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# Surrogacy and human flourishing

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*Opposition to legalizing surrogacy often involves the argument that it commodifies or objectifies women and children. When surrogacy involves consenting parties claiming to benefit from the transaction, commodification- or objectification-based arguments seem unpersuasive. This article argues that new natural law theory offers an alternative case against legalizing surrogacy based on the violation of basic goods of human flourishing, a notion which unpacks afresh what is really at stake in the commodification/objectification arguments. Exploring the new natural law approach through John Finnis's theory, this article suggests that the new natural law case against surrogacy hinges on the link between childbirth and raising children, which turns out to be the major bone of contention in the surrogacy debate. The establishment of the link turns on answers to empirical questions as to what is in the best interests of the child, as well as on contested notions of motherhood, raising questions of a philosophical or normative nature. This article elucidates for policy makers and legislators the precise issues they must face squarely in order to determine whether to legalize or prohibit surrogacy arrangements.*

**Keywords:** *surrogacy, human flourishing, John Finnis, natural law theory, surrogate parenthood, best interests of the child, commodification*

## 1 A SURVEY OF THE LANDSCAPE AND ETHICAL CONCERNS

Persons who cannot conceive or do not wish to go through pregnancy may seek to have children through surrogates, in order to fulfil their desires to be parents. Surrogacy may be chosen because pregnancy is impossible or risky for an intended mother; or because homosexual men wish to have children with genetic connection to one of them.<sup>1</sup> It is not inconceivable that some would choose surrogacy to avoid what they perceive to be the inconvenience of pregnancy, though the intended mother would have to endure the extraction of ova if she wishes to maintain a genetic connection. Others may be desirous of heirs or children without desire for marriage or a relationship with the child's mother.<sup>2</sup> Yet others may choose surrogacy over adoption even if the intended child has no genetic connection. For instance, they may wish to select what they view as the combination of ideal genetic material from sperm donors

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1. Douglas Nejaime, 'The Nature of Parenthood' (2016) 126 Yale LJ 2260, 2306.

2. For example, Lee Shau-kee, one of the richest men in Asia, became the grandfather of triplets when his bachelor son engaged a surrogate in California. See SCMP Reporter, 'Peter Lee Surrogacy Case Referred to Police' *South China Morning Post* (2 December 2010) <[www.scmp.com/article/732171/peter-lee-surrogacy-case-referred-police](http://www.scmp.com/article/732171/peter-lee-surrogacy-case-referred-police)> accessed 23 August 2020.

and ova donors with certain qualities, or they may wish to avoid any perceived complications from adoption, such as the child feeling abandoned or the birth parents seeking to find the child, though some of these risks may be present in surrogacy.

Altruistic surrogacy involves no monetary profit, while commercial surrogacy involves the surrogate going through pregnancy for a fee and typically involves a broker. Traditional surrogacy involves artificial insemination with the intended father's or a donor's sperm, with the surrogate contributing the ovum, while gestational surrogacy involves the surrogate carrying a child that is conceived with the ovum of the intended mother or a donor, and the sperm of the intended father or donor. The traditional surrogate is the genetic mother of the child, while the gestational surrogate has no genetic connection. As gestational surrogacy diminishes the connection between the surrogate and the child, it may be preferred by intended parents<sup>3</sup> as it may be easier for the surrogate to part ways with the child.

The regulation of surrogacy remains highly varied across the world, and even across different states in a federal system such as the United States.<sup>4</sup> As surrogacy arrangements become increasingly common, the issue arises as to whether the objections to surrogacy may be better dealt with through effective regulation, rather

3. While in some cases there may be only one intended parent, in this article, I will refer to the 'intended parents'.

4. Deborah Machalow, 'Legislating Labors of Love: Revisiting Commercial Surrogacy in New York' (2014) 90 Ind LJ Supp 1, 4–10.

Jurisdictions which do not legalize commercial surrogacy may be entirely silent on the issue of surrogacy; they may prohibit surrogacy of any form; they may permit only altruistic surrogacy; or they may permit commercial surrogacy. Sometimes only gestational or only traditional surrogacy may be permitted, or only in particular circumstances. Surrogacy may be permitted based on the marital status of intended parents; an exception may be made for surrogates who are family members; genetic connection of one of the intended parents may be required; certain conditions such as a prior pregnancy may have to be satisfied by the surrogate; proof of infertility may be required of the intended parents; parties may have to be evaluated for suitability for such arrangements; court validation may be required before conception; parties may be required to seek independent counsel; and so on. See, for example, the summary in Courtney G Joslin, Shannon P Minter, and Catherine Sakimura, *Lesbian, Gay, Bisexual and Transgender Family Law* (Thomson Reuters, 2016 update), ch 4, s 4.2.

Legalization of surrogacy may be accompanied by provision for the enforcement of contracts, legal determination of parentage, and so on. For jurisdictions that prohibit surrogacy, penalties may be imposed on surrogate agencies, medical professionals, intended parents, or surrogates. Sanctions may be civil, such as treating the contracts as void, or criminal. Jurisdictions which are silent on surrogacy or which prohibit surrogacy and which have no mechanism for recognizing children conceived through surrogacy may have to deal with adoption proceedings and applications for citizenship for the child conceived through surrogacy arrangements overseas: some may allow the intended parents to adopt if it serves the best interests of the child. See, for example, the Canadian court's suggestion that the best interests of the child is only a rule of interpretation and does not justify everything, discussed in Alex Finkelstein and others, 'Surrogacy Law and Policy in the US: A National Conversation Informed by Global Law-making', *Report of the Columbia Law School Sexuality & Gender Law Clinic* (2016) 24.

Some jurisdictions such as Thailand and India have recently tightened surrogacy laws. Some have engaged in extensive examination of laws relating to surrogacy and parenthood to determine if legal reform is necessary. See, for example, the consultation paper by the Law Commission of England and Wales and the Scottish Law Commission on the law of surrogacy in the United Kingdom, *Building Families through Surrogacy: A New Law* (2019).

than a blanket ban on surrogacy arrangements. Intended parents fulfil desires to raise a child, and in some cases, in their perception, ‘complete’ their marriage or relationship if they are a couple. Surrogates may act altruistically, or receive substantial payment for their labour, which some say is also borne of benevolence. Surrogates may apply the monies to other ends that serve their own flourishing or the flourishing of their loved ones. With willing parties at both ends of the transaction, coupled with the view of some that government should, as far as possible, not interfere in the private lives of citizens, whose autonomy to choose their own conception of the good must be respected, the case for legalizing surrogacy seems strong. If consenting adults enter into a mutually beneficial contract which does not seem to harm third parties, why continue to raise ethical concerns and prohibit such arrangements? Surrogacy is sometimes the only way for some to fulfil desires to have children with whom they have genetic connection.

Some arguments against surrogacy may be addressed by appropriate regulation. The concerns of fraud of medical clinics,<sup>5</sup> which might not use the genetic material of intended parents, or of brokers exploiting surrogates, for example, by getting the bulk of the surrogacy fee in commercial surrogacy,<sup>6</sup> can be addressed by legalizing assisted reproductive treatment only at approved hospitals, tasking a non-profit or governmental agency with brokering, or requiring judicial approval of surrogacy agreements. The concern of the poor being exploited as they undertake surrogacy arrangements without proper regard for the risks of pregnancy or particular medical procedures can be addressed through legal restriction of multiple surrogacy arrangements, regulation of procedures for consent, and mandating of health screening. The possibility of an entrepreneur manufacturing children by getting a sperm donor, an egg donor, an assembler, and a gestational surrogate to carry a child through pregnancy can be countered through a criminal prohibition.<sup>7</sup> Potential parenthood contests between a reneging surrogate and intended parents, or vice versa, such as in the case of disabilities of the child,<sup>8</sup> can be settled by statutes similar to those relating to assisted reproduction.<sup>9</sup>

That said, the question of who – the surrogate or the intended parent – has a stronger claim, if the surrogate reneges, is not easily resolved. Any legislative resolution of such contests is likely to involve heartbreak on at least one side, at least in cases when genetic material has been provided by the intended parents. While there may be a time limit during which one can reverse an adoption, providing for an

5. For example, it was alleged that a Ukrainian medical clinic did not use the semen of the intended parent (Paola Frati and others, ‘Surrogate motherhood: Where Italy is Now and Where Europe is Going. Can the genetic mother be considered the legal mother?’ (2015) 30 *Journal of Forensic and Legal Medicine* 4, 5).

6. Ronli Sifris, ‘Commercial Surrogacy and the Human Right to Autonomy’ (2015) 23 *JLM* 365, 367.

7. This was raised in *In re Roberto dB* 399 Md 267, 923 A 2d 115 (2007).

8. European Centre for Law and Justice, ‘Surrogate Motherhood: A Violation of Human Rights’, Report Presented at the Council of Europe, Strasbourg, on 26 April 2012, 11 <[www.ieb-eib.org/en/pdf/surrogacy-motherhood-icjl.pdf](http://www.ieb-eib.org/en/pdf/surrogacy-motherhood-icjl.pdf)> accessed 23 August 2020.

9. See, for example, problems highlighted in Celia Burrell and Hannah O’Connor, ‘Surrogate Pregnancy: Ethical and Medico-Legal Issues in Modern Obstetrics’ (2015) 15 *The Obstetrician & Gynaecologist* 113, 115–16. Legislation can apply a presumptive rule as to gestational parentage, necessitating adoption by intended parents, and agencies can approve of adoption if it is in the best interests of the child, or in view of genetic connection, or with due consideration of both factors.

opt-out period for the surrogate involves greater complications given that both sides to the contract may have contributed something of incommensurable value from their respective perspectives.<sup>10</sup> In any case, short of international conventions, legislative regulation is imperfect if the arrangement is cross-border in nature. The jurisdictions involved may take different views as to parenthood, adoption, and citizenship.

Parsing the objections to legalizing surrogacy shows that some problems can be alleviated by effective regulation. However, ethical concerns remain about the commodification of pregnancy and children, in the case of commercial surrogacy, or objectification of women and children, in commercial as well as altruistic surrogacy. As ‘commodification’ does not, strictly, apply to altruistic surrogacy, and as ‘objectification’ encapsulates the essence and objectionability of ‘commodification’, I shall refer to commodification- and objectification- based arguments by using the term ‘objectification’.

Supporters of surrogacy tend to make autonomy-based arguments, whether from the perspective of the surrogate to provide the service, or that of the intended parents to found a family.<sup>11</sup> Some regard surrogacy arrangements as just another contract for service, not different from the contract to be a paid caretaker, ‘a nurse for the sick, an aide for the infirm, and a sitter for children’.<sup>12</sup> Even if risks are involved in pregnancy which exceed those of nurses or sitters, no similar objections as are raised in surrogacy are made on the basis of risks undertaken by police officers or firefighters. If we can accept the risks that police officers or firefighters take, why not accept the risks taken by surrogates? Moreover, it is sometimes argued that surrogacy is not objectionable if undertaken by one woman with the desire to help another.

Opponents of surrogacy, in contrast, argue that the surrogacy contract should not be regarded simply as a contract for the services of the surrogate. Also, it can be argued that a child is sold in commercial surrogacy, even in the case of gestational surrogacy. It would be helpful, however, to pinpoint exactly how there is objectification as opponents seem to take the objectionability as given, though the argument about objectification remains fairly abstract.

I shall examine whether surrogacy involves choices that are made, by the surrogate and by the intended parents, in violation of the principles of practical reasonableness that structure each person’s pursuit of human flourishing under new natural law theory. As John Finnis has articulated a comprehensive version in his book, *Natural Law and Natural Rights*, this article will rely on that version.<sup>13</sup> Admittedly, the new natural law

10. Michael Trebilcock and others, ‘Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services’ (1994) 32 *Osgoode Hall LJ* 613, 677.

11. Sifris (n 6) 365–6.

12. Machalow (n 4) 24.

13. New natural law theory is a reinterpretation of Thomist natural law theory developed by Grisez, Boyle, and Finnis in several iterations. Earlier, Grisez offered his interpretation of Aquinas in Germain G Grisez, ‘The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1–2, Question 94, Article 2’ (1965) 10 *Nat L F* 168. An important work is Germain Grisez, Joseph Boyle and John Finnis, ‘Practical Principles, Moral Truth, and Ultimate Ends’ (1987) 32 *Am J Juris* 99. As Finnis’s development of his own ethical ideas are extensively set out in his compendium, *Natural Law and Natural Rights* (2nd edn, OUP 2011) (‘Finnis, *NLNR*’), the second edition of which includes clarifications, I will refer to Finnis’s version of new natural law theory (which he and Grisez have observed is more of his own ethical theory and not merely a commentary on Aquinas’s work, in contrast to Grisez’s specific commentary on

idea of human flourishing is contested, for example, by anti-perfectionists.<sup>14</sup> It is beyond the remit of this article to separately argue for its tenability, which would require an engagement with the entire theory. My objectives are to consider what new natural law theory entails for surrogacy and whether it explicates the idea of objectification, which seems too abstract a notion to be persuasive if surrogacy involves consenting parties claiming to benefit from the transaction.

My argument is that, under the new natural law analysis,<sup>15</sup> surrogacy is not morally justifiable, even if parties regard the transaction as beneficial, and even if they do not subjectively intend to exploit, or regard themselves as having been exploited, as the case may be. This argument hinges in part on the link between childbirth and raising children, which turns out to be a major bone of contention in the surrogacy debate. The establishment of the link turns on the answers to empirical questions as to the best interests of the child. It also turns on contested notions of motherhood, which raise questions of a philosophical or normative nature that policy makers and legislators should address. By applying the new natural law analysis, my modest aim is to shift the debate conceptually away from the abstract theoretical notions of objectification

Aquinas's Question 94 (John Finnis and Germain Grisez, 'The Basic Principles of Natural Law: A Reply to Ralph McInerny' (1981) 26 *Am J Juris* 21).

14. Rawls, for example, believes that there are many conceptions of the good, dependent on comprehensive doctrines individuals hold – the 'conceptions of what is of value in human life and ideals of personal character, as well as ideals of friendship and of familiar and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole' (John Rawls, *Political Liberalism* (Col Univ Press 1993, 1996) 13).

15. I should add the caveat that assisted reproduction technologies, whether in the form of in vitro fertilization (IVF) or heterologous insemination, are not justifiable by Finnis's theory even if they do not involve the possibility of destruction of excess embryos and even if they occur within the boundaries of marriage. According to Finnis, a child conceived through IVF comes about not as a '*a gift supervening on an act expressive of marital unity*, and so not in the manner of a new partner in the common life so vividly expressed by that act, but rather in the manner of a product of a making (and indeed, typically, as the end-product of a process managed and carried out by persons other than his parents)'. Rather than one intentional act of choice in sexual intercourse leading to procreation,

there are irreducibly separate acts of choice, all indispensable, and all the independent acts of different people: the acts of those involved in *producing and collecting sperm* (a process which might involve an act of intercourse but in practice it does not); the act(s) of the mother and those involved in *collecting an ovum or ova*; the act(s) of those who *mix sperm and ovum*, and again of those who *transfer the product* of that mixing or uniting; and the choice of the mother to *permit that transfer*.

Emphasis in original. As a result, the child is the 'product of a making', and the 'relationship of product to maker is a relationship of radical inequality, of profound subordination'. The result is that 'the child does not have the status which the child of sexual union has, a status which is a great good for any child: the status of radical equality with parents, as partner like them in the familial community' (John Finnis, 'CS Lewis and Test-tube Babies' in *Human Rights and Common Good, Collected Essays: Volume III* (OUP 2011) 276, 276–7).

While critics may reject Finnis's argument against assisted reproduction, I wish to acknowledge that Finnis's argument against assisted reproduction entails an objection to surrogacy on his part, insofar as assisted reproduction is employed to achieve surrogate pregnancy. I shall not examine separately the tenability of objections to assisted reproduction. Instead, addressing surrogacy as a standalone issue, I shall determine whether it serves or detracts from human flourishing. If it detracts from human flourishing, even if the case against assisted reproduction fails, the case against surrogacy can stand.

and commodification and highlight the precise issues that must be faced squarely by policy makers and legislators when considering whether to legalize or prohibit surrogacy. I shall refer to existing empirical research in psychology insofar as such research highlights and introduces the important empirical questions that policy makers and legislators should examine when applying the natural law analysis, which implicates such questions. A caveat, though, is that as my expertise is legal-philosophical, the foray into empirical research in psychology in this article serves only as a starting point. The objective is to call for policy makers and legislators to conduct a more detailed study.

Part 2 is an exposition of how acts are assessed for their rational intelligibility and moral permissibility under new natural law theory. The salient parts of the theory, found in different works of Finnis, will be set out to the extent relevant for application to surrogacy.

Part 3 applies new natural law theory to surrogacy in two sections, through a consideration of the acts involved in surrogacy arrangements where the surrogate is concerned, and a separate consideration of the acts where the intended parents are concerned. A separate consideration is warranted because it is plausible that what are damaging side effects of one party's act may be an intended damage on the part of another party. While one ought not intentionally damage a basic good, a side effect may in some circumstances be acceptable. I shall argue that, while the surrogate serves the goods of life-in-its-transmission and sociability vis-à-vis the intended parents, the surrogate's act possibly damages the good of life in herself. While such damage may be classified as a side effect rather than an intended act, its permissibility is dubitable. Most crucially, the good of sociability vis-à-vis the child is potentially at stake, along with possible damage to the psychological well-being – that is, the good of life – of the child. Even if damage to the good of life can be characterized as an unintended side effect, the surrogate's decision to go ahead with surrogate pregnancy evinces an arbitrary preference for the interests of the intended parents and herself over the child. Furthermore, the surrogate's act may derogate from the good of practical reasonableness. The intended parents seek the goods of life-in-its-transmission and sociability (in establishing a parent-child relationship), but their pursuit of these goods possibly involves damage to the goods of life, sociability, and practical reasonableness of the surrogate, and the goods of sociability and life of the child. The analysis through basic goods of human flourishing unpacks the empirical and normative questions that policy makers and legislators must attend to in deciding whether to legalize or prohibit surrogacy.

I shall recapitulate in Part 4 on how new natural law theory better unpacks the objectionability of surrogacy than ideas of commodification and objectification simpliciter.

## 2 HUMAN FLOURISHING

According to Finnis, there are seven basic aspects of human flourishing, also known as basic values or goods: life, including 'life-in-its-transmission' (that is, procreation);<sup>16</sup> knowledge; play; aesthetic experience; sociability (friendship), which involves concern for another for their own sake and acting for their good, purposes

16. Finnis, *NLNR* (n 13) 86–7.

and well-being; practical reasonableness; and religion.<sup>17</sup> The basic goods are self-evidently good,<sup>18</sup> apprehended as first principles, and ‘not inferred or derived from anything’.<sup>19</sup> They are equally fundamental. None is reducible to an aspect of the other; none is a mere means for the pursuit of the other. They are intrinsically good, regarded as desirable for their own sake.<sup>20</sup> The goods constitute intelligible ultimate reasons for our rational choices:<sup>21</sup> ‘anything one does which does not somehow instantiate one of those goods is pointless’.<sup>22</sup> But the goods are not ‘moral’ values, nor would their pursuit necessarily be moral obligations.<sup>23</sup>

Finnis formulates ‘the first and most abstract principle of morality’ as such: ‘In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with integral human fulfillment’.<sup>24</sup> Nine requirements of practical reasonableness structure the pursuit of the goods.<sup>25</sup> First, one must have a coherent plan of life. Second, one must not wholly neglect, arbitrarily discount or exaggerate any of the basic goods. Third, there is leeway for self-preference but one must not arbitrarily prefer amongst persons and prevent others from realizing the goods. Fourth, there must be a level of detachment in that one’s project cannot be all-consuming. Fifth, at the same time, one must be committed. Sixth, one may choose efficient means of pursuing the goods, without being utilitarian or consequentialist. Seventh, every basic good must be respected in every act. Eighth, one must act in line with what Finnis terms the common good of one’s community, which is a set of conditions which enables members of the community to realize their own objectives and goods for the sake of which they have reason to collaborate with one another. This set of conditions justifies the exercise of authority of the state through law. Finally, one must act in accordance with one’s conscience.<sup>26</sup>

Moral dilemmas (in the application of Finnis’s theory) concern the interplay of the requirements, for example, when one’s pursuit of a good is in derogation of another good, or in derogation of a good in another’s life. The interplay of the requirements is critical to determine whether surrogacy is compatible with integral human fulfilment.

In particular, the seventh requirement – that one must respect every basic good in every act – requires elucidation. In one formulation, the seventh requirement entails

17. While an eighth good of marriage has subsequently been added (John Finnis, ‘Marriage: A Basic and Exigent Good’ (2008) 91 *The Monist* 388), I shall consider the case of surrogacy without engaging in the controversial eighth good.

18. Their being basic goods is ‘obvious’, ‘cannot be demonstrated, but equally ... needs no demonstration’ (Finnis, *NLNR* (n 13) 65, 67–9).

19. Finnis, *NLNR* (n 13) 34. He refers to Aquinas’s ‘first, pre-moral principles of practical reasonableness’.

20. *ibid* 62.

21. *ibid* 62–3.

22. John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Catholic University of America Press 1991) 43 (‘Finnis, *MA*’).

23. Finnis, *NLNR* (n 13) 62.

24. Finnis, *MA* (n 22) 45.

25. In so being guided, we are at the same time participating in the good of practical reasonableness (Finnis, *NLNR* (n 13) 102).

26. Finnis, *NLNR* (n 13) ch v.



that ‘one should not choose to do any act which *of itself does nothing but* damage or impede a realization or participation of any one or more of the basic forms of human good’.<sup>27</sup>

First, if good effects are part of the same act, the act does not of itself do nothing but damage the goods. It may nevertheless not be morally permissible because other requirements of practical reasonableness may be violated.<sup>28</sup>

Second, choosing a project to promote one good could ‘indirectly impoverish, inhibit, or interfere with the realization of those other values’. These ‘unsought but unavoidable side-effects (that) accompany every human choice’ amount to indirectly damaging, or impeding one’s realization of, some basic goods. But they are

obviously quite different, rationally and thus morally, from directly and immediately damaging a basic good in some aspect of participation by choosing an act which in and of itself simply (or we should now add, primarily) damages that good in some aspect of participation but which indirectly, via the mediation of expected consequences ... promote(s) either that good in some other aspect or participation, or some other basic good(s).<sup>29</sup>

Third, relatedly, consequentialist reasoning is not permissible, as otherwise ‘acts which themselves do nothing but damage or impede a human good could often be justified as parts of, or steps on the way to carrying out, some project for the promotion or protection of some form(s) of good’.<sup>30</sup> The fact that net beneficial consequences ensue from acts which directly damage some goods, even if beneficial consequences are foreseen as certain, does not justify those acts.<sup>31</sup> One must not choose evil, that is, ‘to destroy, damage, or impede some instance of a basic good’ that ‘good may come’.<sup>32</sup>

Fourth, every choice of an act which is a distinct and complete act, even if it is also a part of a larger project, should be directed by one or more incommensurable<sup>33</sup> basic goods, in order to be in line with reason. Finnis acknowledges the difficulty in characterizing ‘one complete act-that-itself-does-nothing-but-damage-a-basic-good’. He suggests that human acts ‘are to be individuated primarily in terms of those factors which we gesture towards with the word “intention”’.<sup>34</sup> In the second edition of *Natural Law and Natural Rights*, Finnis clarifies in the postscript that intention refers to

the adoption of a proposal for action, by choice, such that what is included in one’s intention – and defines one’s action – is (just) the whole set of ends and means which make the proposal attractive to one as an immediate option, under the description of ends and means which makes them seem as a set choiceworthy and to be chosen by (the actor) here and now.<sup>35</sup>

27. *ibid* 118 (emphasis original).

28. Finnis gives the example of the second, third, fourth, and fifth (*ibid* 123).

29. *ibid* 120.

30. *ibid* 119.

31. *ibid* 121.

32. *ibid* 455.

33. *ibid* 455.

34. *ibid* 122.

35. *ibid* 454. Also, ‘(i)ncluded in one’s intention is everything which is part of one’s plan (proposal), whether as purpose or as way of effecting one’s purpose(s) – everything which is part of one’s reason for behaving as one does’ (*ibid* 454–5).

Thus, one intends what one chooses, whether as a means, or as an end. Means are intermediate ends,<sup>36</sup> or ‘subordinate’ or ‘proximate’ objectives; ends are ‘ultimate’ or ‘remote’ objectives.<sup>37</sup> One intends the ends and wills the means in a single or entire act of will.<sup>38</sup> The focus is on volition rather than feelings, as one may will what one does not desire.<sup>39</sup>

Choosing to destroy a basic good as a means or intending it as an end are ‘distinct from causing it as a side effect of what one intends and does’.<sup>40</sup> Side effects are not intended as ends and means.<sup>41</sup> Something is not intended even as a means when the result does not figure in ‘the clear-headed practical reasoning which makes the plan seem a rationally attractive option’.<sup>42</sup> Side effects may be connected, ‘very closely and directly, with the carrying out and the outcome of one’s action’. But they are not ‘needed nor wanted’ as part of the way of what one proposes to do.<sup>43</sup> Even foresight of certainty of effects does not count as intention.<sup>44</sup> The doctrine of double effect is formulated to address difficult situations involving side effects.<sup>45</sup> One can intend to pursue the goods, while acknowledging that the intended act has another side effect one does not intend, which may be damaging of goods.

Classifying something as a side effect suggests only that one has not intended to ‘destroy, damage, or impede any instantiation of a basic human good’. The intended act would have been morally unacceptable.<sup>46</sup> In contrast, ‘(a)cccepting – knowingly causing – harms caused to basic human goods as side effects will be contrary to reason (immoral) only if doing so is contrary to a reason of another sort, viz. a reason which bears not on choosing precisely as such but rather on knowing acceptance, awareness, and causation’.<sup>47</sup> These include ‘reasons of impartiality and fairness (the Golden Rule), and reasons arising from role-responsibilities and prior commitments’.<sup>48</sup> In other words, there is ‘moral responsibility for what one knowingly causes as the fully foreseen and inevitable side effect of one’s chosen means’:<sup>49</sup> ‘One’s acceptance of the side effects must satisfy all moral requirements (must “be proportionate”, as it was often vaguely put)’.<sup>50</sup> Finnis suggests that there is discretion as to which side effects to accept. In face of such discretion, one must recognize that sometimes, the acceptance of a side effect can be ‘unfair or unfaithful’;<sup>51</sup> at other times, ‘the side effects of

36. Finnis, *MA* (n 22) 69.

37. *ibid* 69–70.

38. *ibid* 70.

39. John Finnis, ‘Intention and Side Effects’ in John Finnis, *Intention and Identity, Collected Essays: Volume II* (OUP 2011) 173, 177 (‘Finnis, *Intention and Identity*’).

40. Finnis, *NLNR* (n 13) 455.

41. Finnis, *Intention and Identity* (n 39) 180.

42. *ibid* 181.

43. Finnis, *MA* (n 22) 70–1.

44. Finnis, *Intention and Identity* (n 39) 183.

45. Finnis, *NLNR* (n 13) 123–4.

46. It would not be ‘morally acceptable – to choose contrary to a reason, unless one has a reason to do so which is rationally preferable to the reason not to do so’: no such reason can be present where the reason not to act is a basic good (Finnis, *Intention and Identity* (n 39) 195).

47. *ibid* 195.

48. *ibid* 196; Finnis, *MA* (n 22) 81.

49. Finnis, *Intention and Identity* (n 39) 190; Finnis, *MA* (n 22) 71.

50. Finnis, *Intention and Identity* (n 39) 190.

51. Finnis gives the example of a man at a party who considers whether to drive woozily home as opposed to sleep uncomfortably on the sofa at the house where the party is held or to call a

alternatives will be equally harmful to some human goods, or harmful to very important but incommensurable goods'.<sup>52</sup> Finnis singles out two situations when one can say *a priori* that harmful side effects do not give reason to reject an option – when 'the feasible alternative option(s) involves *intending* to destroy, damage, or impede some instantiation of a basic good' or when any feasible alternative not involving such an intention 'is necessarily accompanied by harmful side effects which it could not be reasonable to accept'.<sup>53</sup>

In short, one is morally responsible for 'intending ends, choosing means, and accepting side effects'.<sup>54</sup> Side effects are subject to a different test of moral permissibility from intended ends and chosen means.

### 3 ASSESSING THE ARRANGEMENT FOR SURROGACY

The arrangement for surrogacy involves distinct acts of will by the surrogate and the intended parents. The surrogate goes through pregnancy, possibly with contractual obligations such as going for medical appointments. She then relinquishes parental rights over the child to the intended parents. The intended parents provide none, part, or all of the genetic material for the surrogate's pregnancy, and eventually take the child away from the surrogate, paying her in return for her service and to relinquish parental rights over the child as she gives them the child in the case of commercial surrogacy,<sup>55</sup> and reimbursing her for various expenses in the case of altruistic surrogacy.

I shall examine the questions of rational intelligibility and moral permissibility of the acts involved from the perspectives of the surrogate and the intended parents. As surrogacy arrangements may be varied, I shall highlight the relevance of such differences in my analysis.

#### 3.1 Assessing the Acts of the Surrogate

To bolster the claim for the moral acceptability of the surrogate's service of pregnancy, supporters of surrogacy have compared the surrogate's labour to the work of police officers or firefighters, which are inherently dangerous but do not evoke negative responses.<sup>56</sup> Unpacked in terms of human flourishing, I argue the analogy fails. Hence, the general moral acceptability of the work of police officers or firefighters does not support the case for commercial or altruistic surrogacy.

cab. If he wishes to get home cheaply and drive but happens to run someone down, he is responsible for that side effect in that he should have taken it into account made the reasonable choice of one of the other alternatives. This is a case of foreseen but unintended side effect. One can be 'morally responsible for outcomes of one's action that are outside one's intention'. In contrast, if he decides to drive in order to get the hostess to the hospital quickly, his choice may be reasonable. See John Finnis, "'Direct" and "Indirect" in Action' in Finnis, *Intention and Identity* (n 39) 235, 237 and 242.

52. Finnis, *Intention and Identity* (n 39) 196.

53. *ibid.*

54. *ibid* 246.

55. The arrangement often involves brokers, but as the moral permissibility of surrogacy hinges on the issues relating to acts of the surrogate and the intended parents, I will not separately interrogate the act of the brokers.

56. Sifris (n 6) 369.

### 3.1.1 *Serving the goods of life and sociability vis-à-vis the intended parents*

If police officers or firefighters labour to save lives, they act for the good of life of others and possibly for the good of sociability in being other-centred in their officially-constituted relationship with members of the public. Even if sentiments of altruism towards those they serve in their work is subjectively absent, given that their work in fact saves lives, their intended acts in the course of their work are intelligible. It is volition, rather than desire, that matters. Further, if the intention is to earn a living and apply the monies to other ends, if those other ends are basic goods, the chosen means of their work in the larger context of their life's projects is directed towards those ends and is rationally intelligible.

Pregnancy simpliciter serves the good of life-in-its-transmission (that is, procreation), which is part of the good of life. As for surrogate pregnancy, the surrogate is serving the good of life-in-its-transmission of the intended parents (that is, helping them to procreate).

Some supporters of surrogacy suggest the practice is altruistic.<sup>57</sup> Some surrogates are motivated by the desire to help other women, having themselves experienced the joy of having children and empathizing with those who are unable to have children on their own,<sup>58</sup> even if there is payment. Critics, on the other hand, question why there are not more surrogates helping lower-income intended parents if altruism were the true motivation.<sup>59</sup> At times, the small amount of compensation for surrogates is cited as evidence that even commercial surrogates must have at least a partially altruistic motive, though this neglects the fact that the compensation may translate into a large amount for the surrogate in a developing nation,<sup>60</sup> or may be consistent with exploitation of women.<sup>61</sup> Supposing that surrogacy is undertaken altruistically, or that in commercial surrogacy the surrogate is at least partially motivated by altruism, it becomes meaningful to view the surrogacy arrangement as a collaborative relationship in which the good of sociability is served. Finnis's good of sociability involves a minimum of peace and harmony amongst persons and ranges through different forms of community to its strong form of friendship, which involves acting for another's

57. The assumption that altruistic surrogacy is not problematic has also been critiqued as a form of perpetuation of male-imposed norms which oppress women under the guise of a celebration of their altruism (Rakhi Ruparelia, 'Giving Away the "Gift of Life": Surrogacy and the Canadian *Assisted Reproduction Act*' (2007) 23 Can J Fam L 11, 32–3). Ruparelia cites MacKinnon who has noted that women may value care because men value women according to the care they give.

58. David F Eisenberg, 'Evolving with the Times: A Push to Legalize Surrogate Parenting Contracts in the State of New York' (2013) 33 Pace L Rev 302, 314.

59. Finkelstein (n 4) 34.

60. If there is a lack of investigation in regimes that allow altruistic but not commercial surrogacy, some might disguise what is in substance commercial surrogacy as altruistic surrogacy. It is not hard to disguise the fact that one is motivated by financial gain (Burrell and O'Connor (n 9) 115). For example, in *Re X & Y*, the compensation was used to put a deposit on a house (Claire Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of Case-Law' (2015) 27 Child & Fam LQ 83, 87).

61. Indeed, it has been observed that there is consistency of exploitation of women in particular countries across different areas: for example, Thailand, a country that is known for its sex industry and cheap female workforce, also had a flourishing surrogacy industry (Jessica M Caamano, 'International, Commercial, Gestational surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention' (2016) 96 Boston Univ L Rev 571, 583).

well-being for their sake, or caring for another for their own sake.<sup>62</sup> Friendship in the classical sense is a clear instance where one cares for the other for their own sake in a relationship that extends over time.<sup>63</sup> But it is possible to actualize the good of sociability in relationships that we do not classically regard as friendship, as one can act for another's well-being for their own sake in a more limited collaboration or encounter with another person. Insofar as surrogate pregnancy is other-centred, it can be said to be undertaken in pursuit of sociability, or friendship, towards the intended parents. The surrogate's act is rationally intelligible on this additional basis.

Subjectively, a surrogate may be motivated by monetary benefit, which she plans to apply to other ends such as raising her own family, providing dowry for a daughter,<sup>64</sup> and so on. In some countries, serving as a surrogate offers economic advancement and allows women to contribute to their family monetarily in a way that is not otherwise possible for them.<sup>65</sup> Suppose a surrogate seeks money to be applied to other worthy purposes which may amount to fulfilling basic goods, she intends her pregnancy as a means in a larger project for the sake of other basic goods. Her intended act of surrogate pregnancy is not only in pursuit of the goods of life-in-its-transmission and sociability towards the intended parents, it may be a means to other basic goods in a larger project.

So far, the situation of surrogacy is analogous to the police officer/firefighter situation.

### 3.1.2 *Derogating from the good of life in the surrogates*

Finnis's good of life 'signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination' and 'includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning and injury'.<sup>66</sup> While psychological or emotional health are not specifically mentioned, they can be encapsulated under cerebral health, or the general idea of vitality.

62. Finnis, *NLNR* (n 13) 142–3.

63. *ibid* 88.

64. Serene J Khader, 'Intersectionality and the Ethics of Transnational Commercial Surrogacy' (2013) 6 *International Journal of Feminist Approaches to Bioethics* 68, 81.

65. Maneesha Deckha, 'Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding' (2015) 61 *McGill LJ* 31, 56. It has been noted that public discourses about American surrogates disapprove of surrogacy transactions motivated by financial considerations (for example, in the case when military wives undertake such arrangements). Underlying such disapproval in wealthier nations seems to be the view that women who choose to be surrogates are profiting from the surrogacy fee while also being subsidised for the costs of pregnancy by the state. In contrast, such transactions are seen as a means for women in poor countries to get out of poverty, thus casting women – for example, in India – as motivated by good reasons, even as the fact that they are being driven by economic need is regretted (Susan Markens, 'The Global Reproductive Health Market: US Media Framings and Public Discourses about Transnational Surrogacy' (2012) 74 *Social Science & Medicine* 1745, 1749–50). For example, in India, surrogate mothers can earn in nine months what would otherwise take them 15 years to accumulate (Louise Anna Helena Ramskold and Marcus Paul Posner, 'Commercial Surrogacy: How Provisions of Monetary Remuneration and Powers of International Law Can Prevent Exploitation of Gestational Surrogates' (2013) 39 *J Med Ethics* 397, 399). This may have its way of legitimating transnational surrogacy while deeming the practice unacceptable domestically.

66. Finnis, *NLNR* (n 13) 86.

Surrogate pregnancy may derogate from the good of life in being detrimental to the surrogate's physical and psychological health.

Pregnancy simpliciter carries risks to health, such as the risks of gestational diabetes, hypertension, anaemia, mental health issues whether during or after pregnancy, and so on.<sup>67</sup> In relation to surrogate pregnancy, researchers have highlighted increased risks to physical health arising from multiple births, twinning rates, and C-sections that are performed on surrogates as a matter of course,<sup>68</sup> though these additional risks may not be present in every surrogate pregnancy.

Do surrogates face increased risks of harm to their emotional and psychological well-being? Researchers have noted that 'evidence-based information concerning the long-term effects' on surrogates (and indeed, on intended parents and children) is scant and more longitudinal research is needed.<sup>69</sup> However, several identifiable points of concern are pertinent for policy makers and legislators based on what is known.

The first point of concern relates to maternal-foetal attachments that occur in some pregnancies<sup>70</sup> and the sense of loss that may arise from the need to relinquish the newborn in surrogacy. Some studies show surrogates have less of an attachment to foetuses than non-surrogates,<sup>71</sup> though it has been acknowledged that this finding needs further investigation in comparison with the surrogates' attachment to their own children, the intended parents, and others. The reduced attachment is thought to be a coping mechanism to produce an 'affective isolation' to complete the surrogacy process,<sup>72</sup> given that attachment theory suggests that attachment in pregnancy continues to the baby following delivery.<sup>73</sup> A study has shown that surrogates choose not to form emotional maternal-foetal attachments while evincing greater care and attention towards the foetus by regarding their pregnancy as paid employment.<sup>74</sup>

67. 'Pregnancy Complications' (*Centers for Disease Control and Prevention*) <[www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm](http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm)> accessed 23 August 2020.

68. Olga BA van den Akker, *Surrogate Motherhood Families* (Palgrave Macmillan 2017) 258.

69. *ibid* 7. This is a comprehensive work that includes extensive references to studies by the author as well as results from other available studies.

70. The classical work which found the existence of maternal-foetal attachment behaviour towards the unborn child is Cranley's research (MS Cranley, 'Development of a Tool for the Measurement of Maternal Attachment During Pregnancy' (1981) 30 *Nursing Research* 281, 284). In theory, it has been said that the attachments between women and their foetuses vary during pregnancy and after delivery, and consist of emotional and cognitive bonds (the research from various sources is cited in van den Akker (n 68) 158). Maternal-fetal attachments may also vary in pregnancies in which the pregnant woman is also the intended mother (Luca Rolle, Maura Giordano, Fabrizio Santoniccolo and Tommaso Trombetta, 'Prenatal Attachment and Perinatal Depression: A Systematic Review' (2020) 17 *Int J Environ Res Public Health* 2644 (*MDPI*, 12 April 2020) <[www.mdpi.com/1660-4601/17/8/2644?type=check\\_update&version=2](http://www.mdpi.com/1660-4601/17/8/2644?type=check_update&version=2)> accessed 23 August 2020).

71. Susan Fischer and Irene Gillman, 'Surrogate Motherhood: Attachment, Attitudes and Social Support' (1991) 54 *Psychiatry* 13, 17; and N Lamba, V Jadv, K Kadam and S Golombok, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33 *Human Reproduction* 646, 649–52.

72. Fischer and Gillman, *ibid* 19.

73. This is according to the works by R Rubin, *Maternal Identity and the Maternal Experience* (Springer 1984); and A Reading, D Cox, S Sledmere and S Campbell, 'Psychological Changes Over the Course of Pregnancy: A Study of Attitudes Towards the Foetus/Neonate' (1984) 3 *Health Psychology* 211, cited in van den Akker (n 68) 160.

74. Lamba (n 71). See also text accompanying n 78.

Policy makers and legislators should consider<sup>75</sup> whether postpartum depression which affects some women has been complicated by having to give up the newborn in surrogacy, given the publicity surrounding, for example, *In re Baby M*,<sup>76</sup> a case in which the surrogate refused to give up the child. Some research suggests there is no difference in the level of depression from the time of pregnancy to after the birth, which researchers took as suggesting that relinquishing the newborn did not add to depression for the subjects surveyed.<sup>77</sup> Some surrogates attest to coping satisfactorily from the outset by intentionally remembering that the child is the intended parents' and not their own,<sup>78</sup> a point which surrogate agencies emphasize to the surrogates.<sup>79</sup> While many surrogacy arrangements end in handing over of the newborn as agreed, there are studies indicating trauma, unhappiness, guilt, regret, and loss.<sup>80</sup> Some surrogates have been known to cope with 'cognitive restructuring', for example, in the case of genetic surrogates downplaying the importance of the genetic link in constituting a family, as they are giving up genetically connected babies.<sup>81</sup> The irony, though, is that surrogacy is chosen by the intended parents usually precisely to

There is research on the association between prenatal attachments and depression during pregnancy and in the postpartum (see Rolle (n 70) and see, also, Anna R Brandon, Sandra Pitts, Wayne H Denton, C Allen Stringer and HM Evans, 'A History of the Theory of Prenatal Attachment' (2009) 23 *J Prenat Perinat Psychol Health* 201). For example, in the studies considered in Rolle (n 70) 14–15, most of the studies identified a significant negative association between prenatal attachment and perinatal depression. A majority of the studies also identified a negative association between prenatal attachment and prenatal depression, though many focused on depression being a predictor of attachment rather than a consequence of it. The extent to which any link in a pregnancy in which the pregnant woman is the intended mother can be extrapolated to the surrogacy context is unclear. Additionally, the association may not be causal in nature. In that sense, the link between the decision to avoid any form of prenatal attachment and the detrimental effect on the surrogate cannot be inferred from these works.

It would be important for the policy makers and legislators to look into such empirical studies with greater granularity on the precise types of attachment as well as with larger samples of surrogates, bearing in mind that the measures of attachment need also to be refined. This is given that the examination of maternal attachment during pregnancy is a topic of study only in the last few decades. Aside from Cranley's classical work (Cranley (n 70)), see, for example, M Laxton-Kane and P Slade, 'The Role of Maternal Prenatal Attachment in a Woman's Experience of Pregnancy and Implications for the Process of Care' (2002) 20 *Journal of Reproductive and Infant Psychology* 253, 265; and Jeanne L Ahusen, 'A Literature Update on Maternal-Fetal Attachment' (2008) 37 *J Obstet Gynecol Neonatal Nurs* 315.

An important caveat is that these are just a sampling of references given that the expertise of this author is legal-philosophical: the emphasis in this article is that policy makers and legislators should look at, amongst other things, empirical research to discern damage to well-being.

75. For example, this point has been raised in Margaret Ryznar, 'International Commercial Surrogacy and its Parties' (2010) 43 *J Marshall L Rev* 1009, 1030.

76. *In re Baby M* 537 A 2d 1227.

77. Lamba (n 71) 651. See also H Hanafin, 'Surrogate Parenting: Reassessing Human Bonding' (presented at American Psychological Association Convention, New York, 1987) <<http://claradoc.gpa.free.fr/doc/313.pdf>> accessed 23 August 2020.

78. Kathleen Simmonds, 'Reforming the Surrogacy Laws of Australia: Some Thoughts, Considerations and Alternatives' (2009) 11 *Flinders J L Reform* 97, 116.

79. Olga BA van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' (2007) 13 *Human Reproduction Update* 53, 56.

80. van den Akker (n 68) 103.

81. *ibid* 104.

produce a child who is genetically connected to at least one of them. Another point for consideration is that maternal-foetal attachments are thought to be beneficial for the pregnant woman's health by lowering the risk of postpartum depression (at least outside of surrogacy),<sup>82</sup> which also raises the concern that managing such attachments to cope with relinquishment is possibly detrimental to the good of life of the surrogate. That said, it is unknown whether such attachments would in fact be beneficial, or worse, for the postpartum health of a surrogate given that she must relinquish the newborn. Researchers have suggested that more longitudinal follow-up studies are needed to assess the surrogates' sense of loss, if any, bearing in mind that long-term difficulties in women relinquishing a child, such as in adoption, have been reported.<sup>83</sup>

The second point of concern relates to other stresses associated with surrogacy arrangements aside from maternal-foetal attachments and any loss arising from relinquishing the newborn. A study has shown that surrogates (in India) were more depressed than a control group of women who were expecting for themselves.<sup>84</sup> Studies have suggested surrogates face myriad difficulties in coming to terms with their surrogacy for a variety of reasons.<sup>85</sup> There are social risks that stem from the lack of acceptance by family, friends, and the community.<sup>86</sup> Surrogates may face the stigma of having served as a surrogate out of financial necessity,<sup>87</sup> experience distancing from their own families after their stint,<sup>88</sup> and hide their participation in surrogacy.<sup>89</sup> Some surrogates housed in a facility, as was common in India when foreigners could employ an Indian surrogate,<sup>90</sup> may experience guilt over their inability to provide for their own offspring as compared to the offspring of the intended parents. Movement and activities may also be curtailed:<sup>91</sup> some may be required to keep to a certain bedtime, compelled to live within the facility for part or all of the gestational period, restricted in what physical activity they can undertake, or required to keep to visitation hours with their own families, including their own under-nourished children.<sup>92</sup> The hostel-type restrictions have been termed a 'Foucauldian enclosure' that produces a 'mother-worker subject',<sup>93</sup> though another study has reported that a majority of Indian surrogates felt positive about the surrogate house.<sup>94</sup> Surrogates may also find that nutritional provisions and prenatal medical care

82. See research cited in Marcus Agnafors, 'The Harm Argument Against Surrogacy Revisited: Two Versions Not to Forget' (2014) 17 *Med Health Care and Philos* 357, 361.

83. van den Akker (n 79) 59; van den Akker (n 68) 29.

84. Lamba (n 71) 651.

85. van den Akker (n 79) 59.

86. van den Akker (n 68) 257.

87. Khader (n 64) 72. This may also be because unfamiliarity with fertility treatment leads to a sense that surrogacy is similar to sex work (Alison Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' (2011) 26 *Responsibility and Identity in Global Justice* 715, 725).

88. Khader (n 64) 82.

89. Lamba (n 71) 649.

90. A study is found in Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 *Journal of Women in Culture and Society* 969.

91. Deckha (n 65) 55.

92. Sheela Saravanan, 'Global Justice, Capabilities Approach and Commercial Surrogacy in India' (2015) 18 *Med Health Care and Philos* 295, 303–4.

93. Pande (n 91) 970–1.

94. Lamba (n 71) 649.



far exceed that of their own pregnancy.<sup>95</sup> Notably, reproductive health care is more available to surrogates than during their own pregnancies, based on, as one commentator put it, the worth of the foetus they are carrying.<sup>96</sup> For the well-being of surrogates, a pertinent issue for future empirical studies to consider is whether abundant prenatal provision in contrast with postpartum care may contribute to the surrogate's sense that her well-being is ignored and only the development of the commissioned offspring is valued. The lack of follow-up care upon delivery,<sup>97</sup> aside from being possibly detrimental to the physical well-being of surrogates, can increase a sense of being used – a point that policy makers and legislators should look into, especially as a study suggests that in the longer term, the cutting off of contact by intended parents has left surrogates feeling betrayed that their new 'friends' no longer care and support them in the longer term.<sup>98</sup>

The third point of concern relates to potential effects on well-being from the degree of forfeiture of self involved in the extraordinary nature of the surrogates' labour, when compared with other forms of employment. Commentators have argued that reproductive labour, during which the surrogate is essentially treated as a womb renter, or 'baby machine',<sup>99</sup> is unlike labour – for example, in a factory – where an employer hires a factory worker to make products. The employer pays for the labour, and acquires rights over the products manufactured, the raw materials of which the employer has supplied. In contrast, the surrogate is the 'environment in which her reproductive labor is performed', providing 'materials out of which the child is created' (even if the genetic material come from the intended parents), being 'inevitably and solely directly responsible for the wellbeing of the entity that will be the future infant, an infant whom she 'builds' out of the materials of her own body'.<sup>100</sup> The control for nine months for 24 hours a day extends to limitations on the body, over what the surrogate can do or eat. While an athlete may face similar controls, the end result of the surrogate is not an act, but a person.<sup>101</sup> Moreover, it has been noted that the surrogacy industry treats the 'entire affective lives' of the surrogates as if they deserve to be commodified, emotionally dominating the perspectives of surrogates and subordinating all their relations to the goals of the industry.<sup>102</sup> It engages in 'suppressing, manipulating, and trivializing (the surrogate's) perspective'.<sup>103</sup> Feelings of attachment to the foetus may be impugned by surrogate recruiters as feigned, while brokers also manipulate surrogates by suggesting that the lack of altruistic motives imputes vulgarity to the practice of motherhood.<sup>104</sup> The degree of 'forfeiture of self'

95. Bailey (n 87) 735–6.

96. *ibid.*

97. Khader (n 64) 72.

98. van den Akker (n 79) 57.

99. Ayesha Hasan, 'Surrogacy: Enhancement or Restriction of a Woman's Autonomy' (1999) 6 UCL Juris Rev 101, 112.

100. Christine Overall, 'Reproductive 'Surrogacy' and Parental Licensing' (2015) 29 Bioethics 353, 357.

101. Herjeet Marway, 'La gestation pour autrui commerciale: droit et éthique' (2012) 28 *Travail, genre et sociétés* 173 ('The UK Law and Global Ethics of Commercial Surrogacy', translated from French <[www.cairn-int.info/article-E\\_TGS\\_028\\_0173-the-uk-law-and-global-ethics-of-commerci.htm](http://www.cairn-int.info/article-E_TGS_028_0173-the-uk-law-and-global-ethics-of-commerci.htm)> accessed 23 August 2020).

102. Khader (n 64) 80.

103. Elizabeth S Anderson, 'Is Women's Labor a Commodity?' (1990) 19 *Philosophy & Public Affairs* 71, 83.

104. Khader (n 64) 81.

has been regarded as extreme, even though some forfeiture or other is present in other kinds of work.<sup>105</sup> Some feminists liken it to sex work, which some, though not all, feminists see as demeaning, as a woman's body is being used in return for money.<sup>106</sup> If there is a lack of follow-up care after such an intense and intimate use of the body for pregnancy, the surrogate is treated instrumentally – her body is used, and she is cast aside when she has served her purpose. Such use of the woman has been seen to be ultimately in service of patriarchal notions that view childlessness as abnormal.<sup>107</sup> Some feminists point out that surrogacy enables men to present wives with children, while making surrogate mothers 'patriarchal subordinates' with no rights over the children and at the same time, even their wives' rights are insecure because the children are children of biological fathers.<sup>108</sup>

It should be noted, however, that some empirical studies report that some surrogates experience a sense of satisfaction from having done something good for another, and being appreciated, for example, through having baby-showers organized for them and receiving gifts.<sup>109</sup> They may also be well-treated by the intended parents. Some studies show they keep in contact.<sup>110</sup> Some attest to bonds between the surrogate and the intended mother.<sup>111</sup> Critics, however, point out that surrogates deliberately shift an attachment with the foetus to the attachment with the intended parents,<sup>112</sup> and reconstruct their own roles, emphasizing family values such as helping others to form a family, while deemphasizing that which contradicts 'family ideology', in order to come to terms with what they have done.<sup>113</sup>

Any damage to the good of life (in the form of physical and emotional or psychological health) can be classified as a side effect of the surrogate's choice, rather than what she intends. This is similar to the risks undertaken in the work of police officers/firefighters, with possible damage to the good of life for themselves, which are side effects rather than intended acts. In those cases, the side effects are acceptable if precautionary measures are taken, there is no alternative (for example, one could not use robots for the work), and they are not required to undertake foolish risks that amount to an arbitrary preference for the lives of others over themselves. What about the side effects in the case of surrogates? Given that researchers looking into the long-term psychological well-being of surrogates have called for more studies, such

105. Anne Phillips, *Our Bodies, Whose Property* (Princeton University Press 2013) 72.

106. Gerda Neyer and Laura Bernadi, 'Feminist Perspectives on Motherhood and Reproduction' (2011) 36 *Historical Social Research* 162, 168; Meredith W Michaels, 'Other Mothers: Toward an Ethic of Postmaternal Practice' (1996) 11 *Hypatia* 49, 53.

107. Sarojini Nadimpally and Deepa Venkatachalam, 'Marketing Reproduction: Assisted Reproductive Technologies and Commercial Surrogacy in India' (2016) 23 *Indian Journal of Gender Studies* 87, 88.

108. A summary of this critique is found in Richard A Posner, *Sex and Reason* (Harvard University Press 1992) 424 though he does not agree with this critique.

109. Eisenberg (n 58) 313–14. See, also, Zeeshan Mansoor, 'Contracts Contrary to Public Policy under English and Dutch Law' (2014) 1 *Eur J Comp L & Governance* 297, 331; Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Bioethical Inquiry* 477, 481; Deckha (n 65) 65 (which cites some studies showing no dissatisfaction).

110. Susan Imrie and Vasanti Jadva, 'The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements' (2014) 29 *Reproductive BioMedicine Online* 424, 425.

111. Michaels (n 106) 62–3.

112. van den Akker (n 68) 110.

113. See the various works recounted in *ibid* 108.

as on whether the intent before pregnancy can help surrogates cope emotionally, and given that studies relating to surrogates' experiences vary, policy makers and legislators should be cautious to protect the well-being of surrogates. Laws that ensure adequate postpartum care<sup>114</sup> and a level of freedom for the surrogate during pregnancy can go some way to alleviate the side effects of damage to the surrogates' good of life. But if regulatory measures are inadequate and negative experiences are inherent, undertaking to serve as a surrogate is tantamount to an arbitrary preference for others (the intended parents) over themselves. The goods of life and sociability can be pursued in ways other than serving as a surrogate.

But what if we recast the act of the surrogate as an instance where the surrogate acts sacrificially and suffers a damage to a good? And how would self-sacrifice be regarded by Finnis? As argued, surrogacy involves the surrogates' arbitrary preference for the interests of the intended parents over their own. When Finnis elucidates the principle of practical reasonableness that there should be no arbitrary preference amongst persons, he is primarily concerned with the idea that self-preference must be reasonable. Self-sacrificial acts involve a preference of others over one's self. Finnis alludes to the possibility of self-sacrificial acts in relation to a different issue of conflicts of opportunities where one's friend's well-being can be secured only at the destruction of one's own. He acknowledges that in the case of responsibilities to family or one's political community, for example, responsibility may require reasonable self-sacrifice.<sup>115</sup> It is noteworthy that Finnis alludes to the case of 'reasonable' self-sacrifice. Self-sacrifice is unreasonable by reference to the violation of the requirements of practical reasonableness. Thus, if a surrogate intentionally damages a good in her own life or suffers a side effect in a manner that is impermissible, such as when arbitrarily preferring others over herself, then self-sacrifice would be unreasonable. The availability of adoption for the intended parents may make the surrogates' acceptance of the side effects in the case of surrogacy unacceptable. Recasting the act as one where the surrogate acts self-sacrificially adds nothing new to the analysis.

### *3.1.3 Damage to the goods of life and sociability vis-à-vis the child*

An act that intentionally damages a basic good in another's life is an act against the other's well-being. When the parties are in a collaborative or any other form of recognized relationship, it is meaningful to speak of damage to the good of sociability when damage to any of the other basic goods occurs when one party uses the other as a means to their ends. Finnis does not elaborate on damage to the good of sociability in this manner, but it seems to be a plausible interpretation. Not only can the good of sociability be served, it can be damaged in the context of a collaborative or other recognized relationship where one would ordinarily expect one party to act for the other's best interests.

Crucially, while police officers and firefighters do not directly damage any good, the chosen means of the surrogate – pregnancy on behalf of another – involves the surrogate acting directly against the goods of life and sociability in relation to the child, in whose best interests she can no longer act. This point in the analysis, if established, disposes of the case for legalizing surrogacy. Its tenability hinges on the link between childbirth and raising children. Whether there is such a link turns on

114. *ibid* 105.

115. This was referred to in passing in relation to a different question of whether there is a further point to human existence (Finnis, *NLNR* (n 13) 372).

empirical evidence as to the best interests of the child, on the one hand, and raises philosophical or normative questions, on the other. I will consider each in turn.

In relation to the empirical question as to whether the best interests of the child are served, the tendency<sup>116</sup> of surrogates to dissociate emotionally from the developing foetus while taking care of the foetus in an instrumental sense<sup>117</sup> may be damaging to the good of life of the child, right from the time of pregnancy. Recent research suggests that poor parental *prenatal* attachment has been connected to behavioural and conduct problems, lower cognitive development, and negative socioemotional regulations in early childhood.<sup>118</sup> The research builds upon Bowlby's attachment theory which suggests the importance of early attachments between an *infant* and a caregiver as foundational for development. Loss of, or failure to attach to, a primary figure can be problematic.<sup>119</sup> While some empirical studies have, in contrast, indicated that there is no harm to children conceived through surrogacy, the facts that there have been few studies, non-representative samples, high dropout rates leading to poor longitudinal outcomes, and methodological problems in eliciting responses from surrogates and intended parents have led philosophers<sup>120</sup> and empirical researchers to note the need for more studies. In particular, those researching on this area suggest there is a need for more research on the psychological state of the surrogate mother in not attaching to the foetus and the foetus's 'epigenetic health and future wellbeing'.<sup>121</sup> Even if such potential damage to the child's good of life is not intended but only a side effect, the damage is not reasonably incurred as it is unfair to bring a child into existence to suffer such damage just to serve the goods of the surrogate and the intended parents.

Moreover, the surrogate must give up the newborn to fulfil her transactional obligation: the well-being of the newborn – whether the intended parents are suitable or would act in the best interests of the newborn – is simply irrelevant. The pregnancy is not undertaken for the child's sake, but for the sake of the surrogate (if it is a means to other ends in her life) and for the sake of the intended parents. Despite being gestationally and possibly genetically connected with the child, the surrogate is not permitted to concern herself with the good of the child for the child's sake and consider whether to give up the newborn – the essence of the good of sociability – as gestational and genetic mothers (outside of the surrogacy context) are expected to. Her rights and duties as a mother, which otherwise arise by virtue of gestational and genetic connections outside of the surrogacy context, have been replaced by her transactional obligations. The substitution of a primary caregiver during the prenatal

116. Indeed, if her surrogacy is carried out in a facility as was common in India, she is exposed to 'industry messaging' encouraging her to suppress attachments to the unborn during pregnancy, or to form a 'strong but "disposable" attachment', resulting in 'cognitive dissonance' or even 'trauma' (Khader (n 64) 73).

117. van den Akker (n 68) 159. See text accompanying n 74.

118. Rolle et al (n 70) 2; van den Akker (n 68) 158. Maternal-fetal bonding is also a predictor of maternal-infant bonding (see Eleonora Petri, Laura Palagini, Olivia Bacci, etc, 'Maternal-Foetal Attachment Independently Predicts the Quality of Material-Infant Bonding and Post-Partum Psychopathology' (2018) 31 *Journal of Maternal-Fetal & Neonatal Medicine* 3153). See, also, research cited in Jeanne L Alhusen, 'A Literature Update on Maternal-Fetal Attachment' (2008) 37 *J Obstet Gynecol Neonatal Nurs* 315, 315–16.

119. John Bowlby, *Attachment and Loss: Volume I: Attachment* (2nd edn, Basic Books 1969, 1982); see also the research cited in Agnafors (n 82) 360.

120. Agnafors (n 82) 359.

121. van den Akker (n 68) 175.

phase with the intended parents in the early postpartum phase constitutes a loss or hindrance to the child's formation of early attachments which has been thought to be detrimental to the child's well-being.<sup>122</sup> Despite the child having a closer early link, gestationally and possibly genetically, with the surrogate than the social link with intended parents,<sup>123</sup> the surrogate must ignore the gestational, and possibly genetic, relationship, thus damaging the good of sociability. While such loss might also happen outside of surrogacy, such as when a newborn loses a mother through death, the damage to the child's well-being in surrogacy occurs due to the obligations incurred in the surrogacy arrangement.

That the well-being of the newborn is subordinate to the will of the surrogate and the intended parents can also be seen in how the process of legal recognition of parenthood in surrogacy fails to consider the welfare of the child. The suitability of the intended parents, such as whether the intended parents have previous histories of sexual crimes,<sup>124</sup> is often not assessed, unlike classic cases of adoption, though this can be addressed with legislation. In surrogacy, the intended parents select the donors of the gametes, if any, and the surrogate. This is unlike adoption when the focus is the capability of the adoptive parents to meet the needs of the child.<sup>125</sup> It could, however, be argued that the situation in surrogacy is more akin to reproduction without medical intervention, where suitability of parents is not considered, at least where one or both gametes are from the intended parents.

Aside from the empirical question as to the best interests of the child, the link between childbirth and raising a child turns on a contested notion of motherhood and can thus be challenged on a philosophical or normative level. Policymakers and legislators should squarely address this debate.

In favour of surrogacy, the link between childbirth and raising children, and, indeed, a more general link between mothering and women,<sup>126</sup> have been challenged as a form of 'gender essentialism'.<sup>127</sup> The notion that the child can only be properly

122. Agnafors (n 82) 360–1.

123. van den Akker (n 68) 8.

124. See, for example, the case of Baby Gammy's father who was previously convicted for child sexual abuse: 'Child Abuse Convictions of Gammy's Father Prompt Investigation' *The Guardian* (4 August 2014) <[www.theguardian.com/world/2014/aug/05/gammy-father-child-abuse-convictions-investigation](http://www.theguardian.com/world/2014/aug/05/gammy-father-child-abuse-convictions-investigation)> accessed 23 August 2020.

125. Rhoda Scherman, Gabriela Misca, Karen Rotabi and Peter Selman, 'Global Commercial Surrogacy and International Adoption: Parallels and Differences' (2016) 40 *Adoption & Fostering* 20, 24.

126. Elaine Tuttle Hansen, 'A Sketch in Progress: Introducing the Mother Without Child', in Andrea O'Reilly (ed), *Maternal Theory* (Demeter Press, 2007) ch 26, 433.

127. Andrea O'Reilly, *Matricentric Feminism: Theory, Activism, Practice* (Demeter Press 2016) 111 ('O'Reilly, *Matricentric Feminism*'). This is part of a larger feminist resistance of a child-centric motherhood model (Judith Stadtman Tucker, 'The New Future of Motherhood' (2006) 36 *Off Our Backs* 32–8). Some feminists object to how the image of the ideal mother has turned motherhood in America into a 'religion' and made working motherhood seem like a poor choice leading to critical judgement of mothers who desire to work (Judith Warner, 'The Motherhood Religion' in Andrea O'Reilly (ed), *Maternal Theory* (Demeter Press 2007) ch 43). Such societal expectations have resulted in women's needs not being met (O'Reilly, *Matricentric Feminism* 141). There is no monolithic view amongst feminists. While some have viewed the identity of mothering as patriarchal oppression and rejected motherhood, others have sought to 'overcome power structures in order to allow motherhood' (Neyer (n 106) 167). More fundamentally, feminist scholarship has challenged traditional conceptions of motherhood as 'serving the social, economic, and political agendas of hegemonic male and/or capitalist

raised by the biological mother has been rejected as patriarchal ideology.<sup>128</sup> On the other end of the spectrum, however, there are feminists and others who take the view that ‘women’s historical and social capabilities incorporated within childbearing and childrearing practices possess independent value wholly apart from their patriarchal context’. These are concerned that the interventions of reproductive technology would take away from women the chances to develop such capabilities while claiming to serve their interests.<sup>129</sup> The link between childbirth and raising children has also been watered down in the current culture open to ‘shifting families’, when the heteronormative and monogamous model of the family has been challenged not only by single-parent and homosexual parenting households, but by households that do not fall within the ‘gay-straight dichotomy’.<sup>130</sup> Such trends, while ipso facto having no normative significance, indicate an overall empirical attitudinal shift that may lend to the decentring of both genetic and the gestational mothers. The net result is that some are unlikely to be persuaded that the surrogate stands in a special position of motherhood vis-à-vis the newborn by being involved as a gestational, and possibly genetic, mother. If the surrogate is not in any special position vis-à-vis the child by being involved in childbirth, she cannot be said to be acting against the good of sociability of the child in fulfilling her transactional obligation, and being no longer involved in the child’s life once pregnancy and childbirth are over.

In reply to these philosophical or normative objections which reject gender essentialism and the heteronormative and monogamous model of the family, it should be noted that permitting surrogacy involves the imposition of an at least equally contested notion on a child that their surrogate mother (possibly also their genetic mother, and at least their gestational mother) ‘is not important as a mother’.<sup>131</sup> Ironically, this is imposed on the child even as, practically, the use of donor gametes or the surrogate’s ovum (if present) in surrogacy leads to genetic differences from the intended parents, while the use of the surrogate for gestation has epigenetic effects on the life of the child. Those whose links with the child are doubted for their normative significance in reality influence the child’s makeup. Practically, too, surrogacy leaves the child ‘wondering about the unknown genetic and/or gestational environment which has contributed to their eventual makeup’.<sup>132</sup> There would be a loss in this regard in terms of the knowledge of one’s origins,<sup>133</sup> in addition to a child possibly

interests’ (Caroline Knowles, *Family Boundaries: The Invention of Normality and Dangerousness* (Univ of Toronto Press 1996) 117). By rendering ‘sacrificial motherhood as both normative and natural’, gender essentialism through motherhood – the result of ‘patriarchal mandate’ – may also lead to the needs of mothers who do not fit the model being neglected as they are regarded as undeserving of concern. It is also said to be ‘deeply oppressive to women because it requires the repression or denial of the mother’s own selfhood’ (O’Reilly, *Matricentric Feminism* 116, 143, and 146).

128. Andrea O’Reilly, ‘Feminist Mothering’ in Andrea O’Reilly (ed), *Maternal Theory: Essential Readings* (Demeter Press 2007) 792, 801.

129. Anne Donchin, ‘The Future of Mothering: Reproductive Technology and Feminist Theory’ (1986) 1 *Hypatia* 121, 134.

130. Margaret F Gibson (ed), *Queering Motherhood: Narrative and Theoretical Perspectives* (Demeter Press 2014) 146–7.

131. van den Akker (n 68) 172.

132. *ibid* 172.

133. Allowing people to adopt unwanted children does not present a similar problem insofar as the act of the biological mother giving up the child for adoption can be viewed as distinct from the act of adoptive parents. Even if the act of giving up a child for adoption is in some ways not in

desiring to know and connect with their gestational, and possibly genetic, mother. This would be the case to some degree even if the legal regime were to allow or require the surrogate to maintain contact or involvement since the degree of association is far less than it would otherwise have been. Anyway, this is unlikely to be a practical solution as surrogates may not want to be reminded of the child they have given up while intended parents may fear interference by the surrogate.<sup>134</sup> It is also not certain that contact between the surrogate and the child is helpful or that it does not have a negative effect on the relationship between the intended parents and the child. Research on the loss of a mother in other contexts has shown effects on a child's ability to form a relationship with the new parent and a child's experience of conflicted loyalties. Awareness of their own conception through surrogacy also means awareness of the possible fact that their gestational (and possibly genetic) mother relinquished them in return for payment.<sup>135</sup>

As an aside, adopted children may face similar issues. Notably, however, in adoption, one is finding a home for a child who already exists and is unwanted or cannot be cared for by birth parents. Birth parents may be unable or unwilling to act for the child's well-being. They are unable or unwilling to serve the good of sociability in relation to their child by providing a parent-child bond. It is the act of giving up the child, rather than the adoption by adoptive parents, which engenders analogous problems. The surrogate's part of the arrangement, in contrast to adoption simpliciter, involves precisely bringing a child into existence only to refuse to provide a parent-child bond, similar to the birth parents being unable or unwilling to serve the good of sociability and giving the child up for adoption. The act of adoption by the adoptive parents will be considered later in comparison with the act of intended parents in surrogacy.

In short, while legislation can go some way to ensure the suitability of intended parents to serve as parents, the importance of prenatal and early attachment to the well-being of the child and the effects of the deliberate arrangement for the substitution of an early caregiver are concerning on an empirical level. Normatively, supporters of surrogacy may argue that the link between childbirth and raising children trades on contested notions of motherhood and that parentage is a social construct. But the epigenetic (and possibly genetic) impact on the makeup of the child remains. Policy makers and elected legislators may be left to decide on what is appropriate for a particular jurisdiction if the philosophical issue is intractable. The analysis based on the basic goods of human flourishing, rather than the objectification/commodification debate, better illuminates what is at stake in the ethical controversy surrounding surrogacy. It highlights the salient issues to be resolved – whether the interests of the child are disserved and whether the child is a means to the ends of others turns on empirical evidence as well as the resolution of the philosophical question about the link between childbirth and raising children.

the best interests of the child, the act of adopting a child that has been given up is to put the child in a better position than if the child were to have no parents. This contrasts with the surrogacy arrangement which, while comprising several acts, is one entire arrangement (where the surrogate would not get pregnant but for the fact that the intended parents want a child).

134. The surrogates' other children might fear being relinquished too. See the research discussed in van den Akker (n 79) 57. There are also practical problems with enforcement that exceeds that required to ensure that a divorced parent maintains a child, for example.

135. van den Akker (n 68) 181–2.

### 3.1.4 *Practical reasonableness of the surrogate*

What about the argument that allowing a woman to be a surrogate for profit enables self-actualization as she determines for herself what goods to prioritize in her life and acts accordingly? Supporters of surrogacy point, for example, to how poor women gain a new way of providing for themselves.<sup>136</sup> The choice to be a surrogate may be viewed as ‘economically rational’<sup>137</sup> given that the labour may generate earnings that are many times more than what the women would get in any other form of labour. Critics have noted that the idea that women should have the right to seek employment in any way they wish ‘is acceptable only if this is done from an empowered perspective, not a vulnerable one’.<sup>138</sup> It is highly suspect to speak about empowerment if women who ‘choose’ to be surrogates are disproportionately lacking in money, education, and prospects. The end of financial gains induces some surrogates to undertake risks to their physical and possibly psychological well-being.<sup>139</sup> Some critics also object to commercial surrogacy for a similar reason as an objection to the pornography industry – it entices women to do the only thing which they think they can do which is of social value.<sup>140</sup>

There are four distinct challenges to the idea of self-actualization which I shall consider in turn: the lack of actual consent; the impossibility of advance consent for the act of surrogacy; the opprobrious extent of the relinquishment of autonomy expected of the surrogate; and the notion that moral autonomy is not unbridled but must be exercised in accordance with reason. Of these, the third is the strongest as it cannot be satisfactorily addressed by legislation, though it is not a sufficient reason in itself against legalization; the second and fourth are conceptually highly controverted for different reasons.

First, factually, sometimes consent is not truly informed. In terms of factors such as occupational class, financial capacity, and education, which affect negotiating power, surrogates on average tend to be markedly inferior to intended parents.<sup>141</sup> In some places such as India, surrogates may not be able to discuss the ‘taboo subject’ with anyone; they may lack the understanding to consent; studies suggest that surrogates may be illiterate, and consent procedures not properly followed, with surrogates not even holding on to copies of their contract.<sup>142</sup> Further, in cases where surrogates are supposedly altruistically motivated, given that there is a general tendency to call for women to put the interests of others above themselves,<sup>143</sup> pressure may have been exerted. Critics have regarded the discourse about women helping women as possibly

136. Hasan (n 99) 109.

137. Khader (n 64) 77.

138. van den Akker (n 68) 251–2.

139. Trebilcock (n 10) 617.

140. Michaels (n 106) 55.

141. Olga BA van den Akker, ‘A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy’ (2005) 26 *Journal of Psychosomatic Obstetrics & Gynaecology* 277, 279; van den Akker (n 79) 57; Saravanan (n 92) 303–4. Indeed, a commentator has criticized the neo-eugenic slant in the discourse that casts the high fertility rate in the global south as a problem whilst relying on such women, in India, for example, as surrogates (Amrita Pande, ‘Global Re-Productive Inequalities, Neo-Eugenics and Commercial Surrogacy in India’ (2016) 64 *Current Sociology Monograph* 244, 248–9).

142. Khader (n 64) 74.

143. Finkelstein (n 4) 35–6.



manipulative, drawing upon the tendency of women to want to sacrifice for others, particularly when relatives or family members<sup>144</sup> are called upon to help an infertile couple, and hypocritical, particularly when providers of assisted reproductive technologies earn huge fees.<sup>145</sup> Manipulative practices of surrogate recruiters in the industry, geared to getting women to sign up and do their best have also been documented. They include discourse which suggests that surrogates should value the child they are carrying for another more than their own; that if they refuse to be surrogates, it is because they do not properly value sexual purity.<sup>146</sup> Some of these concerns can be addressed by examining actual empirical evidence of the context in which the surrogacy arrangements occur, and using laws to ensure that the decision is freely made and in an informed manner.<sup>147</sup>

Second, it has been argued that a surrogate cannot truly consent in advance as she does not understand the nature of her choice until she has gone through the specific pregnancy which is the subject of the transaction.<sup>148</sup> In contrast, supporters of surrogacy point out that the rejection of a surrogate's personal account of her experiences and insistence that she has not truly consented is in fact paternalistic and condescending.<sup>149</sup> Indeed, it is extraordinary to particularize the capacity to consent down to a specific pregnancy. What is at stake is not so much that each pregnancy is factually completely unlike any other experience (or previous pregnancies). Opponents of surrogacy are instead arguing that pregnancy, the bearing of a child, *ought* to be treated differently from other experiences. The argument is a normative one that the bond between the gestational mother and the child can only be relinquished at birth (through adoption). As such, the argument's tenability does not really turn on the capacity to consent before birth. The real issue is the nature of motherhood – whether there are norms, duties, or rights attaching to gestational, and possibly genetic, motherhood. It has been said that a surrogate gets pregnant and delivers a child just to give the child up, which 'defies mainstream assumptions that identify pregnancy with the birth mother's commitment to the project of subsequent lifelong social mothering and threatens dominant ideologies in many cultures that assume an indissoluble mother-child bond'.<sup>150</sup> Detractors, however, argue that motherhood and family are 'contested and highly fluid constructs'.<sup>151</sup> This brings us back to the crucial issue which I had suggested must be resolved by policy makers and legislators – whether it is detrimental to allow a child to be brought into existence with the precise objective of having the child removed from its gestational, and possibly genetic, mother and placed with intended parents.<sup>152</sup>

Third, the extent of control involved in surrogacy is opprobrious. The surrogate contractually relinquishes a large part of her autonomy. Supporters of surrogacy counter-argue that every form of labour involves control. For some, such as priests and athletes, control extends to regulation of matters going to one's identity, such as diet

144. Indeed, this has been the case in the family context, when an infertile woman may ask a relative to carry her child (Ruparelia (n 57) 17–20).

145. Sifris (n 6) 368.

146. Khader (n 64) 81.

147. Sifris (n 6) 377.

148. Hasan (n 99) 113.

149. See, for example, Finkelstein (n 4) 36.

150. Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (2010) 7, cited in Finkelstein (n 4) 41.

151. Finkelstein (n 4) 41.

152. See the discussion in Section 3.1.2.

and sexual activity.<sup>153</sup> Regulation during the process of surrogacy, however, may exceed the norm in labour contracts as control extends not just to body and mind, but to the managing of emotions to ensure women do not change their minds,<sup>154</sup> given that maternal-foetal attachments may form during gestation. In this sense, legalizing surrogacy would be diminishing, rather than facilitating, the autonomy of women. Moreover, a distinct question is whether ‘in matters involving this kind of use of the body, one can be expected to relinquish the right subsequently to change one’s mind’.<sup>155</sup> One may not know how it feels to give up a childhood home when contracting to sell a house but is still bound to deliver. However, specific performance is generally not ordered for contracts of employment, as forcing someone to carry out such contractual obligations may be viewed as involving too much personal subordination, akin to slavery.<sup>156</sup> Insofar as surrogacy involves pregnancy which takes place over a term, it is more akin to a personal contract than a property transaction, though this might be disputed in scenarios when the renegeing happens only after childbirth and the personal service element has concluded.<sup>157</sup> Even so, the law’s solution of not requiring specific performance for personal contracts cannot be readily transposed to the surrogacy context. Something else highly, and perhaps equally, personal is involved – the provision of gametes. If specific performance is not ordered, any damages to the intended parents may also be perceived to be manifestly inadequate. The metaphysical dilemma of who is more of a parent – whether intended social parenting has priority over gestational, and possibly genetic, connection, or whether genetic connection has priority over gestational connection, as the case may be – is precisely generated by the act of surrogacy. The fact that it cannot be satisfactorily resolved might constitute one of the reasons not to legalize surrogacy. Not all transactions end in a dispute, and there are surrogates who do not feel that their emotions have been manipulated or managed in any way but would gladly help intended parents. But legalizing surrogacy *eo ipso* settles the philosophical question as to the link between childbirth and raising a child by deciding that parenthood is a

153. Phillips (n 105) 81.

154. *ibid* 86–7.

155. *ibid* 79.

156. *ibid* 82–3.

157. Robin West has observed that the supposed likeness of a surrogacy contract to other categories of contract is used to justify judicial decisions as to how to treat the novel case of a surrogacy contract, such as in the seminal case of *In re Baby M* 537 A 2d 1227. The reasoning by analogy between novel cases and other contractual cases seems to treat the enforceability question as though it posed a descriptive rather than normative or moral question, and on the basis of formal equality, the judicial outcome appeared to be mandated. This would not have been so if instead the novel element of the case was emphasized. Thus, the judge is able to engage in legal reasoning, which is seemingly distinguishable from political reasoning that the legislature might have engaged in. (See Robin West, ‘Re-imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law’ (Georgetown Law Faculty Publications and Other Works, 2003) 112–29 <<https://scholarship.law.georgetown.edu/facpub/970/>> accessed 23 August 2020.) Although we are considering the arguments for the legalisation of surrogacy by the legislature, and a legislative regime can stipulate the solutions in cases of renegeing, West’s elucidation of the limits of analogical reasoning and formal equality highlights the pertinence of a proper consideration of myriad issues rather than relying on apparent likeness between surrogacy and other categories of contracts as formal equality would belie the difficult moral and policy questions at stake.

social construct, allowing the imposition of a contested notion of motherhood on the child, as was earlier discussed.<sup>158</sup>

Finally, Finnis's good of practical reasonableness requires that autonomous choices be made in compliance with the requirements of practical reasonableness. But this is a highly contested part of natural law theory from the anti-perfectionist point of view. Anti-perfectionists would regard the objection that surrogacy is necessarily chosen in violation of the requirements of practical reasonableness as irrelevant. Choice is not to be constrained in such a way. To persuade supporters of surrogacy, the exact goods being violated must be properly and cogently unpacked.

### 3.2 Assessing the Acts of the Intended Parents

The analysis from the perspective of the intended parents draws on parts of the analysis relating to the surrogate. The intended parents enter into the surrogacy arrangement, in many cases with at least one intended parent providing their own genetic material, in pursuit of the good of life-in-its-transmission. This is the good sought even though procreation occurs through medical intervention. The transaction is a means within a larger project of parenting that they are hoping to undertake: it is in pursuit of the good of sociability. From the intended parents' perspective, the act is rationally intelligible as it is in pursuit of basic goods. The choice of means, however, is morally impermissible as it violates two principles of practical reasonableness, first, in failing to respect the basic goods of life, sociability, and practical reasonableness, and second, in evincing an arbitrary preference amongst persons – for themselves over the surrogate and over the child. Even if damage to some of the goods is in the form of side effects, these are not reasonably accepted.

#### 3.2.1 *Towards the surrogate*

At the very least, the intended parents' pursuit of surrogacy results in the side effect of damage to the good of life in the surrogate.<sup>159</sup> Amongst other things, it is probable that they intend that she bears in mind that the child she is carrying is not her own, so that her attachment is managed, possibly to her detriment, as earlier discussed; if, however, they do not discourage the forming of such emotional bonds, they subject her to possible distress at the time she is to part with the child.<sup>160</sup> The tendency to prefer the transfer of multiple embryos without regard to the welfare of surrogates has also been documented.<sup>161</sup> Given the other stresses known to be faced by surrogates, the intended parents' participation in the surrogacy market also involves the acceptance of these side effects of damage to well-being of the surrogate.

In both altruistic and commercial surrogacy, particularly if postpartum care is neglected after the intensive and intimate use of the surrogate's body, the intended parents seem to have brought themselves into a collaborative relationship with the surrogate for the purpose of using her as a means to their own ends, knowing the potential effects on her well-being. They thus act against the good of sociability. Such

158. See text accompanying n 131.

159. The argument in this section hinges on the arguments in Section 3.1.2.

160. Agnafors (n 82) 362.

161. Cited in van den Akker (n 68) 220. This is in relation to the employment of surrogates by male partners in same-sex relationships. The embryos would be fertilized by each of the male partners, though multiple embryonic transfer can be regulated by law.

an act can also be perceived as an arbitrary preference of themselves in their pursuit of the good of life-in-its-transmission at the expense of the surrogate's good of life.

If the surrogate's consent is in doubt, or if the industry exerts an opprobrious level of control over the surrogate's practical reasonableness, the intended parents intend to damage the good of practical reasonableness in the surrogate in their bid to use her service. Her choice to be a surrogate is not authentic, that is, not a result of her freely ordered evaluation of her preferences. But even when she regrets that decision at the point of delivery, she is viewed as renegeing and her attempt to keep the child contested. As noted earlier though, supporters of surrogacy point out that not all surrogacy arrangements are the same, as some surrogates feel valued by the intended parents, and it would be disrespectful towards surrogates to assume that surrogates are not capable of an authentic choice. Even if her consent is real, however, the essence of the arrangement is that the surrogate is required to act against the good of sociability in relation to the child. In that sense, she is required to violate the principle of practical reasonableness that one should not intend to damage a basic good (of sociability), as part of the arrangement. The intended parents can be said to intend to damage her good of practical reasonableness, by requiring that she acts contrary to it.

### 3.2.2 *Towards the child*

Where the child is concerned, the intended parents seek a parent-child relationship. They hope to pursue the good of sociability in the context of that relationship.

However, they also intend to separate the child from the surrogate. Studies show that the substitution of a primary caregiver during the prenatal phase with the intended parents in the early postpartum phase constitutes a loss or hindrance to the child's formation of early attachments which is detrimental to the child's well-being.<sup>162</sup> The severance can be viewed as an intentional act against the good of sociability of the child: the child's prenatal link to the gestational (and possibly genetic) mother, which is closer than the child's link to the intended parents, is deliberately severed. All gaps in the chances to form parent-child attachments are significant.<sup>163</sup> Research on children who lose biological mothers examine how they reattach to another mother, suggesting that the circumstances of loss affect dynamics of reattachment. In contrast, '(n)othing is known about the effects of separation on a newborn baby from its surrogate birth mother because the questions have not yet been asked', but this can likewise affect the ability of baby to attach to the intended parents.<sup>164</sup> These acts may result in long-term issues for the child, contrary to the good of emotional or psychological health, and therefore, the good of life, of the child. Even if the intended parents have no ill intent, do not desire the child to be so affected, and are otherwise suitable parents, they choose the means of surrogacy which includes such side effects on the good of life.

Moreover, policy makers and legislators should consider issues such as whether a child has a desire or a right to know and connect with their birth mother,<sup>165</sup> whether someone conceived through surrogacy has a right to understand their genetic and

162. See text accompanying n 122.

163. van den Akker (n 68) 147.

164. *ibid* 153.

165. See, for example, Finkelstein (n 4) 20.

epigenetic makeup,<sup>166</sup> and problems arising from disclosure. Studies on the discomfort relating to disclosure on the part of those using surrogacy, particularly genetic surrogacy, suggest that intended parents may have some cognitive dissonance about their employment of surrogacy.<sup>167</sup> This may affect their decision as to how much to disclose. But if they do disclose, would a child conceived through surrogacy wonder why the birth mother would part with them, as some adopted children are known to experience in relation to their birth mothers? If surrogacy is for a fee, and the surrogates are genetic mothers, such problems may be even more acute as the child might wonder why their genetic and gestational mother parted with them for a fee.<sup>168</sup> Again, there is at least a side effect of damage to the well-being, and therefore good of life, of the child.

The possibility of damage to the good of life of the child through the conflicted emotional states of the intended parents should also be considered by policy makers and legislators. Research on intended parents is 'relatively rare and relatively incomplete'.<sup>169</sup> But from what is known, what is especially concerning is that some intended mothers with parental orders in their favour who had employed genetic surrogates expressed that it would have been easier to accept a child if the child had been genetically connected with them (rather than the surrogates). Also, the number of such intended parents increased post-relinquishment when compared with pre-arrangement.<sup>170</sup> Even genetically related mothers who believed that it was easier to accept a genetically related baby decreased in numbers post-relinquishment by the surrogate, though it is not clear whether it was because they realized subsequently they had difficulty accepting their genetic children due to missing out on the gestational process, or they thought that it would be as easy to accept non-genetic children.<sup>171</sup> It should not be assumed that intended parents who are desirous of children through surrogacy do not later struggle over accepting the child.<sup>172</sup> A 'missing genetic link' in gestational surrogacy 'may pose a threat to the marital/family relationships',<sup>173</sup> particularly if the child comes to be viewed by the intended mother as fathered by the intended father and the surrogate.<sup>174</sup> Given the importance of the parents-infant bond in the development of the child, the well-being of the child may be further affected, especially if there is a gap immediately post-delivery as intended parents are conflicted over, and take time to adjust to, their new parenthood.<sup>175</sup> If there is rejection on the part of intended mothers, or difficulty in bonding in early infancy as

166. See text accompanying n 132.

167. For example, while most intended mothers said they would reveal their use of surrogacy, their reluctance to disclose hypothetical use of sperm or egg donation and adoption suggested some dissonance and concern with lack of genetic connection (see van den Akker (n 68) 132).

168. van den Akker (n 68) 181–2.

169. *ibid* 139.

170. van den Akker (n 141) 282.

171. *ibid*.

172. van den Akker (n 68) 8.

173. *ibid* 28.

174. *ibid* 138. It has been noted that 'few intended couples take up the offer of paternity testing', possibly in a bid to de-emphasize the genetic link with the intended father and equalize the connection between the baby and either intended parent, by emphasizing the social, rather than genetic, construction of family (see research cited in *ibid* 138–9). This is somewhat ironic given that they may have opted to pursue surrogacy over adoption to have a genetically connected child.

175. *ibid* 152.

a result of such emotional struggles, the damage done to a child in a surrogacy arrangement might be doubled from that which a child might encounter in adoption – rejection first by their genetic mother, and then by the intended mother. Similarly, anxiety has been known to affect the efficacy of parental care, and if surrogates and intended parents have increased anxiety for different reasons – the surrogate, during pregnancy, over the anticipation of relinquishment or the sense of responsibility as she perceives herself to be responsible for someone else’s child, and the intended parents, over parenthood through surrogacy without experiencing gestation, it would be detrimental to the child’s well-being.<sup>176</sup> More research needs to be done on parenting behavior post-surrogacy, just as research has been done on this subject in the context of IVF families.<sup>177</sup>

A practical difficulty remains. Even as we would benefit from longitudinal empirical studies over a number of issues recounted in this section, not only is hard to get participants and follow up over time, ‘in studying infertile populations, attrition, lack of cooperation, and giving socially desirable responses are not uncommon’.<sup>178</sup>

Relatedly, the preceding points also raise the question of the role of gestation in transforming someone into a mother, a point which the classic work on maternal-foetal attachment was concerned with.<sup>179</sup> Recent research suggests the link between maternal-foetal sensitivity and maternal-baby sensitivity, suggesting that the attachment formed during pregnancy is important for the postpartum care of the newborn.<sup>180</sup> Thus, delinking childbirth and raising a child can result in damage to the good of life of the child. Some supporters of surrogacy suggest it is possible for the intended mother to bond with the child via the surrogate mother,<sup>181</sup> but it is obvious that the degree of ‘contact’ is less extensive and its nature is indirect, via a proxy.

It has been suggested that the consideration of attachment opportunities, necessary for ‘lifelong overall wellbeing’ should ‘feature prominently in surrogate arrangements policy and practice’.<sup>182</sup> Even if the damage to the child is a side effect, if the child is not brought into being, the side effects would not be experienced.<sup>183</sup> The alternative of adoption to fulfil the desire of parenthood is available, even though there is no genetic connection with the child. Therefore, the side effects of the intended parents’ acts are not acceptable. It has been noted that while the commonly framed position is that babies need caring and nurturing parents, it is the intended parents’ needs that are the ‘primary needs being met by surrogacy arrangements and the baby is there to fulfil the parental need’.<sup>184</sup> By participating in surrogacy, the parents evince an arbitrary preference of themselves over the child, wanting to meet their desire for (genetic) parenthood at all costs. They bring a child into being in disregard of such problems. Given that the (voiceless) child’s need is really secondary in the arrangement between

176. *ibid* 154.

177. *ibid* 152–3.

178. van den Akker (n 141) 277.

179. Cranley (n 70) 281.

180. van den Akker (n 68) 127.

181. *ibid* 136.

182. *ibid* 158.

183. This does not entail a premise that it is better for the child not to be born, but only that to pursue the good of parenting, the intended parents had alternatives such as adoption which do not involve the damage to the same good.

184. van den Akker (n 68) 171.

the participating parties, policy makers and legislators need to be the child's advocate and consider the welfare of surrogate children.<sup>185</sup>

Adoption may lead to similar issues for the child, but it does not generally involve a deliberate act of the adopters to bring a child into existence<sup>186</sup> for such purpose. The act of adoption by the adoptive parents involves the adoptive parents stepping into the shoes of the birth parents to serve that good of sociability (and other goods) which the child needs, and which the birth parents are unable or unwilling to serve. Thus, even if it can be said that the birth parents damage some goods in their act of giving a child up for adoption, the assumption of parental role by adoptive parents does not run into the same problem as the act of commissioning for surrogacy.

#### 4 CONCLUDING THOUGHTS: OBJECTIFICATION AND HUMAN FLOURISHING

Supporters of surrogacy have argued that there is no objectification of surrogates as no rights to a woman's body are acquired in a surrogacy contract: intended parents are not paying to use the surrogate's body, but paying the surrogate for the surrogate to use her body in a way that benefits the intended parents, without acquisition of rights in the body of the surrogate.<sup>187</sup> Also, while objectification of children is perhaps more obvious in cases when the child is rejected at birth, not just by the surrogate but by the intended parents,<sup>188</sup> it has been argued that there is no sale of a child, but only the transaction for a service. After all, monthly instalments may be arranged for the surrogate, and payment due even if a child is stillborn or there is a miscarriage, suggesting the transaction is for a service to be provided.<sup>189</sup>

While the circumstances under which intended parents and the surrogate engage with one another may be varied, my argument in this article has been that Finnis's idea of human flourishing better explicates why surrogacy is objectionable. It demonstrates how the surrogate and the child are treated as means to the ends of the intended parents, insofar as their basic goods for human flourishing are not respected (even if they are otherwise well-treated). The transaction of surrogacy involves an arbitrary preference of persons – the surrogate over the child, the intended parents over the surrogate, and the intended parents over the child.

The surrogate serves the goods of life-in-its-transmission and sociability in relation to the intended parents, while possibly suffering the side effect of damage to the good of life for herself, acting against the good of sociability in relation to the child, and possibly causing the child to suffer the side effect of damage to the good of life. At the same time, her good of practical reasonableness is not advanced, but possibly damaged.

The intended parents pursue the goods of life-in-its-transmission and sociability by seeking to have a child through surrogacy. The surrogate's goods of life and practical reasonableness may be damaged in certain practices, whether intentionally or as side effects. Insofar as the intended parents act contrary to her well-being in the relationship they have initiated with her, they are acting against the good of sociability. Most

185. *ibid* 171.

186. If such an act is present, it would be akin to surrogacy, and not a classic case of adoption.

187. Hasan considers the arguments of Ketchum and Malm here (Hasan (n 99) 111–12).

188. This happened in the case of *Baby Manji Yamada v Union of India* (2008) 13 SCC 518.

189. Phillips (n 105) 72.

crucially, they intend to sever the relationship between the surrogate and the child, further damaging the good of sociability. In requiring the surrogate to damage the good of sociability *vis-à-vis* the child, they also require her to act contrary to practical reasonableness. Also, there may be a side effect of damage to the well-being, that is, the good of life, of the child – a side effect which cannot be reasonably accepted because there remains the alternative of adoption if the parents want to pursue the good of sociability in parenting.

Through highlighting the arbitrary preference amongst persons in the choices made by the surrogate and the intended parents, natural law theory unpacks the objectionability of surrogacy more clearly than the ideas of commodification or objectification simpliciter. Without this analysis offered by natural law theory, it remains a somewhat puzzling fact how a transaction which ostensibly benefits women who choose to be surrogates and which brings into being children who are desired by intended parents can be said to involve their objectification.

The tenability of these arguments hinge on the resolution of empirical questions as to what is in the best interests of the child and philosophical questions relating to contested notions of motherhood. Policy makers and legislators would do well to squarely confront these issues when deciding whether to legalize surrogacy.

Finally, I also made the point that even if legal regimes seek to ensure the informed consent of surrogates, there remains an insurmountable problem of the unfairness of requiring specific performance in such a highly personal contract, and conversely, of how to address the problem of manifestly inadequate damages from the point of view of intended parents who may have supplied the gametes. While this is a problem only if parties change their minds, the occasions of its occurrence showcase the limitation of the remedies of contract law – specific performance when damages are inadequate, and damages for ordinary scenarios. The realization of such limitation should, one hopes, highlight to policy makers and legislators that the surrogacy arrangement is no ordinary contract. Deep ethical questions arise. Those hoping for a pragmatic solution that satisfies individual preferences should not turn a blind eye to these questions.