FREE MARKET FEMINISM: RE-RECONSIDERING SURROGACY

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Abstract. The COVID-19 pandemic has thrown the global surrogacy industry into chaos, stranding surrogates, infants, and their caretakers across the world from the intended parents. As surrogates and staff are left caring for infants that are strangers to them by law, the emotional toll of commercial surrogacy is more visible than ever before. In this article, I argue that this moment is ripe for reconsidering our laissez faire approach to for-profit reproduction. When the Baby M case hit the news in 1988, it set off a chorus of alarm among feminists (and others). Many states subsequently passed laws banning commercial surrogacy. Yet in the years since then, the dominant feminist position has quietly shifted. Surrogacy is now seen as a choice, one that expands women’s possibilities both as workers and as mothers. Surrogacy is also seen as an LGBT rights issue, as it provides a way for gay men to have children that are genetically related to them. However, the issues of gender, race, and exploitation that inflamed feminists in the 1980s and 1990s are no less relevant today. As renewed concern with economic justice has made a resurgence on the national stage, I argue that it is time for socialist-feminist perspectives on surrogacy to reemerge. Eschewing freedom of contract as an illusory freedom that serves the ruling class, such a politics would demand social policy that limits commodification and promotes reproductive justice and freedom for all, not just the wealthy few.

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INTRODUCTION .................................................................................................................................................. 445
I. THE EVOLUTION OF FEMINIST VIEWS ON SURROGACY .......................................................... 446
   A. From surrogacy as exploitation to surrogacy as choice ........................................................................ 446
II. INDIVIDUAL LIBERTY CLAIMS OFTEN SERVE CAPITALIST INTERESTS, ESPECIALLY IN THE SPHERE OF ECONOMIC REGULATION ................................................................. 454
III. THEORETICAL PERSPECTIVES ......................................................................................................... 458
   A. Marxism & free labor ...................................................................................................................... 458
   B. Marxism & alienation/estrangement .............................................................................................. 459
   C. Commodification vs. Decommodification ..................................................................................... 463
III. THE SOCIAL MEANING OF THE SURROGACY INDUSTRY .......................................................... 469
   A. Surrogacy in global perspective today .......................................................................................... 475
V. TOWARDS A PRACTICAL, FEMINIST, ANTI-CAPITALIST POLITICS OF SURROGACY .......................................................... 478
   A. At a minimum, we must always protect parental rights of gestators by giving them
      the right to back out of surrogacy contracts .............................................................................. 478
      1. Bodily Autonomy ................................................................................................................. 478
      2. Marxism & the Labor Movement ...................................................................................... 478
      3. Reproductive Justice .......................................................................................................... 480
      4. Black Feminism ................................................................................................................. 481
      5. Limiting Commodification by Giving Workers Power .................................................... 481
   B. Altruistic surrogacy – exploitation in disguise? ........................................................................... 481
   C. A public policy based on reproductive justice is inconsistent with commercial surrogacy .......................................................... 483

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**INTRODUCTION**

When Sierra Martin signed up to be a gestational surrogate for a gay couple from China, she had no inkling of the havoc that COVID-19 would bring. One week before her due date, she learned that the couple would be unable to travel to the United States to pick up the baby due to travel restrictions. The couple asked her if she could take the baby home and care for him until they were able to travel. Martin didn’t know what to do, but eventually, she agreed. Spending months on end in lockdown with the baby was emotional.

> It will be hard to give him back, because I’ll miss him . . . But I know he’s not mine, and that I have to give him up, which is totally OK with me . . . But there’s definitely a bit of attachment there . . . I care for him. When you love on a baby, you love on a baby.¹

This situation is unusual but Martin’s emotional attachment is unsurprising. Indeed, because the surrogacy industry seeks to avoid the possibility of bonding, it is rare, “unprecedented,” for a surrogate to care for the baby after birth.²

The COVID-19 pandemic has exposed many grossly unequal and exploitative features of our society that were previously easier to ignore, including the surrogacy industry and its workers. From U.S. surrogates and staff members stuck “holding the baby,” to the Israeli couple stuck in New Jersey with their new infant unable to fly home, to the dozens of surrogates, nurses and newborns holed up in a hotel in Ukraine while borders closed, COVID has thrown the global surrogacy industry into chaos.³ Although by no means the most important problem that COVID has exposed, it’s still worth pausing to examine a global industry worth billions of dollars⁴ which has a vested interest in making sure that love does not form between a pregnant person and the child they gestate. This places a burden upon workers like Martin, which philosopher Elizabeth Anderson calls the emotional labor of surrogacy: the conscious effort to not bond with a child.⁵

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² Id.
⁵ Elizabeth Anderson, *Is Women’s Labor a Commodity?*, 19 Phil. & Pub. Aff. 71, 82 (1990). Here she is using the term “emotional labor” in the sense originally proposed by Arlie Hochschild in *The Managed Heart* (1979), in which a worker has to manage her own emotions in order to produce a particular emotional experience in another person (usually a customer). But see Julie Beck, *The Concept Creep of ‘Emotional Labor,’* The Atlantic (Nov. 26, 2018), https://www.theatlantic.com/family/archive/2018/11/arlie-hochschild-housework-inst-emotional-labor/576637/ [https://perma.cc/RYB5-Q5UE] (explaining that the term “emotional labor” has become blurry as it has been used to apply to a wider range of...
Approximately 1,000 babies are born to surrogates in the U.S. every year, and “media coverage of births via surrogacy is more positive than ever before.” Yet in the 1980s and 1990s, surrogacy generated a great deal of concern in feminist discourse. In this article, I will discuss how mainstream American feminism has changed its position on commercial surrogacy and invite readers to re-reconsider the issue. Starting with the feminist response to In re Baby M, I chart how feminist discourse shifted from seeing surrogacy as a form of exploitation to seeing it as a personal choice.

As an activist with a labor rights background, this neoliberal discourse of personal free choice is very familiar and deeply misleading. Surrogacy is a contract, and contracts are often used to restrict workers’ legal and substantive freedoms. To understand why workers sign them anyway, we have to look at the imbalance in bargaining power between workers and employers. Using this lens of true social and economic justice enables us to ask what individual freedom really means in the context of the workplace. Is freedom the ability to alienate things from ourselves in exchange for money, or is freedom the ability to live a good life with material security, without exchange? Addressing the bodily workplace specifically, I turn to Marxist feminist scholarship on labor and commodification to explore what it means for individuals and society when human reproduction is for sale. In doing so, I address the comparison between surrogacy and sex work, outlining how state interventions into each have had very different consequences for workers.

Moving beyond the theoretical dimensions of class and gender, I question what surrogacy means in the context of white supremacy and imperialism. Revisiting Black feminist scholarship from the 1990s, I will discuss the analysis of commercial surrogacy as reinscribing a white, patriarchal, heteronormative, neo-eugenicist, unjust notion of family. Despite many changes in the market since the 1990s, including the expansion of commercial surrogacy to the Global South, I find that much of this analysis still holds.

Finally, I outline a practical, feminist, anti-capitalist politics of surrogacy. I argue that its foundational demand must be the right for surrogates to back out of the contracts and keep the baby, if they choose. Next, I address how altruistic surrogacy might play a role in a just and equitable future. I then sketch a reproductive justice policy platform which would truly expand reproductive freedoms for all people, not just the wealthy. I conclude that commercial surrogacy is irreconcilable with such reproductive justice.

I. THE EVOLUTION OF FEMINIST VIEWS ON SURROGACY

A. From surrogacy as exploitation to surrogacy as choice

When surrogacy first came to public attention in the United States, the feminist response was near-universal extreme concern. Feminists including Betty Friedan, Gloria Steinem, Gena Corea, Barbara Katz-Rothman, Evelyn Fox Keller, Janice Raymond, Mary Daly, and Phylis Chesler wrote as amici curiae in In re Baby M, opposing surrogacy and supporting Mary Beth

experiences).


446
Whitehead-Gould’s right to keep her child. Feminist commentators including Katha Pollitt decried the practice, while feminist philosophers Elizabeth Anderson, Mary Gibson and Christine T. Sistare wrote articles opposing the legalization of commercial surrogacy. During this period,

[f]eminists and women’s groups were united against the trial level decision of Baby M and similarly united in support of the New York State legislation banning surrogacy. The New York Women’s Bar Association and the New York chapter of the National Organization for Women lobbied actively for the passage of the law and the bill itself was sponsored by Helene Weinstein, a pro-choice Brooklyn Democrat.

Writers, scholars, and activists such as Angela Davis, Dorothy Roberts, and Anita L. Allen contributed to a rich discourse on the ways that commercial surrogacy echoed the United States’ tradition of racially stratified reproductive labor and could exacerbate racial inequalities.

As time went on, however, a new consensus on surrogacy began to emerge among American feminists. The neoliberal ideology that dominated in the late 1990s and 2000 influenced this consensus. Surrogacy and reproductive technology came to be viewed as expanding women’s options, both to become mothers and to become surrogates. Moving away from a framing of exploitation, feminists repositioned the decision to become a surrogate as a free choice. Deborah Machalow’s argument for legalizing commercial surrogacy in New York State is typical of this “choice” discourse. She writes:

[T]he ability to enter contracts, including surrogacy agreements, is included in the meaning of personal autonomy... Enforcing surrogacy agreements strengthens self-determination and personal autonomy, as enforcement “presupposes that the woman’s body is hers and hers alone unless she consents to some particular use of

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12 Commercial surrogacy is illegal in many countries around the world, including much of Europe and Asia. Feminist views may be different in those countries, a topic which unfortunately is outside the scope of this paper. Lennee Keep, Surrogacy Facts and Myths: How Much Do You Know?, PBS: INDEPENDENT LENS (Oct. 22, 2019), https://www.pbs.org/independentlens/blog/surrogacy-facts-and-myths-how-much-do-you-know/ [https://perma.cc/XL52-C3WL].
it.” “The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.” . . . .14

Other early authors in this discourse included Carmel Shalev and Lori Andrews.15 According to Shalev, “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.”16 Instead, she calls for laws that “recognize the constitutional privacy of individuals, regardless of gender, to define legal parenthood as a matter of autonomous decision-making authority, before conception.”17

In addition, surrogacy could be seen as increasing the choices available to women who would like to acquire a child through surrogacy. Christine Kerian argues that “[s]urrogacy extends the ability to procreate to persons who may not otherwise be able to have children, thereby enhancing individual freedom and the right to make choices.”18 This discourse of individual reproductive choice has also been elevated through the language of international human rights. A study by the Cornell Law School International Human Rights Policy Advocacy Clinic concluded that “legalizing surrogacy would be consistent with the [international human rights] treaties’ stated goals by protecting intended parents’ right to found a family and a woman’s right to reproductive autonomy.”19 Sital Kalantry writes:

When a woman chooses to support a couple or individual by serving as a gestational surrogate (where she is not genetically connected to the child because she did not contribute her egg), I believe she must have the autonomy to do so – provided she is protected by the law to ensure that any power imbalance between her, on the one hand, and the intended parents, surrogacy agencies and doctors, on the other hand, is mitigated.20

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15 LORI B. ANDREWS, Surrogate Motherhood: The Challenge for Feminists, 16 LAW MED. & HEALTH CARE 72 (1998) (arguing that the surrogacy is a viable alternative reproductive method for couples struggling with infertility and should be protected as an important choice); CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1991) (arguing that the law must treat surrogates as autonomous parties to a binding contract rather than reinforce paternalistic attitudes and deny women legal autonomy).
16 SHALEV, supra note 15, at 11.
17 Id.
Even where inequality is acknowledged, feminist thinkers still see the choice to become a surrogate as worthy of protection.

As neoliberal feminism consolidated its position, the new consensus held that feminist concerns about surrogacy are “outdated.” As an indicator of this consensus, the Women’s Bar Association of New York State issued a position statement in favor of a bill to legalize commercial surrogacy in 2018. Framing having children that are genetically related to one as a “need,” the Association chastised the New York State legislature for failing to “evolve” in response to advances in reproductive technology. Acknowledging the legacy of Baby M, the Association provided two solutions to the hypothetical problem that surrogates may develop emotional attachments to the child. First, the Association noted that “traditional” surrogacy, in which the surrogate uses her own ova, is today “frowned upon in both the legal and medical communities.” This position is based on an implicit assumption that surrogates will not form an attachment to a baby that is not genetically related to them. Second, the Association asserts that “professionals involved in surrogacy arrangements impose strict screening procedures to ensure that anyone seeking to act as a gestational carrier has the emotional and financial stability to ensure success.” What the Association does not state is the normative claim underlying its assumptions: that pregnant persons ought not to feel an emotional bond with children who are genetically unrelated to them. Nor does the Association acknowledge the harm that will be caused by contract enforcement in those circumstances in which “screening” inevitably fails to predict how every person will feel about the child she is gestating during a pregnancy. Even more surprisingly for a women’s organization, it fails to even mention that gestational surrogacy – involving embryo implantation – is more physically invasive for surrogates and has worse health outcomes for her and the child(ren) than a natural pregnancy.

22 “While the law in most states has evolved to keep pace with these medical advances, that is not the case in New York and the consequences for New Yorkers are profound.” Id.
23 Id.
24 Id.
25 Several writers on this topic have cited the statistic that over 99% of surrogates willingly relinquished the child and less than one-tenth of one percent of agreements resulted in court battles. See Kalantry, supra note 20, at 21; Elly Teman, The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood, 67 Soc. Sci. & Med. 1104, 1104 (2008). However, the strongly biased source of the statistic about court battles is a spokesperson for the Organization of Parents Through Surrogacy (OPTS), a support group for intended parents. See Judy Keen, Surrogate Relishes Unique Role, USA Today (Jan. 22, 2007), https://usatoday30.usatoday.com/news/health/2007-01-22-surrogate-role_x.htm [https://perma.cc/WQL5-WEQS]. In contrast, neutral studies documenting the prevalence and outcomes of surrogacy in the U.S. are scarce. Any such studies do not address the number of surrogates who either do not have access to courts or who are aware that the law is against them, and therefore do not pursue claims to keep the children they gestate. Ethnographic studies of surrogacy in India have shown that emotional distress at relinquishing the children is a part of the experience of at least some surrogates. See Sharmila Rudrappa, Discounted Life: The Price of Global Surrogacy in India 60-61 (2015); Amrita Pande, Wombs in Labor: Transnational Commercial Surrogacy in India 148 (2014). The existence of cases in which US surrogates have sought custody of the children they gestated also demonstrate that this does happen, however infrequently. See for example Cook v. Harding, 190 F. Supp. 3d 921 (C.D. Cal. 2016), aff’d, 879 F.3d 1035 (9th Cir. 2018); In re Baby, 447 S.W.3d 807 (Tenn. 2014); In re F.T.R., 833 N.W.2d 634 (Wis. 2013); P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018), 139 S. Ct. 125 (2018); In re C.K.G., 173 S.W.3d 714 (Tenn. 2005); J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007).
this way, a highly sanitized image of commercial surrogacy is presented, in which surrogates successfully disassociate their emotions from their bodies and in which their bodies do not suffer pain, stress, or exploitation.

The consensus has shifted so far that feminist groups have raised little protest even when U.S. states have allowed contracts to significantly curtail surrogates’ bodily autonomy. For example, Oklahoma, Delaware, Illinois, and Nevada have regulatory schemes that specifically allow for contract clauses requiring surrogates to undergo all medical examinations, treatments and fetal monitoring procedures recommended by their treating physician.\(^\text{27}\) Other states, including Arkansas, California, Connecticut, Iowa, New Jersey, and North Dakota, have left it up to the courts to decide whether contract clauses that restrict surrogate’s medical decision making during pregnancy will be enforced.\(^\text{28}\) Research indicates that these clauses are found in contracts in at least some of these states.\(^\text{29}\) Such contracts may even require a surrogate to undergo an unwanted abortion.\(^\text{30}\) This issue finally received some national attention in recent years when a California surrogate faced legal damages for refusing to have an abortion requested by the intended parent.\(^\text{31}\) Delaware, Illinois, and Nevada statutes provide that a surrogate may only choose her physician after consultation with the intended parents.\(^\text{32}\) Many states also allow contract clauses that intrude into the surrogate’s daily life, including what foods she can eat, what hair products she can use, whether she can exercise or receive acupuncture, and more.\(^\text{33}\) These might seem like excessive intrusions into women’s personal lives, yet “public and scholarly engagement with the details of these schemes has all but disappeared.”\(^\text{34}\) Courtney Joslin’s meticulous research into legislative histories has shown that when Illinois and California implemented their statutory schemes, both of which contained some of the problematic aspects discussed above, there was literally no recorded opposition, and not a single legislator voted against them.\(^\text{35}\)

The only way to make political sense of why these laws have been ignored by major feminist organizations is that neoliberal feminism’s focus has always been on the needs and interests of white, upper class women, rather than the class of women as a whole. Permissive surrogacy regimes promote the interests of wealthy white women who either cannot be pregnant themselves, or choose not to, but nonetheless want children who are genetically related to them or their male partners, and whose gestation they can monitor and supervise. Even where surrogacy does not involve a genetic

\(^{27}\) See OKLA. STAT. tit. 10, § 557.6 (2019); DEL. CODE ANN. tit. 13, § 8-807 (2013); 750 ILL. COMP. STAT. 47/25 (2005); NEV. REV. STAT. § 126.750 (2013).

\(^{28}\) Joslin, supra note 13, at 34-35 (noting the lack of a statutory scheme).


\(^{30}\) See, e.g., Cook, 190 F. Supp. 3d at 929 (“C.M.’s attorney informed Cook in writing that, by refusing to [terminate one of the pregnancies], she was in breach of the contract and liable for money damages thereunder.”). In these cases a surrogate who refuses an abortion may have to pay contract damages but courts will not order specific performance.


\(^{33}\) Berk, supra note 29, at 156-57; Joslin, supra note 13, at 32-37.

\(^{34}\) Id. at 49.

\(^{35}\) Joslin, supra note 13, at 49-50.
connection between the intended parents and the child, some wealthy would-be parents find the consumer-oriented experience of surrogacy preferable to adoption procedures. For example, as a caller into an NPR show explained her feelings:

My daughter is adopted, and my son was with a surrogate, and it just felt much more like . . . concrete with my son, because like, I knew that my daughter’s mother could choose to mother her, choose to parent. Whereas the surrogate I was working with I knew was going to surrender my son to me . . . partly because we paid her money.36

Fertility companies also offer a shopping-like experience with regard to genetic material. As one company advertises,

People from around the world are secure in knowing that our egg donors are indeed derived from remarkable, accomplished young women. Our Donors range in age from 20-29 to maximize the quality of eggs produced. . . . Many intended parents find they want their egg donor have [sic] similar ethnic traits including eye color, height, etc. We understand this need . . . .37

Surrogacy agencies may also go to great lengths to accommodate the scheduling needs of would-be parents.38 Thus, would-be parents may also feel that surrogacy offers a more predictable timeline compared to adoption. In this way, convenience for the would-be parent/consumer is maximized. As will be discussed later, commercial surrogacy also gained popular acceptance as many wealthy celebrities publicly embraced it in their own families.

The reproductive interests of a minority of upper-class straight couples dovetailed well with the reproductive interests of upper-class gay men. Surrogacy allows gay men to have children that are genetically related to one member of a couple, and some gay male advocates are in favor of making surrogacy more widely available.39 However, the embrace of surrogacy as an matter of LGBT justice requires further explanation. After all, “[l]esbians are more likely to be surrogates than enter into a surrogacy contract as intending parents.”40 Yet expanding surrogacy has been quite uncritically

36 New Bill to Legalize (and Limit) Gestational Surrogacy, The Brian Lehrer Show, WNYC, at 26:00 (Feb. 17, 2020) (on file with author).
38 Medically unnecessary cesarian sections have been ubiquitous at some clinics in India, in large part to accommodate the scheduling needs of international clients. Pande, supra note 25, at 117.
embraced by the mainstream of the LGBT rights movement. For example, in New York, an extensive coalition of LGBT rights nonprofits, from Lambda Legal to the Trevor Project, endorsed a bill to legalize commercial surrogacy in the state, despite objection from older feminists and women’s health advocates. As one commentator stated, “This bill may benefit some gay men and a smattering of trans people, usually white and wealthy — but not LGBT people as a group.”

It would appear then that “a gay elite has hijacked queer struggle and positioned their desires as everyone’s needs.” In recent years, a revitalization of radical queer activism has rejected the mainstream LGBT rights movement’s focus on marriage equality and access to the military. Instead, these queer activists have rallied in support of immigrant rights, anti-racism, and an expanded welfare state, positioned in opposition to marriage, assimilation, U.S. militarism, police, and prisons. However this revitalized radical queer politics has yet to deeply engage in the discussion around surrogacy.

Third-wave feminism and the movement for sex workers’ rights have also contributed to the new feminist consensus. Feminists rejected the notion that women who worked in industries, such as sex work and surrogacy, that required enacting stereotypically sexist or gendered roles suffered from a kind of false consciousness. Instead, women may rationally choose to enact such roles because they may enjoy playing such roles on terms that they set, and/or because they can gain income by doing so. It take this perspective to be true, to the extent that it describes the choices of many, or perhaps most, women workers in these industries. However, some completely reject earlier concerns about the type of work that women do, as such concerns are seen as moralizing and paternalistic.

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43 Briggs, supra note 40.


47 As applied to surrogacy, see generally Sophie Lewis, Full Surrogacy Now (2019) (discussing paternalistic forms
affirming the choices and dignity of individual workers, this analysis provides few tools for cultural critique of different industries and how they perpetuate sexist, racist, and classist ideologies. Nor are labor rights best advanced by inattention to the intensity of exploitation in different industries, and its nature and specificity. As I argue in this paper, a better socialist-feminist politics would also be concerned about the type of world that we are building through our collective labor.

The globalization of the surrogacy industry has also played an interesting role in the development of feminist perspectives with regard to surrogacy. Poor conditions and apparent exploitation in the surrogacy industry in India and other parts of the developing world have garnered a fair amount of press attention. While some feminists took up this issue, others charged them with patronizing savior attitudes towards women in the Global South. This would be in keeping with a pattern in which “Western feminists have [historically] constructed third-world women as poor, illiterate, culturally oppressed, and in need of rescue.” The critics may have a point, as Joslin’s research has shown how public concern for surrogate’s welfare abroad was not matched by engagement with or concern for the welfare of surrogates at home. Capital’s ability to shift its location with relative ease also led some observers to conclude that bans were impractical.

Finally, opposing commercial surrogacy brings together strange bedfellows. Surrogacy (along with all IVF) is opposed by the Catholic Church, while anti-gay movements have shaped regulation of commercial surrogacy in India and Israel, where access to surrogacy has specifically been denied to gay intended parents. The anti-surrogacy positions of certain vocally transphobic radical feminists of sympathy for commercial surrogates); as applied to sex work see Peter Frase, *The Problem with (Sex) Work*, Peterfrase.com (Mar. 27, 2012), http://www.peterfrase.com/2012/03/the-problem-with-sex-work/ (discussing the moralizing nature of some arguments related to sex work); see also Corvid, supra note 46 (discussing how sex work is just another type of work).


48 RUDRAPPA, supra note 25, at 1-2.

49 Lewis, supra note 47, at 56 (describing anti-surrogacy feminists as motivated by “neoimperialist humanitarian feminism”). One of the groups Lewis discusses critically is FINRRAGE, the “Feminist International Network of Resistance to Reproductive and Genetic Engineering,” which describes itself as an “international network of feminists who are concerned with the development of reproductive and genetic technologies and their effects on women.” See id. at 54; FINRRAGE, http://www.finrrage.org/ (last visited May 10, 2021).


51 Joslin, supra note 13, at 53. On the other hand, even taking into consideration the serious problems with US surrogacy that Joslin highlights, labor conditions for surrogates in the global south are likely worse overall, and thus more worthy of concern.

52 Pande, supra note 25, at 172-74; Lewis, supra note 47, at 4.

have also likely soured this issue’s appeal for many younger feminists.56

Commercial gestational surrogacy is explicitly legalized in twenty states,57 and the trend strongly favors legalization.58 Some states have no laws governing surrogacy at all, but outright bans are now present in a very small minority of states.59 Recent laws legalizing commercial surrogacy have passed in New Jersey, Washington, New Hampshire, Nevada, and the District of Columbia.60 New York joined them in April 2020.61

II. INDIVIDUAL LIBERTY CLAIMS OFTEN SERVE CAPITALIST INTERESTS, ESPECIALLY IN THE SPHERE OF ECONOMIC REGULATION

When feminists argue that becoming a surrogate is a choice, they echo the classic liberal tradition that valorizes individuals’ choices without deeply considering the context in which they are made. This discourse leaves out the important question of what other options are available to the person making such a choice, and it ignores the balance of power between the parties entering into an agreement such as a surrogacy contract. Legal theory and lawyering in the tradition of economic and social justice has a very different approach to contracts from the liberal approach I have outlined above. In this section, I will outline the economic and social justice approach to contracts in general. I will then show how these perspectives apply to surrogacy.

Contrary to liberal discourse, labor law is premised on the idea that there is an inequality of bargaining power between workers and employers. The preamble to the NLRA outlines its purpose to address “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association....”62 Collective bargaining provides one avenue for addressing this systematic power imbalance. However, even with unions, employers will almost always try to get the most favorable contract terms for themselves.

In non-union sectors, unfair terms in employment contracts are a much bigger problem. Around 60 million American workers have signed employment contracts with mandatory arbitration
clauses, barring them from access to the courts for employment-related claims.\textsuperscript{63} Recent litigation such as \textit{Epic Systems Corporation vs. Lewis} has continually expanded the power of employers to limit employee rights through contract.\textsuperscript{64} The widespread abuse of non-compete clauses is another example of how employers use contracts to limit their workers’ freedom, or indeed their very ability to make a living except through working for that employer.\textsuperscript{65}

This pattern is found perhaps even more egregiously in consumer law. From credit cards to predatory mortgages to usurious payday loans, low-income consumers are often the targets of grossly unfair schemes perpetrated through contracts.\textsuperscript{66} These practices can have consequences far beyond the individual consumers, as it was adjustable-rate mortgages—a particularly unfair type of contract—that were instrumental in crashing the global economy in 2007.\textsuperscript{67}

To counteract these trends, lawyers working for economic justice will typically argue that unfair contracts should not be enforced. They may use the doctrine of unconscionability, which provides a way for judges to decline to enforce contracts that are unusually unfair and one-sided. The Uniform Commercial Code § 2-302 states,

> If the court as a matter of law finds the contract to have been unconscionable at the time it was made, the court may refuse to enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.\textsuperscript{68}

“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”\textsuperscript{69} Courts may look at factors such as unequal bargaining power, unfair surprise, lack of notice, language barriers, whether a contract was one of adhesion, and other factors.\textsuperscript{70} However, unconscionability is generally considered a high burden to prove.\textsuperscript{71} After a period

\begin{itemize}
\item \textsuperscript{63} Alexander J.S. Colvin, \textit{The Growing Use of Mandatory Arbitration}, \textsc{Econ. Pol'y Inst.} (Sept. 27, 2017), \url{https://files.epi.org/pdf/135056.pdf} [https://perma.cc/3MG6-QLRB] (last visited Apr. 8, 2021).
\item \textsuperscript{64} \textit{Epic Systems v. Lewis}, 138 S. Ct. 1612 (2018) (holding that mandatory arbitration clauses in employment agreements must be enforced).
\item \textsuperscript{68} U.C.C. § 2-302 (Am. I. Inst. & Unif. L. Comm’n 2012).
\item \textsuperscript{69} \textit{Williams v. Walker-Thomas Furniture Co.}, 350 F.2d 445, 449 (D.C. Cir. 1965).
\item \textsuperscript{70} \textit{See, e.g., Homeland Energy Sols., LLC v. Retterath}, 938 N.W.2d 664 (Iowa 2020), \textit{mrbg denied}, (Feb. 26, 2020)
\end{itemize}
of popularity in the 1960s, courts have more often turned to legislators to address grossly usurious practices in the low-income credit market through specific regulations.\(^{72}\)

In keeping with this concern for the fairness of a contract, an argument can be made that surrogacy contracts suffer from problems of informed consent that make them particularly unfair. Because surrogacy contracts typically require a person to waive their parental rights to a child prior to becoming pregnant with that child, they require a person to make a decision when they do not have full information about that choice. A pregnant person’s feelings toward the choice to become a parent can change during the course of a pregnancy. This is illustrated quite clearly by the steady number of cases in which surrogates have sought parental rights, despite previously having renounced them.\(^{73}\)

Even after she began to want the child, [Anna] Johnson said that she was ‘in a state of denial’ and she kept ‘trying to tell myself that I am not supposed to have any emotion toward my child, but there is no way that you can prevent those emotions from taking over, and those instincts came out naturally.’\(^{74}\)

Without knowing how she will feel during a later stage of a pregnancy, the would-be surrogate is asked to make a choice without full knowledge of what may be at stake for her. This makes surrogacy contracts particularly unfair and arguably unconscionable. However, this unique aspect of surrogacy contracts has not stopped many American courts from upholding them.

Relatedly, lawyers representing working class clients may argue that contract enforcement is against public policy. The public policy doctrine is interesting because it allows an inquiry into policy objectives and areas of law aside from contract.\(^{75}\) Essentially, it allows the courts to consider what is best for society. For example, concern for the environment might be a reason that certain contracts

\(^{71}\) See, e.g., Sanchez v. Valencia Holding Co., 353 P.3d 741, 749 (Cal. 2015) (“A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain. Not all one-sided contract provisions are unconscionable; hence the various intensifiers in our formulations: “overly harsh,” “unduly oppressive,” “unreasonably favorable.... An evaluation of unconscionability is highly dependent on context.”).


\(^{73}\) See supra note 25 (collecting cases).


\(^{75}\) See 17A AM. JUR. 2D CONT. § 231 (2021) (internal citations omitted) (“In general, parties are free to contract as they see fit, provided that the contract does not impose obligations that are contrary to public policy. However, a contract or contractual provision that violates public policy is invalid, unenforceable, void, and without legal effect, to the extent of the conflict. Thus, parties may not privately contract to contravene a state’s public policy or to circumvent or disregard a statutory prohibition based on public policy.”)
should not be enforced on the basis of public policy. Likewise, very broad exculpatory clauses are typically seen as against public policy, and of course contracts for illegal purposes will also not be enforced.

Public policy was the doctrine used to invalidate a surrogacy contract in the infamous Baby M case in 1988. Although the case is over 20 years old, the issues that the court considered are no less relevant today. In Baby M, the court explained its public policy objections as, “[t]he contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child’s best interests shall determine custody.” Furthermore, “[t]he surrogacy contract guarantees permanent separation of the child from one of its natural parents. [The court’s] policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents.”

The court found that the contract also violated the public policy of the state in that it did not accord equal rights to both natural parents. Instead, “[t]he whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.”

Like legally prohibited adoption for pay, commercial surrogacy is ripe for abusive, coercive situations. Contrasting these, the court found “the essential evil is the same, taking advantage of a woman’s circumstances (the unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree.”

Although Baby M involved a “traditional” surrogacy agreement, gestational surrogacy also entails courts upholding concepts of family based on genetics and fathers’ rights that are arguably against the public policy goals of anti-eugenics and gender equality. Furthermore, public policy is implicated in the question of whether we, as a society, think that employing individuals to do this particularly dangerous, invasive form of labor is something that our society wants to promote through the courts.

Finally, lawyers advocating for working class clients will generally argue that their clients have not waived a specific right, and/or that the right in question is not waivable by contract. In employment, an example would be minimum wage. Despite many employers’ attempts to use contract terms as a defense to statutory minimum wage or overtime protections, courts have consistently found that the right to receive minimum wage and overtime are not waivable by contract. Likewise in Epic Systems Corp. v. Lewis, employees and the NLRB argued that the NLRA,

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76 See, e.g., SI Venture Holdings, LLC v. Catlin Specialty Ins., 118 F. Supp. 3d 548, 550 (S.D.N.Y. 2015) (noting an argument by a company that paid for legally-required environmental cleanup that a clause in its insurance contract requiring it to obtain the insurer’s prior consent before expending funds for such cleanups was void as against public policy because it “impede[d] compliance with environmental regulations… to the public’s detriment.”)


78 17A AM. JUR. 2D CONT. § 290 (2021) (“No court will lend its assistance in any way toward carrying out or enforcing the terms of a contract or transaction that is illegal or whose purpose is to violate the law.”)

79 Baby M, 537 A.2d at 1246.

80 Id. at 1246-47.

81 Id. at 1247.

82 Id. at 1249.

83 “This Court’s decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee’s right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the
which gives workers’ the right to engage in concerted activities to address workplace issues, makes class and collective action waivers illegal.\textsuperscript{84} Similarly, consumer plaintiffs argued that the Credit Repair Organization Act (CROA) prohibited waivers of any rights under the Act.\textsuperscript{85} This is analogous to the New Jersey Supreme Court’s holding in Baby M that Mary-Beth Whitehead’s parental rights were not waivable by contract, which reinstated her as a legal parent of the child. In this way, opposing the waiver of parental rights for all gestators can be part of a broad agenda to limit corporations’ ability to use contract as a tool of oppression.

As shown here, limiting the false “choices” for workers to sign away their rights and to be exploited has always been a necessary part of allowing workers to have substantive freedoms and to live a better life. It is only when one does not have the “freedom” to work for less than minimum wage, when one does not have the “freedom” to work in unsafe conditions, and when one does not have the “freedom” to sell one’s body parts, that a person is able to enjoy the substantive freedoms of dignity, health, and free time. Using civil law to limit or prohibit surrogacy is consistent with this approach.

Of course, there are always individual workers, consumers, and tenants who disagree with this approach. Instead of believing that their interests are tied with the collective, some workers have fought for their rights to be free of protective regulation. Mark Janus, for example, successfully convinced the Supreme Court that his freedom of speech was impermissibly constrained by an Illinois law that authorized unions to charge agency fees from non-members like Janus.\textsuperscript{86} When the California legislature passed a bill requiring that rideshare companies like Uber and Lyft treat their drivers as employees with all attendant rights and benefits, a significant portion of drivers supported the companies’ repeal bill, Proposition 22, because they believed that being independent contractors was more in their interests.\textsuperscript{87}

Creating a more economically just society has always required implementing policies that may not please every individual. We therefore must be skeptical of pedestalizing individual liberties, especially when it comes to economic regulations. Social theory can help illuminate which rights and freedoms, or “rights” and “freedoms,” should actually be championed in the interests of advancing social and economic justice.

III. THEORETICAL PERSPECTIVES

\textit{A. Marxism \\& free labor}

To ground our perspective in economic justice, we must start from the foundational theorists who have written on capitalism. The writings of Karl Marx have been influential in legislative policies it was designed to effectuate.” Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 740 (1981) (citing Brooklyn Savings Bank v. O’Neil, 324 U.S. 697, 707 (1945)).


\textsuperscript{85} \textit{See} CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012). That the U.S. Supreme Court disagreed in both of these cases does not change that this is a common type of legal argument advanced by working-class plaintiffs.


458
understanding capitalism from a workers’ rights perspective for over 200 years.

One of Marx’s major interventions was to show how so-called “free labor” is not actually free. Because workers do not have capital and do not own the means of production, they cannot produce their own means of subsistence without working for a boss. They must sell their labor power as a commodity in the market. Although they can move from job to job, they can never get free from this exploitative relationship because they must sell their labor to someone. In this way,

the worker, whose only source of income is the sale of [her] labour-power, cannot leave the whole class of buyers, i.e., the capitalist class, unless [s]he gives up [her] own existence. [S]he does not belong to this or that capitalist, but to the capitalist class; and it is for [her] to find [her] man – i.e., to find a buyer in this capitalist class.88

In this way, all “choices” that workers make to work in one position or another have to be seen as essentially unfree, because the worker does not have the option to work for herself, or to not work at all. Although there is no doubting that having the ability to move from one employer to another is preferable to being tied to a single employer or to the land, as medieval serfs were, this limited “choice” should never be mistaken for freedom. Because of this, the struggle must be to change the fundamental power structure that forces workers to sell their labor in the first place.

B. Marxism & alienation/estrangement

Marx’s theory of alienation or estrangement is also highly relevant to thinking about surrogacy. In Marx’s terms, labor (both mental and physical) is an important aspect of what makes us human. Not all labor is drudgery in this formulation. According to Marx, the activity setting oneself a goal, to make something, for example, and then achieving it, is inherently rewarding. Thus “overcoming of obstacles is in itself a liberating activity . . . “ and labor becomes an act of “self-realization.”89 However, under capitalism, the worker does not have ownership or control over the means and product of labor, hence this deeply human activity becomes alienated, or estranged. Because workers are not the owners of the means of production, they are not free to determine what to produce or how to do it. They have no control over what products they make nor over the process by which they make them, except in the same sense that a machine has control over the process.90

Thus, Marx and Engels famously argued that capitalism turns workers into a mere

“appendage of a machine,” as the factory worker must accommodate her body and her life to the needs of the machine she operates. Meanwhile the worker experiences a psychological dissociation from her own labor, as this does not belong to her either.

However, because labor cannot be fully separated from the human person, there is something of ourselves that go into products that we make. Marx writes, “The worker puts [her] life into the object; but now [her] life no longer belongs to [her] but to the object . . . It means that the life which [she] has conferred on the object confronts [her] as something hostile and alien.” When the fruits of our labor belong to another, labor stops being an expression of our human creativity and desires, and instead becomes a coercive task. Waged work is something that we hate to do, and doing it costs us physically and emotionally, while we reserve our humanity for the ever smaller amounts of time we have outside of work.

A necessary correlate of alienation is exploitation. Because capitalists own the means of production (capital, machinery, land, resources), workers cannot simply produce their own means of subsistence. Instead, workers have to sell their labor to capitalists. Throughout their working day, workers produce a stream of commodities, the sale of which would provide many times what the worker needs to live. Yet according to Marx, capitalists only pay workers wages that are roughly equivalent to their subsistence needs. “By selling [her] labour to the capitalist, the worker obtains a right only to the price of labour, not to the product of this labour, nor to the value which [her] labour has added to it.” The difference between what the worker produces and what the capitalist pays them is what Marx calls “surplus value,” or capitalist profits. In this way, the worker ends up working far more than they would need to if they owned the means of production themselves, and the extra time that they work for the capitalist is “the forced appropriation of the unpaid labor of workers. Under this definition, all working-class people are exploited.” Because the worker doesn’t own the product


92 “["T"]he external character of labor for the worker appears in the fact that it is not his own, but someone else’s, that it does not belong to him, that in it he belongs, not to himself, but to another.” KARL MARX, ESTRANGED LABOR, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844 (1932), reprinted in MARXISTS.ORG 1, 30, https://www.marxists.org/archive/marx/works/download/pdf/Economic-Philosophic-Manuscripts-1844.pdf [https://perma.cc/GGG7-HJEF] (last visited Apr. 27, 2021) [hereinafter Estranged Labor].

93 Id. at 29.

94 “[T]he fact that labor is external to the worker, i.e., it does not belong to [her] intrinsic nature; that in [her] work, therefore, [s]he does not affirm [her]self but denies [her]self, does not feel content but unhappy, does not develop freely [her] physical and mental energy but mortifies [her] body and ruins [her] mind. The worker therefore only feels [her]self outside [her] work, and in [her] work feels outside [her]self. [S]he feels at home when [s]he is not working, and when [s]he is working [s]he does not feel at home. [Her] labor is therefore not voluntary, but coerced; it is forced labor.” Id. at 30.

95 See MARX, supra note 89, at 8-9.

96 Id. at 8-12.

97 See MARX, supra note 89, at 308.


of her labor, the employer becomes rich from the worker’s labor, and this wealth in turn increases the employer’s power over her.\footnote{100}{See Estranged Labor, supra note 92, at 29 (“So much does the appropriation of the object appear as estrangement that the more objects the worker produces the less he can possess and the more he falls under the sway of his product, capital.”).}

If we apply these terms to the labor of pregnancy and reproduction, a person who becomes pregnant and chooses to have a baby that she will later raise herself is not an alienated worker because she controls the labor process, and because the product of her labor belongs to her, not to another. Although we do not (and should not) think of a child as simply a “product,” in legal terms a modern U.S. gestator’s children do belong to her, although not as property. A gestating parent typically enjoys a legal presumption of maternity that arises from having given birth.\footnote{101}{See UNIF. PARENTAGE ACT § 201 (UNIF. L. COMM’N 2017) (stating that a parent-child relationship is established by giving birth, except in the case of a surrogacy contract). This of course was different for enslaved women in the U.S. whose children were legally the property of her enslaver. Today, non-gestating genetic parents typically have to do something in addition to proving their genetic connection to establish legal parenthood (such as hold themselves out as the father or be married to the birth mother). See Michael H. v. Gerald D., 491 U.S. 110, 126 (1989) (finding that the burden rested on the natural father to establish that parental rights over the child were so “deeply embedded in our traditions as to be a fundamental right”). Non-gestating non-genetic parents usually have to go through additional legal hurdles to establish parenthood, such as second parent adoption. The differences in laws between US states create insecurity, and the situation is widely criticized as adding arbitrary hurdles for LGBTQ families. See Elizabeth A. Harris, Same-Sex Parents Still Face Legal Complications, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/gay-pride-lgbtq-same-sex-parents.html [https://perma.cc/AL3B-STZK] (last visited Apr. 7, 2021).}

Until they choose to give the child up for adoption or their child is removed based on serious neglect or abuse, such a parent has the right to “care, custody and control” of their own children.\footnote{102}{Troxel v. Granville, 530 U.S. 57, 66 (2000).}

Ideally, a person chooses to become pregnant and perform the labor of pregnancy as an expression of their own creativity and humanity. But even where a pregnancy is unplanned, unwanted, or otherwise emotionally fraught, the gestator retains control over the process and product of their labor. For a pregnant adult, they alone have the right to choose how to conduct themself during her pregnancy, they alone have the right to choose their doctor, they alone have the legal authority to decide whether they should terminate the pregnancy, relinquish their parental rights, or raise the child themself.\footnote{103}{Many states have laws which require minors seeking abortions to get the permission of their parent or have a judge find them competent to make the decision themselves. See e.g., Parental Involvement in Minors’ Abortions, GUTTMACHER INST. (Apr. 1, 2021), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/8L6W-FQ6M] (last visited Apr. 7, 2021).} Notwithstanding the many government restrictions upon abortion, this is still a far cry from a scheme in which a pregnant person would have to get permission from the biological father, or from her employer, in order to make these decisions.

Surrogacy contracts purport to change this.\footnote{104}{Courtney Joslin writes, “[i]n the past, the person who gave birth was always considered a legal parent. Hence, children always had mothers at birth. But under permissive surrogacy laws, the person who gave birth may not be the child’s legal parent at birth.” Joslin, supra note 13, at 6.} Where they are enforced, a surrogacy contract will stipulate that the baby does not belong to the gestator/worker but rather to the so-called “intended parents,” typically, the biological father.\footnote{105}{See, e.g., Cook v. Harding, 879 F.3d 1035, 1038 (9th Cir. 2018) (noting that the contract provided for the

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intended parents’ right to the child is based on the contract and by the fee that they paid. A commercial surrogate is paid a fee for her services, transforming the process of pregnancy into a form of waged labor. In this way, she no longer has a right to the product of her labor but only to the wage. Furthermore, in many instances, the process of pregnancy is also heavily controlled by the intended parents, with surrogacy contracts including clauses that limit the pregnant person’s right to choose their doctor, the foods they can eat during the pregnancy, and more.\textsuperscript{106} In Marxist terms, we could say that commercial surrogates perform \textit{alienated} or \textit{estranged} labor.

The Marxist-feminist philosopher Kelly Oliver uses Marx’s theory of estranged, or alienated, labor to analyze surrogacy, arguing that “whereas much of Marx’s analysis of estranged labor applies only metaphorically to other forms of labor, it applies literally to surrogacy.” Moreover, the labor of surrogacy can be seen as “doubly estranged”\textsuperscript{107}:

\begin{quote}
[t]he ‘surrogate’ is seen, and sees herself, as a fragment of a woman, a womb and/or egg. Her body itself is seen as a machine which can be rented out. Unlike other workers, she is not an appendage of a machine. She is the machine. Her body becomes the machinery of production over which the contractor has ultimate control (internal quotations omitted).\textsuperscript{108}
\end{quote}

According to Marx, workers only feel free when they are outside of work using their bodies in basic functions like eating, sleeping, and having sex.\textsuperscript{109} For Oliver, the surrogate is even worse off because the labor of pregnancy never stops, and because the contracts purport to control her body itself. Furthermore, instead of engaging in a conscious human labor activity, the surrogate’s labor is reduced to the functions of her body, and thus “[e]ven her human production is only animal reproduction.”\textsuperscript{110}

Oliver argues that the liberal framework that sees surrogacy as a free exchange between autonomous individuals disguises the social context of their interaction, most importantly, the power differential between the actors. The practice of putting the intended parents (and not the surrogate) on the birth certificate illustrates the fraudulence of this arrangement.\textsuperscript{111} Thus, “Marx’s analysis of estranged labor has helped to reveal that the ‘surrogate’ mother is the real mother of the child.”\textsuperscript{112} Instead of selling her labor, “the ‘surrogate’ is not renting her womb, but selling herself and her child. She is not free either when she enters the contract or after.”\textsuperscript{113} This is because it is the economic system that forced her into making the choice to become a surrogate.

Oliver is careful to distinguish the empirical from the normative in her Marxian analysis. Even though commercial surrogacy under capitalism effectively treats children as products and

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\begin{flushleft}
\textsuperscript{106} Berk, \textit{supra} note 29, at 157.
\textsuperscript{107} Kelly Oliver, \textit{Marxism and Surrogacy}, 4 HYPATIA 95, 105 (1989).
\textsuperscript{108} \textit{Id.} at 106.
\textsuperscript{109} Estranged Labor, \textit{supra} note 92, at 30.
\textsuperscript{110} \textit{Id.} at 106-7.
\textsuperscript{111} \textit{Id.} at 109.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 110.
\end{flushleft}
mothers as the “machinery of production,” this is not how she believes things ought to be. Thus she rejects a “ crude” Marxist analysis which would reify these categories and “ perpetuate the very structure which it proposes to undermine.” 114 Instead, we may preserve some aspect of humanity under capitalism by insisting on the real human relationship between the parties, which may involve economic exchange but which is not reducible to that exchange. Thus we can simultaneously recognize how the capitalist legal system seeks to treat the surrogate as nothing but a machine, while recognizing her rightful status as a mother and a human being.

C. Commodification vs. Decommodification

Commodification has been the term that social theorists use to describe the process of making something into an object to be bought and sold in a market, i.e., a commodity. Where many premodern societies treated land as a public good or a commons, under capitalism, land becomes a commodity. 115 This process happens repeatedly as capital finds more ways to turn the natural world and human relations into products for sale. 116

In the Information Age, knowledge, ideas and culture are the hot commodities. Intellectual property is America’s most important export . . . traditional knowledge and genetic resources in the developing world stand at the center of global struggles for control of these valuable resources. Corporations mine everything from forests to medical patients for ‘raw materials’ for their lucrative patents. 117

Yet even under a capitalist system, most people think that there should be limits on what can be bought and sold. This is because the brutality of commodification is undeniable in some iterations. Slavery, of course, is the ultimate commodification: “ the reduction of persons to things.” 118 If we accept that slavery should be illegal even in a free market capitalist society, then we are accepting that there should be limitations on the market. Similarly, many people who are generally in favor the free market still think that selling human organs is a bad idea, or that selling elections or votes should not be permitted. The question becomes where to draw that line.

For Marxists, these attempts to reserve some areas of society as protected from the market are likely to come under stress and pressure due to capitalism’s inherent drive to expand. In the Communist Manifesto, Marx and Engels explained, “The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere,

114 Id.

115 The transformation of land into a commodity is a major topic of Karl Polanyi’s The Great Transformation: The Political and Economic Origins of Our Time. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Beacon 2d ed. 2001). The privatization of land and resulting dispossession of peasants from it is also discussed by Marx, a process he calls “ primitive accumulation.” See MARX, supra note 98, at 507-09, 512-13.


117 Margaret Jane Radin & Madhavi Sunder, Introduction: The Subject and Object of Commodification in Rethinking Commodification 8, 9 (Martha Ertman & Joan C. Williams eds., 2005).

118 Id.
settle everywhere, establish connexions [sic] everywhere.”¹¹⁹ In order to establish capitalist relationships, societies must first undergo a process of “primitive accumulation,” in which the majority of people are stripped of their traditional land rights, so that they are then “freed” to become wage laborers.¹²⁰

Some Marxist theorists, starting with Rosa Luxemburg and recently David Harvey, have argued that primitive accumulation is an ongoing feature of capitalism.¹²¹ Capitalism is by its nature expansionary, expanding both into non-capitalist areas of the globe, (hence the necessity of imperialism, as Luxemburg argued), and extending its reach within capitalist societies by commodifying what had been free, whether it be parts of nature like air and water, or labor (care work for example) or public services (such as public schools).¹²²

Thus, commodification is an inherent driver of capitalism. Ultimately, capitalism turns workers themselves into commodities, as they must sell their own labor power in the market in order to live. Marx writes, “Labor produces not only commodities; it produces itself and the worker as a commodity – and this at the same rate at which it produces commodities in general.”¹²³ Commodified human social interaction creates alienated relationships, while the market comes to dominate all our lives, dividing society into haves and have nots.

Building upon Marxist theory, the legal theorist Margaret Jane Radin argues that human flourishing requires limiting markets and commodification. Radin centers her argument on a holistic concept of the self. Where liberal theorists have posited negative liberty as key to human freedom, Radin posits that human flourishing requires positive supports for the things that humans collectively and individually need. Where market ideologies see freedom in the ability to alienate aspects of ourselves in order to maximize profit, Radin argues:

A better view of personhood should understand many kinds of particulars—one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these as monetizable or completely detachable from the person—to think, for example, that the value of one person’s moral commitments is commensurate or fungible with those of another, or that the “same” person remains when her moral commitments are subtracted—is to do violence to our deepest understanding of what it is to be human.¹²⁴

Fully developed, flourishing, personhood requires the ability to make free choices about our own lives, the ability to have stable relationships with other people and our environment, the ability to engage in creative pursuits and sexual expression, the ability to maintain bodily autonomy, and others.

¹²⁰ MARX, supra note 98, at 508.
¹²¹ Holmstrom, supra note 117, at 79-80.
¹²² Id.
¹²³ Estranged Labor, supra note 92, at 28-29.
In order to protect that flourishing self-development, Radin proposes making things that are deeply connected to our personhood market-inalienable, meaning that they cannot be separated from a person by sale (although they may be voluntarily relinquished).\(^{125}\)

When something is noncommodifiable, market trading is a disallowed form of social organization and allocation. We place that thing beyond supply and demand pricing, brokerage and arbitrage, advertising and marketing, stockpiling, speculation, and valuation in terms of the opportunity cost of production.\(^{126}\)

Examples of things that are market-inalienable in the U.S. today would be kidneys and children whose birth is not arranged through surrogacy. Although some liberal theorists see market inalienability as a restriction on human freedom, Radin’s discussion of personhood casts this in a different light.

If we reject the notion that freedom means negative liberty, and the notion that liberty and alienation in markets are identical or necessarily connected, then inalienability will cease to seem inherently paternalistic. If we adopt a positive view of liberty that includes proper self-development as necessary for freedom, then inalienabilities needed to foster that development will be seen as freedom-enhancing rather than as impositions of unwanted restraints on our desires to transact in markets.\(^{127}\)

However, instituting market-inalienability into public policy is not a simple task in Radin’s view. We live in a vastly unequal and difficult society, and in many instances, commodification is important to how people survive day to day. If we had a robust social welfare state, many of the more contested examples of commodification would be less frequently found, as fewer people would need to sell deeply personal things in order to live. But without social welfare guarantees, people have few options. Radin provides the example of using tort damages to compensate family members for the death of a loved one. Many people feel uncomfortable with the way that these remedies seem to put a price on human life, especially as it tends to reinforce existing inequalities by providing greater compensation for the loss of a person with anticipated higher-earnings.\(^{128}\) If we had a society in which everyone’s basic needs were met and families did not have to depend on each other for financial stability, then there would be less need to provide financial damages to surviving family members when a wage earner dies. But in the meantime, to deny such compensation to family

\(^{125}\) Margaret Jane Radin, Contested Commodities 19 (1996).

\(^{126}\) Radin, supra note 124, at 1855.

\(^{127}\) Id. at 1899.

\(^{128}\) “To determine loss of future earning capacity, courts typically instruct the jury to determine the plaintiff’s future earnings for the duration of his or her worklife expectancy . . . Since women and blacks fare worse in the labor market, they fare worse in torts as well.” Similarly, “Most courts prefer that projected average earnings be adjusted according to predictions particularized to the plaintiffs regarding their likely educational attainment, in light of their personal characteristics and family background . . . Such projections reinforce the already existent discriminatory effects of plaintiffs’ race or gender on their access to education and opportunities and essentially perpetuate that discrimination into the future.” Ronen Avraham & Kimberly Yuracko, Torts and Discrimination, 78 OHIO ST. L.J. 661, 673 (2017).
members who will legitimately suffer a loss of income as a result of the death would seem to only make the situation worse. This is what Radin calls the “double bind,” in which both commodification and complete decommodification may both cause harm. In situations like these, Radin suggests that we accept incomplete commodification as a medium-term solution. Thus we can allow a price to be put on human life in the limited instance of tort damages, but not in other instances such as buying and selling humans in enslavement.

Radin also uses this concept of incomplete commodification to describe many kinds of regulations on business. For example, labor is commodified under capitalism, but regulation and collective bargaining limit the full force of the market upon labor. Housing is also commodified, but regulations can limit the full impact of the market upon tenants. Limiting the force of the market allows people to place non-market values upon things that are important to their personhood. For example, collective bargaining can help workers have a say in their workplace, limiting the level of alienation that they experience at work and allowing a more flourishing self to emerge. Residential rent control allows people to have stable homes and communities, also necessary for human flourishing. In this way, the market economy can be overlaid with non-market values, enabling people a better quality of life within capitalism.

As applied to surrogacy, Radin argues that human reproduction is one area that is often very central to people’s conceptions of themselves. For this reason, she argues for making women’s reproductive capacities market-inalienable, by prohibiting commercial surrogacy but allowing altruistic surrogacy (that is, unpaid surrogacy that is motivated by a desire to help someone have a child). An important part of Radin’s concept of personhood is that people may freely give of themselves, thus ideally sex is a “sharing of selves” rather than an exchange of services. Where it is based upon a true desire for mutual aid and human connection, altruistic surrogacy would fit this model. If commercial surrogacy is to be allowed, Radin suggests an incomplete commodification. Surrogacy could be compensated, but we should prohibit courts from enforcing surrogacy agreements through specific performance, which would treat children as goods to be handed over. By limiting the ability of persons to sell their reproductive capacities and children, we would help preserve a situation in which biological reproduction and relationships with children are kept as a part of ourselves, rather than resources to be maximized for profit.

Beyond the individual persons involved in a surrogacy transaction, Radin argues that commodification impacts all of society through the way it makes us think. She asks,

If a capitalist baby industry were to come into being, with all of its accompanying paraphernalia, how could any of us, even these who did not produce infants for sale, avoid subconsciously measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value?

When pregnancy is a transaction and a child is a product, the values inherent in these conceptions may “shape our reasoning and description, and the shape (for us) of reality itself.” At

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129 Id. at 1857.
130 Id. at 1908.
131 Id. at 1935 n.294.
132 Id. at 1926.
133 Id. at 1881-2.
its core, “[c]onceiving of any child in market rhetoric wrongs personhood.” We are better able to see the intrinsic value of children as human beings when we are not conceiving of them as objects. Furthermore, it would be unsurprising if “the market value of babies [were] decided in ways injurious to their personhood and to the personhood of those who buy and sell on this basis, exacerbating class, race, and gender divisions. For example, if the market value of Black babies was cheaper than white babies, it’s easy to see how this would negatively affect Black people in general, not just the babies bought and sold. In this way, instances of commodification such as commercial surrogacy impact all of our lives, not simply the persons directly involved. Fostering a better society requires limiting our ability to conceive of ourselves and each other as monetizable objects.

With her concepts of market-inalienability and incomplete commodification, Radin posits herself as a pluralist, somewhere in the middle in between Marxists who believe in “universal noncommodification,” and thinkers in the “law and economics” tradition such as Richard Posner, who believe that everything is, or should be, a commodity. However, she acknowledges that “some who espouse universal noncommodification for the long run might espouse pluralism in the short run, if they think that introducing piecemeal market-inalienabilities is a way of making progress toward universal noncommodification.” Radin calls these two approaches the “evolutionary” approach, which views specific instances of market-inalienabilities as a path towards universal non-commodification, versus the “revolutionary” approach, which accepts nothing less than universal noncommodification. I would argue that, in fact, left-wing social movements influenced by Marxism have generally embraced a version of what Radin calls the “evolutionary” approach to achieving universal noncommodification. Protecting certain lands from private development, defending public schools from privatization, defending public housing from privatization, and similar struggles all entail restricting the market to its current boundaries, preventing commodification from reaching these critical areas. These movements have advocated for policies that would expand protection from the market to new areas. A current example of this is the growing movement to decommodify our healthcare system, with its primary political demand of “Medicare for All.” When activists and politicians, from ACT UP to Bernie Sanders, use the slogan “healthcare is a human right,” they are asserting that healthcare must be transformed from a capitalist business into a public good based on mutual care. In the same way, restricting commercial surrogacy could be a piecemeal market-inalienability which, combined with others, would insulate society from the rule of the market and gradually lessen its impact.

Some might think that restricting surrogacy is not simply an economic regulation to protect workers’ rights, but rather expresses normative social values that are inappropriate for the state to

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134 Id. at 1927.
135 Id. at 1927.
136 RADIN, supra note 125, at 3; Radin, supra note 124, at 1857-8, 1903.
137 Radin, supra note 124, at 1875.
impose. This misunderstands the stakes of all economic regulations. Labor regulations have always been about more than wages and hours. Rather, they are about workers’ dignity; their value as a member of society; their rights to have a say in how they spend their workdays; their worth irrespective of their race, gender, sexuality; and other normative values.\textsuperscript{140} Normative values are also expressed in any legal limitation on commodification. The normative value of the natural environment as something that should be protected is one example. The normative value of disallowing baby selling is another. Every economic regulation involves a judgement about what kinds of economic conditions will promote a healthy society for all.

Feminists are of course right to be concerned about government regulation of women’s reproductive choices based upon normative values, since those in power are so often men who are seeking to control women’s bodies. However, my argument is that banning commercial surrogacy is fundamentally an economic regulation, rather than a personal one. Altruistic surrogacy has never been subject to penalties in the U.S.;\textsuperscript{141} thus there is no intervention into women’s personal choices about why, with whom, and how, they choose to reproduce. Banning commercial surrogacy must also be distinguished from laws against sex work, since those typically involve criminal sanctions for the

\textsuperscript{140} See generally NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR (2002).

\textsuperscript{141} According to Courtney Joslin’s extensive study of all surrogacy statutes nationally, only Arizona, Indiana, Louisiana, Michigan, New York, and North Dakota have (or recently had) civil bans that prohibit altruistic surrogacy agreements. Courtney Joslin, (Not) Just Surrogacy, 109 CAL. L. REV., 69-72 (forthcoming 2021). However, a look into the details shows that these statutes only provide that such contracts are unenforceable and/or have provisions making the gestational mother in a surrogacy contract the legal mother; they do not impose penalties upon parties who enter into uncompensated surrogacy agreements. See ARIZ. REV. STAT. § 25-218A (“No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract”); IND. CODE ANN. § 31-20-1-1 (“The general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following: (1) Provide a gamete to conceive a child. (2) Become pregnant. (3) Consent to undergo or undergo an abortion. (4) Undergo medical or psychological treatment or examination. (5) Use a substance or engage in activity only in accordance with the demands of another person. (6) Waive parental rights or duties to a child. (7) Terminate care, custody, or control of a child. (8) Consent to a stepparent adoption under IC 31-19 (or IC 31-3-1 before its repeal);”) LA. REV. STAT. ANN. § 9:2719 (applies to “traditional” or genetic surrogacy only) (“A contract for a genetic gestational carrier shall be absolutely null.”); MICH. COMP. LAWS § 722.855 (“A surrogate parentage contract is void and unenforceable as contrary to public policy”), § 722.859 (“(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation. (2) A participating party other than an unemancipated minor female or a female diagnosed as being intellectually disabled or as having a mental illness or developmental disability who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000.00 or imprisonment for not more than 1 year, or both. (3) A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.”); N.Y. DOM. REL. LAW § 122 (“Genetic surrogate parenting agreements are hereby declared contrary to public policy of this state, and are void and unenforceable”), § 123 (“No person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any genetic surrogate parenting agreement, or induce, arrange or otherwise assist in arranging a genetic surrogate parenting agreement for a fee, compensation or other remuneration... Any party to a genetic surrogate parenting agreement or the spouse of any party to a genetic surrogate parenting agreement who violates this section shall be subject to a civil penalty not to exceed five hundred dollars.”); N.D. CENT. CODE ANN. § 14-18-05 (“Any agreement in which a woman agrees to become a surrogate or to relinquish that woman’s rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate’s husband, if a party to the agreement, is the father of the child. If the surrogate’s husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter 14-20.”).
workers. Criminal penalties for women acting as commercial surrogates have not been a salient feature of surrogacy bans in the U.S. context, and thus the criminalization of women's choices about how to use their bodies is not at issue. Instead, the question of commercial surrogacy is about whether we believe that this activity ought to be a capitalist business, or one whose transactions are upheld with the coercive power of the legal system. The question becomes in Radin's terms: will such an industry promote human flourishing? This brings us to the question of the social meaning of the surrogacy industry, and the vision of society that it promotes.

III. THE SOCIAL MEANING OF THE SURROGACY INDUSTRY

The surrogacy industry has always represented and promoted a white, patriarchal, and elite conception of family at the expense of oppressed groups. When surrogacy was first introduced in the U.S., it immediately prompted comparisons to slavery. As Angela Davis wrote,

Slave women were birth mothers or genetic mothers – to employ terms rendered possible by the new reproductive technologies – but they possessed no legal rights as mothers, of any kind. Considering the commodification of their children – and indeed, of their own persons – their status was similar to that of the contemporary surrogate mother.

The history of chattel slavery should particularly warn us of the dangers of the legal commodification of human life, including reproduction. Anita Allen wrote, “The American slave experience, while not equivalent to surrogacy, can help illuminate why many people find the practice of commercial surrogacy disturbing.” Since the reproductive capacities of enslaved women were used for the benefit of their enslavers, the prospect of women’s reproductive capacities being used for profit is disturbing. The commodification of children is also deeply concerning. Although clearly not equivalent to slavery, the legacy of chattel slavery has rightfully created a strong aversion to any legal commodification of human life. As Radin argues, commodification does not simply operate in the market but also is a feature of our ideas and thoughts. Thus, breaking down the normative

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142 See Joslin, supra note 13, Appendix A (describing how only Michigan provides for criminal penalties for parties to surrogacy contracts). In Michigan, any mentally competent adult who knowingly enters into a commercial surrogacy contract is guilty of a misdemeanor and punishable by a fine not to exceed $10,000 or one year in prison. MICH. COMP. LAWS § 722.859(2). Brokers who arrange these agreements are subject to a felony charge and a fine not to exceed $50,000 or up to 5 years in prison. MICH. COMP. LAWS § 722.859(3). In New York, NY Dom. Rel. Law § 123 allows for the surrogate, her husband, and the intended parents to be fined up to $500, and the broker could be fined up to $10,000 (the NY State Assembly has introduced a bill to repeal the law). NY Dom. Rel. Law § 123. For a second infraction, the broker could be charged with a felony, but there were no criminal penalties to the surrogate herself. NY Dom. Rel. Law § 123. According to Lori Andrews, in 1995 there were four US states that had criminal penalties for women acting as surrogates. Lori Andrews, Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood, 81 VA. L. REV. 2343, 2350 (1995). However, it is also worth noting that even though these penalties are on the books, their application may be quite rare given the disincentives to enter into surrogacy contracts in states in which they are unenforceable.


144 Id. at 17.

145 Id. at 18.

146 See Radin, supra note 124, at 1879 (noting Richard Posner’s market conception of sexual assault).
aversion to commodifying human life is not a trivial thing but rather can affect how people think and feel for the worse.

Given the long history of working-class women, especially women of color, performing household labor including childcare, Davis argued that surrogacy was just a new iteration of this longstanding exploitative-type of relationship. Perhaps in the future, embryo implantation could allow wealthy, privileged women to opt out of the messy business of pregnancy and childbirth entirely. Davis asked, “Considering this previous history, is it not possible to imagine the possibility that poor women—especially poor women of color—might be transformed into a special caste of hired pregnancy carriers?” In 1993, *Johnson v. Calvert* validated these fears: a Black surrogate lost her fight to gain joint custody over the baby she had gestated, who was of white and Philippine genetic descent. This led some Black feminists to wonder if Black women would become targets for recruitment to work as commercial surrogates. Given that the deeply racist family court system would be unlikely to award custody of a white child to a Black woman, “Black gestators could be the safest surrogate mothers for white women who want white children.”

Furthermore, commercial surrogacy had an ideological power that extended far beyond the people who actually participated in it. As Dorothy Roberts has argued, surrogacy and assisted reproductive technology serve to exalt white reproduction and white babies, at the same time as our society denigrates Black reproduction and Black children:

> The monumental effort, expense, and technological invention that goes into the new reproduction marks the children produced as especially valuable. It proclaims the unmistakable message that white children merit the spending of billions of dollars toward their creation. Black children, on the other hand, are the object of welfare reform measures designed to discourage poor women’s procreation.

In this way, the surrogacy industry can fairly be described as a capitalist business that profits from promoting a culturally white, heteronormative, neo-eugenicist, genetically-defined concept of parenthood. Like all capitalist industries, it does not simply respond to existing wants but rather shapes people’s expectations and desires. As influential celebrities like Sarah Jessica Parker, Nicole Kidman, and Kim Kardashian-West publicly discuss their use of surrogates to expand their families, genetically-related children, produced at any age and free of bodily complications, become a part of the constellation of desirable things that people can aspire to have, if only they have the money.
Kardashian-West described it as “the best experience” she “would recommend [it] for anybody.” 153

Closely related to the racism discussed above, commercial surrogacy serves to uphold a narrow, culturally white, heteronormative concept of family. Davis argues that assisted reproductive technology may be used today by people who, had such technology not existed, might have been satisfied with (a) non-biological mothering relationship(s). What Davis calls “play motherhood” is “deeply rooted in the black community tradition of extended families and relationships based both on biological kinship – though not necessarily biological motherhood– and on personal history which is often as binding as biological kinship.” These extended kin networks could mitigate the experience of infertility by giving infertile people opportunities to be important caretakers and mentors for children who are not genetically their “own.” 154 This is not to suggest that Black and other women of color do not experience pain due to infertility. There is no denying that “[i]nfertility causes unique psychological stresses and anxieties, as well as affecting relationships.” 155 Moreover, Black women in the US are at higher risk of infertility than white women. 156 Rather than to minimize the pain of infertility, Davis’ analysis requires us to recognize that such pain is at least somewhat influenced by ideology and culture, and that the surrogacy industry sharpens these contradictions in painful ways.

By purporting to make the nuclear, genetically-related family available to those who are infertile through the miracle of technology, the industry reifies the desirableness of this model of family over other family forms. Even worse, such technologies are only available for those with enough money. Describing the life of her non-genetically related aunt who had no children of her own but was a “second mother” to her, Davis asks “If she were alive and in her child-bearing years today, I wonder whether she would bemoan the fact that she lacked the financial resources to employ all the various technological means available to women who wish to reverse their infertility. I wonder if she would have felt a greater compulsion to fulfill a female vocation of motherhood.” 157 Furthermore, as Mary Gibson argues, the desire to conform to “the mythical ‘normal’ family consisting of breadwinning father, nurturing mother (now possibly also a career woman/super-mom), and their genetic offspring . . .” 158 also likely explains the impulse to deny parental rights to surrogates. In this way, the surrogacy industry and its legal apparatus upholds the value of nuclear, genetically related families over other family forms.


153 Petit, supra note 152.
154 Davis, supra note 143, at 214.
157 Davis, supra 143 at 214-215.
158 Gibson, supra note 10, at 66.
In addition to the racist, neo-eugenic aspects of commercial surrogacy, the critique of surrogacy on purely feminist grounds is also difficult to refute. Surrogacy as an industry primarily serves to allow men to have children that are genetically related to them, using women’s bodies as mere tools towards that end. That multiple women should be asked to undergo invasive procedures, endure the physical pain of childbirth, and even risk death to ensure the continuation of men’s genetic material seems to express a normative value that his genetic material is more important than her life. As Katha Pollitt wrote in 1987, “How can it be acceptable to pay a woman to risk her life, health and fertility so that a man can have his own biological child, yet morally heinous to pay healthy people to sacrifice ‘extra’ organs to achieve the incomparably greater aim of saving a life?” If it would be wrong to use the coercive power of money to induce people to do something as potentially harmful as sell their own organs, then using the coercive inducement of money would also be wrong for inducing people to endure pregnancy and childbirth, given that both can be life threatening.

The surrogacy industry also promotes a type of pronatalism that can be harmful to women. Mary Gibson writes, “In our pronatalist society, the desire for children is presumed to be universal, and parenthood is regarded as a normal and necessary developmental task. Those who do not conform are stigmatized, regarded as deviant, selfish, emotionally immature, psychologically maladjusted, sexually inadequate, and unhappy.” The importance of children for one’s identity has typically been even greater for women, given the societal norms that valued motherhood as women’s most important role. As Angela Davis argued, the assisted reproductive technology industry as a whole reinforces women’s stereotypical role as mothers and creates additional pressures upon women to pursue every possible option to become mothers, often at great personal expense. The capitalist reproductive industry “sends out a message to those who are capable of receiving it: motherhood lies just beyond the next technology.”

The culturally conditioned desire to be nurturers may also propel some women into becoming commercial surrogates. This altruistic desire to assist the infertile could make women vulnerable to exploitation, as brokers and fertility companies seek to manipulate these emotions towards their own profitable ends. The industry thus seems to promote a particularly gendered version of altruism, “which demands radical self-effacement, alienation from those whom one benefits, and subordination of one’s body, health, and emotional life to the independently defined interests of others.”

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159 Pollitt, supra note 9.
160 Gibson, supra note 10, at 64.
161 Id.
162 Davis, supra note 143, at 215.
163 Gibson, supra note 10, at 65.
164 For example, the website of the company American Surrogacy says, “[l]et’s be honest — becoming a surrogate mother is a demanding process, asking you to meet a number of requirements, attend numerous doctor appointments, take various fertility medications, and of course, carry a baby for nine months. And yet, here you are, researching how you can help make another person or couple’s dream of becoming parents come true by becoming a surrogate — because of how much it means to them and how much it means to you. . . . Surrogates should be motivated by an altruistic desire to help other people become parents. If you’re mainly motivated by surrogate compensation, you may rethink the reason why you want to be a surrogate mother.” How to Become a Surrogate, AM. SURROGACY, https://www.americansurrogacy.com/surrogate/how-to-become-a-surrogate [https://perma.cc/8623-E8FM] (last visited Apr. 28, 2021).
165 Anderson, supra note 5, at 86.
Furthermore, when courts uphold surrogacy arrangements, they seem inevitably to reify the value of the male genetic connection at the expense of all other values. After the New Jersey lower court upheld the contract in Baby M, Pollitt wrote,

The Baby M decision did not disclaim the power of biology at all: it exalted male biology at the expense of female. Judge Sorkow paid tribute to Mr. Stern’s drive to procreate; it was only Mrs. Whitehead’s longing to nurture that he scorned. That Baby M had Mr. Stern’s genes was judged a fact of supreme importance—more important than Mrs. Whitehead’s genes, pregnancy and childbirth put together. We might as well be back in the days when a woman was seen merely as a kind of human potting soil for a man’s seed.166

This implication is amplified by the use of gestational surrogacy. The use of an anonymous egg donor who has no legal rights, combined with a gestational mother who also has no legal rights to the child, allows men to create children that are legally related only to them. In this way, gestational surrogacy elevates men’s power vis-à-vis the mothers of their children to a degree not seen before. Pollitt argues,

What William Stern wanted . . . was not just a perfect baby . . . He wanted a perfect baby with his genes and a medically vetted mother who would get out of his life forever immediately after giving birth. That’s a tall order, and one no other class of father—natural, step-, adoptive—even claims to be entitled to. Why should the law bend itself into a pretzel to gratify it?167

The question of what precisely is being sold in the case of surrogacy also seems to turn upon people’s relative valuation of men’s and women’s contributions to baby-making. Proponents of surrogacy typically argue that only gestational services are being sold. For example, legal scholars J. Brad Reich and Dawn Swink suggest that gestational surrogacy should legally be conceived of as a bailment: “[a] delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, . . . [usually] under an express or implied-in-fact contract.”168 They continue, “When embryos are property, surrogacy is legally a mutual bailment. In a mutual bailment the bailee must take reasonable care of the bailed property,”169 and is liable for damages if for failing to do so.

Some proponents use this framework to describe even “traditional” surrogacy, in which the surrogate uses her own ova and thus is a genetic parent of the child. This raises the issue of how to distinguish such “surrogacy” arrangements from paying someone to give a child up for adoption whom they had conceived naturally (typically referred to as “baby-selling”). Radin writes,

If we think that ordinarily a mother paid to relinquish a baby for adoption is selling

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166 Pollitt, supra note 9.
167 Id.
169 Id. (internal citations omitted).
a baby, but that if she is a surrogate, she is merely selling gestational services, it seems we are assuming that the baby cannot be considered the surrogate's property, so as to become alienable by her, but that her gestational services can be considered property and therefore become alienable.\textsuperscript{170}

While we don’t permit baby-selling, it is understood that it involves selling something more than a gestational service. Radin suggests that “conceiving of the ‘good’ as gestational services . . . reflects an understanding that the baby is already someone else’s property—the father’s. This characterization of the interaction can be understood as both complete commodification in rhetoric and an expression of gender hierarchy.”\textsuperscript{171}

A strict application of contract law principles would support the hypothesis that what is being sold is a baby, rather than merely services. Specific performance is presumptively not available for service contracts, but it can be a remedy for breaches of contracts for rare or unique goods.\textsuperscript{172} Thus, when a court orders a surrogate to physically relinquish control of a child, the court is treating the child as a unique good. Furthermore, most surrogacy contracts entail that the surrogate relinquish her parental rights to the child. A promise to refrain from doing something that the promisor would otherwise be legally permitted to do constitutes consideration.\textsuperscript{173} The difference between selling a baby and selling \textit{rights to a baby} seems nebulous at best.\textsuperscript{174} Furthermore, the law readily understands that many contracts involve both a combination of goods and services. Contracts for custom-made goods will generally be treated as goods contracts rather than service contracts under the “predominant purpose” rule.\textsuperscript{175} It seems quite obvious that the predominant purpose of a surrogacy contract is to \textit{produce a baby}. As Elizabeth Anderson argues, the intended parent “would not pay [the surrogate] for the ‘service’ of carrying the child to term if she refused to relinquish her parental rights to it.”\textsuperscript{176} The fact that so many courts are willing to see these relationships as services alone shows the depth of this bias.

In this way, surrogacy elevates cis men’s legal control over their children by legally excising gestators, typically women, from the picture. Surrogacy also elevates men’s role ideologically, by promoting the idea that cis men alone can produce children, despite their biological need to collaborate with someone with a uterus to do so.\textsuperscript{177} To be clear, I don’t think any proponents of such feminist arguments reject the idea that gay men and single men can be excellent parents. They can be, and furthermore I believe that men taking on more active roles in childrearing is good for gender equality. One day, ectogenesis may allow the creation of babies outside of a human body, and perhaps

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\textsuperscript{170} Radin, supra note 124, at 1929.
\textsuperscript{171} Id.
\textsuperscript{172} 25 WILLISTON & LORD, supra note 77, at § 67:106; U.C.C. § 2-716 (AM. L. INST. & UNIF. L. COMM’N 2020)
\textsuperscript{173} See, e.g., Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).
\textsuperscript{175} 67 AM. JUR. 2d Sales §§ 31-32.
\textsuperscript{176} Anderson, supra note 5, at 78.
\textsuperscript{177} Although men who have children through surrogacy often have partners that they plan to share parenting duties with, it is also worth noting that single men are a growing market for surrogacy in the U.S. See Avichai Scher, \textit{Gay Fathers, Going It Alone}, N. Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/nyregion/single-gay-fathers-through-surrogacy.html [https://perma.cc/8SC5-ZPPE] (last visited Apr. 8, 2021).
\end{footnotesize}
then cis men could rightfully claim to be the only parents of such children. However, in the meantime, the feminist objection is against the idea that men should be able to use women’s bodies to produce children that are biologically related to them without having to also share any rights with those women.

It is worth noting that in the future, surrogacy may become a more common way for transgender women to have biological children. However, like many other women who face biological barriers to gestating their own children, trans women are likely to remain a minority of the total market for surrogacy. Furthermore, the only trans women who would be able to use commercial surrogacy would be those who have enough class (and often race) privilege to afford it. The purpose of this analysis is not to say that commercial surrogacy is inherently exploitative along one single axis of gender, class, race, sexuality, etc. Rather, the purpose is to show that by its capitalist nature, commercial surrogacy will typically exacerbate existing social inequalities, at least in aggregate.

A. Surrogacy in global perspective today

Empirical evidence on U.S. surrogates may not fit the image of “extreme” exploitation that was initially imagined by feminists in the 1990s, but inequality remains and the principled reasons for opposing commercial surrogacy still hold.

“The profile of surrogate mothers emerging from the empirical research in the United States and Britain does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement.” On the other hand, “[t]ypical intended parents are Caucasian, heterosexual, married, and financially secure. They want a genetic connection to their children, so they pursue surrogacy. Surrogates are often married mothers in their twenties or thirties who are white, Christian, and working class.” Surrogates in the U.S. are typically from “moderate-income” families. U.S. based surrogacy agencies often exclude women whose income falls below the federal poverty line, and various industry “best-practices” standards recommend against hiring poor women as surrogates. One author has suggested that agencies purposely do not recruit very poor women because they may fear courts voiding the resulting contracts on grounds of duress or unconscionability. As a recent report noted, “... it is unlikely that intended parents would choose a surrogate who is entirely motivated by financial remunerations because the intended parents desire a surrogate who is a committed, emotionally-engaged participant in the surrogacy arrangement.” Even if the profile of U.S. surrogates does not fit the worst-feared image of the surrogate as a desperately poor woman of color, there is undoubtedly a class divide between surrogates and intended parents. In order for them to be


179 Machalow, supra note 14, at 1-2.

180 NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, supra note 7, at 48.

181 Sital Kalantry, Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India, 27 CORNELL J. L. PUB. POLY 685, 688-89 (2018).

182 NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, supra note 7, at 48.

183 Kalantry, supra note 186, at 687-87.

184 NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, supra note 7, at 48.
motivated to undertake such a significant labor, surrogates must not be indifferent to the prospect of increasing their income, even at significant personal expense. Furthermore, the rise of surrogacy in the U.S. has coincided with long term wage stagnation and the severe increase in debt and precarity among the middle classes.185 This must also be taken into context when evaluating American women’s motivations for looking for additional sources of income.

Evaluating the evidence that U.S. surrogates are mostly white, Khiara Bridges suggests that “surrogacy may create a racial catch-22: the commissioning of women of color to act as surrogates may be as terrifying as the failure to commission women of color to act as surrogates.”186 She further writes,

We have to wonder why. It might be that the reproductive capacities of white women are simply more highly valued than those of women of color. It is possible that wealthy white couples that hire surrogates deem women of color untrustworthy. They may believe that women of color will somehow harm the children that they carry.187

This suggests a deeply disturbing and racist devaluation of the reproductive labor of women of color. Yet to really evaluate whether it is a “problem” for women of color to be absent from this workforce, one must also ask whether being a surrogate is a “good” job. Considering the low compensation surrogates receive when calculated as an hourly wage,188 and the risk of health complications including death, it is hard to see why we would want this job to be more widely available to anyone.

The explosion of surrogacy in the Global South, mainly serving clients in the global north, has also prompted calls to reconsider surrogacy. On the one hand, some have interpreted this to indicate that “the concerns that critical thinkers about race have articulated about the ownership and exploitation of the bodies of women of color for white benefit have come to be realized.”189 Yet there has been the impression that some of the loudest critics of surrogacy in the Global South are white feminists in the Global North who take a paternalistic attitude towards women in the Global South.190 Western media reporting on surrogacy in India has typically been sensationalist and pitying.


187 Id. at 1140. One explanation that Bridges does not consider is whether women of color are less interested in becoming surrogates.


189 Id. at 1141.

190 See Lewis, supra note 47, at 56 (describing anti-surrogacy feminists as motivated by “neoimperialist humanitarian feminism.”).
inevitably describing the women who do this work as “desperately impoverished, malnourished, oppressed, and uneducated Indian women who are somehow duped into vending their reproductive services in global intimate industries.”191 Thus sociologists studying commercial surrogacy in India have been at pains to surface the actual experiences and ideas of these women, whose views are often more nuanced than the stereotypical narrative of victimhood.192 One such scholar, Sharmila Rudrappa, has also spoken out against the Indian state’s recent ban on commercial surrogacy, citing concerns that the industry would simply go underground.193 However there is no substantive disagreement that the surrogacy industry in the Global South is highly exploitative and arguably racist. In India at the height of the surrogacy boom, surrogates had little control over medical decisions, medically unnecessary cesarean sections were routine,194 surrogates had little control over their living and working conditions, wages were insufficient, and relationships with intended parents are often disappointing, among other issues.195

If surrogacy in the Global South is a highly exploitative, what does that mean for our policies in the Global North? Some commentators have argued that surrogacy bans in places like the U.S. actually push this labor into the Global South.196 Therefore, the policy most in line with the interests of the exploited women working as surrogates abroad would be to make or keep surrogacy legal in the Global North, where conditions are likely to be better. Yet the same argument could be used for any protective labor regulation. Child labor, for example, has been largely eliminated from the Global North, yet it continues to be prevalent in many parts of the Global South.197 It is well known that companies move their operations in response to more business-friendly legal environments, such as the mid-century shift of U.S. manufacturing from the north to the Sun Belt in the south, which had business-friendly “Right to Work” laws.198 While it is incredibly important for labor organizers to form ties of solidarity between workers in the Global North and the Global South, the “solution” to the global “race to the bottom” cannot be for states in the Global North to lower their labor standards. Furthermore, even if more states in the Global North allowed for commercial surrogacy, it would still be more vastly more expensive than in the Global South.199 The existence of surrogacy in the Global South is therefore unlikely to be eliminated by increasing the

191 RUDRAPPA, supra note 25, at 2.
192 See PANDE, supra note 25; RUDRAPPA, supra note 25.
194 PANDE, supra note 25, at 117.
195 See RUDRAPPA, supra note 25, at 174.
196 See, e.g., PANDE, supra note 25, at 173-74.
197 Africa and the Asia-Pacific regions have the highest rates of child labor according to the International Labour Organization. INT’L LABOUR ORG., GLOBAL ESTIMATES OF CHILD LABOUR: RESULTS AND TRENDS, 2012-2016 EXECUTIVE SUMMARY 10 (2017).
legal availability of commercial surrogacy in the Global North.

V. TOWARDS A PRACTICAL, FEMINIST, ANTI-CAPITALIST POLITICS OF SURROGACY

A. At a minimum, we must always protect parental rights of gestators by giving them the right to back out of surrogacy contracts.

In this section, I will discuss several different theoretical lenses, all of which can be considered to be coming from a “social justice” perspective.

1. Bodily Autonomy

Even though most people recognize that would-be fathers (and/or others) may have an interest in the outcome of a pregnancy, feminists have long argued that the ultimate decision should lie with the pregnant woman because this preserves bodily autonomy. Expanding this logic to parenthood, we could make a similar feminist argument that the gestator should have the first claim to parental rights, even where there are other claims based on genetics and/or intention. Although the baby is no longer literally a part of the woman’s body after the pregnancy has concluded, the intimate involvement of her body in bringing it into being should still be given great weight. Pregnancy is by definition, a period of prolonged physical closeness between gestator and child which, not surprisingly, often creates a strong emotional bond. Once this bond is formed, a forced separation from the child inflicts a particularly deep type of harm. To avoid such harm, gestators should always have the right to maintain a relationship with any child that they gestate, if desired. Such a policy would still allow recognition of other parental claims based upon genetics, intention, or a subsequently formed relationship. Once recognized, non-gestating parents would have rights vis a vis their children that are equal to those of the gestating parent.200 This policy would simply ensure that none of these parties has a parental right that may defeat the gestator’s parental right.

2. Marxism & the Labor Movement

As discussed above, Marx sees the separation of the worker from the fruits of her labor as a kind of theft. In a similar vein, the socialist and labor movements have long used the slogans “Labor creates all wealth”201 and as such, “Labor is entitled to all it creates.”202 Applying this principle to pregnancy, I believe that the gestator, as the person doing the labor of creating the child, should have

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200 An exception to this is the “tender years” doctrine, which gives some preference to mothers for custody of very young children (when they are in their “tender years”). However, this doctrine has been all but abolished, due to changing social norms and its apparent conflict with non-discrimination law. See 67 A.C.J.S. PARENT AND CHILD § 69, at 2 nn.6-12 (citing lower court decisions finding the “tender years” doctrine an impermissible gender-based preference).


202 DSA (@DemSocialists), TWITTER (July 11, 2017, 1:24 AM), https://twitter.com/DemSocialists/status/88464477977186304 [https://perma.cc/2NAT-WF8P] (last visited Apr. 28, 2021) (a Tweet from the official Democratic Socialists of America Twitter account, reading, “[l]abor is entitled to all it creates. All power to the working class.”).
greater rights to that child than the purchaser who paid money for it. Although it may take a revolution to give all workers the legal right to all that they produce, this doesn’t prevent us from ensuring that in the meantime, at least reproductive laborers have the legal right to the product of their own labor. The many states that effectively do so through surrogacy bans demonstrates that this is possible even under a capitalist system.

Contract principles are particularly inappropriate for deciding intimate personal matters such as child custody. Contract law is based on holding people to the promises they made in the past, which is expressed as the parties’ intent at the time of contracting. This has great advantages for businesses by making commercial dealings more predictable. Our personal lives are quite different. Instead of holding people to promises made in the past, family law is based on fundamental rights, principles of equity, and the best interests of the parties moving forward. In particular, when dealing with issues of child custody, courts are governed by the “best interests of the child” standard. The legal doctrine supporting commercial surrogacy reverses this, by using the intent of the parties at the time of contracting as determinative. Yet as Anita Allen writes, “[i]f courts can justify enforcing surrogacy contracts by appeal to intent, they can, by the same token, justify enforcing betrothals, marital vows and other personal undertakings . . . .” For good reason, our courts have abandoned this approach to family matters, as it had devastating and oppressive consequences. Patricia Williams writes, “. . . there are implicit issues of dignity, bodily integrity, and public health in surrogacy arrangements. These issues defy and exceed the sphere of private contract.” Yet when a court decides to enforce a surrogacy contract, they are in effect deciding matters of child custody according to contract principles instead of family law principles.

In order to limit the applicability of commercial principles to such intimate family matters as child custody, some commentators have suggested using the best interests of the child standard for determining parentage in disputed surrogacy cases. For example, the dissent in Johnson v. Calvert took this approach. However, as I will discuss later, this standard has major drawbacks for parents who are economically or socially underprivileged.

Another approach would be to disallow specific performance as a remedy for surrogacy contracts. This could apply to all parties, such that a surrogate could not be ordered to hand over a

203 See LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 7:2 (1993) (“Natural parents have a fundamental liberty interest in the care, custody, and control of their children which is constitutionally protected. The parental preference rule mandates that parents are entitled to custody of their offspring unless shown to be unfit by clear and convincing evidence.”).

204 Id. at § 4:1 (“When the custody dispute is between two natural or adoptive parents, married or not, all states mandate that the judge place the physical residency and legal custody of the child according to the “best interests” of the child.”).

205 For example, Judge Edward Panelli reasoned, “[t]he parties’ aim was to bring Mark’s and Crispina’s child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child’s mother. Although the gestative function Anna performed was necessary to bring about the child’s birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child’s mother. No reason appears why Anna’s later change of heart should vitiate the determination that Crispina is the child’s natural mother.” Johnson, 851 P.2d at 782.

206 Allen, supra note 74, at 29.

207 Patricia Williams, Babies, Bodies and Buyers, 33 COLUMBIA JOURNAL OF GENDER AND LAW 14 (2016).

208 Johnson, 851 P.2d at 790 (Kennard, J., dissenting).
child and the intended parents could not be ordered to take custody of a child. Alternatively, a statutory scheme might make termination of parental rights a non-enforceable contract term. A recent bill proposed in New York attempted to do this by including language that disallowed enforcement of contract terms giving intended parents a “judgement of parentage” in cases where the surrogate objected to the termination of her parental rights.209

3. Reproductive Justice

The Reproductive Justice movement’s emphasis on parental rights as part of reproductive freedom provides another lens through which to see the importance of protecting parental rights. As defined by the SisterSong collective, “Reproductive Justice [is] the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”210 The Reproductive Justice movement emerged out of Black women’s dissatisfaction with the “Reproductive Rights” framework of mainstream feminism. With the emphasis on abortion rights, the mainstream feminist movement elevated women’s choice to not be a parent, while providing little attention to the corollary right to become a parent. “SisterSong affiliates have broadened the conversation to recognize how race- and class-based histories of population control, sterilization abuse, high-risk contraception, and the effects of environmental pollution on fertility and maternal health have shaped the reproductive lives of third-world woman, (including women of color in the first world).”211

Movement activists organized against laws and policies that amounted to official reproductive abuse of people of color and their communities. Abuses included coerced sterilization; welfare and fostering policies that punished poor women for ‘illegitimate’ motherhood. . . . [R]eproductive justice was born from the claims of women of color that they had the right to be sexual persons and to be fertile. They claimed the right to decide to become parents and the right to the resources they needed to take care of their children.212

Thus the right to become a parent was always crucial to this movement, a right which may have particular resonance given the U.S.’s history of commodification and selling enslaved women’s children.213 Native populations and other people of color have also been subject to similar denials of parental rights, from the assimilationist boarding schools that Native children were forced to attend, the excessive out of community adoptions that motivated the passage of the Indian Child Welfare

211 Bailey, supra note 51, at 727.
213 See Davis, supra note 143, at 212.
Act, to the family separation border policy of the Trump administration. Given this context, it seems particularly important to protect the parental rights of all gestators, especially in situations where society and courts may not see the gestator as the most rightful or desirable parent. Surrogacy is one such situation.

4. Black Feminism

This concern for setting policy with the most vulnerable in mind is influenced by the famous Combahee River Collective Statement. In it, the Collective argued that the multiple “interlocking” systems of oppression that Black women face means that Black women’s struggle can help identify the revolutionary strategy that will liberate everyone. They wrote, “If Black women were free, it would mean that everyone else would have to be free since our freedom would necessitate the destruction of all the systems of oppression.”214

In applying this concept to surrogacy, we can see the problems with using the best interests of the child standard for determining custody in disputed surrogacy cases. The race and class biases of judges can all too easily influence their determination of what is in the child’s best interests. Given that we know that intended parents are mostly white and invariably will be wealthier than a surrogate they hire, using the best interests of the child standard would be very unlikely to award custody to surrogates in all but the most extreme cases. For these reasons, ensuring that parental rights are not waivable by contract is the policy option that would best protect working-class women of color and, in so doing, would best protect the rights of all women working as surrogates.

5. Limiting Commodification by Giving Workers Power

Giving surrogates the right to back out of contracts will also have the effect of making surrogacy riskier and more expensive for intended parents. This might make it less popular, and the industry could decline as its profits suffer. If commercial surrogacy were less common, this would mean a reduction in the commodification of babies and women’s reproductive labor. As I have argued, this would be a good thing from a social justice perspective.

B. Altruistic surrogacy – exploitation in disguise?

Since surrogacy’s outset, some feminists have argued that altruistic surrogacy is more exploitative than commercial surrogacy, because at least commercial surrogates are paid for their labor. Lori Andrews argued that without legal commercial surrogacy, “infertile couples will only be able to have a child through this arrangement by pressuring friends or relatives into being a surrogate.”215 A similar concern has been raised in relation to India’s 2016 ban on commercial surrogacy, which specifically exempted altruistic surrogacy performed by female family members. Critics have suggested that exempting such familial altruistic surrogacy from censure assumes that the family itself is not also a site of exploitation and coercion.216 Some women who became altruistic

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216 See, e.g., Lewis, supra note 47, at 115-16 (“[A]ssisted reproduction’s track record in human rights violations is
surrogates for family members have reported bad experiences, and nasty intrafamilial disputes have resulted.\footnote{NEW YORK TASKFORCE ON LIFE AND THE LAW, supra note 7, at 23. See, e.g., Ted Sherman, N.J. Gay Couple Fight for Custody of Twin 5-Year-Old Girls, N.J.COM, Dec. 20, 2011, https://perma.cc/W47Z-ABYD (last updated Mar. 30, 2019). For a full discussion of this issue, see American Society for Reproductive Medicine (ASRM), Using Family Members as Gamete Donors or Surrogates, 107 FERTILITY AND STERILITY 1136, 1139-40 (2017) (discussing the potential for emotional harm to donors and surrogates).} So how serious is the risk of coerced altruistic surrogacy, and what relationship does it have to banning commercial surrogacy?

First, from a Marxist perspective, it should be clear that substituting the complex intimacies of the family with the “simple” arms-length transactions of the market does not end exploitation or coercion. Instead, the deeply personal nature of such labor under capitalism becomes erased by liberal market ideology, which posits everyone as disembodied utility-maximizers interacting according to simple mathematical rules. In addition, I would argue that it may be hard to distinguish the relative frequency of pain and discord associated with commercial as compared to altruistic surrogacy given the way each conforms to socially preconceived ideas. Because workers under capitalism do not generally have a right to the product of their labor, to the extent that commercial surrogates are viewed by themselves and others to be workers, they are less likely to see the worker having a claim upon the resulting child. Because unpaid gestators do generally have a right to parent the children they gestate for their families, it seems likely that people are more able to see the legitimate but competing claims to parenthood involved when a conflict arises between surrogates and intended parents who are family members.

The frequency of coerced intrafamilial altruistic surrogacy is a matter for empirical research beyond the scope of this paper. However, there is no evidence that this has become a widespread problem in U.S. states that have banned commercial surrogacy. It is certainly hard to imagine that altruistic surrogacy would ever take place on the scale of commercial surrogacy, given that only the latter is supported by corporate investment. When India legalized surrogacy in 2002, it only took approximately a decade for it to become the global “mother destination” for the industry.\footnote{RUDDRAPPA, supra note 25, at 5.} Having invested capital in their businesses, it is not surprising that some doctors have been trying find ways to skirt the new ban, for example by implanting embryos in women at their clinics in India but sending them to Nepal or Kenya to give birth.\footnote{Ruddrappa, supra note 193, at 81-82.} These are complex situations, and we should not expect to find a perfect policy solution. However, I would suggest that these experiences should hazard against legalizing commercial surrogacy in the first place. Like any capitalist industry, it is harder to shut it down than to not develop it in the first place.

The popular narrative of altruistic surrogacy as a laudable example of selfless giving should certainly be complicated, especially given the way that such narratives can reinforce gendered stereotypes of women as naturally nurturing, etc.\footnote{PANDE, supra note 25, at 173.} Furthermore, altruistic surrogacy certainly provides no ready “solution” for the many people who might like a child produced through surrogacy dwarfed... by the track record of the ‘natural family.’\footnote{Ruddrappa, supra note 193, at 90 (“[F]amilies are never quite safe havens from the corrupting forces of the market; instead, they are sites that perpetuate gender subordination. By posing altruistic surrogacy within kin networks as the path to women’s welfare, the State re-inscribes an idealized concept of the traditional heterosexual family... .”).}
but who don’t have a friend or family member they can convince to do the work without pay. Instead, we should recognize that just like any other intimate relationship, altruistic surrogacy arrangements can be fraught and disappointing. Nor should we expect it to be free of coercion along the lines of gender and power. In my next section I will discuss the types of policy regime that I believe would best help fight these forms of exploitation and oppression.

C. A public policy based on reproductive justice is inconsistent with commercial surrogacy

As explained above, the reproductive justice movement emphasizes true freedom of choice for working class people, especially people of color, which can only be realized through material support and a caring community. Such a policy framework would be beneficial to all people, but its expansive inclusivity would require abandoning liberal individualism for a more collective ideal. Dorothy Roberts writes,

We would all benefit from a health policy that redirected billions of dollars currently spent on fertility treatment towards eradicating the causes of infertility. We would all benefit from a view of family that valued loving relationships, however created, rather than genes traded on the market. We would all benefit from a work world that appreciated mothers’ care for children. Once again, America’s unwillingness to attend to the needs of Black citizens stymies the potential for widespread change that would enrich everyone’s life.221

A policy regime based upon reproductive justice would require expanding substantive freedoms for all people, not just those with enough privilege to access expensive technologies and services. It would also mean expanding the freedom to not have to become a surrogate due to a need for money. It would mean finally having a true reckoning with the racism that has been core to this country from the start, and which today wreaks havoc on Black families through medical neglect, racist child welfare policies, and police violence.

Commercial surrogacy will always be in conflict with this agenda because as a capitalist business, it seeks to make money rather than promote the social good. It needs workers to exploit, and it will promote its product regardless of whether that product is good for workers or society. The product that it sells are children who are genetically related to the purchaser and/or who have genetic material chosen for various attributes that are desirable to their wealthy, white clientele. In doing so, the industry perpetuates deeply racist, classist, and sexist notions about whose genetic material is worth reproducing, whose children are worth millions of dollars to create, and whose children are worth the bodily labor and pain of strangers. In other words, it expresses a normative value about whose lives matter. The question, then, is whether our laws should endorse this view. As Patricia Williams writes, “If having children is reduced to a cipher for the projected vanities of self-centered reproductive consumers, then we have turned the enterprise of parenting into that of narcissism.”222

We perhaps cannot help that the desire for genetically related children is a strong one with a long cultural history.223 Yet there is no reason that public policy, such as legalizing commercial

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221 ROBERTS, supra note 151, at 292.
222 Williams, supra note 207, at 15.
223 See ROBERTS, supra note 151, at 264-69.
surrogacy, should encourage such a conception of family. Williams writes, “... the exciting new technologies of creating and sustaining life should not blind us to the multiple ways we might otherwise make family, particularly if we relinquish the conceit that all our children must ‘look like us.’”224 Good public policy would work to foster a diverse vision of family that is less dependent on genetics. It would also support working class families through free childcare, better quality public education, and culturally sensitive supportive services replacing the racist and punitive child welfare system. Quality socialized medicine would address many common causes of infertility, while paid family leave would reduce pressures on women to delay childbearing. Reproductive technology such as IVF could be free for people’s personal use as part of socialized healthcare. Barriers to adoption for LGBTQ couples and others who do not fit the white, nuclear, heteronormative family mold should be removed. Perhaps new models for raising children, such as non-romantic partnerships, could also be facilitated through changes to family law. Non-enforceable altruistic surrogacy agreements could potentially be a part of this diverse ecosystem of reproduction, enacting family formation as a type of mutual aid.

In conclusion, activists and policymakers should work to create a public health and family policy that fosters the type of world we want to build. This world is inclusive, decommodified, and in which labor and love have priority over genetics and money. A reproductive justice policy agenda would have many facets, but commercial surrogacy would not be one of them.

224 Williams, supra note 207, at 15.