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Prostitution and Baby-Selling: Contested Commodification and Women's Capacities

Payment in exchange for sexual intercourse and payment in exchange for relinquishing a child for adoption are nodal cases of contested commodification. They express the double bind for women especially clearly. They implicate issues of race and class. They show how our culture stubbornly insists on conceiving of the person as a moral agent, as a subject distinct from a world of objects, yet how at the same time our culture persistently commodifies and objectifies.

Social policy decisions about these practices, which have become focal mirrors for the crosscurrents of our culture, cannot help but symbolize how we view ourselves now, and how we envision our future. In pursuit of our vision of the future we might see certain changes as desirable for our culture as a whole. But policy decisions are made piecemeal, and our vision of what the whole is, and should be, keeps changing as those piecemeal decisions are made. It is in this context that we try to make incremental changes for the better, as we see the better. Our vision of the whole is always implicated.

In fact any decision, including the decision to avoid decision (the decision to privilege the status quo), gets made in the context of our

entire situation, whether or not we explicitly recognize its larger context. As a pragmatist, I can't claim that explicit recognition of larger cultural context is always useful or important, regardless of the practice to be evaluated. It depends on the practice and the circumstances. But explicit recognition of the symbolic meaning of the practices targeted for discussion here, in light of the surrounding cultural institutions and practices, is indeed useful and important. As we decide what to do about them, for now (for we may well need to decide again, later, in different circumstances), we should try explicitly to make whatever sense we can of the cultural/conceptual cross-currents pervading commodification and the general issue of objectification.

Prostitution

Start with the traditional ideal of sexual interaction as equal non-monetized sharing. In an ideal theory of justice, we might hold that the "good" commodified sexuality ought not to exist: that sexual activity should be market-inalienable. But considerations of nonideal justice might tell us that prohibiting sale of sexual services in order to preserve sexuality as nonmonetized sharing is not justified under current circumstances. One reason to say this is that sex is already commodified. Legalized prostitution has existed in many places, and there has always been a large black market of which everyone is well aware. Those who purchase prostitutes' services are often not prosecuted, at least in traditional male-female prostitution.¹ This practice tolerates commodification of sexuality, at least by the purchasers.²

Moreover, in our nonideal world, market-inalienability—especially if enforced through criminalization of sales—may cause harm to ideals of personhood instead of maintaining and fostering them, primarily because it exacerbates the double bind. Poor women who believe that they must sell their sexual services in order to survive are subject to moral opprobrium, disease, arrest, and violence. The ideal of sexual sharing is related to identity and contextuality, but the identity of those who sell is undermined by criminalization and powerlessness, and their contextuality, their ability to develop and maintain relationships, is stunted in these circumstances.

Despite the double bind and the harms of the black market to prostitutes, fear of a domino effect—the discourse contagion of mar-

ket rhetoric—might be thought to warrant market-inalienability as an effort to ward off conceiving of all sexuality as commodified. To this suggestion many people would protest that the known availability of commodified sex does not by itself render noncommodified sexual interactions impossible or even more difficult. They would say that the prevalence of ideals of interpersonal sexual sharing despite the widespread association of sex and money,³ is proof that the domino effect in rhetoric is not to be feared.

But we must evaluate the seriousness of the risk if commodification proceeds. What if sex were fully and openly commodified? Suppose newspapers, radio, TV, and billboards advertised sexual services as imaginatively and vividly as they advertise computer services, health clubs, or soft drinks. Suppose the sexual partner of your choice could be ordered through a catalog, or through a large brokerage firm that has an 800 number, or at a trade show, or in a local showroom. Suppose the business of recruiting suppliers of sexual services was carried on in the same way as corporate headhunting or training of word-processing operators.

If sex were openly commodified in this way, its commodification would be reflected in everyone's discourse about sex, and in particular about women's sexuality. New terms would emerge for particular gradations of sexual market value. New discussions would be heard of particular abilities or qualities in terms of their market value. With this change in discourse, when it became pervasive enough, would come a change in everyone's experience, because experience is discourse dependent. The open market might render an understanding of women (and perhaps everyone) in terms of sexual dollar value impossible to avoid. It might make the ideal of nonmonetized sharing impossible. Thus, the argument for noncommodification of sexuality based on the domino effect, in its strongest form, is that we do not wish to unleash market forces onto the shaping of our discourse regarding sexuality and hence onto our very conception of sexuality and our sexual feelings.

This domino argument assumes that nonmonetized equal-sharing relationships are the norm or are at least attainable. That assumption is now contested. Some feminists, notably Catharine MacKinnon, argue that male-female sexual relationships that actually instantiate the ideal of equal sharing are under current social circumstances rare or even impossible.⁴ According to this view, moreover, women are

oppressed by this ideal because they try to understand their relationships with men in light of it, and conceal from themselves the truth about their own condition. They try to understand what they are doing as giving, as equal sharing, while their sexuality is actually being taken from them. If we believe that women are deceived (and deceiving themselves) in this way, attempted noncommodification in the name of the ideal may be futile or even counterproductive. Noncommodification under current circumstances is part of the social structure that perpetuates false consciousness about the current role of the ideal.

Some feminists also argue that many male-female sexual relationships are (unequal) economic bargains, not a context in which equal sharing occurs.⁵ If that is true, attempted noncommodification of sexuality means that prostitutes are being singled out for punishment for something pervasive in women's condition. They are being singled out because their class or race forecloses more socially accepted forms of sexual bargaining. This situation returns us to the double bind.

Perhaps the best way to characterize the present situation is to say that women's sexuality is incompletely commodified, perhaps both in the sense that it is a contested concept and in the sense that its meaning is internally plural. Many sexual relationships may have both market and nonmarket aspects: relationships may be entered into and sustained partly for economic reasons and partly for the interpersonal sharing that is part of our ideal of human flourishing. Under current circumstances the ideal misleads us into thinking that unequal relationships are really equal. Yet because the ideal of equal sharing is part of a conception of human personhood to which we remain deeply committed, it seems that the way out of such ideological bondage is not to abandon the ideal, but rather to pursue it in ways that are not harmful under these nonideal circumstances. Market-inalienability (attempted noncommodification) seems harmful as it is practiced in our world. Yet complete commodification, if any credence is given to the feared domino effect, may foreclose our conception of sexuality entirely.

So perhaps the best policy solution, for now, is a regime of regulation expressing incomplete commodification. The issue becomes how to structure an incomplete commodification that takes account of our nonideal world yet does not foreclose progress to a better world of more nearly equal power (and less susceptibility to the domino effect

of market rhetoric). In my opinion, we should now decriminalize the sale of sexual services. We should not subject poor women to the degradation and danger of the black market nor force them into other methods of earning money that seem to them less desirable than selling their bodies. At the same time, in order to check the domino effect, I believe we should prohibit the free-market entrepreneurship that would otherwise accompany decriminalization and could operate to create an organized market in sexual services. Such regulation would include, for example, such deviations from *laissez-faire* as banning brokerage (pimping) and worker training (recruitment).

In structuring a regulatory regime expressing incomplete commodification for sexual activity, an important issue is whether contracts to sell sexual services should be enforced. The usual reason given for precluding specific performance of personal service agreements is that forcing performance smacks of slavery. If sexual service contracts were to be specifically performed, persons would be forced to yield their bodily integrity and freedom. This is commodification of the person. Suppose, then, that we decide to preclude specific performance but allow a damage remedy. Enforceable contracts might make the "goods" command higher prices. Prostitutes might welcome such an arrangement; it might be on the procommodification side of the double bind. The other side is that having to pay damages for deciding not to engage in sex with someone seems very harmful to the ideal of sexuality as integral to personhood. Moreover, it seems that determining the amount of damages due is tantamount to complete commodification. Granting a damage remedy requires an official entity to place a dollar value on the "goods"; commodification is thus officially imposed.

In this context both specific performance and damages seem to go all the way to complete commodification. Thus, we should continue to make prostitution contracts unenforceable, denying the most important factor of commodification—enforceable free contract. We could either provide for restitution if the woman reneges or let losses lie. If we let losses lie, we preclude any increased domino effect that official governmental (court) pronouncements about commodified sexuality might cause. But letting losses lie would also allow men to take and not pay when women are ignorant or powerless enough to fail to collect in advance. Similar two-edged results are reached by the doctrine of nonenforcement of illegal contracts, under which con-

tracts to render sexual services are currently unenforceable because of the illegality of prostitution.

An incomplete commodification regime for prostitution might also include banning advertising. Trying to keep commodification of sexuality out of our discourse by banning advertising does have the symbolic effect of failing to legitimate the sales we allow, and hence it may fail to alleviate significantly the social disapproval suffered by those who sell sexual services. It also adds "information costs" to their "product," and thus fails to yield them as great a "return" as would the full-blown market. But these nonideal effects must be borne if we really accept that extensive permeation of our discourse by commodification-talk would alter sexuality in a way that we are unwilling to countenance.

Baby-Selling

Just as some women wish to sell their sexual services, some wish to sell their children. Is a regulatory regime expressing incomplete commodification also now warranted for baby-selling? In my opinion, the answer is no, but the issues are very complex.

Let me start with the general issue of selling babies to would-be parents. If our regime were to allow would-be parents to approach a woman of their choice and commission a pregnancy for a fee, with the woman releasing the baby to them at birth, we would no doubt characterize this regime as one in which babies are being produced for sale. I refer to this scenario as "commissioned adoption." A regime allowing commissioned adoption would provide for a full-blown market in babies. The supply of newborn babies for sale would be related primarily to the demand of the would-be parents who wanted to buy them; that is, the quantity of children supplied would depend on the prices would-be parents would pay and how many would be willing to buy children at a given offering price.

If our regime were to allow would-be parents to approach a woman who is already pregnant, or who has already given birth, and for a fee have her release the baby to them, we would also characterize this regime as one in which babies are sold, though not one in which babies are being produced for sale. I refer to this scenario as "paid adoption of 'unwanted' children." This regime would not be a full-blown market in babies, because the supply of newborn babies for sale

would not be related primarily to the demand of the would-be parents who wanted to buy them. Instead, supply would probably be related primarily to access to birth control information and education, and to cultural characteristics having to do with sexuality and permissibility of abortion. Of course, this regime could approach a black-market version of a commissioned adoption regime, because some women might conceive babies without any prearranged purchaser but hoping to put them up for sale.

As far as I know, no jurisdiction permits paid adoption of “unwanted” children; it is universally prohibited as baby-selling. (Many jurisdictions permit the birth mother to be paid expenses, and this arrangement creates a gray market.) A fortiori, no jurisdiction permits commissioned adoption. Our status quo “official” social regime—and the “official” regime is the one that has the most symbolic cultural significance—bans the exchange of children for money. That cultural significance makes troubling even the market rhetoric I have been using in these paragraphs.

Like relationships of sexual sharing, parent-child relationships are closely connected with personhood, particularly with personal identity and contextuality, and the interest of would-be parents is a strong one. Moreover, poor women caught in the double bind raise the issue of freedom: they may wish to sell a baby on the black market, as they may wish to sell sexual services, perhaps to try to provide adequately for other children or family members.⁶ But the double bind is not the only problem of freedom implicated in baby-selling. Under a market regime, prostitutes may be choosing to sell their sexuality, but babies are not choosing for themselves that under current nonideal circumstances they are better off as commodities. If we permit babies to be sold, we commodify not only the mother’s (and father’s) babymaking capacities—which might be analogous to commodifying sexuality—but also the baby herself.

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, as Gary Becker says, there would be “superior” and “inferior” babies, with the market for the latter likened to that for “lemons.”⁷ As a result, boy babies might be “worth” more than girl babies; white babies might be “worth” more than nonwhite babies.⁸ 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.

Hence, the domino theory has a deep intuitive appeal when we think about the sale of babies. Yet perhaps we are being too pessimistic about our "nature" as market actors if we succumb to it. Maybe the fact that we do not now value babies in monetary terms suggests that we would not do so even if our official regime allowed babies to be sold. Maybe. Perhaps babies could be incompletely commodified, valued by the participants in the interaction in a nonmarket way, even though money changed hands. Perhaps. Although this outcome is theoretically possible (see Chapters 6 and 7), it seems risky to commit ourselves to this optimistic view in our nonideal world.

If a free-market baby industry were to come into being, with all of its accompanying paraphernalia, how could any of us, even those who did not produce infants for sale, avoid measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value? This measurement makes our discourse about ourselves (when we are children) and about our children (when we are parents) like our discourse about cars.⁹

Perhaps we should separately evaluate the risk in the cases of selling "unwanted" babies and selling babies commissioned for adoption or otherwise "produced" for sale. The risk of complete commodification may be greater if we officially sanction bringing babies into the world for purposes of sale than if we sanction accepting money once they are already born. Such a distinction would probably be quite difficult to enforce, however, because nothing prevents a would-be seller from declaring any child to be "unwanted." Permitting the sale of any babies (any kind of paid adoption) is perhaps tantamount to permitting the production of them for sale (commissioned adoption).

I suspect that an intuitive grasp of the injury to personhood involved in commodification of human beings is the reason many people lump baby-selling together with slavery.¹⁰ But this intuition can be misleading. Selling a baby, whose personal development requires caretaking, to people who want to act as the caretakers is not the same thing as selling a baby or an adult to people who want to act only as users of her capacities. Moreover, if the reason for our aversion to baby-selling is that we believe it is like slavery, then it is unclear why we do not prohibit baby-giving (release of a child for adoption) on the

ground that enslavement is not permitted even without consideration. Perhaps most important, we might say that respect for persons prohibits slavery but may require adoption. There might be cases in which only adoptive parents will treat the child as a person, or in the manner appropriate to becoming a person.

But this answer is still somewhat unsatisfactory. It does not tell us whether biological parents who are financially and psychologically capable of raising a child in a manner we deem proper nevertheless may give up the child for adoption, for what we would consider less than compelling reasons. If parents are morally entitled to give up a child even if the child could have (in some sense) been raised properly by them,¹¹ our aversion to slavery does not explain why infants are subject only to market-inalienability. There must be another reason why baby-giving is unobjectionable.

Baby-giving is unobjectionable, I think, because we do not fear relinquishment of children unless it is accompanied by—understood in terms of, structured by—market rhetoric. Relinquishing a child may be seen as admirable altruism. Some people who give up children for adoption do so with pain, but with the belief that the child will have a better life with someone else who needs and wants her, and that they are contributing immeasurably to the adoptive parents' lives as well as to the child's. Baby-selling might undermine this belief because if wealth determined who gets a child, we would know that the adoptive parents valued the child as much as a Volvo but not as much as a Mercedes. If an explicit sum of money entered into the birth parent's decision to give the child up, then she would not as readily place the altruistic interpretation on her own motives. Again, however, if babies could be seen as incompletely commodified, in the sense of coexistent commodified and noncommodified internal rhetorical structures, the altruism might coexist with sales.

The objection to market rhetoric as the discursive construction of the relinquishment of a child may be part of a moral prohibition on market treatment of any babies, regardless of whether nonmonetized treatment of other children would remain possible. To the extent that we condemn baby-selling even in the absence of any domino effect, we are saying that this "good" simply should not exist. Conceiving of any child in market rhetoric wrongs personhood. To the extent the objection to baby-selling is not (or is not only) to the very idea of this

“good” (marketed children), it stems from a fear that the nonmarket version of human beings themselves will become impossible because of the power of market discourse (the domino effect).

A Special Case of Commissioned Adoption

Surrogacy is a special case of commissioned adoption. The question is whether the circumstances that make it a special case render it morally distinguishable from commissioned adoption in general, so as to justify creating a legal exception to permit the practice. In what has been the usual use of surrogacy so far, one of the would-be parents, the man, contributes his genetic material to the child to be adopted by supplying sperm. This couple approaches a woman and commissions a pregnancy. The woman promises, in return for a fee, that the child she gives birth to will be turned over to them for adoption. (There can also be the more unusual situation in which both would-be parents contribute their genetic material. Perhaps such cases will become more prevalent in the future.)

Paid surrogacy can be seen as tantamount to permitting the sale of babies. A surrogate is paid for the same reasons that an ordinary adoption is commissioned: to conceive, carry, and deliver a baby. Surrogacy appears even more like a commissioned adoption if what is important to the adopting couple is not primarily the genetic link between father and baby, but rather the opportunity, as some adopting parents have testified, to exercise control over the mother’s background and genetic makeup and to monitor her pregnancy.¹²

Even if we do not see surrogacy as commissioned adoption, what difference is there between paid surrogacy and any paid adoption? There seems to be no substantive difference between paying a woman for carrying a child whom she then delivers to the employers, who have found her through a brokerage mechanism, and paying her for an already “produced” child whose buyer is found through a brokerage mechanism (perhaps called an “adoption agency”) after she has paid her own costs of “production.” Both are adoptions for which consideration is paid.

Others view paid surrogacy as better analogized to prostitution (sale of sexual services) than to baby-selling. They would say that the commodity being sold in the surrogacy interaction is not the baby itself, but rather some form of service provided by the birth mother.¹³

The different conceptions of the good being sold in paid surrogacy can be related to the primary difference between this interaction and (other) baby-selling: the genetic father is more closely involved in the surrogacy interaction than in a standard adoption.

The disagreement about how we might conceive of the “good” reflects a deeper ambiguity about the degree of commodification of mothers and children. Why might someone think that ordinarily a birth mother paid to relinquish a baby for adoption is selling a baby, but that if she is a surrogate, she is merely selling gestational services? Someone who thinks this way seems to be assuming that the baby cannot be considered the surrogate’s property, so as to become alienable by her, but that her gestational services can be considered property and therefore become alienable. It seems to be assumed, that is, that the “good” being sold in an ordinary paid adoption is the baby, which sale we condemn, but the “good” being sold in paid surrogacy is not the baby, so we need not condemn the sale.

This way of thinking could reflect a commitment that a baby cannot be property at all—cannot be objectified—cannot even be thought of or spoken of as property. But 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. No one argues for commissioned adoption in general this way.

A more plausible interpretation of some people’s conception of the “good” in paid surrogacy as gestational services is that this conception reflects a covert understanding that the baby is already someone else’s property—the father’s. This characterization of the interaction can be understood as both complete commodification in rhetoric and an expression of gender hierarchy. The would-be father is “producing” a baby of his “own,” but in order to do so he must purchase these “services” as a necessary input. In a celebrated surrogacy case, *Baby M*, the trial judge was quite open about male ownership: “At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his.”¹⁴

Indeed, the very label we now give the birth mother reflects the father’s ownership: she is a “surrogate” for “his” wife in her role of bearing “his” child. Thus, surrogacy raises the issue of commodifica-

tion and gender politics in how we understand even the description of the problem. An oppressive understanding of the interaction is the more plausible one: women—their reproductive capacities, attributes, and genes—are fungible in carrying on the male genetic line.¹⁵

Paid surrogacy involves a potential double bind. The availability of the surrogacy option could create hard choices for poor women. In the worst case, rich women, even those who are not infertile, might employ poor women to bear children for them. It might be degrading for the surrogate to commodify her baby (or her gestational services), but she might find this preferable to her other choices in life. So far surrogates have not tended to be rich women or middle-class career women, but neither have they (so far) seemed to be the poorest women, the ones most caught in the double bind.¹⁶ Perhaps legitimating paid surrogacy but not permitting commissioned adoption would worsen the double bind for poor women, who are less likely to be chosen as surrogates by the kind of couples who seek this arrangement. To underscore the irony of the double bind, consider the testimony of an adopting mother who fears that surrogacy “can exploit the lower classes and the women of the Third World,” and thus finds it “unconscionable” to choose as surrogates women who are poverty-stricken and need the money.¹⁷

Whether surrogacy is paid or unpaid, it may harbor an ironic self-deception for the women who engage in it. Acting in ways that current gender ideology characterizes as empowering might actually be disempowering. Surrogates may feel they are fulfilling their womanhood by producing a baby for someone else. Yet they may actually be reinforcing oppressive gender roles, in particular the role of the mother image in women’s subordination. Even if surrogate mothering is subjectively experienced as altruism, the surrogate’s self-conception as nurturer, caretaker, and service-giver might be viewed as a kind of gender role-oppression.¹⁸

It is also possible to view would-be fathers as (perhaps unknowing) oppressors of their own partners. Infertile women, believing it to be their duty to raise their male partners’ genetic children, could be caught in the same kind of false consciousness and relative powerlessness as surrogates who feel called upon to produce children for others. Some women might have conflicts with their partners that they cannot acknowledge, either about raising children under these circumstances instead of adopting unrelated children, or about having children at all.

In addition to the concerns about commodification and gender hierarchy, permitting any kind of commissioned adoption (including surrogacy) would, it seems, given our nonideal world, injure the chances of proper personal development for children awaiting adoption. Unlike a mother relinquishing a baby for adoption (the case of paid adoption of an “unwanted” child), surrogacy is commissioned adoption. The surrogate mother bears a baby only in response to the demand of the would-be parents; their demand is the reason for the child’s being born. There is a danger that “unwanted” children might remain parentless even if only unpaid surrogacy is allowed, because those seeking children will turn less frequently to adoption. Would-be fathers may strongly prefer adopted children bearing their own genetic codes to adopted children genetically strange to them; perhaps women prefer adopted children bearing their partners’ genetic codes.

There is a more visionary reason one might consider for prohibiting all surrogacy. The demand for surrogacy expresses a limited view of parent-child bonding, a view in which bonding is based on genetics rather than relationship. In a better view of personal contextuality, it may be urged, bonding should be reconceived. Some people do defend surrogacy on the basis of (the genetic interpretation of) bonding. People who are sensitive to what men lose by not having the bonds with children traditionally thought characteristic of motherhood might argue that if we hope for “new” men who are more bound up with their children, we should foster progress toward this ideal by assuming a deep and personal bond between men and their genetic offspring.

It is unclear, however, why we should assume that the ideal of bonding depends especially on genetic connection. Many people who adopt children feel no less bonded to their children than do responsible genetic parents;¹⁹ they understand that relational bonds are created in shared life more than in genetic codes. True, there is usually a deep bond between a baby and the woman who carries it, but it seems that this bond too is created by shared life, the physical and emotional interdependence of mother and child, more than by the identity of the genetic material. (It will be difficult to study this question unless—until?—childbearing by embryo transfer, in which a woman can carry a fetus that is not genetically related to her, becomes widespread.) We might make better progress toward ideals of interpersonal sharing—toward a better view of contextual personhood—by breaking down the notion that children are fathers’ (or parents’) genetic property.²⁰

It is true that artificial insemination—and for that matter traditional procreation—pose a similar issue of genetic property. It is just as inappropriate to conceive of parent-child bonding in terms of women's genetic "property" as in terms of men's. But in the context of the present gender structure, the desire to carry on the woman's genetic line is less likely to reinforce cultural stereotyping of men as fungible child-producers. Moreover, the interests of women and men are asymmetrical because the carrying of the child in the woman's body (whether or not it is hers genetically) is a stronger factor in interrelationship with a child than an abstract genetic relationship.

All of these concerns, if taken seriously, suggest a social policy banning surrogacy, even unpaid surrogacy. But such a ban would be hard to enforce because it infringes on people's choices. At present, many people seem to believe that they need genetic offspring in order to fulfill themselves; at present, some surrogates believe their actions to be altruistic.²¹ Perhaps an appropriate policy would be to permit only unpaid surrogacy. Concerns about commodification of children (and women) underwrite our society's general ban on commissioned adoption, and the difficulties with finding a justifiable basis on which to exempt paid surrogacy suggest that paid surrogacy should not be legitimated. Maybe, in other words, market-inalienability is warranted, even when a commissioned adoption involves genetic contribution from the would-be parent(s).

Market-Inalienability versus Incomplete Commodification

Market-inalienability might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood, and in a judgment that the difficulty of distinguishing surrogacy from baby-selling harms our self-conception too deeply. In a social regime permitting any type of commissioned adoption, there is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Birth mothers with "better" qualities will command higher prices in virtue of those qualities. This monetization commodifies women more broadly than merely with respect to their sexual services or reproductive capacity.

If we wish to avoid the dangers of commodification and, at the same time, recognize that there are some situations in which a surro-

gate—or indeed any woman willing to become pregnant for the purpose of giving a baby to someone else—can be understood to be proceeding out of love or altruism and not out of economic necessity or desire for monetary gain, we could prohibit sales but allow a surrogate—or indeed any woman—to give her services. We might allow her to accept payment of her reasonable out-of-pocket expenses—a form of market-inalienability similar to that governing ordinary adoption.²²

Fear of a domino effect might also counsel market-inalienability. At the moment, it does not seem that women's reproductive capabilities are as commodified as their sexuality. Of course, we cannot tell whether this means that reproductive capabilities are more resistant to commodification or whether the trend toward commodification is still at an early stage. Reproductive capacity, however, is not the only thing in danger of commodification. We must also consider the commodification of children. The risk is serious indeed because, as I have argued above, if there is a significant domino effect, commodification of some children means commodification of everyone. We have all been children. Yet, as long as fathers have an unmonetized attachment to their genes (and as long as their partners tend to share it), even though the attachment may be nonideal, we need not see children born in a paid surrogacy arrangement—and they need not see themselves—as fully commodified. Does this mean there may be less reason to fear the domino effect with paid surrogacy than with commissioned adoption in general?

The most credible fear of a domino effect—one that paid surrogacy shares with ordinary commissioned adoption—is that all women's personal attributes will be commodified. The pricing of surrogates' services will not immediately transform the rhetoric in which women conceive of themselves and in which they are conceived, but that is its tendency. This fear, even though remote, seems grave enough to warrant steps to ensure that paid surrogacy does not become the kind of institution that could permeate our discourse.

Thus, for several reasons market-inalienability seems an attractive policy solution. But it also has its drawbacks, having to do with the personal freedom of would-be buyers who yearn for children and would-be sellers caught in the double bind. There might be degrading simulations of altruism by those who would find living on an expense allowance preferable to their current circumstances.²³ Furthermore,

the fact that they are not being paid “full” price exacerbates the double bind and is not really helpful in preventing a domino effect. We would also have to recognize that there would probably not be enough altruistic surrogates available to alleviate the frustration and suffering of those who desire children genetically related to fathers, if this desire is widespread. In light of the apparent strength of people’s desires for fathers’ genetic offspring, the ban on profit would also be difficult to enforce. As with adoption, we would see a black market develop in surrogacy.

Another policy choice to consider, therefore, is a regulatory regime that reflects incomplete commodification, perhaps similar to the one suggested for sale of sexual services. The problem of surrogacy is more difficult, however, primarily because the interaction produces a new person whose interests must be respected. An incomplete commodification regime could permit performance of surrogacy agreements by willing parties, yet stop short of forcing any kind of performance or penalty on women who change their minds.²⁴

The issue of whether surrogacy agreements should be specifically performed—whether the mother who changes her mind should nonetheless be forced to hand over the baby—has received the most popular attention. In the *Baby M* case, the New Jersey Supreme Court decided that contract pregnancy was contrary to public policy and that specific performance could not be granted. (The “best interests of the child,” however, were found in that case to support granting custody to the adopting couple who paid the surrogate.) If we do decide to permit an exception for surrogacy from the ban on commissioned adoption, we should not think that granting specific performance of such contracts automatically follows. To conceive of surrogacy as a special situation requiring specific performance seems to place undue weight on the supposed genetic interests of would-be fathers in their unique “property,” and to undervalue both the personal development of “unwanted” children they might otherwise adopt (and become bonded to) and the personal identity of women torn between economic need and deep attachment to a baby.

A regime expressing incomplete commodification would allow a woman who changes her mind to decide to keep the baby.²⁵ Yet we 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.²⁶ We might wish to make the birth mother's decision to keep the child not an absolute right but only a very strong presumption, such as would be used in a custody dispute over a newborn baby in a divorce. In my view, however, ordinary adoption is the better analogy: except in very special cases, both surrogates and others who are considering relinquishing children for adoption should be able to decide after birth to keep the child.²⁷

In an incomplete commodification regime, those who hire a surrogate and then change their minds should not be forced to keep and raise a child they do not want. But if a baby is brought into the world and nobody wants her, the surrogate who intended to relinquish the child should not be forced to keep and raise her. Instead, those who, out of a desire for genetically related offspring, initiated the interaction should bear the responsibility for providing for the child's future in a manner that can respect the child's personhood and not create the impression that children are commodities that can be abandoned as well as alienated. The special dangers of commodification in the surrogacy situation should serve to distinguish it from the way we treat children generally. Perhaps a regulatory scheme should require bonding, insurance policies, or annuities for the child in case the adoptive parents die or renege.²⁸ Perhaps a better scheme (because less oriented to market solutions) could require that alternative adoptive parents at least be sought in advance.

Because a pregnancy and a child's life are involved in the surrogacy interaction, rather than just one sexual encounter as with prostitution, "official" recognition of the interaction, with its contribution to commodification, will have to be tolerated, whether we choose market-inalienability or incomplete commodification. Decisions will have to be made about restitution in case of breach, about payment of the surrogate's expenses, and, above all, about care for the child if all parties fail to take responsibility. Even if we choose incomplete commodification, contract remedies should be avoided. Specific performance should be avoided because of the analogy to personal service agreements, and also because we should not conceive of children as unique goods. Damage remedies should be avoided because of the obvious "official" commodification involved in setting a dollar value on the loss.

We should be aware that the case for incomplete commodification is much more uneasy for surrogacy than for prostitution. The poten-

tial for commodification of women is deeper because, as with commissioned adoption in general, we risk conceiving of all of women's personal attributes in market rhetoric, and because paid surrogacy within the current gender structure may symbolize that women are fungible babymakers for men, whose seed must be carried on. Moreover, as with ordinary commissioned adoption, the interaction brings forth a new person who did not choose commodification and whose potential personal identity and contextuality must be respected even if the parties to the interaction fail to do so.

Because the double bind has similar force whether a woman wishes to be a paid surrogate or simply to create a baby for sale on demand, the magnitude of the difference between paid surrogacy and commissioned adoption is largely dependent on the weight we give to the father's genetic link to the baby. If we place enough weight on this distinction, then incomplete commodification for surrogacy, but not for baby-selling, will be justified. But we should be aware, if we choose incomplete commodification for surrogacy, that this choice might seriously weaken the general market-inalienability of babies, which prohibits commissioned adoptions.

For some people, incomplete commodification rather than market-inalienability on balance seems right for now. The reasons underlying such a judgment are these: evaluating the double bind to suggest that we should not completely foreclose women's choice of paid surrogacy, even though we foreclose ordinary commissioned adoptions; judging that people's (including women's) strong commitment to maintaining men's genetic lineage will ward off commodification and the domino effect, distinguishing paid surrogacy adequately from ordinary commissioned adoptions; and judging that that commitment cannot be overridden without harm to central aspects of people's self-conception.

In my opinion, however, market-inalienability is better for now, in spite of its difficulties. The reasons underlying this judgment are these: evaluating the double bind to suggest that poor women will be further disempowered if paid surrogacy becomes a middle-class option; and judging that people's commitment to men's genetic lineage is an artifact of gender ideology that can neither save us from commodification nor result in less harm to personhood than its reinforcement would now create. In addition, it seems significant that no grass-roots movement among women has coalesced to push for the right to engage in commissioned adoptions of any sort.

Feminism For and Against

Raising the issue of what women themselves are willing to struggle for politically suggests consideration of the feminist politics of commissioned adoption.²⁹ It should be clear that there are coherent feminist arguments on both sides of the general issue of baby-selling (commissioned adoption). By feminist arguments, I mean arguments advanced by those who wish primarily to make inroads against entrenched subordination of women, both conceptual and practical. By "conceptual," I mean subordination in what it now means, culturally, to be a woman, and by "practical," I mean subordination in how much money and power women now have.

One side would radically alter the status-quo regime in the name of market-based liberation. The feminist argument in favor of commissioned adoption, in favor of the full-blown market, is roughly that in this nonideal world of ours, power in the market is power, and power is liberating. Women, like men, the argument runs, should now be free to get out of their protected sphere and enter the market on an equal basis. Men in power should not tell them what to sell and what not to sell. Whatever is problematic in baby-selling (the dangers of commodification, the results for the women who do the selling and the children who are sold) should be for women to deal with as a matter of their own moral deliberation and choice.³⁰ Feminists who make the market-based liberation argument often apply it only to nonstandard reproduction, but the logic of the argument cannot be cabined on its own terms. If liberation requires that women themselves assess their own risks and decide what they will or will not commodify, it so requires however pregnancy is achieved.³¹

The other side would largely preserve the status-quo regime in the name of preventing harm to the personhood of women and children. The feminist argument against the market is roughly that in this nonideal world of ours, treating women like anonymous fungible breeders objectifies them and recreates subordination, and that in our culture of materialist fungible objects, children who know they have been bought will have difficulty forming a Kantian self-conception.³² Entering the market by degrading oneself is not liberating under the circumstances; women have always both sold themselves and been degraded for it.

Neither of the coherent feminist arguments can find it an easy case to permit paid surrogacy but otherwise maintain the current “official” regime. The market-liberation position would validate paid surrogacy but also baby-selling in general; the personhood-preservation position would invalidate surrogacy along with baby-selling in general.

The difficult question for the feminist view of the situation in which we keep the status-quo regime, except permit surrogacy, is the one I described above. What makes surrogacy relevantly different from commissioned adoption, which our status-quo regime purports to abhor? Is it that a man is adopting a baby that carries on his genetic line? (Isn’t that the symbolic way our culture as a whole is likely at this point in history to conceptualize the situation?) If *that* is what makes surrogacy an exception to our status-quo regime, then it appears that women are indeed fungible breeders.

In other words, from a feminist point of view, it appears that the symbolic result of an “official” regime in which surrogacy is recognized but all other paid adoptions decried is a reinforcement of aspects of the conceptual structure of sexual subordination. This regime, by keeping the status quo largely intact, denies women the liberating effect of the full-blown market that the first kind of feminist hopes for; and by making an exception that symbolically prefers the male genetic line, it reinforces the categories of subordination that the second kind of feminist fears.

It seems to me that if there is a good feminist argument for permitting surrogacy as an exception to the status-quo regime (rather than as part of a radical market-liberation approach that would permit all commissioned adoptions), it will probably start from the practice’s possible effects on the traditional conception of the nuclear family. Perhaps the practice of surrogacy—in some respects like the widespread practice of divorce—can bring about new kinds of relationships of coparenting and new kinds of relationships between parents and children. This could perhaps be beneficial in transforming the traditional conception of the family as it has been in some respects oppressive for women (and children).³³ In order for this argument to be satisfying, one would want to know that these effects occurred in the practice of surrogacy, but not in ordinary commissioned adoption. Otherwise, by continuing to prohibit commissioned adoption we would still be symbolically preferring the male line if we permitted surrogacy.

It could be that if we allowed commissioned adoption, interesting relationships would develop among the various parents and the child; or it could be that commissioned adoptions would be more like arm's-length transactions. We will not be able to get empirical information about this unless we permit commissioned adoption in general. At the moment, therefore, my opinion is that if the state promotes surrogacy as an exception to the status-quo regime, not having sufficiently distinguished it from commissioned adoption in some way other than the one whose symbolism can be anguishing to feminists, feminists should remain quite troubled by the practice.

Race and Class

My discussion thus far has focused on surrogacy in the cross fire of issues raised by commodification and sexual subordination. It is necessary also to consider issues of race and class. Anita L. Allen makes the point that the practice of surrogacy does have connotations of the heritage of slavery for African-American women. Under slavery, white male owners impregnated their female slaves; slaves were surrogate mothers for their owners.³⁴ Allen also makes the point that if commercial surrogacy is legitimated, there is a very real danger that women of color will be used as gestational mothers to deliver white children to white genetic parents.³⁵

Allen's concern is borne out by a California case, *Johnson v. Calvert*, in which an African-American woman, Anna Johnson, received both egg and sperm from the buyers, the adopting parents.³⁶ She changed her mind at birth about giving up the baby, but was forced to give it to the couple, a white man and an Asian woman. Unlike the *Baby M* case, in which a white surrogate mother retained parental rights even though custody was given to the buyers, the court in *Johnson v. Calvert* held that a woman in Johnson's position has no parental rights at all.

If we believe feminist market-liberationists (or for that matter free-market economists) that commissioned adoption benefits women, then it is necessary to notice that women of color do not participate much in these benefits, such as they are. The dangers that Allen points out might be less salient because of the exclusion of poor women and women of color from the practice of surrogacy, but then the double bind becomes more compelling. It appears so far that (mostly) fairly

well-to-do white people engage the services of surrogates, and that surrogates themselves are (mostly) less well-to-do but not poverty-stricken white women. Legitimizing surrogacy might reinforce the divisive injustices of class and race.

Now, one could respond to this situation by saying that surrogacy is just one more luxury that is available only to the rich, and, as we know, there is substantial overlap between the categories of "rich" and "white." After all, we haven't banned cosmetic surgery or moved to make it available to poor people. More to the point, we haven't banned *in vitro* fertilization and other expensive technological interventions to relieve infertility or yet moved to fund them for poor people.

We all understand already (this response continues) that in our culture the quality and extent of medical care depend upon one's place in the social hierarchy. Moreover, we know both that well to-do white couples will have an easier time obtaining a baby through "official" or "gray market" adoption channels, and that there is a tremendous demand for white infants because that is what these would-be parents desire. We all understand already that in our culture access to parenthood for those who cannot or choose not to bear their own children is biased in favor of those higher in the social hierarchy. Surrogacy is just more of the same.

I am not sure how to respond to this response. It seems despairing or uncaring just to say that one more expression and confirmation of existing patterns of subordination doesn't matter, given the existing pattern. At least we should be troubled about it; at least we should let our concern about it help us think about our culture as a whole, and about other practices that contribute to this pattern.

In our culture, the ability to become a parent seems to be important to self-conception. It seems analogous in some respects to the importance of education to self-development and full citizenship. Even though we do not ban private schools, no one welcomes the deterioration of public schools and the withdrawal from them of those privileged in the social hierarchy. Few are untroubled by white flight and what it means for the education of our young. Universal education is important to full citizenship, and many would say that a polity that does not take more care than ours to ensure equal distribution of quality education is reinforcing unjust subordination.

The parent-child relationship is important to the human form of life. All of us have had parents, and many of us make becoming

parents ourselves important to our self-conception (personhood). Perhaps considerations analogous to those regarding education would imply that access to technological interventions to assist in procreation should be socially available. Some of these technological interventions could perhaps be made available to those of lower socioeconomic status without too much difficulty. But it seems that, as with private schools, it would be difficult under present social circumstances to create any regime of commissioned adoption (including surrogacy) that would be egalitarian in practice.