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“Surrogate Mothering” and Women’s Freedom: A Critique of Contracts for Human Reproduction

Mary Lyndon Shanley

FEMINIST THEORISTS and students of public policy are deeply divided over the question whether the so-called surrogate motherhood contract by which a woman agrees to undergo artificial insemination, bear a child, and relinquish the child at birth to someone else (usually the biological father and his wife) is liberating or oppressive to women. Some supporters of contract pregnancy regard a woman as having a right to enter a contractual arrangement to bear a child and receive money for her service; they view the prohibition or nonenforcement of pregnancy contracts as illegitimate infringements on a woman’s autonomy and self-determination.¹ Others focus on the desire for a child that motivates those who hire a woman to bear a child; they argue that to prohibit or fail to enforce pregnancy contracts violates the commissioning party’s “right to procreate.”² Those who oppose pregnancy contracts, by contrast, see such contracts as oppressive to the childbearing woman, particularly if she enters the contract out of dire economic need or is forced to fulfill the contract against her will.³ These differing viewpoints are reflected even in a dispute as to what to call such a pregnancy; proponents tend to accept the term surrogate motherhood, while those with reservations resist calling a woman who bears a child a “surrogate” mother (although some regard her as functioning as a “surrogate wife” to a man who commissions the pregnancy).

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² Hill 1990, 157–59; Robertson 1983, 1986; Shalev 1989.

³ See, e.g., Bartlett 1988; Field 1988, 1990; Pateman 1988, 209–18; Rothman 1989, 229–45; and Okin 1990.

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While contract pregnancy clearly can be viewed from the perspective of those who commission a pregnancy as well as from that of the woman who bears the child, I put the childbearing woman at the center of my analysis.⁴ In doing so I seek to focus discussion directly on the issue of women's freedom, both because differing understandings of whether pregnancy contracts enhance or violate a woman's freedom deeply divide feminists, and because the ways in which proponents and opponents describe the gestational mother reveal important but largely unarticulated differences in their views of two clusters of considerations that extend beyond contract pregnancy. The first is the importance we give to human embodiment in our understandings of the “self” and its freedom, and the second is the tension between promoting freedom through contracts on the one hand, and the recognition and preservation of non-contractual human relationships on the other.

Because they raise issues of individual autonomy, freedom, and contract, these considerations are important for liberal feminist theory in general. Starting our analysis of contract pregnancy from women's experiences and perspectives compels us to see how some forms of liberal theory have ignored or misunderstood what it means to be “free” and “autonomous” as physically embodied and gendered beings. Contract pregnancy sheds important light on the necessity for any adequate account of human freedom to attend to the conditions under which we form, sustain, and develop within relationships—including sexual and reproductive relationships—that are central to human existence. Contract pregnancy raises issues that are important not only for the children, mothers, and fathers who are directly touched by them, but also for all those concerned with the meaning of new reproductive practices for the common life we shape together through public discourse and law.

I. “Woman's body, woman's right”: Considerations in favor of pregnancy contracts

It is no wonder that many feminists have welcomed contract pregnancy as a way to illustrate that childbearing and child rearing are two quite distinct human functions and that child rearing need not and should not be assigned exclusively to the woman who bears a child. A woman's agreement to bear and then to relinquish custody of a child offers concrete resistance to the overly close connection that law and social practice have often made between women's childbearing capacity and other as-

⁴ Defenses of the practice of contract pregnancy that focus on the “right to procreate” sometimes ignore the ethical issues related to the woman who bears the child. Robertson 1983 and 1986 render the pregnant woman all but invisible. For a critique of Robertson's work, see Ryan 1990.

pects of their personalities. Motherhood has often been taken as women's preeminent, even defining, characteristic, and possession of a womb deemed reason enough to disqualify women for most activities of public life.⁵ Separating the responsibilities of parenthood from gestational activity allows us to see childbearing as one thing a woman may choose to do, but by no means as the definition of her social role or legal rights. In a somewhat parallel fashion, a man who commissions a pregnancy undertakes "fatherhood" quite consciously, and might be expected to be more involved in caring for the child than men traditionally have been. Marjorie Shultz believes that contract pregnancy is thus a way to make the assumption of parental responsibilities more gender neutral: it can "soften and offset gender imbalances that presently permeate the arena of procreation and parenting" (Shultz 1990, 304).

Just as "surrogacy" emphasizes that not all women who bear children (or who have the capacity to bear children) need be thought of as mothers, it allows women who cannot bear children to assume the responsibilities of parenthood. This can also be done through foster care and adoption, of course, but a contract pregnancy allows a couple to take responsibility for a child even before conception; in a heterosexual couple it enables at least the man and sometimes the woman to have a genetic relationship to the child. The "heightened intentionality" of contract pregnancy makes it possible for any number of persons of either sex to commission a pregnancy. While most known contracts to date have involved married couples, there is no technological reason why anyone, male or female, married or not, could not provide or purchase sperm and, using artificial insemination, impregnate a "surrogate" to obtain a child by contractual agreement; this would encourage a plurality of family forms in which parents would share a deep commitment to raising children (Shultz 1990, 344).

Carmel Shalev regards the gestational mother's obligation to relinquish the child she bore for the commissioning party as an expression of her freedom to undertake whatever work she chooses. She argues that "the refusal to acknowledge the legal validity of surrogacy agreements implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive activity." Like other defenders of contract pregnancy, Shalev places great emphasis on the consent that is at the heart of any valid contract. "If the purpose is to increase the voluntariness of the decision, attention should focus on the parties' negotiations before conception. If conception is intentional and the surrogate mother is an autonomous agent, . . . why should she

⁵ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961), which held that Florida's automatic exemption of women from jury duty because they might have dependent children at home was not unconstitutionally overbroad. See generally Rhode 1989, 29-50.

not be held responsible for the consequences of her autonomous reproductive decision?” (Shalev 1989, 11–12, 96). The same liberty that should protect a woman from any governmental effort to prohibit birth control or abortion or to force sterilization also protects her freedom to agree to carry a child for someone else. The slogan “Woman’s body, woman’s right” succinctly captures the notion that a woman herself—not a husband, not a doctor, not the state—must make those procreative decisions that affect her.

Those who see contract pregnancy as an exercise of freedom particularly emphasize that consent is given prior to conception: “The surrogate consciously enters into the agreement and voluntarily consents to give up the child even before she becomes pregnant. Rather than being unwanted, the pregnancy is actively sought” (Katz 1986, 21). Or again, “if autonomy is understood as the deliberate exercise of choice with respect to the individual’s reproductive capacity, the point at which the parties’ intentions should be established is before conception” (Shalev 1989, 103). Defenders of contract pregnancy seek to distinguish it from baby selling, arguing that it is not the child or fetus for whom the woman receives payment, but the woman’s gestational services.

But how can one be sure a woman’s agreement is really voluntary, her consent truly informed? Advocates of contract pregnancy propose a variety of safeguards to help ensure that pregnancy contracts will be fair and noncoercive. For example, so that women fully understand what kind of physical and emotional experiences to expect from pregnancy, the law could allow only women who have previously given birth to contract to bear a child for someone else. To facilitate adjustment to this new mode of family formation, all parties to a contract pregnancy could be required to undergo counseling before the conception, during the pregnancy, and after the birth. And to avoid financial exploitation of poor or economically vulnerable women, only those with a certain level of financial resources could be allowed to enter a pregnancy contract.⁶ The emphasis in all these proposals is on the combination of reason and will that are involved in consent. “In contract law, intent manifested by a promise and subsequent reliance provides the basis for enforceable agreements. Typically, the mental element is the pivotal element in determining legal outcomes” (Stumpf 1986, 195). If the choice is a free one, argues Marjorie Shultz, then “the principle of private intention [should] be given

⁶ See, e.g., Andrews 1989, 252–72; Shalev 1989, 144; and Hill 1990, 157–59. In his decision in Orange County (Calif.) Superior Court, Judge Richard N. Parslow awarded custody to the commissioning parents, and “he proposed that all parties to any surrogate agreement undergo psychiatric evaluation, that all agree from the start that the surrogate mother would have no custody rights, that she have previous experience with successful childbirth and that a surrogate be used only in cases where the genetic mother is unable to give birth” (Mydans 1990, A14).

substantial deference and legal force" (Shultz 1990, 398). Attention should focus on whether conditions under which the mind can be held to have freely acceded to the bargain pertained when the contract was made.

Feminist proponents of contract pregnancy argue that those who would allow a "surrogate" to change her mind about relinquishing custody fall into the age-old trap of assuming that women are not as rational as men or that their reason can be overridden by instinct or sentiment. "The paternalistic refusal to force the surrogate mother to keep her word denies the notion of female reproductive agency and reinforces the traditional perception of women as imprisoned in the subjectivity of their wombs" (Shalev 1989, 121). One surrogate mother quoted approvingly by Lori Andrews insisted that "a contract is a contract. . . . It's dangerous to say that we are ruled by our hormones, rather than our brains. You don't have a right to damage other people's lives [i.e., those of the expectant couple deprived of a child when a surrogate reneges] because of your hormones." Robin Bergstrom, a legislative aide in the New York State Senate, is quoted in the same vein, "I truly can't understand the feminists who are now arguing against women's rights [i.e., to prohibit payment to surrogates and to make pregnancy contracts revocable]. . . . Women's rights have been cut back in the past based on male perceptions that women are incompetent to make decisions, but this time women will be putting it on themselves" (Andrews 1989, 92, 223).

It is important to notice that these arguments about a woman's free consent to bear a child assume, implicitly or explicitly, that the "work" of pregnancy is analogous to other kinds of human labor. What distinguishes allowing a surrogate to renege on her contract from state interference in women's contractual capacity implicated in much protective labor legislation? In the early twentieth century many feminists supported legislation to protect women from oppressive working conditions, although the U.S. Supreme Court had struck down protective labor legislation for men as a violation of freedom of contract (Sklar 1986, 25–35). But by the 1990s most advocates of women's rights had come to argue that women should not receive protections unavailable to men, with the possible exception of maternity leave, so that they, like men, could become parents without forfeiting their jobs (many feminists, of course, advocated gender-neutral parental leave policies; Finley 1986, 118–82; Littleton 1987, 1043–59). Many argued that even when work involved substances that might cause fetal damage, pregnant women should not be barred from such jobs. If, after appropriate medical and psychological counseling, a woman freely consents to a pregnancy contract, then allowing her later to renege on her agreement and keep custody of the child she bears—or to share custody with its biological

father—smacks of the legal paternalism that many feminists have long opposed. Is it not antithetical to all that feminists have worked for, ask proponents, to argue that women’s reproductive experience should be the grounds for allowing the law to treat their contracts concerning pregnancy as less binding than other contracts; does it not suggest that women are less bound than others by their freely given words?

Defenders of contract pregnancy assume not only that gestation of a fetus is work that is analogous to other forms of wage labor, but also that selling one’s labor for a wage is a manifestation of individual freedom. From this perspective, prohibiting a woman from receiving payment for her services bearing a child denies her the full and effective proprietorship of her body. Lisa Newton, director of the Program of Applied Ethics at Fairfield University, has argued that surrogacy is a service that is “simply an extension . . . of baby-sitting and other child-care arrangements which are very widely practiced” and that it is “irrational” to allow payment for the latter services and not for pregnancy (Andrews 1989, 267).⁷ Shalev similarly believes that “the transaction under consideration is . . . for the sale of reproductive services. . . . A childless couple is regarded as purchasing the reproductive labor of a birth mother.” Banning the sale of procreative services will “reactivate and reinforce the state’s power to define what constitutes legitimate and illegitimate reproduction,” while allowing payment will “recognize a woman’s legal authority to make decisions regarding the exercise of her reproductive capacity” (Shalev 1989, 157, 94).

The consequence of prohibiting pregnancy contracts or banning payment for gestational services is suggested by the question of the surrogate who asked, “Why am I exploited if I am paid, but not if I am not paid?” (Andrews 1989, 259). When the state forbids payment for contract pregnancy it treats reproductive activity as it has traditionally treated women’s domestic labor—as unpaid, noneconomic acts of love and nurturing, rather than as work and real economic contributions to family life. Even Margaret Radin, who opposes pregnancy contracts, acknowledges that prohibiting paid pregnancy creates a “double bind.” Contract pregnancy could “enable a needy group—poor women—to improve their relatively powerless, oppressed condition, an improvement that would be beneficial to personhood” (Radin 1987, 1916). To forbid people to labor or be paid for using their bodies as they choose when no harm is done to others seems extraordinarily hard for a liberal polity to justify, a point that proponents of the decriminalization of prostitution never tire of repeat-

⁷ Judge Parslow said that Anna Johnson had served as a “‘home’” for the embryo she carried, “much as a foster parent stands in for a parent who is not able to care for a child” (Mydans 1990).

ing.⁸ Proponents of contract pregnancy emphasize the value of allowing individuals to determine their activities and life courses as they choose. When the contract between the gestational mother and the commissioning parents reflects the procreative intentions of both parties, enforcement of the contract is the only way both to give force to the desire and commitment of those who seek to raise a child and to recognize the autonomy of the gestational mother.

Although I deeply value self-determination, I believe that pregnancy contracts should not be enforceable. I would not, however, prohibit "gift surrogacy" in which only payment of medical and living expenses would be allowed. Such surrogacy agreements could be treated like preadoption agreements that leave the birth mother free to decide not to relinquish custody at birth. I am ambivalent about whether any further payment should ever be permitted.⁹ I take up only the enforceability of contracts in any detail here.

II. "Our bodies, our selves": Considerations against irrevocable contracts

Perhaps the most salient problem with the notion that women's freedom is reflected in and protected by a contract signed prior to the conception of a child is that the woman carries to term a fetus that did not exist at the time the agreement was struck. As we have seen, most advocates of contract pregnancy insist that the payment the gestational mother receives is not for the child, but for gestational services.¹⁰ This distinction, however, seems hard to sustain when the fetus develops from the gestational mother's ovum. In such cases, the woman is contributing

⁸ The debate over whether prostitution should be decriminalized finds feminists on both sides of the issue, sometimes for reasons akin to those that divide them with respect to contract pregnancy. See discussions in Jaggar 1980; Pateman 1983; Tong 1984, 37–64; Shrage 1989; Schwarzenbach 1990–91; and Overall 1992.

⁹ Two strong critics of gift surrogacy, on the ground that it reinforces gender stereotypes of women as altruistic conduits for fulfilling the needs of others, are Sharyn L. Roach Anleu and Janice G. Raymond. Anleu 1990 concludes that commercial surrogacy provides an acceptable and desirable challenge to gender norms, while Raymond 1990 condemns both altruistic and commercial surrogacy. Richard J. Arneson, "Commodification and Commercial Surrogacy," *Philosophy and Public Affairs* 21, no. 2 (Spring 1992): 132–64, presents a thoughtful analysis that leads him to argue "tentatively for the claim that commercial surrogacy should be legally permissible" (133).

¹⁰ A few writers propose legalizing commissioned adoption or creating a market in babies, but they are in a minority, and they arrived at their views from considering issues other than contract pregnancy. Richard Posner declares that the objections to the sale of babies for adoption are unpersuasive. Even the poor might do better in a free baby market than under present adoption law because people who did not meet adoption agencies' requirements might, "in a free market with low prices, be able to adopt children, just as poor people are able to buy color television sets" (Posner 1986a, 141–42). See also Landes and Posner 1978; but see Posner 1986b, where he says he "did not advocate a free market in babies" (cited in Radin 1987, 1850, 1863).

more than the labor of her womb; she is also selling her genetic material, and it becomes difficult to see how the exchange escapes the charge of baby selling.¹¹ In addition, as Margaret Radin has pointed out, selling an ovum along with gestational services entails pricing all of a woman's personal attributes—race, height, hair color, intelligence, artistic ability—as well as her reproductive capacity, and, in a society in which women's bodies are already highly commodified by advertisers, pornographers, and promoters of prostitution, the dangers of commodification of women's attributes are palpable and pressing (Radin 1987, 1933).

When the childbearing woman has no genetic relationship with the fetus, the assertion that the commissioning couple is purchasing only gestational services is stronger. To date there are some eighty known cases in which an embryo has been introduced into another woman's womb for gestation after having been fertilized in vitro (*New York Times* 1990, 1). In the recent California case in which Anna Johnson bore a child conceived by in vitro fertilization from the ovum and sperm of Crispina and Mark Calvert and sued to have her contract declared invalid, Judge Richard N. Parslow awarded custody to the genetic parents and commented that the contract was binding: “I see no problem with someone getting paid for her pain and suffering. . . . They [gestational mothers] are not selling a baby; they are selling pain and suffering” (Mydans 1990, A14).¹² To Judge Parslow the contract appeared to be an agreement about work, and his remarks raise the question of how the “pain and suffering” of pregnancy are analogous to the physical and psychological demands of other kinds of labor.

Arguments for contract pregnancy depend, it seems to me, on a strong analogy between the “work” of pregnancy and forms of wage labor with which we are already familiar. The analogy seems to rest on two main

¹¹ Men sell their genetic material through artificial insemination by donor programs, a fact advocates of contract pregnancy often mention to argue that contract pregnancy is the analogous activity for women. The analogy between donating sperm and gestating a human fetus for nine months is extremely strained. Even donating an egg is not comparable to donating sperm, as doing so requires surgery. The logic of commercial contract pregnancy allows the eventual commodification of all procreative activity, where individuals of either sex might purchase sperm from one source, ova from another, and hire a third person to gestate the fertilized egg. This total commodification seems undesirable and at least raises the question of whether the sale and purchase (rather than the donation) of human sperm and ova is bad public policy.

¹² Judge Parslow makes a false distinction between gestational mothers who have a genetic relationship to the fetus they bear and those who do not. The absence of a genetic relationship need not alter a gestational mother's experience of pregnancy, and that experience is the basis of her custodial rights. A gestational mother undergoes all the extensive hormonal and physiological changes of pregnancy, and her social experience as a pregnant woman will be the same whether she has a genetic tie to the fetus or not. From her perspective, the distinction between “full surrogacy” (in which she donates an ovum) and “partial surrogacy” (in which she bears no genetic relationship to the fetus) may well be immaterial.

considerations: pregnancy involves the body, culminating in the extraordinary physical exertion of "labor" and giving birth; and pregnancy ends with the appearance of something new in the world, a tangible "product" of gestational work.

Human gestation is distinguished from other kinds of productive work, however, by the ways in which it involves both a woman's physical and psychological being and by the difference between the human being that results from a pregnancy and other kinds of products. I concentrate here on the woman's experience and on how a rich account of pregnancy might inform our judgment about the claim that only enforcing pregnancy contracts properly recognizes women's freedom and autonomy.

Women's accounts of pregnancy point out the complexity of women's childbearing experiences and the ways in which a woman's self, not simply her womb, may be involved in reproductive labor. Iris Young offers one such account in a phenomenological examination of pregnancy and embodiment. She notes that in our culture "pregnancy does not belong to the woman herself. It either is a state of the developing foetus, for which the woman is a container; or it is an objective, observable process coming under scientific scrutiny; or it becomes objectified by the woman herself, as a 'condition' in which she must 'take care of herself.'" Young points out that we almost never see the pregnant woman as Julia Kristeva does, as "the subject, the mother as the site of her proceedings" (Young 1990, 160). The mother's body is the "environment" in which the fetus grows, but most arguments in favor of contract pregnancy seem to posit no more intrinsic relationship between them than there would be between an artificial womb and a fetus that might develop within it. Even our everyday language reflects the distinctness of mother and fetus: pregnant women are said to be "expecting" the babies that doctors "deliver" to them (Rothman 1989, 100; Young 1990, 167).

Mother and fetus, however, are not yet, or are not in every way, distinct entities. Neither are they the same being. In her 1945 poem about abortion, "The Mother," Gwendolyn Brooks cries out against the inability of language to express the relationship between mother and fetus: "you are dead. / Or rather, or instead, / You were never made. / But that too, I am afraid, / Is faulty: oh, what shall I say, how is the truth to be said?" (Brooks [1945] 1989, 2505). In her analysis of "The Mother," Barbara Johnson notes that "the poem continues to struggle to clarify the relation between 'I' [the woman] and 'you' [the fetus]," but in the end "[the language of the] poem can no more distinguish between 'I' and 'you' than it can come up with a proper definition of life" (Johnson 1987, 190). Like Brooks, Adrienne Rich testifies to her experience of the fluidity of the boundary between self and other during pregnancy. "In early pregnancy, the stirring of the foetus felt like ghostly tremors of my own

body, later like the movements of a being imprisoned within me; but both sensations were *my* sensations, contributing to my own sense of physical and psychic space” (Rich 1976, 47). Iris Young points out that while for observers pregnancy may appear to be “a time of waiting and watching, when nothing happens,” for the pregnant subject “pregnancy has a temporality of movement, growth and change. . . . The pregnant woman experiences herself as a source and participant in a creative process. Though she does not plan and direct it, neither does it merely wash over her; rather, she *is* this process, this change” (Young 1990, 167). Mother and fetus are at one and the same time distinct and interrelated entities, and this fundamental fact of human embodiment means that to speak of the “freedom” of the mother as residing in her intention as an “autonomous” agent misunderstands both the relationship between woman and child and that of the woman to her ongoing self.

The interrelatedness of mother and fetus makes it difficult to specify exactly what gestational labor entails. Unlike other work, gestational labor is not consciously controlled; the bodily labor of pregnancy goes on continuously, even while the pregnant woman is asleep. Whether the “work” is done badly or well is only marginally within the mother’s control; she can refrain from smoking, drinking, and drug use; eat properly; and get an appropriate amount of exercise, but whether the fetus grows to term, has a safe birth, and is free of genetic abnormalities is otherwise largely beyond her ability to effect.

In her critique of contract pregnancy, Carole Pateman argues that while all wage labor involves selling some aspect of oneself to some degree, the alienation involved in selling gestational services is so extreme as to make it illegitimate. In Pateman’s view, wage labor rests on a fundamentally flawed notion of the proprietary self that assumes that it is possible to separate labor power or capacities from the person of the worker “like pieces of property.” But “the worker’s capacities are developed over time and they form an integral part of [the worker’s] self and self-identity” (Pateman 1988, 150). While this is true of all workers, some forms of labor involve the worker’s sense of self more directly and intimately than do others. Labor that leaves no time for other pursuits, deadens the mind through boring and repetitive chores, warps the spirit by requiring unethical behavior, or enfeebles the body by unhealthy practices involves a forfeiture of the self greater than that experienced by more fortunate workers. Contract pregnancy entails a very high degree of self-alienation, because the work of pregnancy involves women’s emotional, physical, and sexual experiences and understandings of themselves as women. Pateman argues that the “logic of contract as exhibited in ‘surrogate’ motherhood” sweeps away “any intrinsic relation between the female owner, her body and reproductive capacities. She stands to her

property in exactly the same external relation as the male owner stands to his labour power or sperm" (Pateman 1988, 216). This objectifies women's bodies and their reproductive labor in a manner and to a degree that are wholly unacceptable.

Elizabeth Anderson echoes this point when she argues that any form of paid pregnancy involves "an invasion of the market into a new sphere of conduct, that of specifically women's labor—that is, the labor of carrying children to term in pregnancy." In her view, "treating women's labor as just another kind of commercial production process violates the precious emotional ties which the mother may rightly and properly establish with her 'product,' the child." When a woman is required "to repress whatever parental love she feels for the child, these [economic] norms convert women's labor into a form of alienated labor." The forfeiture of self involved in contract pregnancy is an extreme instance of the diminution of the self involved in many labor contracts. Market norms may be legitimate and useful in their proper sphere, but when "applied to the ways we treat and understand women's reproductive labor, women are reduced . . . to objects of use" (Anderson 1990, 75, 82, 81, 92).¹³

It is also important to take into account that payment for gestational service does not occur in some neutral market environment but in a society in which many of our institutions and interactions are shaped by relationships of domination and subordination between men and women. To talk about the freedom of the self-possessing individual to do what she will with her own body while ignoring gender structures in her society distances such arguments from the world of lived experience. I think it is possible (barely) to imagine conditions in which it would be legitimate for a woman to receive payment for bearing a child to whom she had no genetic relationship, provided always she retained the power to assert custodial rights before or at birth. At a minimum, such conditions would include an economy free from wage labor undertaken in order to survive; rough economic equality between men and women; a culture in which the "ideology of motherhood," which asserts that childbearing is women's natural and preeminent calling, did not contribute to some women's deriving their sense of self-worth from being pregnant; a society free from the objectification and commodification of women's sexuality; and a politics uninfluenced by gender hierarchy. Descriptions of contract pregnancy that depict the practice as nothing more than womb rental in a supposedly neutral market fail to take account of the profoundly gen-

¹³ In recommending the prohibition of payment under any circumstances, Anderson assumes the existence and desirability of mother-fetus bonding; I do not assume that such a bond always develops or that the state should prohibit all payment. When a gestational mother does experience a strong tie with the child she is carrying, however, law and social practice should recognize and protect that bond.

dered nature of the structures that surround the transaction. Viewed in its social context, contract pregnancy can as appropriately be described as enabling economically secure men to purchase women’s procreative labor and custodial rights as allowing women the freedom to sell procreative labor. And in this context payment should be prohibited.

These reflections lead me to think that pregnancy contracts might as usefully be compared to contracts for consensual slavery as to other kinds of employment contracts. Discussions of slave contracts force us to ask whether certain kinds of contracts are illegitimate, whether people can be held to have agreed to certain stipulations that limit in fundamental ways freedoms essential to human dignity, autonomy, and selfhood, or whether some kinds of freedom are inalienable.

In both contract pregnancy and consensual slavery, fulfilling the agreement, even if it appears to be freely undertaken, violates the ongoing freedom of the individual in a way that does not simply restrict future options (such as whether I may leave my employer) but does violence to the self (my understanding of who I am). Both John Locke and John Stuart Mill asserted that consensual slavery was illegitimate. Locke argued that “a man, not having the power of his own life, *cannot*, by compact, or his own consent, *enslave himself* to any one” (Locke [1690] 1980, sec. 23, p. 17).¹⁴ In a much-quoted passage of *On Liberty*, Mill asserted that to agree to be a slave might look like an exercise of freedom in the present, but that since such a contract removed the possibility of free exercise of freedom in the future, “freely choosing” to be a slave was incoherent. “By selling himself for a slave, [a person] abdicates his liberty; he forgoes any future use of it beyond that single act.” But, says Mill, this act “defeats . . . the very purpose which is the justification of allowing him to dispose of himself.” One limitation on freedom is that one cannot “be free not to be free. It is not freedom, to be allowed to alienate his freedom” (Mill [1859] 1975a, 126).

The analogy of consensual slavery to enforceable pregnancy contracts may seem flawed because slavery is for a lifetime, while human gestation lasts for about nine months. But the time involved in a pregnancy depends upon how one regards pregnancy and childbirth in relationship to a woman’s identity and self-understanding. If the baby is an extrinsic “product” of her gestational work, then the gestational mother simultaneously fulfills her contractual obligation and regains her freedom in turning the baby over to the commissioning parent(s). If, however, she and the fetus were beings-in-relationship during pregnancy and she perceives herself as (at least one of) its mother(s), then a law that denies her

¹⁴ Locke only allowed for slavery following capture in a just war, when enslavement was substituted for a death sentence. For an excellent discussion of Locke’s views of slavery, see Farr 1986, 263–89.

all custodial rights will deprive her of any lived expression of her relationship to that child for her entire lifetime. Writing of the lower court decision denying the gestational mother custody in the "Baby M" contract pregnancy case, Patricia Williams noted that "Mary Beth Whitehead's powerlessness came about as a result of a contract that she signed at a discrete point of time—yet which, over time, enslaved her by depriving her of freedom to assert custodial rights" (Williams 1988, 15).

Shifting understandings of divorce are also related to the questions of whether the freedom to choose at one point in time captures what is most important about human freedoms in a liberal society. Concern for what it means for a person to exercise freedom over time have dramatically altered divorce laws in Anglo-American jurisdictions during the past century. Most American states now permit "no fault" divorce, which entails releasing people upon their request from the promise to be husband or wife "until death do us part." The views of John Stuart Mill are again interesting for this discussion. Mill frequently referred to marriage as "slavery" because nineteenth-century marriage law bound a woman for life to a man who gained possession of all her property, whose consent was necessary for her to make any valid contract or will, who decided where she would live, who had legal custody of their children, and who could not be prosecuted for rape or sexual assault against her. Mill was ambivalent about divorce but unequivocally believed that the act of consent with which a woman entered marriage—consent often joyfully and lovingly given—did not and could not legitimate the terms of such a marriage contract (Mill [1869] 1975b, 425–548).

Arguments in our own day justifying divorce are somewhat different, because the law has gotten rid of most of the injustices of coverture (although, notably, marital rape is not a crime in some jurisdictions). Yet laws of most Anglo-American jurisdictions allow for divorce, a recognition that the state will not enforce a person's promise to live intimately with another person for life, nor will it prohibit the formation of a new relationship through remarriage. Divorce law reflects in part society's determination that the law cannot permit people to be bound to a promise when they and their relationship have fundamentally changed. Not to allow a woman to revoke her consent during pregnancy or at birth seems to ignore the possibility of a somewhat analogous change that simultaneously affects the self as an individual and as a person-in-relationship. It is possible that persons may also undergo such change, regardless of whether or not they are in relationship with someone else, to justify the judgment that the person's sense of self has changed so significantly that enforcing a contract would do violence to that self.¹⁵

¹⁵ For example, we might imagine a student who received a college scholarship from the military discovering as she drew near to graduation that she has become a pacifist, and that the person she is now cannot in conscience enter the armed forces as she had

The arguments prohibiting consensual slavery and justifying divorce are related to the issue of enforcing pregnancy contracts. The potential violation of a woman's self when she has entered a pregnancy contract stems from the months she will spend in relationship with a developing human being. It is this relationship that may change her, and it is this relationship that is severed if a pregnancy contract is enforceable. Defenders of pregnancy contracts argue eloquently, and with much truth, that intentional parents have also been in relationship with their child-to-be, imagining the role the child will play in their lives, planning for its care, and loving it as it develops in utero. Marjorie Shultz argues that it is the relationship between intentional parents and fetus that must be protected by enforcing reproductive contracts. “To ignore the significance of deliberation, purpose and expectation—the capacity to envision and shape the future through intentional choice—is to disregard one of the most distinctive traits that makes us human. It is to disregard crucial differences in moral meaning and responsibility. To disregard such intention with reference to so intimate and significant an activity as procreation and child-rearing is deeply shocking.” When a surrogate reneges on her promise to relinquish custody, it is wrong “to say to a disappointed parent, ‘go get another child.’” Such a judgment “offends our belief in the uniqueness of each individual. It inappropriately treats the miracle and complexity of particular individual lives as fungible. By contrast, surrogacy and other reproductive arrangements transfer the life and parental responsibility for a particular unique child.” Hence, argues Shultz, “although it may seem counter-intuitive, the extraordinary remedy, specific performance of agreements about parenthood, in some sense confirms core values about the uniqueness of life” (Shultz 1990, 377–78, 364).

The claims on behalf of both the intentional parents and the gestational mother rest, then, on assertions about the relationship between parent and fetus. Defenders of contract pregnancy like Shultz are deeply disturbed by the prospect that allowing a gestational mother to void her contractual agreement “expresses the idea that the biological experience of motherhood ‘trumps’ all other considerations. . . . It exalts a woman's experience of pregnancy and childbirth over her formation of emotional, intellectual and interpersonal decisions and expectations, as well as over

promised. To force her to do so would violate her deepest principles concerning the taking of human life and do violence to the “self” she has become since entering into her agreement with the military. On the very complicated problem of whether promises can bind people who experience profound changes in values, see Parfit 1973, 144–46; and Williams 1976. Charles Fried believes that to respect persons we must respect the persistence of their choices over time, and that to release them from their promises “infantilize[s]” them. See Fried 1981, 20–21. I am grateful to Robert Goodin of the Australian National University for an insightful letter about the problem of “later selves” (personal correspondence, October 1989).

others' reliance on the commitments she has earlier made" (Shultz 1990, 384). Yet even Shultz's eloquent plea and my own commitment to gender-neutral law do not persuade me that promises to relinquish custody should be enforced against the wishes of the gestational mother. Her later judgment based on her experience of the pregnancy does "trump," and what it trumps is her own earlier promise, upon which the intentional parents' claim to sole custody depends. It trumps because enforcement of a pregnancy contract against the gestational mother's wishes would constitute a legal refusal to recognize the reality of the woman and fetus as beings-in-relationship, which the law should protect as it does many other personal relationships. Yet the biological father or the commissioning couple also have parental claims, and these can probably best be recognized by granting and enforcing visitation rights.¹⁶

I find my thoughts on the importance of the actual embodied relationships of gestational mother and fetus to be akin (with certain significant exceptions) to those of Robert Goldstein, who argues in *Mother-love and Abortion* that most discussions of abortion, whether put forward by regulationists or prochoice advocates, err in regarding pregnant woman and fetus as distinct individuals with competing rights.¹⁷ As he points out, "rights talk" in this context emphasizes what Ferdinand Schoeman refers to as "the appropriateness of seeing other persons as separate and autonomous agents," whereas "the relationship between parent and infant [or fetus] involves an awareness of a kind of union between people. . . . We *share our selves* with those with whom we are intimate" (Schoeman 1980, 35). A correct approach, says Goldstein, would not "define personhood as if it were a solitary achievement of the fetus and its DNA that precedes rather than presupposes participation in the primary community of woman and fetus." With regard to abortion, respect for this "primary community" requires that the law recognize the preg-

¹⁶ Even if one accepts my argument that a woman's contract to relinquish all custodial claims should not be enforced against her will, the question of how to deal with the custodial claims of the commissioning parent(s) is enormously difficult. One could argue that these claims should be adjudicated on a case-by-case basis, but that would not serve the goal of stabilizing the child's situation as quickly as possible, nor would it give more weight to actual physical relationship and nurturance than to intentionality alone. Yet the claims of the commissioning parents are real and certainly stronger than those of a biological father who "unintentionally" becomes a parent through unprotected intercourse (and who can claim paternal rights and responsibilities in many jurisdictions). This is a large issue that I cannot address adequately here, other than to note that society might do well to develop forms of acknowledging the existence of "intentional" and biological, as well as nurturing, parents, rather than try to make all families resemble households of two heterosexual parents and their biological offspring. In this regard see Bartlett 1988.

¹⁷ See Goldstein 1988. I do not believe all women experience mother-love during pregnancy, and I disagree with Goldstein's assumption that mother-love must continue to privilege a mother's relationship to her child over the father's after birth.

nant woman as the person who must make decisions about the dyad she and the fetus constitute; she must be accorded “a privileged position as dyadic representative that is superior to that of other would-be dyadic participants,” such as the biological father, the state, or potential adoptive parents. In Goldstein’s analysis, the privacy and autonomy that the *Roe v. Wade* decision protects, then, “[belong] not only to the woman as an individual but also to the dyadic, indeed symbiotic, unit of woman and fetus. This dyad constitutes the relevant community for understanding the abortion decision” (Goldstein 1988, 35, 65, x). In the case of surrogacy, the embodied relationship of the gestational mother (who may or may not be the genetic mother) is stronger than that between the commissioning parent(s) and fetus, or between her own “intentional self” and the fetus prior to conception. In Kenneth Karst’s expressive phrase, a critically important aspect of the right of “privacy” is not to isolate people from one another, but to protect and foster what he calls “the freedom of intimate association” (Karst 1980, 634–83). A legal rule enforcing a pregnancy contract would reinforce notions of human separateness and insularity rather than recognize that the development of individuality and autonomy takes place through sustained and intimate human relationship.

None of these considerations argues against a woman’s voluntarily bearing a child for someone else or against adoption. Law in a liberal polity should not force a woman to retain physical custody of her child once it is born, and the woman may decide that placing the child in someone else’s care may be best for her, for the child, and for the new custodial parent(s). But adoption and “gift” pregnancy must be distinguished from contract pregnancy: even though gestational mothers may mourn for children they entrust to others to care for and raise, they have made their decision to separate from an existing human being, not from a potential one. Their actions, which may bring relief as well as (or as much as) sorrow, are not the consequence of an agreement that ignores or dismisses the relevance of the experience of pregnancy and of the human and embodied relationship between woman and fetus to our understanding of human freedom and choice.

III. Contracts, human relationships, and freedom

Those who argue that respect for women’s autonomy necessarily entails allowing and enforcing pregnancy contracts present contract as the paradigmatic bond linking people to one another in human society. Thinking carefully about pregnancy contracts shows what is wrong not only with contract pregnancy but more broadly with certain efforts to enhance women’s freedom in family relationships by replacing legal rules

based on notions of men's and women's "natural" roles in families with contractual paradigms and rules.

The impetus behind such efforts is quite understandable given the burdens that ascriptive notions about women's "nature" and proper roles have placed upon women seeking equality in both the family and public life. From the mid-nineteenth to the mid-twentieth centuries, feminists found contractual ideas, which emphasize equality, freedom, and volition, to be extremely effective tools for removing the disabilities married women suffered under traditional family law.¹⁸ In place of the common-law rules of coverture that assumed that when a woman married, her legal personality was subsumed in that of her husband, advocates of women's rights fashioned statutes that rested on notions of spousal equality. Gradually the idea that the family was a natural, hierarchical, unitary, and indissoluble association gave way to understandings of families as voluntaristic and egalitarian associations that people could enter and leave at will, and in which responsibilities were not prescribed by nature but properly determined by the marriage partners themselves. Without arguing for a return to earlier notions of natural or ascriptive family roles, I maintain that some of the inadequacies of a contractual paradigm for family relations are evident in the proposals for legal recognition and enforcement of pregnancy contracts. Family relationships involve and affect the self in ways that cannot be fully predicted or provided for in advance and are particularly striking in parent-child relationships. In addition, Martha Fineman has criticized the effects of adopting abstract liberal principles in laws dealing with child custody, property division, and spousal support after divorce. When a court assumes that its aim should be to restore divorcing parents to their former autonomy and independence, it frequently produces grave inequalities in the actual social and economic opportunities of divorced men and women (Fineman 1991).

The dilemmas and difficulties that arise in trying to conceptualize the proper bases of family law should stimulate a rethinking not only of these laws but also of certain aspects of liberal political theory. This article certainly takes exception to the libertarian version of liberalism that understands freedom only as the ability to determine and pursue one's goals without interference from government or other individuals and that sees relationships among individuals as the result of specific agreements. This individualistic paradigm ignores the human need to foster the interdependence that is the basis of human development. While some of the human associations that the liberal state should protect can be understood in voluntaristic or contractual terms, some cannot. The fallacies of

¹⁸ For a discussion of nineteenth-century feminist ideology and marriage law reform campaigns, see Basch 1982 and Shanley 1989.

a view of political—as well as family—life that ignores the noncontractual ties among human beings is well captured in Christine Di Stefano’s analysis of some passages from Thomas Hobbes’s writings. Di Stefano notes that when Hobbes set out to depict those aspects of the state of nature that he hoped would make his prescriptions for civil society seem “welcome and reasonable,” he asked his reader to “consider men as if but even now sprung out of the earth, and suddenly, like mushrooms, come to full maturity, without all kinds of engagement with each other.” As Di Stefano argues, Hobbes’s picture of “abstract man” altogether ignores women’s experience of reproduction and early nurturance and falsely assumes that “characteristically human capacities need no particular social life forms in which to develop.”¹⁹

The attempt to justify the enforceability of contracts for pregnancy similarly rests on a model of the autonomous individual that either ignores or takes too little account of the truth that human beings are constituted in part by relationships with others. Men as well as women do not spring like mushrooms from the earth but begin existence in a state of interdependence with and dependence on another human being. As Virginia Held points out, “Western liberal democratic thought has been built on the concept of the ‘individual’ seen as a theoretically isolatable entity. This entity can assert interests, have rights, and enter into contractual relationships with other entities. But this individual is not seen as related to other individuals in inextricable or intrinsic ways.” As Held has correctly observed, “at some point contracts must be embedded in social relations that are non-contractual” (Held 1987, 124, 125). This is not to argue, as some do, that all liberal theory is antithetical to women’s interests.²⁰ Indeed, liberalism’s very respect for the individual and her freedom, as seen among other places in Locke’s and Mill’s condemnations of consensual slavery, shapes my conviction that enforceable pregnancy contracts are illegitimate.²¹ It is those contractarian theories that ignore the limits to the freely willed self that run the risk of confusing broadly conceived human freedom and dignity with a narrow notion of freedom of contract.

Feminists must look elsewhere than contractual paradigms to find the theoretical basis for the human liberation we seek. One error of the

¹⁹ Di Stefano 1983, quoting Hobbes (1651) 1972, 205, 638.

²⁰ For example, Rothman 1989 condemns contract pregnancy as a manifestation of “liberal philosophy [that] is an articulation of the values of technological society, with its basic themes of order, predictability, rationality, control, rationalization of life, the systematizing and control of things and people as things, the reduction of all to component parts, and ultimately the vision of everything, including our very selves, as resources” (63).

²¹ Damico 1991 intelligently distinguishes liberal values from arguments for contract pregnancy.

feminist arguments for contract pregnancy is that they conflate the freedom of the individual woman prior to conception with the conditions that preserve her freedom as a person-in-relationship. Another is that they conceive of market language and mechanisms as morally neutral, whereas market language invokes a particular notion of the person and her relationship to her body and her labor. Further, market transactions occur within social contexts that affect their meanings. In each instance, feminist arguments defending contract pregnancy attribute freedom to the person only as an isolated individual and fail to recognize that individuals are also ineluctably social creatures. Any liberalism worth its salt must protect both individual rights as such and the associations and relationships that shape us and allow us to be who we are. Outlining such a theory is a task well beyond the scope of this article, but I hope that by showing what is wrong with arguments for contract pregnancy I have also shown that the model upon which it rests—the self-possessing individual linked to others only by contractual agreements—fails to do full justice to the complex interdependencies involved in human procreative activity, family relations, and human social life in general. Attention to women's experience, so long absent from political theory, must provide us with ways of understanding and conceptualizing the individual-in-relationship that will allow us to speak more adequately than has been done so far about the simultaneity of human autonomy and interdependence, of freedom and commitment in social and political life.

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