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Is There a Right to Surrogacy?

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ABSTRACT *Access to surrogacy is often cast in the language of rights. Here, I examine what form such a right could take. I distinguish between surrogacy as a right to assisted procreation, and surrogacy as a contractual right. I find the first interpretation implausible: it would give rise to claims against the state that no state can fulfil, namely the provision of sufficient surrogates to satisfy the need. Instead, I argue that the right to surrogacy can only be plausibly understood as a contractual right. I then investigate two different sets of harms that are often employed to argue against such a contractual interpretation of the right to surrogacy: (1) harm to women's interests in a gendered society, and (2) harm to the sense of self of the surrogate. I assess both of these through the analytical lens of vulnerability. I find neither of them to be convincing arguments against surrogacy contracts. In conclusion, I agree that surrogacy contracts should be carefully regulated, but I disagree with those who call for prohibition of the right to surrogacy as a contractual right.*

1. Introduction

Many different aspects of our lives are now subjected to a language of rights. But of course, we need to wonder if '[it is] reasonable or even intelligible to claim a right to something that is impossible', as Mary Warnock writes.[1] The right to have a family and biological children seemed for many infertile couples such an unintelligible right until the advent of artificial reproductive technologies (ART) like IVF. Thanks to such technologies, many can now realise their wish for biological children. Nevertheless, there are still some for whom ART do not help realise their goal of having their own children. But, as Warnock asks, 'does it make sense in all circumstances to claim a right to reproduce?'[2] This question is particularly relevant in the context of surrogacy, i.e. the context in which a woman is commissioned to have the fertilised egg provided by a commissioning couple implanted in her womb for her to carry to term. Such gestational surrogacy, which is to say surrogacy in which the surrogate has no genetic ties to the foetus, is available to all hopeful couples, and the procedure may give children to otherwise childless couples.[3] Considering these obvious benefits, should we accept that there is a right to surrogacy?

Here a distinction may be in order. Rights as I construe them here can be assessed according to what *interests* they aim to protect, and what *claims* they may entitle its holders to make.[4] In a second step, these claims may be divided into two different categories: on the one hand, some rights give rise to *positive* claims against others, and often the state, to help realise the right in question; on the other hand, some rights simply entitle their holder to negative claims against others, which is to say that the rights-holder can claim not to be interfered with when exercising the right. It should also be noted that

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it is not the case that important interests always warrant positive claims; at least in some interpretations, all that is needed is the absence of interference for the interest to be protected. In other words, claims need to be assessed from a perspective of the implementation of the right. When assessing the claims a right may generate, we need to ask what is necessary for the realisation and protection of the interest at stake. To illustrate, think of the right to individual autonomy that many liberals hold dear, and which will be important for my assessment of the right to surrogacy. Some commentators argue that the interest at stake is to be able to shape our lives as much as possible according to our own choices.[5] Now, some argue that the claim resulting from a right to individual autonomy is simply to be free from undue interference, what we normally refer to as the postulate of negative freedom.[6] Others, however, argue that negative freedom is not sufficient to effectively realise the interest of individual autonomy — instead, the state needs to provide us with a set of options amongst which we may choose, and which alone will enable us to take the kinds of decisions that characterise autonomous living.[7]

A right to surrogacy may be understood as aiming to protect two different interests, and generating two different sets of claims. In the next section, I will discuss surrogacy as a *right to assisted procreation*. I will argue that a right to surrogacy as a procreative right cannot be defended. I reach this conclusion not because I doubt that surrogacy is procreation. This is to say that I accept that surrogacy arrangements can help couples realise their interest in having and rearing biological children. I also believe it fair to say that this is an interest worth protecting. Instead, I want to show that the argument for a right to surrogacy as a procreative right fails because of the claims the right-holders may have towards others, and the state in particular. It would prove impossible to effectively realise a right to surrogacy as a procreative right simply because we don't have any way of assuring that hopeful commissioning parents would find women willing to work as surrogates. The claim that would derive from a right to surrogacy as a procreative right would therefore be implausible. Moreover, as I argue in Section 3, consent to work as a surrogate is highly controversial, especially in cases of international surrogacy, which is the context I am concerned with here.

Section 3 begins with an assessment of the *right to surrogacy as a contractual right*. Here I argue that individual women should have the right to employ their bodies for reproductive labour. In order to realise the interests this interpretation of the right to surrogacy aims to protect, namely that of contractual freedom, the state's obligation is simply to frame surrogacy in contractual law, thereby stipulating what forms surrogacy contracts can take. In particular, such contracts need to assure that surrogates in international contexts are not vulnerable to being harmed when engaging is such work. Moreover, commissioning couples also have obligations towards the child after birth. These latter obligations are not due to the specific conditions under which they become parents, however — rather, they are due to the kind of limits and obligations we impose on parents in society.

To consider the right to surrogacy as a contractual right rather than as a procreative right opens the way to a critical assessment of possible limits that may be imposed on such a right. This is to say that, while I accept surrogacy as a contractual right that may be a means for commissioning parents and women working as surrogates to realise important goals in their lives, the interest at the basis of such a right — namely, contractual freedom — may weigh less heavily than the interest to procreate. In this instance, the right to surrogacy is a right that needs to be balanced and weighed against

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other considerations. Put differently yet again, an interpretation of the right to surrogacy as a right to enter contractual agreements may allow for restrictions to the right to surrogacy — it is not a trump. Restrictions may be justified with conflicting interests or potential harms an unfettered exercise of the right may bear. In Section 3, I will discuss two sets of harms that have been mobilised against surrogacy as a contractual right: the harm to a surrogate's interests in a gendered society; and the harm to the surrogate's sense of self. I reject them as unconvincing restrictions against a right to surrogacy as a contractual right, proposing instead that such contracts need to be regulated rather than prohibited.

2. Surrogacy as a Right to Assisted Procreation

A right to surrogacy as a right to assisted reproduction could be proposed in the first instance with the aim to protect the interest of a couple to have children. Some have plausibly argued that the ability to have children and parent them provides individuals with uniquely valuable opportunities to realise themselves and their deeply held goals in life.[8] If we accept the argument made in the context of ART, namely that we usually accept the interest of individuals to have children and create a family,[9] then we may accept that those who don't respond to such treatments or those for whom such treatment options are not helpful need to have access to a right to surrogacy in order to realise this interest. We may convince ourselves that gay couples or couples with medical conditions prohibiting pregnancy will only be able to realise their fundamental interest in procreation if they have access to surrogacy.

Some could argue of course that the interest in a right to have children does not suffice to motivate a right to surrogacy since such an interest could be satisfied by means of adoption. The interest the right to surrogacy as a right to assisted procreation aims to protect, however, is the interest to have *biological* children. This specific interest may be prompted by different motivations: for some, adoption in the current legal and international context is not feasible or too lengthy a process. Others may fear that an adopted child may have special needs that they as future parents won't be able to satisfy, or they may fear that they lack the intuition and understanding necessary to care for an adopted child, believing instead that a shared genetic heritage may make it easier to face the challenges childrearing may bring. Suffice to say that, in support of a right to surrogacy, we can't simply assume adoption to be as good an option for all hopeful parents as the option of having biological children.[10]

On a more positive note, some may have good reasons to hope for biological children. Anna may love some of her partner's character traits so much that she may hope to have a child with similar features. Or she may hope to recreate together with her partner some of the features that are prevalent in their families. Other hopeful parents may simply desire to continue life in the lives of their children, a kind of perspective that gives the parents' lives meaning and sense.[11] Most dramatically, of course, some parents may wish for biological children because they hope to thereby find a donor of a renewable organ for another, ill child.[12] In general we don't question people's motivation to have biological children, even though we may very well think that we should, from an ethical perspective.[13]

If we accept that many people have an interest in creating and rearing biological children, to what claim should a right protecting this interest give place? Many would

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argue that the healthcare services in developed states should provide couples with the possibility to have children if this were possible. In this vein, many states have accepted a responsibility to provide ART for couples who have trouble conceiving without assistance. The argument, then, is that to have access to a family, some persons may need medical intervention. If we accept that it is a basic interest of individuals to have children and create a family, and if the state can help realise this interest, then it should be easy to accept, also, that the state has a responsibility to help those of its members who cannot realise this basic interest without help.[14] To be sure, IVF and other medical interventions are only advocated within the boundaries of the reasonable — Ontario, for instance, has recently accepted to fund only one cycle of IVF for couples who suffer from infertility of all kinds[15] — but the principled part of the argument suggests that the state may have a responsibility to help individuals realise one of their important goals in life, which is to have biological children.[16] The argument for such claims is similar to those supporting many other services provided by the state — it underlines the state's responsibility to enable individuals to lead autonomous lives centred and organised on defensible self-chosen goals and projects. In this view, to procreate is a project individuals have and cherish, and societies that value the individual projects of their citizens should help realise them.[17] Many gay rights activists have therefore argued that surrogacy should be considered a reproductive *gay* right since it is the only possibility for them to have biological children.[18]

Oftentimes, however, the same states that support ART also prohibit commercial surrogacy.[19] One way to justify prohibition may be to say that commissioning surrogacy is not actually an exercise of a procreative right. Instead, some argue that surrogacy is baby-selling[20] or, in the case of commissioning parents, baby-buying. But while we may believe that part of surrogacy comes close to a trade in babies, this can't be the whole story. After all, and certainly in the case of gestational surrogacies, the commissioning parents are those who bring about the existence of the child. This is to say that they are those who need to count as the 'causal', 'genetic' and 'intentional' parents;[21] commissioning parents have intended and caused for the child to come into being, by providing their genetic material and by commissioning a surrogate to accept to carry the child to term. I am not addressing the question here of how we should think about the different sources for rights and responsibilities that parenthood may bear.[22] Instead, what is important for my purposes is that surrogacy is at least not *only* baby-selling; it also needs to count as an act of procreation. Commissioning parents must count as parents. This is the case even if we may debate to what extent the surrogate should also count as a parent.[23] By this account, then, commissioning parents are simply exercising their procreative rights to become parents by engaging in surrogacy agreements. To prohibit surrogacy as simply baby-selling fails, on this account, since engaging in surrogacy has to count as least in part as the exercise of parental procreation.

So far, then, I have argued that surrogacy should be considered as a means that helps realise the fundamental interests individuals may have in creating and parenting biological children. In this sense, we can say that to consider surrogacy as a right to assisted procreation may be warranted. Recall, however, that I stipulated earlier that rights need to be divided into the interests they aim to protect, and the claims they entitle individual rights-holders to make.

To assess whether or not there is a right to surrogacy, then, we must not only consider the interest-based argument for a right to procreate. We must also include the claims

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aspect of such a right into our assessment. I will discuss the kinds of possible claims that surrogacy as a right to assisted procreation may bring forth. Even if we accept that the right to surrogacy aims to protect individual interests in creating and having biological children, we may still wonder if we should *also* accept that such an interest is weighty enough to justify the right to the services of a surrogate. Put differently, even if we accept that there is a right to procreate and that surrogacy can help realise this right, we nevertheless may ask if there is a right to procreate outside our own body? If there was such a right, commissioning parents or those who would want to become such, may have a strong claim towards the state to help realise their right. I want to argue that such a claim may prove to be implausible.

Some critics of surrogacy foresee a potential futuristic world akin to that described by Margaret Atwood in her novel *A Handmaid's Tale*, in which some women of a future country are designated as living incubators. Such may be the consequences of a right to surrogacy as a right to assisted procreation, if we were to accept the right to procreate beyond our own body, or so some fear.[24] I don't believe that this is an actual danger in liberal-democratic societies: after all, surrogacy as a right to assisted procreation would only be justifiable because of the protection it provides to goals of autonomous members of society. Such a society is necessarily wedded to ideas of individual autonomy for all of its members. To satisfy the conditions of autonomy, individuals have to consent to their employment in society. It thus seems far-fetched that in such a society, the goal of protecting the individual interests of some would give license to neglect concern for those of others.[25]

Even without such bleak prospects, though, *A Handmaid's Tale* does point to an important reason why we should resist a right to surrogacy as a right to assisted procreation. Assuming that all those having an interest in procreation as a vital part of their life, but lacking the means to realise this interest without the help from a surrogate, would qualify to be holders of the right to surrogacy. What kind of claims could plausibly ensue? The negative claim, obviously, would demand that surrogacy not be prohibited within the borders of the state. Moreover, it may necessitate that IVF treatment and implantation of the surrogate be provided and facilitated by the state. But none of these provisions would effectively protect the interest of hopeful parents *if they lack a surrogate*. A right to surrogacy as assisted reproduction becomes meaningless without the provision of women who are willing to work as surrogates.

Now, to be sure, we can imagine different initiatives the state could adopt to facilitate surrogacy: it could promote and encourage such work, either through an official payment scheme, through official agencies, and other incentives that may motivate a woman to work as a surrogate. All of these initiatives might be successful in generating interest in this line of work; but crucially, it is not certain that these would successfully provide every hopeful commissioning couple with a willing surrogate. We would not be able to satisfy the claims that a right to surrogacy as a right to assisted reproduction raises.[26]

In this instance, therefore, surrogacy is not a continuation of the right to ART; instead, surrogacy is comparable to organ donation. Despite recent arguments that the state should compensate those of its members who have the bad luck of being in need of an organ transplant, that the state should therefore pursue a policy of redistributive justice to compensate for such bad luck,[27] the inviolability of bodily integrity is a cardinal value of liberal democratic states. We simply can't legislate that people donate or sell their organs in sufficient numbers to satisfy the need for transplantable organs. We can of

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course speculate that by opening up markets in organs, we might achieve where calls for voluntary donations have failed. We may also believe that we should at least open the market for the increased numbers of organ transplants we might thus generate.[28] Nevertheless, we can't be certain that we could provide even a portion of the organs needed.

Similarly with a right to surrogacy: we simply can't be certain that sufficient numbers of women would sign up to work as surrogates, even if it was highly remunerated, provided extensive benefits, and was socially sanctioned. More importantly, claims against the state fail in this respect since liberal democratic states don't have this kind of jurisdiction over individual bodies.[29] Put differently, even if there were sufficient numbers of women willing to work as surrogates, states can't legislate the right to surrogacy as a right to assisted procreation, since they can't legislate the disposal of individual bodies. This remains the domain of individual autonomy and consent.

We are reminded at this point of Warnock's question: to what extent is it intelligible to 'claim a right to what is impossible'? The impossibility in the case of surrogacy is not that the technology would not work, or that the realisation of the right is in principle unfeasible, as may be the case with a right to life, medically understood. Instead, a right to surrogacy as a right to assisted procreation is unintelligible because it is impossible to promise the effective protection of the interest at stake, where the protection requires the collaboration and consent of a third party.

A right to surrogacy for the commissioning parents can therefore not take a positive form. This is to say that a right to surrogacy can't be plausibly understood as a claim right against the state to help realise the interest of having biological children. Instead, a right to surrogacy can only plausibly take the negative form that, in principle, nothing should stand between the hopeful parents and a hopeful surrogate if both are willing to enter into a contractual agreement for reproductive labour. Put otherwise, a right to surrogacy can only take the form of a right to enter surrogacy contracts. Just below, I will consider whether the contractual right to surrogacy I now propose is based on a *general right* to freedom of contract, or if its justification depends on the specific interest it aims to protect.

3. A Right to Surrogacy as a Contractual Right

Conceiving of surrogacy as a contractual right protects a different set of interests from the ones discussed so far. Instead of the interest of hopeful parents to realise a fundamental value of their life by creating and rearing biological children, a right to surrogacy as a contractual right simply protects the interests of the contractual parties involved to enter a contract freely. The nature of the contract is one of employment: both parties enter the contract on the assumption that the prospective surrogate agrees to engage in reproductive labour on behalf of the commissioning parents.[30] In exchange, the latter agree to compensate the surrogate for her labour. The nature of the contract as an employment contract implies that compensation is not owed for other reasons — it does not compensate the surrogate for relinquishing parental rights, for example, nor is it *a priori* a contract that compensates the surrogate for adhering to the demands of the commissioning parents, even though some conditions of employment can include a set of behaviours stipulated in order to best protect the well-being of the foetus. Such requirements are not necessarily unduly arduous on the surrogate. A readily accepted analogy may be stipulations for police officer to abstain from alcohol while on duty, in

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order to ensure their own wellbeing, and that of those in their care. I don't take prescriptions that contractually determine how best to perform surrogacy reproductive work to be immediately problematic from an autonomy perspective. I will return later on to discuss specific conditions of the contract that may prove more problematic.

I accept that freedom of contract is an important interest to be protected by the liberal democratic state. However, we can't assess the scope of the right to freedom of contract independently of the interests such a right aims to protect, and without assessing the relationship between the interest at stake and the need for protection through freedom of contract. To illustrate, most of us would probably hesitate to wholeheartedly endorse the right to freedom of contract for purposes of cannibalism. We would at least hesitate even if a plausible case can be made that an important interest — to enjoy the right to bodily self-determination — may be as much at stake in cannibalism contracts as in surrogacy contracts. Freedom of contract is a liberty right most clearly when without such freedom, the interest it aims to protect can't be realised. Without freedom to enter into surrogacy contracts, we can say that some couples won't be able to realise their interests in biological children. Once the interests at stake become less dependent on contractual freedom, I believe that freedom of contract as a liberty right weighs less heavily. If we can show that the right to bodily self-determination can be realised without demanding strong protection of freedom of contract, then I think it plausible to say that we can justify some restrictions to the right to freedom of contract.[31]

If this conditionality of freedom of contract as a liberty right is accepted, and if we also accept the important distinction between surrogacy as a right to assisted procreation, on the one hand, and surrogacy as a contractual right, on the other, then I believe we can say, at least in principle, that the right to surrogacy that I advocate here can and may be legitimately circumscribed. Possible limits are often justified by the kind of harms that such contracts can provoke. I will now turn to a discussion of some kinds of harm that surrogacy as a contractual right may bear, and how a consideration of these should weigh in our assessment of surrogacy contracts. I will argue that the harms proposed are not convincing arguments against surrogacy as a contractual right. Instead, I will conclude that only a concern for the wellbeing of the future child can justify restrictions to surrogacy contracts. To my mind, however, these restrictions are not tied to the fact that children come into the world as a result of surrogacy — instead, they are justified by a concern about who should be a parent.

Women may choose to work as surrogates for diverse reasons. Most importantly for my purposes here, they may choose to work as surrogates in order to be able to realise some important goals in their lives. These may include the desire to provide for their own biological children. We now have many different accounts of the kinds of motivations women have to engage in reproductive surrogacy labour.[32] So far, I have taken it for granted that women should be free to determine how to employ their bodies — in fact, the argument for bodily integrity and autonomy in how to employ our bodies was at the basis of my rejection of surrogacy as a procreative right in Section 2. There I argued that the state has no jurisdiction over women's bodies and how they should employ them, since liberal democratic states believe that such decisions should be left to each individual, subject to the usual caveat of inflicting harm to others.

What should we think of governments, then, that prohibit women from choosing reproductive labour as a surrogate? Why, in other words, is there asymmetry between the

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value we bestow on individual bodily self-determination that prevents us from ordering women to work as surrogates, on the one hand, and paternalism when it comes to surrogacy work, on the other? The arguments against surrogacy as a contractual right that should be enjoyed by surrogate mothers and hopeful parents most often starts from potential harms that may ensue from exercising the right over our own body. I will discuss two of these: (1) the harm that can come to women surrogates in the context of gender inequality; (2) the harm that surrogacy is assumed to cause to a surrogate's sense of self. I will analyse these through the lens of vulnerability.

The perspective of vulnerability when assessing surrogacy contracts is helpful from a moral perspective, and for several reasons. First, there is a strong moral intuition that we have a responsibility to protect the vulnerable. Bob Goodin, for instance, argues that 'we bear special responsibility for protecting those who are particularly vulnerable to us';[33] in particular, we ought to protect those whose interests we can easily harm, those 'whose vital interests are particularly vulnerable to our actions and choices.'[34] Goodin's account of the vulnerability of others and our obligations towards them assumes that '[o]ne is always vulnerable to particular agents with respect to particular sorts of threats.'[35] Vulnerability is thus essentially a 'relational notion' that designates relationships of dependence. Moreover, vulnerability according to Goodin ascribes moral obligations to those who have 'the capacity to produce consequences that matter to another,'[36] and where these consequences affect the interests of another. This account of vulnerability cautions us against creating conditions of vulnerability for another. We have moral obligations to attend to those who are vulnerable to our actions, but we have furthermore an obligation not to create vulnerability in others. Applied to the case of surrogacy, the lens of vulnerability posits that if it were the case that surrogacy contracts created vulnerability — and I will be concerned with the vulnerability of surrogates in particular — then an assessment from a vulnerability perspective and the moral obligations that flow from it would demand that, indeed, we prohibit surrogacy contracts. Put differently, the harm of vulnerability would weigh heavily against the interest in contractual freedom the contractual partners may have. The interests of surrogates not to be vulnerable ought to outweigh the interest of contractual freedom.

(1) Vulnerability to Harm in the Context of a Gendered Division of Society

According to Debra Satz, the gender context in which surrogacy is brought about should play an important role in our assessment of surrogacy contracts.[37] By signing a contract, the surrogate hands over some control over her own body to somebody else for an extended period of time, namely the period of pregnancy.[38] According to standard surrogacy contracts, a surrogate accepts medical intervention for the sake of impregnation. She further agrees to regular medical examinations, a dietary regime and daily schedule if she resides in a surrogacy clinic, that most often includes extended periods of rest. In some cases, surrogacy contracts stipulate further the kind of delivery method when the foetus comes to term — very often by C-sections — or in what cases the foetus will be aborted. We can agree that the extent of a surrogate's control over her own body depends largely on the terms of the contract she agrees to.

Handing over control over one's own body occurs in other social contexts, of course, and for other employment relationships: individuals sign up for military service all over

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the world, for example, thereby agreeing to be sent somewhere where they might not choose to go and to engage in a line of work that may prove harmful to them. What makes the case of surrogacy morally problematic, according to Satz, is the fact that women sign over authority over their body in a societal context that has traditionally not protected women's interest. Instead, it has 'historically subordinated women's interest to those of men, primarily through [. . .] control over women's sexuality and reproduction.'[39] If women's interest were represented in the social context, we might in fact convince ourselves to find some positive sides to surrogacy: 'in a society in which women's work was valued as much as men's and in which child care was shared equally, pregnancy contracts [. . .] have the potential to transform the nuclear family.'[40]

Satz seems to suggest here that surrogacy contracts are not inherently problematic, but instead that they are problematic in the context of the actual gendered division of labour, to which in the international context is added the racial and socio-economic aspects.[41] The question Satz raises, then, is whether women should be able to employ their reproductive organs in order to further their own goals, or if this risks entrenching stereotypical gender structures and increasing women's vulnerability in a society that doesn't have their interests at heart. We should be critical of the conclusion Satz draws from this though, namely to prohibit surrogacy contracts. While we may share Satz's concern that allowing for international surrogacy contracts may perpetuate a gendered division of labour, prohibition against surrogacy contracts should give us pause, since prohibition would simply perpetuate another ill, namely the 'control over women's sexuality and reproduction' she rightly criticises. Prohibition, in other words, would not protect women from harm in a world that doesn't have their interest at heart. It would instead deprive women of one way to engage in contractual labour.

More importantly, and returning to the analytical lens of vulnerability I want to employ here, we need to ask if a ban on surrogacy contracts would actually address the kind of vulnerability Satz identifies. This vulnerability takes two forms: first, it is the lack of representation of women's interests in society; and second, it is the exposure of their interest in the contexts of specific contracts. Considering the first kind of vulnerability, and recalling that vulnerability is a relational notion that assumes an agent to whom one is vulnerable, we could speculate that women are vulnerable towards men in society. The harm to women's interests may be that they see themselves employed as 'handmaids', rather than being considered as equals in society, or as equal partners in their relationships. The question we need to ask, though, is from where this vulnerability derives. If it comes from carrying out work that they would not have chosen of their own volition, then the evidence seems to speak against this particular reason for prohibiting surrogacy contracts: women who describe their experiences as surrogates often report that they like their work and indeed take pride in it.[42] If, on the other hand, the vulnerability derives from the subordinate socio-economic status women may have in many societies, then it is not clear how prohibiting one way of elevating their socio-economic status, namely, surrogacy work, should convince us as a remedy. Put differently, we may wonder if surrogacy cannot play a different role; we may ask to what extent surrogacy and reproductive work can't change women's position in their society. Against Satz's blanket warning, we may point instead towards those women who use surrogacy to improve their own socio-economic status.

Concerning the second possible source of vulnerability, the conditions of the contract, we need to look at the interest a contractual right to surrogacy aims to protect. The first

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such interest is of course contractual freedom; a second interest, furthermore, pertains to the realisation of autonomous goals in life, as I have argued all along. The only possible way this interest can be protected is if the claims deriving from a right to surrogacy as a contractual right includes contractual protection. This is to say that such contracts need to be regulated in a manner in line with the interests motivating the second order interest of entering into a contract. To accept surrogacy as a contractual right does not neglect that the interests of the contracting parties give rise to specific claims. For example, and in order to protect the interests of the surrogate, there may be specific obligations the commissioning parents need to satisfy to qualify as legitimate contractual partners to surrogacy agreements: they would have, for instance, specific obligations towards the surrogate such as paying medical bills, providing for accommodation, food, etc. In turn, the surrogate may have obligations so as not to sabotage the realisation of the goal of the contract: she should not sabotage her health, the pregnancy, the welfare of the foetus, to name but the most obvious ones. Earlier on, I briefly described the kinds of medical interventions often specified in surrogacy contracts. It is certainly true that current surrogacy contracts are tailored more to the needs and demands of the commissioning parents than to those of surrogates: for instance, C-sections are oftentimes imposed on surrogates to accommodate the commissioning parents' schedules. Rather than waiting for contractions to set in, a C-section date allows couples to organise travel and be present at the birth of the child. Surrogates should have the real possibility to withhold consent to what many regard as an undue invasion into the pregnancy.[43]

Both parties, we can say, have claims against each other, and both parties can ask that the state ensure that the kinds of contracts regulating surrogacy are carefully codified and implemented. Once we think about the interests at stake, I believe it fair to say that prohibition of international surrogacy contracts may be too blunt a tool to address the vulnerability to harm of women's interests in gendered societies.

(2) Vulnerability to Harm to Sense of Self

The second harm that I would like to consider is that to a surrogate's sense of self. This particular worry relates to the kind of work that surrogacy demands. Some argue that reproductive work in surrogacy alienates a woman from her sense of self.[44] This worry is weighty from a vulnerability and autonomy perspective: vulnerability can be construed not simply as a harm to interest, as I have done so far. Instead, a specific kind of vulnerability — what we may refer to as *self-negating* vulnerability — is characterised by a lack of sense of self. The possibility for such a sense, however, is intimately tied to the definition of individual autonomy that I have assumed so far: it implies 'real and effective capacity to develop and pursue [one's] own conception of a worthwhile life.'[45] To be able to engage in this kind of designing of our own lives, we need to have a sense of self — we need to know what we stand for, and who we are in relation to others.[46]

Now, if we were to accept that surrogacy is justifiable because it is autonomously chosen, and if we subscribe to the liberal value of autonomy, then it would be problematic if surrogacy turned out to be *undermining* the conditions of autonomy. If it proved to be true, in other words, that surrogacy led individual women to negate their sense of self, their own idea of who they are, then this would be problematic since one of the conditions for autonomy is to know who we are and what we stand for.[47] Then the

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original assumption of surrogacy as a contractual right is void: we can't defend entering a contract as being based on autonomous decision making if the decision will undermine a personal sense of self, thus making any further autonomous decision impossible. This, we could say, would be analogous to allowing an autonomous decision to sell ourselves into slavery. Liberals don't allow such a decision not only because it is irreversible, but also because it is incoherent. We can't use autonomy to create conditions of slavery that render future autonomous decisions impossible. We can hold that in a case like this, the liberty right to freedom of contract comes to its limits.[48] Similarly, it would be incoherent to employ autonomy to create conditions that undermine the background conditions of autonomy. If surrogacy were the kind of work that alienated women from their sense of self, then surrogacy would provoke a specific kind of vulnerability that *negates a sense of self*. Our moral obligation would have to be to prevent any such contract from being drawn up.

Again, I am doubtful, this time not about the remedy, but about the diagnosis. We need to ask if it is indeed the case that women lose their sense of self when working as surrogates. The studies referred to earlier attest to the fact that alienation among surrogates, while not impossible, may at least be as rare or common as alienation from any other work in the capitalist market economies. It is not clear that work in a garment factory in Bangladesh provides women with greater or lesser sense of self than surrogate work. In fact, we may speculate that surrogate work provides women with more possibilities to develop an extended sense of self and a basis of self-respect, and for two reasons: first, such work allows them to realise some of their own goals, as I have proposed before. Moreover, we can imagine that it gives them satisfaction to be able to help an otherwise childless couple to realise something dear to them. As Pande has convincingly argued, some surrogates identify as bearers of gifts to the childless.[49] It is not clear why this should jeopardise a positive sense of self.

Instead of bemoaning the self-negating vulnerability that comes from surrogacy work, then, I want to argue that surrogacy can *counter* this specific kind of vulnerability because it may contribute to a *positive* sense of self that arises in relationships in which we can realise ourselves. Such self-realisation may happen in two ways: first, recall the value of parenthood that I have accepted in Section 2. Surely we need to assume that a mother who is able to provide for her children materially may find satisfaction in her ability to carry out her parental obligations and her duties of care. In this instance, surrogacy may foster a positive sense of self for the surrogate not only in relation to the childless couple, but also in her relationship with her biological children: to be able to provide for them with the proceeds from the surrogacy contract may be an important aspect of a woman's identity and may help her define herself in a meaningful way. If this is accepted, then I believe that concern for the surrogate's sense of self, and harm to conditions of autonomy doesn't warrant a blanket prohibition.

So far, then, I have argued that a positive sense of self may stem from the newly won socio-economic status that surrogacy work provides. If surrogacy contracts are regulated the way it has been proposed elsewhere,[50] it is not clear why such work can't help address social gender inequalities. Second, much vulnerability can be addressed through careful regulation and properly enforced implementation of surrogacy contracts. We may also easily accept that their legitimacy be tied to specific regulations in order to create conditions of autonomy, since this is the rationale for a right to surrogacy as a contractual right. One such condition might be that only women with their own biological children

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may be considered for surrogacy contracts. Against those who might hold that such a requirement constitutes a restriction of the right to access to surrogacy contracts, I would reply that the condition is justified from a liberal perspective. The fact of having borne children provides women with necessary knowledge about the work they propose to undertake. Such knowledge, in other words, creates conditions of autonomy if these are understood as conditions in which we can give informed consent to an option before us.

A restriction on who can work as a surrogate is symmetrical to the justifiable restrictions concerning who can commission a child. Here, I believe it fair to say that the interests of the future child have to play a role in assessing who can enter into surrogacy contracts. We should discuss what kinds of limits we may reasonably motivate against reproductive freedoms,[51] and we should also discuss limits on who can enter into surrogacy contracts that aim, after all, to bring into existence future children. Framing the right to surrogacy in this way, in other words, may allow restrictions on who can become a contracting partner — we may, for instance, stipulate that the very young and the very old should not be party to such contracts, for concern of the well-being of the child. These restrictions are not based on the fact that we are restricting surrogacy arrangements. They are not determined by the fact that the children result from such contracts. Instead, they are founded in the kinds of restrictions we may want to apply to all hopeful parents.[52]

4. Conclusion

International surrogacy is a growing way for childless couples to realise their goal of biological children. At the same time, the practice provides women especially in developing countries with access to employment that may allow them to provide for themselves and their families. Surrogacy should not be understood as an unfettered right to assisted procreation, however. This would impose implausible burdens on societies that otherwise aim to help their members to realise cherished goals of their lives. Instead, a right to surrogacy can only be conceived as a right to enter surrogacy contracts. If surrogacy contracts are regulated and implemented with the best interest of the contracting partners and the future child in mind, the right to surrogacy as a right to enter surrogacy contracts may be defended.

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NOTES

1 Mary Warnock, *Making Babies* (Oxford: Oxford University Press, 2002), p. 15.
2 Ibid.
3 Gestational surrogacy is the form of surrogacy at the basis of most international commercial surrogacy arrangements and I will focus on such arrangements. In the case of male gay couples it may involve a donated egg that is then inseminated with the sperm of one of the commissioning fathers before being implanted in the surrogate's womb.
4 Cécile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006), pp. 16–23.
5 See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
6 This thought is classically articulated in Isaiah Berlin, 'Two concepts of liberty', in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. 118–172.
7 Charles Taylor, 'What is wrong with negative liberty?', *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), pp. 187–210.
8 See Harry Brighouse & Adam Swift, *Family Values* (Princeton, NJ: Princeton University Press, 2014); Harry Brighouse & Adam Swift, 'Parents' rights and the value of the family', *Ethics* 117 (2006), pp. 80–108; Mary Warnock op. cit.
9 For a summary of the arguments in favour see Warnock op. cit.; Daniel Weinstock & Jurgen Wisperlaere, 'State regulation and assisted reproduction: Balancing the interests of parents and children' in C. McLeod & F. Baylis (eds) *Family Making* (Oxford: Oxford University Press, 2014), pp. 131–150.
10 '[A)ccess to adoption remains by and large too complex and burdensome for the time being to justify significant restrictions on the availability of access to ART', argue Weinstock & Wisperlaere op. cit., p. 143. The same could be said for access to surrogacy, according to the analogy I am drawing here.
11 See Brighouse & Swift 2006, op. cit.
12 Warnock op. cit. discusses this case and defends this motivation against opponents who perceive here the instrumentalization of an unborn child.
13 See Christine Overall, *Why have Children?* (Cambridge, MA: MIT Press, 2012).
14 This position was first advocated by the Warnock report, published in 1984, which served as the basis for the British *Human Fertilization and Embryology Act* of 1990, regulating access to and licencing of ART in the UK. See Mary Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984).
15 Available at: http://news.nationalpost.com/2014/04/09/ontario-to-fund-in-vitro-fertilization-with-a-caveat-one-embryo-at-a-time-to-cut-risky-multiple-births/; accessed 10 April 2014.
16 The government of Ontario may in fact have been prompted to accept the funding of IVF since it has been the subject of a human rights complaint based on its lack of funding. See ibid.
17 See Brighouse & Swift 2006 and 2014.
18 See 'Gay rights advocates fight to lift ban on paying surrogate moms', *New York Daily News* 15 January 2014, available at http://www.nydailynews.com/news/politics/push-nys-ban-paying-surrogate-moms-article-1.1581165, accessed 10 April 2014.
19 This is the case in different countries including France, Germany and the UK.
20 The *locus classicus* of this argument is Elizabeth Anderson, 'Is women's labour a commodity?', *Philosophy and Public Affairs* 19,1 (1990), pp. 71–92.
21 See David Archard, 'The obligations and responsibilities of parenthood' in D. Archard & D. Benatar (eds) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children* (Oxford: Oxford University Press, 2010), pp. 103–128.
22 Archard is critical of theories that derive parental rights and obligations as a 'package' from the fact of biological parenthood. I agree with his assessment for all cases of parenthood, but I do believe that the package argument works for the case of sharing parenthood of commissioning parents in surrogacy agreements.
23 I am also not claiming that they are the only parents; the surrogate mother may have parent status as a gestational parent. This may in turn confer some rights to her that are often employed to justify clauses in surrogacy contracts that allow the surrogate to renege on her original contractual agreement to release the child. In the UK for instance, the surrogate mother is always considered the parent of the child, regardless of genetic link (see https://www.gov.uk/rights-for-surrogate-mothers, accessed 10 April 2014).
24 See Vida Panitch, 'Surrogate tourism and reproductive rights', *Hypatia* 28,2 (2013) pp. 274–289.

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25 The tale of the handmaid is a recounting of the circumstances of her life that clearly don't respond to her own hopes and goals. See also Vida Panitch, 'Assisted reproduction and distributive justice', *Bioethics* 29,2 (2015), pp. 108–117.
26 My concern here follows again the ART versus adoption debate. If, as Weinstock and de Wisperlaere argue, the lack of children for adoption makes it permissible to say that adoption is not as good an option as ART, then, analogously, I believe it reasonable to say that surrogacy is not as good an option as non-surrogate procreation simply because it is 'too complex and burdensome' an alternative for lack of willing surrogates.
27 See Fabre op. cit.
28 Janet Radcliffe-Richards, *The Ethics of Transplants* (Oxford: Oxford University Press, 2011).
29 See Panitch 2013 op. cit.: 'But positive rights necessarily end where another person's body begin . . . the right to a family doesn't justify reproductive coercion' (p. 285).
30 I would like to thank one of the anonymous reviewers for asking me to clarify the nature of the contract that should be protected by the right to surrogacy as a contractual right.
31 Another anonymous reviewer has greatly helped me here in articulating what kind of status freedom of contract should have as a liberty right.
32 Amrita Pande, ' "At least i am not sleeping with anyone": Resisting the stigma of commercial surrogacy in India', *Feminist Studies* 36,2 (2010), pp. 292–314. See also Tanika Gupta's radio drama on the subject: http://www.bbc.co.uk/programmes/b04003j9.
33 Robert Goodin, *Protecting the Vulnerable: Reassessing Our Social Responsibilities* (Chicago, IL: Chicago University Press, 1985), p. 109.
34 Goodin op. cit., p. 111.
35 Goodin op. cit., p. 112.
36 Goodin op. cit., p. 114.
37 Debra Satz, *Why Some Things Should Not be For Sale. The Moral Limits of Markets* (Oxford: Oxford University Press, 2010).
38 Satz op.cit., p. 129.
39 Ibid.
40 Satz op.cit., p. 46. An instance of Satz's intuition about this has recently been reported in the media in the case of a change in legislation in India that will from now on only allow surrogate contracts with heterosexual couples, rather than non-traditional nuclear families. This has left some women currently serving as surrogates for homosexual couples, for example, in a state of uncertainty about the future of the foetus in their womb. Here, Satz could say that this is a typical instance of a society that neglects women's interest to the benefit of those of heterosexual men (available at: http://www.telegraph.co.uk/news/worldnews/asia/india/9811222/India-bans-gay-foreign-couples-from-surrogacy.html, accessed 1 April 2014).
41 Amrita Pande, 'Transnational commercial surrogacy in India: Gifts for global sisters?' *Reproductive BioMedicine* 23,5 (2011): 618–625.
42 Karen Busby & Delaney Vun, 'Revisiting The Handmaid's Tale', *Canadian Journal of Family Law* 26,13 (2010): 41–52.
43 Pande 2011, op. cit.
44 See Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988), p. 119.
45 Joel Anderson & Axel Honneth, 'Autonomy, vulnerability, recognition, and justice' in J. Anderson & A. Honneth (eds) *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press, 2005), p. 137.
46 Gerald Dworkin, 'The concept of autonomy' in J. Christman (ed.) *The Inner Citadel* (Oxford: Oxford University Press, 1989), p. 61.
47 Anderson & Honneth op. cit. p. 137. See also Christine Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford: Oxford University Press, 2009), pp. 110–116; pp. 122–125.
48 David Archard, 'Freedom not to be free: The case of the slavery contract in J. S. Mill's *On Liberty*', *Philosophical Quarterly* (1990): 453–465.
49 See Pande 2011 op. cit.
50 See Steven Wilkinson, in this issue.
51 Sarah Conly, 'The right to procreation-merit and limits', *American Philosophical Quarterly* 42,2 (2005): 105–115.
52 See David Benatar, 'The limits of reproductive freedom' in D. Archard & D. Benatar (eds) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children* (Oxford: Oxford University Press, 2010), pp. 78–102.

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