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## WOMBS FOR RENT, SELVES FOR SALE?\*

David H. Smith\*\*

In this paper I want to offer some preliminary reflections on the highly controversial practice of surrogating, the bearing of a child for another, often for a fee. The practice was the core of the widely publicized "Baby M" trial in New Jersey; it will continue to attract the attention of legislators and courts; it has been the subject of legislation in the United Kingdom and elsewhere; the Holy See has released pertinent judgments. Many of the most interesting minds of our culture have commented on it. Few persons are neutral on the subject.

Although I have some conclusions to offer, the tone I should like to attain is interrogative rather than assertive. Ultimately my conviction is that we can move too quickly to pronounce on the morality of practices made possible by new technologies for reproduction. It is unlikely that any one philosophy or theology will be able to provide a definitive resolution to these problems. The brave new world is too new; among the virtues it most requires is patience.

My strategy will be to discuss a series of perspectives on surrogating, extracting what we can from each in turn. The perspectives are *analogies*. Much moral reasoning proceeds by analogy, *e.g.*, stealing real property is wrong, so stealing ideas—intellectual property—is wrong; killing people in war is acceptable, so capital punishment must be all right. I doubt I need to illustrate further.

Reasoning by analogy is particularly important when we face a new issue, for the moral imagination needs to start from somewhere. We need a more or less fixed point from which we can extrapolate our conclusions. I suppose the process is a bit like that of reasoning from precedent in the common law. There, as here, a great deal turns on what is judged to be *relevant* precedent.

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My concern today is not primarily with the law; it is with those habits of the heart that should inform our social judgments and reflections. If my analysis is correct on this moral level, it may have implications for law and policy, but that is my end rather than my beginning.

Before I turn to the analogies I wish to discuss, I must add one more caveat. I do not mean to speak about *all* issues that the practice of surrogating may raise. In particular I put aside issues associated with risks to the embryo and its putative right to life. I do not suggest that these issues are unimportant, but one can only attempt so much at a time. Therefore, I shall proceed on the assumption that any techniques of *in vitro* fertilization and embryo transfer that may be involved in surrogating are as safe for embryos as normal conception. My focus will not be on risks to the embryo but on risks to the parents.

## II

The first analogy to surrogating that comes to mind is Artificial Insemination by Donor (AID). The practice of using donated semen to impregnate the fertile wife of an infertile husband is not itself uncontroversial, but it is widely practiced and accepted. In this country, semen donors may be paid. Their anonymity is preserved, although they may be screened for possible genetic problems. The technology required is simple, and the practice is not particularly new.<sup>1</sup>

The positive analogy with surrogating seems clear; in both cases a child is engendered who has, in a sense, more than two parents. But with surrogating the possible variations are greater, for the surrogate may or may not be the donor of the ovum. If she is not—that is, if an *in vitro* fertilization of husband and wife's gametes precedes implantation in the surrogate—then the disanalogy is maximized. But in the more likely event that the husband's semen is used to impregnate the surrogate and her own egg is fertilized *in vivo* (as in the well-publicized Baby M case), then the analogy is closer. (Of course, the closest analogy would be with an egg donation and fertilization of a wife *in vivo*.)

Those who stress the analogy mean to call our attention to the use of a donated gamete. Then we are asked to pronounce on this use of sperm or egg from a third party beyond the married partners. The English theologian

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1. See generally, Smith, *Procreational Autonomy v. State Intervention: Opportunity or Crisis for a Brave New World?*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 635 (1986); Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 NEW ENG. L. REV. 639 (1982).

Oliver O'Donovan has developed this point with considerable force. One way to see his subtle point is to focus on the notion of donor anonymity.

O'Donovan notices that clinics doing AID place great emphasis on the anonymity of a sperm donor. This approach contrasts with the roughly analogous practices recorded in the Old Testament. One of those practices was levirate marriage in which a dead man's brother impregnated the widow to engender a child who would be counted as the heir of the deceased.<sup>2</sup> [Onan defaulted on this responsibility]. The other practice is patriarchal—a servant bears a child when a barren wife cannot, as Hagar bore a child when Sarah could not.<sup>3</sup> In neither of these cases is the donor anonymous. Quite the contrary, it is the prior relationship between donor and couple that validates the whole procedure. The Biblical texts represent a sensibility very different from ours.

Which is the better way? To focus our thinking on this issue we can ask: Is sperm, egg or womb donation between siblings the ideal or the worst possible arrangement? In terms of the donor's motivation, we may feel that it is optimal—I know how much my brother wants the child he cannot have, and I give of myself to make paternity possible for him. It's arguable that this inter-familial context is the one in which altruism, spontaneity and generosity on the part of the donor will be maximized. If those are our worries, we should choose this arrangement.

But in fact I am ambivalent about this option. In part, my reservation is due to memory. Everyone will remember who was pregnant or notice that Junior looks like his uncle. The events of gestation will not be a "sometime thing" but, through memory and representation, an ongoing part of the present. Within the familial context it would be obvious that procreating a child establishes a real connection, even if the subsequent social arrangements minimize the significance of that fact. It would be clear that I am inevitably linked with the children I engender.

The whole point of the stress on donor anonymity is to minimize the tie of biological lineage as much as possible. It is to reduce to a bare minimum the personal involvement of the donor, who becomes a kind of *deus absconditus*. O'Donovan suggests that we might think of the donor as a *representative* of the sterile spouse, but in our modern stress on anonymity it is what he calls "representation by effacement",<sup>4</sup> signifying that the donor who acts vicariously for the sterile party is clearly subordinated to the sterile parent. Hagar

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2. *Deuteronomy* 25:6.

3. *Genesis* 30:3.

4. O. O'DONOVAN, *BEGOTTEN OR MADE?*, p. 34 (1984).

and a modern gamete donor are people who do the bidding of a superior. Is this a role that can be played with dignity?

O'Donovan argues that it is not; he suggests that in order to "overcome the depersonalizing implications of anonymity . . . and the intrusiveness of the alien personality" we might seek ways—in the case of AID—of developing "a strong doctrine of male-to-male identification, through the notion of a contractual relationship between donor and husband."<sup>5</sup> This approach builds on the Biblical precedent of levirate marriage in which the donor, so to speak, plays from strength. O'Donovan calls it "representation by replacement."<sup>6</sup> Its presupposition is a notion of community between the fertile and the sterile. The idea is that a sperm donation is morally more credible if it is a gift from the donor *to the infertile man*. Donations of ovum and uterus are most favorably seen as expressions of sisterhood. It is not clear how these ideas could be implemented in policy, but they are suggestive.

So far I have been attempting to focus on the positive analogy between AID and surrogating, but it must be clear that we have—perhaps long since—reached the point where the analogy breaks down. That point is pregnancy. Both males and females can donate gametes; males cannot become pregnant. Pregnancy is, so to speak, an extended event. An involvement of nine months duration, inevitably characterized by interactions between animate beings, differs qualitatively from masturbation and donation of the ejaculate. This is not to say that semen donation never means anything to the donor; I have tried to suggest a normative thesis to the contrary. Rather, it is to say that there is an obvious disanalogy between a surrogate mother and a sperm donor.

If donor anonymity is problematic for a gamete donor, how should things stand with the surrogate? Should surrogate mothers be anonymous? Does the disanalogy weaken or strengthen the ambiguous case for third party anonymity? One way to look at this question is to inquire about the *degree* of involvement in various kinds of "mothering". Would it be right to say that the woman who contributes an egg is less involved with an engendered child than the woman who bears it? I leave this question open, as it need not be raised in the usual form of surrogating, in which the same woman donates *both* egg and uterus.

Presuming that her involvement is greater than that of the semen donor, does that strengthen or weaken the case for anonymity? On the one hand it would seem to strengthen her claim to have her presence acknowledged and to play a role in the child's life; on the other hand, this threat to the exclu-

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5. *Id.* at 41.

6. *Id.* at 34.

siveness of monogamy must be intolerable to the infertile couple and it may well lead to complications in the child's life. My preliminary conclusion from reflections on our first analogy is that a surrogate has a strong claim for involvement in the life of a child she bears because the bond established by pregnancy is at least as significant as the bond established by genetic continuity. I do not claim to have shown that a surrogate should have exclusive rights, only that her involvement is distinctive and significant and that it engenders plausible claims that are more powerful than those associated with simple biological paternity.

### III

O'Donovan relates his discussion of AID to adoption, and in fact adoption may provide another analogy to surrogating. In both cases a woman bears a child whom she gives over to another. We recognize that this act may be a particularly mature and generous choice on the part of a woman who gives her child for adoption. And it is important to see that the motives of a surrogate may be comparably generous and loving. No one can deny that surrogating may be a loving act, creative of human community and sacrificially empowering. Indeed, the very strength of the bond that can be fostered in pregnancy increases the degree to which a surrogate may be giving of herself, laying down her life, for another. Supported as it is by the words of Jesus, this is a hard idea for Christian theologians, and many others, to oppose. Insofar as surrogating is like adoption, it too may be a just and loving act.

But two disanalogies must be mentioned. The first concerns equality. The adoption that is often analogized with surrogating does not involve one spouse adopting children from the other spouse's previous marriage. Rather, the adopted children are the children of *neither* of the adoptive parents. Each partner in the adopting couple has the same kind of relationship to the child they adopt.

Surrogating, in contrast, establishes an unequal relation—the engendered child is the biological child of one parent, but not of the other. Given the maneuvers that are part of any marriage, I find this imbalance troubling, for it provides a purchase point for power plays at the core of the marriage. The question that must be raised is—why must the husband have whatever benefits of genetic parenthood there may be? Why insist on this good, which his wife cannot share? Can his genetic patrimony be all that important?

This inequality would also exist when a spouse adopts children from the other spouse's previous marriage, but then we have a disanalogy of cause. In surrogating a woman becomes pregnant *in order to* give up the child. This

intention is not the case in adoption as we normally think of it. If a woman were to sell children she had engendered with her husband, we would regard her action as radically different from the forms of adoption with which we are familiar. We would think that it revealed an unfortunate attitude toward the child, whose conception had become a means to an end. We would find the woman's attitude toward her own body troubling. And we would worry about the social circumstances that put persons in such a position that they resorted to this means of support.

We will see that surrogating raises these kinds of issues as they would be raised with the bizarre form of adoption practice that I have described. Of course we can imagine exceptions in the adoption situation. There may be times when a woman might become pregnant in order to give some other specific person (*e.g.*, a sterile sister) a child. However, this course would be exceptional, and it is made palatable as an act to provide a child for an identified sterile couple. A plausible situation might be one in which the bearing mother knows and loves the adoptive parents. But that is not modern surrogating.

Adoption differs from surrogating in that the first motive in the mind of the mother is the welfare of her child. Her primary intention is to provide for the child, not to help another couple. Thus, as O'Donovan rightly remarks, an adequate theory of adoption must see that it is the adoptive parents who are doing a favor, representing or acting on behalf of the biological ones.<sup>7</sup> Adoption is morally credible precisely in its difference from surrogating. Like giving up a child for adoption, surrogating can be a magnanimous act. But as we push the analogy the disanalogies become more prominent, and surrogating looks problematic by comparison.

#### IV

At our next level I should like to cluster three analogies that are not always used together. One of these is an analogy with prostitution. Both a prostitute and a surrogate make their bodies available for the use of another. Both are paid a fee. Neither expects the creation of a personal bond with the client; both may bring pleasure into the lives of others. In either case these expectations may not be realized. A bond may form; VD may be contracted; a child may be impaired; the payment may be withheld.

A second analogy in this cluster is the sale of organs, a subject of renewed debate today. Blood and blood products are, in this country, bought and sold in a market; we have only a limited market for other kinds of human tissue, *e.g.*, kidneys. If we accept the idea of the sale or donation of some

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7. *Id.* at 37.

kinds of human tissue, gamete donation may not appear radically different from selling blood or kidneys. In a next step, we could say that a surrogate is simply hiring out her body, not permanently giving up a part of it as a kidney donor would. Surrogating is like organ donation in that it is giving someone else use of part of your body.

And, thirdly, we allow people to decide how they choose to use their bodies in other contexts. Dangerous sports (boxing) and leisure activities (smoking) are not prohibited. Surrogating is like those kinds of activities in that it involves a person's right to use her own body as she sees fit.

I have grouped these analogies because they have a common ingredient. Each of them suggests that the fundamental issue in surrogating is the question of women's rights. This claim is true even for the prostitution analogy, a fact that may be hidden by a rhetorical maneuver appealing to our traditional opposition to prostitution. Of course, surrogating differs from prostitution in that sexual intercourse is not involved, but I believe the greatest modern opposition to prostitution arises from the fact that the prostitute may have been coerced into her social role. Insofar as she has freely chosen her career, the user of this analogy may not mean to fault her.

These analogies, then, raise the question of the appropriate limits of the jurisdiction that people have over their own lives. Stated differently, they raise questions of paternalism. Who am I to say that someone should not sell her favors, his kidney or the use of her uterus? In a culture that respects autonomy, such restrictions make one person subservient to another's conception of the good; they impose someone else's conception of the good life on me without my consent. When we cannot agree on the merits of a practice, we should have the courage to be tolerant.

This kind of argument was advanced in the Baby M case.<sup>8</sup> Gary Skoloff, the Sterns' (pro-surrogating) lawyer, argued that to invalidate the contract would deprive the surrogate of her dignity by limiting her control over her own body. Addressing the male judge, he argued that if:

you prevent women from becoming surrogate mothers and deny them the freedom to decide. . . you are saying that they do not have the ability to make their own decisions, but *you* [emphasis added] do. It's being unfairly paternalistic and it's an insult to the female

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8. In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987). On February 4, 1988, the New Jersey Supreme Court voided the surrogate contract as well as the termination of the surrogate mother's parental rights and the adoption of the child by the donor's wife. The court acknowledged that a woman may still, voluntarily, and without payment, agree to act as a surrogate so long as she is not subject to a binding agreement to surrender her child upon its birth. 14 FAM. L. REP. (BNA) 2007 (1988).



population of this nation.<sup>9</sup>

Ellen Goodman, from whose fine column I have taken this quotation, interprets it to mean that:

. . . any bona fide adult, over 18, able to read the fine print, is grownup enough to take responsibility for his or her own action. Signing up for maternity [is] like registering for the Marines. Anybody who said that such a contract should be prohibited was a relic from an era when women were prohibited from all sorts of economic activities.<sup>10</sup>

On this point, Goodman commented:

Maybe I have a rather tough hide but, somehow or other, I won't be insulted if the court limits the business arrangements women can make with their genes and their wombs.<sup>11</sup>

The general force of the anti-paternalistic analogies to prostitution, property and lifestyle is libertarian. And there is a progression. People should be able to choose their own spouse or line of work; they should be free to adopt their own lifestyle, however self-destructive it may be; they should be free to sell their body parts, and therefore they should be free to hire out their uteruses. This progression of argument is difficult to resist, if one's only basic moral principle is respect for human autonomy. There can be no denying that increased control over reproduction gives women greater freedom, freedom that they should have.

In order to test the depth of this analogical perspective, we need to distinguish between two possible ways of thinking about a woman's relationship to a child she bears and indeed to her own reproductive processes. In one of these perspectives the relationship between self and reproductive involvement is extrinsic and contingent. Pregnancy is viewed externally and objectively as a temporary state one is in for any one of a number of reasons. The self calculates its reasons for pregnancy, mode and form of personal involvement. People of both genders regularly use this detached perspective to consider bodily events. It is not only a possible but a necessary perspective, enabling self-criticism and self-discipline.

Another perspective on body is also possible: I identify myself with my body. I not only control it, but I have to listen to it. This self that is not simply instrumental to my plans is in some ways alien — but an alien brother telling me that it's time for coffee or breakfast, that another is attractive, or that I like someone for reasons I don't understand. I have embodied

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9. Goodman, *Baby M: The Right to Give Away Your Rights?*, Wash. Post, March 24, 1987, at A12, col. 1.

10. *Id.*

11. *Id.*

involvements with others, involvements that are constitutive of me as a self. These constitutive, involving embodiments are clearest in our relations with our parents and our children. My daughter and son, father and mother, are essentially and intrinsically involved with my selfhood.

The credibility of the libertarian analogies hinges on adoption of the first and extrinsic perspective on reproduction. It tends to suggest thinking of my body as property that I can alienate by contract; limitations on that right of contract are limitations on the essential me. We can apply the analogy handily with respect to the sale of tissue, especially regenerating tissue like blood. We would not object if for some bizarre reason a person were to profit from the sale of his feces or nail trimmings — why, then, should we scruple over the sale of his blood?

Pausing only to note that a human byproduct is distinguishable from a (fluid) part of the human body, I want to stress that a decision to become a surrogate is significantly different from a decision to donate blood or even to sell a kidney. And the reason is that it is impossible to be a surrogate at a distance or anonymously. By definition, the body of a surrogate and the life of a child are intertwined for thirty-eight weeks, more or less. Time and propinquity are relevant variables.

I decline any support this observation might receive from strong theories of fetal personhood. Nor do I mean to appeal to a mystical maternal instinct. I could make much the same point with reference to 4-H kids and livestock, or a researcher and a mouse tested over several months. Interactive engagement over time tends to lead to personal involvement. Not in every case, but the tendency is intrinsic to a relationship that involves two animate beings in ways that it is not intrinsic to my relationship to my blood or kidneys.

It is a commonplace that people create artifacts of many kinds, and they may find themselves heavily invested in their work. A scholar is seldom indifferent to colleagues' reception of his work; the destruction of a painting in which the artist has invested — and this investment must go on in any serious human activity — is painful for the artist. In these cases it is clear to us that a bonding between creator and created is something that we could only call natural. Why are we reluctant to see the same tendency in pregnancy?

I think the reason may be that pregnancy does not seem to us to be an action in the same sense that artistic creation is. Pregnancy may seem more passive, something happening to the self rather than something the self controls. But this perspective reveals a narrowness of vision and a limited conception of the self that we should repudiate. Pregnancy is the most intimate form of biological interdependence we know of; it involves risk, inconven-

ience and reciprocity; if it goes to completion, it culminates in a powerful experience. Throughout, the fact of the existence of two embodied individuals is apparent. I think it sensible to say that a natural bond tends to form.

The problem with the extrinsicalist perspectives and libertarian analogies is not that they are altogether wrong. Really they have two problems. First, use of these analogies inevitably suggests that the formation of the natural bond is more contingent than it is in fact. By implying that people can *choose* whether or not to bond, these approaches inevitably suggest that people can count on kinds of security and control that, in reality, they cannot. They perpetuate a deadly modern myth. Second, they do get at something true, namely the possibility of treating our bodies as commodities. This objectifying perspective is not altogether perverse; in fact the liberation it brings is a profound necessity. The problem, as with the previous analogies, is that this perspective is insufficient. They obscure some dimensions of surrogating and of our lives, and they are dimensions of great importance. As we think of the tendency to self-involvement, another analogy suggests itself.

## V

In the column to which I have already referred, Ellen Goodman discusses the contract that Mary Beth Whitehead signed with Elizabeth and William Stern. Goodman refers to the "absurd" contract provision "that in the best interests of the child [Whitehead] will not form or attempt to form a parent-child relationship with the fetus."<sup>12</sup> Goodman reports further components of the contract:

The Whiteheads agreed to assume all risks "including the risk of [Mary Beth's] death." They agreed that if she miscarried before the fourth month there would be no payment. If she miscarried after the fourth, even if the baby was stillborn, she would be paid only \$1,000. She wasn't to be paid for her services, but rather for the product.

More intrusively, the contract states that Mary Beth promised not to abort the fetus unless the doctor said it was necessary for her physical health. Conversely, she also agreed to amniocentesis and promised if the "test reveals that the fetus is genetically or congenitally abnormal . . . to abort the fetus upon demand of William Stern." If she refused, his contractual obligations were over.

As a final touch, the contract compelled Whitehead to follow all the medical instructions of her physician and "not to smoke cigarettes, drink alcoholic beverages . . . or . . . take medications without written consent from her physician." It said nothing about

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12. *Id.*

childbirth, but presumably those decisions were also up to the doctor and father. In short, she sold her body, put her womb in the hands of others.<sup>13</sup>

Whitehead contracted a relationship in which control over her reproductive processes, indeed over her habits and movements, were surrendered to another. The fetus' father had rights. Whitehead's husband would not have had if he and Whitehead had engendered a child. That these restrictions are logical from the perspective of the parents who hope to receive the child is obvious. However, we have to ask what status they impose upon the surrogate, whose entire life is subordinated to "the delivery of a product" for another.

A powerful and close analogy in our cultural tradition is slavery. To be sure, there are disanalogies of great moment: The surrogate's status is not hereditary, and the bondage period is brief. She assumes the status by a seemingly free contract and in nine months she is freed. I think that these disanalogies are very powerful and that they are strongest when the form of slavery we think of is American black slavery, which was racial, hereditary and entirely involuntary. But that is not the only form of slavery the world has known, nor was it the form John Stuart Mill had in mind when he argued against the legitimacy of persons selling themselves into slavery. Indeed, we might bring the prostitution analogy back for discussion if we remember that prostitution was sometimes called "white slavery."

There are two intuitive points of contact. One is that control over progeny, the ability to separate parents and children, has always been thought to be among the most repugnant features of slavery, including American black slavery. Totalitarian control is ratcheted to a new height when, going beyond depriving me of my freedom, it deprives me of my offspring. That is to say, a freedom lost in surrogating and in slavery is widely perceived to be important, touching an intimate side of the soul.

Secondly, it is in no way clear that the bondage will necessarily be limited to nine months duration; to be sure, it may be. Some women may be able to avoid personal involvement with a baby they bear, although I confess to amazement at the claim that someone "knows" she can avoid becoming involved. Should bonding occur, as I have claimed it tends to do, then the surrogate has put herself in the position of selling the "part" of herself that is bonded to the child. Even if no bonding occurs, the surrogate has surrendered control over her life for nine months in ways that are unique and often considered incompatible with the dignity of free persons.

In fact I have already made some claims that seem inconsistent with this

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13. *Id.*

judgment, for I have celebrated the extent to which persons are not in control of themselves in pregnancy. Indeed, true human selfhood is discovered through acknowledgment of some relations that are constitutive of the self. Some of these relations, such as marriage or vocation, are not so obviously biological as pregnancy and I freely concede that some non-lineal social relations, including adoptive parenthood, are rightly understood to create conditions that require the sacrifice of independence.

Thus it is not exactly the loss of “autonomy” that is problematic in surrogating because selves are fulfilled in social relations that inevitably involve the loss of independence. But surrogating is like slavery in the absence of reciprocity, in the fact that one person becomes what Aristotle called an “animated tool” of another, serving simply as a means to another’s ends. Thus most modern people believe that the fact that a marriage makes someone miserable is a relevant reason for divorce as the marital relation is understood to be reciprocal, but the surrogate’s unhappiness — from a strict contractual view — is irrelevant to the validity of the contract. The fact, widely reported in the media, that some surrogates find the arrangement fulfilling, is entirely irrelevant; some slaves may have relished their lot. The issue is what sort of constraints on freedom are compatible with life in a just community. The practice of surrogating inevitably places people in a position where they may find they have committed themselves to allowing part of themselves to be used for another’s purposes and this may be wrong for essentially the same reasons as slavery.

In using this strong term, I do not mean to retract my earlier observation that renunciation of a child may be a moral act of the highest order. In the conclusion, I shall return to that possibility. But I have tried to suggest that surrogating may involve a very different kind of relation, one that is likely to be exploitive. Indeed, when the woman’s exact relation to the gift cannot be determined in advance, the prior contract itself prevents the transfer from being a gift and converts it to commerce in human selfhood.

## VI

The analogy with slavery is deliberately provocative, meant to call attention to problems with those analogies that stress the importance of self-determination. If *who* or *what* the self is were clear, those analogies would be much stronger, but because embodiedness is inescapable and relational ties are not always under our own control, the analogies break down. Ulysses could lash himself to the mast, binding himself in an act of freedom. A surrogate *may* be able similarly to guarantee her own commitment to indepen-

dence, but in the nature of the case, it's harder. The likelihood of civil war within the self is significant.

Of course, there is a further disanalogy with Ulysses, glossed over by users of the libertarian analogies. Margot Hornblower,<sup>14</sup> writing in the *Washington Post*, sketched a profile of a typical surrogate: She is poor; she is not well-educated. In contrast, the beneficiaries of surrogating are typically middle-class professionals who are well-educated and in good shape financially. The contrasts between the Sterns and the Whiteheads are not atypical. Clearly, we are not dealing with bargains between equals.

Some would argue that contracts between partners of such differing degrees of economic power are necessarily exploitive, claiming that the poor have no real freedom. I resist that claim in its strongest form. Moreover, the desire to have a child can become so strong that the purchasers of a surrogate's services are surely more to be pitied than censured. There is certainly weakness and despair on the purchaser's side of the contract, and attempts to improve one's lot through initiative and industry are praiseworthy. A strident contrast between the saintly, poor exploited surrogate and the care-less, career oriented purchaser is terribly cruel and oversimple.

Still, the pattern remains troubling. If surrogating is such a great thing, why don't more middle-class women line up to do it for their friends? The comparative profiles make it appear that a choice to surrogate is often an act of desperation, a risk of the self in order to find meaning or money when other alternatives have been exhausted. Given the paucity of published data on income levels and occupations of surrogates and their clients, it is hard to draw any firm conclusions. But we should be suspicious of arguments that these exchanges are required by freedom, if in fact the transactions show a consistent pattern of benefitting the American professional class.

The justice of surrogating arrangements affects another dimension of the libertarian analogies besides the economic. Some discussions of the custody of surrogated children have developed an analogy with child abuse. Noting that the state may remove an endangered child from the custody of its parents, they claim that, similarly, it is appropriate for the courts to decide the child's fate in a custody war involving a child born through surrogating. In both cases, the best interest of the child should triumph. Insofar as it may be predicted, it appears likely that surrogates will regularly lose when this standard is applied, for the advantages of money and position are significant *ceteris paribus*.

The trouble is that child abuse statutes are designed precisely for situa-

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14. Hornblower, *Baby M: Battle of Class and Gender*, Wash. Post, Feb. 17, 1987, at A1, col. 3.

tions of abuse and are a most imperfect “fit.” A surrogate situation may be more like a custody battle in a divorce court. Even here, a disanalogy arises, for surrogate and client have never committed to sharing a life and the surrogate has already run the risk of alienation of self for the donor. Under these circumstances, it seems inappropriate simply to apply a “best interest” standard to the child, as there are few parents who are not distinctly inferior to an alternative. We should not take the contract so seriously that we acknowledge equal claims on the part of surrogate and client. It’s one thing to say she has to give back the money; it’s another to add insult to injury by getting into a “Sophie’s Choice” of adjudicating between the relative fitness of surrogate and client.

## VII

At the outset, I claimed that I wanted to be interrogative and I called for patience rather than dogmatic assertion. As the argument has developed it may seem that this statement was an act of bad faith — or at best dissembling. For it must be clear that I have deep reservations about the practice of surrogating. But the issues are of such moment that thoughtful persons will differ. When the uncertainties involve the relation of self and body, of selves to each other, and of the limits — if any — of human sovereignty, who could expect anything else?

In conclusion I want to repeat my conviction that surrogating can be an act of great love. “Greater love hath no man than this, that he lay down his life for his friends”<sup>15</sup> is rightly treated as a description of moral heroism. The giving over of a child may be sanctifying. Our policy should not preclude this option through legislation that outlaws surrogating.

Since the relationship of surrogate and donor is laden with the possibility of abuse, we should do two things. First, we should make it clear that surrogating contracts will not be enforced in the courts and that those contracts are irrelevant to any custody battles that may ensue. Second, when a surrogate defends her right to keep a child, we should measure her fitness as a mother against some threshold standard of adequacy rather than vis-a-vis the ability of the alternative (donor) claimant. If these principles are followed we will see a decrease in commercial surrogating, for we will create a situation in which *caveat emptor* is the rule. The possibility of exceptional self-giving will remain, but the incentive for a practice that would inevitably exploit some for the sake of others will be minimized.

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15. *John* 15:13 (King James).