

# **Surrogate Motherhood: Beyond the Warnock and the Brazier Reports**

Dr. Hugh V. McLachlan

*School of Law and Social Sciences, Glasgow Caledonian University, Cowcaddens Road, Glasgow G4 0BA, SCOTLAND*

Professor J. Kim Swales,

*Fraser of Allander Institute, Department of Economics, University of Strathclyde, Cathedral Street, Glasgow, SCOTLAND*

## **Introduction**

We shall examine and discuss the arguments and recommendations with regard to surrogate motherhood of both the Warnock Report and the Brazier Report. We shall conclude that the law in Britain regarding surrogate motherhood should be reconsidered. The issues need to be more deeply and widely examined by legislators and policy-makers than they have been hitherto. In saying this, we are strongly of the view that in the framing and implementation of public policy, of crucial importance is not only what is done but also the reasons behind what is done. The war with Iraq and the public reaction to it illustrates this point well.

Britain was the first country in the world to have specific legislation relating to surrogate motherhood when, as what seemed like a panic measure in 1985, the Surrogacy Arrangements Act was passed. The impetus for this legislation - although the legislation and Warnock's recommendations diverged to an extent - came from the Warnock Report on Human Fertilisation and Embryology (1984). [1,2]

Under this Act, although it is not a crime to be a surrogate mother nor to be a commissioning parent (whether or not money changes hands in the arrangement) 'commercial' surrogate agencies and the 'commercial' actions of surrogacy agents are prohibited. It was reiterated in section 36(1) of the Human Fertilisation and Embryology Act (1990) that no surrogate motherhood arrangement is enforceable by or against any of the people making it. In 1995, section 30 of the same Act came into force, the effect being that married couples who have commissioned a 'surrogate mother' to carry a child for them may apply for and be granted a parental order. By virtue of this they will then be regarded as the legal parents of the child provided that one or both of them supplied the gametes of the embryo of the child. A further stipulation is that the court must be satisfied that no money or equivalent benefit, other than 'expenses reasonably incurred' has been given or received by the husband or wife pertaining to the arrangement unless authorised by the court.

In June 1997, a small team was given the task of reviewing for the U.K. Health Ministers some aspects of the law and its implementation concerning surrogate motherhood. This Review Team comprised: Margaret Brazier, Alastair Campbell, and Professor Susan Golombok. It was chaired by Professor Brazier. With remarkable promptness, in October 1998, its report was published. [3]

## **The Warnock Report**

In the Warnock Report, surrogate motherhood is discussed very briefly, almost in passing. The issue is addressed in only six pages (plus an expression of dissent of two and a half pages) out of the eighty-nine pages of the Report. Concerning surrogate motherhood, the Warnock Committee made two majority recommendations.

One was that all surrogate motherhood agreements – not only commercial ones - should be illegal contracts and therefore unenforceable in the courts. They made this recommendation - to put the matter 'beyond any possible doubt in law' - even although they felt that surrogate motherhood arrangements were probably not enforceable anyway.

The other was that the creation and operation of agencies (both 'profit making' and non- 'profit making') whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother should be a criminal offence. [4] As can be noted, the present law in the U.K. is in accord with the first but not with the second recommendation.

The rationale given by Warnock for these recommendations is weak. It is as follows:

That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved. It is therefore with the commercial exploitation of surrogacy that we have been primarily, but by no means exclusively concerned. [5]

There is an allusion to Kant here. According to Kant, it is morally wrong to treat people merely as means to one's own ends. However, not even Kant would say that it is always wrong to treat people as means to our own ends: such actions can be right as long as they are consistent with treating the people concerned with the respect due to autonomous moral agents. Surrogate motherhood can fulfil this condition. Furthermore, it is not reasonable to say that all morally wrong actions should be made crimes. Kant thought that, for instance, suicide is a highly immoral action. Even if Kant were right so to think, would it be wise to make suicide - as it was before - a crime? Surely not.

One uses a dentist as a means to one's own ends when one pays a dentist for the very intimate services of dental treatment. Unless the dentist is coerced by the patient or the patient's friends into performing the service or is not paid for it, there seems to be no reason for imagining that such a commercial transaction is exploitative nor in any way morally dubious. If contractual agreements between patients and dentist were legally unenforceable and/or if commercial dental agencies were illegal then one can readily see that visits to dental surgeries might be more hazardous and worrying than they presently are.

Lady Warnock does not make it at all clear what is meant by 'exploitation' nor why she thinks that surrogate motherhood, especially 'commercial' surrogate motherhood is exploitative. [6,7,8] Furthermore, even if commercial surrogate motherhood were exploitative, a case would still have to be made for saying that it should be illegal. Consider, for instance, Marxists. They think that members of the proletariat are being exploited when they work for the bourgeoisie. However, they do not argue that it should be a crime for the bourgeoisie to employ people or to advertise their services as employers. Nor do they say that commercial employment contracts should be legally unenforceable. Perhaps the world would be a better place were there no capitalist employers and no surrogate mothers (and perhaps it would not be). But public policies have to be made concerning present conditions, rather than for the manner in which they might be or would be, if the best came to the best.

In the U.K., exploitation is not in itself a criminal offence. And to our knowledge, exploitation is not a criminal offence anywhere in the world. If Lady Warnock believes that commercial surrogate motherhood should be criminal because it is exploitative, why does she not argue that exploitation should be a crime? If it is not appropriate to make exploitation a crime, then it is not at all clear why it should be appropriate to make commercial surrogate motherhood a crime on the grounds of its supposed exploitativeness.

In a sketchy, hit-or-miss sort of a way, the Warnock Report very briefly outlines, with no critical evaluation at all, some 'arguments against surrogacy' and some 'arguments for surrogacy'. This exercise is beside the point. One might as well put arguments for and against, say, the consumption of

alcohol or the committing of adultery. Should such activities be illegal? That is another matter. Whether it is wise to be or to use the services of a surrogate mother is not what is at issue. One need not put forward a convincing case for adultery nor for alcohol consumption in order to justify the legality of the practices. They should be legal unless and until a good case can be given for making them illegal. Similarly, surrogate motherhood, including commercial surrogate motherhood should be legal unless a case can be established for making it illegal. There is no onus on those who think it should not be illegal to establish a case for not outlawing it.

*'The moral and social objections to surrogacy have weighed heavily with us':* so it is said in the Warnock Report. [9] What is not clear is why the suggested moral objections weighed so heavily nor that they should have done. In seeming to give, as it were, the pros and cons of surrogate motherhood, it might seem that the Warnock Report is even-handed in its treatment on the topic. In our view this is not so. For instance, it is said that:

*'There are strongly held objections to the concept of surrogacy, and it seems from the evidence submitted to us that the weight of public opinion is against the practice. The objections turn essentially on the view that to introduce a third party into the process of procreation which should be confined to the loving partnership between two people, is an attack on the value of the marital relationship'. [10]*

How could this objection, even if one accepted it, support the contention that surrogate motherhood agreements should be illegal, legally unenforceable contracts and that commercial surrogate motherhood agencies should be illegal? In any case, not everyone accepts this view of the marital relationship as the only appropriate one for the procreation and rearing of children. Warnock was, in the early 1980s, probably wrong in her estimates as to what public opinion regarding surrogate motherhood and regarding marriage was. Public opinion has changed since then and not in the direction of considering marriage as a uniquely favoured position in which to procreate and rear children.

Furthermore, to regard surrogate motherhood as an 'attack' on marriage is bizarre. 'Surrogate' is a synonym for 'substitute' and, by convention the word 'surrogate' rather than the more usual word, 'substitute', is used in this context. The terminology requires clarification. There are two sorts of so-called 'surrogate motherhood': genetic and gestational. In the former one, the male member of the commissioning couple impregnates - usually *via* artificial insemination - the surrogate mother who is the genetic mother of the child. In the latter one, the male member of the couple fertilises, *in vitro*, an egg from the female partner. The fertilised egg is placed, for development and delivery, into the womb of the surrogate mother, who is not genetically related to the child. She is not a substitute for a mother, she is someone who performs for the mother the service - which function the mother cannot perform for herself - of carrying her baby (i.e. the baby of the genetic mother) to term. The service is a substitute for the function: one woman is not a substitute for the other. In the former case - that of genetic surrogate motherhood - the so-called surrogate mother is the mother of the child (both biologically and legally) and the female partner of the commissioning couple is the one who, strictly speaking, becomes the surrogate - i.e. substitute - mother. While she is not and never can become the biological mother of the child, she can become its legal mother and be its social mother.

But suppose that a husband and wife want to have a 'child of their own' but that the woman, although fertile, has a damaged womb. Suppose that they decide that they want to use the services of a gestational, carrying, so-called 'surrogate-mother'. Suppose too that they are happy to pay money to a surrogate motherhood agency in order to make and keep contact with someone who they consider appropriate for the performance of the particular service. Perhaps they have no friends or relatives to whom they would want to be indebted for the performance of such a service for them, although they might have an abundance of relatives and friends. In these circumstances, there is no obvious reason why one should say that 'surrogatemotherhood' is an attack on the marriage in this illustrative example (nor an attack on any one else's marriage). If anything, it seems supportive of, rather than antagonistic to, the relationship of the commissioning couple. You might say that, for instance, adultery is an attack on marriage in general or in particular. However, this is not akin to adultery.

Furthermore, that adultery should be illegal because it is an attack on marriage is not a view that is sufficiently widely held in contemporary Britain to require it to be seriously addressed, although it is very firmly held by some.

Even with genetic surrogate motherhood, it is far from clear that it is likely to undermine marriage in general or in particular. Given the prevalent high divorce rate, it is strange even to talk about such a consideration as this. Of course, having a child in these circumstances might drive a couple apart but getting married, with or without children, and having children, with or without marriage, can drive some couples apart: this hardly seem like an argument against the legality of marriage nor the legality of having children.

The Warnock Report itself also says: *'As for intrusion into the marriage relationship, it is argued that those who feel strongly about this need not seek such treatment, but they should not seek to prevent others from having access to it'*.<sup>[11]</sup> This seems to us to be a sound point and one which itself answers the suggested fulcrum of objections to surrogate motherhood.

The arguments for and against legislation concerning surrogate motherhood are not, in the Warnock Report, rigorously, rationally, impartially and judiciously put forward. For instance, as an objection to surrogate motherhood it is said: 'Furthermore, it is felt that a surrogacy agreement is degrading to the child who is to be the outcome of it since, for all practical purpose, the child will have been bought for money'.<sup>[12]</sup> This is all that is said about this point: there is no attempt to develop or to evaluate it critically. The point, as it stands, seems to us to be a facile one. It can hardly be better for any one not to be born at all than to be degraded. 'For all practical purposes', the child will have been born when otherwise it would not have been. Is not that the crucial point? Furthermore, as we shall argue more fully later, commercial surrogate motherhood is not the purchase of children: it is, if it is the actual purchase of anything at all, the purchase of something else such as the services of the carrying mother. To say that 'for all practical purposes', this is the purchase of children is like saying that rape is, for all practical purposes, the same as seduction or that stealing is, for all practical purposes, the same as receiving something as a gift. Often, even when outcomes are, in some respects, similar, what matters hugely is how the similar outcomes have dissimilar means of bringing them about.

The arguments given in the Warnock Report against surrogate motherhood amount, in essence, to the claim that it is felt to be ethically unacceptable. There are various problems with this position. If Lady Warnock and others feel that surrogate motherhood is ethically unacceptable then the solution for them is obvious. They need not indulge in it. But other people feel differently about it. And it is not clear that their actions should be constrained by the feelings - and the 'values' - of Lady Warnock and others. The reasons given and mentioned by Warnock for supposing that surrogate motherhood is ethically unacceptable are not good ones. Furthermore, to say that something is 'ethically unacceptable' is not to say that it should be illegal. Adultery and the over-enthusiastic consumption of alcohol, for instance, can be ethically unacceptable. It does not follow that it would be wise to make these activities nor the actions of professionals and others who facilitate them criminal offences. Why should surrogate motherhood and commercial surrogate motherhood agencies be illegal? Why should surrogate motherhood contracts, including 'commercial' ones, not be legal? These are the questions that are not adequately addressed by the Warnock Report. <sup>[13,14,15,16,17]</sup>

### **The Warnock Report: Expression of Dissent**

There is a minority view also given - by Wendy Greengross and David Davies - as an 'Expression of Dissent' from the Warnock Report. The recommendations of the minority are more reasonable or, rather, less unreasonable than the majority ones. However, they are still unjustified in their restrictiveness, whether or not their restrictiveness might, on some grounds or other, be justifiable.

Greengross and Davies are not against the possible legal enforceability of surrogate motherhood agreements. They write: *'If our proposals are accepted, we believe that it would be inappropriate for*

*steps to be taken to provide that all surrogacy agreements are illegal contracts.... For the time being the Courts should be free to consider individual cases on their own merits if they so choose'. [18] The current UK law is not in accord with this.*

Partially at least, with another of their recommendations, the current law in the UK is in accord: 'non-commercial' agencies are not illegal. Greengross and Davies recommended that, under licence (from what has since emerged as the Human Embryology and Fertilisation Authority) and with suitable regulations, surrogate motherhood agencies of some sort, akin to traditional adoption and fostering agencies might be legally permissible. This arrangement, they say, should be permissible provided that: *'there was no commercial motive'*, although they were prepared to accept that surrogate mothers might be paid for their services. They say: *'On the other hand anyone (including a medical practitioner) who made surrogacy arrangements for a couple and who was not licensed to do so would be committing an offence, regardless of whether they were acting for profit'. [18]*

To a large extent, the minority agreed with the majority recommendation concerning 'commercial' surrogate motherhood agencies but disagreed, to an extent, with the majority's rationale for it. Greengross and Davies write: *'We go along entirely with our colleagues in our disapproval of surrogacy for convenience. We also agree that the criminal law should be brought in to prevent the operation of profit making agencies in this field, although our reasons for this are somewhat different from those of our colleagues. In our view the question of exploitation of the surrogate mother, or the treating of her as a means to other people's ends, is not as clear cut a moral issue as our colleagues assert. On the other hand we hold firmly that the very difficult personal, legal and social issues raised by surrogacy lie close to those raised by adoption and fostering and hence there should be no place for commercial operations just as there is no place for commercial adoption agencies'. [19]*

This does not actually indicate what their reason is for prohibiting certain types of agencies, only what it is identical to. It would have been interesting if Greengross and Davies stated the reason for believing that 'there is no place for commercial adopting agencies' since their reason might have been a poor one and/or it might have been a reason which did not apply to surrogate motherhood agencies. That it is wise to make the operations of commercial surrogate motherhood agencies illegal has been established by the minority members no more than it has been by the majority members on the Warnock Committee.

The discussion of surrogate motherhood in the Warnock Report is disappointing and unconvincing. According to McHale *et al*:

*'Commentators are virtually unanimous that the Warnock Committee's recommendations on surrogacy represent the weakest stage of the report, since the conclusions appear to have been based on public opposition to the practice rather than any considered philosophical position'. [20] Further, as Freeman notes, Warnock's recommendation concerning surrogate motherhood are very paternalistic and this paternalism is at variance with the tone of the other recommendations of the Warnock Report in relation, say, to I.V.F. and embryo donation, where the virtues of autonomy and self-determination are upheld. [21, 22]*

### **The Brazier Report**

With good reason, it is said in the Brazier Report that: 'the incomplete implementation of the recommendations of either the majority or the minority of the Warnock Committee created a policy vacuum within which surrogacy has developed in a haphazard fashion'. [23] An important part of the background to the setting up of the Review Team headed by Brazier was concern that commissioning couples were - without prior authorisation by the courts - paying carrying mothers more than 'reasonable expenses'. In other words, rather than being consequently denied parental orders, commissioning parents were having the payments authorised retrospectively and being granted the orders.

The terms of references of Brazier's Review Team were quite narrow. They were:

*'to consider whether payments, including expenses, to surrogate mothers should continue to be allowed, and if so on what basis;*

*to examine whether there is a case for the legislation of surrogacy arrangements through a recognised body or bodies; and if so to advise on the scope and operation of such arrangements;*

*in the light of the above to advise whether changes are needed to the Surrogacy Arrangements Act 1985 and/or section 30 of the Human Fertilisation and Embryology Act 1990.'* [24]

It was specified that it was not the role of the team to consider surrogate motherhood in the round. Tessa Jowell, the Minister for Public Health at the time said:

*'We have specifically asked the review team to consider the issue within the context that surrogacy should not be commercialised and that any woman who has a baby as part of a surrogacy arrangement should not be compelled to give it up if she changes her mind. We also want to know whether there is, realistically, any practical way in which surrogacy arrangements could or should be regulated and if so how.'* [24]

### **The Recommendations of the Brazier Report**

The Review Team considered that its recommendations were more similar to the minority rather than the majority view of the Warnock Report concerning surrogate motherhood. Like the minority, Brazier and her team wanted to regulate and control surrogate motherhood rather than to ban and/or prevent it completely. The Review Team recommended that parental orders should not be granted to couples who paid more than actual expenses directly relating to the pregnancy. In addition they recommended that what constitutes actual expenses should be defined by a new Surrogacy Act and that parental orders should be obtainable only in the High Court.

Furthermore, the Brazier report recommended that, under the new proposed Act, surrogate motherhood agencies should legally be required to be registered by the Department of Health. And, as is presently the case, only agencies that function 'on a non-profit making basis' should be legally permitted to operate. To operate a surrogate motherhood agency that was not registered would become a crime. Moreover, it would not be a criminal offence to be a surrogate mother nor to use one, whether or not payments above that of expenses were exchanged.

The Brazier report also recommends that a Code of Practice should be drafted. This would, in terms of the proposed Surrogacy Act, be legally binding on surrogate motherhood agencies although it would not be binding on the surrogate mothers and commissioning couples. The Team clearly envisaged that it would be part of the Code of Practice that commissioning couples do not pay more than (statutorily defined) actual expenses. If they did they should, in terms of the recommendations, be prevented from becoming the legal parents of the children being gestated. These children - let us not forget - might be the biological children of the over-spending couples. This is obviously a very tough-minded approach. If the proposed legislation were ever passed, it would be most interesting to see how courts would deal with it, given their 'soft' approach to current surrogate motherhood legislation and given what seems to us to be a softening, rather than a hardening, in public opinion towards surrogate motherhood.

Finally, the Review Team recommended for consideration the view that the Surrogacy Arrangements Act 1985 and section 30 of the Human Fertilisation and Embryology Act 1990 should be repealed and replaced with a new act. The proposed Surrogacy Act would include:

*'(i) the continuation of the current provisions of Section 1A of the 1985 Act relating to the non-enforceability of the surrogacy contract;*

(ii) the continuation of current provisions prohibiting commercial agencies from assisting in the creation of surrogacy arrangements and related provisions prohibiting advertisements in relation to surrogacy arrangements;

(iii) new statutory provisions defining and limiting lawful payments to surrogate mothers;

(iv) provision for the promulgation by the UK Departments of Health of a Code of Practice governing surrogacy arrangements generally;

(v) provision for the registration of non profit-making agencies by the Departments of Health and that such agencies should be required to comply with the Departments' Code of Practice on surrogacy arrangements.

(vi) provision to prohibit the operation of unregistered agencies;

(vii) new provisions for the granting of a parental order to commissioning couples .... The revised order should provide the applicants for a parental order to establish compliance with the Surrogacy Act and the Code of Practice; and that they have complied with the statutory limitation on payments.' [25]

### **Rationale for Recommendations**

The report says of the Code of Practice that: *'It should seek to ensure that the interests of surrogates and commissioning couples are adequately protected and that all parties to an arrangement are clear about their expectations of each other'*. [26] However, it would not be legally binding on individuals: for them it would be merely an advisory code. Surrogate motherhood arrangements would remain legally unenforceable. Obviously, it is desirable that the interest of surrogate mothers and commissioning parents are protected and it is very important that all parties to the agreement are clear about their reasonable expectations of each other. However, it is far from obvious that these interests would be appropriately served by the implementation of Brazier's recommendations. In the absence of the legal enforceability of surrogate motherhood contracts, it is not clear what are the reasonable expectations that one party can have of another.

It was also indicated by the committee members that their proposed Code of Practice: *'... should confirm that the welfare of the child to be born must be the paramount concern of all those involved in any surrogacy arrangement'*. [26] This is a curious sort of claim to make. Why should the interests of any particular category of people be paramount? Typically, legislation should be framed in terms of balancing the interests and claims of different people and of different categories of people and of similar categories of people in different sorts of circumstances. For example, in deciding whether or not to join the Euro-zone, one would surely not say that the interests of children should be paramount. Even in legal decisions concerning divorce, the concerns of any children to the marriage are not 'paramount' and nor should they be. Children, after all, are not children for long but their interests, like themselves, outlive their childhood. What about the interests of a person - who was, obviously, once a child and perhaps, even, a child of a surrogate mother who would want to be or to use a surrogate mother? It is not clear that the interests of such a person would be served by the implementation of the recommendations. Furthermore, even if one did want to promote the welfare of particular children - whether or not one believed that their welfare was paramount - it is not clear that one would adopt the recommendations on the Brazier Report. For instance, suppose that a commissioning couple are denied a parental order with regard to a particular child (whose biological parents the couple might be) because the couple paid the child's carrying mother more than reasonable expenses. Such a denial cannot be said to be in the interests of the child concerned. The child is deprived thereby of the legal recognition that his or her natural mother and father are his or her mother and father. How such a draconian, punitive measure can be shown to further the welfare of anyone at all is far from clear. Consider, in addition, the interests of those who might have been born were it not for the restrictions on surrogate motherhood of the sort advocated by Brazier and her colleagues.

Harris has recently noted an anomaly in the Brazier Report in which it is indicated simultaneously that both the 'welfare of the child' is paramount and that regulations should exist in which various children who might otherwise have been born as a result of commercial surrogate motherhood will not be born. Something seems to have gone wrong here. As Harris indicates:

*'To give the "highest priority ... to the welfare of the child to be born" is always to let that child come into existence, unless existence overall will be a burden rather than a benefit. Wherever that child's life, despite predictable suboptimalities, will be thoroughly worth living, then it cannot be that child's interest which justify any decisions or regulations which would deny it opportunities for existence'.* [27]

Harris, it seems, is correct. We have written elsewhere, in connection with commercial surrogate motherhood:

*'After all, it is surely better to be born with one's dignity violated than not to be born at all. If the only way that a particular person could be born is through becoming an object of barter then no obvious favour is being done to that person by failing to allow him to become an object of barter'.* [28]

In the report, Brazier and her colleagues discuss the situation where, because of legal disallowment, a surrogate motherhood arrangement that would have taken place does not do so and, consequently, someone who might have been born is not born. They state that: *'... there is no child who suffers the loss or to whom we or the parents have moral obligations'.* [29] This is a dubious claim to make. We would say that the person whose body might have been carried by the surrogate mother can be the bearer of rights and the object of obligations. [30, 31, 32] Brazier and her colleagues come to their particular anomalous position by way of the assumption - since explicitly iterated by Campbell in defence of the report - that only people who have bodies which are currently alive have moral rights and/or are due moral consideration from those who do have such live bodies. [33] The view is debatable: it is not self-evidently correct. It is asserted rather than argued for by Brazier *et al.* It is presented in the report as if it were a discovery from the deliberations of its members when it is nothing of the sort.

According to the Brazier report: *'Payments to surrogate mothers should cover only genuine expenses associated with the pregnancy.... Additional payments should be prohibited in order to prevent surrogacy arrangements being entered into for financial benefit...'* [34] What, one might wonder, is wrong with financially benefiting from being a surrogate mother (whether or not one became a surrogate mother in order solely to benefit financially)? The quintessence of the case of the Review Team in support of its recommendations is as follows: *'We find that payments to surrogate mothers, other than in recompense for genuine expenses, give rise to the following concerns. (1) Payments create a danger that women will give less than free and fully informed consent to act as a surrogate. (2) Payments risk the commodification of the child to be born (3) Payments contravene the social norms of our society that, just as bodily parts cannot be sold, nor can such intimate services'.* [23]

There are two general problems with this suggested rationale. [35] First of all, even were the three suggested reasons to be accepted as justified grounds of concern, it is far from clear that they support the particular policy recommendations which the Brazier committee make. Secondly, the suggested reasons for concern are not powerful ones. [36,37,38,39,40]

#### The Relevance of the Brazier Report's Arguments

It is said in their suggested rationale that there is an objection to the surrogate mothers benefiting financially from undertaking a pregnancy. However, their recommendations do not directly relate to this. Their recommendations would make it more difficult for a commissioning couple to become the legal parents of the relevant children if they are truthful in and towards the courts. Were their recommendations to be accepted, surrogate mothers could still benefit financially from carrying the child. Their recommendations would not criminalise nor, necessarily, otherwise prevent the occurrence of paid surrogate motherhood. Even if the Brazier recommendations were put into effect,



surrogate mothers no less than at present could have a financial motive for being a surrogate mother and commissioning couples could still have a motive for paying them. The effect of the recommendations would be to give them a motive for lying about how much had been paid if more had been paid than authorised expenses. This would arise if the commissioning parents wanted a parental order and the carrying mother wanted them to be granted one. A surrogate mother might have a motive for lying by saying that more than expenses had been paid should she change her mind and want to keep the baby.

Although the recommendations of Brazier and her colleagues generally relate to the activities of surrogate motherhood agencies, their suggested rationale does not mesh with their recommendations. Whether agents and agencies should be allowed to receive payments for and/or make a profit from the entrepreneurial business of liaising between commissioning couples and surrogate mothers is one thing and whether surrogate mothers should benefit financially is quite another one.

### The Soundness of Brazier's Arguments

Furthermore, that there is an objection, to the surrogate mothers benefiting financially from the provision of their services is not established by Brazier and her colleagues. Their arguments do not develop those of the Warnock Report: they are, to a large extent, a repetition of them. There is, for instance, the familiar claim that payment for surrogate motherhood is against the 'values' of the Brazier team and of a majority of the public. Particularly in a society of different 'cultures' and 'values', (although, perhaps all societies are such) this type of plea should be rejected. One cares not what Brazier's or Warnock's or any one else's 'values' are in this context: one wants to hear what their arguments are. After all, beliefs, practices and actions are not reasonable, good, correct or true because Brazier or some one else happens to 'value' them: rather, if beliefs, practices and actions are true, reasonable and/or virtuous, then one should value them highly whether one does or not. If such beliefs, practices and actions are not in accord with one's 'values', then one should try to ignore or change these 'values'. [41]

Similarly, what public opinion happens to be is not the only relevant issue: one often looks to the law to protect people from what public opinion happens to be, on some issues. [42]

The apposite question is not: what is public opinion at the moment? If it were, there are better ways of finding out than setting up commissions and teams like those of Warnock and of Brazier. In so far as 'public opinion' is relevant, the appropriate question is: What would public opinion be if its members were all able to take the required time and effort to ponder and weigh up all the possibly pertinent considerations rationally and impartially? If the Warnock Commission and the Brazier Review Team were not trying to answer a question such as this, then it is difficult to see what the manifest function of such commissions and teams is.

The curious claim about the risks associated with the lure of financial gain melts into the familiar argument that commercial surrogate motherhood is, or can be, exploitative. In essence, this is the claim on the part of Brazier and her team that they know better than some potential commercial surrogate mothers what their best interests are and what risks are acceptable to them. [8] Even if one agreed that women may sometimes act unwisely when they decide to be commercial surrogate mothers, one might want to resist the paternalistic impulse to intrude on the decision.

Brazier *et al* say:

*'... it is a fundamental belief in our society that children should not be viewed as commodities to be bought and sold .... Although a theoretical distinction can be made between payment for purchase of a child and payment for a potentially risky, time-consuming and uncomfortable service, in practice it is difficult to separate the two, and it remains the case that payment other than for genuine expenses constitutes a financial benefit for the surrogate mother'. [43]*

Whether or not it is a fundamental belief of our society or, rather, of many of the members of our society, it is true that babies should not be - and cannot rationally be - regarded as commodities. Babies cannot and should not be bought and sold. We would suggest that to distinguish between the intelligible notion of paying a woman for her services and the unintelligible notion of paying someone for a baby is not a difficult intellectual exercise. [35] However, the issue does not necessarily pivot around this distinction. In a commercial surrogate motherhood transaction, what is actually bought and sold? Perhaps nothing is bought and sold. At the very least, one can assert unequivocally that babies are not bought and sold. There is often quite a difference between what people think they have bought and what they have actually bought. There is often quite a difference between what people think they are selling and what they are actually selling. In addition, there can be differences between what people buy and sell and what other people think and/or say that they have bought and sold. It is not always the case that: 'What you have got is what you have bought'. If, for instance, you pay a ransom to a kidnapper for the return of your child, you have not thereby bought your child from the kidnapper. What, if anything, have you *bought*? We would suggest: nothing at all. You have effected, we would say, but not bought, the child's freedom. Often, in the absence of specific contracts and court decisions, it cannot be said what, if anything, actually has been bought or sold. For example, someone, in a pub in Britain might offer you a slave for sale. If you gave the person money and you were given another person in return, then you would not thereby have become the owner of a slave: you would not have bought a slave nor even the services of one. It would be a misrepresentation of the situation to say that you had done so, even that you had illegally done so. [44,45,46]

That which can be bought and sold must be, in some sense or other, property. Not everything actually is property. [47] Not everything can be bought and sold. Babies are not property and neither is parenthood. Babies cannot be bought or sold and neither can parenthood. Consider, for instance, houses. Houses, as property, can be bought and sold. The owner of a house has a particular cluster of rights and duties relative to that house. If someone buys the house from him or her, then there will be a flow of money from the buyer to the seller and a corresponding transfer of the cluster of rights and duties from the initial owner to the new owner. Property is a complex matter and it can take various forms. However, one might say that the buying and selling of commodities in general shows a similar pattern to house purchase. It is the transfer of rights and duties relative to them rather than the physical transfer of the commodities themselves that constitutes buying and selling. One can, obviously, buy commodities that one fails to receive and receive things that one has not bought. Notice too that ownership can be transferred in ways other than by buying and selling: for instance, property can be transferred as a gift or it can be forfeited by a fine. Services as well as 'tangible things' can be bought and sold (or transferred as gifts). Concerning the buying and selling of houses, one might well pay other people for services that they provide in the facilitation of the transaction - lawyers, estate agents and so forth. (Lawyers and estate agents might waive their fees.) However, there is a distinction between payment to them for the services they provide and payment for the purchase of houses. Suppose that you give us, McLachlan and Swales, money and, in return, we hand over to you a baby. This situation is quite unlike the buying and selling (or the giving as a gift) of property. No cluster of legal rights and duties pertaining to the baby is, as a consequence of our supposed transaction, transferred from us to you. You might have possession of, but you do not have ownership of, the baby. Babies are not commodities: they cannot be bought and sold (nor given away) as commodities. Babies are not property. Similarly parenthood is not purchaseable (nor transferable by gift): it is, like the state of being married, a particular conferred legal status: it is not a form of property. Parents do not own their babies although they might own - and be able to sell - some things pertaining to them such as privately taken photographs of them.

Even if babies were commodities, it does not follow that they legally could be and actually would be treated in the same manner that, for instance, inanimate commodities may be and are treated. To say that one owns something most certainly does not imply that one can do with it what one wants. Ownership can involve severe duties and can carry with it, sometimes, rights only of a very restrictive sort. Cats and lumps of coal can be commodities. It does not follow that the owners of cats and lumps of coal are allowed to do with them what they want, nor that they actually do treat cats and lumps of

coal the same way in all respects. It is not necessarily wrong to treat babies, in some respects, in the same way that one treats commodities. It all depends on the manner and the respects. [35]

### **The Comprehensiveness of Brazier *et al's* arguments:**

#### **Feminism and Human Rights**

The Brazier report, like the Warnock one before it, is not sufficiently comprehensive, in its discussion of surrogate motherhood: many of the relevant arguments are not discussed. For instance, arguments pertaining to feminism and to human rights are neglected.

According to Anderson, there is a strong feminist case for prohibiting commercial surrogate agreements and agencies. [48] She says that: 'While contract pregnancy brings financial rewards to a few women, it reinforces gendered relations of inequality and stereotypes that undermine the status of women in general'. [49] She also indicates that :

*'Critics of contract pregnancy argue that it reinforces negative stereotypes of women that prevent them gaining equality with men. It reinforces the gendered division of labor that keeps women subordinate to men by confining them to domestic work. It also supports the sexist view of women as primarily valuable for providing shelter for the genetic offspring of men.'* [50]

Tong also speaks powerfully from a feminist position against surrogate motherhood, especially commercial surrogate motherhood although she makes it clear that there is also a good feminist case in support of surrogate motherhood including commercial aspects. [51]

Which of the feminist arguments are good ones and which are weak? Which feminist arguments should be accepted and why should they be? The Brazier Report, like the Warnock one before it, does not say. This is a weakness. We do not necessarily accept Anderson's arguments but in what is supposed to be a review of the law and public policy concerning surrogate motherhood, they should be, in our view, considered. If they are dismissed as reasons for supporting legislation then the dismissal, and its causes, should be indicated. The reasons behind what is done as well as the decision itself are important.

The Brazier Report is also lacking in comprehensiveness in its failure to consider surrogate motherhood in relation to debates about (so-called) human rights. We are not very comfortable with the notion of a 'human right' to procreate. It is, rather, our view that whether or not people have a 'right' or even a 'human right' to procreate - there is a strong case for allowing them to do so. There is even often a case for helping them to do so unless there are particularly powerful contrary arguments. One does not require a human right to X in order for it to be wise to allow the doing of X to be legal. Nonetheless, the arguments about surrogate motherhood and human rights need to be addressed and weighed in any comprehensive analysis of the issues concerning surrogate motherhood. [52,53,54,55,56]

Harris says:

*'The Brazier Report and the HFE Act, violate, or recommend violations, not only of our shared morality, which attaches great importance to choice in matters of procreation, but of the right to found a family, a right or liberty protected by Article 16 of the Universal Declaration of Human Rights and article 12 of the European Convention on Human Rights'.* [27]

Whether or not this criticism is justified, that the Brazier Report is open to it is noteworthy.

#### **Conclusion**

We have not resolved the debate about what the law and public policy should be regarding surrogate motherhood nor have we tried to do so. We have, however, shown that the present situation requires to

be reconsidered and that the argumentation of the Brazier report, no less than that of the Warnock report, is poor. The debate within these documents is - in both cases - unsatisfactory, insufficiently comprehensive, lacking in rigour and lacking in balance. The argumentation that is presented in these reports does not resolve the issues: neither the present legal position nor a suggested alternative is sustained by it. The law and public policy concerning surrogate motherhood require a more radical re-appraisal than Brazier and her colleagues were authorised to give. Their terms of reference were too narrow. They were, as we have shown, asked to consider the matter: '*... within the context that surrogacy should not be commercialised and that any woman who has a baby as part of a surrogacy arrangement should not be compelled to give it up if she changes her mind.*' This very context should be examined.

The questions of what 'commercialisation' means and of whether it is wise to retain 'commercial', surrogate motherhood arrangements and the operation of commercial surrogate motherhood agencies as criminal offences are worthy of a thorough re-appraisal.

Similarly, if it is demonstrable that a surrogate mother who changes her mind should never be compelled to part with a baby, it would be useful to be reminded of the demonstration. After all, we compel baby sitters and foster parents to surrender children - no matter how emotionally attached to them they might be - to people who are sometimes no more biologically related to the children concerned than they are. In the case of gestational surrogate motherhood, the baby is genetically the child of the commissioning couple: the surrogate mother is not genetically related to the child. Even if surrogate mothers should not normally be legally compelled to surrender their babies one would want to think about the issues, especially if they are the result of gametes from the commissioning parents. One would want to be made aware of the relevant arguments and considerations before stating with justified confidence that surrogate mothers should never be compelled to surrender a carried child. Furthermore, even if a surrogate mother should not be compelled to give up her baby if she changes her mind about a surrogacy arrangement, she should maybe be compelled to return the money that she has already received on the understanding that she would relinquish the child. Whether surrogate motherhood should be 'commercialised' and whether commercial agreements should be legal are distinct questions from whether or not a surrogate mother should be compelled to give up the baby if she changes her mind. In this respect, the UK Minister of Health's attitude towards babies in dispute evokes an image of an ostrich rather than of a Solomon.

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