have been seriously mismanaged. At the time of the Baby M case, Keane was being sued by four surrogates from his program, including Baby M's mother, who was suing for fraud and negligence. It has been suggested his screening and counseling procedures were less than scrupulous. He received fees of $5,000 and $7,500 for his part in these cases, while the surrogates received $10,000.47

By using the form of regulation suggested by the Law Commission, those persons wanting to become involved in commercial surrogacy would be given sufficient incentive to abide by the regulation. In this way they would be subject to the necessary screening and counselling, and would likely abide by adoption laws, thus avoiding presenting the court with such awkward decisions, and thereby ensuring the best interests of the child.

5.6 Conclusion

Though perhaps as few as one percent of commercial surrogacy contracts break down, the case examples discussed above demonstrate that the consequences are severe when an arrangement does not go as intended. The best approach is therefore to set a clear legislative framework for commercial surrogacy. In my opinion, the best solution in terms of the status of a commercial contract is to make it enforceable in part, with damages an available remedy. This results in some security for the contracting parties, knowing that terms are enforceable and damages are payable in the event of non-fulfilment. At the same time, the surrogate cannot be forced to give up the child if she changes her mind. I believe the best solution in terms of regulation is a pre-conception assessment as suggested by the Law Commission. This would ensure that appropriate counselling and screenings occurs, reassure parents that acquiring parental status through the proper channel is most beneficial to all parties, and thus ensure the stability and security of surrogate children by settling the legal status of their parents.

47 Supra 3, p 333, footnote 11.
Chapter 6: Conclusion

Infertility can have a devastating effect on people’s lives. The wish to have children is a basic human desire, and for some people surrogacy is the only option to fulfil this desire. Compassionate surrogacy is lawful in New Zealand and is generally regarded as a positive thing. But surrogacy is not free from cost for the surrogate. They are likely to incur medical expenses, clothing costs and they may face loss of income. Yet none of these expenses can lawfully be charged to the commissioning parents. Section 14 of the HART Act makes it an offence to give or receive valuable consideration for participation in a surrogacy arrangement except for very limited reasons. Surrogacy is therefore unattractive in financial terms and discouraged. Thus to make surrogacy arrangements more accessible, and to allow adequate compensation for the service a surrogate provides, commercial surrogacy should also be a legal option for infertile persons who have limited alternative options. Surrogacy should not be used merely for convenience, as mere convenience cannot justify transferring the burden of risk of pregnancy from one woman to another, and such a practice could lead to a class-like system for reproduction. However with sufficient regulation, commercial surrogacy can be immensely rewarding for all parties involved. Allowing commercial surrogacy would be comparable to other recent public policy changes particularly in the area of organ donation.

Criminalising commercial surrogacy, as the HART Act recently has, interferes with the procreational liberty of those persons who have limited alternative options. Procreational liberty is a right to decide whether or not to reproduce, and for those people for whom commercial surrogacy is a last resort, prohibiting commercial surrogacy effectively takes away the opportunity to decide. No matter what the circumstances of conception and gestation, for the commissioning parents the event of reproduction has the meaning and significance that procreational liberty deems worthy of protection. Procreational liberty as a right may only be limited where it affects the rights of others or would ignore the interests of the child intended to be brought into the world.
It is debatable whether procreational liberty also protects the rights of women wanting to act as surrogates for money. However, not allowing them to charge for the services they provide in a surrogacy arrangement does interfere with their autonomy. Autonomy, while not being an absolute right, is a very significant one that should not be interfered with lightly. As commercial surrogacy does not cause significant harm, a woman's right to make an autonomous decision about being a commercial surrogate should be protected.

As commercial surrogacy does not cause significant harm, it should also be allowed in order to protect all potential parties' rights to freedom of contract. The right of persons to bind themselves legally should not be subject to external interference when the contract is based on mutual agreement and free choice, and would not cause significant harm or involve illegal matters. While public policy may limit commercial surrogacy contracts, this limit does not make the contract worthless, as contracts are always potentially subject to the restrictions of public policy. Therefore the right to freedom of contract does support the right to contract for surrogacy.

The primarily emotional arguments against commercial surrogacy, while worthy of consideration, do not amount to reason for banning the practice. Arguments regarding the severing of the mother-child relationship and the intrusion into the unity of marriage can be dismissed with rational arguments. The deep-seated emotional concerns that remain despite such reasoning must be respected, but cannot be allowed to disproportionately influence public policy decisions. More than moral discomfort is needed in order to interfere with the rights of procreational liberty, autonomy and freedom of contract.

Harm to children, if proven, would be good reason to interfere with the above mentioned rights. However this argument is not made convincingly by opponents. It appears the psychological harms said to arise from being separated from one's parents or discovering money changed hands over one's birth, may in fact be less of a worry in commercial surrogacy than in comparative practices such as adoption and AID. These
harmdoes, and suggestions that a child is premeditatedly harmed by commercial surrogacy, are nothing more than speculation. Harm from intolerance and from arrangement breakdowns can hardly be said to be unique to commercial surrogacy, as these are risks all children face. As for harm to those children who might otherwise have been adopted, many people turn to surrogacy because there are not enough children available for adoption, and at any rate, infertile persons bear no more responsibility for neglected children than anyone else. These arguments are not only unconvincing, they also apply to many other practices; and in particular compassionate surrogacy, which has been accepted in New Zealand despite these arguments. Thus they do not amount to a sufficient reason to ban commercial surrogacy.

The argument that commercial surrogacy exploits women does not justify interference with the above mentioned rights either, as the claimed exploitation either does not exist, or where it does exist, is not necessarily harmful. The claim that commercial surrogacy is exploitative because desperate need undermines consent is inadequate because many contracts result from desperate need and this justifies only regulation, not prohibition. Also most surrogates do not seem to enter commercial surrogacy arrangements because of a desperate need for money. The argument that offering a woman money to be a surrogate is exploitative because it is coercive is incorrect, as it is an offer to make the woman better off, not a threat to make her worse off. The money offered may be an inducement, but then most employment involves inducement. In fact paying a surrogate for her services may be less exploitative than expecting her to provide her services for free. The transference of risk of pregnancy from one woman to another in surrogacy is not dissimilar to many other jobs women take on. This is not a reason to prohibit commercial surrogacy; rather it strengthens the argument that surrogates should be adequately compensated. Incommensurability does not show commercial surrogacy to be exploitative as it does not prove any party is negatively affected, and an object or service's value will usually be subjective. The argument that commercial surrogacy commodifies a form of labour that should never be exchanged for money does not establish that it harms or exploits surrogates. As for whether it harms women as a class by reinforcing inequalities of gender, the intolerance of some persons
does not justify restricting the freedom of women. At any rate, evidence of exploitation
does not justify prohibition if commercial surrogacy is still of benefit to all parties. When
sufficient regulation of commercial surrogacy is in place, that would appear to be the
case.

The argument that commercial surrogacy commodifies children wrongly relies on
the assertion that commercial surrogacy is baby-selling. The fee in commercial surrogacy
pays for the service the surrogate provides in carrying and delivering the child. It is not
payment for the transfer of the baby, thus it is not baby selling. This is particularly
apparent when we see that the commissioning parents cannot treat the child as a
commodity, and must pay the surrogate even if the child is stillborn, thus showing that
they have paid for a service and not for a child. While it may then be said that the
surrogate’s labour is commodified, this is not problematic, as any arguments that
women’s labour should be treated differently from other types of labour we usually pay
for are unconvincing. Attempts to show commercial surrogacy to be problematic through
comparisons to prostitution rely on silly slippery slope arguments, and in fact suggest we
are being overly cautious as prostitution has been decriminalised. Labelling reproduction
as noble labour is no more helpful in opposing commercial surrogacy, as much noble
labour is paid for.

Restricting commercial surrogacy is said to be necessary in order to prevent the
decline of altruism in society. However prohibition will merely create a state of artificial
altruism; people will only decline to participate in commercial surrogacy because of legal
restrictions, not because they are trying to protect the altruistic integrity of surrogacy. At
any rate, we have not similarly admonished those who charge for their services in caring
for children or elderly, among other services that once were solely altruistic. And
significantly, this argument ignores that altruism is in fact a significant motivation for
many, if not most, commercial surrogates; monetary compensation and altruistic
motivations are not mutually exclusive.
The introduction of the HART Act, and recent changes to the regulation of compassionate IVF surrogacy, indicate that policy in New Zealand is moving towards tighter restrictions on surrogacy, rather than becoming more moderate. The more appropriate response would be to introduce appropriate regulation, rather than blanket prohibition. Regulation would require deciding on the status of commercial surrogacy contracts. I have argued that they should be enforceable in regard to the financial terms but that transfer of parenthood should be subject to the child’s best interests, with damages available for breach of contract. The experiences of other countries suggest that criminalisation is not the most effective method. Regulation would also limit the kinds of clauses a surrogacy contract could legally include. Though adoption is the method used to transfer legal parenthood from the surrogate and her partner to the commissioning parents, adoption law was not formatted with surrogacy in mind and the particularities of commercial surrogacy are not adequately dealt with by adoption law.

The regulatory proposal made by the Law Commission would be a more appropriate process for dealing with commercial surrogacy. A pre-conception assessment would ensure the appropriate counselling and screening was carried out before conception occurred, and would improve the process for transferring parenthood to the commissioning parents. The child’s situation would be more stable with parenthood legally determined at this early stage, and the rebuttable presumption of suitability would provide adequate incentives for parents to comply with the regulation.

Commercial surrogacy can be a valuable and admirable practice. Restricting it unjustly interferes with person’s rights of procreative liberty, autonomy and freedom of contract. Arguments that it harms children, exploits women, commodifies women and children and reduces altruism in the community do not stand up to scrutiny, and do not provide justification for the interference with those rights. Any risks associated with commercial surrogacy can be adequately dealt with by sufficient regulation. Thus the prohibition on commercial surrogacy in New Zealand should be lifted, and New Zealanders should be able to access commercial surrogacy if they so wish.
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