1. Introduction

Commercial surrogacy has been subject to many criticisms, such as that it degrades women or exploits their labor. In this paper, I will focus on one criticism of the practice, that it is a form of baby-selling. I will argue for two main theses, one semantic and the other moral. My semantic thesis (section 2) is that commercial surrogacy is in fact baby-selling. My moral thesis (section 3) is that commercial surrogacy evades powerful objections that afflict other forms of baby-selling. I also happen to think that commercial surrogacy should be allowed, whereas these other, worse forms of baby-selling probably should not be, but I will argue only for the more cautious thesis that allowing commercial surrogacy does not commit us to allowing all forms of baby-selling.

It is important to distinguish the semantic question of whether commercial surrogacy is baby-selling from moral questions about commercial surrogacy, such as whether people should engage in it, whether its contracts should be enforceable, and whether it should be criminalized. Unlike the concept of murder, for example, the concepts of commercial surrogacy and of baby-selling do not have evaluative assumptions built into them. Thus, if one wants to claim that baby-selling is wrong, one has to argue for that claim, rather than just pointing out that it is wrong by the very meaning of the words involved. In contrast, wrongness is built into the meaning of ‘murder', so the argument for the claim that murder is wrong can be very quick indeed.

Thus, we should not prejudice the semantic question of whether commercial surrogacy is baby-selling with moral judgments of commercial surrogacy or of baby-selling. Unfortunately, just about every commentator on this topic makes this mistake: critics of commercial surrogacy uniformly claim that commercial surrogacy is baby-selling, and defenders of the practice uniformly claim that it is not.[[1]](#footnote-1) This suggests that writers on this topic do not consider the question of whether commercial surrogacy sells babies to be independent of the question of whether commercial surrogacy should be allowed. However, that is not correct: the two questions are independent, and commercial surrogacy might turn out to be both a form of baby-selling and also relatively benign, at least when compared to other forms of baby-selling. Or so I will argue.

I want to make several preliminary points before proceeding to my arguments. Let me begin with some definitions. *Surrogacy* is the process by which a woman, *the gestational mother*, gestates a pregnancy and then relinquishes the resulting child to another party, *the social parents*. If the social parents pay the gestational mother more than is required to compensate her for undergoing the process, the surrogacy is *commercial*; otherwise, it is *altruistic*. The *genetic* *mother*, i.e., the woman whose egg is used in the process, need not be the gestational mother. If they are the same person, the surrogacy process is *traditional*; otherwise, an embryo from someone else’s egg (not necessarily that of a social parent) is implanted into the gestational mother, in which case the surrogacy is *gestational*.

I want to highlight the distinction between *traditional* and *gestational* commercial surrogacy because, though I will eventually conclude that both types of commercial surrogacy are baby-selling, the argument for gestational surrogacy requires an extra premise, namely that we are not identical to the early embryos from which we originated. I think that extra premise is quite plausible, but I will flag it for separate discussion, in section 2.5. Those who think that there are important moral differences between traditional and gestational surrogacy can take me to be discussing traditional commercial surrogacy until then.

Another important feature of my definitions is that my distinction between altruistic and commercial surrogacy focuses exclusively on whether the gestational mother profits. I will not discuss whether third parties, e.g., match-makers or fertility clinics, should profit from surrogacy. Along similar lines, I will eventually discuss cases where a birth mother might profit from selling her pre-existing baby, but I will not discuss whether adoption centers should profit from placing babies.

Another exclusive focus of this paper is on gestational mothers selling babies, rather than on social parents buying them. Of course, any bought item is also sold, but there could be systems where the only legal buyer of babies is the state, which then allocates them to hopeful social parents for free, based on some appropriate criteria. There might also be systems where the only permissible sellers of babies are adoption centers, to which gestational mothers must relinquish their babies for free.[[2]](#footnote-2) Such possibilities are beyond the scope of this paper; I will focus on cases where gestational mothers profit from surrogacy.

A last restriction is implicit in my use of the word ‘baby’ instead of ‘child’, namely that I will assume in all cases under discussion that the baby in question is transferred to its intended social parents at birth or shortly thereafter. I will not consider cases where parties might agree to transfer a child from one set of parents to another when that child is much older.

2. The Semantic Thesis

2.1 Conditional Contracts

There is a common argument for the claim that commercial surrogacy is baby-selling, and I want to mention it only to set it aside, because this common argument requires a restriction that mine will not. Consider a *conditional* commercial surrogacy contract, by which I mean a commercial surrogacy contract that pays more if the baby is healthy than if it is unhealthy or stillborn. George Annas (1988, 14) argues that such contracts concern the buying and selling of a baby, not merely a service. Laura Purdy (1989, 28) seems to agree. The reasoning is that if a contract pays more for a healthy baby than for an unhealthy or stillborn baby, then the contract cannot concern merely the service of gestation, which is fulfilled regardless of its outcome. Rather, in such conditional contracts what is being bought and sold is, at least in part, that baby. Indeed, if a conditional contract pays an extra $X for a healthy baby, on top of whatever is paid regardless of outcome, then it is natural to infer that the contract involves the sale of a (healthy) baby for the price of $X.

R. Jo Kornegay (1990) rejects this argument. She suggests, as analogies, that a lawyer who charges more if she wins the case than if she loses is still merely selling a service, as is a plumber who charges more if she successfully fixes the sink than if she merely attempts to, as is an assassin who charges more for killing the target than for the mere attempt. Now, according to Kornegay, a service that is bought or sold often includes an intended and specified outcome, for example a baby (gestational mother), a victory (lawyer), a working sink (plumber), and a dead target (assassin). Referring to the assassin analogy, Kornegay writes:

It does not follow from the fact that an assassin may perform the same bodily movements in two cases—one in which the victim dies and s/he is paid and the other in which the victim is saved by a passing ambulance and s/he is unpaid—that the assassin is not being paid for services in the former case, but for a corpse. The contract is not for performing bodily movements merely, but for performing bodily movements which result in the victim’s death. (Kornegay 1990, 48-49)

I am not persuaded by Kornegay’s reasoning. She claims that some services include things (or events) as essential parts, because one cannot perform the service successfully without also producing that thing (or event); e.g., the service of assassination might include someone’s death as an essential part. I object on two grounds. First, even if Kornegay is right that some services include things (or events) as essential parts, surely buying the service would include buying all its essential parts. If dough is an essential part of pizza, then buying a pizza includes buying dough; analogously if a victory is an essential part of the defense lawyer’s conditional contract (where she gets paid only on condition of victory), then buying the defense from her includes buying the victory. After all, if the lawyer loses, the buyer does not have to pay, in which case the contract has gone unfulfilled, and she has literally not bought anything.

Second, Kornegay is mistaken in thinking that services include things (or events) as essential parts. Ordinary language does not support such a claim; it is quite unnatural to say, for example, that the service of having one’s car washed literally includes a clean car as a part. Where Kornegay wants to say that the social parents in a conditional commercial surrogacy contract pay for a service, which includes a healthy baby as an essential part, I object that a more natural way of speaking is that sometimes, as in cases of conditional commercial surrogacy, we pay both for a service *and* for a product. Analogously, a full service restaurant sells both food and a service, whereas a self-serve restaurant sells only food. And if A pays B to build a car from scratch, A buys both the car and the service of its construction, whereas if C pays D to wash C’s pre-existing car, C has bought merely the service of a car washing, not also a clean car. After all, given how cheap car washes are relative to cars themselves, if car washes literally sold clean cars there would be no reason to buy cars anywhere else.

Applying these lessons to surrogacy, I suggest, and will argue in more detail in the remainder of section 2, that in cases of commercial surrogacy the social parents pay both for the service of gestation *and* for a baby. In contrast, a commercial adoption center sells pre-existing children but not the service of gestation. And, of course, it is possible to pay for the service of gestation without paying for its final product: suppose the buyer is directing a film in which a character becomes pregnant, and he wants the film to be as realistic as possible, but for whatever reason he cannot hire anyone who is already pregnant. The director cares not a whit what happens to the baby after it is born, but he pays an actress to become pregnant anyway. In that case, the director buys the service of gestation but not its end product.

Now, as I said at the beginning of this section, I want to set aside arguments about conditional contracts. That is because a case can be made that even *unconditional* commercial surrogacy contracts concern the buying and selling of a baby. Such contracts might fall apart when one or both parties change their mind (as happened in the famous Baby M case), when the gestational mother miscarries, or when she delivers a baby that is so unhealthy that the social parents no longer want it, but what is potentially morally troublesome is the attempt, not whether it succeeds.

2.2 Ordinary Language

Consider the following case:

*Post Birth Exchange*: A wants a baby. B has a baby. B agrees to let A raise the baby (and B will not be involved in its care), in exchange for money.

It seems quite obvious that *Post Birth Exchange* involves the buying and selling of a baby. Similarly, consider this case:

*In Utero Exchange*: A wants a baby. B is pregnant. B agrees to let A raise the baby once it is born (and B will not be involved in its care), in exchange for money.

*In Utero Exchange* is also clearly a case of baby-selling. Commercial surrogacy differs from these two cases, which we might lump together under the label *post-conception* *exchange*, only in that its exchange is agreed to before conception:

*Pre-Conception Exchange* (i.e., commercial surrogacy): A wants a baby. B can become pregnant. B agrees to become pregnant and let A raise the baby once it is born (and B will not be involved in its care), in exchange for money.

If post-conception exchanges are baby-selling, then so are pre-conception exchanges (a.k.a. commercial surrogacy). In all three cases, the actual *exchange* of baby for money occurs after birth; they differ only in whether the *agreement* to exchange occurs before conception, during pregnancy, or after birth, and surely that alone cannot affect whether the agreed to exchange is one that sells a baby versus some other thing.

Granted, one can also plausibly claim that pre-conception and in utero exchanges include payment for the service of gestation, because in those two cases the agreement to exchange occurs before gestation is complete. Indeed, pre-conception exchanges can also plausibly be interpreted as involving payment for the service of *fertilization*. But, as I have already argued, it is possible to sell multiple things at once. Thus, while the relative timing of conception, birth, and the agreement to exchange matter to which *services* are being sold, if any, those timing issues are irrelevant to whether a *baby* is being sold. In all three cases, the baby is given to A in exchange for money; therefore, A has bought the baby, and B has sold it, and this is true regardless of whether the agreement to exchange occurs before, during, or after the pregnancy.

2.3 Selling and Ownership

A popular objection to the claim that commercial surrogacy sells babies insists that what is being sold is *parental rights* (and obligations), rather than the baby itself. The reasoning behind this objection relies on the fact that one cannot in fact own human beings, coupled with the premise that it is impossible to sell things that one cannot own:

*Selling Entails Ownership*: When one sells an item to someone else, one transfers ownership of that item to the other person in exchange for some consideration, where owning an item means having the right to dispose of the item however one pleases.[[3]](#footnote-3)

Because we cannot dispose of babies however we please, either legally or morally, we cannot own babies. Therefore, the objection continues, we cannot sell them either; commercial surrogacy trades only in parental rights, not in babies.

The objection fails, because *Selling Entails Ownership* is false. That is, it is perfectly possible to buy and sell things without owning them, i.e., without having the right to dispose of those things however we please. Consider, first, that *Selling Entails Ownership* is incompatible not only with the claim that commercial surrogacy (i.e., a preconception exchange) is baby-selling but also with the claims that *Post Birth* and *In Utero* exchanges are baby-selling. However, such exchanges are clearly baby-selling.

Consider, again, *Post Birth Exchange*, which I might describe thusly:

*Baby-Selling Description* (of *Post Birth Exchange*): Suppose A wants a baby. A notes that B has a baby. A proposes to B “I’ll trade you money for that baby.” B agrees and gives the baby to A, in exchange for money.

This transaction is clearly one where a baby has been bought and sold. Those who disagree will have to describe the exchange quite differently from what seems to be the most natural way of describing it, as above. They must say that my above description is, strictly speaking, inaccurate, and that a more accurate description would be something like this:

*Rights-Transfer Description* (of *Post Birth Exchange*): Suppose A wants to raise a baby. A notes that B has parental rights over a baby. A proposes to B “I’ll trade you money for the parental rights to that baby.” B agrees and gives parental rights over the baby to A, in exchange for money.[[4]](#footnote-4)

Now, I do not think that the rights-transfer description of post birth exchange is inaccurate; rather, I think that it is simply a more pedantic way of expressing the same point made in the simpler baby-selling description of the same exchange. That is, when we say that B sold a baby to A, what we mean, in contexts typical for conversations about surrogacy, is simply that B sold parental rights (and obligations) over the baby to A. To be clear, my thesis is not that a baby is identical to parental rights over that baby; that would be absurd. Nor is my thesis that commercial surrogacy sells *three* distinct things: a service, a baby, and rights over that baby. Rather, I claim that, in most conversational contexts, the sentence ‘B sold parental rights over a baby to A’ expresses the same proposition as the simpler sentence ‘B sold a baby to A’. Thus, commercial surrogacy sells two things: a service and parental rights over a baby, where, in most contexts, one can truthfully describe the sale of parental rights more simply as the sale of a baby.

The reason for the “in most contexts” caveat is that we might mean something quite different by ‘B sold a baby to A’ in unusual conversational contexts. For example, if we are discussing a market for cannibals (perhaps because we are engaged in the philosophical exercise of refuting Jonathan Swift’s modest proposal) and I comment that B sold a baby to A, I need not convey to you that A intends to raise the baby as her child. I might rather convey that A intends to eat the baby. But, in contexts where we are discussing transfer of parental rights, if we say “A bought a baby from B”, we might say something *true*, and what we would mean by that true statement would be simply that A bought parental rights over the baby from B.

A related argument against *Selling Entails Ownership* begins with the idea that if selling entails ownership then so does giving. After all, the same rationale for saying that selling transfers ownership also applies to giving: when one sells a thing, one transfers ownership for a price, and when one gives a thing away for free, one transfers ownership without expecting anything in return. Thus, if there is transfer of ownership in one case, then there is transfer of ownership in the other case as well. But giving clearly does not entail ownership. Consider, as examples, these three cases:

*Post Birth Gift*: A wants a baby. B has a baby. B agrees to let A raise the baby (and B will not be involved in its care), for free.

*In Utero Gift*: A wants a baby. B is pregnant. B agrees to let A raise the baby once it is born (and B will not be involved in its care), for free.

*Pre-Conception Gift* (i.e., altruistic surrogacy): A wants a baby. B can become pregnant. B agrees to become pregnant and let A raise the baby once it is born (and B will not be involved in its care), for free.

We all agree that no one may own babies, where ownership is interpreted to mean that the owner has wide-ranging rights of disposal over the owned thing. From this, coupled with *Giving Entails Ownership*, we would be able to conclude that in none of the above three cases does B in fact *give a baby to* A. Yet that is clearly absurd. We can describe any of the above three cases as ones where B gives a baby to A, because we are sufficiently loose with the requirements necessary for bestowing the linguistic label ‘give’ that ‘giving up a child’ simply means, in most conversational contexts, giving up parental rights to that child. In other words, it is possible to give something to someone else even though neither the giver nor the recipient have full rights over the thing given.

Indeed, a similar point about *having* is likewise uncontroversial. It can be perfectly natural to say that someone *has three children*, but that does not entail that the person *owns* three children any more than having three sisters entails owning three women. Rather, in most contexts, having three children means simply that having parental rights and obligations over three children. Similarly, possessive phrases like ‘my baby’ can be used truthfully without implying ownership: A person saying “my baby is fussy” does not commit herself to ownership of a baby, just as “my boss is fussy” does not entail ownership of a boss.

The general principle that underlies this insight, that buying, selling, giving, and having need not entail ownership, is that we are loose with the semantic requirements necessary for bestowing those linguistic labels; we do not require full rights of disposal in order to use them truthfully. But just how lax are we? The answer is that we are lax enough to classify exchanges of parental rights for money as ones where a child is bought and sold, in most conversational contexts, though so lax as to classify various other rights exchanges for money as cases where the thing itself, over which rights are being bought and sold, has been bought or sold. For example, a student might hire a tutor, meaning that the student acquires various rights over the tutor’s time and attention in exchange for money, but it would be clearly semantically incorrect to say that the student bought *the tutor*, even in conversational contexts where we are discussing hiring tutors. And, of course, there may be difficult cases, where semantic intuition is unclear. For example, if a john pays a prostitute for sex, it seems plausible though not incontrovertible that “the john bought the prostitute”, spoken in a context where prostitution is the topic of discussion, is also true.

Note also that this same general laxity in how we apply ‘buy’, ’sell’, ‘give’, and ‘have’ labels explains how we talk about pets. Just as there are various restrictions, both moral and legal, on how one may treat one’s children, so also are there various restrictions, both moral and legal, on how one may treat one’s pets. Still, it would be perfectly natural, in a normal conversational context, to say that someone bought a puppy, received a puppy as a gift, or has a puppy, where we do not thereby imply that the person in question has the moral or legal right to do whatever she pleases to that puppy.

Now, Richard Arneson (1992, 148-149), who endorses *Selling Entails Ownership*, mentions the apparent counter-example of pets, but he responds that, while there are moral and legal boundaries to what we may do to pets, we still own them in a sense that we do not own babies. In contrast, I note first that there are quite stringent legal limits on what we may do to pets, and second that it is at best controversial whether, morally, we may own non-human animals, in the sense of having some (perhaps limited) legitimate freedom to dispose of them at will. However, it is not controversial whether ‘buy’, ‘sell’, ‘give’, and ‘have’ language can be used truthfully to describe transactions of animal guardianship rights. Even Tom Regan might, with no insincerity or linguistic sloppiness, say that he *gave* an abandoned dog to a rescue center.[[5]](#footnote-5)

And even if, in the end, ownership of non-human animals is morally permissible, there are other contexts where we use the language of buying, selling, giving, and having, when discussing *full grown people*, and without implying that anyone owns those people. Thus, consider the owners of the Boston Red Sox and the New York Yankees. They might engage in a trade, player X from the Red Sox for player Y from the Yankees. How might we describe this transaction? One natural way is to say that the Red Sox *traded X for Y*. Such a description is semantically innocuous, clearly, yet it does not imply that the Red Sox owner literally swapped full property rights over two human beings, in the sense that the owner used to have the moral or legal right to do whatever he pleases with X, and now has those rights against Y. Rather, it means simply that the X’s and Y’s baseball-related obligations have switched, as have various of the Red Sox’s and the Yankee’s baseball-related rights concerning those players.

Notice how the very same sort of statement, “A traded X to B for Y”, might mean something completely different in a slightly different context. Thus, two fans who participate in a fantasy baseball league might trade one professional baseball player for another, where this means simply that the one player’s previous statistics count towards the first fan’s fantasy team but from now on count towards the second fan’s team, and vice versa for the other player. The point is that what a statement of the form “A traded X to B for Y” means depends on the context, and there are certainly contexts where we can make such statements truthfully, about people, without implying that people can be owned. Likewise, in ordinary contexts we can truthfully describe commercial surrogacy as a situation where a baby was sold, without implying that babies can be owned.

2.4 The Counterfactual Principle

The objection I just considered alleges that commercial surrogacy is the merely the sale of parental rights, not the sale of a baby. The objection fails, not because commercial surrogacy is not the sale of parental rights, but rather because, in ordinary conversational contexts, to say that one sold a baby just is to say that one sold parental rights over that baby. Another objection is more extreme; it alleges that commercial surrogacy does not even sell parental rights. The reasoning behind this objection is that gestational mothers never had parental rights over the baby to begin with, in which case they cannot correctly be described as transferring those rights to someone else. On this view, it is more appropriate to think of the social parents’ rights as *acquired from nothing*, rather than via *transfer* *from the gestational mother.* Unlike post-conception exchanges, then, where the gestational mother can have parental rights over a pre-existing fetus or baby, commercial surrogacy trades merely in a service, according to this view, because when the surrogacy agreement is reached there is as yet no fetus over which the gestational mother has any rights. In that case, the child comes into existence with parental rights assigned initially to the social parents, rather than secondarily after a transfer from the gestational mother.[[6]](#footnote-6)

I think that Melinda Roberts (1993) refuted this objection when she articulated and defended a counterfactual principle that explains how, in surrogacy cases, parental rights are transferred from the gestational mother rather than acquired from nothing. That counterfactual principle says that an agreement between A and B transfers parental rights from A to B when, had A engaged in the same activities in the absence of any agreement, she would have acquired parental rights. In particular, if the gestational mother had gestated an embryo (to which she is entitled) to term in the absence of any agreement, she would have acquired parental rights over the resulting baby. Thus, a surrogacy agreement between her and social parents is one where the gestational mother transfers those rights, the ones she *would have had*, to the social parents.

I think that the counterfactual principle is correct, but Jason Hanna (2010) has recently subjected it to criticism. Referring to an analogous case where a museum commissions an artist for a painting, and the artist produces Painting A for them, Hanna writes:

The Counterfactual Principle thus implies that the artist has sold her rights over Painting A as part of a commercial contract. But this is false; the commission is not a contract for the sale of Painting A. Although the museum may *acquire* rights over Painting A, it does not *pay* for rights over Painting A. Those who deny this face a familiar problem: if the museum paid for rights over Painting A, then it can justifiably claim that the artist has breached the contract if she produces any painting other than Painting A. But clearly the artist could have fulfilled the commission by completing any number of different paintings.

I deny that there is any problem here. The museum paid for a painting, and the artist happened to produce Painting A for them; therefore, the museum bought Painting A. Had the artist happened to produce Painting B for them instead, the museum would have bought Painting B. Had the artist produced two paintings and then picked one to give to the museum, the museum would have bought that particular painting and not the other one. In no case can the museum claim breach of contract because the painting has or lacks A-like or B-like qualities. Of course, had their initial contract *specified* A-like or B-like qualities, then the museum would have been able to sue for breach of contract if the painting lacked those particular qualities. However, in the absence of specification, they still received a painting in exchange for money, in which case they bought that painting.

In general, Hanna’s view precludes the possibility of buying anything on commission (that is, exchanging money for the creation of the item of intended exchange), and that is too high a semantic price to pay. For example, when one orders a cake from a bakery, it seems quite obvious that one has bought a cake, even if the bakery had to bake it from scratch after the order was placed. It would be quite surprising if the question of whether one has bought a cake depends on whether the bakery decided to use a pre-existing cake to fulfill the order or make a new one from scratch. Not so, according to Hanna. He would describe a cake-on-commission exchange as one where the customer *acquires* rights over the cake (in exchange for money), rather than one where the customer *pays* for the cake. To my ear, that is a distinction without a difference.

Hanna might reply that, in the cake case, the relevant parties *do* agree beforehand exactly which item is the object of exchange; they just do this tacitly when the baker puts the cake on the counter. The problem with this reply, though, is that it also works for paintings and babies: the transacting parties can be interpreted as agreeing tacitly to the exchange of money for this particular painting and that particular baby after those items have been produced and immediately before the actual exchange of item for money.

I conclude, then, that the counterfactual principle is correct: parental rights are *transferred* from gestational mother to social parents, rather than *acquired from nothing* by the social parents, because in the absence of any agreement the gestational mother would have had those same parental rights. The contrary position must flout too many common-sense intuitions about when things can be bought and sold, in particular that it is conceptually impossible to buy anything on commission. Here, as elsewhere, the linguistic intuitions that one must flout, in order to deny that commercial surrogacy is baby-selling, are simply too entrenched.

2.5 Gestational Surrogacy and Personal Identity

Even if one agrees with my arguments so far, when applied to cases where the gestational mother uses her own egg, one might object that if the social parents provide the embryo to the gestational mother, then the gestational mother is not selling a child back to the social parents but rather just selling the service of gestating that given embryo to birth. Analogously, if I send my child away to boarding school, even for a very long time, I have exchanged money for my child’s education, not bought an educated child.

The problem with this analogy is that it is one thing to educate a child, quite another to turn an early embryo into a child. More precisely, I concede that a case where A improves upon an existing item X, in exchange for money from B, is one where A merely sells a service (improving X), not also an object (an improved X). Recall that car washes sell only a service, not also a clean car. The problem, though, is that surrogacy is not a case where the gestational mother merely improves upon an existing item. Rather, it a case where she turns one thing, an early embryo, into another thing, a baby, that is not identical to the original thing.

In general, we are not identical to the early embryos from which we arose. How early? Well, gestational surrogacy impregnates the gestational mother via in vitro fertilization (“IVF”), in which early embryos are cultured until at most the *blastocyst* stage (five to six days after co-incubation).[[7]](#footnote-7) Thus, a more precise articulation of the principle on which I rely is that *we are not identical to the blastocysts from which we arose*.

Now, one might think that whether we were once blastocysts depends on the correct theory of personal identity. According to the popular *psychological* account of personal identity, identity follows psychological criteria.[[8]](#footnote-8) Because blastocysts lack psychological properties, we were never blastocysts, on this view. However, according to the psychological account’s main competitor, the *animalist* view, we are essentially biological organisms. In this case, one might think that we were at one point blastocysts, because we developed from them.

That last thought is mistaken, though; proponents of animalism who discuss the issue (of how far back our identity extends) concede that our identity does not extend back to the blastocyst stage.[[9]](#footnote-9) Rather, they peg the most salient point in development that marks the beginning of a human being as occurring at about sixteen days into development, when *gastrulation* occurs. At this point, the embryonic cells begin to differentiate into three basic layers of tissue, ectoderm, mesoderm, and endoderm, which will eventually specialize further into, e.g., skin (ectoderm), skeleton (mesoderm), and intestines (endoderm). The reason gastrulation is important is that it marks the beginning of the presence of a heterogenous multicellular organism, where different cells perform different and coordinated functions, rather than the presence of a mere “cluster of homogenous cells”;[[10]](#footnote-10) starting at this point, “cutting away half the cells would not result in two smaller living embryos but would simply cause death.”[[11]](#footnote-11)

Thus, I am quite confident that we were never blastocysts, not because I think there are conclusive reasons to favor a psychological account of personal identity over an animalist one, but rather because both leading theories of personal identity claim that we were never blastocysts. And, because the early embryos implanted in gestational surrogacy are no more mature than early blastocysts, I am also confident that gestational surrogacy is not merely the continued maturation of one thing, as when a one month old baby matures into a five year old child, but rather the transformation of one thing—a blastocyst—into another—a baby.

3. The Moral Thesis

I have argued that commercial surrogacy is baby-selling. In the remainder of this paper I will argue that certain serious moral objections afflict other forms of baby-selling but not commercial surrogacy. In other words, I want to support the conclusion that commercial surrogacy is morally superior to other forms of baby-selling. This blocks a line of argument, common amongst writers on this topic, according to which if commercial surrogacy is baby-selling then its legitimacy would entail the legitimacy of other forms of baby-selling too.[[12]](#footnote-12)

3.1 Arguments Against All Forms of Baby-Selling

It will be useful to begin by articulating two clearly bad arguments that infer from the true claim that commercial surrogacy sells babies to the conclusion that it is therefore immoral. Thus, first, recall a point I made in the introduction, that the question of whether commercial surrogacy is baby-selling is not itself inherently moral; unlike ‘murder’, one cannot conclude just from the meaning of the description ‘baby-selling’ that anything meeting that description is by that very fact made morally objectionable. This blocks the clearly bad reasoning that the presumptive wrongness of commercial surrogacy, if that turns out to be a form of baby-selling, is *analytic*.

Second, recall the main point of section 2.3, that to call a transaction ‘baby-selling’ is not to say that ownership, and therefore *property* rights, have been transferred in the transaction. Rather, in conversational contexts associated with discussions about surrogacy, what it means to say that a baby is sold is simply that *parental* *rights* have been sold. This blocks another clearly bad line of argument, which relies on the false premise that to sell a baby is to sell the right to do whatever one pleases with that baby. Because there are obviously plenty of immoral and illegal things one might do to a baby, if baby-selling entailed that one can do whatever one pleases to babies then baby-selling would be immoral. There is no such entailment, however: selling does not entail ownership.

Now, the two arguments against baby-selling I discussed above both claim that we can deduce immorality just from the concept of baby-selling alone. Those arguments, if they worked, would prove that all forms of baby-selling, not just commercial surrogacy, are immoral. Both arguments are, of course, quite bad, but it is possible that some other, better argument might deduce immorality from the very concept of baby-selling, in which case all forms of baby-selling would be wrong. I think the prospects for such an argument are dim, and I will briefly discuss a notable one and my reasons for thinking that it fails.

Elizabeth Anderson (1990) argues against commercial surrogacy on two fronts, first that it wrongs children and second that it wrongs gestational mothers. I will focus on her argument that it wrongs children, as that is most relevant to the charge that commercial surrogacy is baby-selling. The conclusion of her argument is that commercial surrogacy *degrades* children. Now, her argument for that claim applies to any situation where a child is bought or sold, so it applies to post-conception exchanges as well, rather than being exclusive to commercial surrogacy.

How does Anderson get to the conclusion that baby-selling degrades children? She claims first that parents ought to love their children rather than treat them as commodities (i.e., items to be bought and sold on the market), and second that selling babies treats children as commodities. From these two premises, along with the definitional premise that to degrade something is to treat it with a lower mode of valuation than it deserves, Anderson concludes that commercial surrogacy degrades children.

There are several potential replies to this argument, but I will focus on one, first because I think it is the most important reply and second because Anderson responds to it explicitly.[[13]](#footnote-13) That reply is that commercial surrogacy does not so much *substitute* market norms for norms of parental love as *supplement* the latter with the former. In other words, it is certainly possible both to love a child, in just the way a parent should, *and* to buy or sell (parental rights to) that child. After all, the fact that social parents bought a baby does not preclude them from loving it, just as people who bought their pets might still love them just as much as people who got acquired their pets for free.[[14]](#footnote-14)

Now, Anderson has a response to this compatibilist strategy. She writes:

One might argue that since the child is most likely to enter a loving home, no harm comes from permitting the natural mother to treat it as property. So the purchase and sale of infants is unobjectionable, at least from the point of view of children’s interests. But the sale of an infant has an expressive significance which this argument fails to recognize. By engaging in the transfer of children by sale, all of the parties to the surrogate contract express a set of attitudes toward children which undermine the norms of parental love. They all agree in treating the ties between a natural mother and her children as properly loosened by a monetary incentive. Would it be any wonder if a child born of a surrogacy agreement feared resale by parents who have such an attitude? And a child who knew how anxious her parents were that she have the “right” genetic makeup might fear that her parent’s love was contingent upon her expression of those characteristics.[[15]](#footnote-15)

Anderson here seems to make two potentially independent rebuttals, first that commercial surrogacy has *negative expressive significance*, second that it has the potential to cause *psychological harm* (namely, fear) in children.

I must admit that I find Anderson’s claims about psychological harm rather implausible. I am quite skeptical that a surrogate child might fear resale. This is especially true because, as I will argue in the next section, powerful and uncontroversial objections apply to post-conception exchanges but not to commercial surrogacy. In that case, perhaps the best society is one in which commercial surrogacy is permitted, though selling pre-existing children is not. As for the claim that a child might fear that her parent’s love is contingent upon expressing the right characteristics, I think this too is unfounded. One reason to be skeptical is that, often, the right characteristic is simply “being a genetic descendent of one of the social parents”, where the social parents donated at least one of the gametes to create the embryo. Another more fundamental reason for skepticism is that the potential for this sort of fear is not unique to commercial surrogacy; it is just as likely to occur in natural childbirth and even adoption.

Now, I have stated my skepticism about Anderson’s claims of psychological harm, but of course this is at bottom an empirical matter. As far as I know, there have been no studies examining whether, all else equal, commercial surrogate children feel more fear than naturally born children do, but in principle such studies are possible. I would be quite surprised if the results supported Anderson’s contention.

And what of Anderson’s claims about negative expressive significance? She might have been saying that negative expressive significance is bad because it has the potential to induce fear in children, thereby causing them psychological harm. In that case, my skeptical remarks above also apply to claims about expressive significance.

Another way of interpreting Anderson’s claim of expressive significance, however, is as saying that using money in a surrogacy transaction undermines the norm of parental love. However, this interpretation of Anderson suffers another flaw, namely circularity. If we have already shown that market norms are incompatible with norms of parental norms of love, then any activity, such as commercial surrogacy, that applies market norms to children thereby expresses that no other norms can possibly be applied to those children. Yet this is precisely what is being disputed; it seems quite natural to describe typical cases of commercial surrogacy as ones where parental rights (i.e., children) are bought and sold, yet where the social parents will still love the child in question. Another way of putting this point is that the attitudes of people involved in commercial surrogacy contracts need not in any way undermine the norms of parental love, just as the attitudes of people involved in pet sales need not in any way undermine the norms of guardians loving their pets.

Again, I have stated my skepticism about Anderson’s claim of undermining norms of parental love, but of course this is also at bottom an empirical matter. Again, as far as I know, there have been no studies on whether social parents who used commercial surrogacy love their children any less than traditional parents love theirs, but in principle such studies are possible, and I would be quite surprised if the results supported Anderson’s contention.

Thus, I suggest that it will be very difficult to argue, as Anderson attempts to, that baby-selling is wrong in all its forms, by its very nature. More promising, I suspect, will be arguments that purport to show that particular types of baby-selling are more or less wrong, based on features of those particular types of baby-selling. For example, one might argue that transnational commercial surrogacy is wrong, on grounds that exploitation in such cases is especially problematic.[[16]](#footnote-16) In that spirit, I will focus in the remainder of this paper on contrasting commercial surrogacy with post-conception exchanges. I will argue that serious moral objections can be made against post-conception exchanges that do not apply to commercial surrogacy.

3.2 Psychological Harm

There are strong reasons to forbid agreements to sell a baby, where the agreement occurs after the baby has already been conceived. First, agreeing to sell a baby after it has already been conceived may cause psychological harm to the sold child. Now, I have just argued that children of commercial surrogacy will not suffer psychological harm; why, then, should they suffer psychological harm from *post*-conception sales? After all, the only difference between pre- and post-conception baby-selling is whether the agreement takes place before or after conception.

The difference is that, in pre-conception exchanges, the child in question would not even exist were it not for the surrogacy agreement. Thus, the surrogate child would be simply confused if she asked herself, “why did my gestational mother sell me; is it because she didn’t love me?” The confusion in that question arises because it is not as if, in cases of commercial surrogacy, the child first exists, and then the gestational mother decides she does not want him enough and therefore prefers to sell him. Rather, in commercial surrogacy the child was conceived because of a pre-existing commitment. In contrast, post-conception baby-sales are cases where the birth mother has no prior commitments and therefore must, at some point, face and answer the question, “now that I have this fetus / child, what am I going to do with it?” A child can suffer psychological harm if his birth mother’s answer was “sell it”.

Another way of putting this same point is that in cases of post-conception baby-selling the gestational mother is faced with a choice between money and keeping her child. In contrast, in cases of pre-conception baby-selling (i.e., commercial surrogacy) she is faced with a choice between money-plus-creating-a-child-to-sell and *nothing*. A child wondering why his birth mother gave him up in the former sort of case might be harmed by the possibility that she preferred money to him; a child wondering why his birth mother gave him up in the latter sort of case cannot be similarly harmed, because in that case there is no simple preference of money over him. Instead, the gestational mother preferred money-plus-pregnancy to nothing, and his social parents preferred his existence to money.

Of course, this is not to deny the Baby M possibility, that a gestational mother can change her mind, so that by the time she is pregnant, or when the baby is born, she no longer wants to give up the child. And such cases might make for tricky law, especially if the contracts involved do not stipulate what should happen in that case. My point is only that a reasonable child of commercial surrogacy will not suffer psychological harm from such possibilities. In particular, he will not wonder why his gestational mother did not love him enough to *break her contract* and keep him instead. In contrast, a child of post-conception baby-selling might reasonably suffer psychological harm from wondering why his gestational mother decided, at a point where she did not need to break any contract for doing so, that she preferred money over keeping him.

In defending the contention that post-conception baby-selling can cause psychological harm to the sold child, let me also point out the obvious fact that children can already be traumatized by being given up for *adoption*, where the parents receive nothing in return; even in those cases, children can wonder why their parents do not want them any more. That same harm can be magnified if instead the child knows that her parents brought them into this world but then chose money over them.

Now, one might reply that being sold is not as bad as being given away for free. According to this hyper-economic attitude, parents who are willing to give their children away for nothing are in fact worse than parents who would let go of their children only if they received something valuable in exchange. After all, it is one thing to give up something precious when getting something valuable in return, quite another to give up the thing for no benefit at all.

The problem with the hyper-economic attitude is that parents who give their child away for free often do so for the sake of the child, to provide a better life for it. When parents have an incentive to get rid of their child, it is much less likely that they do so with the best interest of the child in mind. Thus, there are good reasons to think that being sold is in fact *more* harmful to a child’s psyche than being given away for free is: a child who was given away for free can console himself with the thought that his birth parents wanted a better life for him; a child who was sold must face the possibility that his birth parents just preferred money to him.

Of course, we must recognize that not everyone is fit to be a parent, and some parents recognize that they are not fit and that their children would lead better lives under someone else’s care. Thus, we do not want to preclude parents from giving their children away, via adoption, when those children would really be better off elsewhere, and this is true in spite of the fact that adopted children can suffer psychological harm from being given up. The point is only that, given that we already have a system in place where parents can give up their children (for free) when they think they are unfit parents, there are strong reasons, based on the interests of the child in question, to preclude *also* implementing a system that gives parents *incentives* to give away their children.

Notice that the argument I have given above does not depend on controversial ethical assumptions, as Anderson’s argument does. It does not assume that selling a child degrades it, or that it has negative expressive significance, for example. Rather, the argument relies only on the very plausible theses that sold children will suffer psychological harm, that this harm will be worse than that suffered by adopted children, and that the best excuse for such harm (that the child would in fact lead a better life with different parents) is more easily invoked in adoption, in which case there is no need to legalize post-birth sales in addition to allowing adoption.

3.3 Perverse Incentives

I have just argued that children of post-conception baby-selling can suffer psychological harm. There is another, related problem for post-conception baby selling, though this one is not so much a problem with the practice itself as with the unintended consequences of a state policy that permits the practice. If people are given incentives to get pregnant, because there is a possibility that they can sell the baby once it is born, then we should expect more people to get pregnant, and in fact we should expect more people *who are not prepared to raise children* to get pregnant. For example, if couples can make arrangements to sell babies while still pregnant, there is less incentive to use birth control when one does not want a child; indeed, there would be a perverse incentive *not* to use birth control when one does not want a child. Now, this would be bad even if every birth mother who wanted to sell her child was able to do so, because it would increase the amount of psychological harm sold children suffer, the problem I discussed in the previous section. However, we cannot even guarantee that all women who want to sell their children will be able to find good buyers for them. Even when a greater number of (competent) potential parents are willing to buy babies than there are babies available, what matters for whether inventory clears completely is whether buyers and sellers can find each other, and no market is perfect in this regard. This leads to another problem, that a policy that permits post-conception baby-selling would increase the number of *unwanted pregnancies*.

Unwanted pregnancies are bad for two reasons. First, they can lead to abortions. Now, in saying that abortions are bad I am emphatically not saying that they should be prohibited. I am merely making the common-sense claim that there is a legitimate sense of loss or tragedy when a human fetus is killed. Getting an abortion is not like getting a haircut; it is an occasion for sadness even if it was the best option available at the time.[[17]](#footnote-17) Second, unwanted pregnancies lead to unwanted children, and it is uncontroversially bad for society to add to its stock of unwanted children.[[18]](#footnote-18)

Note that my argument here is compatible with the idea that children are good for society, such that it might be good for the state to give incentives for people to have children, e.g., by giving parents tax breaks. The point is that, while children in general are good for society, unwanted children are not, so we should put our incentives in the right places, reducing the burden of child-care for parents, for example, rather than allowing people to make a profit from selling pre-existing children.

Note also that, like the problem of psychological harm discussed in section 3.2, the problem of perverse incentives does not depend on controversial ethical assumptions. It depends only on very innocuous assumptions, such as that it is bad for there to be unwanted children and that a policy that permits post-conception agreements to sell the child once it is born increases the chances for there to be such unwanted children.

Finally, note that the problem of perverse incentives, like that of psychological harm, simply does not apply to commercial surrogacy. In commercial surrogacy, an agreement is made before conception even occurs, so there is essentially no chance that the child will be unwanted: the whole point of the agreement is to secure a buyer before the child is even conceived. Now, I said “*essentially* no chance” to acknowledge the possibility that the gestational mother or social parents will change their minds by the time the child is born, possibly because of fetal abnormalities or maybe for other reasons. In that case, the state may have to deal with the burdens of settling a custody dispute or placing or caring for an unwanted child, and that is bad. However, this possibility is just as likely for normal cases of child-rearing, so to hold it against commercial surrogacy while not holding it against traditional reproduction would be inconsistent.

3.4 Defenses of Post-Conception Baby-Selling

Not surprisingly, there are some academic defenses of post-conception baby-selling.[[19]](#footnote-19) They all discuss various benefits of permitting that practice, such as the obvious one of increasing aggregate welfare by allowing mutually beneficial exchange. The problem is that these benefits are not unique to post-conception baby-selling; they accrue also to commercial surrogacy. Thus, if commercial surrogacy does not face some objections that apply to post-conception baby-selling, we have reason to permit commercial surrogacy but not also post-conception baby-selling. By doing so, we would in effect be requiring that parties who want to participate in the mutually beneficial exchange of baby for money simply *commit to do so before creating that baby*. This restriction would ensure that every baby is wanted. With most inanimate objects, like cars or cans of paint, we can just store unwanted surplus in a parking lot or on a shelf, with no moral qualms. Babies are not like that; unwanted babies, and babies whose status as wanted or unwanted was at any point unsettled, might later suffer for that fact, and thus we should prefer commercial surrogacy to post-conception baby-selling.

And what do defenders of post-conception baby-selling have to say about my two objections to that practice? Unfortunately, most simply do not consider them. The exception is Alexander & O’Driscoll (1980, 191-192), who discuss close variants of both my objection of psychological harm and of perverse incentives. I think their responses are inadequate, however.

On psychological harm, they respond thus:

The manifest love of the adoptive parents and the pattern of their interaction with the child, more than the origin of the legal relationship, however, will determine the strength of the child’s sense of worth and his confidence that he is valued as a person… Moreover, if the natural parents have retained have retained the right to visit him and know about the child, their conduct can evidence their concern for him, and the child need not believe that their decision to relinquish their parental rights was a rejection of him personally or a reflection of a low estimate of his worth as a person.

This response, effectively that if things go well then a sold child will suffer no psychological harm, strikes me as naively optimistic. After all, the response would apply also to altruistic adoption, yet we all concede that things do not always go well in adoption: being given up for adoption may cause psychological harm in the orphaned child. Of course, whether this harm is so bad that we should ban adoption is another question entirely, but we should at least admit that there is a real danger here. The same is true for post-conception baby-selling.

On the perverse incentive to increase the number of unwanted pregnancies, Alexander & O’Driscoll (1980, 189) have this to say:

It cannot be guaranteed that if the proposed arrangement [baby-selling] is instituted, no child will ever be produced for the sake of profitable exchange of parental rights and that no relinquishing parents will ever set an asking price higher than any potential bidders are willing to pay. Nor can it be guaranteed that parents who do not value their children as persons will relinquish them to a nonprofit agency, or lower their price until a bidder can be found, or else nurture the children themselves. The importance of these admissions, however, should not be exaggerated. It should not be assumed that these undesirable episodes will occur frequently.

Basically, Alexander & O’Driscoll suggest that, though there will be perverse incentives, the effect will be small. (They also deny that relinquishing an unwanted child to a nonprofit agency is a societal cost, when it most certainly is.) It is then open that the benefits of baby-selling outweigh these rare costs. The problem with this response is that the objection of perverse incentives did not require that there will be *many* unwanted pregnancies. It required only that there will be *some*, coupled with the fact that in commercial surrogacy there will be *none*.[[20]](#footnote-20) If commercial surrogacy can accrue all the benefits of post-conception baby-selling, without any of the cost, then there is strong reason to permit the former but not the latter.

3.5 Problems Unique to Commercial Surrogacy?

I have argued that there are strong reasons to prohibit child-selling agreements that are made either after the child is conceived, one relating to psychological harms and another to perverse incentives, and I have argued that these reasons do not apply to commercial surrogacy. I have also suggested that generalized arguments against all forms of baby-selling fail, whether because they are mistaken about what baby-selling amounts to, or because they rely on false or controversial premises. But what about arguments that apply exclusively to commercial surrogacy? Could there be reasons against allowing commercial surrogacy, where those reasons do not apply to post-conception baby-selling?

At least when we focus on potential harms to the surrogate child, I think there are no such reasons. Of course, if we broaden our scope to consider potential wrongs against women, there will be potential reasons to reject commercial surrogacy that do not apply to post-conception exchanges. For example, it might be that paying for gestation harms women (because pregnancy is a burden), exploits them, or wrongly commodifies their labor.[[21]](#footnote-21) Now, I think such concerns can be answered,[[22]](#footnote-22) but they fall outside the scope of this paper. For now, I am content to conclude that, while there are strong reasons to ban post-conception baby sales, those same reasons do not apply to pre-conception baby sales, i.e., commercial surrogacy. Therefore, I suggest, we may safely allow commercial surrogacy without also allowing other, more harmful forms of baby-selling.

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1. For critics, see, e.g., Annas (1988), Anderson (1990), and Roberts (1993). For defenders, see, e.g., Kornegay (1990), Hill (1991), Arneson (1992), and Hanna (2010). Purdy (1989) is a defender, and her view is a bit more complex: the only morally legitimate form of commercial surrogacy, according to Purdy, will not pay different amounts depending on whether the baby is healthy; such forms of commercial surrogacy are not baby-selling. I will discuss her view in section 2.1. [↑](#footnote-ref-1)
2. Some claim that this is in fact our *actual* system. See, e.g., Goodwin (2006). [↑](#footnote-ref-2)
3. See, for example, Purdy (1989, 28) and Arneson (1992, 148) for endorsements of this view. [↑](#footnote-ref-3)
4. Note that my original descriptions of *Post Birth Exchange*, *In Utero Exchange*, and *Pre-Conception Exchange* all use a mix of the simpler “exchange as baby-selling” language and the more complex “exchange as transfer of parental rights” language. [↑](#footnote-ref-4)
5. I use Regan as an example because he is a well-known defender of animal rights. See Regan (1983). [↑](#footnote-ref-5)
6. Advocates of this objection include Hill (1991) and Hanna (2010). [↑](#footnote-ref-6)
7. After maturing into blastocysts, early embryos need to implant in a uterus for continued support and growth; thus, it is currently technologically impossible to grow an embryo *in vitro* for much longer than six days. Of course, current technological limitations are contingent; see Warmflash (2015). [↑](#footnote-ref-7)
8. Derek Parfit (1984)’s view of personal identity counts as psychological for my purposes, because he insists that normative questions follow psychological criteria, even if personal identity does not. [↑](#footnote-ref-8)
9. See, e.g., Olson (1997) and Smith & Brogaard (2003). [↑](#footnote-ref-9)
10. Smith & Brogaard (2003, 62). [↑](#footnote-ref-10)
11. Olson (1997, 91). [↑](#footnote-ref-11)
12. See, for example Hanna (2010, 342): “If we accept markets in parental rights, however, we will be forced to accept not only commercial surrogacy, but also a system of commercial adoption under which the adoptive parents pay the birth mother to relinquish her rights.” [↑](#footnote-ref-12)
13. See, e.g., Arneson (1992) for several more replies to Anderson. [↑](#footnote-ref-13)
14. This point is obvious, and I am not the first to make it. See, e.g., Alexander & O’Driscoll (1980, 188) and Arneson (1992, 140). [↑](#footnote-ref-14)
15. Anderson (1990, 77). [↑](#footnote-ref-15)
16. See, for example, Khader (2013). [↑](#footnote-ref-16)
17. See Little (2008). [↑](#footnote-ref-17)
18. That it is bad for *society* if there are unwanted children is uncontroversial. That it is bad for a *child* if it is unwanted, where the relevant contrast is never having existed at all, is controversial. See Boonin (2014). [↑](#footnote-ref-18)
19. See Landes & Posner (1978), Alexander & O’Driscoll (1980), Posner (1987), and Boudreaux (1995). [↑](#footnote-ref-19)
20. Again, we must always admit exceptions for cases where one party or another has a change of heart, but that is true for traditional pregnancy too. [↑](#footnote-ref-20)
21. See, e.g., Anderson (1990) for arguments about exploitation and commodification. [↑](#footnote-ref-21)
22. See, e.g., Purdy (1989) and Wertheimer (1992). [↑](#footnote-ref-22)