IN SEARCH OF COMMON GROUND: ONE PRAGMATIST PERSPECTIVE ON THE DEBATE OVER CONTRACT SURROGACY

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I. INTRODUCTION

> There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.[1]

Two events prompted my interest in the topic of this article. The first was the Baby 'M' case in which the New Jersey Supreme Court found a surrogacy contract between an infertile couple and a woman who agreed to be artificially impregnated for money to be void in violation of the law and public policy of the state.[2] When I first learned of the decision, I accepted it as largely unproblematic. The contract seemed like an obvious attempt by a wealthy couple to coerce a poor and desperate woman into selling her body for sustenance.

The second event occurred ten years after the Baby 'M' case when Richard Posner delivered his wildly provocative essay on normative moral theory at the 1997-98 Holmes Lectures at Harvard Law School. In The Problematics of Moral and Legal Theory, Posner confessed his "visceral dislike . . . of academic moralism," while at the same time presenting a fairly channeled (though casually "Posnerian"), poststructuralist argument against the foundationalist Moral Realism of the kind exhibited by Ronald Dworkin, Thomas Nagel, Martha Nussbaum, and many others.[3]

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[1] In re Baby 'M', 537 A.2d 1227, 1249 (N.J. 1988).

[2] *See id.* at 1264.

[3] Richard Posner, The Problematics of Moral and Legal Theory, 111 Harv. L. Rev. 1638, 1640 (1998).

I found Posner's lectures to be refreshing. After the onslaught of thinkers like Kuhn, Quine, Derrida, Foucault, and Lyotard, I cannot fathom how normative moral philosophy can ever again be "normative," in the traditional, foundationalist sense of the word. But what began to concern me was my attempt to understand the decision in the Baby 'M' case through Posner's lens. In other words, could the New Jersey Supreme Court decision survive, in any intellectually coherent way, the onslaught of poststructuralism?

I think that our intuitions against at least some forms of contract reproduction can survive; but they can only survive as *intuitions*, contingent and culturally conditioned to the core. In this article, I explore the issue of contract pregnancy through what I believe to be the most adequate response to the advent of poststructuralism—philosophical pragmatism, which I associate with the tradition of William James, John Dewey, and Richard Rorty among others. I conclude that a judge's decision to refuse to enforce a surrogacy contract can, in some cases, be adequately grounded in liberal American cultural norms so that it can be said, in Rorty's words, to "hang together" with our valuative scheme.[4] In other cases, I conclude that a judge should enforce the contract.

A. A Note on Scope

There are two qualifications concerning what this article is not about. First, I assume that the judge called upon to make a decision regarding the enforceability of contracts for reproduction will inevitably be influenced by moral theory and so I do not take up, to any significant degree, Posner's second thesis in The Problematics, in which he argues that "moral theory has nothing for law."[5] It is not that I find the question of the proper role of moral theory in legal reasoning to be irrelevant; it is just that I think Posner is clearly wrong on this point. The judge will of course be influenced by moral theory of some variety because the judge is called upon to answer moral questions and appeals to "Originalism" or the "Legislature" are just appeals to other moral theories.[6] It is true that explicit considerations of these issues might alter the calculus of my

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[4] Richard Rorty, Pragmatism and Philosophy, *in* After Philosophy 26, 28 (Kenneth Baynes et al. eds., 1987).

[5] Posner, *supra* note 3, at 1698.

[6] For a good discussion, see Ronald Dworkin, Law's Empire (1986), especially ch. 7.

conclusions. For example, the commodification argument might win the day, but because the judge is bound to respect the moral authority of the legislature, which has spoken in favor of enforcement of gestational contracts, she must decide the case in another way. But the reason this issue is so fascinating is because the judge is largely left to her own devices in determining if contract reproduction is "unconscionable" or violates "public policy."[7] It is therefore likely that moral theory will find more explicit recognition in any judicial opinion that tackles the issue of contract pregnancy.[8]

Second, characterizing the inquiry as whether or not a woman should be allowed to sell a *child* is largely a red herring. As I discuss below, if we choose to define the transaction in the same way we define "baby-selling," that is, the selling of a child to a totally unrelated adult, we have already condemned the transaction by definition. To make the question interesting, I will look at contract pregnancy as a question of whether or not a woman should be able to sell her reproductive capacities.[9] Framed in this way, there is still room to consider whether concerns about a child who later discovers "that she is the offspring of someone who gave birth to her only to obtain money" might counsel against allowing women to sell their gestational services.[10] The concern, however, is not about when the child learns that "she was sold"—if it is, then the game is over. Instead, we are concerned that the child who learns that her birth mother

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[7] Though it is largely the case that courts are left to the common law and their own judgment, some states have enacted statutes proscribing contract reproduction. *See* Ky. Rev. Stat. Ann. § 199.590(4) (Michie 1999); La. Rev. Stat. Ann. § 9:2713 (West 1999); Mich. Comp. Laws Ann. § 722.859 (West 1999); Neb. Rev. Stat. § 25-21,200 (1999); N.Y. Dom. Rel. Law § 123 (McKinney 1999); Utah Code Ann. § 76-7-204(1) (1999); Wash. Rev. Code Ann. § 26.26.230 (West 1999).

[8] *See* In re Baby 'M', 537 A.2d at 1249 (discussing the existence of social values that are more important than market norms).

[9] However, I do take up the question of defining the practice as a sale of gestational services versus the sale of a child in my discussion of Elizabeth Anderson's Value in Ethics and Economics (1993), and Margaret Radin's Contested Commodities (1996). I think that a *better* interpretation of the practice is characterizing it as a sale of services. But as I admit below, I may be wrong. The problem is that if we think of contract reproduction as "baby-selling," then the debate is over, and there is no need to engage in the present inquiry. To at least make the issue interesting, I will be both arguing for and assuming that we are talking about the sale of a woman's reproductive capacities, and not the sale of children.

[10] In re Baby 'M', 537 A.2d at 1250.

accepted money in exchange for use of the mother's body for gestational purposes might suffer some harm as a result.

B. Question Presented and Brief Outline

We can now begin the work of exploring the following question: given that the judge accepts the proposition that moral theory will inevitably influence her decision-making, what guidance do different moral arguments offer when the judge must make a decision concerning the enforceability of a surrogacy contract?

In the next section, I begin by laying out the philosophical context in which I explore the question. Next, I examine the values implicated by the debate over contract reproduction. Finally, I explore some of the arguments for and against contract pregnancy, as well as differing perspectives on full enforcement of such contracts, to see how different argumentative thrusts mesh with our shared, cultural values. The emphasis will be on reconciliation and finding a middle way solution that might offer hope for a trans-theoretical discourse based on common ground.

II. CONTEXT AND MORAL CONCERNS

A. The Pragmatist Context

In reading Posner's Problematics, I was struck by how much the piece reminded me of some of Nietzsche's work, in both tone and substance. One can almost see in Posner's caricatures of "professionalized" academic moral philosophy[11] overtones of Nietzsche's raging against the "'objective' armchair scholar, this kind of scented voluptuary of history, half parson, half satyr, perfume by Renan who betrays immediately with the high falsetto of his applause what he lacks, *where* he lacks it, *where* in this case the Fates have applied their cruel shears with, alas, such surgical skill!"[12] The comparison is also substantively apt. In Problematics, Posner appears to embrace the tradition of perspectivalism characteristic of the poststructuralism that Nietzsche christened.

The central insight of that unruly band of philosophers who have followed Nietzsche's lead in the poststructuralist direction is that when we search for a truth that is objective we search in vain. There is no rationally

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[11] *See* Posner, *supra* note 3, at 1688.

[12] Friedrich Nietzsche, The Genealogy of Morals 155 (Walter Kaufmann & R.J. Hollingdale trans., 1989).

determinable foundation, metanarrative, or norm of human existence that can serve as the grounding for all normative moral judgment on a transcultural, transhistorical basis. We cannot see the world from an Archimedean perspective, and we speak nonsense when we talk about Plato's Forms[13] or Cartesian rationality.[14] Poststructuralists criticize "presence" (versus construction), "origin" (versus phenomena), "unity" (versus plurality), and "transcendence" of norms (versus their immanence). Everything said to be "basic" or "foundational" is analyzed in terms of its constitutive otherness to unmask the relationship of the term to what it excludes, opposes, and subordinates, illuminating how the term therefore fails to be universal.[15]

I share the general poststructuralist intuition that we cannot rationally verify our "confidence in 'the mind' as something about which one should have a philosophical view, in 'knowledge' as something about which there ought to 'be a theory' and which has 'foundations', and in 'philosophy' as it has been conceived by Kant."[16] Therefore, this article analyzes the issue of contract reproduction under the rubric of what has come to be known as philosophical pragmatism, the method that eschews universalizing any particular value and instead looks to see how certain practices hang together with the values that we, as bearers of the Western liberal tradition, can affirm as being constitutive of our cultural experience. In the words of William James, we will look to see how different moral theories about contract pregnancy "work," by how well they "mediate between all previous truths and certain new experiences . . . [and] derange common sense and previous belief as little as possible."[17]

The values that come to the fore in the debate over surrogacy are both conflicting and overlapping. Therefore, the task throughout this article is to identify the relevant moral concerns, and then to ask how different moral theories reconcile divergent valuative impulses that appear incompatible. In other words, what theory might find that most

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[13] *See* Plato, Republic 186-90 (G.M.A. Grube trans., 1992) (discussing the classic image of education as a means of emerging from the "cave" of ignorance, and finally perceiving "the form of the good").

[14] *See* 1 Renee Descartes, Meditations on First Philosophy, *in* The Philosophical Works of Descartes 144 (Elizabeth Haldane & G.R.T. Ross trans., 1975).

[15] *See* From Modernism to Postmodernism 14-16 (Lawrence Cahoone ed., 1996).

[16] Richard Rorty, Philosophy and the Mirror of Nature 7 (1979).

[17] William James, Essays in Pragmatism 167-68 (1948).

intersubjective agreement within our web of concerns?[18] In the next section, I begin by identifying the relevant moral propositions.

B. Values Implicated in the Debate Over Contract Reproduction

Five values important in liberal American culture are implicated by the debate over contract reproduction. They are: (1) individual autonomy; (2) maximization of the goods of parenthood and family; (3) gender equality; (4) healthy sexuality; and (5) bodily integrity. I call the last two values "communally intrinsic," a term which I describe in more detail below.

1. Individual Autonomy

> [T]here is still a definite uniformity and consistency to liberal teaching that can be traced to the one-sided priority attached to the good of freedom.[19]

As a product of the Enlightenment, liberal thought has been characterized by a central "intention to establish the material and institutional conditions within which individuals can make lives for themselves without the deadening obstacles offered by political, economic, or cultural (race, status, ethnicity, gender) sources of oppression."[20] Western society has conferred an ontologically privileged status on the individual citizen-subject that often places the individual, and her "rights," in the center of our web of social justice.[21] We take seriously ideas about

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[18] *See* Richard Rorty, Objectivity, Relativism, and Truth 23 (1991) (describing the pragmatist task as "extend[ing] the reference of 'us' as far as we can"); *cf.* John Rawls, Political Liberalism 9-11 (1993) (describing the concept of the Overlapping Consensus between citizens regarded as free and equal).

[19] R. Bruce Douglass & Gerald Mara, The Search for a Defensible Good: The Emerging Dilemma of Liberalism, *in* Liberalism and the Good 253, 259 (R. Bruce Douglass et al. eds., 1990).

[20] Stephen Salkever, Lopp'd and Bound: How Liberal Theory Obscures the Goods of Liberal Practices, *in* Liberalism and the Good 167, 175 (R. Bruce Douglass et al. eds., 1990).

[21] We can affirm *Kantian* autonomy *not* in the way that Kant would have wanted us to affirm him, which is in a way that would take seriously the idea that "when we think of ourselves as free, we transfer ourselves into the intelligible world as members and know the autonomy of the will together with its consequence, morality." Immanuel Kant, Grounding for the Metaphysics of Morals 54 (James W. Ellington trans., 1981). I am not even sure

individual autonomy and freedom of choice, that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[22] In many circumstances, we privilege the individual over the community, independence over dependence, choice over being chosen, and most notorious of all, the right over the good.[23]

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what this means, and suspect that Kant may not have been terribly lucid when he wrote it. Instead, we can affirm a concept of autonomy that privileges the moral status of human beings as much as Kant did simply because the idea seems to play a central role in our cultural discourse. I realize that this is entirely circular: human beings hold an ontologically privileged status. Why? Because we believe that human beings hold an ontologically privileged status. But I certainly prefer a justificatory strategy that looks to shared, concrete norms and practices over one that says that we should value human autonomy because we really all live in a Magical Land of Freedom. *See* Richard Rorty, *supra* note 18, at 33 ("There is, in short, nothing wrong with the hopes of the Enlightenment, the hopes which created the Western democracies. The value of the ideals of the Enlightenment is, for us pragmatists, just the value of some of the institutions and practices which they have created.").

[22] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). I have to admit that I think this part of the Casey decision may get a little bit carried away with its own rhetorical flourishes. Yet, even if we are somewhat skeptical about the Court's discussion of "*existence*," "*meaning*," "the *universe*," and "the *mystery* of *human life*," we can still see that the Court's opinion reflects a well-settled cultural disposition that favors the concept of autonomy.

[23] We do not really need to get into the *deep* debate going on under the surface here about the degree to which liberal theory is really "neutral" with regard to differing conceptions of the "good." Alasdair MacIntyre and Michael Sandel have made forceful, and I think persuasive, arguments deconstructing (Rawlsian) liberal pretensions to neutrality that expose the degree to which liberal theory privileges the "unencumbered self." *See* Alasdair MacIntyre, Whose Justice? Which Rationality? (1988); Michael Sandel, Liberalism and the Limits of Justice (1982) [hereinafter Sandel, Liberalism]. We will be focusing on the "background conditions" aspect of this debate rather than the neutrality debate itself. But, in brief, I think that the answer to the liberal dilemma over neutrality is not some return to "Nature," or "Aristotle," or even a return to a former vision of ourselves that Sandel now reads into American history. *See* Michael Sandel, Democracy's Discontent (1996) [hereinafter Sandel, Democracy's Discontent]. The answer is to drop neutrality, and say, "Yes," liberalism *does* privilege the "unencumbered self," and we certainly like that vision more than the image of the individual "encumbered" in a sea of cultural oppression. Sandel seems to be particularly concerned that the Rawlsian vision lacks a proper foundation for the "co-operative virtues, such as altruism and benevolence," that are necessary for the modern welfare state. *See* Sandel, Liberalism, *supra*, at 11. But we can affirm cooperative values as constitutive of our community, recognizing that our values are *often* conflicting and incommensurable, without recourse to some grand theory of the human subject. For good discussions, see Salkever, *supra* note 20; Richard Rorty, The Virginia Statute for Religious Freedom (1988), especially ch. 10.

In the context of contract reproduction, the autonomy interest resides in the right of the birth mother to contract with a buyer to sell her reproductive services, and the right of the buyer to contract for access to the birth facilities that he or she may lack.

There is one qualification to our concept of autonomy that needs to be made clear at the outset. In the context of contract and the market, some theorists have argued that the right of the individual to be free from cultural oppression means that government must get out of the way in terms of economic redistribution and setting market background conditions that prescribe certain minimal standards of conduct that people can rely upon in the market sphere.[24] As a matter of exploring our intracultural values, however, we are well beyond Lochner now.[25] The welfare state has triumphed—both as a matter of general economic policy,[26] and as a matter of contract law—in the form of the unconscionability doctrine.[27]

Some theorists have argued that the American welfare state, by doing little more than providing a safety net for the most economically vulnerable, only goes half way towards fulfilling deeper liberal commitments to a vision of individual autonomy that is sustained by

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[24] *See, e.g.*, Milton & Rose Friedman, Free to Choose: A Personal Statement (1980); Friedrich Hayek, The Constitution of Liberty (1960); Robert Nozick, Anarchy, State, and Utopia 169 (1974).

[25] In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court struck down a New York statute limiting the working hours of bakers on grounds that the law denied them freedom of contract.

[26] *See* Sandel, Democracy's Discontent, *supra* note 23, chs. 7 & 8.

[27] See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), where the court invalidated a credit purchase contract that stipulated that if the buyer defaulted on a payment, the company was entitled to repossess not only the piece of furniture being paid on, but also all the furniture that the buyer had ever purchased on credit from the company in the past (even if the other furniture was already paid off). The court explained,

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.

Id. at 449 (footnotes omitted).

institutions that equip all citizens to "live and function well."[28] For the purposes of this article, and given the level of debate that still exists about the proper scope of welfare politics, we can make do with a more modest claim. That claim is that even though we value autonomy, we are repulsed by what Michael Walzer calls "desperate exchanges" or "trades of last resort" made when one party to the exchange is operating within a context of brutal necessity.[29]

What both the welfare state in general and the contract doctrine of unconscionability illustrate is that society does not allow an appreciation for individual autonomy to get in the way of creating background conditions that emphasize to some degree the value of *equality*—that we do not want any person, regardless of the individual's identity, to starve on the streets or to be cheated by a manipulative salesperson willing to capitalize on the buyer's ignorance. This is so regardless of the fact that the individual may be suffering harms that are of her own making—she may be on the streets because she refused to seek gainful employment or she may have entered into an unfavorable contract because she desired an item that, in all truth, she could not afford. That the individual may have "chosen" to be where she is does not alleviate our concern because we view her choice as largely illusory. She "chose" not to seek gainful employment only because she was never equipped with the education and material resources necessary to allow her access to an interesting, fulfilling, and rewarding career and she "chose" to purchase goods with money she did not have only because she did not understand the terms of the contract. Similarly, we fear that when poor people try to sell their organs, or poor women sell their bodies for sex, they may be engaging in the transaction out of brute necessity, and not because they have made a rational choice from a position of equal bargaining power.[30]

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[28] *See* Martha Nussbaum, Aristotelian Social Democracy, *in* Liberalism and the Good, *supra* note 20, at 203.

[29] Michael Walzer, Spheres of Justices 102 (1983).

[30] *See* Leon Kass, Organs for Sale? Propriety, Property, and the Price of Progress, 107 The Pub. Int. 65, 76 (1992) ("The most common objections . . . have to do with matters of equity, exploitation of the poor and the unemployed, and the dangers of abuse. . . . People deplore the degrading sale, a sale made in desperation, especially when the seller is selling something so precious as a part of his own body."); Cass Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 787 (1994)

> (There is often a connection between blocked exchanges and ideas about equal citizenship. The exchange may be barred by social norms or law because of a perception that, while there may be disparities in social

Keeping this qualified sense of autonomy in view is important because theorists have tended to get carried away on one side or the other—either fetishizing the value as absolute, or defining it in some odd way that eviscerates its substance. A pragmatist account of autonomy recognizes its fundamental place in our cultural landscape, but recognizes also that there are competing values that come into play.

2. Maximization of the Goods of Parenthood and Family

Even those who do not embrace the standard wealth maximizing Law and Economics arguments can agree that "other things being equal, a society whose members are happy is better than one whose members are (by their own lights) less happy."[31] In this sense, Bentham was right when he advised legislators to

> Sum up all the values of all the *pleasures* on the one side, and those of all the pains on the other. The balance, if it be on the side of pleasure, will give the *good* tendency of the act upon the whole, with respect to the interests of the *individual* person; if on the side of pain, the *bad* tendency of it upon the whole.[32]

Any society would rather have more good than bad, more pleasure than pain, more satisfaction than deprivation. The problem, of course, is that it has proven impossible to boil everything down to one commensurable standard of good and bad.[33] How do we weigh the value of money versus the value of a child, the value of autonomy versus the value of equality? We certainly cannot do so on any all-purpose scale that pretends to add and subtract the values of each, playing them off against one another with fifth grade arithmetic.

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wealth, the spheres in which people are very unequal ought not to invade realms of social life in which equality is a social goal.).

[31] William Fisher, Property and Contract on the Internet, 73 Chi.-Kent L. Rev. 1203, 1216 (1998).

[32] Jeremy Bentham, Introduction to the Principles of Morals and Legislation 31 (Laurence Lafleur ed., 1948).

[33] Even Bentham's most ardent follower, John Stuart Mill, recognized the difficulty when he wrote that regardless of the pleasure principle, "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied." John Stuart Mill, Utilitarianism 9 (George Sher ed., 1979).

Nevertheless there is a kind of wealth maximization-related interest at stake in the debate over contract reproduction—giving as many people as possible access to the goods of parenthood and family.

3. Gender Equality

As inheritors of the Western liberal tradition of emancipation from arbitrary sources of oppression, we are all feminists if feminism means, in Mill's words, that the "subordination of one sex to the other . . . is wrong in itself."[34] Feminism in America is a contentious issue and I could not even begin to try to tackle the epic volume of literature on gender subordination in the Western tradition. But what I do have to distinguish at this point in the article is that view of feminism that some have called the "Total Reject" school of thought, characteristic of scholars like Catharine MacKinnon and Andrea Dworkin. Theorists in this camp argue that *all* Western institutions have been built around a more or less conscious construct of phallic dominance, and a perverse eroticization of that dominance, making it impossible to even know what conditions of gender equality might be like without a radical escape from our gendered false-consciousness.[35] Because I am admittedly grounding my account in an intracultural pragmatist theory of value and reconciliation, I can hardly embrace a notion of gender relations in which all sex is rape.[36]

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[34] John Stuart Mill, The Subjection of Women, *in* Readings in Philosophy and Human Nature 203 (John Kinerk & Keith Hoeller eds., 1998).

[35] *See* Catharine MacKinnon, Feminism Unmodified 147 (1987) ("[S]exuality itself is a social construct, gendered to the ground. Male dominance here is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being. Sexuality free of male dominance will require *change*, not reconceptualization, transcendence, or excavation."); Andrea Dworkin, Pornography: Men Possessing Women 55 (1979) (stating:

> Force—the violence of the male confirming his masculinity is seen as the essential purpose of the penis, its animating principle as it were . . . . This penis must embody the violence of the male in order for him to be male. Violence is the male; the male is the penis . . . . What the penis can do it must do forcibly for a man to be a man.)

[36] *See* Christina Hoff Sommer, Hard-Line Feminists Guilty of Ms.-Representation, Wall St. J., Nov. 7, 1991 (quoting Catharine MacKinnon) ("The major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often that one cannot get anyone to see anything wrong with it."). There is a lengthy and troubled debate about where feminism should go after the advent of poststructuralism, and the concomitant deconstruction of all categories of gender. *Compare* Seyla Benhabib, Feminism and Postmodernism, *in* Feminist Contentions 17 (Seyla Benhabib ed., 1997) (arguing that

However, if a practice tends to objectify or commodify women, or to make normative a relationship of male power and female subordination, then it is a worse as opposed to a better thing. When the gender equality principle is recast in this more modest form, it becomes clear that conscious subordination—that is, the intent to subordinate, or the fostering of background conditions that make normative gender subordination—violates society's shared intuitions about the value of individual autonomy.[37]

Communally Intrinsic Values

I come now to two values that I call "communally intrinsic" because society assigns to them a privileged status that often outweighs the value assigned to individual autonomy.[38] In other words, even though

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without some "regulative principle of hope, not only morality but also radical transformation is unthinkable."), *with* Judith Butler, Contingent Foundations: Feminism and the Question of Postmodernism, *in* Feminist Contentions, *supra* (arguing that the poststructuralist-feminist task is to "interrogate what the theoretical move that establishes foundations *authorizes*, and what precisely it excludes or forecloses . . . . [T]he subject, understood as autogenesis, is always already masculine.").

[37] There is another critical identity-based concern on which some theorists have focused—the issue of race. Anita Allen, for instance, worries that women of color will be used as gestational warehouses for white children to be delivered to white parents. *See* Anita Allen, The Black Surrogate Mother, 8 Harv. Black-Letter L.J. 17 (1991); *see also* Patricia J. Williams, The Alchemy of Race and Rights 216-36 (1991) (analogizing contract reproduction to slavery). The idea is that white women will be able to escape the labor of child-bearing by passing this less-preferred task on to African-American women. Race-based stratification in the labor market is a critical concern, and I think that we could all endorse some view of racial equality—though formal equality, see, for example, Paul Brest, The Supreme Court 1975 Term—Forward: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 6 (1976) (arguing against all "race-dependent decisions and conduct"), versus the anti-subordination principle, see, for example, Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978) (critiquing the concept of formal equality and arguing for antisubordination principles that affirmatively alleviate the conditions of the African-American underclass) is tricky business. The reason that I do not bring up race as a separate topic in our valuative scheme is that I think that the ways in which a market in gestational services would affect women of color is the same way that the labor market affects people of color in general—by allowing what looks like race-based stratification of privilege. Of course, that is a terrible and unjust thing that violates the principles of individual autonomy and racial equality; but it is not a *special concern* in the contract pregnancy market, whereas contract pregnancy *does* specially affect *all women*. Hence, I have included the concern of gender equality as specially implicated in the debate over contract reproduction, but not the norm of racial equality.

[38] I do not mean "outweigh" in the sense that we can rank communally intrinsic values on the same commensurable scale as autonomy. I mean only that, in practice, we often choose to reinforce these values in a way that does not gel with a notion of *absolute* autonomy.

society values individual choice, there are some things that the community feels are so important that individuals cannot be allowed to treat them as only optionally valuable. Healthy sexuality and bodily integrity are values of this type. We often impose their meaning on individuals in order to preserve the social construction of their importance. I call these values "communal" to emphasize their opposition to the individual and "intrinsic" to emphasize their imperative status.

In particular, society does not allow people to sell goods associated with these values when a market translation threatens a disvaluation of the good by treating it as fungible, optional, or alienable. In this sense the commodification theorists are right when they claim that there are some things that cannot be bought and sold.[39] Market freedom, or freedom of contract, is a kind of freedom that implicates individual autonomy. But it is not the only important value, and in certain circumstances there may be other values that outweigh the freedom to transact—values that are so important that things associated with them cannot be alienated from the person without a loss that defies market translation. Notice, however, that the justification for the restraint is not the background conditions rationale (i.e., that the individual's choice was illusory because the transaction was made in a context of desperation). Under the communally intrinsic rubric it would not matter if an individual who wanted to sell his kidney was a white, upper class, college-educated male; we would still not allow the sale. It would not matter that the individual may be capable of making an informed choice because we despise the choice itself.

4. Healthy Sexuality

The social disapproval of prostitution (body *physical* as sexual commodity)[40] and pornography (body *image* as sexual commodity)[41]

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[39] *See* Walzer, *supra* note 29, at 100-03. Walzer lists 14 things that money cannot buy: human beings; political power; criminal justice; freedoms of speech, press, religion, and assembly; marriage; the right to leave the political community; exemptions from military service, jury duty, or other communally mandatory work; political offices; basic welfare services; desperate exchanges; prizes and honors; divine grace; love and friendship; and criminal sales. *Id.*

[40] It is often stated that prostitution is illegal in every state except Nevada. *See, e.g.*, Jill P. Meyer, In Search of a Right to Escape from a Pornographic Society, N. Ky. L. Rev. 553, 571 (1996). Actually, "[p]rostitution remains illegal in Nevada outside of the licensed brothels in the less populated counties. Of the less populous counties, four counties prohibit prostitution, six ban it in the unincorporated areas of the county, and seven permit it throughout the county." Sylvia A. Law, Commercial Sex: Beyond Decriminalization, 73 S.

indicates that there is some communally intrinsic value in healthy sexual functioning that is imposed rather than made optional.[42] There are three aspects of healthy sexuality made apparent by the social opposition to

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Cal. L. Rev. 523, 559-60 (2000). The U.S. also devotes substantial resources to enforcing criminal prohibitions of a market in sex.

> In 1996, 99,000 people were arrested in the United States on prostitution and prostitution-related charges, and in 1994, 12,243 people were arrested in New York state alone. In 1985, police in the nation's sixteen largest cities made as many arrests for prostitution as for all violent crimes combined. And police in Boston, Cleveland and Houston arrested twice as many people for prostitution as they did for all homicides, rapes, robberies and assaults combined—and perpetrators evaded arrest for ninety percent of these violent crimes.

Id. at 527.

I realize that there is a *large* volume of academic literature arguing that, for one reason or another, we ought to legalize commercial sex. *See, e.g.*, Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 Harv. L. Rev. 1045, 1058-59 (1992) (arguing that legalized prostitution could combat "dominant images" of "the maternalized female body"). But this article is about exploring the motivations and intuitions behind our actual, present social circumstances; and the fact is that we do, indeed, seem to find prostitution to be a distasteful and corruptive practice, as evidenced by the sheer magnitude of legal and political machinery that we have committed to the task of stamping out the sex trade.

[41] Like prostitution, the extent to which we should and should not regulate pornography is a topic of immense debate. *Compare* Catharine MacKinnon, Only Words (1993) (presenting pornography as expression and legitimation of dominance perspective), *with* Nadine Strossen, Defending Pornography (1995) (presenting the feminist choice pro-pornography argument), *with* Donald Downs, The New Politics of Pornography (1989) (presenting a compromise view). For our purposes, we can simply recognize that many communities *have* chosen to regulate pornography to the extent allowed by Miller v. California, 413 U.S. 15, 24 (1973) (holding that expression must be sexual in such a way that the average person applying contemporary community standards finds that the work, taken as a whole, appeals to the prurient interest, depicts, in a patently offensive way, sexual conduct specifically proscribed by a state, and lacks serious literary, artistic, political, or scientific value).

[42] There are, of course, many reasons why we might be opposed to prostitution and pornography: we might be afraid, for instance, that the poor will engage in the desperate exchange of their bodies for money, that the practices contribute to the social subordination of women, and there are legitimate health-related concerns about an industry in which one's daily occupation involves intimate contact with a number of unknown individuals. But it is also certainly the case that at least *part* of our revulsion to a market in sex is borne out of a common appreciation for our notions regarding *healthy* sexual practices. Because the practices of prostitution and pornography fail to account for some of the most salient features of our communally intrinsic value of healthy sexuality, we regard the practices as inferior forms of sexual expression.

prostitution and pornography. First, healthy sexual exchanges constitute a shared rather than a distinct good: "complete sex acts occur when each partner's embodying desire is active and actively responsive to the other's. This . . . aspect of complete sex constitutes a 'reflexive mutual recognition' of desire by desire."[43] Second, healthy sexual expression is a personal rather than a transferable experience: "[t]he beloved is not interchangeable; and personal love is the deepest experience of the irreplaceability of people."[44] Finally, healthy sexuality offers access to goods that we think of as intrinsically worthy—the goods of children, shared intimacy, and the attendant bonds that develop between those who engage in a fulfilling sexual relationship.

Prostitution and pornography are antithetical to healthy sexuality, as neither invites a shared experience or a personal connection. One who purchases a prostitute's services is not looking for genuine intimacy, but is seeking to achieve a one-sided satisfaction with a replaceable resource. Pornography resides even farther outside the realm of shared, personal experience; the consumer does not relate to a live, human being, but instead interacts with still or moving images of one. Finally, the purpose of engaging a prostitute for her services, or of purchasing pornography for private consumption, is to achieve a sexual release. The consumer desires neither children, nor intimacy, nor any other intrinsically valuable good.

I do not want to get too carried away here. Sketching the social norm of healthy sexuality as shared, personal, and of intrinsic worth may seem overly speculative.[45] But however contestable sexual norms have

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[43] Sara Ruddick, Better Sex, *in* Philosophy and Sex 280, 285 (Robert Baker & Frederick Elliston eds., rev. ed. 1984).

[44] Robert Ehman, Personal Love and Individual Value, *in* Occasions for Philosophy 212, 220 (James Edwards & Douglas MacDonald eds., 1985); *see also* Ruddick, *supra* note 43, at 295 (describing good sex as sex which treats the partner as "a 'subject' rather than a depersonalized, will-less, or manipulated 'object'").

[45] I am also on unsteady ground here because so much work has been done in exposing the degree to which our "communally intrinsic value" of "healthy" sexuality is really just a hegemonically enforced system of social regulations designed to reify the dominance of males, see, for example, MacKinnon, *supra* note 35, at 147, or heterosexuals, see, for example, Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 777-800 (1989) (arguing that the whole concept of the "homosexual," as defined in relation to a heterosexual identity, is inherently subordinating to gays and lesbians), or both, see, for example, Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499, 504-05 (1991) (linking the ideas of sexuality, power, masculinity, and the domination of women, gays, and lesbians). Many of the theorists who argue in this mode appear to find no value in our present social sexual milieu, endlessly decoding every sexual interchange as an expression of heterosexist, male power. I will admit that there is much to be said for the arguments that expose the degree to which our present

become, the open disapproval of some sexual practices—prostitution and pornography—indicates that there does exist a notion of healthy sex that can be defined in opposition to the practices that are condemned. The debate over contract pregnancy implicates the norm of healthy sexuality because a woman's reproductive capacities are both a physical and a sexual element of her being.

5. Bodily Integrity

> Our dignity [finally] consists not in denying but in thoughtfully acknowledging and elevating the necessity of our embodiment, rightly regarding it as a gift to be cherished and respected. Through ceremonious treatment of mortal remains and through respectful attention to our living body and its inherent worth, we stand rightly when we stand reverently before the body, both living and dead.[46]

There is also a category of communally intrinsic value associated with the good of the person and her body, which I call the value of bodily integrity. Contract reproduction operates within an area that implicates the person, herself, in terms of her body. Whether because of Kantian respect,[47] religious reverence,[48] or typical Western false-consciousness, society views things associated with the body—that is, the corporeal form—as possessing intrinsic importance. This necessitates that the body not be valued optionally or exchanged on the market.[49]

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notions of sexuality have been constructed to both establish and legitimate the primacy of heterosexual male power, and I could not possibly provide an adequate response within the confines of this article. It is enough for the present inquiry to say that I am, indeed, grounding my theory in a reconciliation of our actual, social valuations, and that I do not believe that describing "healthy" sex as shared, personal, and of intrinsic worth is, necessarily, fundamentally masculist or heterosexist.

[46] Kass, *supra* note 30, at 71 (quoting Leon R. Kass, M.D., Toward a More Natural Science: Biology and Human Affairs (1985)).

[47] *See* Stephen R. Munzer, An Uneasy Case Against Property Rights in Body Parts, 11 Soc. Phil. & Pol'y No. 2, 259 (1994) (arguing against a market in body parts on the ground that objectifying parts of the body by assigning them a market price fails to respect Kantian human dignity).

[48] *See* Paul Ramsel, The Patient as Person xiii (1970) ("Just as man is a sacredness in the social and political order, so he is a sacredness in the natural, biological order. He is a sacredness in bodily life. He is an embodied soul or ensouled body.").

[49] *See* Kass, *supra* note 30, at 81-82

We privilege different aspects of the body along a hierarchical range of valuation. At one end, the most important thing associated with the person is her whole physical form. Even if there was some way to define the choice as completely informed, we would not allow a person to sell her whole body into slavery because treating human bodies as "chattel" under any circumstances is abominable.[50] The prohibition applies even to the deceased; the law also forbids the purchase or sale of corpses.[51]

The social taboo against treating human bodies as commodities supports the contention that if surrogacy arrangements are characterized as "baby-selling,"—that is, the sale of an existing child from the birth mother to a completely unrelated individual—then the debate over contract reproduction is finished. Arguments to the contrary notwithstanding,[52] of course society would not allow the buying and selling of children because the practice would be too similar to chattel slavery.[53] It is for this reason that I explore the issue of contract reproduction as one involving the sale of

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> (To claim that these things are "priceless" is not to insist that they are of infinite worth or that one cannot calculate . . . how much it costs to sustain or support them. Rather it is to claim that the bulk of their meaning and their human worth do not lend themselves to quantitative measures; for this reason, we hold them to be incommensurable, not only morally but factually.).

[50] *See* Frederick Douglass, The Nature of Slavery, *in* African-American Social and Political Thought 215, 216 (Howard Brotz ed., 1966).

[51] *See* Uniform Anatomical Gift Act, 42 U.S.C. § 10 (1987) (prohibiting the purchase or sale of corpses).

[52] *See* Elisabeth Landes & Richard Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323 (1978).

[53] For instance, we would all regard as detestable this example recounted by Lewis Hyde:

> In 1980 a New Jersey couple tried to exchange their baby for a secondhand Corvette worth $8,800. The used-car dealer (who had been tempted into the deal after the loss of his own family in a fire) later told the newspapers why he changed his mind: "My first impression was to swap the car for the kid. I knew moments later that it would be wrong—not so much wrong for me or the expense of it, but what would this baby do when he's not a baby anymore? How could this boy cope with life knowing he was traded for a car?"

Lewis Hyde, The Gift: Imagination and the Erotic Life of Property 96 (1979).

pregnancy services, as opposed to the sale of a child. In order for my conception to be valid, the purchaser in a surrogacy arrangement would be required to have some active connection to the conception of the child—through artificial insemination or some other means. It is only by virtue of this conceptive connection that we can avoid conceiving of the transaction as one in which the buyer purchases an already existing child, a transaction that is too close to the practice of chattel slavery to be socially palatable.

On the other end of the spectrum are things associated with the body to which society attaches no social importance. "Waste products" might be one way of characterizing these things—finger nail clippings, peeling skin, and detritus are all things that we not only fail to value; we affirmatively disvalue them. We want to get rid of them as trash that is appropriately discarded.

With that in mind, the following is a provisional list of things associated with the body, ranked relative to the social importance attached to each item:

Least Important ("Alienable")

"Waste products"—finger nail clippings, peeling skin, detritus
Hair
Blood[54]
Sperm[55]

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[54] *See* Radhika Rao, Property, Privacy, and the Human Body, 80 B.U. L. Rev. 359, 373 (2000)

> ([B]lood is currently deemed to be full-fledged property—a "product" whose sale constitutes "income" under the tax code, while the "business expenses" incurred by the seller in creating this "product" are deductible for the purposes of the tax laws. To the extent that blood is regarded as a commodity produced by its owner, who may place it on the market for sale to others, it serves as the paradigm example of the body as property.);

United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (finding that blood plasma is tangible property and that the proceeds of its sale are taxable to the seller). Most states have enacted laws characterizing the sale of blood as a sale of services, rather than sale of a product, in order to protect health care providers and blood banks from product liability lawsuits for breach of an implied warranty of fitness. *See* Laura Pleicones, Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices, 50 S.C. L. Rev. 463, 490-91 (1999).

[55] *See* Ann Alpers & Bernard Lo, Commodification and Commercialization in Human Embryo Research, 6 Stan. L. & Pol'y Rev. 39, 41 (1995) (finding that payment for sperm and eggs is now "widespread in American clinical infertility programs"); Christine L.

Human Eggs[56]
Reproductive Capacities (contract reproduction)?
Pornography—body *image* as sexual commodity
Prostitution—body *physical* as sexual commodity
Human organs[57]
Babies[58]
Adult human bodies

Most Important ("Inalienable")

C. Locating Reproductive Capacities

Determining where along the spectrum a woman's reproductive capacities lie depends on looking at the distinctions between things that are

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Feiler, Human Embryo Experimentation: Regulation and Relative Rights, Fordham L. Rev. 2435, 2455 (1998) ("Payment for sperm and eggs is widespread among American infertility clinics: sperm donors typically receive $50, and egg donors receive $2,000, per donation."); Julia D. Mahoney, The Market for Human Tissue, Va. L. Rev. 163, 188 (2000) ("Payments to providers of sperm traditionally generated little or no controversy.").

[56] *See* Alpers & Lo, *supra* note 55, at 41; Feiler, *supra* note 55, at 2455; Mahoney, *supra* note 55, at 186 ("Providers of eggs are called donors, but to induce 'donation' both fertility clinics and aspiring parents follow standard commercial procedures, offering financial compensation in advertisements appearing in periodicals and on websites."). Although no states prohibit the sale of sperm, two states do proscribe the sale of human eggs. *See* Fla. Stat. Ann. § 873.05 (West 1994); La. Rev. Stat. Ann. § 9:122 (West 1991); *but see* Va. Code Ann. § 32.1-289.1 (Michie 1991) (prohibiting the buying or selling of "any natural body part for any reason including, but not limited to, medical and scientific uses," but specifically excepting from the ambit of the statute sales of blood, sperm, and ova). The differential treatment is puzzling. *See* Alpers & Lo, *supra* note 55, at 41-42 (contrasting the widespread acceptance of compensating sperm providers with the controversy over payments to egg donors); Kathleen Guzman, Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth, 31 U.C. Davis L. Rev. 193, 239 (1997) ("society and the law are more hostile toward ova sale[s]" than toward the sale of sperm).

[57] Despite arguments that a market in organs (particularly kidneys) is desirable because it would alleviate a demand that now far outpaces available supply, see Richard Epstein, Organ Transplants: Is Relying on Altruism Costing Lives?, 4 Am. Enterprise Inst. 51 (1993), the National Organ Transplant Act ("NOTA"), 42 U.S.C. § 274e(a) (1991) makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." *See generally* Andrew Kimbrell, The Human Body Shop (1993).

[58] The NOTA even proscribes the sale of fetuses and their organs or tissue. *See* 42 U.S.C. § 274e(c)(1) (1999). Many states also have similar statutes prohibiting the buying and selling of fetal and embryonic tissue. *See* Rao, *supra* note 54, at 460 n.409.

and are not allowed to be sold on the market under both the bodily integrity and the healthy sexuality rationales. First, under the bodily integrity rationale, why does society prohibit the sale of human beings, babies, and human organs, but generally allows the sale of eggs, sperm, blood, and hair? Two justifications come to mind: (1) the whole/partial dichotomy; and (2) the wasting/renewable dichotomy.

The difference between the sale of adults and babies and the sale of eggs, sperm, blood, and hair is that when we sell a person, we sell the whole person; but when we sell eggs, sperm, blood, and hair, we sell things that are only part of the person, little pieces that do not rise to the ontological importance that we attach to the human being in her entirety. In other words, the whole is greater than the sum of its parts. Under this justificatory rationale, the sale of a woman's reproductive capacities would seem to be acceptable because the woman would only be selling a part of herself, and only for a period of gestation.

But the whole/partial dichotomy does not account for the prohibition on the sale of human organs, which are by definition "body parts." The distinction between organs on the one hand, and eggs, sperm, blood, and hair on the other, is that organs are a wasting asset; once gone, they cannot be replenished. The sale of organs is banned because we suspect that the individual willing to sell her organs does not really appreciate their nonrenewable character. Eggs, sperm, blood, and hair, however, are renewable or inexhaustible resources. Selling them does not work a long-term detriment to the body because the seller does not trade anything that will ever be in short supply. Under this rationale, the sale of a woman's reproductive capacities also would appear acceptable because a woman can become pregnant many times over the course of her life.

Moving on to the norm of healthy sexuality, I earlier argued that prostitution and pornography are disvalued because they stray too far from the shared and personal character of healthy sex. The buyer does not regard the prostitute as a unique individual with whom he hopes to share a "'reflexive mutual recognition' of desire by desire,"[59] but as a sexual object from whom he can extract pleasure. The same is true of pornography to an even greater degree, by virtue of the fact that the consumer does not even interact with a live human being. At first glance, the purchaser of eggs and sperm would seem to be vulnerable to the same charge. Buyers purchase eggs and sperm, and are not interested in knowing the individual who is the source of the products except to confirm that the donor possesses valued attributes that might be passed along to the child. Yet, the purchase of eggs

[59] Ruddick, *supra* note 43, at 285.

and sperm is not generally forbidden. What accounts for the apparent contradiction?

The explanation resides in the degree to which the practices express different levels of respect for the third norm: the intrinsic goodness of the sexual sphere. With the purchase of eggs or sperm the buyer is consciously forging a link to a good of the sexual sphere that is of intrinsic worth—the good of children. In contrast, the buyer of prostitution and pornography only seeks a sexual release. Therefore, the sale of reproductive services could be regarded as acceptable because the purchaser is attempting to access the same intrinsically worthy goods as the buyers of eggs and sperm. There may be other reasons to prohibit contract pregnancy, but it would be a mistake to liken the practice to prostitution and pornography under the healthy sexuality rationale.

D. Prefatory Note to the Next Section

Individual autonomy, maximization of the goods of parenthood and family, gender equality, healthy sexuality, and bodily integrity are the five value categories implicated in the debate over contract reproduction. Even as they collide, overlap, and confound one another, it is important to keep the categories separate in order to identify to which valuative impulses the different moral arguments for and against contract reproduction appeal. With that in mind, in the next section I explore the moral arguments for and against contract pregnancy, and evaluate which arguments best reconcile our divergent moral concerns.

III. THE ARGUMENTS AGAINST CONTRACT REPRODUCTION: COMMODIFICATION AND MARKET TYRANNY

In this section I look at the work of two theorists identified with the anti-commodification school of thought in the debate over contract surrogacy. Elizabeth Anderson proposes a theory of market compartmentalization which contends that the market must be sealed off entirely from women's reproductive labors because if not, it will work a corrosive effect on the goods associated with pregnancy. Margaret Radin presents a more nuanced account of the relationship between the market and reproductive labor, recognizing that we may choose to incompletely commodify this aspect of a woman's person. In addition to the anti-commodification arguments, there are separate feminist arguments against contract reproduction that focus on the practice's potential for objectifying

women. Because both Anderson and Radin embrace these arguments, I address them within the context of their theories.

A. Elizabeth Anderson and the Mean Old Market

Anderson starts from the fundamental empirical proposition that human valuative experiences are diverse. Communities rationally appreciate different goods through modes of valuation that are distinct not only in degree, but in kind. To use, respect, appreciate, love, honor, admire, revere, or tolerate a certain thing is to evaluate it in radically different ways, in a context of norms that are appropriate for it (and possibly things like it), but not appropriate for other things. Consequently, reducing valuation to one all-purpose medium of transfer (interpreting every good in terms of a dollar amount, or assigning a number of "utils") is to impoverish our valuative experience. Differing communities will express different values that accord with the "ideals" the communities embrace as being conceptions of what they aspire to be.[60]

For Anderson, valuing something on the market as a commodity means valuing it in accordance with certain norms. When we buy and sell something, we are expressing a "use" value for the thing:

> Use is a lower, impersonal, and exclusive mode of valuation. It is contrasted with higher modes of valuation, such as respect. To merely use something is to subordinate it to one's own ends, without regard for its intrinsic value.[61]

Anderson makes clear that there is place for market transactions that embody an "economic conception of freedom":

> Economic freedom consists in having both a large menu of choices in the marketplace and exclusive power to use what one buys there at will. It leaves one free from the constraints on use required to realize goods as higher, personal, or shared: it permits one to disregard or destroy the intrinsic value of what one owns; it gives one access to goods independent of one's personal characteristics or relations to others; and it leaves one free from uncontracted obligations to others, free to disregard their desires and value judgments, and free to exclude them from access to what one owns.[62]

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[60] *See* Anderson, *supra* note 9, ch. 1.

[61] *Id.* at 144.

[62] *Id.*

However, it is clear that "economic freedom" is not very admirable. Market transactions are "impersonal,"[63] "egoistic,"[64] "exclusive,"[65] "want-regarding,"[66] and "oriented to 'exit' rather than 'voice.'"[67]

Anderson defines "freedom" as having "access to a wide range of significant options through which [a person] can express her diverse valuations."[68] One might think, then, that Anderson would support an idea of valuation that falls roughly in line with liberal conceptions of autonomy—respecting individual persons as choosing agents by allowing

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[63] "The norms governing market relations are impersonal, suitable for regulating the interactions of strangers. Each party to a market transaction views his relation to the other as merely a means to the satisfaction of ends defined independent of the relationship and of the other party's ideals." *Id.* at 145.

[64]

> The market leaves its participants free to pursue their individual interests without considering others' interests. Each party to a market transaction is expected to take care of herself. Every extension of the market thus represents an extension of the domain of egoism, where each party defines and satisfies her interests independent of the other.

Id.

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> A good is exclusive if access to its benefits is limited to the purchaser . . . . A good is rival in consumption if the amount that one person consumes reduces the total amount of it available to others . . . . Shared goods, by contrast, are not rival. I do not lose, but rather enhance, my knowledge or my pleasure in a joke by conveying these goods to others.

Id.

[66]

> Commodities are exchanged without regard for the reasons people have for wanting them . . . . Since it offers no means for discriminating among the reasons people have for wanting or providing things, it cannot function as a forum for the justification of principles about the things traded on it. Thus the market provides individual freedom from the value judgments of others.

Id. at 146.

[67] "The Counterpart to the customer's freedom to exit a trading relationship is the owner's freedom to say 'take it or leave it.' The customer has no voice, no right to directly participate in the design of the product or to determine how it is marketed." *Id.*

[68] *Id.* at 140.

them to purchase most things on the market, if they choose, and allowing them to value the same things in non-market terms, if they so choose. But she emphatically does not agree because she subscribes to what Margaret Radin calls the market "domino theory." According to the domino theory, if we hope to make different valuative options available to people—so that people can "respect" a given thing, or treat it with "gift norms" instead of market norms—then we need to seal off the market from certain areas, such as family, friendship, clubs, art, science, religion, and charitable and ideal-based associations.[69] Otherwise the market will run rampant so that everyone will be forced to think in market terms in all valuative spheres. I return to the domino theory below.

Anderson uses exotic terminology to describe contract pregnancy, calling it "exploitative to the point of fraud," a "domination that den[ies] surrogate mothers their autonomy," and a practice that treats women like "hatcheries," "plumbing," "rented property," or a "surrogate uterus." Needless to say, she thinks that the market should be kept as far away as possible from women's reproductive labors and sees no problem in legislating a framework of criminal penalties to punish those who attempt to engage in contracts for reproduction.

She begins with the standard trump card argument—that contract pregnancies constitute sales of children. Her argument is that even if the birth mother is providing a "service" to the buyer, the birth mother still agrees to give up any parental rights that she might possess over the child in return for a payment, and so the practice is morally indistinguishable from baby-selling.[70] However, Anderson assumes that the birth mother has parental rights over the child in the first place. If one envisions the practice as one in which the birth mother carries the *buyer's* child from the beginning, then the characterization of rights-transfer need not apply.[71] In many cases, the buyer will also be the sperm donor. His genetic connection to the child at the point of conception will reinforce the idea that the birth mother is only carrying the buyer's child.

In response, some theorists argue that privileging the sperm donor over the birth mother imports a typical patriarchal bias that neglects the

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[69] *Id.* at 141-42.

[70] *See id.* at 171-72.

[71] *See* Joan Hollinger, From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction, 18 U. Mich. J.L. Reform 865 (1985); Note, Baby-Sitting Consideration: Surrogate Mother's Right to 'Rent Her Womb' for a Fee, 18 Gonz. L. Rev. 539, 549 (1983) (arguing that the birth mother is "provid[ing] a home in her womb for the child of another").

obvious contributions to the birth process made by the female carrier. There are two responses. First, I am not limiting my conception of contract pregnancy to situations in which the buyer is a male who donates his sperm through artificial insemination. What I am calling contract reproduction (as opposed to "baby-selling") is a practice in which the buyer has some active connection to the *conception* of the child rather than a case in which the buyer appears after the child has already been conceived. Such a connection might be established through the buyer's selection of sperm that is not his own through use of a donor clinic, or through selection of eggs that are not the birth mother's. As such, I leave open the possibility that contract reproduction could be used to benefit lesbian couples and other nontraditional families. Second, to assume that a child is being bought is to assume that the child can be "property" in the first place. If we cannot conceive of children being bought and sold, then we need not think of what is going on as baby-selling. Instead, what is at issue is not property rights but which party has the primary connective relationship with the child. Because the communally intrinsic good of the practice originates in the buyer's desire for family and parenthood, the buyer's relationship with the child can be favored over that of the birth mother's.

I may be wrong on this point. It may be that the most accurate way of looking at the transaction is as the sale of a child. But if that is the case, then as I argued above, the game is over. It hardly even seems necessary for Anderson to argue that we should not be selling *children*, but she rolls out the parade of horribles anyway ("Would it be any wonder if a child born of a surrogacy arrangement feared resale by [her contracting] parents?").[72] Some have argued that even if the transaction is characterized as the sale of a child, it is morally distinguishable from chattel slavery because the interests of the buyers in the reproductive context differ from the interests of the slave-holder—those who purchase a child seek to establish a family that inures to the best interests of the child, whereas the slave-holder is only seeking a cheap labor source.[73] But I agree with Anderson that the values of individual autonomy and bodily integrity are too powerful for this argument to work. However different from chattel slavery the practice of baby-selling might be, it is not a practice we can stomach.

There is another related argument that Anderson does not make explicit, but that we can address at this point nonetheless. The argument is

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[72] Anderson, *supra* note 9, at 172.

[73] *Cf.* Landes & Posner, *supra* note 52, at 344 (making this argument in the context of a market in adoption).

based upon what economists would call third party negative externalities. The claim is that even if the transaction does not involve the actual sale of a child, the practice may have a negative effect on the child once she learns the circumstances of her conception and delivery. The child may be traumatized in later life by the realization that her birth mother's labor was only endured because of money. This negative effect on the child would be similar to the externalities faced by adopted children. The primary distinction between the two cases would reside in the possibility that the birth parent of an adopted child never wanted the child at all, whereas the birth parent of a child borne of surrogacy consented to carry the child, but only because of a monetary incentive. If children borne of surrogacy arrangements really do experience this kind of distress, then the kinds of background safeguards that the state might consider would not seem very effective. The contracting parents could of course explain the situation to the child with enough sensitivity so that the information is couched in how much the contracting parents wanted the child, how much of a bond they feel to the child, etc. But it is unclear what kinds of emotional harms the child might experience, and it will remain unclear until contract pregnancy becomes a standard practice.

My intuition is that children borne of surrogacy arrangements are better off than adopted children because at least they were wanted before and during conception and gestation. Adopted children, by contrast, face a past wherein they were not wanted for some period while the state searched for a suitable adoptive family. Adoptive parents might respond that they wanted a child even before their adopted child was born, but their desire is different from that of contracting parents. A child borne of a surrogacy arrangement will have the comfort of knowing that she, herself, was wanted—that her contracting parents either donated or selected genetic material that is specific to her as an individual. An adopted child does not have that kind of specialized comfort. Her adoptive parents may have "wanted" her since before she was born, but because the parents took no part in her conception, it cannot actually be said that they wanted *her*. More accurately, they wanted *a* child, and the child they have has specially fulfilled that need.

Anderson also argues against contract reproduction on the basis that it treats women's labor as a commodity. Three of her arguments relate to a generalized contention that a woman's choice to enter into a surrogacy contract can never be defined as fully free and informed. Her fourth argument relates to gender equality.

First, Anderson argues that "[t]he pregnancy contract denies mothers autonomy over their bodies" because of the "potentially unlimited

control [exercised by the buyer] over the gestating mother's activities."[74] A birth mother, required by contract to obey a doctor's orders for the sake of the health of the child she carries, "could [be] forc[ed] to give up her job, travel plans, and recreational activities."[75] First, women do have an autonomy interest in their bodies, but it is too much to say that this interest must always trump every other concern, especially when we are dealing with the countervailing communally intrinsic good of children and their bodily integrity. Even the Roe court recognized that the state's interest in protecting the health and welfare of the fetus may eventually outweigh the woman's autonomy interest in controlling her body.[76] Second, it makes no more sense to say that contract reproduction denies a woman autonomy over her body than it would to say that a contract with an artist to create a sculpture denies her autonomy over her hands. The freedom to contract is part of the autonomy interest, and so if women agree to sell their reproductive labors for a fee, then allowing surrogacy contracts does not deny women their autonomy, but instead respects it.

Maybe Anderson is saying that in this particular situation—alienation of gestational services—there is a special potential for abuse of women by buyers who will be prone to try and control the birth mother's work to an excessive degree. Potential abuses, however, do not justify an *ex ante* ban on the practice. Instead, the possibility of buyer domination indicates that compensatory background conditions might be necessary. There is a potential for abuse through excessive buyer-control in many work relationships, including jobs that we think of as blue-collar or assembly-line employment. But we do not ban these jobs because of the potential for exploitation. We create background conditions, such as minimum wage and maximum hours laws,[77] to compensate for the fact that workers may be operating from positions of bargaining inequality.

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[74] Anderson, *supra* note 9, at 175-76.

[75] *Id.* at 176.

[76] *See* Roe v. Wade, 410 U.S. 113 (1973). It is particularly odd that Anderson should focus on autonomy, while still seeking to affirm women's "gestational ties to children." Anderson, *supra* note 9, at 175. This is odd because the notion of women's "gestational ties to children" flows from the bonds that many women develop with their children during pregnancy. These bonds are not the product of an autonomous decision on the part of the woman (as are the bonds that develop, for instance, when one *chooses* to befriend another individual or begin a romantic relationship with a potential partner). "Gestational ties" are instead foisted upon women as a supposedly natural aspect of their gestational experience.

[77] *See, e.g.*, The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994).

Theorists have suggested that we can do the same in the pregnancy market, by regulating it so that only those constraints on the mother that are "reasonably" targeted to insuring the health of the baby will be allowed.[78]

Anderson responds that these theorists are "unduly confident in the ability of a sexist society to determine what is 'reasonable' in terms that pay respect and consideration to a woman's interest in being more than a container for a growing fetus."[79] But this argument reaches too far. Taken to its logical conclusion, the argument would prohibit women from ever engaging in any contract—even with protective background conditions in place—because women are never capable of surmounting "sexist" social conditions. It may be true that society is currently organized along lines of gender stratification that violate the principles of individual autonomy and gender equality. But we should not conclude from this that women are *always* in bondage, *always* incapable of exercising their free choice to engage in contractual labor because any "choice" they make is an illusory act of gendered false-consciousness. Instead, women must be empowered to enter into contractual relationships with men that are premised on background conditions that grant to women the autonomy they have been denied. The alternative is hopelessness.[80]

Anderson also argues that "[t]he surrogate industry dominates the birth mother's feelings in ways that deny her autonomy in interpreting her own perspective on her evolving relationship with her child."[81] According to her, women who enter into pregnancy contracts are always in an unequal position because they lack the necessary information that would be required to make a real choice to alienate. The informational asymmetry exists because the surrogate's relationship with the fetus is not static. Anderson argues that women can never know the degree to which they will become attached to the fetus during gestation, and so can never really understand, *ex ante*, the service they are contracting to perform. This argument treats women like maternal hens given to emotional flights of fancy. Some women certainly do know the emotional attachments that develop between the woman and the fetus during pregnancy because they have been pregnant

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[78] *See* Richard Arneson, Commodification and Commercial Surrogacy, 21 Phil. & Pub. Aff. 132, 161-62 (1992).

[79] Anderson, *supra* note 9, at 176.

[80] *Cf.* Benhabib, *supra* note 36, at 21-22 (arguing that the deep, deconstructivist critique of the "self" may not benefit feminists because women will be left with "no self behind the mask" upon which to focus feminist liberation efforts).

[81] Anderson, *supra* note 9, at 177.

before. Also, it is certainly not the case that all women develop the kinds of attachments that Anderson envisions; if they did, then why the prevalence of abortion?

It is true that some women may not understand *ex ante* what they are getting themselves into. However this possibility does not justify a ban on the practice, but suggests that we need to create background conditions to take into account some women's informational asymmetries. One solution suggested by Margaret Radin is to grant the birth mother the option of reserving her parental rights after birth, but only for a specific time period to respect the placement interests of the child and the buyer. Anderson's response is that this solution would prompt pregnancy agencies to try and coerce the birth mother into giving up the child in even more devious ways than the ways in which agencies already act, and that "[i]t is impossible to regulate the multifarious ways in which brokers can subtly manipulate mothers' emotions to their own advantage."[82] But this response is pure anti-market hyperbole. There is no reason to the think that pregnancy clinics are as manipulative as Anderson assumes. Indeed, even if the clinics' sole interest is in the quality of the child, they would best serve that interest by screening out women who lack full information and ensuring a healthy gestational atmosphere. Anderson admits that "[a]dvocates of contract pregnancy claim that their failure rate is extremely low, since only five out of the first five hundred cases were legally contested by surrogate mothers."[83] But her response is that "we do not know how many surrogate mothers were browbeaten into relinquishing their child . . . ."[84] That is exactly the point; without the appropriate data we do not know. There is no reason, other than a general aversion to the market, to assume that the number is high.

Finally, Anderson argues that "[a] kind of exploitation occurs when one party to a transaction is oriented toward the exchange of gift values [involving love, gratitude, and appreciation], while the other party operates in accordance with market norms of commodity exchange . . . [and] [s]urrogate mothers often follow gift norms, while the surrogate agency follows market norms."[85] Once again, Anderson patronizes surrogate mothers, many of whom are said to be "motivated by emotional needs and

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[82] *Id.* at 179.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 180.

vulnerabilities that lead them to view their labor as a form of gift and not purely commercial exchange."[86] On the contrary, many women do not understand their relationship to contract reproduction in this manner. Many think that they are performing a worthy service for a fee, and while they might understand themselves to be doing something socially valuable, they also understand they are accepting a payment for their services.

The most trite response to Anderson's argument is that those women who want to pursue "gift norms" in the surrogacy context have a choice to refuse to enter into paid contracts for reproduction. The fact that many women choose otherwise indicates that they are pursuing market interests as well. But Anderson is really stalking bigger game. Her unstated premise is that things that are traded on the market cannot be valued in non-market terms. It is all or nothing. When the market comes in, it takes over and reconditions our every thought in terms of the impersonal, egoistic, exclusive, want-regarding, and orientation towards exit rather than voice. This is the "domino theory" of market tyranny that I introduced above.

Because the domino theory is fundamental to Anderson's argument, it requires some explanation and critique. According to Anderson, society should fear market intrusions into social spheres in which non-market values, like love or altruism, are more appropriate because of "an empirical premise, that a non-market regime cannot coexist with a market regime."[87] In explaining this premise, Margaret Radin employs a famous argument by Richard Titmuss in which Titmuss argues that we should forbid the sale of blood, because once we allow the practice, we can no longer experience the act of giving blood as an altruistic act:[88]

> According to this argument, altruism is foreclosed if both donations and sales are permitted. If sales are not allowed, donations have no market value and remain unmonetized. If sales are allowed, then even gifts have a market equivalent. My giving a pint of blood is like giving fifty dollars of my money. According to this argument, such monetization discourages giving. We are more willing to give health, perhaps life itself, to strangers than we are to give them fifty dollars of our money.[89]

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[86] *Id.*

[87] Margaret Radin, *supra* note 9, at 100.

[88] *See* Richard Titmuss, The Gift Relationship: From Human Blood to Social Policy (1971).

[89] Radin, *supra* note 9, at 96-97.

The difficulty with this idea is that it is not reflective of the way in which society actually conceives of gifting blood. Despite the fact that sales of blood are legal, people still line up to donate every time a community has a "blood-drive," and the donors experience their gift as an act of altruism that is in no sense demeaned because some people sell the thing that they freely give. As Radin notes, it is just too "simplistic to think of our social policy choice as binary; either complete commodification or complete noncommodification."[90]

On a broader level, social valuation is often ambiguous. We have plural, conflicting, and even incommensurable values that come to the fore with any difficult and interesting issue. This article has been an exercise in drawing out our competing values in the area of contract reproduction, to realize that we are a little uncomfortable because we think that women might be manipulated by the practice, that there may be gender equality concerns, and that surrogacy may not comport with our most full-blown concepts of healthy sexuality. On the other hand, we generally respect the autonomy interests of contracting partners, we want to maximize the goods of parenthood and family, and we realize that the buyer is trying to access an intrinsic good, rather than experience an illicit pleasure. We take all these things into account and we balance them, recognizing that our valuations will often reflect a compromise rather than a preoccupation with any one particular concern.[91]

What we do not do is enact a prophylactic ban on a practice just because we fear a particular harm, at least when there are countervailing values to be served. It is true that there are some things that society does not allow to be bought and sold on the market. As discussed previously, we discourage the sale of human bodies, babies, human organs, sexual intercourse, and pornography with varying levels of tenacity. But it seems unlikely that these prohibitions stem from a fear of the commodification of the "human sphere." The fact that we so despise the idea of selling these things is evidence that we would not think of them as easily commodified. Instead, the locus of the prohibitions seems to reside in the social horror ignited by anyone who acts in such a way as to disvalue the norms of bodily integrity and healthy sexuality. To argue that the market, once let in, would run rampant through our social constructions of personhood and

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[90] *Id.* at 103.

[91] Radin puts this idea in terms of the "external" and "internal" value pluralism that we experience. External value pluralism involves social policy choices that reflect conflicting values, while internal value pluralism involves an *individual's* recognition of the validity of different valuative perspectives. *See id.* at 102.

sexuality is "implicitly [to] subscrib[e] to the commodified theory of human nature that makes market understandings more powerful than their possible alternatives."[92] In a sense, we can see that the power that Anderson ascribes to the market is, itself, commodity fetishist.

The only way to understand the nature of the communal disapproval of sales of humans, babies, organs, sex, and pornography is to look at these practices in opposition to sales that are generally allowed—of eggs, sperm, blood, and hair. I have argued that the sale of gestational services is more like the sale of eggs and sperm than it is similar to the sale of prostitution and pornography because of the intrinsic goodness of the practice. Further, if understood within the norm of bodily integrity, gestational services are more like eggs, sperm, blood, and hair than organs, babies, and human bodies under the (1) whole/partial and (2) wasting/renewable dichotomies. Because it fails to account for the allowance of sales of some parts of the body—including parts which, like a woman's reproductive capacities, are both physical and sexual—the market domino theory does not succeed as a justification for banning the practice of contract reproduction.

Anderson's final argument relates to the value of gender equality. She argues that contract pregnancy

> reinforces negative stereotypes of women [through objectification] that prevent them from gaining equality with men . . . [,] reinforces the gendered division of labor that keeps women subordinate to men by confining them to domestic work . . . [and] also supports the sexist view of women as primarily valuable for providing shelter to the genetic offspring of men.[93]

There are two reasons why the gender equality argument is not dispositive in the surrogacy context. First, the norm of gender equality can only be understood in the context of examining practices relevant to the value of gender equality that are and are not permitted. It is unclear to what degree the gender equality norm has influenced the social devaluation of prostitution and pornography. If gender equality is conceived of in the manner suggested by MacKinnon and Dworkin, then the Hudnut case would not indicate very much.[94] But to the degree that we think feminist

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[92] *Id.* at 103.

[93] *Id.* at 182.

[94] *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (holding an anti-pornography ordinance, inspired by the work of MacKinnon and Dworkin, to be unconstitutional because it amounted to government viewpoint discrimination).

concerns over objectification and legitimation of domination have influenced debate in these areas, I have argued that contract reproduction does not fit within the pornography/prostitution paradigm because of its laudable motivation and respect for the intrinsic goods associated with children, family, and parenthood.

Second, there are also compelling feminist arguments that contract reproduction has the potential to liberate women from patronizing stereotypes by allowing them to control their sexuality to a degree that has previously been denied them in the private sphere. Arguments in a similar vein have been made in support of prostitution[95] and pornography,[96] but they are less effective because prostitution and pornography are sexual practices that do not offer access to the intrinsic good of children. In the context of contracts for reproduction, however, the countervailing feminist arguments have more force because there are more values, in general, that can be placed on the other side of the scale.

B. Margaret Radin and the Concept of Incomplete Commodification

Margaret Radin accepts that the domino theory of market tyranny is untenable in most contexts, and so she constructs an alternative theory of "incomplete commodification." Her ideas are very similar to what I argue for in this article, that instead of conceiving of our values as hermetically sealed and entirely separate from one another, we should think of them as overlapping, conflicting, and possibly reconciliatory. Radin writes:

> As an alternative to compartmentalization, I think we should recognize a continuum reflecting degrees of commodification that will be appropriate in a given context. An incomplete commodification—a partial market-inalienability—can sometimes reflect the conflicted state of affairs in the way we understand an interaction. And an incomplete commodification can sometimes substitute for a complete noncommodification that might accord with our ideals but cause too much harm in our nonideal world.[97]

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[95] *See, e.g.*, Frug, *supra* note 40; Gayle Rubin, The Traffic in Women: Notes on the 'Political Economy' of Sex, *in* Toward an Anthropology of Women 157 (Rayna R. Reiter ed., 1975).

[96] *See* Strossen, *supra* note 41.

[97] Radin, *supra* note 9, at 104.

As anyone who is familiar with Radin's work knows, she does not usually describe the market in particularly glowing terms.[98] She talks throughout her book, Contested Commodities, about an "ideal" world in which the market, and particularly the concept of private property, would not play such a significant role in our lives. The precise character of this "ideal" world is unclear. What can be said in favor of Radin's concept of social valuation is that, at least in many contexts, her theory recognizes that market and non-market values can coexist alongside one another in a complex web of human understanding.

The example of valuative coexistence that Radin explores is work.[99] She writes:

> Workers take money but are also at the same time givers. Money does not fully motivate them to work, nor does it exhaust the value of their activity. Work is understood not as separate from life and self, but rather as a part of the worker, and indeed constitutive of her.[100]

Many people can identify with this description of their work—teachers, performers, artists, writers, doctors and care-givers, even judges. Yet many cannot. The average assembly line blue-collar employee may feel her work, and her person, to be more commodified because she is less personally invested in the task. Radin argues that we pursue non-market values for these people by "[r]eforms such as collective bargaining, minimum-wage requirements, maximum-hour limitations, health and safety requirements, unemployment insurance, retirement benefits, prohibition of child labor, and antidiscimination requirements."[101] In this way, Radin argues, we pursue market and non-market norms within the same sphere of activity. We allow people to sell their labor, but we also respect other, non-market values by mandating background conditions that may be inefficient,

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[98] *See, e.g.*, Margaret Radin, Market Inalienability, 100 Harv. L. Rev. 1849 (1987).

[99] Radin's concept of "work" implicates the work/labor distinction envisioned by Hannah Arendt. *See* Hannah Arendt, The Human Condition (1958), especially chs. 3 & 4. As described by Peter Herbst, "work" is performed by "a workman [who] needs to love or value that at which he works and if so, he aims at good workmanship." Peter Herbst, Work, Labour, and University Education, *in* Occasions for Philosophy 72, 73 (James C. Edwards & Douglas M. MacDonald eds., 1985). Labor, on the other hand, "is toil, labour is hardship. It is the price we pay for whatever advantages the rewards of labour will buy." *Id.* at 74.

[100] Radin, *supra* note 9, at 105.

[101] *Id.* at 108.

but that respect the bodily integrity and the fundamental equality of the worker.[102]

Perhaps Radin would be lead to an "incomplete commodification" of women's labor were it not for her conviction that contract pregnancy is "baby-selling."[103] Radin recognizes that if we have a commitment to the idea that a baby cannot be property at all, then we can think of the practice as the sale of gestational services instead of the sale of a human being. But she argues that

> this interpretation is implausible because of our willingness to refer to the ordinary paid adoption as baby-selling. If we were assuming that babies cannot be property, we would more readily envision an ordinary adoption for a price not as baby-selling, but rather as sale of gestational services, or fetal growth support services, followed by the gift of an unmonetized child.[104]

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[102] The concept of incomplete commodification is an excellent explanation for much of our antidiscrimination law. Richard Epstein may be correct in arguing that an extremely expansive definition of what could count for a "Bona Fide Occupational Qualification" ("BFOQ"), to allow an employer to discriminate on the basis of gender, would be the most efficient rule because the employer has the correct incentives to make the most efficient employee hiring decisions. *See* Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 283-309 (1992). However, we still want strongly enforced antidiscrimination laws, and a very narrowly defined BFOQ exception, because market values are not the only thing with which we are concerned; we also place primary importance on the value of gender equality.

[103] Like Anderson, though it seems unnecessary, Radin rolls out the parade of horribles:

> When the baby becomes a commodity, all of her personal attributes—sex, eye color, predicted I.Q., predicted height, and the like—become commodified as well. Hence . . . there would be "superior" and "inferior" babies, with the market for the latter likened to that for "lemons." As a result, boy babies might be "worth" more than girl babies; white babies might be "worth" more than nonwhite babies. Commodifying babies leads us to conceive of potentially all personal attributes in market rhetoric, not merely those of sexuality. Moreover to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and this might well create in those people a commodified self-conception.

Radin, *supra* note 9, at 137-38.

[104] *Id.* at 141.

Radin's argument is a *non sequitur*. It hangs on her contention that we "refer" to the practice of paid adoption as "baby-selling," therefore indicating that we really believe that a child can be property to be sold. However, we prohibit the practice of paid adoption precisely because we *do not think* that people should treat children as property to be sold. The fact that we "refer" to paid adoption as "baby-selling" is not evidence that we really conceive of the child as property—we use the term "baby-selling" pejoratively, to condemn what we view as an unconscionable and inconceivable act. Radin confuses an ironic and pejorative use of the term for our actual understanding.

If contract pregnancy is not regarded as "baby-selling," Radin considers the "most credible fear" to be a gender equality concern, "that all women's personal attributes will be commodified."[105] I have addressed this argument above, and have concluded that it is not dispositive.

Because of the third party effects on children—whom Radin views as directly commodified by the practice—and the gender equality concern, Radin argues that market-inalienability is the best practice for now. However, she also states that if we are in part persuaded by "the personal freedom of would-be buyers who yearn for children,"[106] then a regime in which contracts are legal, but unenforceable if the birth mother decides to keep the child, should be considered. Radin writes:

> [W]e would need to decide upon a reasonable time limit during which she must make up her mind, for it would be injurious to the child if her life were in limbo for very long. The limitation could be established analogously with statutory waiting periods for adoption to become final after birth.[107]

This is a reasonable solution that also addresses the informational concerns that troubled Anderson. Along with regulation of the contract terms to prohibit excessive buyer-control of the birth mother—by allowing only those prescriptions that are also "reasonably" required for the health of the child[108]—Radin's fallback position appears to be an excellent reconciliation of values in the arena of contract reproduction.

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[105] *Id.* at 145.

[106] *Id.*

[107] *Id.* at 146-47.

[108] The "reasonably" required standard could encompass an invalidation of any prohibition-on-abortion clause in the contract.

IV. THE ARGUMENTS FOR CONTRACT REPRODUCTION: EFFICIENCY, AUTONOMY, AND FEMINIST LIBERATION

I shift gears now to the other side of the debate to look at some theorists who argue for full enforcement of contracts for reproduction. In this section I look first at Richard Posner's utilitarian argument for contract pregnancy, and then at Richard Epstein's argument from autonomy. Finally, I briefly examine Carmel Shalev's feminist liberation argument.

A. Richard Posner and the Primacy of the Market

> [The Baby 'M' court found that] 'there are, in short, values that society deems more important than granting to wealth what it can buy, be it labor, love, or life.' But how are those values served by prohibiting surrogacy?[109]

Posner's Problematics may be a step in the right direction, but in his work on the issue of contract pregnancy, Posner fails to consider the importance of values that are not explicitly market-related. In The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood, Posner argues that pregnancy contracts should be enforceable against the birth mother by means of specific performance. In other words, Posner would force the birth mother to hand over the baby. He argues:

> The mutual benefits [of the contract] depend critically on the contract's being enforceable. If it is unenforceable, the father and his wife will have no assurance that they will actually obtain a baby as a result of the contract even if the surrogate becomes pregnant. For if the surrogate, having become pregnant and given birth, changes her mind about giving up the baby, the father and wife will have lost almost a year in their quest for a baby (the period necessary for the surrogate to become pregnant plus the period of gestation); they will also be intensely disappointed.[110]

Posner's overarching claim is a standard Coasean[111] argument that pregnancy contracts "would not be made unless the parties to them believed

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[109] Richard Posner, The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood, 5 J. Contemp. Health L. & Pol'y 21, 30 (1989).

[110] *Id.* at 23.

[111] *See* Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).

that surrogacy would be mutually beneficial."[112] The Coasean argument trumpets two values: individual autonomy and wealth maximization. Individual autonomy is respected by allowing people to engage in contracts of their choice. With regard to wealth maximization, the argument posits that if society allows people to contract freely, their transactional choices will lead to an ever-expanding pool of social resources. In the case of contract surrogacy, free choice will result in more children being produced, and thus more needy people will have their parenting desires satisfied. Posner addresses three arguments against contract reproduction.

The first involves the third party externalities argument I noted earlier. It proceeds in two parts. There is a possibility that the respect owed to the bodily integrity of the child may suffer when the child discovers that "his natural mother gave him up for money."[113] Posner's response is that "this knowledge will surely be less wrenching than knowledge that one's mother had sold one (as in baby selling),"[114] and in this respect, I think Posner is correct. If the child conceives of the practice as a sale of the birth mother's services, then this will certainly be less harmful than if the child believes that she was, herself, sold. A relevant question that I earlier noted is whether the child borne of a surrogacy arrangement would experience more or less distress than the child who was adopted, and I have tentatively concluded that the former is better off. The child borne of a surrogacy arrangement can be comforted by the fact that she, as an identified individual, was wanted from conception; the adopted child cannot take such comfort.

The second third party effect presents a more serious concern. There is also the disutility suffered by "those unfortunate children who are available for adoption but whom very few people want to adopt."[115] Were it not for the availability of contract reproduction, it is possible that the buyer would turn to the adoption market and provide a home for one of those children who are considered less desirable, such as minority, handicapped, and older children. Posner's response, that we should not impose a "heavy tax on the infertile to correct a social problem . . . that is emphatically not of their creation,"[116] is not wholly adequate. The value at stake is that of equality. No child should be made to feel that she is less

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[112] Posner, *supra* note 109, at 22.

[113] *Id.* at 24.

[114] *Id.*

[115] *Id.*

[116] *Id.*

worthy than any other child, but comparative judgments are inevitable when buyers are allowed access to the children they most prefer. The equality value must be balanced against three others. The first is the autonomy interest of the buyer and birth mother to engage in the transaction. The second and third are more ambiguous. I have argued that we want to maximize the good of parenthood, and that there is an intrinsic good in children and family associated with our norm of healthy sexuality. But theorists who oppose contract pregnancy could argue that these interests can be adequately served by the adoption market because there are enough children to go around if buyers are willing to accept minority, handicapped, and older children.

This anti-surrogacy argument might constitute a trump were it not for the possibility that part of the intrinsic good of parenthood is a fundamental connection to the child at the point of *conception*, and not *ex post*. I have argued that this conceptive connection might be established either by the buyer's sperm donation, or, for lesbian couples and other nontraditional families, by taking an active part in the selection of the sperm and egg donors *ex ante*. In other words, there may be some good—within the good of parenthood—in the establishment of a *genetic*, or in the case of lesbian couples and nontraditional families, quasi-genetic tie between the buyer and the child. If so, then the ability of contracting parents to establish this tie would weigh in favor of allowing contracts for reproduction.

This issue pits some of our most deeply held values against one another. However, in seeking a reconciliation we can notice that even though we may be a little uncomfortable with Posner's language (a "tax" on the infertile couple), he has a point. Such broad-ranging issues as racial inequality and dehumanization of handicapped and older children cannot be adequately addressed within the limited context of contract pregnancy. Also, allowing contracts for reproduction is already a middle way because such contracts do not *foreclose* resort to the adoption market. They make the option of adoption less attractive for those buyers who value a genetic tie to their children, but the fact that people will still be able to adopt means that those children considered less desirable may not be that much worse off. Finally, the impact surrogacy might have on the number of adoptions could be mitigated by enacting a regime in which surrogacy contracts were legal but unenforceable for a set period of time after delivery, a proposal I have already discussed elsewhere. The surrogacy option would then present a lower expected utility for buyers because of the risk of nonperformance, which may prompt some buyers back into the adoption market.

Posner also addresses Anderson's concerns over informational asymmetries. Anderson argues that women can never be expected to know the gravity of the bond they will develop with the fetus *ex ante*. Posner's response is that "there is no persuasive evidence or convincing reason to believe that, on average, women who agree to become surrogate mothers underestimate the distress they will feel at having to give up the baby."[117] This may or may not be true "on average," but Anderson is certainly right to conclude that there do exist cases in which women realize too late how emotionally invested they have become. Because of our deep aversion to a vision of autonomy that seems illusory, and because contract reproduction presents a context in which it may be impossible for some women to know *ex ante* the emotional toll that the experience will take on them, Posner does not overcome the argument against full enforceability.

Posner next addresses the commodification-related arguments. "I am skeptical," he writes. "People are what they are, and what they are is the result of millions of years of evolution rather than of such minor cultural details as the precise scope of the market principle in a particular society."[118] I am not certain what to make of this proposition. One senses that Posner may have some difficulty regarding commodification theory as a serious contribution to our public debate. He follows up by arguing that "allowing the enforcement of contracts of surrogate motherhood isn't going to have any significant effect on the underlying norms and attitudes in our society,"[119] but he provides little support for this statement. Contrary to Posner's position, full enforcement of surrogacy contracts would appear to neglect the underlying norm of gender equality, and our concerns regarding bargaining power assymetries implicated by our qualified concept of autonomy. For this reason, he is certainly wrong that full enforcement would have no "significant effect on the underlying norms and attitudes in our society."[120]

The strength of Posner's work in this area lies in his effective advocacy for the rights of those who want to have children, but who are, because of biology or life circumstance, unable to do so. The deficit in Posner's argument is his neglect of the birth mother—he respects her autonomy, but fails to give due weight to the fact that she may not always

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[117] *Id.* at 25.

[118] *Id.* at 26-27.

[119] *Id.* at 26.

[120] *Id.*

know what she is getting herself into when she agrees to carry the child of another for a fee. Because of our deep aversion to enforcing a contract made within a context of unequal bargaining power—the inequality stemming from the possibility that the birth mother is not fully aware, *ex ante*, of the costs of her choice—Posner does not overcome the arguments against full enforcement.

B. The Argument from Autonomy

Richard Epstein operates within the same Law and Economics framework as Posner in addressing the question of contract pregnancy, but his work has a slightly different flavor. Epstein emphasizes the priority of individual autonomy in making social choices. He writes:

> The tradition of subjective value states that each person has and may act on his own conception of the good, and may surrender that which is of less value to him in exchange for something that he values even more. There is no external ruler that will tell individuals whether they have given too much for the things they have acquired in exchange. Where both parties have engaged voluntarily in a transaction, there is the prospect of mutual gain, which is what makes people so eager to seek out contractual opportunities in the first place.[121]

He fuses this strong autonomy claim with an efficiency argument, that if people are allowed to contract freely they generally will make the most socially efficient choices. Proceeding from this premise, Epstein argues that pregnancy contracts should be enforceable "come hell or high water."[122]

To Anderson's argument about possible informational asymmetries that may only express themselves after the birth mother has begun the gestation process, Epstein argues that the free market has within it the proper safeguards. He believes that the buyer will have the proper incentives to make the investment necessary to select a birth mother who will not become emotionally invested in the fetus. This is because the buyer's fundamental interest is to select a birth mother who "do[es] not send the arrangement off the rails."[123] That may be true, but even granting

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[121] Richard Epstein, Surrogacy: The Case for Full Contractual Enforcement, 81 Va. L. Rev. 2305, 2313 (1995).

[122] *Id.* at 2339.

[123]

that the buyer has the proper incentives, it would be impossible for the buyer to invest enough in information to protect from every emotional contingency. There certainly will be women who realize too late that they have formed an insoluble bond with the child they carry. To take account of this possibility, I have argued that we should allow contracts for reproduction but hold them unenforceable for a set period of time after delivery. Far from frustrating buyer incentives, this regime would have the further virtue of encouraging buyers to be *that much more careful*. If they know *ex ante* that specific performance is optional, then buyers will be even more attentive to selecting a birth mother who is likely to know what she is getting herself into.

I think that Anderson's concerns about informational asymmetries, on their own, justify a regime of limited unenforceability. But Epstein also describes and critiques a further argument related to the inequality of bargaining power qualification of the principle of autonomy. This argument does not focus specifically on the informational concerns expressed by Anderson, but on the general economic condition of the seller. The argument's concern is for persons who enter into what Michael Walzer has called "desperate exchanges," or "trades of last resort"—exchanges that are compelled not by "choice," but by the seller's condition of brutal necessity. We are uncomfortable with the idea of poor people, in general, selling their reproductive capacities in order to put food on the table. I think that this concern supports a conclusion of limited unenforceability, but the obvious rejoinder is that I have contradicted myself. Under the communally intrinsic value rubric of healthy sexuality and bodily integrity, I have argued that gestational capacities are more like eggs, sperm, blood, and hair, than they are like pornography, prostitution, human organs, babies, and adult human bodies. And we allow poor people to sell their eggs, sperm, blood, and hair regardless of social condition.

> The acquiring couple therefore have [sic] an intimate interest in the condition and conduct of the surrogate mother, which leads to the most important maxim about partnerships and other forms of relational contracts. The most important decision is with whom the contract is made: specific terms are critical but they occupy a subordinate role insofar as they are designed to see that the midcourse regrets do not send the arrangement off the trails. That focus on selection, moreover, helps protect against diffuse concerns of exploitation and advantage that could lead to fraud and other forms of sharp practice. The last thing that an acquiring couple wants is a surrogate whose misbehavior could harm the child. Their interest is in choosing a woman able to fend for herself. It is not in their interest to find a woman whom they can exploit.

Id. at 2317.

Therefore, why are we especially concerned about poor women selling their reproductive capacities?

Maybe the answer is that while we allow it, we are not that comfortable with poor people selling their eggs, sperm, blood, and hair. Even though these things are distinguishable from their counterparts under the whole/partial, wasting/renewable, and illicit/healthy dichotomies, they are still implicated by our norms of bodily integrity and healthy sexuality to such a degree that we become concerned when we think poor people are being forced to sell these things because they are hungry, have to pay rent, or purchase needed medication. Perhaps there is something that I have not captured in my valuative range from adult human bodies to waste products. Poor women should probably be enabled to engage in sales of gestational services on the same level as every other woman because to prohibit them, but not others, would put poor people in what Margaret Radin calls the "double bind"—we prohibit the sale because we are uncomfortable with the desperate exchange, but we do nothing to actually better the woman's economic condition because we have prohibited the sale.[124] Epstein makes this same argument from a freedom of choice (autonomy of the poor person) rationale. But our deep repulsion to "trades of last resort" supports our intuition to find a middle way, which I think is best expressed in terms of limited unenforceability that puts the option in the hands of birth mother.

Epstein argues that unenforceability is undesirable because "[f]irst, women who were once committed to letting go of the child at birth have the luxury of second thoughts. Second, women who are not quite sure what they will do at childbirth will be more willing to participate in surrogacy transactions."[125] These arguments are either overblown or they misunderstand the issues. Giving the option to the birth mother is not about giving her the "luxury of second thoughts," but about recognizing that gestation is a complex and emotional process that often fosters ties to the fetus that may overcome the birth mother's *ex ante* determination to surrender the child. Second, it is unlikely that women will enter into surrogacy contracts without giving the matter proper consideration. It is not as though a regime of limited unenforceability is going to prompt a rush to the surrogacy clinic. All a limited unenforceability provision would do is recognize our concern for the woman who realizes too late that she is insolubly bonded with the child, and provide increased incentives for buyers to select a birth mother who is likely to go through with the transaction. Limited unenforceability would frustrate the goals of the buyer

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[124] *See* Radin, *supra* note 9, ch. 9.

[125] Epstein, *supra* note 121, at 2339.

to some degree because of the risk of nonperformance; but we recognize the interests of the buyer by allowing the contracts to be legal at all.

C. Tough Love: A Feminist Argument for Full Enforceability

I turn finally to a brief look at Carmel Shalev's feminist argument for full enforceability of contracts for reproduction. In Birth Power, Shalev argues that the only way for women to escape the double standard in which society has allowed men more sexual freedom than women is to allow women to renounce the confines of their "biological destiny"[126] and take control of their sexuality through contract. Women should be allowed to use their sexuality in ways in which they choose, rather than having their sex defined by a misogynistic and puritanical moral culture. By addressing issues of reproduction within the structure of legal contract, women can become empowered to face men on equal terms, and define the nature and limits of their participation. Further, unenforceability would be one more expression of the double standard that holds men to their promises but not women. Such a limitation "implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive capacity."[127]

When juxtaposed against the MacKinnon/Dworkin arguments from objectification made by Anderson and Radin, Shalev's argument evokes the central tension in feminism today—the debate between assimilation versus annihilation. Some feminists argue that the goal of liberation can only be accomplished from within American society by both embracing a traditional notion of human autonomy, such as autonomy in the market, and also empowering women to participate within that notion on terms of formal equality with men. Others argue that the whole system is defunct, built upon patriarchal power and domination, and that any "freedom" women gain from within is likely to be a transparent joke. On this view, allowing women to sell their reproductive capacities both expresses and legitimates women's status as property that can be purchased and controlled. The assimilation versus annihilation debate also implicates the debate between those who argue for formal equality[128] and the proponents

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[126] Shalev suggests that the concept of gestational bonding "confines women to a biological destiny and impedes their individuation as autonomous persons." Carmel Shalev, Birth Power 20 (1989).

[127] *Id.* at 11.

[128] *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that state disability program that excluded pregnancy services from its coverage was not discriminatory under the Equal Protection Clause because the same rules applied to all men and all women).

of the antisubordination principle.[129] Is formal equality—treating men and women "the same"—the answer? Or does equality involve an anticaste principle that would necessitate a redistribution of political and economic power that would, at least in the short term, treat men and women differently?

It would be impossible for me to give any sustained treatment to these issues within the confines of this article. However, I have argued that sales of gestational services do not rise to the level of objectification that is engendered by such practices as prostitution and pornography. Unlike those practices, sales of a woman's reproductive capacities implicate the goods of children, parenthood, and family. Acceptance of this argument does not imply agreement with the idea that sales of gestational services are, necessarily, liberating for women in an affirmative sense. However, to the extent that contract reproduction respects women's autonomy, it would seem that allowing the practice would satisfy those feminists, like Shalev, who are associated with the assimilation wing of the debate, while not contradicting the aims of the MacKinnon/Dworkin wing *as much as* allowing such practices as prostitution and pornography. On the other hand, a regime of limited unenforceability would recognize the concerns of those who feel that the practice objectifies women by allowing those who individually feel objectified by their surrogacy experience to opt out after delivery.

I realize that a regime of legality with limited unenforceability is not going be fully satisfactory to either wing of the feminist debate. For feminists concerned about objectification, the problem of feminist liberation is really one big collective action problem. If we think of gender equality as a "public good," no single woman has the proper incentives to pursue radical change by opting out of the patriarchal power structure because she will suffer the full costs of her decision but will realize only a very limited benefit.[130] In the context of contract pregnancy, for example, she will have to suffer the costs of foregoing the sale but will receive no

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[129] *See, e.g.*, MacKinnon, *supra* note 35, at 42 (questioning why

> [i]f differentiation is discrimination, affirmative action, and any legal change in social inequality, is discrimination—but the existing social differentiations which constitute the inequality are not? This is only to say that, in the view that equates differentiation with discrimination, changing an unequal status quo is discrimination, but allowing it to exist is not.).

[130] This is the classic "free-rider" problem. *See generally* Mancur Olson, The Logic of Collective Action (1965).

commensurate benefit because other women will choose to engage in the practice, thereby negating the value of her individual boycott. As long as there are women willing to sell their gestational services, no one woman's decision not to alienate will make any difference. Under this reasoning, allowing women to individually opt out of a sale of gestational services *ex post* does not really address the broader collective problem.

On the other side, Shalev argues that limited unenforceability treats women as flighty and unaccountable. The fact that we allow the practice at all will not satisfy her concerns because the contract we allow is not a real contract—it lacks the hardness of set terms that cannot be breached without fear of damages or an order for specific performance.

Without suggesting that these difficulties are overcome, at least a regime of legality with limited unenforceability offers both the possibility of liberation through exchange, and a wider scope of choice for women who participate in the practice and later discover that they want to opt out. The solution is not perfect. But at least it gives everybody something, as opposed to giving somebody nothing. As a pragmatist, I believe that is really all that we can do.

V. CONCLUSION

In this article, I have discussed what I believe to be the values most implicated by the debate over contract reproduction and argued that the best way to reconcile those values is, as always, a middle way—neither fetishizing nor ignoring any one value that is important in the context. My analysis and conclusions may be lacking. It is entirely possible, even likely, that I have discounted other important values that would affect the overall conclusion, or that I have not given certain values the weight they deserve. If that is the case, then my conclusions will have to be recalibrated to incorporate a fuller understanding of the topic.[131]

I think that my answer is similar to one that I might receive from the "man on the street." If I asked him, "What do you think about contract

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[131] As a pragmatist, I am not particularly attached to my conclusions. It is only the method that is of especial importance.

> From a pragmatist point of view, to say that what is rational for us now to believe may not be *true*, is simply to say that somebody may come up with a better idea. It is to say that there is always room for improved belief, since new evidence, or new hypotheses, or a whole new vocabulary, may come along.

Rorty, *supra* note 18, at 23.

reproduction?," he would probably respond, "I don't think that we should prohibit it in all circumstances, but I also think that we should be very careful about allowing it." His answer is largely my answer. There are plural, conflicting, and incommensurable values that come to the fore in the debate over contract reproduction and the only real mistake that we can make, from a pragmatist point of view, is to go overboard in any one direction. It would be a mistake to absolutely forbid pregnancy contracts, just as it would be a mistake to conclude that such contracts should be enforced "come hell or high water." The trick is in reconciling the competing values through some middle way that exhibits due appreciation for each valuative contribution but does not get carried away in any one direction.

That is what I think I have done—described a middle way that will fail to make everyone happy but will not leave any person feeling ignored either. I have tried to structure my argument to accommodate those liberal American values that I see as being most implicated by the debate over contract reproduction. But the difficulty is in the details, and so I am certain that there can be many improvements on these ideas. And I am thankful for those improvements too; after all, the goal of the inquisitive enterprise is ultimately to keep the conversation going, and to incorporate new arguments and new understandings in the ongoing debate over what it means to be a liberal American who prizes liberal values and American pragmatism. If I am correct, then there is a way out of the surrogacy dilemma. And it is a way that cherishes women, and the infertile, and the children who will be born. Certainly that is a better alternative than focusing on the rights of any one group, or failing to take account of the diversity of values that must sustain the legitimacy and rightness of any social choice.