

IN DEFENCE OF SURROGATE PREGNANCY

JOHANNA FAUST

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BRITISH ASSOCIATION OF
LIBERTARIAN
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FOR LIFE, LIBERTY AND PROPERTY

INTRODUCTION

Chris R. Tame and Johanna Faust

It is significant that this, the first publication (in conjunction with the Libertarian Alliance) of the British Association of Libertarian Feminists should be a defence of commercial surrogate pregnancy. The successful campaign to ban surrogacy has been the first major legislative achievement of the unholy alliance of “left” and “right” wing authoritarianism. Although for a time during the sixties the “left” appeared to defend the “permissive society”, free speech and freedom of personal behaviour, its superficial liberalism has now been almost totally abandoned. Free speech is thus now to be denied to fascists and racists and “sexists” and anyone who can be plausibly — or implausibly — labelled as such. Feminism, which originated as a liberal movement for equal rights and self-actualization for women has been hijacked by Marxism and socialism. Indeed, “feminism” has now tragically become one of the major contemporary threats to human liberty and happiness. In order to justify even more rampant state socialism much contemporary feminism encourages the image of woman as victim. The most vicious anti-male sexual racism is propounded alongside an anti-sexual puritanism that makes the “right wingers” and Mary Whitehouse brigade look like bordello owners.

The climate of intolerance, bigotry and hysteria, the reversal of the social progress of the fifties and sixties, is thus a product of the conjunction of “left” and “right”. Interestingly, both are also united in their opposition to the free market. Of course, for the “left” all market exchange is “exploitative” and unjust. The fruits of individual labour and exchange are held as nought against their monstrous ideals of equality of condition and outcome. While having some glimmering of the fact that free markets produce prosperity for all, the “right” prophesies social dissolution or moral disaster if total freedom is allowed. Moreover, some things are held to be too “sacred” to be left to mere market relationships. We thus observe the absurdity of “right wingers” who attempt the doomed task of trying to justify some degree of private property rights while obsessively seeking to interfere in what people do with their private parts. Of course, for the High Tory paternalists, whether Pym and Walker compassionate (sic) “wets” or “hang ’em and flog ’em” nasties, this inconsistency does not arise. They never liked free markets or freedom in the first place.

But while there is at least some hope for the free enterprise “right”, some hope of awakening them to the truths contained in their rhetoric, it is hard to hold out much hope for the “left”. The social tolerance and liberalism of the sixties was largely a detour from the social and sexual authoritarianism of previous socialist movements. As George Watson has indicated in *Is Socialism Left?*, it is hard to understand how socialism ever became associated with social and sexual liberalism, tolerance, and freedom of speech. “The extreme puritanism of Soviet and other socialist societies, their hostility to the creative artist, their absurd artistic conservatism, and their determination to discipline and gag any writer who defies the standards of the Socialist State, all suggest that socialism might be a good option for anyone with an itch to suppress pop, abstract art or the Theatre of the Absurd” (Centre For Liberal Studies, London, 1982, p. 10).

Now that the “left” has abandoned all pretensions to social liberalism the task of libertarians is both easier and harder. It is easier insofar as the ideological issues are now far more clear cut. The case for economic and social liberty is indivisible. Moral freedoms, free speech, sexual liberty are part and parcel of the case for free market capitalism. One cannot pick and choose liberties. Either human beings have, as John Locke argued, a property right in their selves — in which case free speech, non-

coercive action, free association and the right to appropriate, create and exchange property exists - or they do not. The fight for freedom is harder, though, insofar as the current left/right alliance makes the passage of repressive legislation far easier than before.

Nevertheless, the prospects for liberty are not entirely grim. The revival of classical liberal and libertarian ideas and their popularity amongst students and young people grows with every day. The formation of the British Association of Libertarian Feminists, which joins the Libertarian Alliance in this ideological movement, is a major step in reclaiming true feminism — the tradition of Harriet Martineau, Josephine Butler, Elizabeth Cady Stanton, Mary Everest Boole, and Dora Marsden — for the struggle for liberty. For the cause of women, the cause of equal rights, individual and self-actualization, ethical and social rationality is of course nothing less than the cause of *homo sapiens* as a whole. The goal of true feminism is a specific application of the broader goal of libertarianism as an intellectual and political movement — the creation of a society characterized by, in the words of our liberal forebears — life, liberty, property and the pursuit of happiness.

While some provisions of the Warnock Report have been enacted in the Surrogacy Arrangements Act of 1985 the impossibility of its enforcement will ultimately lead to a reconsideration. The Act will be quite unable to prevent would-be surrogate parents going to countries without such restrictive laws, while, ironically, London remains the abortion capital of Europe.

This pamphlet is the first shot in the campaign for the repeal of the Surrogacy Arrangements Act and for the decriminalization of surrogacy — together with all other freely consenting acts between individuals.

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PREGNANCY REFORM

Johanna Faust

The purpose of this paper is to explore the social consequences of the emerging medical technology which enables childless couples to have children of their own with the assistance of a 'surrogate' mother.

I am not going to defend or attempt to replace the current terminology of 'surrogacy', 'surrogate', and 'commissioning' parents; for all its absurd 'Brave New World' connotations, it is already too late to change it. Once the full implications of this new technology have sunk in, I hope that these connotations will disappear.

My view, as a libertarian and a feminist, is that an unintended consequence of surrogate pregnancy will be the greatest single extension of liberty since the abolition of slavery.

The new techniques are criticised because they have caused novel legal and moral problems; some of these new legal problems are discussed below, with the aim of demonstrating that none of them are in principle insoluble, and that legislation restricting the use of surrogacy is undesirable as well as unnecessary. The framework of existing law is perfectly capable of satisfactorily dealing with these new problems, respecting all parties' (including the child's) potentially conflicting interests. To this end, I wish to discuss, firstly, the common law wardship jurisdiction, and, secondly, to put forward an analysis of pregnancy in terms of contract. This may seem unusual, for I do not think it has been much canvassed previously.

This all prepares the way for some clear thinking about what pregnancy, as a social institution, is.

I will argue that solutions to the legal problems of surrogacy arise from considering pregnancy to be a particular type of contract of employment, with special rights and duties, arising from the nature of the transaction, whereby the mother allows her body to be used for the purpose of bringing a child to term. Now that alternatives to natural pregnancy are available, it is clear that there is no difference, from this point of view, between natural and surrogate pregnancy; natural pregnancy can also be seen as a contract of employment of a particular type.

In the case of natural pregnancy, until now, the only alternative to taking a pregnancy to term has been to have an abortion. I have always doubted the morality of allowing a foetus to be aborted for reasons of convenience rather than, for instance, for some overriding reason, such as danger to the mother's health. Taking this as a starting point, natural pregnancy can be seen to amount to a contract of employment from which it is not possible to resign — until the end of the term.

Term contracts of this type are, of course, common in legal history, although less so today; the parallels which spring to mind include bondsmen, serfs, slaves and apprentices. In all civilised countries slaves have been freed, and apprentices are generally able to resign or transfer their articles to another employer. With the technology of surrogate pregnancy, and the increase in choices made available thereby, comes the possibility of the manumission of women.

I do not mean by this that all women everywhere are in the thrall of wicked macho men. (Some feminists like to cast women in the role of perpetual victim.) I do wish to argue for the enormous increase in individual liberty which the unfettered use of the new techniques will bring.

It will be said that I am exaggerating; after all, it's only nine months of one's life. Nevertheless, primarily because until now there has been no alternative to the natural method, pregnancy tends to dominate women's lives to such an extent that all other

aims and ambitions tend to be submerged by the over-riding desire to start a family. Career women, to varying extents, always have to reconcile the conflicting demands of job and family. By extending the choices available, these new techniques will help to resolve the dilemma.

Surrogate pregnancy, and other emerging medical techniques which can now be foreseen, could also provide a solution to the moral problem of abortion, without doing violence to the unborn child or to the woman's right to choose what is to happen to her own body.

In short, I am in favour of commercial surrogate pregnancy supplied on the free market.

THE ARGUMENTS AGAINST SURROGATE PREGNANCY

Arguments given to support the banning or restriction of surrogate pregnancy range from suspicion of new techniques in the (assumed) absence of a suitable legal framework, to what sometimes appears to be mere atavistic reaction to the notion of people being able to run their lives as they wish. There is a more moderate view which, whilst not hostile to new techniques simply because they are new, looks askance at people making money from them.

The principal arguments are:

"Surrogacy will undermine the family."

The rationale for this point of view is less than clear. The medical aim of surrogacy is simply to enable childless couples to have children — to create a family where there was none before. If this argument were valid, then any medical treatment for infertility ought to be banned, in the interests of preserving the family as an institution, or perhaps as some kind of endangered species. Logically, adoption should be banned as well.

"Surrogacy is self-indulgence."

Again, perhaps its critics can explain why the production of a child by means of a surrogate pregnancy is self-indulgence, while the production of a child by natural means is not. If it is right to criminalise surrogate pregnancy on the grounds that commissioning parents' motives are insufficiently disinterested, then it follows that all would-be parents ought to be licensed to have children, and only allowed to do so if their motives were judged to be sufficiently pure. Fortunately for us, no sane government that might lose an election would contemplate such a lunatic intrusion into individual freedom — no such constraint stands in the way of the government of Communist China.

It is interesting that the legislation recently before Parliament (the Surrogacy Arrangements Act) has avoided criminal sanctions on surrogate pregnancies, and commissioning surrogate pregnancies — for this reason?

"Surrogacy prevents bonding."

Some would have us believe that "science has shown" that there is a special relationship between a child and its natural mother — but if this were such a vital factor, then every adopted child, every child brought up with the assistance of nanny, grandmother or *au pair*, would be psychologically flawed. I find it difficult to believe that this is a factor of such overriding importance that it justifies criminal sanctions on surrogacy — or what the Bill coyly calls "surrogacy arrangements".

“New technology is dangerous.”

Much of the opposition to surrogate pregnancy amounts to the familiar distrust of new technology, precisely because it is new and likely to result in social change. As with other instances of technological change, my prediction is that these new techniques will not fundamentally alter the nature of the family; rather, the change will be in the way in which people go about forming the relationships which make up a family. A parallel may be drawn with the effect of inventions such as the car or the computer on employment. Rather than jobs being made a thing of the past, new skills, and new forms of employment emerge.

Even if all pregnancies took place *in vitro*, people would still form permanent relationships, marry one another and bring up their children, just as they do now. But the ways in which people would choose to achieve these ends would change. Just one consequence would be that women would be able, much more easily than is possible now, to have children without having to interrupt their careers. There would be no need for equal opportunity legislation to compel employers to bear part of the costs of their employees' childbearing in the form of 'rights' to maternity leave or to return to their jobs afterwards, as if nothing had happened.

“It's wrong to trade in human lives.”

Having sensibly conceded that surrogacy is a legitimate medical technique for treating infertility, critics then spoil it by asserting that surrogate mothers ought not to be paid for their services. But why is a course of action all right if it is voluntary, but wrong if it is done for money? This is no more than the familiar hostility to economic activity as such. My suspicion is that the underlying reason for this hostility is distrust in ordinary peoples' ability to run their own lives as they see fit.

“Babies For Sale.”

There is this absurd and inaccurate notion that surrogacy amounts to “baby broking”. Where the embryo is fertilised *in vitro* from the commissioning parents' own genetic material the baby is, throughout, the commissioning parents' baby. The only difference between the surrogate and the normal pregnancy is that the baby is brought to term by a substitute for the genetic mother, who simply provides a service to the commissioning parents which they are unable to do for themselves. If the contract were to buy and sell a person, then the end result would be that the baby would be sold into slavery, which obviously does not happen. If the commissioning parents turn out to be cruel, the child is no worse off than she would have been had she been born by normal means; none of us can choose our parents. In the state of the law, before any Warnock-inspired criminal penalties, the surrogate child has more legal protection than one produced by natural means, because of the Courts' wardship jurisdiction, which enables the Court to resolve “tug-of-love” disputes by reference to the best interests of the child.

“The tug-of-love battles.”

Much is made of the practical difficulties of the relationship between commissioning and surrogate parents, particularly by the gutter press which thrives on tug-of-love stories of all sorts. What happens if the natural mother refuses to hand over the child? This can be provided for in terms of the contract between commissioning and surrogate parents — provided that the law does permit surrogacy to be carried on as a *bona fide* economic activity which can be the subject of legally enforceable contracts, and does allow surrogacy agencies to practise legally. The existing law of wardship provides a fallback, in the absence of explicit contractual provisions (as discussed later). Given these preconditions, it would not be difficult to devise suitable contractual provisions.

Singer and Wells, in *The Reproductive Revolution*¹, report one particular case from the early days of surrogacy, which went wrong when the surrogate mother effectively blackmailed the

commissioning parents. This is just the outcome to be expected when, firstly, there is no framework of law within which the transaction can take place, and, secondly, the details are not sufficiently well worked out in advance as for any other contract for services. That particular case was not one involving an agency. There were doubts about the legality of surrogacy in the particular state concerned, so the parents made their own arrangements, and were unable to make the sort of character checks which any competent agency would have to make to stay in business.

It is of interest that in the recent case brought about by “Baby Cotton”², the Courts were able to decide, on the existing law of wardship, that the commissioning parents should have custody of the baby, applying the fundamental principle that the child's interests are paramount. The claims of the natural mother on the one hand, and of the intrusive social services on the other, were both set aside in favour of sworn evidence showing that the child would be best off with her (commissioning) parents.

It is as plain as a pikestaff (as surrogacy critic Lord Denning would say) that the law as it was before the Surrogacy Arrangements Act was perfectly able to deal with the novel forms of dispute which can arise from surrogate pregnancy, resolve such disputes entirely in the best interests of the child, and (as far as consistent with the paramount interests of the child) uphold the spirit of the transaction, thus demonstrating the adaptability of the common law to meet the needs of new circumstances and new social relationships. The wardship jurisdiction confers on the Courts a wide discretion to act in the paramount interests of the child; I am confident that most, if not all, of the novel forms of dispute arising from surrogate pregnancy can be properly resolved by the law as it stands at present. Legislation is entirely unnecessary and will only be harmful, particularly the introduction of criminal penalties which would only have the effect of removing surrogate pregnancy from the general framework of the law.

It is to Dame Mary Warnock's credit that she is on record as saying that Baby Cotton should have been handed over to her commissioning parents.³ It would have been to Dame Mary's credit if she had reconsidered the absurd criminal penalties proposed in the Warnock Report.⁴

The lack of need for legislation is clear from the principal reasons given to Parliament in the debate on the Second Reading in April 1985 of the Surrogacy Arrangements Bill by the Secretary of State for Social Services, Mr Norman Fowler⁵, that the interests of the child are paramount. This does no more than parrot the textbooks on family law on wardship, and the decision in the “Baby Cotton” case. The additional protection to be given by the new law is spurious. All that the law will achieve will be to create a new source of mega-profits for mafiosi, by the time-honoured method of criminalising a harmless way in which ordinary people are able to make rather smaller profits.

The wardship jurisdiction also gives a perfectly good answer to the legal question of who the surrogate child's mother is. It is whoever, as between the natural and commissioning mother, the Court decides should be the mother, on the paramount consideration of the best interests of the child.

One advantage of agencies being allowed to operate without criminal sanctions is that the agency, not the commissioning parents, would bear the risk of the transaction going wrong. The logical next step for the commissioning parents would be to try again. They would be no worse off than if a natural pregnancy had miscarried at a late stage. Equally, if the baby were deformed and the commissioning parents refused to accept it, the agency itself could apply to the Court, again under the wardship jurisdiction, and the Court would decide, on evidence, what would be in the best interests of the child, the jurisdiction being flexible enough to allow a third party to apply. Again, the child would be no worse off than if there had been a natural pregnancy, for natural parents of deformed children have been known to abandon them, or even commit manslaughter.

The criticisms of surrogate pregnancy which sensationalise, in true gutter press style, all the ways in which a surrogate pregnancy could come to grief are based upon the unrealistic idea that human transactions generally should be risk-free, and, when it is obvious when this is not the case, that the government should "do something about it".

THE SURROGACY ARRANGEMENTS ACT

Because of alleged "public concern", the government has interfered, in this unnecessary legislation, in the provision of surrogacy services.⁶ Perhaps not surprisingly, it has fought shy of making surrogate pregnancy as such criminal, but intends to make it a criminal offence to act as a surrogacy agency, to advertise surrogacy services or to negotiate surrogate arrangements "on a commercial basis", anywhere within the U.K. (section 2(1)). By section 2(2), it will not be an offence merely to be a surrogate mother or to commission a surrogate pregnancy without falling foul of section 2(1). Wisely, the government has sought to avoid criminalising acts which are not wrong, cause no harm whatever to others, and which in a few years may be as commonplace as contraception or plastic surgery. It is (supposedly) the dreadful profit motive which turns these innocuous acts into crimes. It would make as much sense to say that working for another person is all right, but to be paid for it, to advertise a job, or to look for work should be crimes.

It should be no concern of the criminal law to pry into the reasons people might have for undergoing, or procuring, a surrogate pregnancy. It is fatuous to permit these techniques where they are judged to be medically necessary, but not to allow them for reasons of "mere" (i.e. someone else's) convenience. There are parallels here with the well established medical practice of prescribing the Pill for social reasons and carrying out plastic surgery for cosmetic reasons. Provided there is no undue medical risk, the patient's reasons for seeking these medical services are of no concern to anyone except the patient and the doctor.

The similarity of the provisions of the Surrogacy Arrangements Act and the criminalisation of prostitution is clear; the activity itself is not illegal, and arguably harms no-one, but it is a criminal offence to advertise. The consequences, as for prostitution, will be that surrogacy will be run by pimps and mobsters. The rich and well connected will be able to afford the pimps' prices and the legal risks, but ordinary people might as well forget it. Surrogate mothers will be kept in the same economic servitude as prostitutes. The new law will create the "baby farms" which its sponsors are so anxious to avoid.

The thinking behind the Surrogacy Arrangements Act is spurious in another related way. It seeks to eliminate all the alleged risks of surrogacy arrangements. These are: of a child being born handicapped; the parents not being suitable; (according to Michael Meacher, the Labour social services spokesperson, to quote the debate on the Second Reading again) that "poor women might be exposed to exploitation as rich women's baby farms"; or that a surrogate child might want to know who its 'real' parents are.

The first two of these objections have already been dealt with; they are simply examples of the all too common demand for legislation to render life completely risk free. I think people are better off if they are able to decide for themselves what risks are acceptable and what are not.

As for surrogate children trying to find out who their 'real' parents are, this need not detain us long. The child's 'real' parents are her commissioning parents, or alternatively, whoever the Court decides should have custody, on a wardship application, when the para-mount consideration of her welfare would be balanced against the slight and distant risk that she might become curious about her genetic origins.

As for Mr Meacher's baby farm fantasy, this is only a particularly virulent (socialist, instead of conservative) form of the hatred of profit. It is my feminist suspicion that if it were men who got pregnant, pregnancy would have long since evolved into

a simple form of contract of employment, and Mr Meacher would be defending the dignity of labour.

THE FUTURE OF PREGNANCY

What would happen if control over pregnancy were permitted to develop without interference from professional moralists, legislators and philosophy professors?

What will not happen is that people will suddenly stop living in families, nor will they stop bringing children into the world. All that will change is the way in which some people choose to pursue these objectives.

Surrogate pregnancy itself is only a transitional stage in the development of medical control over our own bodies; it will not be long before *in vitro* pregnancy will be possible. With present medical techniques, the age from which premature babies can be kept alive in an incubator is decreasing, approaching the point before which abortions are allowed.

Far from being a threat to moral values, I believe that this and other developments may well produce solutions to current moral problems, particularly abortion.

It will not be long before it will be possible to implant unwanted foetuses into infertile women to bring to term as their own children — essentially, a pre-natal adoption — or into surrogate mothers to be brought to term for adoption after birth. On moral grounds alone, this must be preferable to the present position, where hospitals are full of women having abortions, and also of infertile women undergoing lengthy, painful and expensive procedures in order to conceive. What could be more logical than to transfer foetuses from women who do not want them to those who do?

This would make abortion as a means of birth control a thing of the past, as well as ensuring a source of babies for adoption, which have become progressively scarcer since the Abortion Act.

Nobody suffers, least of all the child. The natural mother does not have to cope with an unwanted pregnancy and an unwanted child at the end of it; the adoptive parents are able to have their child and the child isn't aborted. Everybody gains. Nobody loses.

The Pope ought to be delighted that medical technology may soon bring about the demise of abortion as a means of birth control.

To ensure that this becomes fact, not just science fiction, two things are essential. Firstly, research on embryos must be allowed to continue. Secondly, economic relationships between surrogate and natural parents must be allowed to develop within the existing legal framework, without government interference in the form of criminal penalties. Surrogacy agencies must be allowed to continue their business without legal interference.

Those who wish to see criminal penalties for surrogacy agencies will be, to some degree, responsible for inhibiting, or at least delaying, this development.

Those who wish to prevent, or increase the present restrictions on research using embryos will prevent, or at least delay, this development coming about, and will thereby be responsible for a great deal of continuing human misery and (among other things) many needless abortions in the future.

There are, fundamentally, two ways of organising social relationships. One is for the state to tell people what they need and when, where, how and at what price they are allowed to obtain it. The other is for people to decide these things for themselves. By comparing, for example, the Soviet Union with the average Western country, we can surely see which principle works better.

Legal and medical problems in defining what an embryo is have been extensively canvassed elsewhere. It is impossible to predict which of the undifferentiated cells of an embryo a few days old will develop into part of the foetus, and which, for instance, into the placenta. Singer and Wells⁷ have made a sensible sugges-

tion, which deserves more recognition than the public debate has given it so far, that research on embryonic material should be permitted up to but only until, the nervous system of the foetus has developed. Any dividing line is sure to be arbitrary, but this would be less arbitrary than most. Once the foetus has the capacity for consciousness, its right to legal protection as a potential person appears better founded, as a matter of jurisprudence. Also, since the legal definition of death ('brain death') is in terms of the person's ability to exhibit consciousness, this would demonstrate a degree of consistency.

It is necessary to balance the bogey of Doctor Frankenstein against the enormous increase in human happiness and fulfilment now promised by projected research on embryos. There is room here for a utilitarian judgement in favour of the continuance of research, subject to the good sense and responsible judgement of the researchers themselves, and subject to the rights of the foetus (as opposed to non-conscious embryonic tissue) itself.

A BRAVE NEW WORLD

I do not believe that increasing people's choice over how they can have children will produce Aldous Huxley's nightmare "Brave New World". The point of all the new techniques is that they make available options, on an individual and on a social scale, which otherwise would not exist; they are not compulsory. The middle ground, between making acts criminal offences and making them compulsory, is in danger of being overlooked, as it so often is.

It is also often forgotten that the horror of Huxley's vision of the future is due to the eugenic totalitarianism of the society he portrays, not to the *in vitro* techniques themselves, which (writing in the nineteen twenties) Huxley introduced as a *deus ex machina*.

TO SUM UP

1. Criminal penalties for surrogacy arrangements are unnecessary, and will only be harmful. Far from preventing 'baby farms' they will amount to a baby farmers' charter. It should be no business of the criminal law to examine people's motives for entering into transactions which cause no harm to anybody.
2. New medical developments may enable abortion as a means of birth control to become a thing of the past.
3. Women's lives will not be unequivocally their own until pregnancy is fully under our control. Surrogacy and other techniques will mean that women will be able to make the same choices about their lives as men take for granted.

BIBLIOGRAPHICAL NOTE

In all fairness it should be pointed out that there is considerable disagreement amongst libertarians over the issue of abortion. One wing of the movement holds that the foetus is a human being possessing all the natural rights of a human being. Hence, in this view, abortion is clearly murder. Other libertarians hold that since the source of rights is individuals' property rights in themselves a woman must have sovereignty over her person. The foetus is a dependent part of a woman's body and subject to her self-sovereignty. Hence, in this view, abortion is not murder. There is a voluminous libertarian literature on this subject. The following are representative examples: "The Abortion Debate: Person, Potential, or Parasite" (3 essays by Walter Block, Professor Tibor Machan, and Karl T. Pfock), *Reason*, Vol. 9, No. 12, April, 1978; Leslee J. Newman, "Abortion: The Battle Over Freedom of Choice", *Libertarian Review*, Vol. 8, No. 7, Sept. 1979; Sharon Presley, "Abortion: The Regulars, The Irregulars, and the Ambivalent", *Libertarian Review*, Vol. 8, No. 2, March, 1979; Sharon Presley and Robert Cooke, *The Right To Abortion: A Libertarian Defense*, Association of Libertarian Feminists, New York, 1979; Roderick Moore, "The Beginning of Life and the Right to Life", *Free Life*, Vol. 3, No. 3/4; Doris Gordon, "Abortion and Individual Rights: A Reply To Roderick Moore", *Free Life*, Vol. 4, No. 1/2. The major source of anti-abortion libertarian literature is Libertarians For Life, 13424 Hathaway Drive, Wheaton, Maryland 20906, USA (Co-ordinator: Doris Gordon).

FOOTNOTES

1. Peter Singer and Deane Wells, *The Reproductive Revolution*, Oxford University Press, 1984, p. 116.
2. "Re A Baby", *The Times* Law Reports, February 15th 1985.
3. *The Daily Telegraph*, January 8th 1985.
4. *The Warnock Report*, Cmnd. 9314, HMSO, 1984.
5. *The Times*, April 16th 1985.
6. *The Surrogacy Arrangements Act*, HMSO, 1985.
7. Singer and Wells, *op cit*, p. 147.

WHY COMMERCIAL SURROGACY SHOULD NOT BE BANNED

Madeleine Becker

"Perhaps there never was a more moral man than Mr Pecksniff: especially in his conversation and correspondence ... Some people likened him to a direction post, which is always telling the way to a place, and never goes there."

Charles Dickens, *Martin Chuzzlewit*.

The MPs, religious leaders, and professional experts who comprise government committees, are also very moral persons. So too are liberation front activists and members of action groups. All of them are full of precept, usually of the most fundamental variety. For instance they say: "Life's value is priceless", thus nuclear weapons or abattoirs are evil; "Nature knows best", thus pharmaceutical companies or packaged-food businesses are to be distrusted. Recent advances in medicine have threatened not only to put a price on life, but also to succeed where nature failed. A surrogate mother carries a baby for another woman,

perhaps by receiving an embryo which is derived from the mother and father who are eventually to keep the child. Surrogacy allows infertile couples to have a child, which may be related to one or both of them. Private profit-making agencies, which arrange the transaction between surrogate mother and commissioning parents, have now been banned in Britain. The Committee of Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock, recommended that legislation should be introduced to (a) render criminal the operation of any such agency even if it is non profit making; (b) render any people knowingly assisting in the establishment of a surrogate pregnancy criminally liable; (c) make all surrogacy arrangements illegal and therefore unenforceable in the courts.

WHY BAN SURROGACY?

The only good reason to ban anything must surely be that it permits one individual to harm another. Murder, slavery and theft

are obvious examples; actions which cannot be allowed in a civilised country.

Why is surrogacy banned? Its prohibition will not protect the child, or the commissioning parents, or the surrogate mother. If surrogacy becomes a black-market service, contracts are less likely to be honoured. Not only would the contracting parties not be protected by law, but their very involvement would make them criminals fearful of detection. Abnormal children may be left unloved and homeless. Orphaned children may be left indigent. Commissioning parents may be swindled or blackmailed, and surrogate mothers may be left unpaid. The unborn child needs clear legal rights to inheritance, to citizenship, to legitimacy. All the arguments usually beginning with "What if ..." ("What if the surrogate mother wants to keep the child?", "What if the child is deformed?", etc.) which are put forward by those who wish to ban surrogacy will suddenly seem terribly real. Yet surrogacy will go on, abroad or underground. It is as impossible to enforce this ban as it is to stop childless couples longing for a baby.

It is because surrogacy raises important questions for family and contract law, that all the experts have wished to solve all the problems in advance of their occurrence by statutory prohibitions. Both Left and Right wish this. The Right claim that surrogacy is unnatural, a threat to the nuclear family, and that commercial surrogacy is bound to lead to a Brave New World of manufactured and marketed babies. The Left, and particularly the feminists on the Left, regard any free market transaction as an exploitation of somebody, in this case of the surrogate mother by rich would-be parents and grasping commercial agencies.

THE ISSUE OF 'NATURALNESS'

But if surrogacy is unnatural, so surely is contraception. Indeed the Pope has condemned both in the same breath. Must we now perhaps reject incubators for premature babies, or all "artificial" ways of prolonging life, healing sickness, curing deformities? The *Sunday Telegraph* editorial for January 6th 1985 reported the description of Baby Cotton¹ as "normal" by the maternity hospital where she was born, and commented: "Mercifully, the local magistrates, who have ordered the infant to be placed in 'a safe place', take a more orthodox, humane view of what constitutes a natural, uncomplicated birth." What is normal or natural is a matter of tradition and opinion, not of fact. Incest is quite acceptable in some societies, even mandatory. By tradition it is generally abhorred in the modern West. But there is no tradition to govern our thoughts on something as novel as surrogacy. Must we listen to the Catholic Church, or the High Tory, or a panel of professional experts such as the Warnock Committee to learn our new orthodoxy? Or maybe it is none of their business?

There are always a few who, with J. S. Mill, despise unthinking conformity to public opinion. Purported public opinion is not sufficient reason for limiting the freedom of choice of others. The Warnock Committee itself was divided on many issues. Fourteen of the sixteen members of the committee were in favour of banning all surrogate agencies. However, the report of the committee does confidently state that "The moral and social (sic) objections to surrogacy have weighed heavily with us. In the first place we were all agreed that surrogacy for convenience alone, that is, where a woman is physically capable of bearing a child but does not wish to undergo pregnancy, is totally ethically unacceptable." Why? Because, says the report, of the danger of "exploitation". "That people should treat others as means to their own ends, however desirable the consequences, must always be liable to moral objection." Mankind has long lived with the evils of hiring a taxi, using a bank, employing a cook or buying any service. But perhaps the Warnock Committee are treating us, ordinary laymen, as a means to their own ethical ends. In a country where diversity of opinion and pluralism of political expression is said to exist, laws should not seek to impose new morals.

Kenneth Clarke, the Health Minister, said "The Involvement of commercial agencies is generally seen as tasteless, and I personally object to the idea of a woman leasing out a womb." The Minister's opinion is an aesthetic one. The *Sunday Telegraph* article referred to above, tells us that prostitution has long been regarded as degrading and immoral. (It is also regarded as the oldest profession.) Even more disapprobation should be attached to selling the body for the act of procreation. "Ever since the birth of Christ, motherhood, in the beautiful and moving face of the Madonna has been portrayed as the very picture of innocence untouched by baseness. Although humanity has never succeeded in living up to this divine ideal, surely this is no excuse for besmirching it to the degree involved in encouraging this latest scientific perversion." For some, however, motherhood is a more banal, and painful, worldly process, for which science has done much to ameliorate the shortcomings of Mother Nature.

Let it be conceded that for some surrogacy is unnatural. This does not imply that it is wrong or evil. What then of its threat to the nuclear family? It is because of the growing number of one-parent families, and of abortions, that there is such a huge unsatisfied demand for babies for adoption. A childless, and potentially nuclear family may wait for years for a baby, and still not get one. These couples (estimates range at 10% of couples being unable to have their own children) could, in America, commission a healthy mother to carry their child. Far from destroying nuclear families, surrogacy enables them to exist.

ANTI-COMMERCIAL PREJUDICE

But it is the commercial aspects of surrogacy that are most vociferously condemned. The Adoption Act 1958 provides criminal sanctions for payment associated with the transfer of custody of a child with a view to adoption. But there is no similarity between slavery and surrogacy. The *Sunday Telegraph* discussed the "priceless value of human life". I disagree. It is the priceless value of free life that matters. Life can be valued by the cost of medicines, brain scanners, or the services of a doctor. Money is just a measure of what we value for the improvement and continuation of our lives. It is freedom that is priceless because it cannot change hands: it can be lost, but not sold to another: it is not a sellable commodity like a life. Slavery is detestable because it is the forcible removal of free choice. But a baby never chooses its parents anyway. On growing up, it will have the same freedoms as any other of Her Majesty's subjects. Its life has been bought, that is true; but not its freedom. Professor Michael Freeman, an expert in Family Law at University College, London, has been reported as having accused the government of "moral panic", (*Sunday Times*, January 13th, 1985): "We have a government which is generally committed to liberty and freedom, and I would like to know on what grounds they would like to interfere with what looks like a perfectly good commercial contract which would probably end up with a child being cared for perfectly well." He says that critics are guilty of "sexist glorification of motherhood".

THE CONSEQUENCES OF BANNING SURROGACY

The banning of commercial surrogacy involves an even more ominous possibility than that of a seedy under-the-counter trade in babies. It may well be that the state will have the monopoly of manufacturing children, selecting those worthy of having a child, perhaps doing away with parents altogether, indeed creating a huge army of infant civil servants who start learning rule books from the crib. Notoriously, the state currently leaves babies in the hands of "social" services to become Oliver Twists, or worse still, Baby Jasmynes.² This is a long way from the carefully screened, affluent nuclear family on the agency's books. For millenia private families have had more successes than otherwise in rearing children. The potential Brave New World rests in an all-powerful state.

That there should be no private profit made out of surrogacy is a point on which the Right agrees with the Left. Indeed, the Right

echoes the disgust expressed by its bitter enemy the Militant group, which states that the capitalist system is one in which “great scientific advance is only used to solve the problem of fertility if a profit can be made.”³ Militant also maintains that “only the abolition of private medicine and the nationalisation of the pharmaceutical industry can guarantee the embryo experimentation will be used for the benefit of working class people”. The Left fears “exploitation” above all. The Warnock Report also, after its Kantian diversion that it is morally wrong to treat others as a means to one’s own ends, also proclaims that “such treatment of one person by another becomes positively exploitative when financial interests are involved. It is therefore with the commercial exploitation of surrogacy that we have been primarily, but by no means exclusively concerned”.

The Warnock Report also considers the argument that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else’s child. But the report does admit the argument that women have a right to use their own bodies as they wish. And so far as the surrogate mother is concerned, surely that is just what the feminists ought to be stressing: that their own bodies are their own concern and what consenting adults do in private is not its business.

The real danger of exploitation would arise if there was a state-fixed fee to the surrogate mother, or a criminal market that could charge commissioning parents the earth and give commissioned mothers very little, just as heroin is bought for next to nothing by its traffickers and sold at huge mark-ups. As for those on the extreme Left who see employment as exploitation, and all profits as something gained at the expense of others — enough to say that those of us who pay and accept money voluntarily, are happy in our chains.

THE INTEREST OF THE CHILD

There is indeed cause to fear for the unborn child. The Law Society Committee recommended that the interests of the baby or embryo should be protected. But if statutory prohibitions drive frightened parties away from the due process of the law for fear of criminal proceedings, there will be little opportunity for a clear and necessary body of law to develop in order to protect all parties, including the unborn child.

The Warnock Report comments “There is little doubt that the Court would treat most if not all, surrogacy agreements as contrary to public policy and therefore unenforceable.” The child would be awarded to the mother who gave birth to it in the case of dispute. Solomon’s judgement would be a more equitable one. But surely the child should be given to the one in whose care it is most likely to flourish. At the moment any contract is a risky undertaking. If the commissioning parents lose the child to the mother who bears the baby, and if the genetic father is the commissioning father, he may have an affiliation order imposed upon him. It seems illogical that this father cannot keep his child, as originally agreed, because of the special privileges of maternity above paternity. Perhaps the baby-rearing machines. Perversely these “wimmin” fear any loss of mystique about the birth of a child, just as the *Sunday Telegraph* writer feared the loss of purity in procreation.

Many things can go wrong in a surrogacy arrangement. Partly because of these contingencies, many politicians have rushed into precipitate action. In one case, in Pasadena, California, a mother refused to hand over her baby. She won her case when it transpired that the wife of the commissioning couple had undergone a sex change operation a few years before. Then there was a case of the child born with microcephaly, whom the commissioning parent, Mr Malahoff, did not want. He ordered the hospital to withhold treatment, but the baby survived, unwanted by either side. The results of the blood tests, which proved that Mr Malahoff was not the father, were announced on a television show. The Stivers, who had been the commissioned parents,

were then sued by Malahoff. The Stivers sued the doctor, lawyer and psychiatrists for not warning them not to have sex, and then sued Mr Malahoff.

These instances underline the need for enforceable contracts and clear legal guidelines to determine the legitimacy, inheritance, and citizenship of the baby. But it must be remembered that such problematical cases are likely to be rare; just as infrequent, perhaps, as in any conventional family. Statutory regulation now cannot possibly anticipate all the just solutions to the manifold difficulties than can arise in a contract of so unprecedented a type. Far better to let case law develop as disputes arise, as equity and existing laws dictate.⁴

FOOTNOTES

1. Baby Cotton was the first commercial surrogacy arrangements to become public in Great Britain.
2. Baby Jasmine was a baby girl murdered by her father. She had been entrusted to his care by the social services, despite the evidence of his past cruelty to her. Similar cases have come to light.
3. One might unexpectedly agree with Militant when it talks of the “self-styled guardians of our morals”, who wish to restrict scientific research into embryos. Militant, 25th January, 1985.
4. It is precisely the function of common law to solve such problems, to evolve naturally in order to deal with unforeseeable and unplanned issues. For an incisive libertarian account and defence of common law see Bruno Leoni, *Freedom and the Law*, Nash Publishing, Los Angeles, 1972. And also see Friedrich Hayek, *The Constitution of Liberty*, Henry Regnery, Chicago, 1960, p. 466, note 76.