

Surrogacy, Contract and Labor. Normative Issues Surrounding the Right to Self-Ownership and to Property in the Body

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ABSTRACT

This analysis addresses key normative and critical issues concerning the right to surrogacy as it relates to self-ownership and property rights. Surrogacy remains a contentious choice, expanding possibilities for women as both workers and mothers. Additionally, issues of gender, self-ownership, and exploitation, which were central topics for feminists in the 1980s and 1990s, remain highly controversial in the contemporary debate. Specifically, in the first part, I will examine the limitations of the liberal property model that views individual dual as property holders with the right to do as they please with their bodies and body parts. This issue arises within the current ethical-legal framework that questions whether people can legitimately be considered owners of their bodies and parts. In this context, in the second part, I will argue that in a liberal democratic society, the right to surrogacy is better understood as a contractual right and as a right to freedom of occur optional choice, rather than being tied to the right to self-ownership and property rights.

1. Introduction

In this article, I defend the view that women have the rights to use their body for entering surrogacy contracts, but under certain ethical and legal conditions, requirements and limits. In doing so, I refer to the work of Christine Strachle, aimed at demonstrating that surrogacy is a labor to be defended as the kind of professional choice in a liberal democratic state. But before addressing this point, I critically take up the problematic liberal idea that the right to surrogacy should be justified only in relation to the concept of self-ownership, which is intimately linked to the right to property (in the body). In this regard, I

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will consider the Anne Phillips's critique to the proponents of the self-ownership thesis, who aim at demonstrating how the rights we enjoy over our bodies are justifiable in the same way as property rights over things, on the grounds that if we are free agents, and that is the opposite of a *res*, we are free agents to the extent that we can assert ownership over ourselves¹.

In particular, the problematic point is related to the freedom/property relation that entails recalling property rights that originate precisely from the exercise of freedom insofar as they constitute an integral part of it, since property as such represents a form of expression of freedom. Indeed, the object of property, understood as a set of legal relations governing what each person is entitled to do or not to do with a certain asset, has to do with individual rights and freedoms protected from the interference of others.²

However, asserting this also requires one to justify it adequately, that is, it requires significant reasons that support the position tending to regard property as endowed with intrinsic value, precisely because of its relation to freedom, and any interference in property rights by the state as an interference in freedoms themselves. In fact, when reference is made to what can become the object of property, one does not always consider only that which has a material structure, but also the reference to intangible goods, such as the category of property to self-determination as the free disposition of the subject over his or her own person, body and its parts, with all the difficulties that this entails in the current public space. With reference to the latter, there are two relevant points to be considered: first, subjects boast particularly strong titles to property with respect to conditions that are directly related to their person and thus have the right to full respect for their physical and moral integrity; second, subjects can also dispose of themselves through forms and means of alienation, committing themselves to make use of some of their faculties available to others, as is the case, for example, in the employee-employer relationship, or in the forms of contracts concerning body parts and uses of female bodies, as it is the case with surrogacy. In connection with these two points, I will argue that in a liberal democratic society, the right to surrogacy is better understood as a contractual right and as a right to freedom of occupational choice, rather than being tied to the right to self-ownership and property rights.

¹ Anne Phillips, *Our Bodies, Whose Property?*, Princeton, Princeton University Press, 2013.

² See H. Steiner, *An Essay on Rights*, Oxford, Blackwell, 1994, p. 216.

2. Property, personal autonomy, bundle of rights

In its classical form, property is referred to as a bundle of rights, which may be separate, attributed to different subjects, subordinated to the occurrence of specific circumstances, and variously recombined to form composite or derived rights. Moreover, as Hume has already pointed out, property implies that the figure of the owner and the property possessed are defined precisely and in exact terms, but the figure of those against whom property rights can be enforced may remain generic. The influential analysis of Tony Honoré traces property back to a more or less standard set of different legal relations, aimed at expressing the idea that it is “the best possible interest in a thing that a mature legal system recognizes”³. As is well known, Honoré’s conception is a liberal conception endowed with eleven elements (standard incidents) that jointly characterize property and possessive individualism in mature legal systems; these are subjective legal positions connected to property in a manner not too dissimilar to the model formulated by Wesley Newcomb Hohfeld⁴. From this perspective, Honoré’s conception appears to be among the most convincing theoretically and legally, as is typical of liberal societies in formulating property as a “right” for individuals to own, use, administer, possess, and dispose of property without any interference⁵. This liberal conception raises many critical issues in the contemporary debate about the question of the use of one’s body and its parts. The critical literature on the subject has pointed out that there are still quite a few knots to be unraveled about the difficulties of applying Lockean theory to the question of labor and the appropriation of natural resources. There are likewise difficulties in applying variants of that Lockean theory, beginning with Robert Nozick’s thought, to the question of the ownership of self, body and its parts⁶.

³ A.M. Honoré, *Ownership*, A.G. Guest, *Oxford Essays in jurisprudence*, Oxford, Oxford University Press, 1961, pp. 101-147, p. 108. Cfr. W.N. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, *Yale Law Journal*, 23, 1, 1913, pp.16-59; Id., “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, in *Yale Law Journal*, 26, 8, 1917, pp. 710-770.

⁴ A.M. Honoré, *Ownership*, pp. 107-147.

⁵ C. B. Macpherson, *The Meaning of Property*, Id., *Property. Mainstream and Critical Positions*, Toronto, University of Toronto Press, 1978, p. 1-13.

⁶ See: R. Nozick, *Anarchy, State and Utopia*, New York, Basic Books, 1974.

In this regard, some positions adhering to left libertarianism, while agreeing in principle with Locke's and Nozick's theses on the subject of individual rights, seem to distance themselves from them on the subject of private appropriation of resources, embracing a theory of private appropriation that, rather than grounding a theory of justice, results from it. Thus, for example, Hillel Steiner started from a universal right to an equal share of freedom to derive constraints of justice on the private appropriation of raw natural resources, bringing property back within questions of social justice. And so the justification of particular ownership patterns will depend on the justifiability of that theory of justice on which those patterns rest⁷.

Classical liberal thought, as is well known, has always upheld the necessary connection between freedom and the right to private property, which could be condensed into the idea of property as private ownership of an evidently Lockean matrix. Roughly speaking, a line can be drawn in the debate that since the modern era has been traced back to the contrast between a conception of property as a natural right, filtered through Locke's thought, and a conventionalist response to this conception elaborated in its most sophisticated form by Kant, who assigned to property rights the role of securing for the individual a sphere of external freedoms through which to pursue life plans and projects without needing the permission of others. Moreover, Kant viewed property not as a relationship between persons and things, but as a relationship between persons concerning things, affirming the need for a sovereign authority to establish duties with respect to the property of others. Thus, only rules or legal regimes succeed in establishing individuals' duty to respect the property of others.

On the other hand, the Lockean idea, in the well-known terms that "every man has a property in his own person" and "the work of his body and the work of his hands are properly his own", envisages that each person has a property in his own person in the same way that one owns inanimate objects, in a view that, however, remains metaphysical. In fact, arguing for full and absolute ownership of self requires demonstrating the extent to which this is equivalent to arguing that property rights are natural rights and why their existence in the domain of

⁷ Cfr. H. Steiner, *Territorial justice and global redistribution*, in Gillian Brock & Harry Brighouse, *The Political Philosophy of Cosmopolitanism*, Cambridge, Cambridge University Press, 2005, pp. 28-38; Id., *An Essays on Rights*, Oxford, Blackwell, 1994.

law would reflect the way things are in nature, in which sense the positions that assume everything by default are very problematic in incorporating the Lockean view.

In the current debate there are, on the other hand, also proponents of a new liberal project who claim a robust assessment of civil and political rights such that they dispense with an extension of property rights, at least those that go beyond private (and personal) property.

In the late Twentieth Century, a significant reconceptualization of the notion of property was advanced by Thomas C. Grey with the *disintegration thesis* that revitalized the idea of property as a bundle of rights⁸. Following this thesis freedoms and powers can be divided among the parties in multiple ways, thus nullifying the old idea of a monolithic concept of property or ownership, as well as the assertion of an abstract model of property and proprietary individualism theorized in the seventeenth century by Hobbes and Locke. In general, against this background just outlined, the philosophical-legal problems related to the multiplication of ownership situations have become an inevitable reflection of an increasingly complex, ultimately globalized society in which ever-increasing possibilities for the production and enjoyment of goods for mass consumption have been configured. If Jeremy Waldron has pointed out that private ownership now expresses an abstract idea of an object related to the name of some individual who owns it⁹, Grey points out that the disintegration of ownership is dealing with a complex dispersion of rights claimed by different people and organizations, including the state. In general, against this background just outlined, the philosophical-legal issues related to the ownership situations have become an inevitable reflection of an increasingly complex globalized society. Thus, the idea of bundle-of-rights in defining property ownership comes to be determined as an ultimate consequence of property, ceasing to be an exclusive and monolithic category in political and legal theory. Compared to Honoré's model, where a person has full ownership of property X if he or she has full right to use it, that is, if he or she has exclusivity, in the last two decades, having a property right over the body and its parts has been increasingly configured as having a part of this bundle-of-rights, more and more comparable to contractual rights, whose core rights are also represented by ac-

⁸ See T.C. Grey, "The Disintegration of Property", *Nomos*, Vol. 22, 1980, pp. 69-85.

⁹ J. Waldron, *The Right to Private Property*, Oxford, GB, Clarendon Press, 1990.

tions, interests and claims of third parties, and not only, or no longer, by the exclusive right of the subject (owner) to an asset or to possess a resource.

David Schmitz, in recognizing that at present the expression property rights refers to a bundle-of-rights that may include the right to sell, lend, bequeath or destroy property, insists that at the core of property rights remains the right to exclude so-called non-owners¹⁰. In other words, a right to exclude that is not a mere twig in the bundle, but, Schmitz argues recalling a well-known metaphor, is the trunk of the entire representative tree of property, while all other rights are branches, because without such a right the other rights included in the bundle would be mere freedoms rather than genuine rights. In addition, there are cases governed by an inalienability right, where no one can use property X even if one has the owner's permission. Interesting for the purposes of this inquiry, as will be seen later in the discussion of body property rights, is precisely the reference to the rationale behind the inalienability rule that governs forms of property so fundamental that they cannot be surrendered even by the owner himself, such as the vote or a body part judged to be inalienable for being a person¹¹.

Against the backdrop of this debate, legal and liberal political theory at the end of the twentieth century has taken note of the new challenges that this notion poses particularly with regard to the knot between property and personality, and between property and autonomy, in relation to the body and the formulas of its government. The conflict is deadlocked precisely on the proprietary scheme to be adopted for the governance of the body, a debate that reopens the rift between two positions. On one hand there are those who, in the neoliberal context, maintain a so to speak individualistic vision centered on the right to freely dispose of one's body, a right that also includes the freedom to "sell" parts of the body (the reference is limited to the commercialization of biological materials). On the other hand, those who prefer an idea of the common good for which the freedom to use our bodies is functional to the idea of using its parts for socially useful purposes, such as the freedom of scientific research and the advancement of medicine. In the first case, the body is conceived in relation to personal autonomy, and thus ownership is conceived in an individual-

¹⁰ D. Schmitz, "The Institution of Property", in *Social Philosophy and Policy*, 2, pp. 42-62, 1994.

¹¹ See G. Calabresi, A.D. Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral", in *Harvard Law Review*, 85, 1972, pp. 1089-1128.

istic sense, in terms of freedom of choice; in the second case, ownership of the body is conceived in terms of interests other than self-determination, but still in terms of ownership. In fact, both of these views move from the idea that the body is a source of resources to be used either in an individualistic or in a collectivistic sense.

In this regard, Ruth Chadwick argues that we are so accustomed to thinking in terms of ownership that we now conceive of ownership of our bodies in the same terms. But if we abolished the institution of ownership, we would still be our bodies, which means that we do not have a “right” to “sell” parts of our bodies, and that it also needs to be shown whether the individual himself has the right to do so, or whether selling body parts is acceptable in itself. If the answer were simply in the affirmative, then, says Chadwick, we could say that the body is property for sale, which would mean saying the same thing, but this does not seem to be plausible¹².

3. Property in the body and personal rights: a genealogical relationship

Thus, the legal and political problem of rearranging the relationship between personhood and property lies precisely in the mark of an individualistic paradigm of modernity that emphasizes the subject and his or her rights, which flows into classical liberalism’s conception of personal identity. It is a matter of seeking a solution for contemporary legal discourse that goes beyond the impasse between body and material life, between *res* and person, and that considers in the idea of personhood the entrenchment of an ability to maintain over time an authentic representation, because the subject is free and autonomous to the extent that he is able to define and expand what belongs to him. Although it is true that the body is the first and most significant dimension of exteriority, here again the Lockean idea is grafted on, whereby individuals are not autonomous beings, in the sense that they do not have absolute free availability of self because there is the law of nature and the imperative to self-preservation, and, for this reason, self-ownership in Locke would be in close connection with the limits of individual power over self.

In the reciprocal relation between property and freedom, there is thus a radical shift: Locke’s individual does not hold the free availability of the body,

¹² R. Chadwick, “The Market for Bodily parts: Kant and duties to oneself”, in *Journal of Applied Philosophy*, 6, 1989, p.136.

but rather only its use, in accordance with the law of nature. Thus, ownership of the person excludes absolute right over one's body, and this implies the recognition of a power to control the self that is not exhausted, but is based on the possibility of emancipation from the biological body. For Locke, the prohibition against suicide, and buying and selling the imperative not to self-destruct is sacrosanct, thus slipping from rights to civil interests as a function of the preservation of life, liberty, health and bodily integrity that represents the task and delimitation of the civil institution. The self-owning person is a moral subject in Locke. However, such a Lockean conception today is rejected by libertarianism according to the perspective that it is precisely the natural and inalienable character of the right of property over one's own person that would justify the claim to reduce or completely extinguish state prerogatives over the individual.

Both liberal and non-liberal rhetoric vitiate the debate on these issues today, giving rise to motivations that connote certain actions as illiberal or paternalistic. In a context of control over the human body and its parts, the additional conceptual factor is (arguably) related to being sentient and capable of autonomous decision-making. One reason that is often invoked to justify this course of action, which can also be framed in the rhetoric associated with moral and legal paternalism, lies in the interpretation of the concept of ownership as merely an expression of autonomy. This suggests that the rights, freedoms, and powers associated with ownership should not be used to compress the rightful sovereignty that each person has over himself, as the essence of liberalism in accordance with Lockean principles, from which some current decisions of the Courts have derived their line of reasoning, whereby every human being should have decision-making authority over his or her body in order to express his or her personal autonomy. But the fear of the individual becoming an object of property by losing ownership of himself as a subject of law seems to be part of the justifications for preventing and coping with the phenomenon of the trade in body parts, which recalls the slippery slope argument of body slavery. This shows how the Millian autonomy/slavery dichotomy can be used as an argument with opposite outcomes, shaping different and opposing social or political conceptions within the liberal societies. However, even moving within the harm principle, the problem of justifying the position of law, namely whether or not the body is an object of property, remains unresolved.

The effects of all this can be attributed to the category of property: this notion has probably assumed an undue central role in the body property right's

debate, as the law has elected it as synonymous with the concept of decision-making authority, rather than considering the question of what kind of decision-making authority is most appropriate in the cultural, political and social circumstances that have given rise to increasingly complex moral and legal scenarios. Attempts to clarify the issues have been more about projecting the doctrine of property and its uses on the body and its parts within a normative framework centered on the notion of property itself, trying to apply property standards in response to contemporary questions raised by the body and its possible uses in science and technology. The focus of the question remains to understand whether and to what extent the most appropriate method of giving legal effect to decision-making autonomy over one's own body is to resort to the use of the concept of property. Only at a later stage will it be possible to consider what policies and system of regulation a society can give itself if it wants to grant its individuals the right to sell body parts or make them available for services for a fee, that is, under what conditions a liberal society may or may not introduce paternalistic measures that bring part of individual autonomy back under the sphere of state decision-making authority. The inconsistencies and critical issues seem to lie in the fact that the law has limited itself to regulating individual decisions on control of the body by applying a paternalistic line, but at the same time justifying this approach through recourse to the notion of property, and this is inconsistent with the assumptions of liberal philosophy that have informed contemporary societies. Property can play a role in disciplining the body if we first define what kind of authority and control individuals have over the body and its parts. The issue therefore revolves around the question of whether people should have the right to decide about their bodies. The point also lies in identifying what rights are involved and what legal institutions or instruments should be deemed to regulate this, i.e., contract, etc. If the degree of individual authority and control is socially determined in a way that precedes its transfer into the legal sphere, then the solution to these questions will ultimately lie on the relevance of social norms and on balancing this with individual autonomy, against the backdrop of possible risks of overreaching into paternalism, rather than on the translation of property rights as body property rights. In this regard Eugene Kamenka and Alice Tay have argued that proper-

ty rights, like many other rights, are defeasible and that in general they have never been trumps in the game of life¹³.

As a consequence of this and according to the bundle-of-rights model, it's important to recognize that a person's legal rights concerning their body can be constructed in various ways in contemporary legal and bioethical debates. The term "ownership" can denote not only full property rights but also certain inalienable rights, such as the right that one has to one's own life and person. In this direction it's crucial to differentiate between the use of "own" to describe full property rights, which include the right to sell, and its use to describe inalienable rights. And this distinction raises the question how should surrogacy be classified within this bundle-of-rights.

4. The tension between ownership, property and women's bodies in surrogacy

How should we think about the relation between women's bodies in surrogacy practice, self-ownership and the property rights included in the property bundle? If we are our body we simply own our body, then is there a problem with treating bodies as objects or properties? Is there a defensible basis for seeing bodies as different from "other" material resources? Or is thinking the body *special* a kind of philosophical matter that blocks a clear analysis about regulation of practices such as surrogacy? More or less convincing answers have been attempted to these questions, which in this analysis I'm going to argue, specifically in relation to surrogacy. Anne Phillips's thesis contributed significantly to the question of treating bodies as objects or properties¹⁴. She argues that "thinking of the body as property encourages a self/body dualism that obscures the power relations involved in all contracts that cedes authority over the body"¹⁵. Phillips claims her concern in conceiving of ourselves and our bodies in the discourse of property, and she says that the body, especially the women's body, is problematically different, so "We cannot draw what Ronald

¹³ Cfr. A.E-S. Tay, E. Kamenka, "Introduction: Some Theses on Property", *UNSW Law Journal*, 11, 1988, pp. 1-10, p.10.

¹⁴ Cfr. A. Phillips, "It's My Body and I'll Do What I Like With It: Bodies as Objects and Property", in *Political Theory*, 2011, Vol. 39, 6, 2011, pp. 724-74.

¹⁵ *Ibidem*

Dworkin once termed ‘a prophylactic line’ around the body”¹⁶. If we are embodied beings, this involves taking our bodies with us in everything we do, so we cannot differentiate those activities that require the body from those that do not. In recognizing these complexities, we should not overlook the core question related to the concept of body property and the strong arguments against markets in intimate bodily services, practices, and body parts. This includes questioning the justification for payment for explicit bodily services while condoning payment for services where the body is more incidental. Building on these problematic issues related to Phillips’s questions, I will critically examine these three aspects: (1) the relation between property in the body and property in the person; (2) The (controversial) right of all individuals to employ and dispose of their bodies freely; (3) Surrogacy as a right to freedom of occupational choice?

4.1 The relation between property in the body and property in the person

As discussed earlier, in contemporary legal-philosophical debates, the concept of the body as (private) property frequently appears, particularly in relation to the right to exclude. The question of whether the body should be treated as property is especially pertinent when considering policies on surrogacy as a reproductive service. The question, related to the issue of “body exceptionalism”¹⁷, is particularly challenging regarding surrogacy, as it may represent the notion that women’s identity is uniquely tied to their reproductive capacities. Or in other words, as Julian Savulescu asks, “If we should be allowed to sell our labor, why not sell the means to that labor?”¹⁸. In this context, Phillips’s view on the uniqueness of women’s relationship to their bodies aligns with Jennifer Nedelsky’s position. Nedelsky argues that property constructs others as threats to one’s freedom, promoting a deeply individualistic understanding of rights and obligations. This perspective reinforces a “protective individualism” that overlooks the interdependent nature of human relationships and discourages

¹⁶ Cfr. A. Phillips, *Our Bodies, Whose Property?*, cit., p. 49.

¹⁷ N. Eyal, “Is the Body Special?”, *Utilitas* 21, 2, 2009, pp. 233-45.

¹⁸ J. Savulescu, “Is the Sale of Body Parts Wrong?”, in *Journal of Medical Ethics*, 29, (2003), pp.138-139.

collective approaches to addressing social issues¹⁹. For Nedelsky, and similarly for Phillips, using the language of property in relation to surrogacy is problematic because it implies that certain capacities can be separated from the person. This perspective risks treating surrogacy labor, as Savulescu noted, like a trade involving detachable objects such as cars, thereby understating the implications for the self. On this point, as Carol Pateman states, “a worker cannot send along capacities or services by themselves to an employer...employers hire persons, not a piece of property”²⁰. Well, this means that when we talk of owning our bodies and capacities, or suggest that contracting out the use of the body is no different in kind from contracting out the use of a car or house, we imply an ideological distinction between self, capacities and the body that houses or cars them. This means to normalize what remains a power relation. But the starting point of Phillips, that I consider correct, is that we do not need to assert property in the body in order to express what we care about when we say “It’s my body”. In this context, the use of property rhetoric is superfluous. As Nedelsky has contended, property constructs figurative barriers around the self, portraying others as potential threats to one’s freedom. By employing such metaphors to articulate bodily rights, there is a risk of committing to more than we initially intend. I find Nedelsky’s concern regarding protective individualism highly pertinent. However, the specific issue to emphasize here is that when we discuss activities like “renting,” if we frame a surrogacy contract as “renting out your body,” the issue arises that contracting for the use of the body is fundamentally no different from contracting for the use of a car or house. Phillips argues that framing these arrangements in terms of property normalizes what fundamentally remains a power dynamic. Unlike a car, which retains its autonomy when rented out, a person agreeing to work for another always risks a loss of personal autonomy. The issue lies in how representing our agreements in property terms obscures this vulnerability. By describing relationships in terms of property rights and exchanges, it can diminish our awareness of the true nature of the relationship. This can reduce our readiness to recognize new demands, limit our ability to resist, and convince us that no further action is possible. However, as Pateman argues in *The Sexual Contract*,

¹⁹ J. Nedelsky, “Reconceiving Autonomy”, in *Yale Journal of Law and Feminism* 1, (1989); Id. “Are Persons Property?”, *Adelaide Law Review*, 24, 2003, pp. 123-131.

²⁰ C. Pateman, “Self-Ownership and Property in the Person”, in *Journal of Political Philosophy* 10, 2002, pp.20-53, p.33.

it is compelling to view fictions of property in the person as particularly significant in contracts where the body is not incidental but central to the agreement²¹.

However, it is challenging to pinpoint what distinguishes the body as special or provides the essential criterion for distinguishing between legitimate and illegitimate actions. While donating blood could reasonably be seen as a civic duty, few would argue that women have a moral or civic obligation to undergo the invasive medical procedures involved in surrogacy. Phillips contends that when an action is considered significantly beyond ordinary expectations, compensating a surrogate for out-of-pocket expenses, special dietary needs, and medical visits is appropriate. Pregnancy is physically demanding, and childbirth is rightly termed labor; thus, it would be hard to justify a commissioning couple receiving these services without offering compensation. If any form of surrogacy arrangement is permitted, it would be exploitative not to recognize the labor involved and provide some form of compensation. Phillips, however, argues that this should be considered compensation rather than payment: compensation covers actual costs along with some monetary recognition of the donor's generosity, but it does not entail a market-driven payment influenced by overall supply and demand. Donna Dickenson, on this matter, suggests that the central issue is not whether to pay or not, but rather to evaluate the fairness of expecting individuals to undertake tasks without compensation. She questions whether introducing a market mechanism is appropriate because payment differs fundamentally from participation in a market. She emphasizes that for a market to exist, it must involve more than two individuals and must be open to buyers and sellers who are not connected through familial ties²². Similarly, Phillips argues that when feminists advocate for surrogacy as a choice, they are drawing from the classic liberal tradition, which prioritizes individual choices without fully considering the context in which these choices are made. This discourse often overlooks the crucial question of what alternative options are available to individuals making such decisions and disregards the power dynamics between the parties involved in agreements like surrogacy contracts. Despite recognizing the tension between power and inequality, some feminist thinkers still view the decision to become a surrogate as deserv-

²¹ C. Pateman, *The Sexual Contract*, Stanford University Press, 1988.

²² D. Dickenson, *Property in the body: feminist perspectives*, 2nd ed, 2017, Cambridge, Cambridge University Press, pp. 39-40.

ing of protection. Neoliberal feminism has established its position on this matter, and Third-wave feminism along with the sex workers' rights movement have influenced a contemporary feminist consensus: women may opt to engage in these roles either for personal fulfillment according to their own terms or to generate income²³. Certainly, the globalization of the surrogacy industry has significantly influenced feminist perspectives on surrogacy. It is impossible to overlook the poor conditions and apparent exploitation prevalent in the surrogacy industry, particularly in India and other developing regions. Phillips suggests here that, in contrast to liberal discourse, labor law acknowledges the inherent inequality of bargaining power between workers and employers. Regarding surrogacy, it is feasible to establish a system of compensation without necessarily advocating for the introduction of a market. The justification for compensation does not necessarily imply a stance on establishing a market. However, we will revisit these issues in the final section.

4.2. The (controversial) right of all individuals to employ and dispose of their bodies freely

Returning to the initial part of this analysis, the central question revolves around whether and to what extent the decision-making concerning one's own body in surrogacy should invoke the concept of property within the liberal framework. In other words, it explores the conditions under which a liberal society might consider introducing paternalistic measures that bring aspects of individual autonomy back under state authority. Specifically, what unique aspects of the body justify the argument against introducing markets for body parts or highlight the issues with markets in surrogacy?

Debra Satz contends that answers to these questions cannot be found by appealing to supposed "essential" qualities of bodies, sex, or reproduction, nor by asserting that a person's identity is inherently more connected to their sexuality and ability to become a mother than to any other capacities they possess²⁴. This notion would constrain us with rigorous positions that make it challenging to justify abortion, which is why in Satz's argument, the opposition to markets in reproductive labor hinges on circumstances rather than inherent

²³ S. Lewis, *Full Surrogacy Now: Feminism Against Family*, Verso Books, 2019.

²⁴ D. Satz, *Why Some Things Should Not be For Sale*. The Moral Limits of Markets, Oxford, Oxford University Press, p. 147.

characteristics. She contends that contract pregnancy “places women’s bodies under the control of other and serves to perpetuate gender inequality”²⁵. However, it is these circumstantial characteristics, rather than an inherent alienation of women from their essential identity, that render markets in female bodies problematic. While this argument holds merit, there could be at least one non-circumstantial reason for opposing markets that directly deal with bodies. Specifically, more than other markets, markets involving bodies inherently depend on inequality. Phillips’s thesis on this matter appears crucial: “In an imagnate world of social, economic and gender equality, why would some of those choose, out of all possible activities, to specialize in kidney vending? It is hard to conceive what, in those circumstances, would propel anyone to sell, though correspondingly easy to imagine that, in that ideal egalitarian world, many more would offer to donate. Similar arguments apply to the trade in intimate bodily services: most women of child-bearing age can do babies, so what, other than inequality, leads some people but not others to specialise in the provision of reproductive service? It is entirely plausible that markets in other thing could develop even in conditions of total equality because of the benefits we can hope to get from specialising in different trades. It is hard to see why markets in body parts or services would arise except where there is inequality”²⁶. The inequality inherent in such markets is not merely incidental; it is an intrinsic feature because when purchasing other types of services, we often feel that we are buying something we would never personally provide. However, for some of these activities, it is plausible that the individuals paid to perform them perceive them differently. The market for human organs exemplifies systemic inequality between those who receive and those who sell, thereby undermining our moral equality. Surrogacy, on the other hand, presents a less contentious argument. Many surrogates are motivated by the satisfaction of assisting gay or infertile couples, and agencies typically exclude candidates in severe poverty, reducing income disparities with commissioning couples. The reality that financial considerations drive participation in commercial surrogacy and influence various employment choices is not a significant issue, as Phillips argues, because all actions involve people doing tasks for money that they might not do out of affection, and wealthier individuals purchasing what less affluent indi-

²⁵ *Ibidem*

²⁶ A. Phillips, “It’s My Body and I’ll Do What I Like With It: Bodies as Objects and Property”, *cit.*, p. 736.

viduals offer for sale. The core issue is that an employment option, accessible to anyone possessing a body, becomes nonsensical outside the framework of inequality. Therefore, it is problematic to endorse the viewpoint suggesting that the natural and inherent nature of property rights over one's own person justifies reducing or eliminating state authority over the individual. Similarly, relying on a strategy of *soft paternalism*, where the state intervenes to determine the voluntariness of such choices, would also pose challenges²⁷.

4.3 Surrogacy as a right to freedom of occupational choice?

Christine Straehle's analysis offers a significant contribution to the critical examination of surrogacy within the liberal framework of property rights and self-ownership. She specifically addresses gestational surrogacy arrangements, where the surrogate has no genetic connection to the child²⁸.

Straehle supports surrogacy as a contractual right, often framed as balancing the harms and benefits associated with the right. She argues that the primary good worth protecting is the right of surrogates to self-determination and control over their bodies, facilitated through contractual agreements with commissioning parents. Commercial surrogacy can be defended from the perspective of occupational freedom, emphasizing the importance of protecting conditions for individual autonomy, self-realization, and self-respect. So, in liberal democratic societies, the state recognizes citizens' right to occupational freedom, which it typically protects. Following her perspective that rights should be evaluated based on the interests they protect, Straehle highlights the negative aspect of occupational freedom in defending surrogacy as a right: individuals should be as free from prohibitions as reasonably possible when choosing their occupation. This pertains to the domain of *autonomy* and *agency*. While there can be restrictions on some choices, such as those necessary to protect basic interests for a decent life and human needs, or when individuals cannot safeguard their basic or autonomy interests, like protection against

²⁷ See L. Kenendy, "Can I Have Your Baby? Paternalism, Autonomy, and Money in California's 'Surrogacy-Friendly' Statutory Scheme", in *Stanford Law & Policy Review*, 33, 2022, pp. 187-215.

²⁸ C. Straehle, "Is There a Right to Surrogacy?", in *Journal of Applied Philosophy*, Vol. 33, No. 2, 2016, pp. 146-159; A. Gheaus, C. Straehle, *Debating Surrogacy*, Oxford University Press, 2024.

bodily injury, Straehle acknowledges these concerns. She recognizes the importance of individual autonomy, agency, and bodily self-ownership. Drawing on Joseph Raz's concept of autonomy, Straehle argues that being autonomous involves having a sense of self and individual agency²⁹. This involves having the individual capacity to implement autonomous decisions that shape the course of their lives. Straehle references self-ownership arguments from Robert Nozick and G.A. Cohen in her discussion³⁰. In particular, Nozick, a libertarian philosopher, suggested that accepting individual self-ownership rights is essential to support and uphold liberal ideas about individual autonomy. Straehle argues that self-ownership rights are connected to having the means to be autonomous and lead one's own life. Therefore, surrogates should have the right to choose surrogacy as a form of labor, as it can be an autonomously chosen way of using their bodies. At this level, it is crucial to examine whether there is indeed a link between self-ownership and the foundation of individual autonomy. Here, Straehle follows Cohen's position in claiming that "the more plausible interpretation than the full-fledged libertarian one suggests that ownership is conducive to the full range of autonomy, not synonymous with it. It is plausible to suggest that self-ownership enables the full extent of individual autonomy, understood as a range of a person's choice, and not a personality or character trait"³¹.

How does this relate to freedom of occupational choice? In its negative interpretation, as a principle justifying freedom from interference, self-ownership rights demand protection of the body from harmful interference by others. This perspective also implies a distinction between self-ownership and self-determination, with self-determination being a possible consequence of self-ownership: individuals can be self-determining if they have self-ownership. These two concepts are interdependent. In this argument's context, it is important to note that women, like all human beings, should be free from interference in deciding how to use their bodies, as long as they do not infringe on others' rights. If women freely consent to work as surrogates, they should have the right to choose surrogacy work. However, it is essential to consider the cir-

²⁹ See: J. Raz, *The Morality of Freedom*, Oxford, Oxford University Press, 1988. See also: A. Gheaus, C. Straehle, *Debating Surrogacy*, cit., p. 22.

³⁰ See: R. Nozick, *Anarchy, State and Utopia*, cit.; G.A. Cohen, *Self-Ownership, Freedom and Equality*, Cambridge, Cambridge University Press, 1995.

³¹ A. Gheaus, C. Straehle, *Debating Surrogacy*, cit., p. 33.

cumstances under which consent is given, especially in light of the fundamental patriarchal structures that still influence women's lives. The challenge is to critically assess the meaning of consent without denying individual women's agency by disregarding it. Another reason why freedom of occupational choice should be protected as a liberty right is that the profession or employment we choose can be integral to our life plan, providing a foundation for social self-respect. According to John Rawls, self-respect encompasses a person's sense of their own value and a secure conviction that their conception of the good and their life plan is worth pursuing³². People will have access to the social basis of self-respect if they can pursue a life plan they consider good or valuable and that is validated by others. This means that the extent to which professions are valued in society, and thus can serve as the social basis of self-respect, depends, in part, on how these professions are perceived within society. The issue with surrogacy is that it is valued, but not recognized as work. In this context, Strachle addresses whether life plans must meet certain standards to enable individual autonomy and provide the social basis of self-respect.

Should we evaluate the kind of goals and goods people pursue in their life plans?

Rawls stipulates that if individuals are recognized in pursuing a rational life plan, they will have secured the social basis for self-respect. One way of realizing one's life plan is to choose a specific profession, which serves as a means of achieving one's interests and aims. According to Strachle, women may choose to work as surrogates for various reasons, but most importantly, they may do so to achieve significant goals in their lives. The discussion of surrogacy suggests that its social status is highly contingent, dependent on changing social norms surrounding family, reproduction, and women's work. Autonomy requires the ability to present oneself to the world with the reasons and values one has adopted. In light of this, Strachle's thesis supports surrogacy as a right to freedom of occupational choice, based on the link between self-ownership, the right to use one's body for one's own purposes, and individual autonomy. However, concerns remain about whether surrogacy is a truly voluntary decision and whether women have other alternatives to earn the money needed to repay loans. What counts as an acceptable context of choice can be evaluated based on an objective standard, though, such as the promotion of individual

³² J. Rawls, *A Theory of Justice*, 2nd ed., Cambridge, MA, Harvard University Press, p. 79.

wellbeing, the meeting of basic needs, or human flourishing. However, no international surrogacy public policy will effectively address and improve the fundamentally unequal conditions under which women make choices. We need to recognize that surrogacy work should be protected under the liberal principle that societies should safeguard freedom of occupational choice. From this perspective, surrogacy can be chosen as part of a life plan, allowing women to use the money earned to pursue their own interests and provide for their families.

The challenge is to codify surrogacy in a way that ensures it is chosen under autonomy-enabling conditions, voluntarily, and free from coercion. This can best be achieved by requiring that contracts are overseen and enforced by the state.

Straehle claims that while it may be true that surrogates hand over jurisdiction over at least some parts of their body, this not means a permanent alienation³³. The assumption underlying the autonomy-based argument for freedom of professional occupation is that it aims to promote a reasonable context of choice. Justifying the prohibition of surrogacy work might involve arguing that surrogacy is an unnecessary option within an otherwise reasonable set of choices available to potential surrogates. From this viewpoint, one might argue that surrogacy should not be protected as an option within the liberal framework of occupational choice freedom.

On a conceptual level, prohibiting work as a surrogate can be seen as an infringement on the liberty right of professional choice, effectively restricting the context of choice. On a practical level, those who advocate for the prohibition of commercial surrogacy out of concern for individual surrogates must also address the context in which surrogates make their decisions and explain why prohibition is the best option in an inherently unequal world. As Phillips argued, markets in body parts or bodily services rely on inequality more so, and more intrinsically, than other markets. However, Straehle offers a different perspective. She believes it is possible to legislate in favor of allowing commercial surrogacy, for example, by applying minimum wage legislation to create positive conditions for individual choice. To enhance the perspective of free-

³³ A. Gheaus, C. Straehle, *Debating Surrogacy*, cit., p. 47. See also C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person*, Oxford, Oxford University Press, 2006

dom of occupational choice, she justifies minimum-wage legislation as a means to prevent fundamental inequality and dependence in society.

5. Final remarks

Reflection on the concept of property and our sense of belonging within a legal system lies at the heart of the philosophical-legal debate, alongside discussions on sovereignty and self-determination. One area of focus is the consideration of self-ownership from two perspectives: alienability and inalienability of the subject who owns or holds property. Current practices, such as surrogacy, the buying and selling of organs, and the patenting of biological material, highlight the possibility that parts of the body can be separated from their owner for specific uses. Consequently, certain components, including biological samples and DNA, are alienable and can be traded. The primary questions surrounding these practices concern their social desirability and the consequences at the market and commercial levels involving material corporeality. Conversely, the category of inalienability within self-ownership includes powers, capacities, abilities, and talents that are inseparable from their owner. These two categories intersect in the concept of the “right of self-government”, which implies that this right can be, at least partially, alienated.

In this context, Phillips’s thesis is closely aligned with Margaret Radin’s perspective. Radin argues that, to protect and promote flourishing self-development, it is essential to render market-inalienable those things that are deeply connected to our personhood³⁴. Although some liberal theorists view market inalienability as a restriction on human freedom, Radin’s discussion on incorporating market-inalienability into public policy is both urgent and complex, especially in our unequal and challenging society. Radin suggests that we must accept the condition of incomplete commodification as a medium-term solution to justify various business regulations. For instance, while labor is commodified under capitalism, regulation and collective bargaining mitigate the market’s full impact on labor. Collective bargaining can help workers limit

³⁴ M. Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things*, Cambridge, Mass: Harvard University Press, 1996; Id. *Reinterpreting Property*, Chicago, IL, and London, University of Chicago Press, 1993.

the level of alienation they experience at work, promoting a more flourishing self.

In the case of commercial surrogacy, Radin argues that it should be treated as incomplete commodification. This means that while surrogacy could involve compensation, the law should prohibit the enforcement of surrogacy agreements through specific performance, which would treat children as commodities to be handed over. Radin contends that beyond the individuals involved in a surrogacy transaction, commodification impacts society by shaping how workers' dignity and other normative values are protected.

Feminists rightly express concern about government regulation of women's reproductive choices based on normative values, especially since those in power are often men seeking to control women's bodies. However, Phillips argues that banning commercial surrogacy is fundamentally an economic regulation rather than a personal one. Conversely, Straehle believes that surrogacy as work can serve the ideal of individual autonomy and can function as one of the choices available to women.

The foundations of social respect, if properly regulated by liberal democratic states, can be established. Regulation can offer a level of certainty and a planning perspective that both surrogates and intending parents may lack if planning is left to surrogacy agencies, doctors, and lawyers. In this regard, Straehle concurs with Ruth Walker and Liezl van Zyl, who have suggested developing "a professional model of surrogacy"³⁵. But there is a difference. Straehle's concept of surrogacy as licensed work aims to regulate commercial surrogacy. In contrast, Walker and van Zyl propose exploring alternatives to both commercial and altruistic models of surrogacy, drawing inspiration from professions such as nursing, teaching, and social work. Surrogates provide a service, a form of care that is fundamentally ethical in nature, and should, therefore, be compensated. This proposal is reasonable, assuming that liberal democratic states accept a special responsibility for children and have an interest in ensuring that children are born with the legal protections provided by reasonable contracts between intending parents and surrogates. Moreover, it is reasonable to assume that governments have an interest in protecting their citi-

³⁵ R. Walker, L. Van Zyl, *Towards a Professional Model of Surrogate Motherhood*, London, Palgrave Macmillan, 2017. Taking inspiration from professions like nursing, teaching, and social work, the professional model recognizes the nurturing motives of surrogate mothers while also providing compensation for their efforts. In this sense

zens who engage in surrogacy and safeguarding surrogates from exploitation. This is why we agree with Walker and van Zyl that (commercial) surrogacy regulation should fall under state jurisdiction, much like other labor conditions and relations are regulated by states.

In conclusion, I agree that surrogacy contracts should be carefully regulated. Still, I have to disagree with those who call for the prohibition of the right to surrogacy as a contractual right. The state should be actively involved in surrogacy contracts, and social services should be crucial in drafting these agreements. An essential question in this context is establishing criteria for navigating the tension between surrogacy work as an expression of freedom of occupational choice, promoting individual autonomy, and the proposals to formalize surrogacy work through law. This tension revolves around bodily self-ownership as a rationale for permitting surrogacy and protecting the sovereign right over one's body. In my view, the primary normative issue to be addressed to deal with this tension is to show how the right to surrogacy as a contractual right and as a right to freedom of occupational choice can be part of the construction of an appropriate bundle of rights: on one side, individual liberties, and rights are regarding the use of one's body (the right of a woman to employ her womb for surrogacy), on the other side, there are rights, interests, and concerns from intending parents that need to be addressed.

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