

# The criminal nature of commercial surrogacy from a utilitarian perspective——Law, Reproduction and Ethics: Fundamental Debates

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**Abstract:** Pure utilitarianism that sees free market as just restraining and proper tool for the collective common good provides us with this base of thinking. In a transaction where both the people have mutual interest, each of them will move towards economic gains thus improving both their lives; hence, a relief of their overall utility is catered for. (Boudreau, 2007) The business aspect that commercial surrogacy contracts reminds those who oppose it of the need of the market, and so they might place some hope in the theories which stress the importance of the market. Despite the fact that there is a number of arguments that justify surrogacy, commercial surrogate must be outlawed and put under criminal liabilities as well.

**Keyword:** Law; Women's Rights; Transgender individuals; Morality

**DOI:** 10.69979/3041-0843.25.03.062

## Introduction

The argument of utilitarianism in the favor of the commercial surrogacy concept as a result of which the society could have some benefits is one of the views. Normally in this analysis it is done at the macro-level of policies, ensuring that an allowed surrogacy could boost birth rates, reshape the population's age structure, and more effectively handle aging trends. Moreover, another preferring this view might think that surrogacy is merely a product of exchanging needs, however, both parties obtain benefits that are greater than their original conditions through such interaction (Brandão, 2022). Therefore, unless we can prove that this contract reduces the utility of some individuals and they exceed the benefits it brings to the parties involved, markets and surrogacy contracts tend to be the best solution.

## 1 Damage to children's rights and interests caused by commercial surrogacy

Through ways of traditional reproduction birth and representing family is a child-centered mission of the family members initially. They aim to complete their family for the sake of the child. Surrogacy for commercial use may be described as primarily adult-centered, for the clients come expressly for a child production. (Rotabi, 2017). Terminally, for most of the parents, children are a psychological source or fulfillment in general, they can be seen as a consumer good, and sometimes they are both money-producers, hence, children are just a commodity. On the other hand, the children's expenses and the wages they bring not only without fluctuation but with respect to the child's age; therefore, children are the product and at the same durable consumer good. Unlike other consumer goods, a child is considered a 'durable' product, with the "utility" function setting it apart from 'love' which subsequently becomes unconditional as a parent's care becomes dependent on whether their child is a 'successful' product. Furthermore, the surrogate's initial goal is to be remunerated and her intentions about the fetus in her womb does not come from having love for him/her or to have a baby—the intended mother is just creating a child to get something from him/her. (Lee, 2021)

Since the parties involved in commercial surrogacy do not give sufficient attention and care to the child, what should be done if the client unilaterally terminates the agreement before delivery?—If an abortion is performed, it not only harms the surrogate woman physically and emotionally but also deprives the fetus of the right to be born; if the pregnancy continues, the child's interests after birth are difficult to guarantee due to the surrogate woman's own economic conditions, etc. Clearly, the legislative intent of legalizing commercial surrogacy obviously only considers the desire of infertile couples to have a

blood-related child, or supporters of feminist ideas to escape the oppression of patriarchal society on women, all of which only consider the needs of adults, and lack consideration for the rights of the fetus. (Ramskold, 2012) Adoption contracts and surrogacy contracts are equivalent to treating the fetus as a commodity, an object, according to the prior agreement of the contract, the couple orders the surrogate through the contract and pays a deposit in advance, and after the successful live birth of the fetus, the pregnant person only needs to deliver the goods as agreed to complete the entire contract process, neglecting the substantial content of the general moral obligations of parents in the traditional sense. (Saravanan, 2018) When commercial surrogacy uses market norms that govern production, exchange, and consumption activities to replace the parenting rules typically used to regulate the upbringing of children, and when the rights and obligations of parenthood depend on agreements that can be modified at any time and at will, the resulting uncertainties undoubtedly place the legal interests of the fetus/child in a precarious and helpless state.

## 2 Damage to personal dignity caused by commercial surrogacy

However, utilitarianism in background of commercial surrogacy is not only about the interests of children, but it also undermines the core human dignity. The philosophic base of personal dignity dates back to Kantianism - the ethics based on the notion that humans perform their acts according to their own will as rational beings - who are self-normative agents and masters of themselves (Sola, 2023). After WW2, personal dignity, as an independent value, was prescribed in positive law (written in the constitution as a fundamental right). In accordance to the concept of fundamental rights, people cannot exercise their rights or even completely relinquish certain fundamental rights, but at the same time they cannot exceed reasonable limits. (Lenaerts, 2019) If the protection of a fundamental right also serves a public purpose, then such a fundamental right cannot be abandoned by the individual; and vice versa, if their personal dignity is invaded as a result of the renunciation According to the positive law personal dignity is a constitutional right while, in the opinion of the natural law, personal dignity is not granted by law but rather comes from the nature, which is unchangeable and cannot be suspended or discarded.

Proponents of commercial surrogacy argue that, just like those in the other industries rent their services in exchange for remuneration, so surrogates are also simply getting profit by carrying and giving birth for others. In case parties to a surrogacy enter into the agreement with a clear understanding of the benefits and risks and develop the educational surrogacy relationship based on the principles of equality, volunteerism and consent, the surrogacy resembles the labor service contract, a personal legal contractual relation that does not offend human dignity. John Robertson, a member of the Ethics Committee of the American Society for Reproductive Medicine, calls surrogacy collaborative reproduction leading to the argument that once both parties, commissioning and surrogate inclusive, have a clear picture of the roles and responsibilities, possible risks and benefits, and make the decision without being coerced, surrogacy becomes a legally mutual economic behavior based on informed consent. (Robertson, 1983)

Respect for any life entity serves as a rule of value. Valuable things can be reflected through terms such as respect, appreciation, admiration and recognition, and these forms of evaluation are very diverse. Codes of conduct have to be imposed in such evaluation modes. While the good benefits of the market are undeniable, so are the curses it has wrought on our world. And blindness is one such curse which has commodified surrogacy as the prominent example. Inherently connected with the fact that the market approach is reproductive labor turned into commercial product, which is not membership in the production facility and therefore attitude to reproductive work as human dignity which undermines. (Ketchum, 1989) To clarify, here by "degradation" is meant that worthless and unsuitable technique is used to approve or cure certain situations. The destiny of a commodity is what governs how it should be used by the consumer as per the modern standards of the market. Once the market acquires it and the customer has it in his/her possession, only his/her interests matter without consideration of the producers/suppliers. While human beings are able to exercise right to choose and make progress which cannot be possessed by machines, they are also not just pieces of unknowing products hence they should not be subjected to mere commodification but instead, be respected and given the dignity. The most basic difference separating the morality of the treatment of human beings and that of the trade rules is that of the difference of rules and standard in treating human beings as things For an acceptable recruitment assessment with a high degree personal

attachment, unemotional market rules and mortal ideals based perspective of social relations would be optimal.

### 3 Moral interpretations on commercial surrogacy

Sara Ann Ketchum in her views upon for-profit surrogacy agencies free market established for infant body or women's body yield recourse as violation of Kantian personal principles and to feminist principles. According to a American ethicist Thomas A. Shannon, there is still space in commercial surrogacy in woman seen as the object or a mean to an end and thereby female stereotype of woman being a mother is. Therefore, there is a danger of violating women's personal dignity. (Shannon, 1988) In the case of commercial surrogacy, its essence is for the client to rent the surrogate's womb, to purchase her autonomy and self-esteem for a certain period of time, and its legalization would imply that women could become reproductive instruments solely due to economic disadvantage or temporary need, and others could have someone else bear children for them solely due to infertility or not wanting to endure the hardships of pregnancy, and categorize surrogates based on age, health, appearance, educational level, and price them accordingly. Commercial surrogacy would reduce women's wombs to incubators for bearing fetuses for others, treating women with reproductive capacity as baby factories, and criminal law must not allow such a trend that damages personal dignity to become a recognized and permitted value choice.

Michael Sandel is the one who holds that although the markets are quite good instruments for organizing the production process, it is vital to have public debate so as to establish clear boundaries that should restrict markets from rewriting the norms that control social institutions. (Michael, 2012) By nobody's interest, nobody is born just to satisfy anybody, neither is anyone abandoned if they aren't capable of satisfying one's interests. The value of life has nothing to do with what values it possesses or the particular traits it is endowed with by the world but rather in the fact that it is an irreplaceable life. Labeling or applying certain terms to characterize who is of more value and who is not will result in trivializing the overall value of the person.

### 4 Legislative suggestions on commercial surrogacy

Children are neither means of capital ones for interest lending nor bloodline inheritance conveyors, nor do wombs serve a role to make a profit through it moreover to be build the life based on it, hence there is no goal of the procreation to develop life and the continuation of a lineage. Life has its dignity and cannot be subjected to the notion of sacrifice of interests or tool detachable from morality (Ho, 2022). The same applies to the concept of law – it is an absolute minimum of morality. Therefore, the commercial use of the natural right (the right to reproduce) and the right to bodily integrity is abusive as it puts the interests of the prospective children in danger, Considering that commercial surrogacy is an extremely serious offense; it should be criminalized and included in the law.

### 5 Conclusion

Commercial surrogate motherhood challenges the fundamental issues of the citizen's rights and freedoms and at the same time it creates potential risks for the society and for public order and morality. It may cause the physical health and mental wellbeing of women. Thus, the only reasonable approach is to get lawmakers to stick to the idea of impermissibility of commercial surrogacy, for the reasoning that human beings are never to be treated as means for the end and as the third, gently apply legal paternalism to solve this kind of problem. Systematic law must be carried out with the legal order unity framework and in order to improve the level of efficiency of the legislative, the law must be explicitly prohibiting commercial surrogacy and the punishment must be increase. The prevention of and management of risk should be exercised for the problems possibly related to surrogacy-for-profit, and the negative social impacts of commercial surrogacy should be minimized where this is possible.

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