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Removing harmful options: the law and ethics of international commercial surrogacy

Abstract

Focusing on the UK as a case study, this paper argues that having the choice to enter into an international commercial surrogacy arrangement can be harmful, but that neither legalisation nor punitive restriction offers an adequate way to reduce this risk. Whether or not having certain options can harm individuals is central to current debates about the sale of organs. We assess and apply the arguments from that debate to international commercial surrogacy, showing that simply having the option to enter into a commercial surrogacy arrangement can harm potential vendors individually and collectively, particularly given its sexed dimension. We reject the argument that legalizing commercial surrogacy in the UK could reduce international exploitation. We also find that a punitive approach towards intended parents utilizing commercial rather than altruistic services is inappropriate. Drawing on challenges in the regulation of forced marriage and female genital cutting, we propose that international collaboration towards control of commercial surrogacy is a better strategy for preserving the delicate balancing of surrogate mothers' protection and children's welfare in UK law.

Introduction

UK surrogacy law is currently in a state of flux.[1] In this paper, we critically examine UK law bearing on international commercial surrogacy. We draw on normative, legal, and public policy perspectives to argue that such surrogacy raises moral problems and thus ought to be limited, but not on the grounds that are most commonly advanced, nor by the mechanisms that are currently in place. Rather, we draw on the philosophical literature regarding when having an option can be harmful. To clarify what we mean by international commercial surrogacy, however, we need to begin with some definitions.

Surrogacy, according to the Surrogacy Arrangements Act 1985, is when a woman carries a child under a prior arrangement that the child will be handed over to and raised by somebody else once it is born. [2] This definition does not state whose gametes are to be used to create the embryo: when the gestational mother's own ova are used it is sometimes called 'traditional' or 'partial' surrogacy and when the ova are provided by a donor, or by a woman intending to be a social parent to the child, it is called 'gestational' or 'full' surrogacy.

Commercial surrogacy refers to the buying and selling of surrogacy arrangements on a market, and international commercial surrogacy refers to such markets as they exist across national borders. In practice, international commercial surrogacy almost always entails individuals from one economic setting purchasing surrogacy services from those in a less affluent setting. Whether this is, on balance, a good thing for people living in developing economies, or whether it is overall harmful, is a question pertinent to the laws governing surrogacy in the UK and their implementation, which ought to be based in sound ethics.

[1] Hodson N, Bewley S. Parental orders and the rights of surrogate mothers. BJOG: an international journal of obstetrics and gynaecology. 2018 Feb;125(3):352 and Building families through surrogacy: a new law A joint consultation paper. Law Commission Consultation Paper 244. Scottish Law Commission Discussion Paper 167.

[2] S1(2), the 1985 Act

Ethical debates surrounding this question were in their infancy when the 1985 Act was drafted. Arguing against the creation of a commercial market in surrogacy, the influential Report of the Committee of Inquiry into Human Fertilisation and Embryology, known as the Warnock Report, stated that "Such treatment of one person by another becomes positively exploitative when financial interests are involved" and as such surrogacy ought to be circumscribed to 'altruistic' arrangements (that is, arrangements according to which the surrogate mother is only paid for her expenses).[3]

In other words, the view of the *Warnock Report* was that international commercial surrogacy wrongfully exploits women in less affluent settings, and should therefore be prohibited. Although we are sympathetic to the spirit of this argument, we will suggest that the premise concerning wrongful exploitation is harder to defend than it may initially seem, and that the conclusion of the argument (that international commercial surrogacy should be prohibited) would not follow automatically even if the premise were sound. In addition, there are practical and jurisdictional difficulties raised by any attempt to "prohibit" an international market via country-specific legislation.

However, we will attempt to show that simply having the option to participate in international commercial surrogacy does put harmful and unjust pressures on already vulnerable women. This vulnerability may be based in economic status, social status, family pressures, or gender-based violence, such that the unjust pressures we refer to are likely to leave the women worse off than they would be if the option were not available. The relevant challenge for global policy in this area is therefore how to remove the option in a way that minimizes collateral suffering. We offer some thoughts for how to approach such policymaking in the conclusion to this paper. First, however, we will summarize the current state of UK law concerning international commercial surrogacy, and show how it cannot fulfil its own aim in combatting the practice.

[3] Report of the Committee of Inquiry into Human Fertilisation and Embryology, Cm 9314, HMSO, July 1984

PART I: UK Surrogacy Law and International Commercial Surrogacy

Under section 2 of the 1985 Act, it is an offence in the UK to facilitate or negotiate a surrogacy arrangement 'on a commercial basis'. This means that intermediary organisations have to operate on a *not for profit* basis, with respect to any child being brought into the UK.[4] Another significant way English law works against commercial surrogacy is through the making or withholding of parental orders, introduced in s30 of the Human Fertilisation and Embryology Act 1990 and maintained in s54 of the Human Fertilisation and Embryology Act 2008. According to s54(1) parental orders are orders made by a court providing for a child to be treated in law as the child of the applicants so long as the conditions set out in s54(2-8) are met.

Such parental orders may be considered a type of legal fiction. This is a technical term, not intended to disparage: as Fuller defines it, a legal fiction is "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility".[5] The reconstrual of the child-parent relationship by judicial fiat could be described as a legal fiction in Fuller's second sense. The acknowledgement of the parenthood of the intended parents is not false, but for practical reasons the parental orders system does erase or make invisible the gestational mother and her essential role in biological parenthood.[6] This is what the Law Commission for New Zealand meant when it described "extinguishing the fact of the genetic or gestational parental

[4] UK Border Agency. *Inter-country surrogacy and the immigration rules.* Home Office: 2009. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf [accessed 09 08 2018]

[5] Fuller L. *Legal Fictions*. Palo Alto, CA: Stanford. 1967

[6] Important practical reasons given by surrogacy specialists NGA Law include "The parents not having legal authority to make basic decisions about their child's medical care and education, Problems with inheritance and pension rights" *Parenthood and parental orders (surrogacy law)*. NGA Law. 2014. URL: https://www.nataliegambleassociates.co.uk/knowledge-centre/parenthood-and-parental-orders-surrogacy-law [accessed 2018-12-07]

relationship between the gamete donor or surrogate mother and the child" as a legal fiction.[7] Lind has argued that legal fictions should "be understood as true legal propositions asserted with conscious recognition that they are inconsistent in meaning or otherwise in semantic conflict with true propositions asserted within some other linguistic system (or elsewhere in the law)". [8] While parental orders capture the parenthood of the intended parents it conflicts with the legal and semantic truth of the proposition that the woman who gives birth to a child is, in a very basic sense, a mother.

The conditions in s54 stipulate how parliament intended for surrogacy arrangements to operate and offered legal parenthood as a kind of incentive. Subsection 8 is set out below:

> (8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—
> (a) the making of the order,
> (b) any agreement required by subsection (6),
> (c) the handing over of the child to the applicants, or
> (d) the making of arrangements with a view to the making of the order, unless authorised by the court.

Because the legal fiction in making of parental orders was highly prized by those commissioning surrogacy services, this seemed to be a promising approach to ensuring that the conduct of surrogacy was in line with parliament's descriptions. At the same time it was not punitive; rather,

[7] New issues in legal parenthood. New Zealand Law Commission PP54. 24 May 2004. Wellington, NZ.
[8] Lind D. The pragmatic value of legal fictions. in Del Mar M, Twining W *eds*. *Legal fictions in theory and practice*. Cham: Springer 2015 p100

the creation of parental orders was considered a privilege (as opposed to a right or a necessity), acknowledging that as far as the law was concerned it had been a well-arranged surrogacy.

However, in light of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 the *quid pro quo* implicit to parental orders – making parental orders where there has been a surrogacy arrangement within these guidelines – broke down. These regulations undermined the reward system by declaring the child's welfare paramount in relation to the making of a parental order. The courts interpreted this to mean that parental orders, on the whole a good thing for the child, must be made irrespective of whether the criteria have been met. Even in cases such as *Re X and Y (Foreign Surrogacy)*, where there were breaches of several criteria, judges felt that they had no choice but to make parental orders.[9] Hedley J commented "Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions".[10] But why would parliament wish to legislate against international commercial surrogacy? Building on what we said in the previous section, the first part of this paper will lay out some common objections to international commercial surrogacy and show their limitations. Part II will defend a stronger objection to international commercial surrogacy, based on the idea that having certain options can be harmful. Part III will show how this provides a more robust criticism of international commercial surrogacy than the more prominent criticisms typically raised. Part IV will examine legislative options available for effectively curbing international commercial surrogacy.

Opposition to International Commercial Surrogacy

[9] [2009] 1 FLR 733
[10] *Ibid* at 24

One voice opposing international commercial surrogacy is Surrogacy UK, a 'matchmaking' organisation with a prominent lobbying role. According to Surrogacy UK, the short supply of surrogate mothers within the UK is what drives international surrogacy.[11] That is, UK prospective parents who need or desire a surrogate mother to fulfil their parenting goals often find that there are not enough such surrogates based in the UK, and so they look for surrogate mothers overseas. But international surrogacy is disruptive for British residents seeking to commission surrogacy services for several reasons. Immigration processes make international surrogacy difficult in that the child has to return to the UK before parental orders are in place. It can be tricky to establish parenthood because when the surrogate mother is abroad it is more difficult to prove that her spouse, who UK law recognises as the father, consents to parental orders.[12] British residents face a greater anxiety about exploitation by brokering agents facing because, without the protection of UK law, the commissioning parents are vulnerable to spiralling costs or not receiving the service they expect.

There is also opposition to international commercial surrogacy in many countries where the surrogate mothers live. The misuse of the system by people from more affluent countries has particularly alienated local authorities. In 2014 Baby Gammy was born with Down Syndrome to a surrogate mother in Thailand. His Australian genetic parents took his twin sister back to Australia, but left Baby Gammy in Thailand where his surrogate mother has had to raise him.[13] In another example of abuse, a Japanese businessman used Thai surrogates to have at least nine children within six months, thereby deliberately seeking to have children in a way that would confuse or perplex them, knowingly putting great strain on his ability to care for them during their first months of life, making an emotional commitment to those children in the knowledge that he could not keep the

[11] Horsey K, Smith N, Norcross S, Ghevaert L, Jones S. Surrogacy in the UK: Myth busting and reform. Report of the Surrogacy UK Working Gropu on Surrogacy Law Reform. Surrogacy UK: 2015 Nov.
[12] *Re X and Y (Foreign Surrogacy)*
[13] Whittaker A. From 'Mung Ming' to 'Baby Gammy': a local history of assisted reproduction in Thailand. Reproductive Biomedicine & Society Online. 2016 Jun(2):71-78

commitment, and demonstrating little care for the autonomy or wellbeing of their mothers.[14] These scandals led to the Thai government prohibiting foreign people from commissioning surrogacy services and stipulating that surrogate mothers must be over the age of 25.[15] Similarly, in 2012 an Australian couple left one of their genetic children in India and took his twin sister home, thus failing to keep the commitment to that child (and his mother) which was implicit in the surrogacy arrangement.[16]

In October 2015 the Nepalese government banned commercial surrogacy for Nepalese women.[17] The Supreme Court of India recommended shortly after that the government introduce new legislation. The 228th report of the Indian Law Commission advised that commercial surrogacy should be banned and the legislation specifically prohibited the use of surrogacy services by foreigners.[18] These laws resulted in some Indian women moving to Nepal and being commissioned by foreigners to act as surrogate mothers,[19] and after increasingly strict legislation in Nepal, Indian clinics being set up in Cambodia.[20] This pattern of legislation seems to reflect a "not our girls" attitude: commercial surrogacy would harm and demean local women but is good enough for other women.

In keeping with Hedley J's comments above, governments are within their rights to legislate on reproductive technology and that ought to be respected. Differential treatment of foreign women is

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[14] Murdoch L. *Japanese millionaire said to father nine infants*. The Sydney Morning Herald. 2014 Aug 7.
[15] Murdoch L. *Thailand bans foreign surrogacy after Baby Gammy affair.* The Sydney Morning Herald. 2015 Feb 20.
[16] Australian couple abandons surrogate baby in India. The Times of India. 2014 Oct 9. URL: https://timesofindia.indiatimes.com/india/Australian-couple-abandons-surrogate-baby-in-India/articleshow/44747623.cms
[17] Preiss D, Shahi P. The dwindling options for surrogacy abroad. The Atlantic. 2016 May 31. URL: https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/
[18] Law commission of India. Need for legislation to regulate assisted reproductive technology clinics as well as right and obligations of parties to a surrogate. Report No. 228. 2009 Aug. Government of India. p25
[19] Rudrappa S. India outlawed commercial surrogacy – clinics are finding loopholes. The Conversation. 2017 Oct 23. URL: https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784
[20] Bhowmick N. After Nepal, Indian surrogacy clinics move to Cambodia. Aljazeera 2016 Jun 28. URL: https://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html

morally suspect. Such policies suggest that the state views surrogacy as harmful to local women, their families or their communities, to the extent that it should be prohibited. But these policies do not offer such protection to foreign women, families, and communities. This is in effect what English law does by 'rubber stamping' international commercial surrogacy but prohibiting it at home. The objections to international commercial surrogacy reflect the difficulty in controlling the circumstances around surrogacy, especially in jurisdictions beyond the reach of country-specific legislation. Other objections draw on theoretical issues.

Some feminist authors have argued that international commercial surrogacy threatens the dignity of the surrogate mother.[21] They argue that it is degrading to convert a woman's profoundly personal ability to gestate a child into the public function of gestating a stranger's child as a service available to anybody who will pay. Along with privacy and autonomy, self-respect is a central facet of dignity.[22] For many people this kind of 'conversion' presents a challenge to self-respect in that it appears to debase women's childbearing capacities: instead of being seen as special in a way that is beyond monetary value, these capacities become like any other commodity—available at a price.

But if self-respect is the issue, this has several facets too. One of them is the ability to make intimate decisions about one's body and how it should be treated that correspond to one's own values, which are unlikely to be the same for all women. It is at least conceivable that deciding to act as a surrogate, even if only to achieve some other, highly valued personal goal could be a legitimate expression of a woman's agency and initiative, and thus entirely consistent with her self-respect.[23]

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[21] Bindel J, Powell G. *Gay rights and surrogacy wrongs: say no to wombs for rent*. Stop surrogacy now. 2018. URL: http://www.stopsurrogacynow.com/gay-rights-and-surrogacy-wrongs-say-no-to-wombs-for-rent/#sthash.ITQoSdJ5.dpbs and Ekman KE *Being and being bought*. Melbourne, Australia, Spinifex: 2014. p178

[22] Dignity In Care. Social Care Institute for Excellence. 2013 May. URL: https://www.scie.org.uk/publications/guides/guide15/index.asp

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Another argument against commercial surrogacy is that it is exploitative. According to Zwolinski, "To exploit someone is to take unfair advantage of them. It is to use another person's vulnerability for one's own benefit."[24] The 'benefit' or 'advantage' accrues to the intended parents and any intermediaries. Arguably, what is unfair about the treatment of international commercial surrogacy mothers is that international commercial surrogacy takes advantage of the vulnerability created by extreme disparities of wealth across the globe, specifically with respect to accessing basic needs such as education and healthcare. The alleged aim then is to get these mothers to participate in a process they would otherwise not consider, much less regard as instrumentally valuable. Timms articulates this point of view:

> Unbridled commercialisation in the context of social inequality would inevitably lead to exploitation; wealthy foreigners and infertility clinics were in a position to drive bargains in donor or surrogacy contracts. The profile of the typical Indian surrogate—a slum-dweller, financially stressed, and probably desperate—deepened the conviction that this was at heart an issue of injustice. When the surrogacy contract involved cross-border clients and Indian slum-dwellers, the polarisation became extreme.[25]

Such exploitation would be particularly significant because carrying a child is normally regarded as one of the most profound or significant human experiences. One way to object to this view would be to question the profundity of bearing and giving birth to a child, allowing one to argue that being exploited into a pregnancy is fundamentally no different from being forced by global capitalism to do any other job which one might strongly dislike.

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[24] Zwolinski M, Wertheimer A. Exploitation. The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), Edward N. Zalta (ed.). URL: https://plato.stanford.edu/archives/sum2017/entries/exploitation

[25] Timms O. Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016. Indian Journal of Medical ethics. 5 Mar 2018, 3(2)

Parry articulates a version of this view, asking "why these particular forms of reproductive labour should be fetishized as exceptional (and thus prohibited from commercialization)" and compares them with egg donation.[26] The implication is that if paid egg donation is morally acceptable, then so is commercial surrogacy. Yet one who objects to commercial surrogacy may well also object to paid egg donation, so this argument lacks force in such cases. However, some may see paid egg donation as acceptable while objecting to commercial surrogacy, in which case the comparison does need further exploration. Parry's paper discusses three ways in which gestation could be seen as exceptional: 1) it is particularly invasive, 2) it is "uniquely sacralised" (meaning it is generally held as having special or sacred significance), and 3) it is "uniquely generative" (meaning functionally unique in its relationship to reproduction).

With respect to (1), Parry suggests that wet nursing and sperm donation are also invasive, yet seem to be perceived as acceptable, so why should gestation be 'fetishized' as different? The point is valid so far as it goes, but neither wet nursing nor sperm donation are *as* invasive, on any straightforward understanding of that term, as gestation of a foetus inside one's body, 24 hours a day for 40 weeks. Thus, a morally relevant distinction can still be drawn. Parry then points out, in light of her extensive field work, that women in India may be exposed to dangerous chemicals by working in factories. Acknowledging that the existence of one set of invasive and dangerous exposures does not justify exposing women to any other invasive and dangerous exposure, Parry suggests that either surrogacy or factory work are equally amenable to improved conditions. The suggestion here is that improving conditions for commercial surrogacy may be all that is required to address the moral concerns of those who object to such surrogacy, assuming that those same objectors would not seek to prohibit women from working in factories. Yet the claim of equivalence in this respect is not convincing. Occupational health authorities can enforce a barrier between workers and their chemicals, but not

[26] Parry B. Surrogate labour: exceptional for whom?. Econ Soc. 2018;47(2):214-233. Published 2018 Jul 25. doi:10.1080/03085147.2018.1487180

between a surrogate mother and the foetus. It may be the case that investment in healthcare could reduce health risks, but Parry fails to show that surrogacy is not uniquely invasive or risky.

Another way to respond to critics of commercial surrogacy is to turn their argument about the profound importance of gestating and giving birth to a child on its head. If pregnancy is such a uniquely meaningful process, this argument would run, then women ought to pay for the opportunity, rather than be paid to undergo the experience. After all, the personal significance of pregnancy means that many women actively seek out pregnancy when they want it, even accepting the risks and expense of IVF. So perhaps surrogate mothers would also positively value being pregnant, with the monetary compensation being more of a bonus than a form of exploitation.[27]

However, this argument misses something important. In general women do not tend to value pregnancy and giving birth *per se*. Rather, they value the experience of bringing a child into the world that they expect will be raised as their own. Remember, there is a shortage of women willing to act as altruistic surrogates, leading surrogacy organisations to stop processing applications from intended parents,[28] not a surplus.[29] Meanwhile there are large numbers of people seeking reproductive treatment in order to have a child with whom to share their life, increasing by 39% in the UK between 2014 and 2018.[30] Taken together, these two situations strongly suggest that most women do not evaluate carrying a child for somebody to raise quite so positively as they evaluate carrying a child to raise themselves.

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[27] In fact there are reports, especially from non-commercial surrogate mothers, that carrying a child is an enjoyable feature of surrogacy. Whitcome L. Serial Mum: Mum-of-three loved being pregnant so much she became a serial surrogate and had five babies for women struggling to conceive. The Sun. 2018 Jun 26. URL: https://www.thesun.co.uk/fabulous/6629476/mum-loved-pregnancy-so-much-had-five-babies-other-women/

[28] Jackson, E. 'UK law and international commercial surrogacy "the very antithesis of sensible"' (2016) *Journal of Medical Law and Ethics* 4(3) 197 at 204

[29] Ignasi. A true act of love: becoming a surrogate mother for your sister. Sensible Surrogacy. 2018 May 19. URL: https://www.sensiblesurrogacy.com/becoming-a-surrogate-mother-for-your-sister/; Being a surrogate is an amazing thing. Brilliant Beginnings 2018. https://www.brilliantbeginnings.co.uk/surrogates

[30] Human Fertilisation & Embryology Authority. Fertility treatment 2014-2016 Trends and figures. March 2018. p9

Put more generally, that one values something in a given context or within a certain relationship, does not entail that one also values that thing in other contexts or within different relationships. Often, significant life events are highly desirable in circumstances where they are wanted but highly undesirable in circumstances where they are not wanted. The centrality of reproduction to a person's life narrative is evident from assisted reproductive technology and abortion: pregnancy may be highly valued when you want it, but highly disvalued when you do not. In short, pregnancy may be experienced as highly valuable or highly disvaluable, and sometimes both simultaneously. Context and individual differences in preferences and priorities determine which evaluation applies. As such, being exploited into pregnancy may still be harmful or otherwise objectionable in ways that being exploited into other 'jobs' may not.

Some authors acknowledge that surrogacy may exploit some economically vulnerable women in some contexts, but urge caution about generalization. For example, Hevia argues: "In developing countries these factors may be present, but not in each and every transaction."[31] Assuming that this is correct, such a situation still raises questions about just how much exploitation society ought to permit, and how to balance the interests of those who are and are not exploited by some practice. With respect to the tension between the interests of women who are exploited by surrogacy and those who are not, Hevia proposes that exploitation-avoiding policies such as mandatory psychological evaluation or minimum pricing may be beneficial. Yet as the failures of the parental orders system (in particular, making parental orders despite payments) have shown, it is difficult for the courts to enforce policies designed to protect a surrogate mother in another country: once a child exists, its welfare is paramount.

[31] Hevia M. Surrogacy, privacy, and the American Convention on Human Rights. J Law Biosci. 2018 Jul 10;5(2):375-397. doi: 10.1093/jlb/lsy013. eCollection 2018 Aug.

Following Hevia's approach, surrogate mothers might be thought of as falling into two general groups: those who are exploited by the surrogacy arrangement and those who are not. However, in a sense the very structure of global capitalism entails a kind of coercive pressure that makes many, if not most, jobs unavoidably exploitative (in the sense of pressuring people to agree to an objectively bad deal). Insofar as that is correct, if one holds the existence and general workings of global capitalism fixed, it might then be said that there are those who are relatively more versus less exploited, with some threshold of (un)acceptability being passed by one group but not the other. If global capitalism results in something like universal exploitation, such relative comparisons will be necessary for determining who should receive special protection. For as Wilkinson asks, "how would the abolition of international capitalism impact on the millions or billions of people whose livelihoods depend on (often exploitative) international trade arrangements?" [32]

Let us assume that the abolition of global capitalism is not going to happen (whether or not it would be good if it did). Let us further assume, with Wilkinson, that some degree of exploitation is entailed by global capitalism across a wide range of cases. One way to resist the 'exploitation' objection to international commercial surrogacy, then, would be to accept that such exploitation exists, but argue that it is not something that raises serious moral problems of the sort requiring policy change, whether for surrogacy or other paid work.

Although the commissioning couple or individual may certainly get an unfair advantage because of a surrogate mother's vulnerability, the surrogate mother also gets paid. Thus an alternate *quid pro quo* is set up: x will allow y to exploit her because the payment from y remains a significant benefit to x. Wertheimer calls this 'mutually beneficial exploitation' and argues that it would be mistaken to object to such practices without further argument.[33] After all, the exploited party is still better off

[33] Wertheimer A. Coercion. 1987. Princeton: Princeton University Press.

(by her own judgment) than she would have been had the exploitative encounter never arisen. For this reason the exploited party willingly consents to her exploitation.

To summarise, the party who is offered an exploitative option can decide whether or not to accept the (stipulated to be) unfairly low reward. Axiomatically, sufficiently autonomous people ought to be able to make the decisions that they judge to be in their best interests given their circumstances. So, people should be able to choose whether to enter into an exploitative arrangement if that is what they see as best for them. Thus, it is difficult to justify the prohibition of consensual commercial surrogacy on the basis that it is exploitative. Unfairness is of course objectionable, but society cannot prohibit every incidence of imbalanced benefits, and arrangements which are entered into consensually are among the worst candidates for intervention. An impetus to change international commercial surrogacy would be better supported by evidence that there is something harmful about the whole system rather than individual consensual exchanges, whether those exchanges are exploitative or not.

In what follows, however, we propose a novel objection to international commercial surrogacy that we believe is stronger than arguments premised upon the notion that people need protection from entering into exploitative arrangements.

PART II: CAN AN OPTION BE HARMFUL?

It is commonly thought that, for any given decision, having more choices is usually better. Therefore, any addition to one's list of available options (up to the point that more would be overwhelming) is beneficial on this view. Schwartz puts it this way: "Without a doubt, having more options enables us,

most of the time, to achieve better objective outcomes."[34] So runs an influential argument against prohibition of certain decisional options that some may find attractive. To be sure, under many circumstances there are certain options that are beneficial to have, particularly where the available alternatives are unsatisfactory. In this section, however, we will argue that certain options can be harmful to have, and show that this applies to the option to become a commercial surrogate mother.

In the context of a debate about kidney markets, Radcliffe-Richards and colleagues have argued that prohibition of kidney donation is harmful because it takes the option away from people who would choose to sell their kidney under circumstances where it was possible.[35] According to this argument, such prohibition forces the would-be kidney vendor into taking the second-best option as judged by their own lights. Taking the second-best option is less good than taking the best option. Thus people seem to be harmed by having this option taken away from them.

If this argument succeeds, and commercial surrogacy could be shown to be sufficiently analogous to kidney vending that the force of the argument carries over to that case, it would strengthen the case against prohibition of commercial surrogacy. As Bhowmick has argued, ending commercial surrogacy will "kill off an important industry for these women."[36] And Bedi has suggested that India's ban "will severely limit options for … women who carry others' babies as a way out of poverty."[37] However, we will show that the argument does not succeed. Building on the work of Rippon, we will argue that there are certain options that it can be harmful to have, even if a person would be inclined to choose

[34] Schwartz B. More isn't always better. Harvard Business Review. 2016 Jun. URL: https://hbr.org/2006/06/more-isnt-always-better
[35] Radcliffe-Richards J, Daar AS, Guttmann RD, Hoffenberg R, Kennedy I, Lock M, Sells RA, Tilney N. The case for allowing kidney sales. International Forum for Transplant Ethics. Lancet. 1998 Jun 27;351(9120):1950-2.
[36] Bhowmick N. Why banning surrogacy in India will hurt women. The Establishment. 2016 Oct 27. URL: https://medium.com/the-establishment/why-banning-surrogacy-in-india-will-hurt-women-38a0ce5a7586
[37] Bedi R. India unveils plan to band commercial surrogacy. The Telegraph. 2016 Aug 25. URL: https://www.telegraph.co.uk/news/2016/08/25/india-unveils-plan-to-ban-commercial-surrogacy/

that option compared to available alternatives.[38] Rippon suggests that there are wider ramifications of having options which need to be taken into account. This is particularly clear where people are treated differently based on the options available to them.

Options that cause harm

How could it be harmful simply to have an option available to one, if one is ultimately free to decline to take that option? The example of duelling shows how this can be the case.[39] According to Koplin, when duelling was legal, men were put under pressure to risk their lives or have their honour undermined. For many men, the threat to their honour had important social and personal implications which were serious enough that they felt compelled to risk their lives rather than walk away: from their perspective, duelling was the best option available to them. Yet, the prohibition on duelling did not harm these men by leaving them only with their second best option. Instead, it altered the circumstances around honour codes such that men no longer had to risk life and limb in this way to preserve their dignity. Removing the best option in a given decisional set, the option of duelling, improved the position of these men by altering the context—including associated norms and social pressures—in which the decision was previously made. Thus, it can be seen that having certain options can be harmful, while removing certain options that, given a set of background conditions, would be seen as preferable, can all things considered be a benefit to the affected parties.

It is worth distinguishing this argument from an argument that people should not have options because they may make bad decisions. In behavioural economics, "choice architecture" denotes the

[38] Rippon S Imposing options on people in poverty: the harm of a live donor organ market Journal of Medical Ethics 2014;40:145-150.
[39] Koplin J. Choice, pressure and markets in kidneys. J Med Ethics 2018;44:310–313.

sum of all the circumstances bearing upon a decision.[40] Through manipulation of these factors some choices can be promoted over others without prohibition. For example, placement of fruit at eye level can improve healthy eating and a letter reporting that most people pay their taxes on time increases the likelihood that people will do their tax returns. Cass Sunstein defends this ethical approach as "libertarian paternalism".[41] By contrast, Rippon emphasises that his argument does not depend on the potential for actors to be motivated by non-rational factors in the way libertarian paternalism does.[42] Rippon's argument is that even (hypothetical) perfectly rational actors, sometimes referred to as "econs", would still be in a better position without certain options. The duellers believed, perhaps rightly, that they would be so greatly harmed by walking away from a duel that it was appropriate to risk their lives. Even if that appraisal was correct, they became better off without the option to duel.

Another example shows how certain options can harm the most vulnerable in society. In the UK, The National Minimum Wage Act 1998 made it illegal to pay a 22 year old less than £3.60 per hour from 1st April 1999. Take a 22 year old in March 1999 looking for work and applying for jobs paying £3.59 per hour. The Act prohibits the would-be worker's apparent best option. But the reason this was a progressive milestone in the UK was that it had wider ramifications. Without a minimum wage, employers engaged in a race to the bottom and desperate people had to accept what Prime Minister Tony Blair called "the humiliation of poverty pay".[43] Prohibiting this option altered the circumstances surrounding the choice. It meant that companies that needed labour had to pay a decent wage, or else go without the labour. Ostensibly, this improved the position of workers.

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[40] Thaler RH, Sunstein CR. Nudge: Improving Decisions about Health, Wealth, and Happiness. Yale University Press: 2008.

[41] Sunstein C. Libertarian paternalism is not an oxymoron. University of Chicago Law Review. 2003;70(4)1159-1202

[42] Rippon S. Imposing options on people in poverty: the harm of a live donor organ market Journal of Medical Ethics 2014;40:146

[43] Minimum wage increased to £5.05. BBC News. 2005 Feb 25. URL: http://news.bbc.co.uk/1/hi/uk_politics/4296097.stm

Now, it is worth considering that this may have had an impact on employment, such that companies hired fewer people overall,[44] but importantly the UK also had a social programme supporting the unemployed to prevent destitution (which was bolstered by the same government). People who could not find work paying at least £3.60 were thus legitimized in claiming government support. The overall effect of this policy programme was to set a basic level below which social support stepped in and preventing the exploitation of the poor by the powerful through market forces. Removing the option of "poverty pay" benefitted those who would otherwise have had to take it, both by increasing their wages and improving their power to demand a decent welfare state.

Could the option to sell a kidney be harmful?

Let us return to the analogy with kidney vending. The majority of kidney vending is driven by debt. Rippon cites Cohen's anthropological research showing that debt collectors in India are more aggressive in areas where kidney vending is easier.[45] Many people would consider insolvency a better option than undergoing major surgery, just as many people in 1998 would have considered unemployment allowance a better option than working for £3. Prohibiting kidney sale would mean that debtors fail to pay their debts and the lenders lose out, not necessarily that debtors still need to find the cash elsewhere. Furthermore, evidence from legalised kidney markets shows that most people who sold kidneys remained unable to get debt free.[46] The most appropriate, sustainable, and humane solution to debt is presumably not an invasive operation and a dramatic and disruptive cash

[44] Siebert WS. Unemployment and the minimum wage. Institute of Economic Affairs. 2013 Sept 13. URL: https://iea.org.uk/blog/unemployment-and-the-minimum-wage

[45] Cohen L. Where it hurts: Indian material for an ethics of organ transplantation. Daedalus 1999;128:135–65. *Cited in* Rippon S Imposing options on people in poverty: the harm of a live donor organ market Journal of Medical Ethics 2014;40:148

[46] Josefson D. Selling a kidney fails to rescue Indians from poverty. BMJ. 2002 Oct 12; 325(7368): 795.

injection, but rather debt advice and financial counselling. Allowing a minority of desperate people to sell kidneys is not a viable response to the vast problem of global poverty.

Rippon goes even further. In a system where kidney sale is expected, there is less impetus to develop robust systems of social support. Tax payers are more likely to expect kidney sale as a first resort before making state financial support available. Charities may prioritise those who have already sold a kidney and have no other recourse. Legalising kidney sale may mean support is withheld from people who choose not to sell their kidneys. People who would have relied on social support would be expected to sell a kidney first. Rather than improving the position of economically or socially vulnerable people their position becomes even worse; they are even further from the sort of robust and sustainable help they really need. Such outcomes seem likely if kidney sales are broadly accepted by society. However the alternative to the normalization may be stigmatization. The social and psychological harms of stigmatization have been reported by people who have sold their kidneys.[47]

Another concerning, yet predictable, result of the kidney market is its amplification of pre-existing hierarchies of sex, race, and social class. There are reports from around the world of women being forced to sell their kidneys to pay their husband's debts or meet dowry costs.[48] This is a manifestation of the relatively powerful exploiting the less powerful. The sale of the wife's kidney

[47] Nayebpour MM, Koizumi N. The Social Stigma of Selling Kidneys in Iran as a Barrier to Entry: A Social Determinant of Health. World Medical & Health Policy. 2018 Mar 10(1). https://doi.org/10.1002/wmh3.255

[48] See McDougall D. *Wives fall prey to kidney trade*. The Observer. 2007 Feb 18. URL: https://www.theguardian.com/world/2007/feb/18/india.theobserver ; Henion A, Moiruzzaman M. *'I sold my kidney … to repay the loans'*. MSUToday. 2013 Mar 6. URL: https://msutoday.msu.edu/news/2013/i-sold-my-kidney-to-repay-the-loans/ ; Pal S. *Husband, in-laws sell woman's kidney for not meeting dowry demand*; 2 arrested. Hindustan Times. 2018 Feb 06. URL: https://www.hindustantimes.com/india-news/husband-in-laws-sell-woman-s-kidney-for-not-meeting-dowry-demand-2-arrested/story-P5Gpmp0UjitOMUv6zMYgQI.html ; *The Bangladesh poor selling organs to pay debts*. BBC News. 2013 Oct 28. URL: http://www.bbc.co.uk/news/world-asia-24128096 ; Haider Z. *In Pakistan's Punjab, the illegal kidney trade is cashing in on the debt of the poor*. Scroll.in/Thomson Reuters Foundation. 2017 Sep 13. URL: https://scroll.in/article/850288/selling-kidneys-for-money-in-pakistans-punjab-the-organ-trade-business-is-cashing-in-on-debt

may be the husband's preferred option. Without the option to sell a kidney, perhaps the man would have to find another way to pay his debts, or perhaps he would seek insolvency. It is not as simple as saying that the woman would now be forced to choose an option that is less good for her.

Semrau has objected that 'pressure with an option to vend' is not the same as 'pressure to vend'.[49] He argues that a kidney market is unlikely to result in pressure to sell one's kidney specifically. Rather it would create a situation in which those already under pressure economically would have the *option* to sell their kidney among other options. He even speculates that the income from kidney sale would be so high that there would be a lottery to determine who was permitted to sell.[50]

Koplin has responded, showing that Semrau's estimated payments are unrealistically high.[51] There are two other limitations to his proposal. Firstly, empirical evidence shows that people only sell their kidneys due to desperation, seemingly because of an understanding that surgery (and its aftermath) is dangerous and a preference for avoiding unnecessary alterations to the body.[52] The element of chance also makes it easier to manipulate family members and friends into registering for the kidney donor lottery. There is also a risk that people would sign up for the lottery without full commitment in the hope that they would not get chosen, perhaps as part of a deal with family members or friends. Uncertain kidney sellers would disrupt the system, increasing costs and risking cancelled surgery or, worse, reluctant surgery. The notion of a lottery is therefore farfetched, but if it were the case it would likely cause more problems than it solves.

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[49] Semrau L. The Best Argument Against Kidney Sales Fails. Journal of Medical Ethics, 41(6): 443-446. For a parallel argument, see Earp, B. D., & Moen, O. M. (2016). Paying for sex—only for people with disabilities?. Journal of Medical Ethics, 42(1), 54-56 (the arguments in the present paper represent a shift in thinking by the first author of this piece, in light of subsequent discussion in the literature).

[50] *Ibid*

[51] Koplin JJ. Kidney Sales and Market Regulation: A Reply to Semrau. The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine. 15 November 2017, 42(6):653–669.

[52] Josefson D. Selling a kidney fails to rescue Indians from poverty. BMJ. 2002 Oct 12; 325(7368): 795. More generally, see Earp, B. D. (2019). The child's right to bodily integrity. In D. Edmonds (Ed.). Ethics and the Contemporary World (pp. 217-235). Abingdon, UK and New York, USA: Routledge.

But there is a more fundamental problem with Semrau's conceptualization. He fails to recognise that organising a society well involves creating protections for people who end up facing insurmountable financial trouble. Unemployment support and bankruptcy provide a kind of "safety-net" designed to stop people falling out of the bottom of society. As with the minimum wage, prohibiting the best option does not leave people falling into destitution but can facilitate a request for help. More needs to be done to ensure that vulnerable people are aware of their legal options and, in the UK, Step Change and Christians Against Poverty are among the organizations working to ensure vulnerable people are aware of the ways to deal with debt. Only loan sharks benefit from making kidney sale a simple way to release funds (and, as noted, it tends not to get people out of debt anyway).[53] Using nephrectomies to keep vulnerable people on top of their debts does not benefit them, unless one presupposes that more humane and ethical measures cannot be put in place. But such measures can be put in place; and allowing kidney sales would directly undermine the social and political will for doing so.

We have shown how having more options can sometimes be harmful. Whilst this argument has previously been raised in the context of kidney vending, we will now make the novel argument that the same is true of commercial surrogacy.

PART III: CAN THE OPTION OF INTERNATIONAL COMMERCIAL SURROGACY BE HARMFUL?

Potential Harm in international commercial surrogacy

[53] *ibid*

In Part I we rejected the argument against commercial surrogacy from exploitation because mutually beneficial exploitation might be the least harmful option for an international commercial surrogacy mother. In this section we will develop the argument that an international market in surrogacy puts possible vendors in a worse off position, even before they have given consent. Although the principle that people can be made worse off by having an option has been established in the case of kidney sale, this does not entail that the same would be true of international commercial surrogacy. In general, arguments by analogy only work insofar as the phenomena being compared are sufficiently similar in the specific respects that are necessary for the reasoning to hold. Yet there are important differences between kidney vending and commercial surrogacy, so we will sometimes take a different route to the same conclusion. In other words, we aim to show that simply having the option to become a commercial surrogate mother can be harmful, but this does not depend on the parallel argument concerning kidney vending. Instead, we will draw on that parallel argument only insofar as there is indeed the right kind of similarity along the relevant dimensions. That is to say, our argument does not depend on kidney vending being a case of options being harmful: we rely specifically on the line of reasoning which shows how it *could* be harmful.

We will first discuss in more specific terms the potential harms of surrogacy, including physical, social and economic harms. Then we will show that the market in surrogacy—that is, the option for a woman to become a surrogate—unjustly forces fertile women, in particular, to potentially shoulder these risks on behalf of their families or wider communities, and that this would not be the case without the opportunity of international commercial surrogacy.

International commercial surrogacy is not a homogeneous phenomenon and there is particular discrepancy between states of the USA where commercial surrogacy is permitted, often costing more than $100,000 in total, and nations of Eastern Europe and Asia where the fees are much lower and the procedures less transparent. American women who become surrogate mothers may

frequently be exposed to certain of the pressures and vulnerabilities that underpin the argument made here. Courtney Gilmore has highlighted the disproportionate number of military wives who become surrogate mothers, arguing that this is because the military pays relatively poorly and that moving around the country regularly creates barriers to success in other careers.[54] Nevertheless, this paper will predominately focus on Eastern European and Asian commercial surrogacy, as this is what is most relevant to our case study of UK law and practice.

Physical Harms of Surrogacy

The argument against the option to sell a kidney involves showing that nephrectomy has physical harms which must be taken seriously. The physical harms of surrogacy are equally severe. Nephrectomy entails a major operation with a significant chance of complications and a recovery time of two to three months.[55] There is an element of long-term peril as patients know that an insult to the single remaining kidney could be catastrophic.[56]The long terms risks of surrogacy are predominately social and emotional; the significant physical harms of surrogacy normally remit after the end of pregnancy. Many of the health risks of surrogacy are the same as in any other pregnancy. These risks tend to be overlooked because pregnancy is a common and natural consequence of penile-vaginal sex, and constitutes the primary way that women become parents. However, in *R v British Broadcasting Corporation ex parte Prolife Alliance*, Laws LJ recognised that due to its inherent risks, continuing a pregnancy is more risky than an abortion.[57] This is due to its myriad complications and co-morbidities. In the UK, maternal mortality is around 8.5 per 100,000 live births. Other

[54] C Gilmore. America's Overlooked Surrogate Mothers. Richmond Journal of Law and Technology. 2018 Jan 24. Available from URL: https://jolt.richmond.edu/2018/01/24/americas-overlooked-surrogate-mothers/
[55] Commissioning policy statement: reimbursement of expenses for living kidney donors. NHS Commissioning Board. 2013 Apr. p13 URL: http://www.fundingrequests.cscsu.nhs.uk/wp-content/uploads/2013/10/Reimbursemnet-of-Expenses-for-Living-Kidney-Donors.pdf
[56] Wolters HH, Vowinkel T. Risks in life after living kidney donation Nephrology Dialysis Transplantation. 2012 Aug 1, 27(8):3021–3
[57] [2003] UKHL 23

complications and diseases of pregnancy such as pulmonary embolus, pre-eclampsia and gestational diabetes, can have a long-term effect on women's health. Haemorrhage during labour and sepsis are also serious risks.[58]

There is good reason to think that commercial surrogacy has an elevated risk of complications. The use of IVF increases the risk of pre-eclampsia[59] and ectopic pregnancy.[60] The implantation of multiple embryos increases the frequency of multiple pregnancies (the serious medical risks of which are often underestimated by the public).[61] The risk of pre-eclampsia is also increased in surrogacy because the embryo is created with sperm to which the mother has no previous exposure.[62] So in terms of medical complications, carrying a foetus that one does not (otherwise) want would have significant harms. Two other differences between commercial surrogacy and kidney vending will be addressed below.

Social and Economic Harms of Surrogacy

Even where kidney sale is legal, a significant social stigma surrounds individuals and families who take this option.[63] A similar burden of shame can also be associated with the surrogacy. Sometimes, this shame can have adverse social and economic outcomes for women. In Assam, India, some surrogate mothers are viewed as "bad mothers" and are criticized for seemingly selling their

[58] Knight M, Nair M, Tufnell D, Kenyon S, Shakespeare J, Brocklehurst P, Kurinczuk JJ. Saving lives, improving mothers' care. MBRACE-UK. 2016 Dec.
[59] Shevell T, Malone FD, Vidaver J, Porter TF, Luthy DA, Comstock CH, Hankins GD, Eddleman K, Dolan S, Dugoff L, Craigo S, Timor IE, Carr SR, Wolfe HM, Bianchi DW, D'Alton ME. Assisted reproductive technology and pregnancy outcome. Obstet Gynecol. 2005 Nov;106(5 Pt 1):1039-45.
[60] Smith LP, Oskowitz SP, Dodge LE, Hacker MR. Risk of ectopic pregnancy following day-5 embryo transfer compared with day-3 transfer. Reprod Biomed Online. 2013 Oct;27(4):407-13.
[61] Charles S, Shivas T. Mothers in the media: Blamed and celebrated – an examination of drug abuse and multiple births. Pediatric nursing, March/April 2002, 28(2), 142-145.
[62] Wikström A, Gunnarsdóttir J, Cnattingius S. The paternal role in pre-eclampsia and giving birth to a small for gestational age infant; a population-based cohort study. BMJ Open. 2012;2(4).
[63] Nayebpour MM, Koizumi N. The Social Stigma of Selling Kidneys in Iran as a Barrier to Entry: A Social Determinant of Health. World Medical & Health Policy. 2018 Mar 10(1). https://doi.org/10.1002/wmh3.255

children.[64] Research from Gujarat found that surrogate mothers are often accused of adultery. These social labels mean that after surrogacy some families have to leave their homes.[65] This displacement results in lost connections to their extended families and the associated social support. When this happens, the short-term promise of a cash injection for surrogacy leads to financial difficulties over the long term as relocating a family, finding new work, making new contacts, and reduced social support all put the family in a worse economic position.

Some women attempt to avoid the effects of stigma by moving away from their community for the duration of the pregnancy. The direct economic harm of this is that people outside the family are paid for housework and childcare and visits need to be arranged.[66] Surrogate mothers often end up in a cycle of donating eggs between surrogacies and recruiting other women, which shows that in these cases commercial surrogacy is not a one-off way out of poverty but a repeated pattern of survival.[67] Thus many women experience ongoing economic harm due to surrogacy stigma, leading to performing further reproductive services in exchange for money to solve these economic problems, driving a cycle of poverty and reproductive services.

Alternatives to Harm

Being pressured into commercial surrogacy is harmful in terms of reproductive rights, health and family economics. Why do women not simply decline to participate? The option of international commercial surrogacy puts many women in a position where, contrary to the claims of surrogacy

[64] Arvidsson A, Vauquline P, Sara Johnsdotter S,Esséna B . Surrogate mother – praiseworthy or stigmatized: a qualitative study on perceptions of surrogacy in Assam, India. Glob Health Action. 2017; 10(1): 1328890.
[65] Karandikar S, Gezinski LB, Carter JR, Kaloga M. Economic necessity or noble cause? A qualitative study exploring motivations for gestational surrogacy in Gujarat, India. Affilia. 2014;29(2):224-236
[66] Saravan S. Transnational surrogacy and objectification of gestational mothers. Econ Polit Wkly. 2010. 2010;45(16):26-29
[67] Nadimpally S, Majumdar A. Recruiting to give birth: agent-facilitators and the commercial surrogacy arrangements in India. In Davies M, ed: Babies for sale: transnational surrogacy, human rights and the politics of reproduction. London UK: Zed Books 2017:65-81

organisations, they report feeling that they must participate in commercial surrogacy or face worse consequences.

Intermediaries in international commercial surrogacy claim that surrogate mothers are primarily motivated by "huge empathy for intended parents" or "giving life and helping others".[68] While these may be important to some surrogate mothers, Guzman argues that in international commercial surrogacy this "sentimental" view is overstated in order to sanitize the unpalatable truth that many women would not participate in international commercial surrogacy without highly pressurizing circumstances.[69] Altruistic surrogacy is exceptional; altruistic surrogate mothers clearly have a different motivation.[70] The reasons for participation in international commercial surrogacy have been investigated by Sheela Saravanan who revealed that commercial surrogate mothers are often motivated by dire financial situations. Saravanan found a variety of reasons for surrogacy in Western India: repaying current debt, unstable accommodation situations, paying for basic education, husbands with addictions, and exploitative employment situations. No participants had secondary education and many were illiterate and unable to understand the contracts they were signing.[71] There have also been reports of surrogacy driven by a struggling family business in need of investment and debts in the extended family.[72] These situations put the whole family under pressure but with the possibility of surrogacy the fertile young woman is the only one able to rapidly generate

[68] See for example Brilliant Beginnings' Surrogacy FAQs URL https://www.brilliantbeginnings.co.uk/intended-parents/faqs-and-risks or ConceiveAbilities All things conceivable blog. A calling unlike any other: why women become surrogates. 2017 Jul 12. URL: https://www.conceiveabilities.com/about/blog/a-calling-unlike-any-other-why-women-become-surrogates

[69] López Guzmán J. Economic Dimension of Surrogacy Maternity ("Rooms For Rent"). Cuad Bioet. 2017 May-Aug;28(93):199-218.

[70] Horsey K, Smith N, Norcross S, Ghevaert L, Jones S Powell A, McLellan A. Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform. Surrogacy UK. 2018 Dec at 20.

[71] Saravanan S. Global justice, capabilities approach and commercial surrogacy in India. Medicine Health Care and Philosophy. 2015. 18(3)

[72] Haaij S. Cambodia proves fertile ground for foreign surrogacy after Thailand ban. The Guardian. 2016 Aug 19. Available from URL: https://www.theguardian.com/global-development/2016/aug/19/cambodia-foreign-surrogacy-thailand-ban

a large amount of money. Aware of this asymmetrical relationship, members of the extended family put pressure on the woman to become a surrogate.

If there was no option for international commercial surrogacy then these problems would demand different solutions. Families would have to find answers between them. But with the option of international commercial surrogacy the full responsibility is placed on the shoulders of some fertile young women.

It has been argued that the pressure on women to participate in international commercial surrogacy is evidence of a negligent state and a broken social fabric, and to a certain extent this is true.[73] One Indian surrogate mother put it this way: "The government is not helping with our bills and expenses. We work in big houses, my husband is a daily wage laborer and earns $3 a day, what can we do with that money?"[74] The option for surrogacy gives powerful groups an excuse for unfair treatment of vulnerable members of society: if they have a womb they ought to monetize it and look after themselves.

To summarise: international commercial surrogacy often takes place under pressurized circumstances, relating not just the basic needs of a single woman, but her spouse and extended family who may have no other relative able to become a surrogate mother.[75] Crucially, according to this argument, it is not the decision to become a surrogate mother that exposes women to harm,

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[73] Saravanan S. Global justice, capabilities approach and commercial surrogacy in India. Medicine Health Care and Philosophy. 2015. 18(3)

[74] Wu H. 5 faces of India's proposed surrogacy ban. CNN. 2016 Sep 8. URL: https://edition.cnn.com/2016/09/08/asia/india-surrogacy-laws/index.html

[75] See Krishnan K. Ban on commercial surrogacy: Notions of 'choice', 'altruism' need to be questioned. The Indian Express. 2015 Nov 2. URL: https://indianexpress.com/article/blogs/ban-on-commercial-surrogacy-notions-of-choice-altruism-need-to-be-questioned/ or Pattanayak L. Predicament of commercial surrogacy in India. World Pulse. 2015 May 14. URL: https://www.worldpulse.com/en/community/users/lulabi-pattanayak/posts/36932. There is also evidence of cases where the extended family is judgmental and stigmatizing as in the case of Jothi Lakshmi whose mother-in-law "didn't speak to [her] during [the] pregnancy". (Pandey G. India surrogate mothers talk of pain of giving up baby. BBC News. 2016 Aug 15. URL: https://www.bbc.co.uk/news/world-asia-india-37050249)

but the harm of pressurized surrogacy is a direct consequence of the option of surrogacy which brings pressures of family life and global injustice to bear on young women. So this is an example of the option itself being harmful.

Some Objections

Some simple objections to this position should now be addressed. The option could be reframed as one that benefits women, in that it seems to give a woman the ability to proactively access a sum of money, thus benefiting them rather than harming them. As touched upon above in Part I, surrogacy could theoretically be used as a creative (and dignified) way of escaping an unjust or challenging situation. It could be argued that some women would use international commercial surrogacy as a way of escaping an abusive relationship or establishing a small business. The argument fails, however, because there is no evidence that this is in reality what motivates any significant number of surrogate mothers. It is mistaken to defend international commercial surrogacy on the basis that it could be used to liberate women in highly patriarchal societies when as far as we know it is not used in that way and the opposite is far more common.

Although it could be argued that commercial surrogacy at least offers an economic option to women in abusive relationships, the notion that women in abusive relationships should participate in surrogacy in order to escape abuse is unacceptable. Not only would the act of surrogacy put the woman at elevated risk of violence but she deserves to be supported in leaving an abusive relationship without having to gestate and give up a baby, facing the social, psychological, and health risks outlined above.

As with the idea that kidney sale could improve global poverty, there are limitations to using medical law to solve wider social problems. It would be mistaken to construe international commercial

surrogacy as an act of generosity towards the global poor. If we feel compassion for those burdened by medical debt or the cost of education, then we ought to design and campaign for the best achievable policies to solve those problems. We ought to meet the problems head on. Infusing medical law with an element of capital flow from rich to poor in exchange for some biological resource or other is an indirect and half-hearted response. It can only ever help those who find themselves involved in the medical transaction, excluding all affected parties who are not eligible (in this case many infertile women, women living with HIV, and men, amongst others). A truly compassionate response to these problems would seek to help all affected, rather than tagging the issue onto another argument.[76]

We have argued that international commercial surrogacy may harm more people than previously thought and, in particular, affect women in negative ways before they have contemplated, let alone consented, to participate in surrogacy. But just because something harms people who have not consented to it does not necessarily mean that it should be prohibited. Humbryd has argued that the harm done to surrogate mothers "must be balanced against the known good that results", by which she means the benefits to the intended parents.[77] In this paper we have suggested that it is not only women who have already agreed to surrogacy who are harmed by the pressures and tensions that emanate from the international commercial surrogacy market, but other fertile women who would not have been exposed to such a large burden without the option of surrogacy. However Humbryd's challenge stands: how can we compassionately balance these harms against the possible benefit to those who get to become parents in the way they choose (and the benefits to the minority of women who would seek to become paid surrogates even under 'ideal' conditions)? One part of the

[76] Whilst there may be some areas of policy in which a piecemeal approach is necessary, international surrogacy law offers to make such a small impact on the overall problem its advocates claim that it addresses – that is, wealth inequalities between Western and developing economies – that it would be of negligible use to such a piecemeal approach.

[77]Humbyrd C. Fair trade international surrogacy. Dev World Bioeth. 2009 Dec;9(3):111-8.

answer is that, as Guzman argues,[78] potential commissioning couples need to be made aware of the reality of the market in surrogacy, rather than being sold a sanitized version, but further work—in addition to that we have covered in this paper--is needed to ascertain the scope of the harm to potential surrogates and the benefit to people who use surrogacy.

Although there may be a variety of reasons to be sceptical about international commercial surrogacy, the argument that the option of international commercial surrogacy harms women is one strong reason which holds even without assuming that consensual self-exploitation is morally impermissible. We argue that the institution of international commercial surrogacy is problematic because even offering the option to become a paid surrogate harms many potential surrogate mothers, by altering the economic burdens within the family and pressurising women—and only women—to take an option which they would otherwise not choose.

PART IV: THE UK RESPONSE TO INTERNATIONAL COMMERCIAL SURROGACY: PARENTAL ORDERS

So far we have argued that the option of undertaking commercial surrogacy does not necessarily alleviate poverty for surrogates on an international level. In fact, the availability of a 'choice' to enter into a commercial surrogacy arrangement can impact particularly harshly on the poorest and most vulnerable of women in some societies. It can also serve to create an 'expectation' within families and social groups that surrogacy is a go-to means by which fertile females can be expected to generate income. At worst, it can permit others, including state bodies, to shirk their responsibilities towards developing longer-term policies and plans to alleviate poverty. However, while an absolute ban on entering into a commercial surrogacy arrangement removes that 'choice' and thus can, in

[78] López Guzmán J. Economic Dimension of Surrogacy Maternity ("Rooms For Rent"). Cuad Bioet. 2017 May-Aug;28(93):199-218.

theory, protect women from exploitation and other harms, the experience in the UK has shown that theory does not meet reality. In large part, this may be due to the fact that the 'ban' on commercial surrogacy in the UK is something of a legal fiction as we argued earlier, rather than an effective prohibition. In any event, it is easy to get around by choosing a surrogate from outside the UK.

When intended parents from the UK use surrogates inside or outside the UK, under UK law the surrogate (and her partner) remain the legal parents. The intended parents in the UK then have to make an application to the Family Division of the High Court for a parental order, where the court will have to decide whether such an order is in the child's best interests. By this stage, the child will be living with the intended parents in the UK and thus the court invariably will grant the order as it is in the child's best interests. Thus the UK courts are effectively 'rubber-stamping' international commercial surrogacy agreements (particularly if the agreement has made provision to offer the surrogate more than what amounts to 'reasonable expenses' permitted under UK law) – albeit ex-post facto and following lengthy and complex court proceedings.

Some commentators have criticised the prevailing position in the UK.[79] Nevertheless, the demand for international surrogates is growing because the UK market supply simply cannot meet the demand. Ministry of Justice statistics reveal a five-fold increase in the number of parental orders granted each year in the ten years to 2016 (from 55 to 316).[80] So in this part of the paper, we will consider possible alternatives to the use of increasingly toothless parental orders in an attempt to shore-up a system devoid of adequate domestic and international regulation.

Options for Reform

[79] Fenton-Glynn, C. 'Outsourcing ethical dilemmas: Regulating international surrogacy agreements' *Medical Law Review* Vol 24, No 1, 59 at 61 and Jackson, E. 'UK law and international commercial surrogacy "the very antithesis of sensible"' (2016) *Journal of Medical Law and Ethics* 4(3) 197 at 200

[80] Baksi, C. 'How the law is catching up with surrogacy' The Times (16 July 2018).

At the time of writing the Law Commission is considering reforms to the surrogacy laws in the UK. The Commission has indicated that it is considering whether written surrogacy agreements should be permitted prior to birth; whether parental orders should be made during pregnancy (to make intended parents the legal parents at birth), and whether there should be a review of the parental order criteria so that children have their parentage recognised. The Secretary of State for Health has already conceded that parenting orders should be made available to single people. As a result of the case of *Re Z (A Child) (No 2)* [2016][81] the Minister conceded that the prohibition of a single person's access to parental orders was incompatible with the right to be protected from discrimination as guaranteed by Article 14 of the European Convention on Human Rights).[82] Meanwhile, many family lawyers have been calling for an ambitious revision of the current legal framework for surrogacy in the UK. This would not only reflect current practices and prioritise children's welfare within a global context, but include cross-jurisdictional consistency in relation to the recognition of children's status guaranteed by international conventions.[83]

Having shown in previous sections that the option of international commercial surrogacy can be harmful and that current UK law is ill-equipped to implement parliament's apparent desire to reduce international commercial surrogacy, we now consider the following three broad options for reform:

(1) Adopting a punitive approach to those in the UK involved in facilitating commercial surrogacy arrangements between intended parents in the UK and surrogates outside of the UK;

(2) Legalisation and regulation of commercial surrogacy arrangements in the UK;

[81] EWHC 1191 (Fam)
[82] [2016] EWCH 1191 (Fam) at para 11
[83] Supra at 78.

(3) Maintaining the status quo in the UK, while seeking to protect the rights of children, intended parents and surrogates by means of international interventions and collaboration.

Prohibiting International Commercial Surrogacy

Commercial surrogacy arrangements are unenforceable under UK law. For instance, it is a criminal offence for lawyers to draft agreements between intended parents and surrogates. The criminal sanction extends to all third parties who facilitate a commercial arrangement between intended parents and proposed surrogates in the UK.[84] There has never been any appetite to criminalise intended parents or surrogates. In 1984, the findings of the Warnock Report, which favoured a total ban on commercial surrogacy in the UK, specifically rejected the possibility of criminalising private individuals entering into commercial surrogacy arrangements 'to avoid children being born to mothers subject to the taint of criminality'.[85] This is a strong public policy reason, which continues to hold good today. Criminalising private individuals who choose to enter into commercial surrogacy arrangements remains too-short a step away from viewing the birth of the child itself as a criminal act. Therefore we consider that any punitive approach towards intended parents using international commercial surrogacy services would not be appropriate.

The position of third parties who facilitate (and derive profit) from commercial surrogacy is different to that of intended parents. The current law in the UK reflects this. One possible option for reform (and to seek to dissuade parties from entering into international commercial surrogacy arrangements to circumvent UK law) would be to extend extra-territorial effect to the provisions 'banning' commercial surrogacy under the existing law. In other words third parties (provided they

[84] see Human Fertilisation and Embryology Act 2008, s 54
[85] *Report of the Committee of Enquiry into Human Fertilisation and Embryology* ('The Warnock Report'), para 8.19.

were either UK nationals or habitually resident in the UK) could face prosecution in the domestic courts for facilitating a commercial surrogacy agreement between intended parents in the UK and a surrogate outside of the UK. In the UK, many statutory offences have extra-territorial effect, meaning that UK nationals can be prosecuted in the domestic courts for acts committed outside the UK. A recent example includes the provision for extra-territorial jurisdiction over certain offences in the Female Genital Mutilation Act 2003. Sections 70 – 75 of the Serious Crime Act 2015 extended extra-territorial effect to offences under ss 1 – 3 of the Female Genital Mutilation Act 2003 Act, making those offences triable under domestic law if the prohibited acts were committed outside the UK by a UK national or UK habitual resident.[86] Another example relates to the coercion and deception elements of the offence of forced marriage under the Anti-Social Behaviour Crime and Policing Act 2014. Sections 121(7) and (8) of the Anti-Social Behaviour Crime and Policing Act 2014 specifies that any act of coercion or deception in relation to forced marriage which takes place outside the UK is an offence under domestic law (in the case of a UK national or person habitually resident in England and Wales).

At first blush this option might look like an effective way of closing down the UK international surrogacy market. To date, no third parties have been prosecuted for facilitating commercial surrogacy arrangements and it could be argued that this type of approach is needed to strengthen the existing law which cannot be enforced due to the availability of the option of making arrangements outside of the UK to avoid the domestic prohibitions. However, there are strong arguments against taking this approach.

[86] For critical discussions of this Act, see Arianne Shahvisi, "Why UK Doctors Should Be Troubled by Female Genital Mutilation Legislation," *Clinical Ethics* 12, no. 2 (2017): 102–8, https://doi.org/10.1177/1477750916682671; Arianne Shahvisi and Brian D. Earp, "The Law and Ethics of Female Genital Cutting," in *Female Genital Cosmetic Surgery: Solution to What Problem?*, ed. Sarah Creighton and Lih-Mei Liao (Cambridge: Cambridge University Press, in press); Brian D. Earp, Jennifer Hendry, and Michael Thomson, "Reason and Paradox in Medical and Family Law: Shaping Children's Bodies," *Medical Law Review* 25, no. 4 (2017): 604–27.

First and foremost, the demand for commercial surrogacy services is continuing to grow (as noted above) and there is a danger that criminalisation would simply drive the practice further underground, which is not something that would be in the interests of the welfare of the children or surrogates concerned. Intended parents may seek to disguise the origins of the child's birth, fail to access available support or advice services, or fail to apply to the courts for parental orders (for fear of exposing those who facilitated the arrangement to criminal penalties), leaving the child effectively in a legal limbo. This risk is further compounded by the fact that British intended parents are also increasingly making international surrogacy arrangements through online groups or going to countries, such as Ukraine or The United States, where surrogacy is regulated (and are payments over and above 'reasonable expenses' are permitted).[87] In jurisdictions where commercial surrogacy is legal and regulated, the intended parents (as opposed to the surrogate) are named in the child's birth certificate.. This leaves children in an unprotected position (until a parental order is granted) and means that their legal parents in the UK and their country of birth are different for a not insignificant period of time.

Furthermore, experience has shown that statutes specifically designed to prohibit certain prevailing practices (particularly within the familial context) have proved to be unenforceable in practice. For example, to date, there have been only a handful of prosecutions under the legislation prohibiting forced marriage (it is accepted that forced marriage is distinguishable from commercial surrogacy in that the cause and effect of this practice is typically harmful in its own right, whereas the desire for a child is not). There are a number of reasons for this, but, as with the difficulty in prosecuting FGM cases, one of the main reasons is the reluctance of those involved to give evidence.[88] It would be

[87] Ukraine – Clause 123 of the Family Code of the Ukraine. The USA – there are written laws in a number of US states permitting commercial surrogacy.

[88] Townley, L and Bewley, S *Why the law against female genital mutilation should be scrapped* The Conversation (1 November 2017). See also The Brussels Collaboration on Bodily Integrity, 'Medically Unnecessary Genital Cutting and the Rights of the Child: Moving Toward Consensus." *American Journal of Bioethics*, in press.

difficult, if not impossible, to mount a prosecution for facilitating a commercial surrogacy arrangement without hearing evidence from the intended parents and from the surrogate (the latter being outside the jurisdiction would mean that their involuntary attendance at court could not be secured in any event). It is, of course, highly unlikely that either of these parties would be willing to give evidence against any third party who facilitated the commercial surrogacy agreement in which they were involved. Therefore any such legislation is unlikely to achieve its stated aim of ending (or at least discouraging) the practice of international commercial surrogacy. Therefore, in our view, our limited public resources would be best directed elsewhere.

Legalisation And Regulation Of Commercial Surrogacy In The UK

At the time of writing, calls to decriminalise payments for surrogacy are growing apace in the UK and elsewhere. In Canada, a private members bill has been tabled in the House of Commons to legalise payments for gametes and surrogacy.[89] Anthony Housefather, the MP who originated the bill, has called for this change to the law in Canada (where commercial surrogacy is prohibited) on the basis that the desire to have a child, or to help someone to have a child, should not be considered as the sort of societal evil which the criminal law was designed to protect society from. The bill has not, however, enjoyed universal support. The Association of Reformed Political Action Canada has opposed the bill on the basis that it commodifies gametes and, as such, does not respect the best interests of children or defend their human dignity.[90] Any steps to legalise commercial surrogacy would of course create the need for extensive regulation. In Canada, steps to regulate commercial surrogacy remain a work-in-progress. Assistant Professor Dr Alana Cattapan of Johnson Shoyama Graduate School of Public Policy, whose department has been working on the formulation of

[89] House of Commons of Canada, Bill C-404, An act to amend the Assisted Reproduction ct, first reading May 29, 2018

[90] Association for Reformed Political Action Canada. *New bill would allow commercialization of human reproduction*. 30 May 2018. URL: https://arpacanada.ca/news/2018/05/30/new-bill-would-allow-commercialization-of-human-reproduction/

regulations since 2016, has said that legislators should wait until Health Canada has clearer rules about sperm, eggs and surrogacy, which are expected later this year.[91]

We would argue that the current experience in Canada has shown that there remain compelling arguments on both sides of the debate in relation to the legalisation of commercial surrogacy. However, there is another option. It would be possible for the UK to seek to introduce some form of *regulation* on commercial surrogacy arrangements, while still maintaining an overall 'ban' on commercial surrogacy. While this position might be viewed by some as hypocritical, Claire Fenton-Glynn argues that the current UK position, where the courts find themselves required to undertake ex-post facto examinations of agreements made outside the jurisdiction (without any opportunity to interview the surrogate), is untenable. She argues:

> If commercial surrogacy is viewed as a contextual wrong by English law, this suggests that rather than prohibiting citizens from undertaking such arrangements, England should be trying to ensure that the requisite domestic regulation is in place so that arrangements can be adequately supervised and controlled.[92]

The merits of this argument are clear in terms of domestic commercial surrogacy. Potentially, it would enable individuals to be more aware of their rights and enable them to access appropriate support services to help ensure that any decisions or choices made in relation to commercial surrogacy arrangements were open and informed. However, even the best system of regulation, within a domestic context, is unable to solve the many problems potentially associated with international commercial surrogacy arrangements. Any system of regulation is only as good as the

[91] Baylis F. Cattapan A.Paying surrogates, sperm and egg donors goes against Canadian values. 02 April 2018. The Conversation. URL: http://theconversation.com/paying-surrogates-sperm-and-egg-donors-goes-against-canadian-values-94197

[92] Supra at 77

ability of the regulator to monitor and enforce the regime. For instance, if intended parents choose to go overseas, any resultant commercial surrogacy arrangement would be out-of-reach of any UK regulatory system in any event. Therefore even if the UK were to regulate commercial surrogacy domestically, this would not address the concerns raised by the inability to monitor or assess the ethical, quality, and safety standards operating in other jurisdictions where intended parents might choose to engage surrogates. In these situations, little could be done, in practical terms, to ensure that a surrogate was properly safeguarded from inadequate practices or financial exploitation. So all roads would appear to be leading to the necessity of some sort of international co-operation if any in-roads are to be made in relation to limiting the potential harms of commercial surrogacy.

Regulation Of Commercial Surrogacy On An International Level

This brings us to the third option. That of effectively maintaining the status quo in the UK, while seeking to safeguard the rights of children, intended parents and surrogates by means of international interventions, agreements, or collaborations. Moylan J in the case of *Re D (A Child)* supported the case for greater international regulation.[93] He noted:

> This case provides a clear example of the difficulties created as a result of surrogacy arrangements being subject to varying degrees of domestic regulation, from significant regulation to none at all, and also because of the existence of significant differences in effect of such domestic regulation. There is, in my view, a compelling need for a uniform system of regulation to be created by an international instrument in order to make available an appropriate structure in respect of what can be described as the surrogacy market.

[93] [2014] EWHC 2121 at para 1

Given the ease with which individuals can enter into international arrangements over internet fora and chatrooms, coupled with the ease of international travel, international commercial surrogacy is here to stay. Indeed, the significant increase year on year in the last decade indicates that the practice is likely to continue to grow in the future.

Meanwhile, countries are operating wide and varying systems of regulation and there are also conflicts of laws between many countries in relation to commercial surrogacy. Therefore even if the UK seeks to repeal or amend the current law, or introduce a regulatory regime, the need for international regulation, in whatever form it takes, cannot be ignored.[94] That being said, it is acknowledged that this option is likely to be problematic in practice. While there is clearly momentum at a judicial level in the UK for international regulation, the ability to achieve any such uniformity would be challenging given the existing conflicts of laws on commercial surrogacy that currently exists between jurisdictions. Any international instrument would also need to be reflective of the United Nations Convention on the Rights of the Child 1989 and its optional protocols.[95] Difficulties in framing and drafting aside, widespread disagreement on the ethical implications of commercial surrogacy remains, with many viewing it as nothing more than a form of child trafficking.[96] Therefore it is perhaps unlikely that we will see any firm progress towards any widespread form international regulation within the short-term future.

Conclusion

[94] For similar arguments about the need to pursue regulation when prohibition is not feasible, and to consider possible forms of regulation that will maximize benefits and minimize harms, see John Danaher, Sven Nyholm, and Brian D. Earp, "The Quantified Relationship," *The American Journal of Bioethics* 18, no. 2 (2018): 3–19, https://doi.org/10.1080/15265161.2017.1409823. John Danaher, Brian D. Earp, and Anders Sandberg, "Should We Campaign against Sex Robots?," in *Robot Sex: Social and Ethical Implications*, ed. John Danaher and Neil McArthur (Cambridge, MA: MIT Press, 2017), 47–71.

[95] The UNCRC was ratified by the UK on 16th December 1991 and came into force on 15th January 1992. All UK government policies and practices must comply with the UNCRC.

[96] See Arvidsson et al, supra at f/n 63

We have shown that the strongest reason why parliament might wish to reduce international commercial surrogacy is our novel objection that simply having the option can be harmful even before women have consented to participate in international commercial surrogacy. As we await the publication of the Law Commission's proposals for reform of the surrogacy law in the UK, it is hoped that consideration will be given to the need for international regulation because without this, the domestic system cannot be reformed in any meaningful way.