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New Thinking on Commercial Surrogacy

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Pamela Laufer-Ukeles's Mothering for Money: Regulating Commercial Intimacy imagines that a less polarized vision of commercial surrogacy will emerge from reconsidering commercial surrogacy arrangements through lenses of relational autonomy and mixed commodification. This commentary finds much to appreciate in Laufer-Ukeles's contribution and urges a more expansive examination of surrogacy to include its international dimension.

INTRODUCTION

Our enduring fascination with commercial surrogacy¹ stems from the deeply emotional reactions it engenders, reactions that in some parts of the world have become enshrined in legislation. While some jurisdictions that prohibit surrogacy view it as *per se* exploitative and as inappropriately commodifying human reproduction, others see surrogacy as a way to help infertile people have children, to promote economic opportunity, and to accord women who wish to be surrogates a measure of autonomy. Somewhere in the middle lie countries that allow surrogacy because they wish to help the infertile but do not believe that paying for surrogacy is appropriate. The divide between commercial surrogacy and no surrogacy at all is vast and its consequences far-reaching. Those who cannot employ surrogates in their own country travel to countries where they can.² The children born may be considered somehow “illegitimate,” suffering an ambiguous civil status and not recognized as belonging to both of their intended parents.³ Just as an unregulated surrogacy industry would likely result in emotional and financial damage to both would-be parents and surrogates alike, an antisurrogacy stance aimed at stamping out exploitation and commodification leads to other harsh realities with which we must grapple.

Although both the pro- and the antisurrogacy points of view tend to predetermine the position one will assume on the various issues within the debate,⁴ neither point of view seems well grounded in empirical data, in part because we cannot agree on what constitutes exploitation or on what it is we are commodifying when we permit commercial surrogacy. On the other side of the spectrum, the purported benefits of surrogacy are contextual both in place and time. Whereas it

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1. The term “commercial surrogacy” is widely used to mean surrogacy that entails compensation or payment in addition to the reimbursement of expenses. This is in contrast to “altruistic surrogacy,” which is understood to allow reimbursing the surrogate for her expenses.

2. Shan Li, *Chinese Couples Come to U.S. to Have Children Through Surrogacy*, L.A. TIMES (Feb. 19, 2012), <http://articles.latimes.com/2012/feb/19/business/la-fi-china-surrogate-20120219>.

3. Richard F. Storrow, “*The Phantom Children of the Republic*”: *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 561 (2012).

4. See Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1245–47 (2013).

may appear to some that a child already born to a surrogate is best raised by the intended parents who have expended considerable emotional and financial resources to create him, others would argue nonetheless that the benefit to the surrogate from such an arrangement is questionable where she has no other practical option for earning money. None of this is to suggest that principled positions for or against surrogacy require empirical grounding. But at the same time empirical evidence at least allows us to test our assumptions about surrogacy where neither the argument from exploitation nor the one from autonomy forecloses much doubt about which direction we should pursue.⁵ Recognizing this, we may decide in effect that it matters a great deal that neither of the extreme positions accurately reflects what actually happens in these transactions and that a more nuanced understanding is in order.⁶ This is precisely what Pamela Laufer-Ukeles, in *Mothering for Money: Regulating Commercial Intimacy*, aims to achieve. Given the intractability of the disagreement, another set of considerations is required if we are to have a productive dialogue about the surrogacy arrangements that do take place and appear to work⁷ despite our abstract fears or uninformed enthusiasm about involving gestational surrogates in the way we have children.⁸

Entering a debate whose terms have been fixed for so long is not easy, but Laufer-Ukeles rises ably to the challenge. Laufer-Ukeles does indeed believe that empirical findings matter and “should inform the way we think about surrogate motherhood.”⁹ She urges, in contrast to those who believe philosophical theories alone can resolve the surrogacy debate, that we examine “circumstances, conditions, and surrounding relationships”¹⁰ so as hopefully to bring the opposing poles of the surrogacy debate into a constructive dialogue about how best to regulate it. In the course of her analysis, Laufer-Ukeles fashions a practical regulatory framework with the aid of the theories of relational autonomy and mixed commodification. Her regulatory scheme is capable at once of owning the commercial aspect of the surrogacy transaction and promoting the humanity and dignity of surrogate mothers.¹¹

I. COMMERCIAL SURROGACY IN THE UNITED STATES

Laufer-Ukeles makes clear from the outset that her analytical framework is designed specifically for surrogacy arrangements that take place between residents of the United States and that she does not believe the United States should outlaw commercial surrogacy as have most other developed countries. Her position, though, is not based on the oft-cited and frankly unconvincing rationale that surrogacy is a procreative right with which the government should not interfere¹²

5. *Id.* at 1230.

6. *See id.* at 1233–34, 1247.

7. *Id.* at 1223–24, 1254.

8. *Id.* at 1223–24, 1226, 1278–79 (pointing out the high level of satisfaction among the players).

9. *Id.* at 1230.

10. *Id.* at 1228.

11. *See id.* at 1228–29.

12. Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering*

but instead on empirical evidence demonstrating that the primary factors tending to trigger the fear of exploitation in surrogacy are not present in domestic surrogacy arrangements in the United States.¹³ With this important basis for objection out of the way, Laufer-Ukeles's task becomes addressing how regulation might assuage qualms that commercial surrogacy places a transaction with deep emotional and intimate components into the marketplace.¹⁴ This, in essence, is the mixed commodification problem.

Since the market takes care of the commercial nature of surrogacy,¹⁵ the task is to design regulation suitable for mixed commodification—regulation, in short, that recognizes, honors, values, and promotes the intimacy of surrogacy. Empirical studies reveal that surrogates prize above all else their emotional connection with the couples paying for their services, and in particular it is the relationship between the intended mother and the surrogate that is the strongest.¹⁶ Intimacy in surrogacy, then, exists not only between the surrogate and the future child but also between the surrogate and the couple who are commissioning her services.¹⁷ Surrogates seek intimacy in these connections and expect that the birth will not mean the end of them.¹⁸ Thus, the regulation that can help ensure the best outcomes will acknowledge surrogates' fundamental expectations¹⁹ so as to protect them from emotional harm,²⁰ support the other participants in the transaction,²¹ and quell the societal fear that surrogacy undermines human dignity.²²

The difficulty of developing regulation of this sort, of course, is to ensure that its objective is not lost to excessive paternalism.²³ In raising the theory of relational autonomy, as she has in another context,²⁴ Laufer-Ukeles reminds us that autonomy does not exist in a vacuum but must be fostered within an environment where “many social and contextual constraints and pressures” conspire to limit choice.²⁵ The regulation of this mixed commodification context, then, must ensure that surrogates are receiving complete and correct information about the process, are not experiencing familial pressure, and are not suffering economic distress.²⁶

With her theoretical framework firmly established, Laufer-Ukeles crafts a regulatory model that distinguishes between what recognizing relational autonomy would require and what, when added to these requirements, would further enhance it. The most unfamiliar of these is her suggested mandatory provision that the surrogate have the right to claim “infrequent but potentially ongoing visitation”

Difference, 26 VT. L. REV. 407, 410–14 (2002).

13. Laufer-Ukeles, *supra* note 4, at 1234–35.

14. *Id.* at 1243–44.

15. *Id.* at 1243.

16. *Id.* at 1232, 1237.

17. *Id.* at 1231–32.

18. *Id.* at 1232–33.

19. *Id.* at 1253–55.

20. *Id.* at 1238–39.

21. *Id.* at 1262–63.

22. *Id.* at 1259.

23. *See id.* at 1256–57.

24. Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567 (2011).

25. Laufer-Ukeles, *supra* note 4, at 1249.

26. *See id.* at 1250.

with the child²⁷ in the rare event she has difficulty separating from the child. This provision would likely influence the parties at the bargaining stage to reflect more fully on the significance of their intimate undertaking and not to see the arrangement as one that necessarily terminates with no further contact upon the birth of the child.²⁸ Such a provision might understandably dissuade those couples desiring more decision-making control from pursuing surrogacy, but this would be an acceptable outcome, as such couples would likely be less willing to acknowledge and honor the intimate aspects of the surrogacy arrangement.

Other provisions in Laufer-Ukeles's proposed regulatory framework seem more familiar. Indeed, some are already reflected in the law or are part of common practice. For instance, in some jurisdictions only gestational surrogacy is permitted,²⁹ making it less likely that the surrogate will refuse to relinquish the child.³⁰ Making counseling and psychological evaluation³¹ available to surrogates before they embark on the journey is commonly recommended (and in some jurisdictions is required),³² as is the mandate that the surrogate have experienced at least one pregnancy resulting in a live birth.³³ Even limits on compensation are not unknown.³⁴ Laufer-Ukeles labels these autonomy-promoting and exploitation-avoiding measures,³⁵ and indeed they appear to be appropriate screening devices that help ensure the potential surrogate is fit and informed enough to undertake the assignment. Verifying that these various steps have been completed could be part of the judicial preapproval process for surrogacy arrangements that exists in some states.³⁶

27. *Id.* at 1254.

28. *See id.* at 1254–55.

29. *See id.* at 1259–61; 750 ILL. COMP. STAT. ANN. 45/6, 47/10 to /70 (West 2009); 410 ILL. COMP. STAT. ANN. 535/12 (West 2011); UTAH CODE ANN. §§ 78B-15-801 to -809 (LexisNexis 2012).

30. *See* UNIF. PARENTAGE ACT art. 8 cmt. (amended 2002), 9B U.L.A. 76, 77 (Supp. 2012) (“The . . . practice [of having the same woman serve as the gestational and genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational mother’s genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.”).

31. Laufer-Ukeles, *supra* note 4, at 1262–63.

32. *See* N.H. REV. STAT. ANN. §§ 168-B:1–:32 (2002 & Supp. 2012); UTAH CODE ANN. §§ 78B-15-801 to -809 (LexisNexis 2012); VA. CODE ANN. §§ 20-156 to -165 (2008 & Supp. 2012).

33. *See* N.H. REV. STAT. ANN. § 168-B:17(V); TEX. FAM. CODE ANN. § 160.756 (West 2008 & Supp. 2012); VA. CODE ANN. § 20-160.

34. *See* FLA. STAT. ANN. §§ 63.212–213, 742.15–16 (West 2012 & Supp. 2013) (limiting the types of payment allowed); NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010) (restricting payment to living and medical expenses related to the birth); N.H. REV. STAT. ANN. § 168-B:25 (limiting fees to medical expenses, lost wages, insurance, legal costs, and home studies); UTAH CODE ANN. § 78B-15-803 (payment must be “reasonable”).

35. Laufer-Ukeles, *supra* note 4, at 1259–65.

36. FLA. STAT. ANN. § 63.212(1)(h) (providing for review by the court of preplanned adoption agreements and requiring filing of a petition in connection with any preplanned adoption agreement); N.H. REV. STAT. ANN. §§ 168-B:21, 25 (laying out judicial preauthorization provisions and mandatory signed surrogacy contract terms); TEX. FAM. CODE ANN. §§ 160.755–.756; UTAH CODE ANN. §§ 78B-15-802 to -803; VA. CODE ANN. § 20-160 (judicial preauthorization provision); UNIF. PARENTAGE ACT § 803 (amended

It would be helpful to know whether other existing regulations promote Laufer-Ukeles's objectives. For example, in some jurisdictions "convenience" surrogacies are unlawful—that is, the intended mother must be incapable of gestating a child.³⁷ Furthermore, some jurisdictions require at least one of the intended parents to be genetically related to the child.³⁸ It is unclear whether either of these requirements promotes the autonomy of surrogates, but they do arguably bind the intended parents to the arrangement and might even inspire them to experience the intimacy of their relationship with the surrogate in ways they may not otherwise. On the autonomy-promoting side of the equation, Illinois's requirement that the parties must receive "independent legal counseling" seems particularly well suited to promoting autonomy and averting exploitation.³⁹

Finally, Laufer-Ukeles leaves unclear what she feels about the advisability of provisions in some states that allow a surrogate who employs her own egg the right to keep the child if she gives notice of her decision within a certain amount of time after the birth.⁴⁰ She is not entirely correct to say that the "right to rescind does not apply in the context of surrogate motherhood,"⁴¹ since these provisions clearly settle cases of "traditional surrogacy" within an adoption framework and make the agreement voidable by the surrogate who decides to keep the child. While Laufer-Ukeles gives no reason to doubt that traditional surrogates are as much invested as gestational surrogates in the intimacy of the transaction and its benefits, perhaps the more important point is that traditional surrogates, connected by both genes and gestation to the fetuses they carry, may actually experience more intimacy or at least more of a variety of intimacies than do gestational surrogates. After all, the evidence shows that it is the genetic connection to the child that often complicates a surrogate's post-birth separation.⁴² The "cognitive dissonance"⁴³ traditional surrogates demonstrate on the question of whose child they are carrying suggests that traditional surrogacy arrangements may not in many cases lead to the kind of satisfaction Laufer-Ukeles believes gestational surrogacy can. Perhaps allowing traditional surrogates, but not gestational surrogates, a period of time after the birth to decide whether to proceed with or terminate the agreement is a necessary compromise to strike in lieu of prohibiting traditional surrogacy altogether.

2002), 9B U.L.A. 80 (Supp. 2012) (explaining requirements for judicial preapproval of gestational agreements).

37. FLA. STAT. ANN. §§ 63.212–.213, 742.15–.16; TEX. FAM. CODE ANN. § 160.756; UTAH CODE ANN. § 78B-15-803; VA. CODE ANN. § 20-160.

38. FLA. STAT. ANN. §§ 63.213, 742.13, .15; 750 ILL. COMP. STAT. ANN. 47/20, /25; N.H. REV. STAT. ANN. §168-B:17(III); UTAH CODE ANN. § 78B-15-801; VA. CODE ANN. §§ 20-160. This is not a feature of the Uniform Parentage Act. UNIF. PARENTAGE ACT art. 8 cmt. (amended 2002), 9B U.L.A. 76, 77 ("[T]here is no longer a requirement that at least one of the intended parents would be genetically related to the child born of the gestational agreement.").

39. 750 ILL. COMP. STAT. ANN. 47/20.

40. FLA. STAT. ANN. § 63.213 (48 hours); N.H. REV. STAT. ANN. §§ 168-B:25, -B:26 (72 hours); VA. CODE ANN. § 20-161 (180 days). Note that the New Hampshire statute does not distinguish between traditional and gestational surrogacy.

41. Laufer-Ukeles, *supra* note 4, at 1252.

42. *Id.* at 1230–31, 1260–61.

43. *Id.* at 1261.

The most novel facet of Laufer-Ukeles's proposed framework is the right of the surrogate to demand ongoing contact with the child.⁴⁴ The idea seems to be that if the surrogate has a right to demand ongoing contact, then perhaps the commissioning couple will not be overbearing in their dealings with her. As a practical matter, this requirement seems geared to eliminating the potential for exploitation that many believe is inherent in surrogacy arrangements. But Laufer-Ukeles seems to believe that surrogates in the United States are *not* exploited or at least the factors that set the stage for exploitation are not present.⁴⁵ Thus it may seem at first blush that her proposal for contact is unnecessary. Nonetheless, since her primary goal is to recognize and honor the intimacy in surrogacy arrangements, it stands to reason that her proposal for contact is most likely to meet with success in a setting like the United States, where empirical studies have shown that intimacy is already experienced deeply on several levels among the parties to surrogacy arrangements and that wide educational and economic disparities between the parties are seldom in play.

II. INTERNATIONAL COMMERCIAL SURROGACY

It is precisely because Laufer-Ukeles's analysis finds so much support in the practice of domestic surrogacy in the United States that she is obligated to set aside any argument for extending her proposed regulatory model to the international context. By bracketing international surrogacy, which she finds altogether too commercial and too impersonal,⁴⁶ Laufer-Ukeles risks diluting the force of her analysis by acknowledging that it applies only where we have less concern about the potential for exploitation and more confidence in the potential for honoring the intimacy in surrogacy transactions. Since she believes these linchpins of her framework are considerably weakened as an empirical matter where couples from developed countries engage surrogates living in impoverished circumstances abroad, she urges countries with restrictions on surrogacy to find ways to discourage international surrogacy and to encourage commissioning couples to use domestic surrogates instead.⁴⁷

The main problem with this suggestion is that it is difficult to reconcile it with the political reality that in many of the countries to which Laufer-Ukeles refers the debate, if one exists, revolves around whether to authorize altruistic surrogacy or ban surrogacy altogether. Criminal provisions or immigration regulations exist in these jurisdictions to dissuade citizens from pursuing international commercial

44. *Id.* at 1254–55.

45. *See id.* at 1234–35.

46. *See id.* at 1267–75. International commercial surrogacy occurs not only when citizens of developed countries hire surrogates in developing countries. Indeed, there is a robust international commercial surrogacy business coming *to* the United States as well. Laufer-Ukeles is concerned about this latter form of international commercial surrogacy too, since, although exploitation might be less of a concern, “the problem of distance and detaching between the commissioning couple and the surrogate is [a] challenge” and an obstacle to recognizing and honoring the intimacy in such transactions. *Id.* at 1266 n.257.

47. *Id.* at 1277–79.

surrogacy. Compensating surrogates in these countries is, frankly, out of the question.

France presents the latest example. The recent debate in that country, in response to the many cases of French citizens pursuing international commercial surrogacy,⁴⁸ resulted in amendments to the Bioethics Law that did not include a provision for allowing surrogacy or even bestowing citizenship on children who have been born to French citizens with the help of surrogates abroad.⁴⁹ Even in liberal Spain, where gamete donation practices are not at all restricted, people often exhibit a failure to understand surrogacy if not outright alarm over it. It actually is the case in such jurisdictions, as Laufer-Ukeles suggests it is not in the United States, that the “focus on gestation is . . . because of a belief that women ‘should’ gestate their children,”⁵⁰ and that is so for the very reasons outlined in the “Harms of Commodification” section of *Mothering for Money*.⁵¹ Consider in the same connection the following excerpt from *Proceed with Care*: “[C]ommercial preconception arrangements commodify women’s reproduction functions and place women in the situation of alienating aspects of themselves that should be inherently inalienable. A preconception contract obliges the gestational mother to sell an intimate aspect of her human functioning”⁵²

The fact that disincentivizing traveling for surrogacy, whether to developing countries or to the United States, would require, first, permitting surrogacy and, second, permitting surrogates to be compensated, means that the disincentives Laufer-Ukeles proposes are unlikely to materialize.

CONCLUSION

What I appreciate most about *Mothering for Money* is its heartfelt effort to find common ground on which those who assume diametrically opposed positions on surrogacy can stand together. In crafting a regulatory framework that is protective of the parties to the transaction, including the child who benefits from continuing contact with the surrogate mother, Laufer-Ukeles acknowledges, as the most thoughtful scholars do, that neither autonomy nor fears of exploitation and commodification are all or nothing in the surrogacy debate.

As it has done for thirty years, surrogacy will continue to provoke a “whirlwind of agitation.”⁵³ Policymaking may not be at its best in such an atmosphere. Suffice it to say, though, that commentaries such as Laufer-Ukeles’s are essential in our effort to defend our positions on surrogacy with reason instead of emotion and to ask whether these positions are supported by empirical evidence. Of course,

48. Charlotte Rotman, *Gestation pour Autrui: Les Enfants Fantômes de la République*, LA LIBÉRATION (Fr.) (May 20, 2009, 6:51 AM), available at <http://www.liberation.fr/societe/0101568271-gestation-pour-autrui-les-enfants-fantomes-de-la-republique> (reporting on the estimated 400 French couples who travel abroad each year to hire a surrogate mother).

49. Eric Favereau & Charlotte Rotman, *Bioéthique, un débat peu fécond*, LA LIBÉRATION (Fr.) (Feb. 15, 2011), available at <http://www.liberation.fr/societe/01012320018-bioethique-un-debat-peu-fecond>.

50. Laufer-Ukeles, *supra* note 4, at 1257.

51. *Id.* at 14–15.

52. ROYAL COMM’N ON NEW REPROD. TECHS., *PROCEED WITH CARE* 683–84 (1993).

53. Laufer-Ukeles, *supra* note 4, at 1224.

Mothering for Money will not convince those who cleave unerringly to the notion that surrogacy is unavoidably exploitative or is always autonomy-promoting on a more symbolic or abstract level, but nor does it need to. It is enough that Laufer-Ukeles's vision is likely to convince those who are currently undecided about surrogacy and even those who have strong opinions but are nonetheless open to a theory that takes us in a new and enlightened direction.