

MARTINA KELLERMANN

REGULATING SURROGACY:
WHAT IS THE RIGHT APPROACH?

- AN ECONOMIC AND LEGAL PERSPECTIVE -

LLM RESEARCH PAPER

LAW AND MARKETS (LAWS 522)

FACULTY OF LAW
VICTORIA UNIVERSITY OF
WELLINGTON

2005

K29 KELLERMANN, M.
Regulating surrogacy.

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ABSTRACT

The question whether commercial surrogacy should be prohibited, allocated to a free market or regulated has been highly contested since the appearance of the modern form of surrogacy in the 1970s.

This paper is going to illuminate the question what the right approach might be from an economic, moral and legal perspective.

After giving information about the different forms of surrogacy and the market and its background, the paper will give an overview of the contemporary legislation and its development on an international level. It will be shown that the legislative tendency is to prohibit commercial surrogacy as opposed to 'altruistic' - unpaid - surrogacy.

Following an economic analysis and evaluation of moral concerns the author comes to the conclusion that neither the total prohibition of surrogacy, nor the prohibition of paid surrogacy is justified neither from an economic nor from a moral point of view, but that detailed regulation would be able to address the concerns and risks involved.

Subsequently, the question how the surrogacy market should be regulated in detail will be considered and the author offers a suggestion of a tentative framework. However, the examination will reveal that the discussion about how the relevant concerns should be addressed is at least as controversial as the discussion

Therefore it is suggested that legislative trend of prohibiting surrogacy, might not only be because of policy reasons, but because of the controversy about the detail of such a regulation. In fact, a detailed regulation of the surrogacy market would inevitably meet with criticism from both the advocates and opponents of surrogacy.

WORD LENGTH

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,996 words.

Surrogacy - Preconception Contract

Regulation

Economic Analysis

I INTRODUCTION

Surrogacy, in its broader meaning, namely that a woman bears a child for another,¹ goes evidently back to at least biblical time.² Nevertheless, in recent years, it has played an increasing role as more and more childless couples are considering surrogacy for four main reasons: increasing infertility, new technological possibilities, the dismantling of the traditional conception of family and sex, and on top of this, the lack of babies for adoption.³

Contemporary controversy about surrogacy started with its modern emergence towards the end of the 1970s,⁴ and reached its climax during the eighties with the famous *Baby M* case in 1988, where the surrogate mother refused to surrender the child.⁵ Since then numerous countries have introduced legislation concerning surrogacy and although there is highly divergent legal regulation on an international level - from non-regulation to total prohibition - the legislative trend seems to be towards the prohibition of paid or commercial surrogacy as opposed to unpaid or 'altruistic' surrogacy. This trend is also reflected in the new New Zealand legislation.⁶ However, whether surrogacy should be allocated to a free market, non-commodified, or something in between is still highly contested, both amongst academics and the public.

This paper is going to examine the question of the right approach to surrogacy from an economic and a social/ moral point of view and challenges both the international legislative trend and the new New Zealand legislation.

¹ Peter Singer and Deane Wells *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press, Oxford, 1984) 107.

² With Abraham's wife Sarai being infertile she told Abraham to take her handmaid Hagar as concubine so that they may obtain a child by her. (The Holy Bible, Old Testament, Genesis 16:1-2). Elizabeth Kane *Birth Mother* (Sun Book, Melbourne, 1990) 222; Michael J. Trebilcock *The Limits of Freedom of Contract* (Harvard University Press, Cambridge, 2003) 48 [*The Limits of Freedom of Contract*].

³ Anita Stuhmcke "For Love or Money: The Regulation of Surrogate Motherhood" 3 Murdoch University Electronic Journal of Law 1996 No. 1, available from <<http://www.murdoch.edu.au/elaw/issues/v3n1/stuhmck1.html#text20>> (last accessed 5 July 2005) 1.

⁴ Kane, above n 2, 213.

⁵ *Baby M*, 109 N.J. 396 (S.C. New Jersey 1988).

⁶ See Vanessa S. Browne-Barbour "Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?" (2004) 26 Whittier L.Rev. 429, 437, 438. Browne-Barbour also distinguishes between commercial surrogacy, involving a third party as for example agencies, and paid surrogacy without the involvement of third parties. This distinction is not made in all the other relevant literature.

Chapter II provides information about the different forms of surrogacy and the surrogacy market and its background. Chapter III gives an outline of the legislation of surrogacy both on an international level and in New Zealand. Chapter IV considers whether surrogacy should be prohibited, allocated to a free market or regulated in detail. I examine this question from an economic and social/ moral perspective and argue that neither the allocation to a free market, the total prohibition, nor the prohibition of commercial surrogacy is the right approach, but that a detailed regulation might be able to address all concerns. Chapter V discusses the individual issues raised by regulation. It will show that the individual aspects of any regulation are at least as much contested as whether surrogacy should be prohibited itself. In conclusion I also suggest a tentative framework for regulation. Finally, Chapter VI concludes that a targeted intervention is possible to address all the concerns and therefore prohibition is not justified. Finally, I suggest that the trend to prohibit paid surrogacy, as opposed to 'altruistic' surrogacy, might be founded in the regulatory difficulties rather than policy reasons.

*II SURROGACY*⁷

A Classification

*1 Definition*⁸

Surrogacy is the practice by which a woman who is, or is to become, pregnant agrees permanently to surrender the child born of that pregnancy to another person or couple, with the intent that the other person or couple will be the parent or parents of the child. The woman who bears the child is known as the surrogate mother and the person or persons to whom the child is surrendered are known as the commissioning or intended parent or parents.

⁷ The terminology used for surrogacy and the related contract are: surrogate motherhood (or mothering), surrogate parenting (contract), surrogacy arrangement or contract, contract pregnancy, preconception contract.

⁸ John Seymour and Sonia Magri "A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review" (Victorian Law Reform Commission, Melbourne, 2004) 31.

2 *Kinds of Surrogacy*

The first distinction is in regard to payment: With 'altruistic' or unpaid surrogacy the surrogate mother⁹ receives no payment or only the reimbursement of reasonable expenses, whereas with 'commercial' or paid surrogacy a fee is paid to the surrogate."¹⁰

Another distinction is made in regard to the genetic material used. Surrogacy can be divided into two main types: the more traditional type is 'partial' surrogacy,¹¹ which is facilitated by artificial insemination,¹² whilst 'full' or gestational surrogacy involves in-vitro fertilization,¹³ which is a more innovative technology and was therefore only developed in recent years.¹⁴ Each of these two types of surrogacy presents multiple situations.

(a) 'Partial' Surrogacy¹⁵

'Partial' surrogacy is the classical and probably still most common form of surrogacy agreement, where a childless couple consists of a fertile male and an infertile female.¹⁶ The surrogate is artificially inseminated with the sperm of the male, whilst in more rare cases the child might also be conceived by sexual intercourse.¹⁷ The surrogate is paid for surrendering the child to the couple.¹⁸ With 'partial' surrogacy, the surrogate is the biological mother of the child to be born, whilst the male partner of the intended parents is the biological father. However, the

⁹ The woman becoming pregnant and bearing the child is referred to as surrogate mother or surrogate.

¹⁰ Stuhmcke, above n 3, 1; Seymour and Magri, above n 8, 31; National Bioethics Consultative Committee (Australia) "Surrogacy Report 1" (1990) 9 ["Surrogacy Report 1"].

¹¹ Seymour and Magri, above n 8, 31.

¹² Artificial Insemination was applied to human beings in the United States as early as 1884 but only became more common in the 1970s. Richard A. Posner, (Harvard University Press, Cambridge, 1992) 420 [*Sex and Reason*]; Tim Schlesinger "Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support" (2005) 61 J. Mo. B. 22-22; James C. O'Neill "Alternatives to Adoption: Social and Legal Implications of Alternative Reproductive Modes" (1983) Working Paper No.20, University of Waikato Department of Sociology, Hamilton 6.

¹³ Browne-Barbour, above n 6, 435.

¹⁴ "Surrogacy Report 1", above n 10, 6; O'Neill, above n 12, 48; Stuhmcke, above n 3, 2.

¹⁵ The term 'partial' surrogacy refers to the fact that with this form of surrogacy, the children might be biologically related to one of the intended parents. Stuhmcke, above n 3, 2; Seymour and Magri, above n 8, 31.

¹⁶ Seymour and Magri, above n 8, 31.

¹⁷ Seymour and Magri, above n 8, 31.

¹⁸ See also *Sex and Reason*, above n 12, 420.

sperm could also come from a sperm bank, so that the would-be-parents are not related to the child.¹⁹ Furthermore, it would be conceivable for a gay couple to engage in a surrogacy contract or even for a single man to have a child on his own.²⁰

(b) Gestational ('full') surrogacy

Gestational, 'full' or 'in vitro fertilization' surrogacy means that a woman's egg is fertilised outside the womb and then implanted in the uterus of another woman, the surrogate mother.²¹ In this kind of surrogacy the surrogate mother is not genetically linked to of the child and so is not its biological mother.²² This type of surrogacy might be considered when the woman can produce eggs but is not able to carry a child, so the intended parents might be the biological parents.²³ Reasons for women to have a child without pregnancy can also be, for example, health reasons, or she may also not want to give birth for aesthetical or career reasons.²⁴ With gestational surrogacy the egg needs not to come from either of the contract parties. If in addition donor sperm is used, neither of the contract parties might be genetically linked to the child.²⁵ Going further, surrogacy could also facilitate cloning.^{26,27}

B Facts about the Market and its Background

Before evaluating the surrogacy market and its regulation, it is beneficial to obtain an overview of its scope and particularities.

¹⁹ Browne-Barbour, above n 6, 436.

²⁰ *Sex and Reason*, above n 12, 424.

²¹ *Sex and Reason*, above n 12, 420.

²² Browne-Barbour, above n 6, 435.

²³ Susan Downie *Baby Making: The Technology and the Ethics* (The Bodley Head, London, 1988) 14.

²⁴ Downie, above n 23, 146.

²⁵ *Sex and Reason*, above n 1, 425, 434; Browne-Barbour, above n 6, 436.

²⁶ Cloning is the genetically copying a human being. See, for example, definition in Zealand New Human Assisted Reproductive Technology Act 2004, s 5.

²⁷ Gena Corea *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Womb* (Harper & Row, New York, 1985) 264.

Approximately 6.1 million people of child-bearing age are infertile in the United States.²⁸ That is approximately one out of every six married couples.²⁹ Despite this already high number, the infertility rate is meant to increase further, especially due to environmental pollution.³⁰ In contrast with the large amount of infertile people, the number of healthy babies available for adoption is approximately thirty thousand.³¹ This discrepancy is noteworthy as the surrogacy market is partly an alternative market to the adoption market.³² Some authors even see the surrogacy market as a consequence of the strict regulation of adoption.³³ But, in fact, the surrogacy market is not a total alternative to adoption, as it offers more possibilities, especially to uphold a genetic line.³⁴

In the United States until 1986 an estimated 500 children, were born through surrogates,³⁵ and by the mid-1990s this number increased to 4000.³⁶ Today, it is estimated that in the United States every year thousands of children are born due to surrogacy arrangements.³⁷ In the U.K., even though commercial surrogacy is prohibited, it is estimated that every week a child is born to a surrogate mother.³⁸

The average price paid to the surrogate is US\$ 10,000.³⁹ However, using an agency, a couple may expect to pay in total up to US\$ 25,000 – 50,000, of which the major amount goes to the medical costs and the agency fees.⁴⁰ In the 1980s the

²⁸ Browne-Barbour, above n 6, 433; Schlesinger 22.

²⁹ Stacy Christman Blomeke "Note: A Surrogacy Agreement That Could Have and Should Have Been Enforced: *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998)" (1999) 24 *Dayton L. Rev.* 513, 514.

³⁰ The infertility rate increased from 3.5 per cent to 9.7 percent between 1965 and 1982. Peter H. Schuck "Reflections on Baby M" (1988) 76 *Georgetown L. J.* 1793, 1796.

³¹ Browne-Barbour, above n 6, 433.

³² Blomeke, above n 29, 514.

³³ Posner, Richard A. "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" (1989) 5 *J. Contemp. Health L. & Pol'y* 21, 22.

³⁴ Richard J Arneson "Commodification and Commercial Surrogacy" (1992) 21 *Philosophy and Public Affairs* 132, 146; *Sex and Reason*, 422; Iris Leibowitz-Dori, "Womb for Rent. The Future of International Trade in Surrogacy" (1997) 6 *Minn. J. Global Trade* 329, 329.

³⁵ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 22.

³⁶ Browne-Barbour, above n 6, 433.

³⁷ Browne-Barbour, above n 6, 434.

³⁸ Browne-Barbour, above n 6, 465.

³⁹ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 22; Brinig Friedlander, Margaret "A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: *The Case for Full Contractual Enforcement*" (1995) 81 *Va. L. Rev.* 2377, 2384.

⁴⁰ Downie, above n 23, 126; Browne-Barbour, above n 6, 437.

intended parents spent more than US\$ 33 million in more than 1200 surrogacy arrangements in the United States.⁴¹

There seem to be four main motivations for women to enter into a surrogacy arrangement: money, altruistic motives, enjoying pregnancy without wanting to have another child, and overcoming a birth-related trauma.⁴² In fact, in regard to the last motive, 1/3 of surrogates had undergone an abortion or given up a child for adoption before.⁴³ Most stated that they became surrogates because of altruistic motives, although money has been an additional incentive.⁴⁴

In regard to surrogacy contracts themselves, it is estimated that only 1 per cent of surrogate mothers wanted to keep the babies.⁴⁵ This rate is very low compared to adoption where up to 75 per cent of the women change their mind.⁴⁶

The average surrogate mother is 25 years old, married, and has already children and a high-school education.⁴⁷ Whilst the surrogate comes mostly from the lower middle class,⁴⁸ the would-be-parents in general come from the upper middle class and are well educated.⁴⁹

III REVIEW OF THE CONTEMPORARY REGULATIONS OF SURROGACY

This Chapter gives an outline of the legislative approach to surrogacy on an international level. It will show that, although there is highly divergent legal

⁴¹ Leibowitz-Dori, above n 34, 341.

⁴² Hal B. Levine "Gestational surrogacy: Nature and culture in kinship" (2003) 42 *Ethnology* 173 4.

⁴³ Downie, above n 23, 119, 120.

⁴⁴ Downie, above n 23, 119; "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2349, Schuck, 1799.

⁴⁵ Lori B. Andrews "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood" (1995) 81 *V. L. Rev.* 2343, 2351.

⁴⁶ Andrews, above n 45, 2351.

⁴⁷ This figures refer to a 1983 study with 125 potential surrogates in the United States. Downie, above n 23, 122.

⁴⁸ But see "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2349.

⁴⁹ Anne Kaplan "The Politics of Surrogacy Narratives: Notes toward a Research Project (Parts I & II) in Susan Ostrov Weisser and Jennifer Fleischner (ed) *Feminists Nightmares: Women at Odds, Feminism and the Problem of Sisterhood* (New York University Press, New York, 1994), available from

<<http://www.hsph.harvard.edu/rt21/procreative/Kaplan.htm>> (last accessed 1 July 2005)

regulation at an international level, the legislative tendency is to prohibit commercial surrogacy as opposed to 'altruistic' surrogacy.

A New Zealand

Towards the end of 2004 New Zealand passed two new Family Law Acts concerning surrogacy: The Human Assisted Reproductive Technology Act 2004,⁵⁰ which has been in force since 21 August 2005, and the Status of Children Amendment Act 2004, which has been in force since 1 July 2005.⁵¹

The Human Assisted Reproductive Technology Act 2004 prohibits commercial surrogacy and makes it an offence.⁵² Additionally, advertising for commercial surrogacy is prohibited and an offence.⁵³ Section 14 (1) of the Act makes also clear that surrogacy arrangements are not illegal but unenforceable.

B United States

In the United States laws vary from state to state, from total prohibition to allowing it under certain requirements to non-regulation.⁵⁴ In Arizona, Michigan and the District of Columbia, surrogacy contracts are expressly forbidden and made an offence, regardless whether they are paid or unpaid. New Mexico, Utah and Washington only prohibit payment to a surrogate. In other states, for example Nebraska, legislative provisions that declare surrogacy arrangements either void and/ or unenforceable are most common. In some of these states, unpaid surrogacy arrangements are excepted and, thus, valid.⁵⁵ There are also states like New Hampshire, Virginia, Florida and Texas where surrogacy arrangements are

⁵⁰ The New Zealand legislature showed a very good sense of humour when it in section 2 (2) established that the Act comes into force after 9 months of the Royal assent.

⁵¹ Mark Henagham *Care of Children* (LexisNexis, Wellington, 2005) v.

⁵² New Zealand, The Human Assisted Technology Act 2004, s 14 (3). Section 3 (b) of the Human Assisted Technology Act 2004 points even out that "to prohibit certain commercial transactions relating to human reproduction" is one of the purposes of the Act.

⁵³ of The Human Assisted Technology Act, s 15.

⁵⁴ European Society of Human Reproduction & Embryology 2002 Press releases <<http://www.eshre.com/emc.asp?pageId=439>> (last accessed 05 July 2005).

⁵⁵ Seymour and Magri, above n 8, 34.

authorised and regulated.⁵⁶ However, around half of the states have not implemented any regulation in regard to surrogacy so far.⁵⁷

C Canada

In Canada, the Assisted Human Reproduction Act 2004 prohibits the payment of consideration to a surrogate mother and also the payment to a third party for the arrangements of surrogacy. However, the surrogate mother might receive compensation for "expenditure incurred in relation to her surrogacy if a receipt is provided" and also for work-related income loss under certain conditions.⁵⁸

D Australia

In Australia, like in United States, the legislation varies from State to State. In Victoria, Australia commercial surrogacy is illegal and all surrogacy arrangements are considered void.⁵⁹ The corresponding legislation was passed in November 1984 and proclaimed in August 1986. Therefore Victoria was one of the first states of the world to outlaw paid surrogacy.⁶⁰ Since 1994, in the Australian Capital Territory commercial surrogacy is also prohibited, and surrogacy contracts are void and unenforceable.⁶¹

In Queensland and South Australia both 'commercial' and 'altruistic' surrogacy arrangements are illegal. In Tasmania paid and unpaid surrogacy arrangements are void and unenforceable.⁶²

E United Kingdom

In the UK, surrogacy became regulated in 1985 with the Surrogacy Arrangements Act 1985. Following the Government's Warnock Committee,

⁵⁶ Seymour and Magri, above n 8, 36.

⁵⁷ Browne-Barbour, above n 6, 444.

⁵⁸ Seymour and Magri, above n 8, 43.

⁵⁹ Stuhmcke, above n 3, 3.

⁶⁰ Downie, above n 23, 156.

⁶¹ Browne-Barbour, above n 6, 465.

⁶² Seymour and Magri, above n 8, 47; Stuhmcke, above n 3, 4, 5.

commercial surrogacy was banned, making it a criminal offence to advertise surrogate services, recruit surrogates or operate agencies.⁶³ The Human Fertilisation and Embryology Act 1990 amended the 1985 Act to make surrogacy arrangements unenforceable.⁶⁴ However a payment for expenses up to £ 10,000 is accepted.⁶⁵

F Other European Countries

In Austria, Germany⁶⁶, Switzerland, Denmark, Sweden and Norway surrogacy is prohibited.⁶⁷ In Finland, Greece and Ireland, surrogacy is practised and there are no legislative provisions. France, Denmark and the Netherlands prohibit payment to surrogate mothers.⁶⁸

G Rest of the World

In the majority of Middle East countries, surrogacy is prohibited. The Islamic Research Council damned surrogacy contracts in a report from 2001.⁶⁹ Costa Rica even made the prohibition of surrogacy a constitutional provision.⁷⁰ In China, Hong Kong and Japan surrogacy is also prohibited,⁷¹ whereas Buddhist law allows surrogacy.⁷² In India non-commercial surrogacy is accepted and commercial surrogacy is under discussion.⁷³

IV FROM TOTAL PROHIBITION TO ALLOCATION TO A FREE MARKET – WHAT IS THE RIGHT APPROACH TO SURROGACY?

This chapter offers an economic analysis of the surrogacy market, followed by a discussion of the social, moral and ethical concerns. Subsequently, I examine the question, what the right regulatory approach to commercial surrogacy might be –

⁶³ Downie, above n 23, 135.

⁶⁴ Canadian Human Fertilisation and Embryology Act 1990, s 36 (2).

⁶⁵ Browne-Barbour, above n 6, 465.

⁶⁶ In Germany surrogacy is an offence under § 1 (1) 7 ESchG for the acting doctor.

⁶⁷ Browne-Barbour, above n 6, 462.

⁶⁸ http://news.bbc.co.uk/1/hi/health/background_briefings/193076.stm <last accessed 15.09.2005>.

⁶⁹ Browne-Barbour, above n 6, 461.

⁷⁰ Browne-Barbour, above n 6, 462.

⁷¹ Browne-Barbour, above n 6, 462, 465.

⁷² Browne-Barbour, above n 6, 464, 465.

⁷³ Browne-Barbour, above n 6, 466.

whether commercial surrogacy should be prohibited, allocated to a free market, or regulated. I will also consider whether the tendency to prohibit commercial surrogacy as opposed to 'altruistic' surrogacy is justified and come to the conclusion that this is not the case.

H Economic Analysis

Even though a market economy consists of decentralised (many buyers and sellers) and self-interested decision-making (everyone looking for his or her own wellbeing rather than the well-being of the whole society), market economies have in fact shown to be successful in allocating scarce resources in a way that is welfare-enhancing overall. In his book *A Inquiry into the Nature and Causes of the Wealth of Nations* in 1776, economist Adam Smith made the famous observation that market participants are acting as if they are guided by an "invisible hand", leading them to a desirable outcome.⁷⁴

The initial point is the basic economic theory that when voluntary market transactions are allowed, economic efficiency will be attained, which means that resources are allocated in a way that affords their most valuable use, thus maximising social economic welfare.⁷⁵ This state of economic efficiency is called Pareto optimality, which stands for a situation where no person can be made better off without making at least one other person worse off.⁷⁶

Hence, when a market reaches a state of Pareto optimality and, thus, the best possible allocation of the resources for society, there is no need for market intervention. Furthermore, any intervention by the state would disturb this market equilibrium and economic efficiency. This would decrease the social welfare and is consequently not desired.

Therefore, from an economic point of view, a particular market transaction should be allowed and the contract in question enforceable when it leads to a Pareto

⁷⁴ Gregory N. Mankiw *Principles of Economics* (2 ed, Harcourt College, Orlando, 2001) 9.

⁷⁵ Anthony T. Kronman, and Richard A. Posner *The Economics of Contract Law* (Little, Brown, Boston, Toronto, 1979) 1.

⁷⁶ Edward E. Zajac *Political Economy of Fairness* (The MIT Press, Massachusetts, 1995), 13.

improvement, which means an outcome, where at least one person is made better off and none is worse off.⁷⁷ Economists perceive voluntary and fully informed (none of the parties lacks relevant information) transactions generally as mutually beneficial to both parties and, thus, the society, as it is assumable that a party would not enter into a contract without believing him or herself to be better off.⁷⁸ This view, that voluntary and fully informed transactions are generally welfare enhancing and thus should be permitted, is also the basis for the concept of freedom of contract.⁷⁹

In regard to surrogacy contracts, from an ex ante point of view, provided that they enter voluntarily and fully informed into the contract, both parties are better off, as neither the couple nor the potential surrogate mother would enter into the contract without believing they will gain advantages out of the contract.⁸⁰ The childless couple would not enter into the contract without thinking that the benefit they gain by obtaining a child is more valuable than the money they pay. The surrogate mother enters in the contract as she regards the money she receives, and which she can use in her favour, as more valuable than the disadvantages involved in the pregnancy and the fact that she has to give the child away. Additionally, the surrogate mother might improve her welfare by satisfying her altruistic motives.⁸¹

1 *Voluntariness*

However, the above mentioned, economic perception that a surrogacy agreement is automatically mutually beneficial is only valid when both parties voluntarily enter into the contract. Economists tend to assume that this is generally the case. Nevertheless, the question, whether entering in the surrogacy contract is voluntary, is seen as an issue from the side of the intended surrogate mother rather than the couple.

⁷⁷ <http://en.wikipedia.org/wiki/Pareto_efficiency> (last accessed 5 July 2005).

⁷⁸ Anthony I. Ogus *Regulation: Legal Form and Economic Theory* (Clarendon Press, Oxford, 2004) 16.

⁷⁹ Kronman and Posner, above n 75, 2.

⁸⁰ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 21, 23.

⁸¹ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 22; Kaplan, above n 49, 1.

Generally, if a woman enters into a surrogate arrangement, it can be assumed that this is the expression of her free will, as she is a free person and no one forces her into the contract.⁸² In contrast, critics of surrogacy emphasise that poor women in a desperate situation might have no choice but to become surrogate mothers.⁸³ According to Trebilcock, “there is a clear danger of the commissioning parents or their agent opportunistically exploiting these circumstances and, in effect, coercing the birth mother into entering into an arrangement that in less constrained circumstances she would not have considered.”⁸⁴

However, as Trebilcock notes, “... voluntariness is an elusive and complex concept.”⁸⁵ Especially, the border between economic coercion and voluntariness is difficult to determine. Trebilcock makes the crucial point, when he suggests: “In a world where scarcity confronts all of us, few of us have any constrained choices in any exchange relationship into which we enter”.⁸⁶ In the end, everyone is subject to economic coercion. For example, most people would prefer not to work full-time, however the great majority does so, as they need to earn a living.⁸⁷

Consequently, even if I agree that there might be the risk of exploitation of poor women, I regard this problem not as an issue of voluntariness in an economic context but rather as a social problem which I will further discuss within the moral and social concerns.

2 *Market failures*

The basic economic concept also does not work when there are situations that prevent the market from reaching economic efficiency, so called market

⁸² Gena, above n 27, 227.

⁸³ Gena, above n 27, 230.

⁸⁴ *The Limits of Freedom of Contract*, above n 2, 53.

⁸⁵ Michael Trebilcock “The Lessons and Limits of Law and Economics” (2005) (available from <http://www.crdp.umontreal.ca/fr/activites/evenements/050125MT_texte.pdf> (last accessed 25. September 2005) (revised and updated version from “An Introduction to Law and Economics” (1997) 23 *Monash Law Review* 123) 39 [“The Lessons and Limits of Law and Economics”].

⁸⁶ *The Limits of Freedom of Contract*, above n 2, 123; “The Lessons and Limits of Law and Economics”, above n 85, 39.

⁸⁷ See also Alan Wertheimer, “Two Questions about Surrogacy and Exploitation” (1992) 21 *Philosophy and Public Affairs* 211 224.

failures.⁸⁸ Market intervention is, therefore, not only justified but desired, when it can efficiently address market failure and the benefits of the regulation outweigh its costs.⁸⁹ There are four kinds of market failures, which might prevent Pareto optimality: market power, public goods, externalities and information asymmetries.⁹⁰

(a) Market power

Underlying the theory about economic efficiency is that there is a fully competitive market, which means that the price is not manipulated through market participants, because of their power. Such market concentration is not an issue with a free market in surrogacy, as there are many surrogate mothers and couples that would like to enter in the contract. The personal service and the duration of engagement are further factors that prevent market power. As a result, there is no market power concern that would need to be addressed by intervention.

(b) Public goods

Another market failure occurs, where the market trade concerns a public good. A public good is neither excludable nor consumable. This means no one can be prevented from benefiting from it and one person's enjoyment of the good does not prevent others from enjoying it in the same way. Therefore, public goods result in a free rider problem, which means that other persons can benefit from this good without paying.⁹¹ Even if the product might be socially desirable, no one is willing to pay for a product he might enjoy free and, consequently, the market fails to achieve a socially beneficial outcome.⁹² Surrogacy is not a public good, as other people cannot use and enjoy the surrogate's service, because of the nature of the surrogacy-service. Furthermore, other people can also not 'enjoy' the child as much as the

⁸⁸ <http://en.wikipedia.org/wiki/Market_failure> (last accessed 5 July 2005).

⁸⁹ Margaret J. Radin "Market-inalienability" (1987) 100 *Harvard Law Review* 1849, 1862.

⁹⁰ Robert Cooter and Thomas Ulen *Law and Economics* (4ed, Pearson Addison Wesley, Boston, 2004), 44.

⁹¹ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 42.

⁹² Richard A. Epstein "Surrogacy: The Case for Full contractual Enforcement" (1995) 81 *Va. L. Rev.* 2305, 2309.

intended parents. Consequently, this market failure also does not play a role in regard to surrogacy.

(c) Externalities

Externalities are external effects of a market transaction. This means that stakeholders other than the parties are affected by the contract and this external effects are not taken into account by the parties in their decision making process and the third party also does not receive or pay compensation. Even if a transaction is mutually beneficial to the parties, negative effects on others than the contract parties (negative externalities) might prevent Pareto improvement and, furthermore, lead to a net decrease of social welfare.⁹³

(i) Negative effects on the child to be born

In regard to surrogacy, an externality which might affect Pareto improvement is the possible negative effect on the unborn child.⁹⁴ The concerns about the welfare of the child to be born are unquestionably the most important issue in regard to surrogacy.⁹⁵ However, from an economic point of view, the child cannot be disadvantaged by the contract, but only benefit from it, as it derives its life from the contract. Even if one assumes that children born through surrogacy are worse off than 'normal' children, it is not assumed that their life would be so much worse as to regard it as net disadvantage at all, especially in regard to the notion that the life is the most valuable asset.⁹⁶

In summary, from an economic point of view, there even does not exist a negative externality which would warrant governmental intervention, as the children only can benefit from the contract. Nevertheless, despite this economic analysis, the

⁹³ <<http://en.wikipedia.org/wiki/Externality>> (last accessed 5 July 2005).

⁹⁴ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 11, 23.

⁹⁵ See for example Human Assisted Reproductive Technology Act 2004 (NZ), s 4 (e).

⁹⁶ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 1123; Louis Michael Seidman "Baby M and the Problem of Unstable Preferences" (1988) 76 Georgetown law Journal 1829, 1832. See also Schuck, above n 30, 1800.

question whether there are negative effects on the children which need to be addressed remains and will be discussed within the social and moral concerns.

(ii) Negative effect on existing children and the partner of the surrogate

Externalities might also occur in regard to potential negative effect on the existing partner and/ or children of the surrogate.⁹⁷ It is particularly feared, that the existing children might be psychologically affected, and might especially fear also being given away.⁹⁸ On the other hand, it is argued that those effects on the surrogate's other children can be widely avoided by "honest explanation and emotional security".⁹⁹ Moreover, the money the surrogate gains from the arrangement might substantially improve the quality of life of the whole family and so be in their favour.¹⁰⁰ Consequently, whether the surrogacy arrangement leads to a net benefit or a disadvantage for the partner or existing children cannot be said in general but rather depends on the circumstances of each individual case. In light of the lack of empiric study, to evaluate psychological harm is difficult and it must be taken into account that many kinds of women's 'normal' decisions, are able to (psychological) harm family members. For example, when a mother engages in a full-time job, children maybe harmed, because of lack of attention and care. The potential psychological effects also depend on the psychological conditions and the relation of the persons to each other. Furthermore, the possibility of harm is much higher when a mother, for example, decides to leave the family, although this is not prohibited by law.¹⁰¹

In summary, potential negative effects on the children and the partner might in specific cases occur and lead to a market failure, which is at least not significant enough to justify prohibition of surrogacy. Finally, it is also arguable whether the risks are material enough to require being addressed by regulation at all, as will be discussed below.

⁹⁷ Carol Sanger "Great Contracts Cases: (Baby) M is for the Many Things: Why I Start with M" 44 St. Louis L.J. 1443 1458.

⁹⁸ Elizabeth Anderson. *Value in ethics and economics* (Harvard University Press, Cambridge, 1993) [*Value in ethics and economics*] 172; Brinig, above n 39, 2384.

⁹⁹ Downie, above n 23, 145

¹⁰⁰ *The Limits of Freedom of Contract*, above n 2, 49.

¹⁰¹ See also Epstein, above n 92, 2322.

(iii) Negative effects on children available for adoption and other "soft externalities"¹⁰²

A further and less apparent possible negative effect on third parties concerns children that are available for adoption, but are unwanted.¹⁰³ It is argued that surrogacy would have a negative effect on those children, when childless couples, without the opportunity of surrogacy, might adopt such a disadvantaged child instead. From an economic point of view, this issue cannot count as externality, as losing the chance of being adopted, is only a foregone opportunity to obtain a benefit, to which no legal right exists, which, therefore is not considered in an economic analysis. However, the question will be considered again as part of the moral/ social concerns.

There are a number of other positive and negative external effects of surrogacy arrangements, so called "soft-externalities".¹⁰⁴ A possible positive third party effect could be the would-be-grandparents desperately hoping for a grandchild. In the end every market transaction has numerous positive and negative external effects, even if they are very indirect. Taking all these external effects into account is impossible; therefore, only direct third-party-effects that are of certain significance can find their way in an economic analysis.¹⁰⁵

To sum up, there are no material externalities which would justify prohibition of surrogacy. As set out above, the only negative externality which might occur regards negative effects on the surrogate's family. However, as already argued this externality is not material enough to justify prohibition and it is also questionable whether it needs to be addressed at all, which will be discussed below.

¹⁰² Epstein, above n 92, 2323.

¹⁰³ Especially disabled, black and older children. "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 22, 24; Radin, above n 89, 1931.

¹⁰⁴ Epstein, above n 92, 2323; see "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2345.

¹⁰⁵ See generally Epstein, above n 92, 2323.

(d) Information failure

Information failure can prevent Pareto improvements. When the positive outcome of a market transaction anticipated by a party is misevaluated because of lack of information, the transaction might not lead to a net benefit in terms of welfare.¹⁰⁶

In regard to surrogacy, information failure may occur, as women cannot weigh up the psychological and physical disadvantages they may suffer, especially those women who have not borne a child before. The surrogate might, for example, be required to give up her job or certain hobbies or even be forced by the doctor to undergo certain medical treatment, even surgery. She also might suffer harm from the pregnancy and the birth, and the birth also carries the risk of dying.¹⁰⁷ Finally, the information deficit most discussed is that women might not be able to accurately evaluate the psychological harms they might suffer from having to give the child away.¹⁰⁸

However, Posner repudiates that such information failures arise. His argument is that surrogate mothers are in general women that have already children and are older than 20 years, thus able to evaluate the negative effects of a surrogacy agreement.¹⁰⁹ In this regard it is suggested that a fertility test for the women is "too expensive and intrusive" and therefore couples would rather engage women who have children, therefore the market would be self-regulating, and a restriction obsolete.¹¹⁰ Moreover, in fact, the data indicate, that the majority of women are able to properly evaluate the effects of the surrogacy arrangement, as, for example, less than one percent of surrogate mothers wanted to keep their child.¹¹¹ Nevertheless, even if this percentage is very low, it indicates that those information deficits

¹⁰⁶ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 24.

¹⁰⁷ See also see "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2350.

¹⁰⁸ See for example see "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2351.

¹⁰⁹ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 25.

¹¹⁰ Downie, above n 23, 145

¹¹¹ "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2351. In comparison 75 % of women that consider adoption change their mind after the birth of the child.

occur.¹¹² Moreover, assuming that the majority surrogates know from previous pregnancy what they might expect does not mean that the information costs do not occur at all. Hence, Posner's argument is not convincing.

Andersons argues the opposite view, that women cannot foresee emotional consequences, even if they already have children and that, therefore, women always will have information deficits.¹¹³ I agree that even if women that already have children can better foresee what the pregnancy and birth will bring, this does not mean that they might not have information deficits at all. Every pregnancy and birth seems different and they may still underestimate the fact that they have to give the child away. However, to assume that, therefore, women always have information deficits seems also to be too extreme, as even if there obviously are women that misjudge the consequences of the surrogacy arrangement, many women seems to be able to well evaluate the psychological and physical 'costs', as, for example, the very low rate of surrogates wanting to keep the child indicates.¹¹⁴

To summarise, there might be cases where women underestimate the costs they may face when engaging in surrogacy arrangement. Information failure may occur and need to be addressed. However, they can be directly addressed, for example, by giving the woman the chance to change her mind, as will be discussed below. Therefore, they do not justify prohibition.

Additionally, there might be an information asymmetry as the surrogate, when she is fertilised with the sperm or the egg is implanted, does not know about possible genetic diseases of the donor(s), which might lead to complications or be hereditary. The other way round, the intended parents might not have information about diseases or harmful behaviour of the woman. However, from my point of view such potential information asymmetries need not to be addressed by governmental intervention, as the parties can solve these information deficits

¹¹² See for example Terese McFadden "Surrogate Motherhood – Refusing to relinquish a child" in Jocelyne A. Scutt (ed) *The Baby Machine: Reproductive Technology and the Commercialisation of Motherhood* (Green Print London, 1990) 71.

¹¹³ Elisabeth S. Anderson "Is Woman's Labour a Commodity? (1990) 19 *Philosophy and Public Affairs* 71 (see also Anderson, Elisabeth. *Value in ethics and economics*. (Harvard University Press, Cambridge, 1993), 169) 178, see also Stuhmcke, above n 3, 7; see also Brinig, above n 39, 2388.

¹¹⁴ *The Limits of Freedom of Contract*, above n 2, 52.

themselves by contractual provisions.¹¹⁵ Thereby for example the contract can provide for compulsory health tests, and should also stipulate who has to bear the costs.¹¹⁶ Moreover, the reality shows so far that both the couples and the woman are choosing their contract partners well, because of their concern for the welfare of the child and the close connection surrogacy brings about.¹¹⁷

In summary, an information failure which might occur is the problem that an intended surrogate might not be able to outweigh the physical and psychological costs the contract might generate.

3 Conclusion

As a result, the economic analysis shows that there are market failures which need to be addressed. Although I come to the conclusion that there is not a problem of voluntariness and that there are also no market failures in regard to monopoly and public goods, there occur externalities and information failure, which warrant governmental intervention. However the arising market failures can be balanced by a targeted intervention and, therefore, prohibition is not justified.

I Beyond the Realm of Economic Analysis – Social and Moral Concerns about Allocation to a Free Market and their Significance

Economic analysis is a very helpful tool in evaluating whether the state should intervene in a particular market. Nevertheless, it only can be a starting point. Especially in regard to such a highly controversial subject like surrogacy, there are numerous social, moral, and ethical issues that are not taken into account in an economic analysis, but need to be considered.¹¹⁸

¹¹⁵ Mankiw, above n 74, 213.

¹¹⁶ Epstein, above n 92, 2333.

¹¹⁷ Epstein, above n 92, 2353.

¹¹⁸ Zajac, above n 76, 69; Brinig, above n 39, 2387.

1 *Concern about the welfare of the child to be born*

Potential negative effects on the children to be born have already been mentioned in the economic analysis, but have not been further examined, as, from an economic point of view, they are outweighed by the fact that the child derives its life from the contract. Therefore the question whether there are potential negative effects on children and whether those need to be addressed by governmental intervention is considered in the following.¹¹⁹

Critics seem to assume that the fact that the child is born through a surrogacy arrangement makes it automatically worse off than natural born children. However, I argue that this is not necessarily the case. In fact, even adopted children, who are not genetically related to either of their parents, are, according to surveys, in general no less happy or stable than others.¹²⁰ The notion that children are disadvantaged if they are not brought up by their biological parents and within a traditional family does not match the social reality anymore, as a great number of families do not comply with this model any longer. In fact, in the United States every second child has been at least temporarily living in a single parent household.¹²¹ Additionally, there are no indications that children born through surrogacy are nowadays socially or legally discriminated against.¹²² Surrogacy might even be an advantage for the child, as negative factors, such as “unwanted pregnancy, poor parental health (emotional and physical) and the use of harmful drugs ...” and the resulting risks for the child are less likely to be present.¹²³ The American Fertility Society stated: “A child conceived through surrogate motherhood may be born into a much healthier climate than a child whose birth was unplanned.”¹²⁴

It is further claimed that the child might be distressed at finding out that it was given away by its mother for money.¹²⁵ However, the child would probably not be harmed more seriously when it was given away for adoption for other reasons, or

¹¹⁹ Seidmann, above n 96, 1833.

¹²⁰ “The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood”, above n 33, 1123.

¹²¹ Lori Andrews *Between Strangers* (Harper & Row, New York, 1989) 205 [*Between Strangers*].

¹²² Lynn D. Wardle “Parenthood and the Limits of Adult Autonomy” (2005) 24 St. Louis U. Pub. L. Rev. 169, 192.

¹²³ Downie, above n 23, 142.

¹²⁴ Downie, above n 23, 146; see also Epstein, above n 92, 2321.

¹²⁵ Matthew H. Baughman “In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy” (2001) 10 Colum. J. Gender & L. 263, 263.

was accidentally conceived and regarded as a burden by its parents, or neglected in the battle of separation.¹²⁶

Nevertheless, there remain risks for the children to be born, for example, when they do not fulfil expectations or are disabled, and both of the contract parties refuse to care for them.¹²⁷ Furthermore might children also be harmed when the intended parents are totally incapable to adequately care for the child's needs. However, these risks can be addressed by specific regulation, as will be discussed in Chapter V and, therefore, do not justify prohibition.

2 *The commodification argument*

The commodification argument is the most significant argument against paid or commercial surrogacy. The critics of surrogacy raise objections against the commodification of both the child and the mother.

(e) *Commodification of the child*

Surrogacy is undoubtedly a contract to 'produce' babies and is, therefore, condemned by its critics as baby-selling.¹²⁸ The Swedish Insemination Committee stated for example in its 1985 report: "[Surrogacy] presumes that children become objects of financial bargaining."¹²⁹ In this context it is argued that seeing children as goods and giving them a market price would degrade their humanity, and, as a consequence of this, our conception of personhood.¹³⁰ The concern is that when we start to treat children as exchangeable goods with a market price we will automatically start to perceive all children as commodities and, going further, not only children but all human beings. Therefore, this so called domino effect might

¹²⁶ See also Seidmann, above n 96, 1833.

¹²⁷ *The Limits of Freedom of Contract*, above n 2, 53.

¹²⁸ Radin, above n 89, 1928; *Sex and Reason*, above n 12, 423; Thomas A. Shannon *Surrogate Motherhood: The Ethics of Using Human Beings* (Crossroad, New York, 1988) 157.

¹²⁹ Downie, above n 23, 140.

¹³⁰ Elisabeth S. Anderson "Is Woman's Labour a Commodity?" (1990) 19 *Philosophy and Public Affairs* 71, 72.

produce an inferior concept of humans, ourselves and others.¹³¹ A further fear about baby selling is that children will be conceived as exchangeable 'commercial items' and, in consequence, in the long run the attributes of children, like eye-colour, intelligence quotient etc. could be assigned a market price.

Baughman makes clear that "if we choose to define the transaction in the same way we define 'baby-selling', the selling of a child to a totally unrelated adult, we have already condemned the transaction by definition".¹³² To equate surrogacy to baby-selling would mean conceiving of the child as the surrogate's property.¹³³ As long as we do not presume the child to be the property of its parents - and which reasonable person would seriously do so? - the issue is not baby-selling, but rather the sale of parental right.¹³⁴ Nevertheless, Anderson does not agree that there is a difference; she maintains that payment for giving up parental rights is morally the same as baby-selling.¹³⁵ Radin also regards the argument, that as long as the child is not conceived as property, surrogacy cannot be baby-selling, as implausible, as paid adoption is widely recognised as baby-selling.¹³⁶

However, apart from this, there are further differences between surrogacy and baby-selling. The surrogate mother is not selling an existing child, as the contract is made before conception, and the intended parents are paying for her service.¹³⁷ The attributes of the child cannot play a role in the contract and thus not be commodified. The parties would hardly see the price paid to the surrogate mother as a price for the baby, but rather as a price for 'service' of the surrogate mother. Additionally, in most cases the surrogate mother is not selling her baby to strangers, but is rather paid to give up her parental rights in favour of the other biological parent or parents.¹³⁸ Furthermore, even if the intended parents are not biologically linked to the child, they have "some active connection to the *conception* of the

¹³¹ Radin, above n 89, 1913, 1929; Wanda Wieggers "Economic Analysis of Law and Private Ordering: A Feminist Critique" (1992) 42 University of Toronto Law Journal 170, 172.

¹³² Baughman, above n 125, 265.

¹³³ To the application of property theory see in general Jessica Berg "Owning Persons: The Application of Property Theory to Embryos and Fetuses" (2005) 40 Wake forest L. Rev. 159, 159.

¹³⁴ Radin, above n 89, 1929; Epstein, above n 92, 2308, 2327.

¹³⁵ Value in ethics and economics, above n 98, 171.

¹³⁶ Radin, above n 89, 1929.

¹³⁷ But see Scott B. Rae *The Ethics of Commercial Surrogate Motherhood* (Praeger Publisher, Westport, 1994) 32.

¹³⁸ *Between Strangers*, above n 121, 212.

child", be it through selection of the donor sperm or eggs, even if indirectly in engaging a donor clinic.¹³⁹

(f) Commodification of the surrogate

Other critics see surrogacy rather as the selling of the 'gestational service' of the women and compare surrogacy therefore with prostitution, or even slavery.¹⁴⁰ To make this criticism clear, the language used to describe the surrogate ranges from "living incubator" to "flesh-covered test tube".¹⁴¹ In regard to this view, surrogacy is seen to degrade the dignity and the personality of the woman and to lead to self-alienation, because of the use of the body, in particular its reproductive capacity.¹⁴² The basic notion of this perception is that the body is an integral part of the person, and ought not to be commodified.¹⁴³

However, despite this notion, selling of body parts is not entirely condemned: The sale of eggs, sperm, blood and hair, even if parts of the body, is allowed and social accepted. On the contrary, the sale of human organs is tabooed.¹⁴⁴ With surrogacy, the woman is also not selling her entire body. The decisive question is what has to be seen as an essential and untouchable part of the body and how the surrogate's reproductive capacity is to be classified in this context. The acceptance of the commodification of eggs, sperm and blood can be explained as being only a part of the body and in comparison with human organs renewable. Applying this distinction, surrogacy might also be seen as acceptable as the woman is only selling a part of her body, namely her reproductive capacity, which is furthermore renewable, as she can become pregnant many times.¹⁴⁵

Nevertheless, the argument about bodily integrity goes further. It is claimed that the woman not only sells her reproductive capacity but "the pregnancy contract

¹³⁹ Baugham, above n 125, 287 (emphasis in original).

¹⁴⁰ Radin, above n 89, 1929; also for example Corea who argues for a criminal ban of surrogacy. *Between Strangers*, above n 121, 197, 208.

¹⁴¹ Kane, above n 2, xi.

¹⁴² Shannon, above n 128, 151.

¹⁴³ David H. Smith "Wombs for Rent, Selves for Sale?" (1988) 4 J. Contemp. Health L. & Pol'y 23 30.

¹⁴⁴ Smith, above 143, 28.

¹⁴⁵ Baugham, above n 125, 282.

denies mothers autonomy over their bodies”, because the intended parents could, through the contractual provision, “exercise potentially unlimited control over the gestating mother’s activity”.¹⁴⁶ The concern is that the intended parents might try to exercise excessive control over the surrogate through contractual provisions. However, this problem of “potential abuse” is not inherent in surrogacy contracts but also applies to many work relationships, where the unequal bargaining position in regard to employment is balanced through labour legislation.¹⁴⁷ Therefore it is suggested, that potential exploitation of the surrogate can not only be dealt with by prohibiting surrogacy, but by regulation, as will be discussed below.¹⁴⁸

The Commodification argument also contains an ‘utilisation’ argument: It is argued that surrogacy violates the woman’s personality as she is used as a means to the ends of others.¹⁴⁹ Another concern is parallel to the concerns about the commodification of the child, that the women’s attributes could be given market value.¹⁵⁰ Trebilcock makes the point when he states: “Scenarios are constructed where surrogacy fees would vary depending on the physical and mental attributes of a birth mother akin to different breeding fees associated with the rearing of pedigree livestock.”¹⁵¹ This view misconceives the complex motives women generally have for entering into surrogacy contracts.¹⁵² Surveys show that the vast majority of surrogate mothers entered into such a contract not for purely monetary reasons, but more complex ‘altruistic’ reasons.¹⁵³ Furthermore, contracts are generally accepted in family law, without the objection that they commodify the familial bonds.¹⁵⁴ Marriage contracts are common, regardless of the (romantic) notion that people should marry for love and monetary reasons do not have to play a role in regard to marriage. Moreover, it is also not unusual that allocation of child custody is outweighed by financial conditions in a divorce ‘package’.

¹⁴⁶ Value in ethics and economics, above n 98, 175

¹⁴⁷ See in general Debra Satz “Markets in Women’s Reproductive Labour” (1992) 21 *Philosophy and Public Affairs* 108, 108.

¹⁴⁸ Baugham, above n 125, 290.

¹⁴⁹ Value in ethics and economics, above n 98, 80; *The Limits of Freedom of Contract*, above n 2, 50; Rae, above n 133, 54.

¹⁵⁰ This argument plays mainly a role in regard to ‘partly’ surrogacy, because of the genetic contribution of the surrogate.

¹⁵¹ *The Limits of Freedom of Contract*, above n 2, 50.

¹⁵² Epstein, above n 92, 2319.

¹⁵³ “Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood”, above n 45, 2354.

¹⁵⁴ “Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood”, above n 45, 2344.

In summary, I regard the commodification argument both in regard to the child and the surrogate as exaggerated and unconvincing. The basic assumption that the acting people attach a market price to the child and the surrogate in regard to their attributes does not meet reality but is exaggerated.¹⁵⁵ As far as it is claimed that those scenarios might become reality, once surrogacy becomes more common, the feared scenarios can easily be avoided by reasonable restriction of the market, as will be suggested in Chapter V.¹⁵⁶ From my point of view the commodification argument does not warrant prohibition.

3 *The exploitation argument*

The exploitation argument is based on the assumption that, allocating surrogacy to a free market, poor and disadvantaged women might be exploited, as they might be inclined to enter in a surrogacy arrangement because of their desperate situation.¹⁵⁷ This argument corresponds to the in the economic analysis mentioned voluntariness issue.

This objection does not prove to be significant in practice up to date, as the facts show that most surrogate mothers, even if they were in need of money, have not been poor, but come from the lower middle class.¹⁵⁸ Furthermore, a childless couple would hardly tend to choose poor women, because of health concerns, which might jeopardise a successful pregnancy.¹⁵⁹ Nevertheless, in fact, there is a remaining risk of exploitation of poor and undereducated women. However, the other way round, prohibiting surrogacy would deny the chance for poor women to improve their situation by gaining money through surrogacy.¹⁶⁰ This dilemma that both prohibition and allowance might make poor and undereducated women worse off is described by Radin as double-bind.¹⁶¹ Furthermore, prohibiting surrogacy

¹⁵⁵ See also Arneson, above n 34, 144, who states that those scenarios are speculated because of the intuitive fear of new social challenges.

¹⁵⁶ See also Arneson, above n 34, 142.

¹⁵⁷ Arneson, above n 34, 155; Wieggers, above n 131, 176; Marsha Garrison "Surrogate Parenting: What Should Legislature Do?" (1988) 22 Family Law Quarterly 149 150.

¹⁵⁸ Kaplan, above n 49, 4;) Gena, above n 27, 229.

¹⁵⁹ *Sex and Reason*, above n 12, 424; Epstein, above n 92, 2317.

¹⁶⁰ Radin, above n 89, 1929; Seidmann, above n 96, 1831.

¹⁶¹ Radin, above n 89, 1929.

might lead to a black market, where the exploitation of poor women is the more likely.¹⁶²

4 *The unfairness argument*

A further objection to permitted surrogacy is that it is unfair that surrogacy is reserved to rich couples, whilst poor couples cannot afford to enter into a surrogacy contract. This argument is not convincing. The average sum paid in a surrogacy is \$ 10,000 which the average couple can afford.¹⁶³ Furthermore, we live in a capitalistic world in which poor people are disadvantaged in many regards and prohibiting surrogacy would not improve their situation at all¹⁶⁴ Additionally, the unfairness argument must be seen in the context of general criticism of market economy rather than a specific critique of the surrogacy market.

5 *The decline of the established family model*

A further objection is that allowing surrogacy would contribute to the decline of the established family model.¹⁶⁵ The American Fertility Society for example stated in its guideline from 1986 that “there is concern that surrogacy will weaken marriage and ‘the family’”. This opposition is mainly based on the Roman Catholic notion that procreation has to take place within marriage.¹⁶⁶ The Vatican condemns surrogacy, as well as the surrounding reproductive techniques like artificial insemination, insisting that children can only be created by marital intercourse. A Vatican Instruction from 1987 even urged legislators to ban all kinds of reproductive technology, including surrogacy.¹⁶⁷ This religious and conservative conception of family, which, for example, also forbids extramarital sex, has in the last decades been undermined due to social change. Even if the family is still seen as an important social value, such a strict view of family is, in our modern society, no longer supported by the general opinion. Moreover, the vast majority of children

¹⁶² Garrison, above n 157, 343.

¹⁶³ Anderson, above n 29, 74.

¹⁶⁴ “The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood”, above n 11, 26.

¹⁶⁵ *The Limits of Freedom of Contract.*, above n 2, 49.

¹⁶⁶ *The Limits of Freedom of Contract.*, above n 2, 49.

¹⁶⁷ *Between Strangers*, above n 121, 162.

would still be born within families. Thus, the fear that surrogacy might harm our conception of families is also negligible in regard to the limited scope of the surrogacy market.¹⁶⁸

As far as it is argued that people abiding by the traditional model might be affected as surrogacy undermines their moral values, it must be said that, the other way round, prohibiting surrogacy for this reason, would mean forcing their values upon others, who do not share them.¹⁶⁹ People who are of the opinion that surrogacy is immoral "need not become involved", but they do not have the right to stop others from engaging in it.¹⁷⁰ In this context it is argued that the state should be neutral in regard to the conflicting moral ideals and that therefore a prohibition is not justified.¹⁷¹

6 *Parent-child bonding*

The relational bonding between parents and their children is seen as important ideal. Another argument against a free market in surrogacy is, therefore, that surrogacy violates this ideal, as the biological mother has to give her child away. Undoubtedly, the mother carrying the child and the child develop a close relationship through the phase of pregnancy itself.¹⁷² However, the reality shows that surrogate mothers in general, even if they develop this close relationship to the baby, do not see this baby as their own baby.¹⁷³ Secondly, a modern view would not conceive bonding as only related to the genetic parentage or the birth-giving, but much more to the fact of living together and sharing experiences.

¹⁶⁸ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 11, 26. The number of children born through surrogacy arrangements in the United States was 4,000 until the mid-1990s. Even if it is estimated that meanwhile thousands of children are born through surrogacy each year and, one would assume that this number would increase when surrogacy would be permitted in most states, the number would still not play any significance proportional to 'normally' born children. Browne-Barbour, above n 6, 465.

¹⁶⁹ *The Limits of Freedom of Contract*, above n 2, 50.

¹⁷⁰ Downie, above n 23, 143, see also Epstein, above n 92, 2326.

¹⁷¹ *Value in ethics and economics*, above n 98, 169.

¹⁷² This argument was brought forward by the surrogate mother in the famous Baby M Case from 1987. Baby M, 109 N.J. 396, 414 (S.C. New Jersey 1988), See also Smith, above 143, 27.

¹⁷³ "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2352.

7 *Feminist objections*

Feminists differ over the question whether surrogacy is strengthening the role of women and thus has to be appreciated or whether it is a curse, devaluing women.¹⁷⁴ On the one hand, it is argued that surrogacy confines the woman to her biological role thus fortifying gender inequality.¹⁷⁵ On the other hand, it is argued that the woman should have the freedom to enter into a surrogacy contract, as it is her personal decision to use her reproductive capability for the benefit of others and to gain money.¹⁷⁶ The freedom of using her "procreative liberty" would not oppress but empower the woman.¹⁷⁷ This feminist camp goes further and claims that the prohibition of surrogacy would be sexual discrimination, as sperm donors and 'womb donors' are comparable, and men are allowed to sell their sperm for money.¹⁷⁸ In the end feminists hold two opposed extreme views about the effect of surrogacy on gender roles. However, I regard the feminist criticism about surrogacy as insignificant. As women are in general free to enter into a surrogacy arrangement, I cannot see that the surrogacy confines women to her gender role.

8 *The unwanted children free for adoption*

As discussed under externalities in the economic analysis, a further concern about surrogacy is that it might eliminate the chances of children that are available for adoption, especially those that are unwanted because of birth defects, age or skin colour. However, this argument seems to be questionable, as probably only a very few couples would be inclined to choose this alternative, rather than trying to find another way or even preferring to stay childless. Additionally, to refer childless couples to the adoption of such a deprived child instead, seems to be unfair as they are not responsible for this social problem and even might not be capable of coping with such a child.¹⁷⁹

¹⁷⁴ Wiegers, above n 131, 175.

¹⁷⁵ Baugham, above n 125, 273.

¹⁷⁶ Leibowitz-Dori, above n 34, 346; Garrison, above n 157, 150.

¹⁷⁷ Leibowitz-Dori, above n 34, 346.

¹⁷⁸ Gena, above n 27, 226, Smith, above n 143, 24.

¹⁷⁹ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 11, 24.

Asides from that, even if there would be enough children for adoption, the possibility of adoption cannot produce an argument against surrogacy, because, if that would be the case, it must also be considered to restrict the reproduction of fertile couples, so that they instead of creating a new child they adopt an existing child. Carrying on one could also ask whether it would make sense to prohibit reproduction entirely and to redistribute children, especially from third world countries, so that those children barely having enough to eat would be cared for instead of new born children.

9 *The Fear of Interference with Creation*

There is another more intuitive objection to surrogacy, which lies beyond moral argument: humankind fears to interfere with the nature. In our Western society God's Creation is seen as untouchable, and therefore people might have a more instinctive fear of surrogacy. Additionally, surrogacy involves human reproductive techniques, which cause general suspicion. There is the great fear, that humans can be manipulated and artificially 'produced' by these reproductive technologies, questioning our conception of the individuality and uniqueness of human beings, and therefore our concept of humankind itself. However, even if surrogacy, as set out above, might facilitate cloning, surrogacy itself does not bear the risk of manipulation of humans. The related concerns must rather be addressed by regulation which directly addresses the corresponding reproductive technology.

10 *Conclusion*

As a result of the social, ethical and moral evaluation, I come to the conclusion that most arguments are overstated and mostly also based on extreme scenarios which seem not to meet reality. However, there remain concerns which need to be addressed by regulation, especially the potential negative effects on children born through surrogacy arrangements and the risk of exploitation of poor women. These concerns can be addressed by directive regulation and therefore do not justify prohibition of surrogacy.

J The Right Approach

As reflected by the international regulation outlined in Chapter III there are four main regulatory approaches towards surrogacy: Firstly, surrogacy can be allocated to a free market. Secondly, surrogacy can be totally prohibited. Thirdly, commercial surrogacy might be prohibited and only unpaid surrogacy allowed. Fourthly, it is possible to regulate the surrogacy market in detail.

At the end of both the economic analysis and the social/ moral evaluation, I came to the conclusion that prohibition of surrogacy is not justified and that a regulated market might be the right answer. In the following, I am going to clarify my finding by applying the condensed form of my economic and social/moral analysis to the possible approaches. So far I have also neglected the third possible approach, namely to prohibit paid surrogacy, which I will discuss and reject in the following.

1 Total Prohibition

As shown above, there are both market failures and numerous moral and concerns about surrogacy, which need to be addressed. However, to prohibit surrogacy is neither justified from an economic point of view, nor from a social/ moral point of view. Moreover, a targeted intervention should be able to address all the concerns.

In its 1986 guideline, the American Fertility Society came to the conclusion, that “potential problems with surrogacy can be assessed and accepted by those involved.” It further stated that “sperm donation is largely accepted by society as a way around male infertility, and surrogacy could be acceptable as the equivalent for female infertility, ‘unless it can be demonstrated to be significantly more risky to the participants or to society than [DI] or other activities that our society condones’”.¹⁸⁰

I agree with this view. All reasonable concerns and risks can either be addressed or are too vague or immaterial to justify a total prohibition of surrogacy

¹⁸⁰ Downie, above n 23, 141.

and do not outweigh the significance of the fundamental human rights of procreation and freedom of contract.¹⁸¹ Furthermore, because of lack of children for adoption, and the strict selection criteria for adoptive parents, for many people surrogacy might be the only possibility to have children.¹⁸²

Moreover, the prohibition of surrogacy could cause further problems. For example, when surrogacy is seen as illegal the children born through surrogacy might be stigmatised.¹⁸³ Additionally, as mentioned above, prohibition might lead to a black market and, thus, a greater risk of exploitation for poor women¹⁸⁴

Consequently, I consider that prohibition is not the proper solution, but regulation in regard to surrogacy needs to take place in a more directed way.¹⁸⁵

2 *The commercial surrogacy – 'altruistic' surrogacy dichotomy*

Chapter III showed that there is highly divergent legal regulation at an international level. Nonetheless, there seems to be an international tendency in regulating surrogacy towards prohibiting commercial surrogacy as opposed to 'altruistic' surrogacy.¹⁸⁶ I consider this distinction to be inappropriate.

In contrary to paid surrogacy, 'altruistic surrogacy' is meant to take place between family members or other close relations, for example the sister or friend bearing a child for the infertile couple. It is perceived to be 'compassionate family surrogacy' and is regarded as a worthwhile act of charity.¹⁸⁷ This view wrongly assumes that there would be no problems at all, as the woman would act out of love and be happy to surrender the child, and that, thus, the general objections do not play a role. I regard this view of 'altruistic' surrogacy to be unrealistic.

¹⁸¹ *Value in ethics and economics*, above n 98, 74.

¹⁸² *Value in ethics and economics*, above n 98, 169.

¹⁸³ *Between Stranger*, above n 121, 223.

¹⁸⁴ Garrison, above n 157, 154.

¹⁸⁵ See also Radin, above n 89, 1921, who argues that „incomplete commodification”, also partly regulation is the right approach.

¹⁸⁶ Stuhmcke, above n 3, 150; “Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood”, above n 45, 2347 for United States; Kane, above n 2, xv, for Australia.

¹⁸⁷ Kane, above n 2, xii.

Admittedly, the commodification argument, which is the most significant argument against paid surrogacy, and also other objections to surrogacy, as for example the possible exploitation of poor women, do not apply as there is no payment.¹⁸⁸ However, as mentioned above, I regard the significance of the commodification argument to be overestimated and the underlying speculation easily countered by reasonable restriction of the market. In respect to the exploitation argument, this can, as already argued, be addressed by directive regulation and not only by prohibition of payment.

It is further feared that a paid surrogate would, because of her monetary interests, be less likely to disclose harmful behaviour or medical issues.¹⁸⁹ However, the problem of non-disclosure can easily be avoided by the parties themselves, as they can stipulate a compulsory health test, as already discussed within information asymmetries in the economic analysis.

Aside from these objections, the concerns and the risks of surrogacy for the people involved remain largely the same. The potential negative effects for the children remain the same, whether there is payment involved or not. For example, the risk, that after their birth both the intended parents and the surrogate refuse to care for them, may also arise with 'altruistic' surrogacy. The same applies to possible psychological harm. Also the problem that the women might misjudge the psychological and physical effects can also occur with 'altruistic' surrogacy.

Furthermore, especially the potential emotional exploitation with 'altruistic' surrogacy is underestimated, which is even more likely within close relationships.¹⁹⁰ Hence, I suggest that 'altruistic' surrogacy also needs to be addressed by directive regulation, whereas allowing unpaid surrogacy and prohibiting paid surrogacy are not the right way.

¹⁸⁸ Wertheimer, above n 87, 224.

¹⁸⁹ Downie, above n 23, 154.

¹⁹⁰ Kane, above n 2, xiv; *The Limits of Freedom of Contract*, above n 2, 51.

Whilst it is generally accepted that sperm donors are awarded compensation, it is widely argued that a payment to surrogates is immoral.¹⁹¹ However, there is also a strong claim that surrogates should be compensated for their long and intense involvement, which also involves greater inconvenience and bears greater risks than sperm donation.¹⁹² Trebilcock even argues that paid surrogacy might lead to economic recognition of the "reproductive labour" and therefore not any longer be conceived as "uncompensated and assumed duty borne by women."¹⁹³ This argument is parallel to the recent notion that the economic value of women's housework needs to be recognised.¹⁹⁴ I agree with the view, that a woman who takes over the burden of pregnancy and bearing a child has the right to be financially compensated for her commitment.

The underlying fear about commercial surrogacy is that it might become 'big business' and lead to "black market baby selling, breeding farms, turning impoverished women into baby producers and the possibility of selective breeding at a price."¹⁹⁵ The fear that the surrogacy market might tend toward those scenarios, seems to be the basis for many moral objections to surrogacy, for example the commodification or exploitation argument. Those scenarios are undoubtedly horrible and need to be prevented. However, these scenarios are worst case scenarios, which can be prevented by reasonable regulation and therefore prohibition is not necessary.

Another problem with prohibiting paid surrogacy is that not enough 'altruistic' women might be available to meet the demand.¹⁹⁶ This would mean that those infertile people who suffer greatly from their desperate wish for a child would not be catered for.¹⁹⁷

¹⁹¹ Downie, above n 23, 155.

¹⁹² See also Downie, above n 23, 155, Smith, above n 143, 26; Berg, above n 133, 194; Contested Rae, above n 133, 47.

¹⁹³ *The Limits of Freedom of Contract*, above n 2, 51.

¹⁹⁴ *The Limits of Freedom of Contract*, above n 2, 51.

¹⁹⁵ Downie, above n 23, 140.

¹⁹⁶ Brown-Barbour suggests that without allowing paid surrogacy, surrogacy agreements would cease to exist in the United States. Brown-Barbour, 438. See also Sanger, above n 97, 1458.

¹⁹⁷ Radin, above n 89, 28.

3 *Allocation to a free market*

As the economic analysis and the social/ moral evaluation have shown, allocating surrogacy to a free market is neither desirable from an economic point of view nor from an ethical one. The economic analysis revealed market failures which need to be addressed. Furthermore, the numerous social and moral concerns require at least some regulation of the market. Even if the concerns raised do not necessarily justify prohibition, there are risks for the people involved and the society as a whole which need to be addressed.¹⁹⁸ Apart from this, there are several problematic issues concerning the relation of the parties involved: What happens when a surrogacy contract fails? What rights and obligations do the parties have, both in relation to each other and the child? What happens if the child is born disabled? Who has to care for the child and is there room for liability for tort, when, for example, the child is disabled due to harmful behaviour of the surrogate?¹⁹⁹ Prohibition is not the answer, but we need legislation that directly addresses the potential negative effects and problems. Regulating surrogacy, however, means that a sophisticated set of legislation will be needed.

V *REGULATING SURROGACY*

So far I came to the conclusion that a regulated market might be the best approach to surrogacy. However, the remaining and difficult question is how such a regulation should appear in detail, especially to what degree or in which aspects surrogacy should be regulated.

As will be shown in the following, both the scope of the surrogate market needs to be restricted and the performance and consequences of the surrogacy arrangement need to be regulated to address the risks and concerns examined above. However, it will also be shown that there are further risks and uncertainties for the people involved, which also need to be addressed.²⁰⁰ Moreover, regulating the market raises further delicate moral questions. In consequence, the individual points

¹⁹⁸ Downie, above n 23, 144.

¹⁹⁹ See also *The Limits of Freedom of Contract*, above n 2, 55.

²⁰⁰ See also Schuck, above n 30, 1805.

discussed for regulation are at least as controversial as the question of allowing or prohibiting surrogacy itself.

One suggestion is to not specifically regulate surrogacy, but to use the legislation of contract law and family law already in place, as problems occurring to surrogacy could easily be solved with the standard legislation.²⁰¹ However, as shown above and further examined in the following, there are several risks and concerns about surrogacy, which do not fit in the standard contract and family law, but need to be addressed.²⁰² The current regulation is also, at least in regard to some issues, totally inappropriate. For example, no one would seriously suggest, using contract law, and thus to subsume a child with a birth defect under a defective product.²⁰³

In the following I will explore the different suggestions for the regulation of each issue. As the proposals are, like the moral concerns, both conflicting and overlapping I focus on identifying the points which are discussed for regulation and give as structured an overview as possible.

K The Scope of the Market

In regard to the scope of the market the question for entry barriers arises in regard to all possible market participants: infertile couple, surrogate mother, and surrogate firms, and is meant to address different and overlapping risks and concerns of the surrogate market.

1 The intended parents

It is agreed that the would-be parents need to be capable of providing a good and safe environment for the upbringing of the child, to avoid the risk of harm to the child to be born, as discussed above. Nevertheless, how the best interests of the

²⁰¹ *The Limits of Freedom of Contract*, above n 2, 53.

²⁰² See generally "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", above n 45, 2343; Contrast Garrison, above n 157, 157.

²⁰³ See also Trebilcock, who also argues against leaving the resolution of surrogacy agreements to the present regulation. *The Limits of Freedom of Contract*, above n 2, 54.

child can be guaranteed and what requirements for the intended parents should be set in detail are challenging questions.

(g) 'Fitness' and age issue

As long as the intended parents are a heterosexual, married or co-habiting couple with an infertile female, the only really controversial questions are whether there should be a 'fitness' assessment or an age restriction. One suggestion is therefore to make a physical and psychological assessment obligatory.²⁰⁴ Others go further, and claim that the same strict screening as with adoption should be applied.²⁰⁵ Furthermore, an age restriction could be considered.

From my point of view an age restriction or other legislative provisions that set out exact requirements would lead to a too inflexible regulation, which would leave no room for the circumstances of the particular case. As the reproductive age is varying from person to person, and it is also not unusual that men in their sixties still procreate, it is difficult to ascertain a certain age and subsequently the problem of age discrimination could arise.

Nonetheless, I am of the opinion that a selection of intended parents is necessary, to avoid possible negative effects on children, as a result of unqualified surrogate parents. Accordingly, I favour the idea of an obligatory physical and psychological screening to guarantee that the child is brought up in an adequate environment. So, the circumstances of the particular situation can be taken into account and simultaneously the risk of harm to children can be avoided. Even if such an assessment imposes costs on the parties, which need to be taken into account from an economic point of view, I regard them being outweighed by the above discussed advantages of the assessment.²⁰⁶

²⁰⁴ Downie, above n 23, 146

²⁰⁵ *The Limits of Freedom of Contract*, above n 2, 54.

²⁰⁶ Garrison, above n 157, 151.

(h) Beyond Infertility

Surrogacy might also be considered when a woman is not infertile, but does not want to become pregnant and bear a child for other reasons. Whilst the consideration of surrogacy seems, apart from infertility, also widely be accepted when there are serious health issues or the risks that the intended parents might pass on a genetic defect, it becomes more delicate when there are no or only minor health risks involved. Furthermore, possible incentives for women to consider the engagement of a surrogate can also be aesthetic or career reasons, or just that a woman do not want to bear the burden of a pregnancy.²⁰⁷ Even if a restriction in regard to these reasons would not directly address any of the concerns raised above, restriction for moral reasons is discussed and need to be considered.²⁰⁸

The Ontario Law Reform Commission, for example, recommended therefore regulating the market so that only infertile women are allowed to engage in surrogacy arrangements. It made a crucial point when it stated that surrogacy is meant "to respond to infertility, not to afford individual the opportunity to satisfy their lifestyle preferences."²⁰⁹ I widely agree with the Ontario Law Reform Commission in this notion and think that aesthetical or career reasons should be prohibited but I am of the opinion that women with reasonable health risks and inheritable illnesses should also be allowed to engage in surrogacy arrangements.²¹⁰ This requirement could also be guaranteed by the assessment mentioned above.

(i) Homosexual couples, singles and transsexuals

The issue becomes more contested when it comes to homosexual couples, single women or men and transsexuals.

On the one hand, most Western legislation meanwhile accepts same-sex relations and unions. On the other hand, they are still stigmatised in the general

²⁰⁷ Downie, above n 23, 146.

²⁰⁸ The exemption of 'life-style' reasons would probably also considerable restrict the market. As the exploitation of poor women is more likely with an extensive and (morally) unconstrained market, a restriction in regard to the reasons would diminish the risk of exploitation of poor women and also address the Commodification argument.

²⁰⁹ Downie, above n 23, 147.

²¹⁰ See also Garrison, above n 157, 152.

public opinion or at least regarded as an unacceptable environment for children.²¹¹ This suspicion also applies to transsexuals. Also, the traditional family model seems to be so deep-seated in the minds of most people, that there remains a great number who think that children should, at least, not initially be raised by singles.²¹²

In a 1986 Australian survey by the New South Wales Law Reform Commission, 70 per cent of the Australians would prohibit the engagement of female homosexual couples, and 72 per cent the one of male homosexual couples.²¹³ In the same survey 49 per cent were also against single men and 45 per cent against single women becoming parents through surrogacy.²¹⁴

Despite the public opinion, the New Zealand legislature seems not to have an issue with lesbian couples in regard to reproductive technology, as can be seen from section 19 of the Statutes of the Children Act 1969, where, in relation to human reproductive techniques in general, it is explicitly ruled that the woman who is donating the ovum is not the parent of the child unless she is the partner of the birth mother at the time of conception.²¹⁵

From my point of view, homosexual and lesbian couples and transsexuals should be allowed to engage in surrogacy arrangements, not at least in regard to antidiscrimination issues.²¹⁶ As long as potential harm to children is feared, and that is the only concern that might be addressed, I suggest that they should be obliged to the same psychological and physical assessment as every heterosexual couple, too, as outlined above.

²¹¹ See also Epstein, above n 92, 2324.

²¹² Law Reform Division, Department of Justice (New Zealand) "New Birth Technologies" (1985) 18.

²¹³ Downie, above n 23, 147.

²¹⁴ Downie, above n 23, 147.

²¹⁵ This regulation was inserted by the Status of Children Amendment Act 2004, as from 1 July 2005.

²¹⁶ See also Michael Trebilcock, Melody Martin, Anne Lawson and Penney Lewis (1995) 32 *Osgoode Hall Law Journal* 613, 680 ["Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services"] They state that people should not be excluded from the market because of "ethnic background, socioeconomic status, sexual orientation, or marital status."

2 *The surrogate mother*

The introduction of market barriers in regard to surrogates might address possible information failures and externalities, explicitly the potential negative effect on her family.

In regard to possible information failures, it is claimed that surrogacy should be restricted to women who already have children.²¹⁷ It is argued that thus only women who already know about the physical and emotional stresses and strains, and therefore are able to make an fully informed decision, can enter into a pregnancy contract.²¹⁸ From my opinion, this restriction would be wrong. As already discussed under information asymmetries within the economic analysis, neither does the fact that women already have children mean that they are able to make fully informed decisions in any case, nor do women who do not have children necessarily misjudge the effects of the surrogacy arrangement. However, as women without children are more likely to underestimate the risks, the proposed regulation might be nevertheless reasonable, if there were not another, from my point of view better, regulative solutions to overcome potential information failures: Firstly, I favour an physical and psychological assessment of the surrogate, which should also include counselling and thus help the surrogate to make an widely considerate and informed decision. Secondly, I suggest that the surrogate should be allowed to change her mind, as even counselling can not fully circumvent information deficits, as will be discussed separately further below.

Contrarily, it is argued that surrogates should be women without children to avoid potential negative effect on the surrogate's existing children.²¹⁹ That there is a remaining risk of possible psychological harm to the existing children of the surrogate is already discussed in the economic analysis under externalities. However, I regard this suggestion also to be the wrong approach, and suggest, that this problem should rather be addressed by the above suggested psychological and physical assessment of the surrogate. Additionally, such a general assessment would also help to prevent psychological and physical harm to the child to be born, as for

²¹⁷ Downie, above n 23, 145.

²¹⁸ Downie, above n 23, 145.

²¹⁹ Downie, above n 23, 145.

example by declining an intended surrogate with an addiction problem. Therefore I see such an assessment as necessary to address the corresponding risks and concerns, and also justified in view of the costs it imposes on the parties.

In regard to the discussion of a minimum age, in regard to the general notion that minors need to be protect, I am, in accordance with the Ontario Law Reform Commission, of the opinion that minors should be excepted.²²⁰ I cannot see any reasonable ground to impose a higher minimum age. Even if the protection of minors is not a specific problem of surrogacy arrangements and also most jurisdictions already at least regulate that contracts in general are unenforceable against minors, I am, for clarification reasons, in favour of an explicit provision in regard to surrogacy arrangements.²²¹

3 *Private surrogacy agencies*

Private surrogacy agencies are private firms that conduct the matching of the intended parent(s) and the surrogate, provide the contract, cater for the medical conduct and often also offer counselling for the surrogate and the intended parents.

Towards of the end of the 1970s and the beginnings of the 1980s, when there was no regulation of surrogacy, sixteen surrogacy firms were set up throughout the United States and in 1980 *The New York Times* wrote about a “whole new sector of the economy”.²²² This shows that in a free market private surrogacy agencies would flourish and so the question, whether these agencies should be allowed unrestricted, supervised, imposed with restrictions, or totally prohibited is highly contested.

As those agencies are normally paid by the intended parents, it is feared that they might focus on the interest of the intended parents and therefore not sufficiently consider the interests of the surrogate and the child to be born. This concern could

²²⁰ Downie, above n 23, 145.

²²¹ See for example the New Zealand Minors' Contracts Act 1969, s 6 (1), which could however not apply to surrogacy when it is interpreted as service in accordance to section 5 (1) (c) of this Act. Therefore, in regard to section 5 (1) (c), a clarification in New Zealand would be admirable.

²²² Gena, above n 27, 214, 217.

be addressed by imposing regulation and supervising private surrogate agencies.²²³ Information failures in regard to the surrogate can be avoided by a rule that provides that the surrogate has to get independent advice and other counselling.²²⁴ In regard to possible negative effects on the child, procedural rules for the selection of intended parents could be imposed. However, the remaining concern is that those restrictions will not be effective, as manipulation beyond those regulations can hardly be undermined.²²⁵ Therefore it is widely claimed, that private agencies should be prohibited and replaced by a state-run monopoly.²²⁶

The greatest concern about private surrogate agencies is, however, that they, following their monetary interest, would facilitate the exploitation of women.²²⁷ That this concern is quite legitimate is shown by the following statement: The president of an agency in the United States forecasted in an interview in the 1980s that "... the price paid to women ... will come down once surrogate motherhood is more commonplace ..." as "the industry can then go to poverty-stricken parts of the country". He further speculated that with gestational surrogacy the "industry" could use women of third world countries and this could decrease the fee to \$ 1,000.²²⁸ Despite the 'double-bind' - the notion that poor women still would prefer to be exploited instead of earning no money -, the problem is that, with private agencies, an extensive and systematic exploitation might take place.²²⁹

Consequently, I consider that, even if it is contestable whether, in regard to the concerns about the child and information failures of the surrogate prohibition is necessary or regulation would sufficient address these concerns,²³⁰ at least in regard to the risk of an extensive and systematic exploitation of poor women, private surrogacy agencies should be prohibited.

A consequent problem could arise, as without agencies, which do the matching, it might be difficult for the contract parties to find each other and, thus,

²²³ *Value in ethics and economics*, above n 98, 186.

²²⁴ *The Limits of Freedom of Contract*, above n 2, 56.

²²⁵ *Value in ethics and economics*, above n 98, 186.

²²⁶ *Value in ethics and economics*, above n 98, 186.

²²⁷ *Value in ethics and economics*, above n 98, 187.

²²⁸ Gena, above n 27, 214; Leibowitz-Dori, above n 34, 334.

²²⁹ Radin, above n 89, 1929.

²³⁰ To the suggestion to implement state-approved agencies see Discussion-Paper II, 11.

transaction costs might occur.²³¹ Yet, in modern times with plenty of support groups and online forums this should not be too difficult.²³² Furthermore the matching could also be taken over by welfare-organisations or by state-run agencies.²³³ This service of welfare-organisations or the costs of state-run agencies could be financed by a fee paid by the parties. As far as transaction costs or search costs are concerned, the fees would more likely be less than the engagement of a private agency.

L Precondition, Performance and Consequences of the agreement

1 Precondition

(j) Screening and Counselling

I suggest that an obligatory assessment of all parties involved would be a good solution. The remaining question is how this should be put in practice. The assessment could be left to private firms or conducted by welfare-organisation, hospital departments or state agencies. Private assessment firms, even when imposed by procedural regulation and supervised, might be more likely to approve parties, even if they are not qualified, because of monetary interests. The same problem might occur with hospital departments, who also might be focused on the money they gain from the medical procedure. Consequently, welfare-organisations might be a better solution and I am in favour that a corresponding state department, for example, a department of family affairs performs the screening. Thus, it could be assured that qualified psychologists and social workers conduct a proper procedure, who should additionally offer counselling, which will also be able to cope promptly with occurring problems and thus might help to avoid harm.²³⁴

²³¹ Brinig, above n 39, 2393.

²³² See also Browne-Barbour, above n 6, 438; see also Levine, above n 42, 4.

²³³ *Value in ethics and economics*, above n 98, 186.

²³⁴ See also National Bioethics Consultative Committee (Australia) "Discussion Paper on Surrogacy 2 – Implementation" (1990) 12.

(k) Court approval

It is further discussed to have a court approval for the contract and to regard the contract as long as void until a judge affirms it.²³⁵ From my point of view this goes too far, and is also not necessary. Furthermore I regard a screening by specialists, such as psychologists and social workers to be able to deliver a better result, as a judge might lack both sufficient knowledge and time to look close enough into the case.

(l) Agreement of the husband/ partner

It is also claimed that preconditions for the contract should be, that the husband or the partner of the surrogate consents to the contract. Thus, possible negative externalities on him, as discussed above, could be addressed. I think this goes too far, as he also does not have to agree when the woman, for example, engages in a full-time employment contract, even if this might also produce a negative effect on him. Nonetheless, as far as it is regulated that the husband or the partner of the surrogate is the legal parent of the child,²³⁶ he or she also needs to waive parental rights and thus agree to the contract.²³⁷

2 *The binding contract discussion*

One of the most contested issues in regulating surrogacy is the question whether the woman should be allowed to change her mind.²³⁸ The matter of the binding contract is mainly discussed in regard to the scenario, where the woman changes her mind after birth and wants to keep her child. However, there is a second issue, namely whether the surrogate who changes her mind before birth can undergo an abortion.

²³⁵ Baugham, above n 125, 264; Brown-Barbour, above n 6, 446, Garrison, above n 157, 151 (Footnote 10).

²³⁶ See for example Status of Children Act 1969 (NZ), s 5 (1), in regard to the husband; Status of Children Act 1969 section 18 (2), as inserted by the Status of Children Amendment Act 1969, in regard to the partner. In regard to the partner is, however, requirement that he agreed to the procedure, section 18 (1) (c).

²³⁷ Brown-Barbour, above n 6, 436, 437, see also Downie, above n 23, 158.

²³⁸ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 21.

(m) Keeping the child

The problem that the surrogate wanted to keep her child was the subject in the famous *Baby M* Case decided in 1988 in the United States.²³⁹ In 1985 Mrs. Whitehead signed a surrogacy arrangement with Mr Stern, agreeing to be inseminated with Mr Stern's sperm and to surrender the child to Mr Stern and his wife in return for US\$ 10,000. After giving birth to the child Mrs Whithead refused to give up the child. After a long custody battle the court, also holding that the contract was illegal, granted the Sterns custody as to the best interest of the child.²⁴⁰

Regulating that the surrogate is allowed to change her mind if she wants to keep the child after birth would address the information asymmetries of the surrogate explored within the economic analysis. Furthermore, also the risk of coercion could be balanced.²⁴¹

In the end, the decision whether the arrangement should be enforceable is about weighing the possible negative outcomes for the surrogate when the contract is made enforceable on the one hand, who may suffer having to relinquish her child, against the disadvantage to the intended parents, not obtaining a child when the surrogate changes her mind. In regard to the negative effect of the surrogate, studies about adoption have proven that women who gave their child away might suffer for the rest of their lives.²⁴² On the other hand, it is argued, that when the contract is not enforceable, the intended parents are disadvantaged, as they lose valuable time in their aim to obtain a child.²⁴³

Nonetheless, whether the surrogate should be allowed to change her mind seems to be affirmed from the majority of authors.²⁴⁴ Downie makes the crucial point, when she argues that the intended parents have to bear this risk, and even if

²³⁹ *Baby M*, 109 N.J. 396 (S.C. New Jersey 1988).

²⁴⁰ *Baby M*, 109 N.J. 396 (S.C. New Jersey 1988) 411.

²⁴¹ See also *The Limits of Freedom of Contract*, above n 2, 54; "Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services", above 216, 693.

²⁴² Kane, above n 2, xvii.

²⁴³ "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood", above n 33, 23.

²⁴⁴ For example Downie and Trebilcock, both advocating surrogacy, argue for allowing the surrogate to change her mind. Downie, above n 23, 159; *The Limits of Freedom of Contract*, above n 2, 54.

this can be seen as “harsh”, it must be taken into account that the risk is not too high because of the low rate of surrogates who want to keep the child.²⁴⁵ I agree with this view. However the question remains how this should be regulated in detail.

As shown above, New Zealand, like numerous other countries, already explicitly regulate that a surrogacy arrangement is not enforceable.²⁴⁶ Consequently, the surrogate can change her mind, and this is probably what the legislator primarily had in mind. However, this regulation means also that the surrogate cannot enforce her money,²⁴⁷ and might also lead to uncertainty and unfair results, for example in the case the woman is changing her mind several times.

Trebilcock seems to propose a better, as more detailed and thus uncertainty avoiding solution. He suggests that the woman should be conceded a certain time span, for example a couple of weeks, after the birth to change her mind: when the surrogate has surrendered the baby and after that time elapsing – analogous to consumer law regarding door-to-door sale – the contract is fully enforceable.²⁴⁸ A regulation of this kind, would both, avoid psychological grievance for the birth mother, as she can change her mind, in the case she misevaluated her bonding to the child and also give the prospect parents certainty of no further custody claims after this fixed time frame.

Nevertheless, in the case the woman decides to keep the child, this regulation raises subsequent issues which need to be addressed to avoid uncertainty and resulting conflicts: Should she be allowed to get child support from the biological father? Should the biological father be granted visitation rights? Needs the surrogate to pay back money?²⁴⁹ To discuss all these issues in detail is beyond the scope of this paper, but in the end, even if some of these questions are difficult to decide, all these potential problems can be regulated. For example as to visitation rights: If the intended parent is the biological parent, there might be decided that the biological

²⁴⁵ Downie, above n 23, 159.

²⁴⁶ Human Assisted Reproductive Technology Act 2004 (NZ), s 14 (1).

²⁴⁷ In New Zealand, paid surrogacy is forbidden anyway.

²⁴⁸ *The Limits of Freedom of Contract*, above n 2, 54; “Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services”, above 216, 692.

²⁴⁹ *The Limits of Freedom of Contract*, above n 2, 56.

father has visitation rights but then also has to pay child support.²⁵⁰ As to whether the surrogate should pay back the money, it is suggested that she should be legally forced to do so, so as to avoid the surrogate using the power of being able to repudiate the contract to demand more money from the intended parents.²⁵¹

(n) Abortion

Another question is whether the woman has the right to undergo an abortion when she changes her mind or whether she can be forced to continue with the pregnancy in accordance with her contractual obligation. According to Radin, a woman who chooses abortion has to be allowed to do so.²⁵² And also Trebilcock suggests that, as women with a 'natural' pregnancy have now such a right, surrogates should not be treated different.²⁵³ I agree with this view. A woman who misjudged the effects of the pregnancy should be able to abort the child, to avoid violation of her autonomy, protected by privacy rights.²⁵⁴ Moreover, to prevent serious psychological and or physical harm to her, the interest of the intended parents must, as discussed within the question whether she should be allowed to keep the child, take second place.

3 *Parental Rights*

Not at least in regard to who has the right to custody and who has the duty to care for the children, it is important that the parental rights are clearly defined. With surrogacy the crucial question is who is defined as the legal parent in time of birth. With 'partly' surrogacy this is not as complicated because the birth mother is the biological mother. Nevertheless, there is also a suggestion, the so-called "consent intended" definition of parenthood, which "would declare the legal parents of a child to be whoever consented to a procedure that leads to its birth, with the intent of

²⁵⁰ See also Garrison, who argues that the biological father might obtain visitation right through paternity action. Garrison, above n 157, 156.

²⁵¹ *The Limits of Freedom of Contract*, above n 2, 56.

²⁵² Radin, above n 89, 1934; Rao, 391.

²⁵³ *The Limits of Freedom of Contract*, above n 2, 55

²⁵⁴ Radhika Rao "Property, Privacy, and the Humand Body" (2000) 80 B.U.L. Rev. 359 388

assuming parental responsibilities for it.”²⁵⁵ This definition would lead to the fact, that the surrogate would at no stage become the legal parent.²⁵⁶

The question gets more complicated with gestational surrogacy where the birth mother and biological mother are different persons. It needs to be decided whether the genetic link or the pregnancy and birth build the more relevant relationship.²⁵⁷ However, the New Zealand legislature decided this question without doubt in favour of the birth mother (and her partner, as far as he agrees).²⁵⁸

This would mean, that the surrogate is the legal parent of the child until she ‘transfers’ her parental rights. I favour the New Zealand regulation. The regulation that the surrogate is initially the legal mother also optimally matches the above suggested regulation, which concedes the surrogate a certain time period to change her mind.²⁵⁹

4 *Restrictions of possible control over the surrogate*

As one concern is that the woman’s autonomy during the pregnancy might be unacceptably restricted through corresponding contractual decisions, it is suggested to regulate “that only those constraints on the mother that are ‘reasonably’ targeted to insuring the health of the baby will be allowed”.²⁶⁰ To avoid an unacceptable intrusion in the surrogate’s privacy, I favour this restriction.

²⁵⁵ *Value in ethics and economics*, above n 98, 174. This has, for example, been regulated in Arkansas, United States. Brown-Barbour. 449.

²⁵⁶ *Value in ethics and economics*, above n 98, 174.

²⁵⁷ Kane, above n 2, xvii; See general Rae, above n 133, 81; Elizabeth Baxter Legislative Research Service, Department of the Parliamentary Library (Australia) “Surrogate Mothers: The Legal Issues” (1984) Current Issues Brief No. 4, 8.

²⁵⁸ Statutes of the Children Act 1969, section 17 (2), inserted, as by 1 July 2005 by the Statutes of the Children Amendment Act 2004. In regard to the partner Status of Children Act 1969 s 18 (2), section 18 (1) (c).

²⁵⁹ “The Lessons and Limits of Law and Economics”, above n 85, 692.

²⁶⁰ Baugham, above n 125, 290; Garrison, above n 157, 153, Eppstein, above n 92, 2334.

5 *Contract failures*

(o) Miscarriage or stillbirth

One question is what happens when the woman suffers a miscarriage or the baby is stillborn, and whether a regulation is required. In some contracts this is already foreseen, and the payment is differentiated: the woman gets in this case only a part of the full payment when the baby is stillborn and a lesser part if she miscarries.²⁶¹ This shows that this can be easily contractual regulated and, therefore, I suppose that a regulation is not necessary.

(p) Birth defects

A disabled child has always been the greatest fear of prospective parents, and having to make the decision whether to abort a child with a defect is generally seen as one of the worst things that can happen to pregnant women. Dealing with these situations gets the more complicated with a surrogacy arrangement and demands a detailed regulation.

(i) Abortion

When during the pregnancy it turns out that the child has a defect there are two scenarios which might occur and cause conflicts between the contract parties: The woman wants to carry on with the pregnancy, whilst the intended parents want her to undergo an abortion. Conversely, it might occur that the surrogate wants to abort the child whilst the intended parents would like to have the child nonetheless. As already discussed, in regard to the surrogate's autonomy and possible psychological and physical harm, I hold the view that she should be forced neither to abort nor to continue the pregnancy.²⁶² This should be explicitly regulated to circumvent opposed contractual provisions.

²⁶¹ Downie, above n 23, 126.

²⁶² See also "The Lessons and Limits of Law and Economics", above n 85, 695. Contrast Epstein, above n 92, 2336.

(ii) Care for a disabled child

An even more complex issue is the worst case scenario, when the baby is born with a birth defect: Who is responsible for the child? This controversial issue has been brought before the courts in 1983 in the internationally recognized *Malahoff v Stiver* Case.²⁶³ In this case the surrogate gave birth to a child with an abnormality. In consequence, both the father and the surrogate refused the child and just left it at the hospital. Subsequently, the father filed a US\$ 50 million claim against the mother for breaking the contract. There was a twist to the case, when it turned out that the contracting man was not the biological father, but the surrogate's husband.²⁶⁴ Nevertheless, the case raised the question, what should happen when the contractually conceived baby is disabled. Should the contract father be forced to take the baby? Or can he refuse the baby as a faulty product and it should be the responsible of the surrogate to care for the baby?

According to Downie, this is solved with a clear definition who the legal parent at each stage is, as it is already proposed above.²⁶⁵ However, it does not entirely solve the question who has physically and/or financially to care for the children. Furthermore, just to make the responsibility for the child dependent on the legal parenthood would ignore the whole circumstances of the surrogacy arrangement.

Trebilcock, asking and negating the question whether the intended parents should have the right to "renounce" the child, argues that "the contract contemplated from the outset that they would assume responsibility for the child after birth, and as in the case of natural parents in a traditional marriage, they must take the risks of conceiving or helping conceive a child in circumstances different from those which obtain subsequently or of conceiving a child that is disabled."²⁶⁶

Radin suggest that neither the intended parents should be obliged to bring up a child they do not want, nor should the surrogate be forced to keep and care for the

²⁶³ *Malahoff v Stiver* (1992) U.S. App. LEXIS 34150 (6th Cir).

²⁶⁴ Downie, above n 23, 132.

²⁶⁵ Downie comes in result to the same suggestion as proposed in this paper and in according with the New Zealand legislation. Downie, above n 23, 158.

²⁶⁶ *The Limits of Freedom of Contract*, above n 2, 55, 56.

child she intended to surrender.²⁶⁷ Radin further states that the intended parents “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.”²⁶⁸ I agree with the view that the intended parents should care for the child. However, I cannot follow the distinction Radin wants to make between personal and financial care. As the couple initiated the birth of the child they should be responsible, as they would be when they naturally conceived a child. If they do not want to raise the child themselves, they have, as ‘normal’ parents, to find a proper placement for the child and bear the cost.

The question arises, whether this must be decided differently and the surrogate should have the duty to care for the child, when the birth defect is caused through harmful behaviour of the surrogate. I suggest that also in this case the intended parents should be in duty to care for the child. To avoid harm to the child, it is necessary that the question of who has to care for the child is clearly decided. If it would be ruled that normally the intended parents are in duty, but the birth mother is responsible if the disability is caused by her behaviour, a court battle would be the consequence in many cases, both parties blaming the other and the risk is high that, as in the *Malahoff v Stiver* case, the child is left behind. Consequently, I suggest a corresponding legislative regulation, which clarifies that the intended parents have to care for the child.²⁶⁹

(iii) Liability for damages

An even more complicated and resulting question is whether the surrogate should be liable for damages in regard to the child and the surrogate parents, when the child is disabled because of her harmful behaviour during the pregnancy. So far in our society ‘natural’ children cannot sue against their mothers when they are disabled through harmful behaviour, therefore, I suggest that there should be no difference in regard to surrogacy.

²⁶⁷ Radin, above n 89 1934.

²⁶⁸ Radin, above n 89, 1935.

²⁶⁹ See also Schuck, above n 30, 1805.

In regard to the intended parents, harmful behaviour might be a breach of contract. However, even though the surrogate receives money, whether she should be liable for damages is a difficult question. The problem is that various, sometimes even considerate behaviours of the pregnant woman can cause damage to the child and it would lead to an extensive and unjust liability, if the surrogate could easily be made liable for damages, when something goes wrong in the pregnancy, which could be caused by her behaviour, and the distinction is difficult to draw. In this regard, also her right to privacy and personal freedom must be taken into account. On the other hand, when she acts deliberately, there might be room for damages. Therefore I would suggest that the woman should only be liable for damages, when it is proven that she deliberately harmed the child.

(q) Changed circumstances of the intended parents

A further question is what should happen when the circumstances of the intended parents change, so that they do not want the child anymore. This could happen, when a couple divorces or a split up during the pregnancy, or a single person suffers financial or health problems or just changes his or her mind. There are two subject matters arising again: Firstly, can they force the surrogate to abort the child and secondly can they just refuse to care for the child.

In regard to abortion, eventually, this question is already answered within previous matters. The decision whether to abort the child or not should be left to the surrogate. In this regard, it also does not make a difference whether the child is disabled or the intended parents change their mind for other reasons.

As to the care of the child, there can also be no difference to whether the parents reject accountability because the child is disabled or for other reasons. As the parents have to care for the child when it is disabled, a fortiori they have to care for it even if they do not want it anymore for other reasons, which lie within their sphere.²⁷⁰

²⁷⁰ See also *The Limits of Freedom of Contract*, above n 2, 56.

6 *The child's right to find out about its origin and visitation rights*

Another question arising is whether the child born to a surrogate should have the right to access information about its birth mother and also, where applicable, its genetic heritage. As now regulated in New Zealand,²⁷¹ from my point of view, the children born through surrogacy should have the right to find out about both their birth mother and their genetic heritage.²⁷²

7 *Conclusion*

Summing up, in regard to entry barriers, I suggest that private surrogacy agencies should be prohibited, and that there should be an age restriction in regard to minors, and also a restriction in relation to the reasons for women engaging a surrogacy. In regard to determine which surrogates and parents should be allowed to engage in such an arrangement, I come further to the conclusion that an obligatory physical and psychological assessment of all parties involved would be a good solution. This could be conducted by a state health department, which should also offer counselling during the time of the conduct.

In regard to the precondition, performance and the consequences, I came to the following further suggestions: The birth mother and her partner/ husband should be the legal parents in time of birth. Consequently, the partner/ husband of the surrogate needs to agree to the contract. It should be explicitly forbidden, that the surrogate is in any case forced to abort the child or continue the pregnancy. The surrogate should also be conceded a certain time after birth, for example a couple of weeks, where she can change her mind and keep the child. To prevent contractual abuse, the possible control of the intended parents over the surrogate should be restricted to reasonable constraints. If no one wants the child, the care of the child should fall to the intended parents. If the child is harmed through harmful behaviour during the pregnancy, the surrogate should only be liable for damages, if she

²⁷¹ Human Assisted Reproductive Technology Act 2004 (NZ), s 4 (e).

²⁷² See also "The Lessons and Limits of Law and Economics", above n 85, 679. They authors suggest that the child should have access as far as they are grown up and the surrogate or the donor consent.

deliberately harmed the child. Finally, the child should have the right to find out about its genetic heritage and birth mother.²⁷³

These suggestions are intended to provide a tentative regulative framework and to point out that a reasonably detailed regulation is possible. It neither contains all arising and debatable issues, as this is beyond the scope of this paper, nor do I claim to provide an objective answer to the various points. Rather, I regard a normative moral judgement to be impossible. There are even not moral standard frames that can be applied, as moral values in our society "are both conflicting and overlapping".²⁷⁴ Therefore, in the end, it would remain to the respective legislator to find his own answers to the numerous arising issues.

VI CONCLUSION

This paper has shown that a targeted intervention should be able to address both the market failure and the social/ moral concerns. Surrogacy has the potential to be mutually beneficial to all parties involved, provided that there is a clear set of laws and the parties are aware of the legal rules as well as the risks involved. Therefore, in contrast to the tendency in international regulation, the prohibition of paid surrogacy as opposed to 'altruistic' surrogacy is not justified.

However prohibition of commercial surrogacy seems to be chosen because of two main reasons: Firstly, it is very difficult to choose a form of intervention, as every single issue is highly controversial. In recent years, numerous ethical and law reform committees have been examining the regulation of surrogacy and came to very different results and suggestions. Secondly, regardless of which form of interventions is chosen, it will evoke severe criticism. A free surrogacy market is, as discussed, also not an alternative option, as there are too many risks and concerns for the people involved and the society as a whole, which make governmental intervention necessary. Therefore, prohibiting paid surrogacy seems to be the easier solution.

²⁷³ See for a divergent suggestion for regulation Rae, above n 133, 170.

²⁷⁴ Baugham, above n 125, 267.

To foresee the future of the surrogacy market seems to be difficult, especially in regard to the fast advancing reproductive technology. Scientists throughout the world are, for example, already experimenting on the development of artificial wombs.²⁷⁵ These might make surrogacy obsolete in the future, so that the surrogacy might be a temporary appearance; alike wet-nurses who are not required anymore.²⁷⁶ However, an artificial womb would obviously raise many similar issues as with surrogacy.

In light of the fast advancing reproduction technology, it might be better the legislator start to deal with the individual subjects raised by surrogacy arrangements early. Especially, as it is questionable whether they can just react with prohibition in along run, taking into account that the advancing technology will impose increasing pressure on the legislator to respond in a more directive way instead of prohibition.

²⁷⁵ However, this research seems, for example, to be prohibited in New Zealand. Human Assisted Reproductive Technology Act 2004 (NZ), s 9 (2) (b) (i).

²⁷⁶ With the introduction of the baby bottle and a substitute for mother's milk wet nursing disappeared. Gena, above n 27, 240, 258.

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