

## A Partial Defense of the Non-Commercialization of Surrogacy

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Résumé de l'article

La Loi sur la procréation assistée du Canada justifie son approche de non-commercialisation de la maternité de substitution par le fait que les paiements commerciaux pour la maternité de substitution transforment les femmes en marchandises et relève de l'exploitation. Cependant, des preuves empiriques suggèrent que les paiements de maternité de substitution ne sont pas de l'exploitation, du moins pas dans une mesure qui justifierait la criminalisation des paiements. Étant donné le scepticisme qui entoure le lien entre exploitation et marchandisation, je me demande si les critiques de la marchandisation peuvent constituer une justification alternative à la non-commercialisation de la maternité de substitution. Tout d'abord, j'examine l'argument de Vida Panitch selon lequel les critiques de la marchandisation sont imparfaites parce qu'elles sont absolutistes, c'est-à-dire qu'elles ne peuvent pas identifier ce qui fait que certaines transactions de maternité de substitution sont meilleures ou pires que d'autres. Deuxièmement, j'examine la réinterprétation d'Anne Phillips de la critique de la marchandisation : *La maternité de substitution commerciale est problématique car elle porte atteinte à l'égalité dans une société démocratique*. Je soutiens que la révision de Phillips peut échapper à l'absolutisme et fournir une meilleure justification de la position de non-commercialisation du Canada. Cependant, elle implique également que la préférence pour la criminalisation des paiements est affaiblie, car d'autres solutions politiques pourraient être mises en oeuvre efficacement pour protéger l'égalité. En conséquence, je propose un changement dans la manière dont on fait appel à la marchandisation : moins d'attention devrait être accordée aux valeurs abstraites et plus d'attention devrait être accordée à la manière dont ces valeurs sont mises en oeuvre dans les relations entre les membres d'une communauté politique. Je suggère également, à titre provisoire, que les critiques de la marchandisation puissent fournir une base normative dans la politique canadienne pour un cadre réglementaire d'autosuffisance, qui se concentre sur des valeurs telles que la solidarité et le bien public.

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ARTICLE (ÉVALUÉ PAR LES PAIRS / PEER-REVIEWED)

## A Partial Defense of the Non-Commercialization of Surrogacy

Katy Fulfer<sup>a</sup>

### Résumé

La Loi sur la procréation assistée du Canada justifie son approche de non-commercialisation de la maternité de substitution par le fait que les paiements commerciaux pour la maternité de substitution transforment les femmes en marchandises et relève de l'exploitation. Cependant, des preuves empiriques suggèrent que les paiements de maternité de substitution ne sont pas de l'exploitation, du moins pas dans une mesure qui justifierait la criminalisation des paiements. Étant donné le scepticisme qui entoure le lien entre exploitation et marchandisation, je me demande si les critiques de la marchandisation peuvent constituer une justification alternative à la non-commercialisation de la maternité de substitution. Tout d'abord, j'examine l'argument de Vida Panitch selon lequel les critiques de la marchandisation sont imparfaites parce qu'elles sont absolutistes, c'est-à-dire qu'elles ne peuvent pas identifier ce qui fait que certaines transactions de maternité de substitution sont meilleures ou pires que d'autres. Deuxièmement, j'examine la réinterprétation d'Anne Phillips de la critique de la marchandisation : *La maternité de substitution commerciale est problématique car elle porte atteinte à l'égalité dans une société démocratique*. Je soutiens que la révision de Phillips peut échapper à l'absolutisme et fournir une meilleure justification de la position de non-commercialisation du Canada. Cependant, elle implique également que la préférence pour la criminalisation des paiements est affaiblie, car d'autres solutions politiques pourraient être mises en œuvre efficacement pour protéger l'égalité. En conséquence, je propose un changement dans la manière dont on fait appel à la marchandisation : moins d'attention devrait être accordée aux valeurs abstraites et plus d'attention devrait être accordée à la manière dont ces valeurs sont mises en œuvre dans les relations entre les membres d'une communauté politique. Je suggère également, à titre provisoire, que les critiques de la marchandisation puissent fournir une base normative dans la politique canadienne pour un cadre réglementaire d'autosuffisance, qui se concentre sur des valeurs telles que la solidarité et le bien public.

### Mots-clés

loi sur la procréation assistée, Canada, commercialisation, marchandisation, égalité, exploitation, maternité de substitution

### Abstract

Canada's *Assisted Human Reproduction Act* justifies its non-commercialization approach to surrogacy on the grounds that commercial payments for surrogacy commodify women and are exploitative. However, empirical evidence suggests that payments in surrogacy are not exploitative, at least not to an extent that would warrant criminalizing payments. Given skepticism about the connection between exploitation and commodification, I explore whether commodification critiques can ground an alternative justification for the non-commercialization of surrogacy. First, I examine Vida Panitch's argument that commodification critiques are flawed for being absolutist, that is, they cannot identify what makes some surrogacy transactions better or worse than others. Second, I examine Anne Phillips' rearticulation of a commodification critique: *Commercial surrogacy is problematic because it undermines equality in a democratic society*. I argue that Phillips' revision can escape absolutism and provide a better justification for Canada's non-commercialization stance. However, it also entails that the preference for criminalizing payments is weakened, as other policy solutions might be effectively implemented to protect equality. As a result, I propose a shift in how commodification is appealed to: Less attention should be paid to abstract values and more attention should be given to how those values are enacted relationally between members of a political community. I also tentatively suggest that commodification critiques might provide a normative basis in Canadian policy for a self-sufficiency regulatory framework, which centres on values such as solidarity and the public good.

### Keywords

Assisted Human Reproduction Act, Canada, commercialization, commodification, equality, exploitation, surrogacy

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## INTRODUCTION

Canada takes a non-commercialization approach to regulating surrogacy. The justification for non-commercialization, as articulated in the *Assisted Human Reproduction Act* (hereafter, *AHR Act*) and the documents that informed it, hinges on a strong connection between exploitation and commercialization. However, this connection has been challenged empirically and philosophically. In light of these challenges, is there a philosophical defense of non-commercialization that avoids the pitfalls that current justifications face? In this paper, I provide such a defense, focusing on the moral wrong of commodification.

In Section 1, I outline Canada's justification for its non-commercialization stance. The *AHR Act* justifies non-commercialization on the grounds that commercial payments for surrogacy commodify women and children and are exploitative. However, empirical evidence suggests that payments in surrogacy are not exploitative, at least not to an extent that would warrant criminalizing payments. Given that exploitation is insufficient to justify non-commercialization, I turn to commodification critiques of surrogacy. My entry point into commodification is via an exchange between Vida Panitch and Anne Phillips. Panitch argues that commodification critiques are flawed, and unhelpful for policy making, because they cannot identify what makes

some surrogacy transactions better or worse than others (1). In Section 2, I review this problem and show how the *AHR Act* falls prey to Panitch's critique. In Section 3, I turn to Phillips' rearticulation of a commodification critique, which she develops to address the weaknesses identified by Panitch: *commercial surrogacy is problematic because it undermines equality in a democratic society* (2). The structure of commercial surrogacy itself renders the relationship between surrogates and intended parents such that surrogates are treated in ways that are inconsistent with their being recognized as equal citizens. In Section 4, I suggest that this revision better justifies Canada's non-commercialization stance. However, a focus on equality will entail that the preference for criminalizing payments is weakened. Criminalizing payments might be one policy solution that protects equality, but other sorts of protections might also be effectively implemented.

Although my discussion is inspired by Canada's surrogacy regulation, my argument also contributes to the philosophical discourse on commodification. In Section 5, I offer the final piece of my argument, which is a proposal to shift how commodification is appealed to in moral and political debates around assisted reproduction: less attention should be paid to abstract values and more attention should be given to how those values are enacted relationally between members of a political community. Though bioethicists and philosophers often articulate arguments in attempts to inform public policy, commodification critiques are more likely to generate questions and identify ways in which surrogates' equality is undermined by surrogacy arrangements. These are features of surrogacy that policy makers should consider and will inform a policy solution. However, using a commodification critique on its own, apart from other contextual factors, to justify one particular policy solution (e.g., a ban) asks it to do too much. That being said, returning to the Canadian context, I will suggest that commodification critiques might be able to do more than directing moral attention to equality. Commodification critiques help provide a normative basis for a more robust non-commercialization approach to regulation. Specifically, I have in mind a self-sufficiency regulatory framework, which centres on values such as solidarity and the public good (3,4).

One note on the scope of my argument: I focus on gestational surrogacy. However, the *AHR Act* does not distinguish between gestational surrogacy, where the surrogate does not provide the egg to the embryo, from genetic (also known as traditional) surrogacy where the surrogate contributes both the egg and gestational labour. Further, the *AHR Act's* non-commercialization stance also extends to eggs, sperm, embryos, and third parties who organize gamete and embryo donations or surrogacies. Because there may be morally salient differences between commodifying tissues versus labour, I do not make explicit claims about how my argument might apply to gametes, embryos, or other bodily tissues that are commercialized.

## 1. EMPIRICAL CHALLENGES TO CANADA'S NON-COMMERCIALIZATION APPROACH

The ethical justification for criminalizing payments is expressed in one of the *AHR Act's* guiding principles: "(2)f) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition." In this principle, exploitation and commodification are conflated, which suggests that commercialization is necessarily exploitative (5). This conflation was once a dominant trend in feminist bioethics, and a strong influence leading up to the passing of the *AHR Act* (6-8).<sup>1</sup> In particular, feminist arguments against commercialization and commodification were formative for the Royal Commission on New Reproductive Technologies, which was initiated in 1989 and issued its final report, *Proceed with Care*, in 1993. Despite what might seem like a long period of time between the publication of *Proceed with Care* and the *AHR Act* receiving royal assent in 2004, the Commission provides the primary framing and ethical foundation for the *AHR Act* (12).

However, popular opinion seems to question the strong link made between commercialization, commodification, and exploitation.<sup>2</sup> During the Royal Commission's consultations, medical professionals tended to favour self-regulation over federal regulation and criminal sanctions (12). The preference against criminalizing payments has not seemed to lessen. Following Health Canada's announcement that reimbursement regulations would be forthcoming, in 2017 and 2018, the Canadian Fertility and Andrology Society (CFAS), a non-profit professional organization, issued policy statements advocating for the decriminalization of payments. This advocacy went beyond the scope of what Health Canada could address. Reimbursement regulations have to align with the current language of the *AHR Act* Section 12, which only allows for reimbursement where there is a receipt for an expense directly related to surrogacy. (Health Canada published reimbursement regulations on June 26, 2019, and the regulations went into effect in June 9, 2020). Also in 2018, Member of Parliament Anthony Housefather tabled a private member's bill to decriminalize payments for surrogacy, though there was little movement on this initiative despite some rhetoric from the government about its importance (15).

More persuasive than comments from politicians or from the CFAS, which has some members with a financial stake in the success of the private, for-profit fertility industry, is empirical evidence that challenges the necessary link between commercial payments and exploitation in Western countries (13,14,16-20). This evidence suggests that, on the whole, surrogates tend to find their experience to be positive, for themselves and for their families (16,18,20). Surrogates express that motivations to provide gestational labour is a decision that comes from them and is not coerced by others (16-18).

Looking at evidence from commercial surrogacy markets is especially helpful in challenging the claim that commercialization necessarily involves exploitation. In Heather Jacobson's research, most surrogates stress that financially they do not need to

<sup>1</sup> While it would be overblown to describe non-commodification as a dominant trend within feminist bioethics today, a number of feminist scholars in Canada and elsewhere subscribe to positions under this umbrella (9-11).

<sup>2</sup> It is also questionable whether most Canadians found this link to be persuasive during the process of drafting the *AHR Act* (12-14).

serve as surrogates. Rather, they become surrogates because they want to help people have a child and being paid is a way of acknowledging their expertise, time, and labour (18). In Nicole F. Bromfield's analysis of how American surrogates represent themselves online through blogs, she found that surrogates express a sense of pride through surrogacy and that surrogacy was a valuable project for them. Bromfield states, "The surrogates portrayed themselves as empowered, knowledgeable, and in control of their experiences as surrogates and not as exploited, uneducated, or deceived women incapable of giving true informed consent, which is often the portrayal of surrogates in the United States" (16, p.207).

The task of philosophy is to subject experience to critical scrutiny. Someone may be subject to commodification or exploitation without feeling as if those conditions describe their experience. But Bromfield's research does suggest that, on the balance, being paid for gestational labour is beneficial to surrogates' sense of self and their well-being. Where negative experiences were reported in her study, they tended to be about the surrogate's relationship with the intended parents, not with payment issues (16). In research surveyed by Karen Busby and Delaney Vun, relationships between surrogates and intended parents were generally positive, though they include instances where surrogates did feel undervalued by intended parents (17).

This evidence is not uncontested, and it does not prove that exploitation does not occur. Rather, this evidence invites questions about whether payment ought to be criminalized if the goal is to protect against exploitation. Although payments for surrogacy are criminalized in Canada, emerging research on Canadian surrogates' experiences suggests that exploitation is still a concern, especially given the ambiguity that existed prior to 2019 about permissible reimbursements (20).<sup>3</sup> Further, legal scholars have argued that legalization of payments and permissive regulation would better fulfill the *AHR Act's* ethical commitment to preventing exploitation (22,23). If the link between exploitation and commercialization is weakened, then the claim that non-commercialization is a protection against exploitation is likewise weaker. For the sake of argument, I assume that the empirical evidence cited above is sufficient to refute the claim that the likelihood of exploitation in surrogacy is severe enough to warrant the criminalization of payments. To defend Canada's non-commercialization approach to surrogacy, a justification for non-commercialization that does not rely on exploitation is needed.

For the remainder of this article, I focus on moral and political arguments about commodification, which is the other moral wrong mentioned in the *AHR Act*. My starting point is Panitch's criticisms of commodification critiques of surrogacy, which she presents in arguing that exploitation and commodification should be delinked conceptually (1). According to Panitch, exploitation and commodification critiques offer different assessments of moral wrongs. She argues that an exploitation lens provides more ethical clarity and better regulatory guidance, especially in global surrogacy. My interest in her argument is primarily in the conceptual problems she raises for commodification critiques, and whether there are adequate responses to them. If a commodification critique of surrogacy can be defended, then Canada's justification for non-commercialization would have a stronger philosophical foundation.

## 2. ABSOLUTISM: A CONCEPTUAL CHALLENGE TO COMMODIFICATION

Although commodification and exploitation are linked conceptually in the *AHR Act*, a commodification critique seeks to explain why it is wrong to sell some things, even in uncoerced, non-exploitative conditions. Panitch is particularly concerned with *corruption-commodification arguments*: a thing, the seller, or a social norm or value becomes corrupted through commodification. Women serving as surrogates, women in general, children resulting from surrogacy, children in general, reproduction, gametes, gestational labour, motherhood, and equality are things that commodification critiques have identified as being corrupted through commercial surrogacy (6,11,24,25).

The main flaw with commodification critiques, Panitch argues, is their absolutism. Because commercialization is constitutive of the wrongness, there are no cases where commercial surrogacy is morally permissible (1). For Panitch, commodification critiques do not provide a precise enough account of moral issues in surrogacy. If commercialization itself is the moral concern, then a number of morally salient features of a particular transaction are masked, such as: To what extent can a surrogate negotiate her wages or working conditions? To what extent do legal or other social structures protect surrogates' rights and interests? To what extent is a surrogate's daily life subject to the control of others? A commodification critique seems unable to articulate differences between individual transactions or to appreciate structural inequities that shape surrogacy transactions.

Though Panitch is concerned with global surrogacy, her criticisms apply to Canada's regulatory approach.<sup>4</sup> In *Proceed with Care*, the Royal Commission advances an exemplar of a corruption-commodification argument:

By commercialization we mean activities involving the exchange of money or goods and intended to generate a profit or benefit for those engaging in this exchange. By commodification we mean the treatment of human beings or body tissues and substances as commodities - as means to an end, not as ends in themselves. Thus, commercialization necessarily includes commodification, but commodification need not entail a profit motive.

<sup>3</sup> One potential limitation of this study is that it was fully funded by a for-profit fertility clinic (21).

<sup>4</sup> Elsewhere, Panitch suggests as much about surrogacy in Canada by challenging arguments that surrogacy is a gift that must arise from altruism rather than an exchange of money (26).

Commissioners believe it is fundamentally wrong for decisions about human reproduction to be determined by a profit motive – introducing a profit motive to the sphere of reproduction is contrary to basic values and disregards the importance of the role of reproduction and its significance in our lives as human beings. Commodifying human beings and their bodies for commercial gain is unacceptable because this instrumentalization is injurious to human dignity and ultimately dehumanizing. We therefore consider commercialization of reproductive materials and services to be inappropriate. (27, p.55-56)<sup>5</sup>

To emphasize an explicit claim made by the Commission, commercialization is necessarily commodifying. What exactly is subject to commodification can be construed broadly and seems to apply equally to gestational as well as genetic surrogacy. References to human beings could refer to the seller herself or to human dignity. References to bodies and reproduction indicate that gametes or gestational labour, or their social value, might be corrupted. Further, this passage might support claims that surrogacy commodifies children and constitutes baby-selling.<sup>6</sup> In multiple ways, the Commission, which provides the ethical foundation for the *AHR Act*, advances an absolutist argument against commercial surrogacy, precisely the kind of argument that Panitch argues is weak.<sup>7</sup>

### 3. COMMODIFICATION CRITIQUES WITHOUT ABSOLUTISM

Phillips attempts to re-articulate the wrongness of commodification without making an absolutist claim. In contrast to Panitch, Phillips argues that some versions of a commodification critique can locate commodification along a continuum, which avoids absolutism and provides a mechanism for distinguishing between degrees of commodification. A continuum perspective on commodification is helpful especially in analyzing embodied labour. For example, professional basketball might occupy a different position on the continuum than office work or surrogacy. For Phillips, surrogacy occupies a position on the far side of the continuum, as it is “an ‘extreme example’ of the corporeality of all work” (2, p.104). Commodification in surrogacy is worrisome because of the nature of its embodiment: “The worker’s embodiment is essentially *living* in the commodity produced – literally in the form of the worker’s bodily fluids, her blood and sweat” (32, p.106, emphasis original); surrogacy is one of a set of “‘services in the self’: services that rely on in vivo, biological processing and the utilization of the worker’s living substrate as essential elements in the productive process” (33, p.65).

The continuum view of commodification has intuitive appeal, but it does not fully address Panitch’s worry that commodification cannot distinguish moral differences between surrogacy transactions. Phillips seems to place all surrogacies at one location on the continuum rather than placing different surrogacy transactions at different positions. However, I find two clues in Phillips’ argument that I develop to show how individual transactions can be spread along the commodification continuum.

The first clue comes from Phillips’ rejection of a claim that many commodification critiques advance: that commodification entails replacing non-instrumental value with instrumental value. Instead, Phillips argues that commodities can have non-market, non-instrumental value while also being regulated by markets (2). The balance between instrumental and non-instrumental values would enable individual surrogacy transactions to occupy different positions on the commodification continuum. We might distinguish between degrees of commodification. Consider the following examples:

In Surrogacy 1, intended parents are not interested in the surrogate as a person and routinely refer to her as merely an oven they are renting. Although guidelines strongly recommend a single embryo transfer in a gestational surrogacy (34), the intended parents insist on implanting three or four.

In Surrogacy 2, intended parents express genuine concern for the surrogate’s well-being and show an interest in her life outside of the surrogacy. Yet, they also tend to treat her interests as secondary to their own. Their expressed care may also reinforce some dimensions of commodification, such as if they recommend certain foods or vitamins because they are concerned about the surrogate’s health primarily for the sake of the fetus’ (31).

In Surrogacy 3, a surrogate refers to herself as ‘just an oven,’ but this language is part of a collaborative, relational process whereby she seeks to connect the pregnancy to the intended parents. The pregnancy ‘belongs’ to them and not to her.<sup>8</sup>

Commodification might be present in each of these cases, but to different degrees. It can also exist alongside non-instrumental values. In Surrogacy 1, the intended parents’ seeming disregard for the established guidelines around embryo transfer suggest

<sup>5</sup> This definition of commodification is consistent with more developed philosophical accounts, such as Elizabeth Anderson’s: “To say that something is properly regarded as a commodity is to claim that the norms of the market are appropriate for regulating its production, exchange, and enjoyment. To the extent that moral principles or ethical ideals preclude the application of market norms to a good, we may say that the good is not a (proper) commodity.” (6, p.72) For Anderson, use is a kind of valuation appropriate to commodities. Other modes of valuation might include *respect* (in the case of persons) or *appreciation* (in the case of art).

<sup>6</sup> Although the claim that surrogacy is a form of baby-selling is not commonly held, some feminist thinkers do espouse such arguments (10,28,29). In Canadian political discourse, arguments reminiscent of this position were espoused through the development of the *AHR Act*. For example, in a report on an early version of the *Act*, the House of Commons Standing Committee on Health approved of the proposed criminalization of payments for surrogacy as commercial surrogacy “treats children as objects and treats the reproductive capacity of women as an economic activity” (quoted in 13, p.369).

<sup>7</sup> The *AHR Act* does allow for reimbursements in surrogacy, which is not a form of profit. However, as previously mentioned, guidelines from Health Canada regarding permissible reimbursement were only published in June 2019 and came into effect June 2020. The lack of clarity around what counts as a permissible reimbursement between now and 2004, when the *AHR Act* received Royal Assent, has been an issue of stress and uncertainty for surrogates, intended parents, and industry professionals (30). Though legally murky, reimbursement has in some cases been a mechanism for, in effect, paying surrogates (31).

<sup>8</sup> Such modes of relational bonding between the surrogate and intended parents are present in both commercial (35) and non-commercial surrogacy (19,36).

they value their surrogate primarily for her gestational labour. In Surrogacy 2, commodification seems to be intertwined with non-instrumental value (e.g., respect). The intended parents do not reduce the surrogate to being “merely an oven,” however, concerns about commodification may still be present. In Surrogacy 3, the surrogate’s objectification of her own embodiment seems to challenge commodification and objectification by emphasizing the relational bonds between her and the intended parents.

These examples motivate the claim that commodification is not an all or nothing affair and need not be exclusive of non-instrumental value. A reader may disagree with my interpretation of these constructed examples while still accepting my main claim: that commodification admits of degrees. (Note, too, that commodification can intersect with other moral concerns, for example, the exploitation of emotional labour (37)). In accepting that commodification admits of degrees, Phillips states that regulations might be implemented that serve to minimize the risk of full commodification and protect non-instrumental value (2). For example, this is arguably achieved by the recommended limit on embryo transfers or recommendations that surrogates and intended parents have legal counsel. With appropriate regulation, a market might commodify gestational labour without entailing that the value of gestational labour is exhausted by its market price.

The second clue to how commodification can occur along a continuum concerns how exploitation and commodification trade on inequality. While exploitation and commodification target equality differently, Phillips argues that in surrogacy it can be difficult, and undesirable, to disentangle these critiques. Exploitation critiques examine equality through an equity lens and centre on fairness and power dynamics within a transaction (e.g., whether a woman is offered a fair wage or can negotiate terms), whereas commodification critiques render someone unequal by treating bodies differently. For Phillips, equality is intimately connected with embodiment:

Bodies function in my argument as that which reminds us of our shared vulnerability, that which alerts us to the common experience of living as embodied beings in the same world. Our ability to think of others as our equals is, in my view, very much bound up in our capacity to see those others as like us in at least some respect. One crucial way in which we are alike is that we all have bodies. (25, p.11)

According to Phillips, commodification does not corrupt a thing or a person. Rather, commodification warps or diminishes the relations of equality that exist between embodied community members. Later I will return to Phillips’ definition of equality in relation to embodiment. For present purposes, the major insight I draw from her claim is that exploitation and commodification critiques target equality differently. Thus, interventions that address inequities produced by exploitation may not address inequalities resulting from commodification. We might need both critiques for a complete moral assessment of surrogacy, but we might need different policy solutions to ameliorate each.

According to Panitch, the most serious philosophical challenge to commodification critiques are their absolutism, which entails an inability to distinguish better and worse surrogacy transactions. In response, the two clues I tease out from Phillips’ discussion clarify how a commodification critique, which accepts a continuum of degrees of commodification, can recognize moral differences between transactions. The first was that instrumental and non-instrumental value can exist at the same time. The second was that inequality manifests differently in exploitation than in commodification. Thereby, someone may identify differences in how surrogates are rendered unequal across transactions. With the problem of absolutism alleviated, what remains is to explore whether a non-absolutist commodification critique can provide support for Canada’s non-commercialization approach. I will argue that Phillips’ equality-focused commodification critique, with some clarifications and modifications, provides the basis for a philosophical defense of Canada’s non-commercialization approach not found in the *AHR Act*, that is, one that does not depend on commodification being absolute (the philosophical challenge) or being necessarily linked with exploitation (the empirical challenge).

#### 4. COMMODIFICATION CRITIQUES AND EQUALITY

Phillips re-articulates a commodification critique to centre on equality: a democratic commitment to equality is “corrupted” or undermined by commercial surrogacy (2). Whereas an exploitation critique might reveal ways in which the rights, interests, and autonomy of surrogates could be enhanced, a commodification critique reveals ways in which relations of democratic equality are supported or hindered. Importantly, for Phillips, equality is not an abstract value. It is a relation and is part of the structure of our political community. To be more precise, rather than equality being “corrupted” by commercialization, we might say that commercial surrogacy undermines conditions which make it possible for people to recognize and relate to each other as equals (11).

Because economic arrangements help shape other social relations, if commercial surrogacy undermines equality, non-commercialization is one strategy that protects conditions that enable the equal participation of members in a democratic society. Phillips argues that commercialization “shapes the practices and relationships [in surrogacy] in potentially damaging ways” (25, p.96). In other words, on her account, commercial reproduction assumes certain values that conflict with values of equality. Asking about whether a practice treats people as unequal is, partially, to ask about how it differentially affects people’s embodied vulnerability. Recall that, for Phillips, equality involves a recognition of human’s shared, embodied vulnerability. Whereas some philosophical approaches centre on rationality or autonomy, for Phillips, a universal, embodied vulnerability is a marker of personhood. This approach is in the tradition of feminist ethics that seeks to call attention to how persons are fundamentally embodied and embedded in social relationships (38).

For Phillips, commercial surrogacy is problematic because it requires abstraction or distance from recognizing shared vulnerability. She describes this distance in a few ways. One way is by contrasting commercial markets with unpaid donations. Markets abstract away from embodied vulnerability, whereas contexts of donation emphasize it:

[Unpaid] Donation encourages us to think more explicitly about our equality: to think about whether we would have been equally willing to provide the kidney, the pregnancy, or the sex, had we been in a position to offer this; to hope that had things been different, we would have been equally generous. A market in these things relieves the purchasers of the obligation to think themselves in the sellers' shoes. It occludes the equality that is otherwise expressed in the fact that we all have bodies. (25, p.10-11)

To put the point glibly, commercial markets invite us to think that if a person is paid fairly, then our moral obligations to them are met. Markets can mask the risks or vulnerabilities of these exchanges if the price is considered fair. For markets that depend on embodied vulnerability, however, fair payment or equitable working conditions are not the only salient concern. These markets are problematic because of what they ask a seller to do in distancing themselves from their embodied vulnerability. The risks they take with their body in fulfilling their work is treated as something fungible and separable from their personhood. For Phillips, this problem stems from ways in which feminists have problematized a split between personhood and embodiment. This does not mean that there is anything "essential" about reproduction or gestation to a surrogate's identity. Rather, it is that surrogacy arrangements require a surrogate to abstract from her own vulnerability and to treat her body as an object to rent.

The second way in which commercial surrogacy requires distance from shared vulnerability focuses on gender. Phillips argues that a surrogate is treated unequally because she advances the family making project of others but is unable to be a full participant in the future life of the resulting child. This inability is structural, part of the surrogacy process. She says, "Some people (some women) have become the means of resolving the problems of the (by implication, more important) others, in a non-reversible relationship that underscores their equality" (2, p.112). This claim is situated within a discussion of global commercial surrogacy, but taken out of that context, it can reasonably apply to unpaid surrogacy within Canada. At the very least, nothing about a lack of payment necessarily precludes unpaid surrogacy from the potential for the "non-reversible relation" between a surrogate and intended parent(s) to obtain.

While I find the focus on relationships of equality to clarify the moral wrongs of commodification in surrogacy, I have two worries about this shift. One worry is that absolutism re-emerges, and the second is whether payment per se is objectionable.

First, does absolutism re-emerge in Phillips' discussion, despite her commitment to a continuum of commodification?<sup>9</sup> The ghost of the absolute wrong of commodification seems to haunt mention of the "non-reversible," one directional relation between a surrogate and intended parent(s). To call this relationship "non-reversible" recalls feminist concerns that motherhood is conferred gestationally and that the surrogate is a mother (even if she is not the only mother) who gives up maternal responsibilities (39).<sup>10</sup> Are surrogates being asked to give up something (related to the meaning of a gestational bond) that is central to the recognition of their equality? Does Phillips' argument require equality to involve a surrogate feeling "attached" to the fetus she gestates, even though many surrogates express that they are able to distance themselves emotionally from the fetus in a surrogate pregnancy, as opposed to their experience of their own family formations (18,19)?

I read Phillips' concern about non-reversible relations as primarily commenting on the social value of gestation. Surrogacy is a context where the gestational contribution that pregnancy makes to a future child becomes instrumentalized and treated as one intervention that is part of a fertility treatment. Payment for services rendered suggests that an exchange is complete, and yet, the contribution a surrogate makes to a child's life and the family-making projects of others cannot be compensated monetarily. It does not end when a contract does. This misalignment is what renders a woman unequal. Although there may be inequities that interact with sexist background conditions, Phillips' main concern seems to be about the structure of the contract itself.

Phillips has in mind transnational surrogacies where intended parents and surrogates will be separated by national and cultural borders. We might ask if the structure of unpaid arrangements between intended parents and surrogates who are all Canadian residents is prone to a similar critique. Although there is no payment to symbolize the end of a relationship, unpaid arrangements have one kind of conclusion in that the child is released to the intended parent(s). Phillips claims that "the way commercial surrogacy is organized, it is virtually impossible to sustain that sense that the birth mother as a person of equal importance in the world: the process is organized in such a way as to write her out of the child's life" (2, p.112).

Of course, some surrogacy arrangements do make provisions for the surrogate to maintain contact with the intended parents and the child. Canadian research on gay men's use of surrogacy suggests that surrogates and intended parents often enter into the arrangement with some hope or expectation that the relationship will not end when the pregnancy does. (19). Further, in commercial and unpaid surrogacies, intended parents often express their deep gratitude to surrogates, calling them a "gift" or "angels" (18,20,35). Other times, a more distant relationship between intended parents and the surrogate represents the

<sup>9</sup> Panitch has a different worry about absolutism (1).

<sup>10</sup> Here I reference philosophical conceptions of parenthood, not legal ones. In parental law in Canada, the surrogate is usually the birth mother who must transfer parental responsibilities to the intended parent(s).

intended parent(s)'s respect for boundaries the surrogate sets around how she wants their relationship to develop (19). This evidence suggests that gestational labour is valued, and that surrogates are active participants in directing continued relationships with the intended parents and children born through surrogacy.

I do not think that Phillips would be appeased by situations where a surrogate maintains contact with the intended parent(s) and child, or where she plays a role in the child's life. Recall that, as previously discussed, commodification can occur alongside non-instrumental modes of valuation. For Phillips, such arrangements are ancillary to the main point of the surrogacy contract/arrangement, which is the relinquishment of a child. Phillips argues that "gift" language obscures rather than alleviates the concern about how surrogacy arrangements require distance from embodiment. Further, a focus on surrogates' autonomy does not alleviate the concern about distance. Although surrogates may distance themselves from their surrogate pregnancies autonomously and for beneficial reasons (e.g., building a relationship with the intended parents), the structure of the arrangement normalizes this kind of distance from her embodiment (25). Surrogacy arrangements normalize a power difference whereby the intended parents are given some degree of authority over a surrogate, who puts her body at risk to birth a child for them. To use Sarah Jane Toledano and Kristin Zeiler's framing, unpaid surrogacy arrangements can be asymmetrical, even if there is reciprocity between intended parents and a surrogate (36). This power relation is structural; it exists even when all parties have a harmonious, respectful experience.

In sum, for Phillips, commercial surrogacy treats women unequally by asking them to distance themselves from their embodied vulnerability. It is the ask, not necessarily a particular experience, that Phillips finds problematic. Whereas inequitable organization of surrogacy may be clearer with the introduction of payment, I suggest that commercial norms might also be present in unpaid surrogacy arrangements in ways that threaten equality. Surrogacy, whether paid or unpaid, requires the surrogate's distance from her embodiment.

The Royal Commission tacitly acknowledges that paid and unpaid surrogacy might both be commodifying with the claim that "commercialization necessarily includes commodification, but commodification need not entail a profit motive" (27, p.55). Although empirical evidence disputes the first part of that quote, the second part poses a plausible relation. Unpaid surrogacy might require, or encourage, a similar degree of distance from embodied vulnerability that Phillips finds objectionable in commercial surrogacy. This interpretation is plausible because it is not just payment that structures commercial surrogacy, but certain norms about contractual exchanges or markets. Specifically, Phillips targets norms that treat all labour as a disembodied good and norms that privilege autonomy as the overriding principle as to what makes a contractual exchange morally benign.

Even when payment is absent, the norms of the contract or of the market might be present in unpaid surrogacy.<sup>11</sup> I have previously presented an argument along these lines in challenging the *AHR Act's* implicit assumption that unpaid surrogacy is necessarily more ethical than commercial surrogacy (40). Even though unpaid surrogacy does not involve payments, it might treat reproduction as if it were a commodity and a surrogate might be susceptible to accompanying forces of objectification. Rather than focus on payment, I examined how commercial markets have historically relied on a conception of the person as an ideally rational and atomized individual, whereas some unpaid models (e.g., self-sufficiency, which I will discuss later) rely on a conception of the person as embedded in social relationships and co-responsible with other community members for maintaining their shared political community. A non-commercialization approach embedded in a relational conception of the person might contribute to shifting away from market norms in unpaid surrogacy towards ones that affirm equality and solidarity.

Given that equality is relational and part of the structure of a democratic society, Phillips' critique of commercial surrogacy seems to target norms that structure surrogacy arrangements rather than payment as such. Consider two examples to support this interpretation. First, many democratic societies have protections against enforcing surrogacy contracts because doing so would arguably violate equality concerns. Enforced compliance requires giving up too much bodily autonomy (25). Indeed, within Canada's non-commercial system, no province permits enforceability (12). A proponent of an equality-commodification critique might argue that enforceability is a condition that separates problematic from benign commodification. But this does not seem to be Phillips' view. Rather than take unenforceability as a protection for equality, Phillips argues that the contractual norm of enforceability indicates a problematic way in which commercial norms structure relationships. Second, although Phillips supports reimbursement and compensation in surrogacy, she worries that in practice there will not be a meaningful distinction between compensation, which recognizes non-financial losses such as time and energy, and payment (25). In practice, a person should not be financially worse off for providing gestational labour, hence, allowing compensation or reimbursement is a reasonable protection against a form of economic exploitation. It seems as if Phillips' main concern is not the exchange of money per se. Rather, her target is the set of social norms around contracts and markets, norms which determine payment, compensation, and the instrumentalization of gestational labour. These norms effect relations of equality between surrogates, intended parents, and other members of the political community.

Does a focus on equality bring us back to the philosophically problematic absolutist position whereby all instances of surrogacy are equality-undermining? Focusing on how surrogacy undermines relations of equality succeeds in providing a philosophical justification for supporting non-commercialization. Further, it does not equate exploitation with commodification, thereby avoiding the empirical challenges faced by the justification for non-commercialization in the *AHR Act*. But, if my interpretation

<sup>11</sup> I am loose in my language between "contract" and "arrangement" because I am interested in how social values and norms appear in surrogacy, and as I argue, paid and unpaid arrangements may have similar structures. However, in some contexts the difference between a commercial contract and unpaid arrangement is significant, for example, in parental law and policy (12,17,31).

of Phillips is right, the problem of commodification is about the structure of relationships within surrogacy and not (only) about payment. Thus, an equality argument might also support a ban on surrogacy altogether, whether it is paid or unpaid. This would pose a problem for a philosophical justification of the *AHR Act's* non-commercialization stance. In the *Act*, commercial surrogacy is more problematic than unpaid surrogacy, which is legally permitted. If my reading of Phillips' equality-commodification argument is reasonable, then it may support Canada's non-commercialization stance, but at the expense of rendering it inconsistent insofar as unpaid surrogacy is legally permitted.

## 5. COMMODIFICATION CRITIQUES, POLICY CONTRIBUTIONS, AND MORAL GUIDANCE

Do or do not commodification critiques support bans? This question is often in the background of feminist discussions about surrogacy, especially in Canada where non-commercialization is the rule of law. But it is helpful to take a step back and consider what sort of recommendations commodification critiques more generally can make to policy or regulatory frameworks.

Panitch and Phillips offer different answers to this question. Because commodification theory explains why some things should not be for sale (ever), Panitch interprets "X should not be for sale" as equivalent to the policy recommendation that "X should be banned." This interpretation is reasonable, given that many feminists who raise commodification critiques of commercial surrogacy advocate for bans, including feminist interlocutors in the current Canadian discourse (10,41). This is the justification used by the Commission as well, which recommended banning commercial surrogacy and discouraging unpaid surrogacy (27,42).

In contrast, for Phillips and other feminists such as Margaret Radin, when commodification is conceptualized along a continuum, it can inform regulatory initiatives that seek to protect against full (or some problematic threshold) of commodification (2,43). The following might represent an approach consistent with Phillips' position: "Generally, X should not be for sale. X cannot be for sale except under Z conditions." What constitutes the "Z conditions" that permit a sale could be criteria that identify the threshold along the continuum for problematic degrees of commodification. Where people's equality is sufficiently undermined, surrogacy should not be sold.

Following from the claim that surrogacy can be for sale only under specified conditions, a commodification critique could be used to support proposals for decriminalizing payments, either through proposals to fold surrogacy and infertility treatments into provincial healthcare plans (22) or permissive regulation with robust government oversight (23). Both these proposals stipulate unacceptable conditions for selling gestational labour. Maneesha Deckha, for instance, argues for payments to be set by a province and not to be subject to market norms (22). Whatever policy recommendations a commodification critique can offer must specify how equality is to be promoted or protected if payment is permitted. In addition, following from the previous section, policy should reflect ways in which surrogacy arrangements, whether paid or not, might be structured by contractual norms that undermine equality. Phillips does not describe what policy solutions might help protect against the ways in which contracts force distance or an ignorance of embodied vulnerability. But we might imagine some (and some of which are already practiced); for example, counseling prior to and during a surrogacy might help intended parents consider the embodied vulnerability of surrogacy, and regulatory oversight of the fertility industry might ensure that best care practices are consistently followed (44).

It strikes me as plausible that commodification critiques can avoid absolutism and be used to justify a ban on commercial payments. In support of Canada's non-commercialization approach, an equality-commodification critique aligns with Principle 2(c) in the *AHR Act*: "While all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies." Although 'equality' is not a direct synonym for 'health and well-being,' the point about recognizing gendered inequalities is shared with an equality-commodification critique. The instrumentalization of gestational contributions in pregnancy and family-making (that Phillips discusses), the objectification of surrogates, or the potential for a surrogate's autonomy to be subordinated to the intended parents' desires might be equality concerns that are relevant for surrogacy regulation.

It seems that an equality-focused commodification critique can only offer a *partial* defense of non-commercialization. As I suggested in the previous section, equality-undermining norms might structure paid and unpaid surrogacy. Read in an absolutist manner, an equality-commodification critique would recommend that commercial and non-commercial surrogacy be banned. However, if commodification critiques shift from providing absolute descriptions of when something is corrupted to providing an analytic process to assess when and how equality is undermined, it seems less likely that commodification critiques can support bans as preferable to more permissive regulation. The question shifts from "Is equality undermined?" to "To what extent is equality undermined? Can a policy solution protect conditions of equality?" In sum, addressing the philosophical problems with absolutism provides more potential for contextual analyses that distinguish between particular surrogacy transactions. But it also strips commodification critiques of their power to prefer a ban on commercial surrogacy. Other policy initiatives might address the way equality is undermined such that the problematic degree of commodification is prevented. Thus, the support a commodification critique provides for non-commercialization can only be partial.

Nevertheless, I argue that commodification critiques still have something helpful to offer Canadian discourse. Because commodification examines equality differently from other moral lenses, such as exploitation, it can provide helpful guidance as to what is of concern in surrogacy. Rather than directly entail policy solutions like a ban, I suggest that commodification critiques

are helpful to public debate and policymaking in centring equality concerns in moral and political discourse. Commodification critiques help us – as bioethicists, philosophers, policymakers, clients and providers of assisted reproduction, and as members of the public – ask questions about how surrogacy arrangements effect relations of equality within a political community. Commodification critiques do not focus on protecting an abstract value but invite reflections on concrete ways in which relationships are built, maintained, altered, and made vulnerable by and in surrogacy arrangements. Such reflections are especially needed given that Canadian surrogates report that they often face social stigma and feel as if the public does not adequately understand surrogacy (20,30).

Someone might be concerned that the sort of moral guidance that commodification critiques provide might also be performed, or perhaps performed better, by a moral lens such as exploitation. The spectre of absolutism emerges again: If background conditions were equitable and not structured in sexist, heteronormative, racist, classist, and ableist ways, would commercial surrogacy pose the problems that Phillips raises of requiring distance from embodied vulnerability? I think the answer to this question is yes, as it is the structure of surrogacy, not just the background conditions which inform it, that are problematic. A commodification critique can orient us morally to these problems in ways that an exploitation critique may not.

Even in uncoerced, non-exploitative circumstances, commercial contracts can operate in ways that mask relationality and embodied vulnerability. Of course, I suspect that many feminist philosophers of exploitation do think that understanding background and structural inequities likely pushes in the direction of relational personhood and away from the foundations of the abstract, liberal person assumed by many liberal theorists in the Kantian and Rawlsian traditions. Commercial arrangements can be amended to acknowledge relational personhood, but this is a revision to the assumptions that ground contracts and markets (40). The point is that the mode of equality that commodification is concerned with need not be the subject of exploitation critiques.

Panitch recognizes that much depends on how equality is defined, whether it is a principle of distributive justice (as in exploitation) or “a moral value whose achievement constitutes an end in itself” (1, p.130). Phillips’ view of equality, as targeted by commodification, does not seem to be captured by either of Panitch’s descriptions. For her, equality is about how we recognize and respect other members of our political community. This goes beyond merely respecting the autonomy of our fellow community members. It also goes beyond ensuring equitable treatment. Rather, equality is about structuring our institutions and social practices in ways that do not create hierarchies where some people’s embodied vulnerability is treated as a mechanism for achieving another’s flourishing. The normative content of equality understood in this way could be further elaborated upon and expanded. But for present purposes, I think it sufficient to say that an exploitation critique need not go beyond distributive justice in making its assessment and need not rely on equality in the sense that Phillips describes. In this respect, a commodification critique adds something to what an exploitation critique might reveal.

To illustrate the potential of an equality-commodification critique to direct our moral attention, recall that the empirical evidence around surrogates’ experiences indicates that relationships between a surrogate and the intended parent can be one of the most fraught aspects of a surrogacy contract/arrangement. Surrogates express wanting to be treated with respect and care (17). They may feel disrespect if cultural practices or values around birth are not affirmed (17). If intended parents have a different way of “managing” pregnancy than the surrogate, and exert their authority as more important than hers, this can lead to tension in their relationships (18,20). These statements are primarily about one’s recognition as an equal participant in the surrogacy, that one’s contribution to the family-making project of the surrogates matters. This is part of the recognitive work of equality, of being an equal participant in political space with one’s fellow community members.<sup>12</sup>

Although a commodification critique may not justify a ban on commercial surrogacy, it has a role to play in our moral and political discourse. I offer the following as the conceptual work that a commodification critique can offer to debates around regulatory approaches: *When some things are for sale, this can negatively threaten the relationships of equality between members of a democratic society. Whatever regulation is created should recognize this point and seek to protect relational bonds between members of a political community.*

I have a more tentative proposal as well: A commodification critique can provide a normative foundation for implementing a more robust way of thinking about non-commercialization. Specially, I have in mind feminist, relational approaches to self-sufficiency (4,9,40). Self-sufficiency refers to a regulatory approach for a medical product or service that seeks to meet a community’s need through unpaid donations from other community members. Blood donation is one of the most ubiquitous examples of self-sufficiency for a medical product, and some Canadian feminists have called for a similar self-sufficiency approach to egg donation and surrogacy in Canada (9,40). Oftentimes, self-sufficiency is contrasted with market-based approaches. This contrast is deeper than an unpaid/paid donation distinction. Self-sufficiency is explicitly grounded in values such as relational personhood, community solidarity, and the public good. These are values that directly challenge norms, such as individualism and (non-relational) autonomy, that are associated with markets and contracts.

Sometimes surrogacy is defined as a private and legal arrangement. It is “a form of third party reproduction whereby a woman agrees to carry a pregnancy on behalf of another individual or couple who intends to be the legal parent(s) of the resultant child born from surrogacy” (20). Yet, as social scientists have pointed out, it is also a social arrangement, one which involves navigating complex relationships before, during, and after the pregnancy (12,18,19,20). A commodification critique complicates

<sup>12</sup> Importantly, recognizing equality does not require that surrogates and intended parents have a deep emotional connection or an enduring relationship.

how surrogacy is understood as a social arrangement. A moral and political assessment of surrogacy must look at ways in which the practice is situated in social and political relations, institutionally and between community members. A commodification critique calls our attention to these relations. Self-sufficiency begins from the premise of relationality. While I am skeptical that commodification critiques will necessarily entail particular regulatory approaches, it seems that the kinds of concerns highlighted by an equality-commodification critique are also at the center of a feminist, relational approach to self-sufficiency.

## CONCLUSIONS

My goal has been to re-examine commodification critiques and their potential to support Canada's non-commercialization stance towards surrogacy. For the sake of argument, I assumed that exploitation, which is one justification for Canada's current regulatory approach, is not sufficient for justifying criminalization. Likewise, it seems as if commodification critiques on their own cannot justify criminalization. A commodification critique is only sufficient for justifying criminalization when it makes an absolutist argument. But such arguments are ultimately imprecise and obscure a number of moral issues. However, my analysis reveals that equality-commodification critiques may provide a normative basis for a non-commercial approach to surrogacy. Commodification critiques push us to consider what norms structure our current frameworks and how they affect our shared political life. These questions should encourage us to re-examine and challenge market norms that creep into surrogacy arrangements.

Though I have gestured towards empirical evidence about surrogates' experiences, I have not considered the viewpoints or situations of surrogates in a robust way. Like many scholars, I am concerned that surrogates' voices are often the ones most marginalized and most needed in discussing regulation (16,45,46). In some ways this is a limitation to my argument, but insofar as it is a limit it is also an invitation and a beginning. In suggesting that commodification critiques can play a meaningful role in public discourse around surrogacy policymaking, I wish to emphasize the need for surrogates to be able to participate in these debates and not to be relegated to the subjects of philosophical exercises. Such participation is, after all, a marker of equality in democratic societies. Determining a problematic threshold for commodification is not something that should be done without meaningful attention to surrogates' experiences, challenges, and desires.

In focusing on commodification, I do not suggest that it is the primary concern when thinking about surrogacy. Indeed, problems have resulted when commodification has usurped other worries and ignored women's experiences. Further, my argument does not deny the importance of exploitation critiques, especially around how emotional labour may be exploited in unpaid surrogacy, or considerations of children in surrogacy. My more modest claim is that commodification helps us think through moral issues in surrogacy and political issues about its place in our society. It is worthwhile to think about how commercial surrogacy and market norms shape relationships in a democratic society. Commodification critiques are one way to emphasize and help us understand those relations.

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