

Does contract surrogacy undermine gender equality?

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Abstract

Some feminists hold that surrogacy contracts should be unenforceable or illegal because they contribute to and perpetuate unjust gender inequalities. I argue that in developed countries, surrogacy contracts either wouldn't have these negative effects or that these effects could be mitigated via regulation. Furthermore, the existence of a regulated surrogacy market is preferable on consequentialist grounds.

KEYWORDS

commodification, contract surrogacy, Debra Satz, feminism, surrogacy

1 | INTRODUCTION

Contract surrogacy typically involves a person or couple paying a woman (the surrogate) to be implanted with a fertilized egg. The surrogate—who is rarely genetically related to the embryo—is compensated around \$30,000 for her labor and for waiving her parental rights towards the future child or children. There are around 4000 contract surrogacy cases in the United States annually, although its legal status varies by state.¹

There are many potential moral problems with contract surrogacy. My focus will be on a particular feminist objection to the practice. Some feminist philosophers argue that due to sexist background conditions, contract surrogacy is deeply immoral. They claim that the main problem with the practice is that it contributes to and perpetuates gender inequality. Because of this, they hold that surrogacy contracts ought to be illegal or unenforceable. After saying a few things about markets and recapitulating the above argument in more detail, I argue that in developed countries surrogacy contracts either wouldn't have these negative effects or that these effects could be mitigated via regulation. Furthermore, the existence of a regulated surrogacy market is preferable on consequentialist grounds.

¹New York Times. *Baby M and the Question of Surrogacy | Retro Report*. https://youtu.be/fGb_D2TqZ9E?si=7pocZSFeDdGuwGAP; Braverman, B. (2023). *How much surrogacy costs and how to pay for it*. <https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it>.

2 | MARKETS AND THE COMMODIFICATION DEBATE

Some goods are relatively morally inert. Celery, for instance, doesn't cause much harm in the world. There are celery markets that would be morally problematic, for example, if celery was grown via slave labor. But in such a scenario, what is morally wrong is the way in which the celery is produced—not the good, itself. Other goods are morally wrong regardless of how they're sold. Child pornography is an example of this second class of good. A third class of good can be morally problematic depending on background circumstances. Potential examples of such goods include kidneys, sex, drugs, and surrogacy.

A recent philosophical literature has emerged regarding the commodification of goods within this third class. For some of these goods, it seems morally permissible if not praiseworthy to give them away for free but morally problematic or impermissible to sell them. This asymmetry could be put in two ways:

Strong asymmetry thesis: “there are certain goods or services that persons can legitimately both possess (occupy, perform, etc.) and give away but which it would necessarily be wrongful for them to buy or sell.”²

²Taylor, J. S. (2022). *Markets with limits: How the commodification of academia derails debate*. Routledge. p. 11.

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Weak asymmetry thesis: some “markets are more problematic than other currently accepted labor markets. [...] Therefore,] there ought to be an asymmetry between our treatments of [these] markets.”³

Brennan and Jaworski argue that many philosophers (e.g., Sandel, Anderson, Walzer, and Archard) are advocates of the strong version of the asymmetry thesis, which they hold is false.⁴ In a slogan, Brennan and Jaworski's view is that “If you can do it for free, then there is some way that you may do it for money.”⁵ Taylor, however, claims that Brennan and Jaworski are attacking a straw person and that the authors they critique don't defend the “almost ... magical” and “highly implausible” strong version of the asymmetry thesis.⁶

For our purposes, this debate, although interesting, needn't be solved here. This is because my interlocutors aren't committed to the strong version of the asymmetry thesis. In fact, they deny it. The feminist position I am concerned with holds that there is nothing *essentially* or *necessarily* wrong with contract surrogacy. Instead, their view is that contract surrogacy is morally wrong and should be prohibited because *given current sexist background conditions* it contributes to and perpetuates gender inequality. If background conditions were different, if we lived in an egalitarian society that was free from racial and gender discrimination, then contract surrogacy would be far less objectionable. Under ideal conditions, paying surrogates could be viewed as an appropriate way to compensate them for the risks they bear.

What then creates this moral asymmetry between goods like sex, kidneys, and surrogacy, on the one hand, and goods like celery, on the other? Satz gives a plausible answer.⁷ For Satz, goods are viewed as objectionable—in her terminology noxious—depending on how highly they score on four parameters: *weak agency* (where actors have inadequate information about exchanges or others enter the market on their behalf), *vulnerability* (where actors are poor or have very unequal needs), *extreme harms for individual people* (where actors suffer from setbacks to their basic interests), and *extreme harms for society* (where markets negatively affect the social framework required for people to have equal standing as citizens).

Perhaps a few examples would be illustrative. Celery markets typically have low scores on these four parameters, which is why we don't find them morally objectionable. Compare this to the following example from Satz involving two kinds of prostitution.⁸ First, consider a poor, 14-year-old streetwalker who is a heroin addict and relies on a pimp for protection. She doesn't get to choose who she has sex with and is the frequent subject of violence. Moreover, according to Satz, this kind of prostitution contributes to gender

inequality and causes women, as a group, to suffer certain social harms (e.g., it contributes to the false idea that women are the sexual servants of men). Clearly, this case scores highly on all four of Satz's parameters. This is likely why we find this situation morally problematic even if we think there should be some kind of regulated market in prostitution. In fact, we regulate markets in sex with the aim of preventing such situations, and if regulation isn't enforceable, we might be better off making prostitution illegal. Compare the above example to that of a high-end escort who freely drifts into the profession—she neither has material want nor lacks other options. She also chooses her hours, who she has sex with, and makes a lot of money. She enjoys her lifestyle and work. Unless one thinks that the very act of selling sex for money is necessarily wrong, it's difficult to see what is morally problematic with the kind of prostitution exemplified in this case. This is because this kind of prostitution doesn't involve weak agency, vulnerability, or harmful outcomes. Satz's view then is that there is nothing *essentially* wrong with prostitution, surrogacy, or other goods in this third class but that markets in these goods are likely to be more noxious than free markets in other goods such as celery, and, as such, markets in these goods should either be regulated or blocked.

Now that we have a better understanding of the commodification debate, we can examine, in the next section, arguments against contract surrogacy, particularly the feminist argument that the practice contributes to gender inequality.

3 | ARGUMENTS AGAINST CONTRACT SURROGACY

There are many objections one could raise against contract surrogacy. Often the practice is equated with baby selling, and since it's wrong to buy and sell babies, contract surrogacy is wrong too. However, contract surrogacy isn't baby selling. The people who pay surrogates don't treat the children they raise as material things or slaves. They treat them the same as any other parents would treat their children. Surrogates are compensated for their labor and for waiving any parental rights they have regarding the children they give birth to—not for the selling of human beings. Perhaps parental rights are the kinds of things that should never be for sale. But this is a separate claim that would require its own line of argumentation. We will return to the issue of parental rights in Section 4.4.

Others object to contract surrogacy on the grounds that it's exploitative, alienating, a violation of human dignity and autonomy, or so harmful that paternalistic interference is required. Along these lines, Overall argues that contract pregnancy destroys individuality and is alienating, and Pateman holds that a woman's reproductive labor has a special status, in that it's more intimately connected to her identity than other forms of labor.⁹ Similarly, Anderson claims that

³Satz, D. (2010). *Why some things should not be for sale: The moral limits of markets*. Oxford University Press. p. 115.

⁴Brennan, J., & Jaworski, P. (2022). *Markets without limits: Moral virtues and commercial interests* (2nd ed.). Routledge, Taylor & Francis Group.

⁵Ibid: 11.

⁶Taylor, op. cit. note 2, p. 11.

⁷Satz, op. cit. note 3, pp. 94–99.

⁸Ibid: 137.

⁹Overall, C. (1987). *Ethics and human reproduction: A feminist analysis*. Allen & Unwin; Pateman, C. (1988). *The sexual contract*. Stanford University Press.

“some rights in one's person are so essential to dignity and autonomy that they must be held inalienable” and that contract surrogacy is wrong, in that it treats “the mother's inalienable right to love her child, and to express that love by asserting a claim to custody in its own best interests, as if it were alienable in a market transaction.”¹⁰ Furthermore, Okin argues against contract surrogacy on the grounds that it's harmful for children.¹¹

The above arguments have already been discussed at length in the literature. I have little to add to these debates and find the objections to these views by Steinbock, Satz, Purdy, and Brennan and Jaworski to be compelling.¹² In my opinion, the strongest remaining argument against contract surrogacy in developed countries is that due to sexist background conditions, the practice is wrong because it contributes to and perpetuates gender inequality. This view is championed by Satz, and I recapitulate her argument for this position below.¹³

First, Satz notes that gender inequality is pervasive in our society. For example, women make significantly less money and do more domestic work than their male counterparts. Moreover, this situation is deeply objectionable. Satz goes on to claim that contract pregnancy contributes to and perpetuates gender inequality in three ways. First, it gives men increased access to and control over women's bodies and sexuality. Second, it reinforces negative stereotypes of women as “baby machines” who should stay home and carry men's seed.¹⁴ Third, it fails to properly recognize women's reproductive contributions by only recognizing them insofar as they're analogous to men's reproductive contributions. Therefore, given current background conditions, surrogacy contracts are seriously immoral. Because of this Satz holds that surrogacy contracts should be “unenforceable in the courts,” “courts should recognize no distinction between genetic and gestational surrogates with respect to parental rights,” and that “third-party brokerage of pregnancy contracts should be illegal.”¹⁵

4 | OBJECTIONS TO SATZ'S ARGUMENT

In this section, I give several objections to Satz's argument against contract pregnancy. These objections concern whether Satz's policy suggestions are consistent with her account of noxious markets and her claims regarding contract surrogacy and gender inequality.

4.1 | Satz's policy suggestions

First, let's focus on Satz's policy suggestions regarding contract surrogacy. Satz holds that surrogacy contracts ought to be unenforceable. This means that in a Satzian society, it wouldn't be illegal to sign a surrogacy contract; however, such contracts would be meaningless. They wouldn't be worth the paper they're written on. Thus, those who hire surrogates could refuse to pay or take custody of the child or children the surrogate gives birth to, and in such situations, the surrogate would have no recourse. It also means that surrogates could take the intended parents' money but not honor the agreed-upon details of the surrogacy contract.¹⁶ For example, surrogates could get an abortion or refuse to remit custody of the child or children they give birth to (even in cases of gestational, that is, nongenetic surrogacy). The latter would lead to messy court battles that would have to be resolved on a case-by-case basis as Satz holds that courts shouldn't show favoritism toward intended parents, genetic surrogates, or gestational surrogates regarding parental rights.

Satz is trying to limit how many surrogacy cases there are without going as far as to make the practice illegal. However, she does so by weakening the agency of surrogates and those who hire them and by making both sides more vulnerable.¹⁷ Moreover, her policies would often lead to harmful outcomes, for example, bitter custody battles and substantial financial losses. This is compounded by the fact that in the absence of legal protection surrogates and their employers would likely turn to third-party brokerage agencies to make sure things go as planned. However, Satz holds that such agencies should be illegal. This would plausibly lead to the emergence of a black market in contract surrogacy. Such markets come with their own set of harms. It could also lead to instances of “surrogacy tourism” in which prospective parents hire surrogates from other countries where the practice is legal or less regulated. This reintroduces concerns about weak agency, vulnerability, and harmful outcomes, particularly if these contracts take place in developing countries. Thus, given her own views, Satz's policy suggestions are problematic as they would lead to surrogacy markets becoming even more noxious.

These points aren't fatal to the feminist position that the main problem with contract surrogacy has to do with gender inequality. Instead, these criticisms focus on Satz's policy suggestions and views on noxious markets. Someone could give the same argument as Satz but conclude that contract surrogacy should be illegal. Perhaps the reason why Satz doesn't go this route is because she doesn't want to restrict the freedom of women who wish to become surrogates. I think this reasoning is misguided. This is because Satz's policy suggestions restrict liberty. They make it *impossible* for surrogates (who are women) and the people who hire them (who are often

¹⁰Anderson, E. (2000). Why commercial surrogate motherhood unethically commodifies women and children: Reply to McLachlan and Swales. *Health Care Analysis*, 8(1), 19–26, p. 23.

¹¹Okin, S. M. (1990). A critique of pregnancy contracts: Comments on articles by Hill, Merrick, Shevory, and Woliver. *Politics and the Life Sciences*, 8(2), 205–210.

¹²Steinbock, B. (1988). Surrogate motherhood as prenatal adoption. *Law, Medicine, & Health Care*, 16(1–2), 44–50; Satz, op. cit. note 3, pp. 117–127; Purdy, L. M. (2018). Surrogate mothering: Exploitation or empowerment? In *Reproducing persons: Issues in feminist bioethics* (pp. 182–197). Cornell University Press; Brennan & Jaworski, op. cit. note 4.

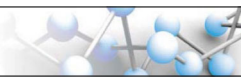
¹³Satz, op. cit. note 3, pp. 127–134.

¹⁴Ibid: 130.

¹⁵Ibid: 132.

¹⁶By “intended parents” I don't mean to beg the question or offend. I simply mean intended per the terms of the original agreement.

¹⁷Fabre, C. (2011). Satz, Debra. *Why some things should not be for sale*. Oxford University Press, 2010. pp. 264. \$35.00 (cloth). *Ethics*, 121(2), 469–475.



women) to do the one thing they really want to do, that is, sign a legally valid surrogacy contract. Satz's policy suggestions also forbid women (and men) from working in surrogacy brokerage agencies. Thus, Satz's position doesn't ultimately seem to be justified by considerations of freedom. In my opinion, the conclusion of her argument should be revised to hold that contract surrogacy ought to be illegal.

4.2 | Control

Surrogacy is a difficult, atypical job. As Satz and others have pointed out, reproductive labor—unlike many other jobs—has a genetic and/or gestational component, is mostly involuntary, involves a 9-month contract that is difficult to terminate, is medically intrusive, and is physically and emotionally demanding.¹⁸ However, Satz is careful to note that there is nothing special about the nature of reproductive labor that singles it out as something that is necessarily wrong. There are other jobs that are permissible and involve these components,¹⁹ for example, sport and military contracts. Furthermore, we already allow people to do far more harmful or dangerous activities for free, for example, smoking or free soloing.²⁰ Lastly, surrogacy can be *morally* and *financially* rewarding. As one surrogate put it, “this is a dream for women to be able to give this gift and have that feeling knowing I provided a family for someone... we were not in need financially; that being said, I never like to downplay the fact that, yes, I was compensated to carry these kids and it helped our family.”²¹ And as one feminist bioethicist notes, “Not only might contracted pregnancy be less risky and more enjoyable than other jobs... there are other advantages as well. Because being pregnant is not usually a full-time occupation, surrogate mothering could buy time for women to improve their lot significantly.”²²

Although there is nothing essentially wrong with reproductive labor, Satz argues that one of the ways in which contract surrogacy leads to and perpetuates gender inequality has to do with the fact that the practice “gives others increased access to and control over women's bodies and sexuality.”²³ For example, Satz notes that in the infamous Baby M case, Mary Beth Whitehead's surrogacy contract asked her to “refrain from forming or attempting to form any relationship with the child she would conceive [... and] not to smoke cigarettes, drink alcoholic beverages, or take medications without written consent from her physician.”²⁴ Additionally, surrogacy contracts often have provisions about medical treatment and the conditions under which it would be acceptable for the surrogate to

get an abortion, for example, if the fetus was suffering from severe abnormalities.

First, setting aside the issue of abortion which will be discussed in Section 4.4, these seem like reasonable requests. I don't think that the intended parents' desire for surrogates not to smoke, drink, abstain from medical treatment, or take harmful medications comes from a nefarious or patriarchal need to control women. Instead, the intended parents are simply looking after the health of the surrogate, fetus or fetuses, and any future child or children. Moreover, regarding the issue of the relationship between the surrogate and the child or children she gives birth to, if surrogacy contracts are to be upheld, then it's important for the surrogate's own well-being that she understands that the future child or children aren't hers to raise.

Second, this level of control is consented to by the surrogate who, at least in one way, often has more control over the situation than those who are hiring her. As Fabre notes, contract surrogacy isn't just about gender inequality.²⁵ In many cases, there is an inequality between surrogates and those who hire them, in that the former can do something (i.e., bear a child) that the latter desperately wishes they could do.

Third, surrogacy isn't merely about men controlling women. Women hire surrogates too (for many legitimate reasons that will be discussed in Section 5), and as previously discussed, Satz's policy suggestions also control women, as does banning the practice.

However, our discussion so far has omitted a key part of Satz's view, that is, why, exactly, the issue of control *qua* contract surrogacy is problematic:

On my view, what makes this control objectionable, however, is not the intrinsic features of women's reproductive labor, but rather the way such control specifically reinforces a long history of group-based inequality. Consider an analogous case that has no such consequence: voluntary (paid) military service, in which men and women sell their fighting capacities. Military service, like contract pregnancy, involves significant invasions into the body of the seller; soldiers' bodies are controlled to a large extent by their commanding officers under conditions in which the stakes are often life and death. But military service does not *directly* serve to perpetuate traditional gender inequalities. The fact that pregnancy contracts, like military contracts, give someone control over someone else's body is not the main issue; rather, the issue is that in contract pregnancy the body that is controlled belongs to a woman, in a society that historically has subordinated women's interests to those of men, primarily through its control over her sexuality and reproduction.²⁶

¹⁸Satz, *op. cit.* note 3, pp. 118–119.

¹⁹Except for the genetic side of things, but it's unclear why that matters. Moreover, this component isn't present in gestational surrogacy except insofar as the practice involves the donation or purchase of the egg or sperm.

²⁰Free soloing is a form of rock climbing where the climbers don't use ropes or other protective equipment.

²¹The New York Times, *op. cit.* note 1.

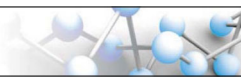
²²Purdy, *op. cit.* note 12, p. 197.

²³Satz, *op. cit.* note 3, p. 128.

²⁴*Ibid.*: 129.

²⁵Fabre, *op. cit.* note 17, p. 474.

²⁶Satz, *op. cit.* note 3, p. 129.



This is a difficult, important passage. I have already argued that in the developed world the kind of control typically involved with surrogacy contracts (e.g., no smoking clauses) isn't particularly objectionable. In Sections 4.3 and 4.4, we will look at other ways in which Satz argues that contract surrogacy contributes to gender inequality. For now, let's focus on Satz's claim that the main issue regarding control and contract surrogacy is that "the body that is controlled belongs to a woman, in a society that historically has subordinated women's interests to those of men."²⁷ I wonder if this is a strong enough reason to ban or interfere with a person's liberty concerning a profession of her choosing. Consider that there are many other jobs that are predominately done by women, for example, schoolteacher, nurse, domestic helper, maid, and server, and this is, in large part, because of past and current injustices. These jobs—like most jobs—involve substantial control over these women's bodies. Does this mean that society should make female servers contracts unenforceable or illegal? To me, this isn't the right way in which to fight inequality.

Satz would likely have two objections to the above argument. First, she might respond that not all servers, schoolteachers, and nurses are women. However, it seems worse to me that these jobs are primarily done by women. Plausibly, the field of nursing is predominately female because of sexist background conditions, but the reason why only women are surrogates is because only women can perform this job. Second, Satz might reply that being a server, schoolteacher, or nurse doesn't involve sexual or reproductive control. But consider other jobs that involve a reproductive component and are only done by women, for example, a wet nurse or a woman who sells her eggs. Satz's arguments imply that society should ban or make these contracts unenforceable too. This seems like a more extreme position than many would want to accept.

4.3 | Negative stereotypes

Satz also holds that contract surrogacy contributes to gender inequality by reinforcing negative stereotypes about women as "baby machines"²⁸ and "incubators of men's seeds," and she claims that "If the practice of contract pregnancy were to become common and widespread, it *might* affect the way all women see themselves."²⁹ I agree that stereotypes—even if false or inaccurate—can shape how people think and view themselves and, as such, can become self-fulfilling prophecies. For example, if society stereotypes women as belonging in the domestic sphere, then there will be more women who become stay-at-home moms and maids and fewer women who

²⁷Ibid.

²⁸One reviewer noted that the phrase "baby machine" is value-laden and could be used as a propaganda term by opponents of contract surrogacy. I agree but use this phrase because it's a term that Satz uses. This same reviewer also notes that the reason why only women are surrogates or "baby machines" is because given our current level of technology only women can produce babies and for the time being this is a biological reality. If ectogenesis becomes available this will change, but so too will the need for surrogacy.

²⁹Ibid: 130–131 (emphasis added).

become doctors and CEOs even if women are better surgeons or leaders than men. Furthermore, I agree that it's *possible* that contract surrogacy could lead to negative stereotypes of women, particularly in societies where women have weak agency and are vulnerable.

However, Satz offers little to no evidence that contract surrogacy actually leads to women being viewed as mere baby machines, and surrogacy may even have the opposite effect. Women's contributions to the creation of life are currently underappreciated. Women can grow a baby inside their body, deliver that baby through their body, and then feed that baby with their body. Comedian Jim Gaffigan makes these observations and then jokes that when you consider the male contribution to life, it's kind of embarrassing.³⁰ Along these lines, Purdy writes:

Women have until now done this reproductive labor for free. Paying women to bear children should force us all to recognize this process as the socially useful enterprise that it is and children as socially valuable creatures whose upbringing and welfare are critically important. In short, surrogate mothering has the potential to empower women and increase their status in society.³¹

These effects have already been seen in some surrogacy cases. For example, one couple who hired a surrogate commented "that was quite an emotional journey for her as well as physical; she got to be a rockstar for nine months to these two gay guys in New York."³² Clearly, this experience didn't cause this couple to view the surrogate they hired as a baby machine. Instead, they're forever thankful for her help with the creation of their family. Such accounts are, of course, anecdotal. But whatever effects surrogacy has on how women are viewed is an empirical matter and can't be decided from the armchair.

4.4 | Reproductive contributions and equality

Lastly, Satz argues that contract surrogacy promotes gender inequality because it fails to properly recognize women's reproductive contributions by only recognizing them insofar as they're analogous to men's reproductive contributions. On this point, Satz writes:

contract pregnancy raises the danger, manifested in several recent court rulings, that motherhood will be defined in terms of genetic material, in the same way as fatherhood. Mary Beth Whitehead [who was a genetic surrogate] won back parental rights to Baby M on the basis of her being the genetic mother. On the other hand, Anna Johnson, a gestational surrogate,

³⁰These observations are from the Jim Gaffigan comedy special *Mr. Universe*.

³¹Purdy, op. cit. note 12, p. 197.

³²The New York Times, op. cit. note 1.

lost such rights because she bore no genetic relationship to the child. These court rulings establish the principle of parenthood on the basis of genetic contribution. In such cases women's contribution to reproduction is recognized only insofar as it is identical to that of men. Genes alone are taken to define natural and biological motherhood. By not taking women's actual gestational contributions into account [... and by] defining women's rights and contributions in terms of those of men, when they are different, the courts fail to recognize an adequate basis for women's rights and needs.³³

Satz's views about parental rights are radical. Most people hold that biological fatherhood and motherhood are determined by genetics. Although they believe that the rights that surrogates do have ought to be respected, they don't believe that gestational surrogates have parental rights regarding the children they are paid to give birth to. However, it may be the case that these beliefs are misogynistic. Let us assume then that parental rights are simply a useful social construct. Until recently, it was expedient and thought of as "natural" to grant birthmothers—who in the past were always genetically related to the children they gave birth to—and their partners' parental rights. But due to technological innovations, we can now separate the genetic from the gestational aspects of motherhood. This opens the question of what gives or ought to give someone parental rights. As such, contract surrogacy doesn't contribute to gender inequality but rather causes us to question frameworks concerning parental rights and family structure that were previously taken for granted.

For the sake of argument, let's assume that gestational surrogates have a legitimate claim to raise the children they give birth to. This view is compatible with contract surrogacy, in that surrogacy contracts typically involve the surrogate waiving her parental rights toward the children that would result from her paid pregnancy. Parental rights aren't inalienable. These rights can be taken away if the parent or parents prove to be unsuitable, and we already allow people to waive their parental rights before birth. As one law review notes, "Numerous case decisions, including the first-ever reported prenatal abandonment case, cite the entitlement of a mother to decide whether to relinquish a child to adoption during the pregnancy."³⁴ Moreover, the Supreme Court has ruled that biological fathers can lose their parental rights before the birth of their child if they don't support the woman and fetus or fetuses during pregnancy.³⁵ The state enforces these decisions, and once parental rights are waived or taken away, they're lost. Thus, if a surrogate who waived her parental rights pre-birth changes her mind, she has no legal claim once the child or children are born.

Satz would likely accuse me of committing an is-ought fallacy. From the fact that courts have decided that parental rights can be permanently waived prior to the birth of a child, it doesn't follow that this is morally right. Perhaps these court decisions are in error and ought to be different. However, it seems correct that parental rights can be waived post birth, and if this is the case, why not during the pregnancy? After all, it's in the best interest of the child and parties involved that issues of custody be decided beforehand.

Satz gives one ingenious argument that could undermine my position. Satz begins by noting that for labor or specific performance contracts compliance can't be enforced.³⁶ For example, suppose I commission Satz to paint a portrait, and I supply her with all the relevant materials, for example, paints, canvasses, and brushes.³⁷ Furthermore, these materials are unique, and Satz couldn't have obtained them without me. Suppose further that Satz defaults on our agreement and doesn't create the portrait. I can sue Satz for breach of contract, but neither I nor the courts can force her to paint. Assuming then that contract pregnancy is a specific performance or labor contract, Satz concludes, "by analogy, if the woman in a pregnancy contract defaults on her agreement and decides to keep the child, the other parties should not be able to demand performance (that is, surrender of the child); rather, they can demand monetary compensation."³⁸

But Satz's analogy is only partly apt. I agree with Satz about the labor aspect of surrogacy contracts. Those who hire a surrogate can't force her to give birth. The surrogate can change her mind and get an abortion, but if she does so, she hasn't completed the terms of their agreed-upon surrogacy contract. As such, she may owe the intended parents monetary compensation depending on the exact details of their surrogacy contract. However, concerning the surrender of the child or children, what matters is who has custody rights, and in typical cases of contract surrogacy these are waived before birth. Thus, by analogy, once the portrait is created, the painter can't legally claim the painting as her own.

Consider another analogous case, that is, recording contracts. Suppose a musician signs a record deal such that future music produced by this artist (say her next two albums or her work over the next 9 months) must be under a certain label. It's true that the record company can't force this musician to make music. However, if the music is produced, then the record company owns the copyright to these albums or songs. Such arrangements seem legitimate and can benefit both parties. The point being that Satz hasn't shown that contracts that involve the selling of the rights to a future entity are invalid. Instead, she has shown that the performance aspect of these contracts is unenforceable, but this isn't related to the issue of custody rights.

³³Satz, *op. cit.* note 3, p. 131.

³⁴Mary Beck, M. (2017). Prenatal abandonment: 'Horton hatches the egg' In the supreme court and thirty-four states. *Michigan Journal of Gender & Law*, 24(1), 53–165. p. 126.

³⁵See the 2013 United States Supreme Court's decision in *Adoptive Couple v. Baby Girl*.

³⁶Satz, *op. cit.* note 3, pp. 129–130. She also notes that this is what differentiates such contracts from indentured servitude.

³⁷Satz's original example involves the painting of a house, but this seems disanalogous in that a house already exists and is a piece of property that someone already owns.

³⁸*Ibid.*: 130.

5 | CONSEQUENTIALIST REASONS IN FAVOR OF A REGULATED SURROGACY MARKET

To be fair, surrogacy isn't like celery. There are situations in which contract surrogacy should be illegal, for example, if its legalization would lead to many women being forced to become surrogates for little money that they, themselves, don't receive. However, such situations are unlikely to occur in the developed world.

Moreover, in the developed world, the best way to mitigate concerns about vulnerability, weak agency, and negative outcomes is via a regulated surrogacy market in which surrogates are matched with potential parents via licensed surrogate agencies. First, a regulated surrogacy market would help to ensure that surrogates aren't vulnerable. We don't want financial desperation to be the reason why women become surrogates. But in a regulated market, surrogacy agencies could screen through thousands of potential candidates to make sure that surrogates and intended parents aren't motivated by the wrong kinds of reasons. Second, surrogate agencies could address issues concerning weak agency by making sure that potential surrogates are aware of the risks associated with pregnancy. Furthermore, agencies could connect potential and current surrogates with psychiatrists, social workers, and former surrogates to help them through the process. Regulated agencies could also serve as an intermediary between the intended parents and surrogates. This would mitigate concerns about inappropriate or controlling interactions between these parties. Lastly, surrogacy contracts could be standardized among licensed agencies. This along with the setting of legal precedent would eliminate many potential harmful outcomes, for example, bitter custody battles.

So far, I have defended contract surrogacy from what is in my mind the strongest remaining objection to the practice in the developed world. I'll conclude by highlighting four benefits of contract surrogacy. These benefits should be weighed against any contribution contract surrogacy may have regarding gender inequality. First, many people desire to have children who are genetically related to themselves. This desire is permissible, and people often report that raising children is the most satisfying and important aspect of their lives. However, some people—estimates are between 10% and 17.5% and these numbers may be on the rise—suffer from infertility issues.³⁹ One benefit of contract surrogacy is that it alleviates some forms of infertility. Second, contract surrogacy gives women more choices over their reproductive decisions, for example, when and how they have children. Third, contract surrogacy allows for the creation of non-traditional families, for example, it

enables gay men, single parents, and disabled people to raise children who are biologically related to themselves, and it's often difficult for these groups to adopt or start a family. Lastly, contract surrogacy can transfer risks or burdens in a way that benefits all parties involved including the children who are, partly, the result of such contracts. On one side, some women would benefit from being a surrogate, for example, they might feel proud that they helped create a family and could put \$30,000 to good use. On the other side, some women greatly desire children, but pregnancy might be especially risky not only for themselves but for the fetus or fetuses and future child or children they would bear. Additionally, pregnancy is especially difficult for some women given their careers, for example, athletes, movie stars, businesspeople, lawyers, doctors, and so on. Voluntary market exchanges between these groups would benefit all parties.

In conclusion, I'm not buying what Satz is selling. In the developed world, there should be a regulated market in contract surrogacy.

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³⁹World Health Organization. (2023). *1 in 6 people globally affected by infertility: WHO*. <https://www.who.int/news/item/04-04-2023-1-in-6-people-globally-affected-by-infertility#:~:text=Around%2017.5%25%20of%20the%20adult,care%20for%20those%20in%20need.>