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What, if Anything, Is Wrong with Baby Selling?*

Margaret Jane Radin**

When I titled this talk, "What, if Anything, Is Wrong with Baby Selling?," I figured we would have debate. Even if I didn't raise the level of debate, we would have debate. You can see how this topic connects with my concerns about property. If it were okay to think of children as property, then it probably would be okay to buy and sell them; and if it's not okay to buy and sell them, then maybe it's not okay to think of them as property.

The issue I'm addressing is in the news a lot. Maybe many of you are aware that legislation is being considered to regulate contract pregnancy, or surrogacy, or whatever you want to call it. (What you call it is rather problematic, too, which I want to talk about.) And some of you may have studied or remember the *Baby M* case in New Jersey a few years ago.¹ This was a case in which a couple decided not have children because the wife had an illness. The husband donated his sperm to another woman who entered into a surrogacy contract with him to deliver the child, but the deal broke down and she wanted to keep the child. She tried to keep it, and eventually the case went to court. When it got to the New Jersey Supreme Court, they said that a surrogacy contract was invalid because, among other things, it violated the New Jersey law against exchanging of consideration for obtaining a child.²

Every state has a law against exchanging consideration for obtaining a child. So if you want a contract pregnancy like surrogacy to be legal, you have to make an exception to every state law, or else you have to repeal all of that and say it's okay to exchange consideration for obtaining a child. What I want us to think about is whether we should reconsider these laws against exchanging money for children. In New Jersey, the trial court in *Baby M* said the contract should be honored because this situation—that is, the situation where an adopting father and

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1. In re *Baby M*, 525 A.2d 1128 (N.J. Super. Ct. 1987), *aff'd in part and rev'd in part*, In re *Baby M*, 537 A.2d 1227 (N.J. 1988).

2. In re *Baby M*, 537 A.2d 1227, 1240-42 (N.J. 1988).

his spouse want to adopt a child that is genetically related to him—is not baby selling. Why not? The trial judge said: “At birth the father does not purchase the child. It is his own biological genetically related child. He can not purchase what is already his.”³ Here are the questions I want to ask:

- How should we know whether to think of this situation as baby selling?
- Does a genetic relationship somehow make this transaction not a sale?
- Does the rightness or wrongness of any transaction where money changes hands, and also parental rights change hands, depend in any way on how we think of it?

I want to answer that last question: Yes. Surprisingly enough, I think the moral evaluation of the transaction does depend to some extent on how we think of it. I also want to answer my first question: Probably Yes. I think that the way we currently understand our situation, the *Baby M* transaction probably is a sale of a child, and so I want to answer my second question, about whether a genetic relationship to the adopting parent(s) can make the transaction into a non-sale: Probably No. Probably the fact that there is a genetic relationship between one or maybe even both of the people who want to adopt doesn’t necessarily make it into a non-sale.

Thus, I’m going to invite us to reflect on baby selling in general and what, if anything, is wrong with it. True to my title, I think many people think that something *is* wrong with it. But they just have a gut feeling, and it’s rather hard to figure out what might really be wrong with baby selling when we think about it rationally. I’m going to go through a list of arguments about what might be wrong with it, but some of these arguments will have arguments on both sides. There will be pros and cons. As you will see, I think the most likely candidate for what is wrong with it, if something is, has to do with the way we view children. I think that if we view children as market commodities, it might make the self-conception of those children as persons harder or impossible. In other words, it might impinge on personhood. If that kind of conceptualization of children as commodities is catching somehow—if we conceive of some children as market commodities because there is a practice of paying money for relinquishing parental rights, then somehow we conceive of all children as commodities—then that is all of us, too, because we have all been children, you much more recently than I. So if it impinges on personhood to conceive of children as commodities, then that’s a reason that baby selling is wrong.

3. *In re Baby M*, 525 A.2d 1128, 1157 (N.J. Super. Ct. 1987).

Now what exactly is baby selling? First, it is a loaded word. People who want to engage in these transactions often call them something else, like reproductive services contracts, or contract pregnancy, or even womb rental. I am going to consider three cases, like the law professor's typical hypos: commissioned adoption; paid adoption of unwanted children; and paid surrogacy.

Case One, which I call commissioned adoption: Let's picture that you want to adopt a baby, and so you go up to a woman of child-bearing years and you say, "I would like to adopt a baby. Would you please get pregnant and deliver the baby to me? Here is the money." Or, "Let's make a contract about it." I call that commissioned adoption, for obvious reasons. Actually, what you are doing is paying money in return for a woman conceiving, gestating, giving birth to, and then relinquishing parental rights to you, the person who pays the money. I think this is certainly the clearest case of baby selling because it treats the child just like any commodity that you try to get the market to produce and then buy. What I mean by that is, in the commissioned adoption scenario, the supply of babies for sale is brought forth by the demand for them. How many babies will be produced for sale in this scenario has to do with how many people are willing to buy them and how much they are willing to pay. Since supply depends upon demand, this is the typical kind of free market structure. Thus, this is the clearest case of baby selling, and of course, all states' statutes prohibit this as exchange in consideration for obtaining a child.

So that is commissioned adoption, pure and simple. Now consider Case Two. I call this paid adoption of "unwanted children." There are a lot of children that are born into the world and their parents, or parent, can't take adequate care of them or for other reasons want to relinquish parenthood. If you paid consideration for that kind of adoption, of a child who was already born to someone who needed to relinquish parental rights, that would be payment of money in return for relinquishing parental rights in a child, but it wouldn't be for conceiving, gestating, or birthing because—by my hypothetical—the child is already born but "unwanted." So now in that case, the supply of children that would be transferred is not in response to the demand for children and how much people would pay for them in a economic market, but is coming about through other factors—maybe poverty, maybe birth control information or the lack of it, maybe religious and cultural traditions, and so on—but other kinds of factors besides sheer market forces. Nevertheless, even though this looks less like the regular old market than my first case, this is also considered to be baby selling as we now see things, and is also prohibited by all those statutes, even though in this case there is much less of the usual market paradigm. In other words, you are not allowed to say to a mother with a child who is not able to keep the child: "I'll give you \$20,000 and you transfer your parental rights to me." The most you can do is pay expenses or certain kinds of support, but you are not allowed to transfer consideration specifically for relinquishing parental rights.

Now consider the Third Case, which I call paid surrogacy. Surrogacy is just commissioned adoption under certain special circumstances. In other words, you go to a woman and you say, "In return for my paying you money, please conceive, gestate, give birth to and relinquish to me a child." But the special circumstances are that one, or maybe both, of the people paying the money are contributing their genetic material to the conception. And the question is whether those special circumstances will make surrogacy an exception to what we call baby selling.

So let's suppose it doesn't create such an exception. In other words, what if the mere contribution of genetic material doesn't suffice to distinguish this case from Case One, pure commissioned adoption? Then it seems to me two things follow. Number one: People who argue in favor of surrogacy have to realize that their arguments are for baby selling in general, since there is not a distinction. That doesn't mean necessarily that we should not permit surrogacy; they just have to realize that. Number two: After we realize that, if we still think it is appropriate to pass legislation that will enable us to have legal surrogacy contracts, then we have to realize that we have to reconsider our laws against baby selling in general. Merely to permit surrogacy would be an irrational exception to our baby selling laws if that distinction based on genetic relationship does not hold good. Now my view is that this question—whether we should reconsider laws against baby selling in general—should be taken very seriously.

That's what I mean to do. I'm going to list various kinds of arguments for and against baby selling, mostly cursorily, and I am going to ask you to reflect on whether they distinguish the special case of genetic relationship or not. Then I'm going to concentrate on the arguments that are most important to me, the ones that seem to me to be telling, and those are the ones that refer to feminism and ones that refer to personhood. As I mentioned, the argument that I find most important refers to personhood. Your self-conception as a person might be a problem for you if you are an exchangeable commodity.

I am going to start by listing a few arguments that I'm really not going to talk about in detail, but are kicking around in the debate, just to have them on the table. First are the kind of arguments which I call liberal arguments. They have to do with autonomy and free choice. The liberal argument in favor of commissioned adoption—payment of money in return for conceiving, gestating, giving birth to and relinquishing a child—is just autonomy and free choice. People should, absent tangible harm to others, have a large sphere of doing what they want. But the liberal argument on the other side is: This is not the way it is in practice. It doesn't come down to free choice, because there is coercion and duress going on, including economic duress. So some argue that people who engage in the transfer of children for money are really under economic duress, if the situation is seen properly. I think that is what the New Jersey Supreme Court

[in the *Baby M* case]⁴ thought, and that's one of the reasons the court ruled that the contract was invalid. It is a common argument. Duress is the other side of the coin if you believe that autonomy and free choice are important. Now if you reflect on whether, on either side of the liberal argument, it makes a difference whether there is a genetic relationship, I think the answer is pretty clear: It doesn't. It's not related to duress or autonomy, whether the would-be payers of money make a genetic contribution to the conception.

Second, there is a category I call traditional arguments. From traditional points of view, the arguments against commissioned adoption are arguments about the structure of the family and arguments about religion. If you have those commitments, you might end up thinking that genetic relationship is important, but usually you think instead that the traditional family and marriage in a traditional way is what's important. Certainly the Catholic position is that way. The Catholic Church doesn't say that genetic relationship makes an exception for sale of babies. Note that you can be a traditionalist and still think that autonomy and free choice are the more important traditional values, so this can coalesce with the liberal arguments.

Third, there are many economic arguments kicking around. Some of you may have seen Judge Richard Posner's several articles arguing in favor of a market for babies.⁵ He is Chief Judge of the Seventh Circuit, and a former law professor who wrote a lot about law and economics. (I think that his baby selling articles are probably going to keep him from ever being on the Supreme Court even if the Republicans get back in. So he has the courage of his convictions.) He says that efficiency is served by free trade, and when people really want things, if some people really want to buy something and other people really want to sell it, it will happen. The only thing is, if the trade is legally prohibited, there will be a black market, and black markets are inefficient. Posner is saying that with all the complicated adoption regulations we have, and people going to foreign countries, and people evading it, and people paying lawyers to evade it and so on, all of this is just a big black market. We would be better off to admit that there is a market in babies and get on with it.

The argument on the other side, from the economic point of view, is that the reason you have prohibitions on certain transactions is because the transaction, if they go through with it, is something the two parties might like, but the parties do not take into account the effect on third parties, or the externalities, as economists call it. If you think that there are major effects on third parties going

4. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

5. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 5.4, at 139-43 (3d ed. 1986); Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *Adoption and Market Theory: The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987); see also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 n. 8, 1863 n. 51 and accompanying text (1987) (discussing Judge Posner's economic theories with regard to a market in babies).

on when children are bought and sold, or adoption rights are sold, then you might want to prohibit being able to do that. So, when you take the economic point of view, whether or not you want to try to stamp out this black market or try to legalize it depends on what you think empirically is the case about effects on third parties. So I won't say any more about the economic arguments, either.

Fourth, there are constitutional arguments. I certainly won't say too much about the constitutional arguments, since I'm a property professor. The argument that surrogacy should be a constitutional right tries to say that privacy and substantive due process would include the man's right to procreate, and men's right to procreate presumably is not limited to their spouses if the spouses are unable or unwilling to help them procreate. That is a dubious constitutional right, but people have argued for it, and you could. In line with the liberal argument, you could also argue that the woman has a constitutional liberty right to sell whatever she wants to. Or you could argue equal protection: You could say, if we allow sperm donors to donate or even sell, maybe we should allow the commissioned adoption transaction, as an analogous transaction for women.

Here, too, there are arguments on the other side. You could argue that commissioned adoption is not analogous to sperm donation because birth mothers develop a relationship with the unborn child that a man doesn't have with his sperm. You might say there is a constitutional argument prohibiting our forcing someone who is a birth mother to give up a child that she decides she wants to keep, because the substantive due process privacy right is that the birth mother has a right to companionship of her children which can't be overridden by contract. So you could have constitutional arguments on both sides. I have often seen them, and I don't think the case is open and shut either way, to say the least.

I'm now going to turn to the feminist arguments and the argument about personhood, both of which I think are very interesting.

The reason that the feminist arguments are very interesting is that there is the same two-sidedness we have seen in the standard arguments I've rehearsed so far. There are really strong committed feminists on both sides of this issue. There are strong committed feminists pushing for legislation to legalize surrogacy arrangements at a minimum, and there are strong committed feminists saying that this is anathema and should never be done. So it's supposed to be pro-liberation and anti-liberation, depending on which feminist you talk to, and that's a very interesting situation. Here is why I think this situation exists, or at least here are the sides in the debate.

What is the feminists' argument in favor of allowing women to accept consideration in return for conceiving, gestating, giving birth to a child, and relinquishing parental rights to the person paying the dollar? Here is how it goes. We are living in a non-ideal world. In our non-ideal world, women have been relegated to a separate sphere apart from the marketplace. They have been kept in the home, which is supposed to be special, but separate sphere ideology instead has made women powerless, because the marketplace is the place of power.

Economic power is power in our society, and economic power has gone to men. So market power is power, and power is liberating. It has gone to men in the past. Women should now be free to get out of this protective sphere and enter the market on an equal basis. Men in power shouldn't tell us what to sell or what not to sell. Whatever is morally difficult in baby selling should be up to women to deal with as a matter of our own moral deliberation and choice. I'll sell what I want to sell, thank you, and if there is a moral problem with it, I'll figure it out along with my sisters. That's the feminist argument. I call this the market liberation argument.

There are two things to notice about the feminists' market liberation argument. One is, I'm sure you have noticed this already, it's quite parallel to pro-choice arguments about abortion. In other words, pro-choice arguments say, if there is something problematic about abortion, nevertheless let us make that moral decision. Don't have the state do that for us. And this is an argument that, at first glance, looks analogous to selling babies. It also looks analogous to arguments about legalizing prostitution. Maybe there is something problematic about markets in sexual favors, or sexual services let's say. But if there is, let the people who want to provide them make those moral decisions. Don't let the state decide.

That is the first thing to notice—these parallelisms that might be important for us to sort out. Another thing that is important for the current context is that a lot of feminists, many feminists that I have talked to, are using this argument to say that surrogacy should be legal, but I don't think that this argument applies only to surrogacy. I think it applies to any kind of paid adoption. It applies to commissioned adoption pure and simple (Case One) and not just paid surrogacy (Case Three). The argument says: We will decide what to sell, and if it is morally problematic, we will figure out the moral problem. That has nothing to do with genetic contribution. That has to do with anything that is an attribute of womanhood that is now being made into a market commodity. So I think those arguments really tell us, if we are serious, that we shouldn't just legalize surrogate parenting, we should rethink baby selling from a feminist point of view.

Shift gears now. There is a feminist argument on the other side; maybe there is an equal and opposite reaction. Feminists on the other side oppose allowing the state to permit women to accept consideration for conceiving, and giving birth, and relinquishing parental rights. So they are saying something like this: Yes, we live in a non-ideal world. In the non-ideal world there has been subordination of women, not just keeping them out of the market, which is true, but also conceiving of women and treating them as baby machines. Women's role as mothers has defined them and subjected them to subordination. So in this non-ideal world of ours, if we allow baby selling, we treat women like anonymous fungible breeders. We reinforce objectification and subordination. We retain this defining role of Mother with a capital M. But now we even make it an alienated version, because we make it into a commodity and an object rather than just saying: That's women's nature and women's character. Entering the market by

degrading oneself is not liberating under these circumstances. This type of feminist argument could conclude by saying, "Women have always both sold themselves and been degraded for it, so let's not do more of same."

We can note again that this argument, the feminist argument against being able to sell babies, or reproductive services, is parallel to arguments against prostitution. It is not, I think, parallel to arguments against abortion, that is, the pro-life side of the debate, because I think the pro-life arguments are more about religion, and more indeed about the nature of women as mothers, which this type of feminist argument is trying to counteract. So I think there is an asymmetry with abortion arguments, but maybe not with prostitution. Again though, more important for my purposes here, this argument is saying: Let's not be so hasty to think that the market is liberating, because it treats women as fungible baby machines and we've already had enough of being treated as mothers by nature.

I think this feminist argument, too, applies to surrogacy as well as commissioned adoption. In fact, it may apply more strongly to surrogate parenting, at least in the case where the reason for the arrangement is that the male wants to carry on his genetic line. (This was part of the litigated case in *Baby M*. The man wanted to carry on his genetic line because he was a holocaust survivor, something we can really sympathize with, surely.) If the reason for wanting to validate the arrangement is that it is so important to carry on the male genetic line that we should have a special exception to laws against baby selling, then what does that say about the place of the woman? After all, a surrogate mother is a surrogate for the father's wife. She is not a surrogate mother, she is a real mother. But she is a surrogate spouse, when the real spouse has failed the man as a baby-maker. So from a feminist point of view, from this side of the aisle, I am tempted to say surrogacy is even worse than baby selling in general. All of this makes me think that if we become serious, as many people are, about making surrogacy a valid option that can be legally enforceable, then the whole thing about baby selling needs to be reconsidered.

Now I am going to talk about a big topic: these arguments about the conception of the person and whether being a commodity does something bad or disallowable to the conception of the person. After this I will take questions or comments. The personhood arguments are arguments about whether there is a good reason to resist a full scale market regime, so I think of this topic as justice and the issue of commodification. There are plenty of issues of commodification, plenty of times where we are making something into a market commodity where there is a problem about doing it, or where maybe we shouldn't. Certainly prostitution is another one. In surrogacy and prostitution, it appears that certain things which were previously considered attributes of women are now being proposed as market commodities, but there are other instances of contested commodification, such as selling pollution permits on the Chicago Board of Trade. Doing this makes something that we thought of as being a harm to ourselves and our environment and our atmosphere into a commodity that we are

selling—in fact on the commodities exchange—and we can ask whether this is a good idea. The talk I gave to your faculty today was about damage remedies—in other words, we can ask whether paying out damages for harm to yourself and your person, like damages for pain and suffering, is a way of making something into a commodity which we really can't conceive of as a commodity.

What do I think about commodification and personhood? One way to look at that is objectification—in other words, an impermissible objectification of persons. This looks at it in a really traditional philosophical way. I think it stems from the philosophy of Kant actually. In any case, whoever said it philosophically, as kind of a traditional rhetoric in our culture we say that persons are unique, that persons should be treated as persons, as unique individuals, with equal concern and respect, that objects are different, that there is a dichotomy between persons and objects, that objects can be manipulated, that we can use objects, but we shouldn't use persons, and so on. That is the kind of distinction that I am getting at.

The distinction philosophically is that a person is a moral agent, autonomous, a subject, self-governing, has a will, is an end in itself, and can't be manipulated by others, or used by others; and that an object, on the other hand, is a non-person, not treated as a self-governing moral agent, doesn't have an end in itself, and could be manipulated by persons. In the philosophy of Kant, he said objects must be manipulated by persons, or persons can't even develop into being persons. We may, today, have a different attitude about our environment than that it must be manipulated by persons, so persons can grow into moral agents, but we still have something left of the idea that a person is a special unique end in itself, and objects can be manipulated and used at will.

Another way to look at this: Part of what makes something a person is that it has attributes as part of its self-constitution. It has personality, has certain unique things that make it/her/him a unique individual. One can think of these attributes as being permanently inside the self; that is, non-detachable. In other words, if I tried to sell my personality, there would be no "me" left to do the selling. That would be a very problematic thing to think about selling, because we think of my personality as being permanently internal to the notion of personhood. So one way to look at this debate is whether reproductive capacity or sexuality are attributes that should be considered permanently inside the person, so as to be not detachable and made into an object of trade.

On the other hand, persons can possess and control objects to achieve their ends as persons, so one can think of objects as outside the person. Objects can be bought and sold in markets to achieve satisfaction of the things that persons need and desire. This is our traditional notion of why there is such a thing as property and contract. We have things that are ours, but they are objects, or at least we can detach them from ourselves without destroying the notion of personhood, and when we do that we can trade them in markets to get things we value more highly, and we have contract laws to make that possible. So it follows that there

is nothing wrong with thinking of objects as commodities, but persons can't be commodities. Why not? Okay, think a little bit more about that. By thinking of commodities as being exchangeable and tradeable for money and other things of like value, we are not only thinking of them as things that we use instrumentally, but we are thinking of them as fungible. We are thinking of things as being tradeable, as if my personality or something that I could detach from myself and trade would be equivalent in value to some other object that someone might want to use. Whatever this is, this is not the way we have conceptualized ourselves. This is not the way we have traditionally thought about personhood. The question to be asking is whether we could think about personhood as another way and still have persons. That's why people think this is really an important question. Could we think about persons, or attributes of personhood that we have previously thought to be essentially inside, as being detachable and saleable, tradeable, equatable with dollars, and therefore fungible? And if we did that, could we still have personhood?

Another way to put that is that the conception of the person that we think we are committed to becomes problematic when attributes that we thought were intrinsically part of the person get detached and get to be thought of as objects of exchange. The way this relates to the baby selling problem is that if we permit baby selling we might be commodifying women, and also commodifying children. Why might we be commodifying women? Well, suppose that we just say: Let baby selling be legal. We could still have some regulation of it. We could say: Let's prevent duress, let's prevent unconscionability, let's prevent rip-offs, just like any other field of contract. Let's say we otherwise let there be a market. Imagine the ads in the paper. Just let your fantasy run a little bit. There are even some ads like this already. Woman with good education, has never taken drugs, blue eyes, athletic ability, musical ability. This woman should command a high price in this market, more so than someone that you can't trust not to take drugs, whose intelligence you don't feel good about, or whose racial background you don't feel good about. Brokers can find a good one for you. It is already happening with finding a mate. Let us find a good mate for you. Let us show you all these videos and find a good mate for you. Imagine a similar marketing technique: Let us find the right person to be the parent for you. We will only charge you \$10,000. What attributes will be valued? All these things that women have previously perhaps considered as attributes of their personhood will start having a market value, such as athletic ability, blue eyes, intelligence, and so on. So that is an argument about commodification of women's attributes if we permit selling of babies, or reproductive capacity, if you will.

And then the argument about commodifying children runs like this. If a baby is the object of a market exchange, there may be an effect on that child's self conception when he or she grows up. You know your parents paid money for you, maybe enough to have bought a BMW, but not enough to have bought a house. When you have a dollar figure, you can make comparisons and you know

what you are worth. (It is like economists who write articles about sexual dollar value.) This equates your whole self to a dollar value when you are a child, giving rise to worries about that child's ability to develop a self-conception as this unique and unfungible human being. Furthermore, kids talk to each other. I know this because my kids have picked up an awful lot of stuff that I didn't teach them. There certainly could be an effect on other children. John, down the street, his parents bought him for as much as a BMW, so my son could say, Am I worth a BMW? How much would you pay for me? It's possible, in other words, that this way of thinking about children could spread, for example, the way some people think that advertising has spread commodity ideas about sexuality or even about the ways we think about politics. So it is possible if we do this, it can spread through our understanding of how we see children, how children see themselves. And since children grow up, how you see yourself when you are a grownup has everything to do with how you saw yourself when you were a kid. So the farthest reach of this argument is that it might just undermine the conception of personhood that we have—all of us.

The question to ask is: How bad is this risk? If the risk is not very bad, then we could buy and sell babies all the time, and we could still have a non-market conception existing at the same time with the market conception and neither one would drive each other out. They would just exist in parallel. Some people say there is such a situation with pets, for example. They are both market commodities and things that people love and cherish; so why not babies?

There is a question here, which I am not proposing to answer, but I think it is central to what we should do when we re-think whether baby selling is bad. Could our conception of the person as unique and worthy of respect, remain firm in the face of market conceptualizations of babies, and hence everybody? I think that this personhood issue ties into feminism too, because the feminists' complaint is that women haven't been taken seriously as persons, but have been put into a gender category that renders them fungible in a way. So the question from the feminists' aspect is: Will commodifying ourselves as women, and commodifying our children, get us more respect and more individuation as persons? As you can tell from what I am saying, I certainly think there is room to doubt it. But we have yet to evaluate the seriousness of the risks. Are they merely theoretical? I can't, at this point, conclude the argument one way or the other. I can conclude this talk, and so I will.

