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Surrogates on Strike?

ABSTRACT

Commercial surrogacy is a longstanding yet ethically complex industry. It has been discussed extensively by academics from across a range of disciplines – including, but not limited to, sociology, anthropology, and law. What has become increasingly notable, however, is the lack of communication between them. In particular, regulators have shown little engagement with the idea that surrogacy ought to be conceptualised as a form of 'work'. There has been little consideration of a labour law model of regulation for these arrangements by legislators or legal academics. This paper begins to bridge that gap by focussing on one particular issue: whether surrogates could 'strike' to strengthen their bargaining power. It asks whether there is a means by which gestational carriers might withhold their labour in a way that would materially improve their position, without transgressing the boundaries of the discipline. By exploring both the meaning of strikes in labour law, and the nature of the work that surrogates perform, it ultimately advocates for a strike of emotional labour as a means by which aggrieved surrogates might improve their position.

KEYWORDS

Surrogacy, Reproductive Labour, Emotional Labour, Labour Law, Strike

BIO

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Surrogates on Strike?

Introduction

Commercial surrogacy – whereby a woman agrees to carry and relinquish a child to another person or couple in exchange for money – is now a well-established, transnational industry. Though heated debate doubtlessly continues as to its legitimacy,[1] with an estimated global value of around $2.3bn its scale cannot be underestimated.[2] Moreover, this practice shows little sign of abating. Recent legalisation of the practice in New York leaves only two US states with express prohibitions on paid gestational surrogacy.[3] Whilst trends elsewhere - particularly Europe - remain restrictive, the rise of 'fertility tourism' has significantly limited the efficacy of these domestic prohibitions. Undeterred, prospective parents unable to access this reproductive service in their own state have proved they will travel elsewhere to do so, despite the host of private international and family law problems this has created.[4]

Such continued proliferation of these arrangements has given rise to extensive literature across a range of disciplines. Sociologists and anthropologists, for example, have been particularly focussed on the lived experiences of those who become surrogates. Rather than imposing ethical judgement on the industry, they instead explore the moral framework that surrogates themselves operate within,[5] as well as considering how best to conceptualise these arrangements.[6] Meanwhile, legal scholars continue to be preoccupied with questions of regulation: how can the law best minimise the risk of harm that this industry gives rise to?[7]

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[1] From the Catholic Church to radical feminists, many continue to lobby for its absolute prohibition. See for example: Stop Surrogacy Now, Mission Statement, [online], available from: <http://www.stopsurrogacynow.com/#sthash.HRmqpSQD.dpbs>, [accessed 22nd February 2021].

[2] J Cottingham, Babies, Borders, and Big Business, *Reproductive Health Matters 25,* (2017), p17.

[3] D Crary, No Longer an Outlier: New York Ends Commercial Surrogacy Ban, *AP News,* (14th February 2021).

[4] D Deomampo, Defining Parents, Making Citizens: Nationality and Citizenship in Transnational Surrogacy, *Medical Anthropology 34(4),* (2015).

[5] M Smietana, S Rudrappa and C Weis, Moral Frameworks of Commercial Surrogacy within the US, India, and Russia, *Sexual and Reproductive Health Matters 29(1),* (2021).

[6] E.g. H Jacobson, Labor of Love: Gestational Surrogacy and the Work of Making Babies, *(New Jersey: Rutgers University Press),* (2016); S Rudrappa, Discounted Life: The Price of Global Surrogacy in India, *(New York: New York University Press),* (2015).

[7] E.g. J Scherpe, C Fenton Glynn, T Kaan (eds.), Eastern and Western Perspectives on Surrogacy, *(Cambridge: Intersentia),* (2019); K Trimmings and P Beaumont, International Surrogacy Arrangements: An urgent need for Legal Regulation at the International Level, *Journal of Private International Law 7(3),* (2011).

Yet while surrogacy literature may be multi-disciplinary, that is not always to say that it is inter-disciplinary. In particular, there is little evidence of regulators giving consideration to the growing body of extra-legal scholarship calling for surrogacy to be recognised as work. The possibility of a labour law model of regulation for this industry remains under-theorised. Though necessarily part of a much bigger project, therefore, the goal of this paper is to try and take a step in this direction. It does so by considering perhaps the most notorious dimension of labour law: the strike.

Strikes are one of the oldest strategies by which workers have traditionally reclaimed bargaining power and established better employment conditions. Beyond this, these manifestations of solidarity have inspired myriad radical feminist thinkers.[8] With this in mind, it is unsurprising that suggestions have begun to emerge that they might be adopted as a tool of empowerment for surrogates.[9] The highly embodied nature of their labour, however, makes it difficult to conceive of how a surrogate might 'down tools'. The question has to be asked, therefore, whether it is possible to translate the merit of strike action for surrogates in theory into a model of industrial action compatible with traditional understandings of labour law – bridging this disciplinary divide. By developing a clearer understanding of both strikes as an industrial tool and the nature of the work surrogacy involves, it is ultimately concluded that the most effective strategy in practice is likely to be an 'emotional labour' strike. Though this proposed model may have limitations, as a method of last resort in challenging circumstances this may help surrogates to strengthen their bargaining power, and have their voice heard as any other worker could.

How Should We Conceptualise Surrogacy?

As payment in exchange for services, commercial surrogacy shares obvious parallels with the wage/work bargain. Yet despite this, even where the practice is permissible 'labour' is not the discursive framework that has traditionally been used to understand or conceptualise it. On the contrary, sociological and anthropological research into this industry indicates that participants frequently distant themselves from this 'mercenary' narrative.[10] In some instances, this is imposed on surrogates, with facilitators actively discouraging them from understanding what they do as work.[11] Elsewhere, they are strongly socialised by

[8] E.g. S Federici, Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle, *(California: PM Press),* (2012).

[9] S Lewis, Full Surrogacy Now: Feminism Against Family, *(London: Verso Books),* (2019), p84.

[10] Z Berend, The Romance of Surrogacy, *Sociological Forum 27(4),* (2012), p914.

[11] S Vertommen and C Barbagallo, The in/visible wombs of the market: the dialectics of waged and unwaged reproductive labour in the global surrogacy industry, *Review of International Political Economy,* (2021).

other surrogates to understand that these arrangements should be entered into out of a desire to help others, not for purely pecuniary reasons.[12] Either way, however, research suggests that there are few jurisdictions in which surrogates identify as 'workers'.[13]

Whether surrogacy is truly an 'exceptional' form of labour is itself an ongoing debate.[14] It is not, however, the analytical coherence of this suggestion which is of greatest concern here. Rather, it is the disadvantageous situation surrogates find themselves in as a result. One of the biggest fears with allowing the surrogacy industry, particularly in its commercial form, is that it allows gestational carriers to become a mere 'womb-to-rent' – a means to an end rather than a person worthy of dignity in themselves.[15] Whilst proponents of commercial surrogacy often argue that it has the potential to empower women,[16] encouraging surrogates to defer to gendered norms (and traditional maternal expectations) of generosity and acquiescence doubtlessly limits its ability to do so.[17] Exceptionalising surrogacy and locating it outside of the world of work allows demands to be made of them that would be exploitative in the ordinary workplace. More than this, in many jurisdictions it has led to an expectation that gestational carriers will detach from self-interest – further minimising their grounds of struggle or ability to voice discontent. For example, the American Society of Reproductive Medicine guidelines indicate that failure to 'exhibit altruistic commitment to become a gestational carrier' is a relative rejection criterion.[18] When being perceived as self-serving is so fundamentally incompatible with industry expectations, it is easy to see how surrogates may be reluctant to ask for improved conditions or to challenge the wishes of the intended parents – regardless of whether their own needs are being met. The idea that surrogacy should come from the heart thus significantly limits their bargaining power and grounds of struggle.

When empowerment and agency are common arguments in favour of allowing surrogacy, it is perhaps unsurprising that a small but growing group of scholarly voices have begun consider these arrangements as a form of 'work'.[19] These writings emphasise the months of physical and emotional effort involved in

[12] H Jacobson, Labor of Love: Gestational Surrogacy and the Work of Making Babies, (2016), p62.

[13] The primary exception to this being St Petersburg in Russia, where it has been found that surrogates do identify as workers but are not afforded rights as such. (M Smietana, S Rudrappa and C Weis, Moral Frameworks of Commercial Surrogacy within the US, India, and Russia, (2021), p10).

[14] B Parry, Surrogate Labour: Exceptional for Whom?, *Economy and Society 47(2),* (2018).

[15] E Anderson, Is Women's Labour a Commodity?, *Philosophy and Public Affairs 19(1),* (1990), p72.

[16] LM Purdy, Surrogate Mothering: Exploitation or Empowerment?, *Bioethics 3,* (1989).

[17] S Vertommen and C Barbagallo, The in/visible wombs of the market: the dialectics of waged and unwaged reproductive labour in the global surrogacy industry, (2021).

[18] ASRM Pages, Recommendations for practices utilizing gestational carriers: an ASRM Practice Committee guideline, *Fertility and Sterility 97(6),* (2012), p1307.

[19] E.g. A Pande, Wombs in Labour: Transnational Commercial Surrogacy in India, *(New York: Columbia University Press),* (2014); M Cooper and C Waldby, Clinical Labor: Tissue Donors and Research Subjects in the Global Bioeconomy, *(North Carolina: Duke University Press),* (2014); K Vora, Life Support: Biocapital and the New History of Outsourced Labor, *(Minnesota: University of Minnesota Press),* (2015).

surrogacy. They unpick the pain, effort and risk; highlight the demands of carrying and birthing a child and the challenges of navigating their relationship with the intended parents, foetus, and own families during the process. Such literature challenges the romanticisation of the pregnancy experience, as well as narratives of devaluation or passivity – reframing surrogacy as a form of labour that ought to be bargained over like any other.

What remains under-theorised, however, is the next step. Though a change in narrative may be necessary to improving the bargaining power of surrogates, it is not sufficient to guarantee meaningful autonomy or contractual fairness. Rather – as with any job – this requires regulatory action and support. It might be thought that given this shift in narrative, adopting labour law to regulate surrogacy would be an obvious avenue of consideration by legal scholars. If surrogacy is to be conceptualised as 'work' to improve their bargaining position, then surely surrogates ought to be offered the same protections as 'workers'? Though specific provisions may vary, employment law is universal - making it an option that could be considered not only by currently permissive states, but also jurisdictions exploring allowing this controversial industry in the future. Yet despite these apparent benefits, there is little evidence of this even being suggested by regulators or legal academics.[20] In particular, the potential procedural benefits of labour law have gone overlooked.

One of the most unique features of labour law compared to other regulatory paradigms is that it offers not only substantive protections, but also procedural rights, to improve the bargaining power of workers. In a highly complex industry with few repeat actors, the potential merit of this seems significant. In particular, Lewis suggests that treating surrogacy as a form of work is most significant as it 'opens up the realization that pregnancy workers can bargain, commit sabotage, and go on strike'.[21] Giving surrogates the right to strike as a worker, however, is meaningless if there is no way they can do so that is practically effective. As will become apparent, the highly embodied nature of contract pregnancy, and the difficulties with interrupting the gestational process, make this challenging – particularly when the limitations of labour law are taken into consideration. Both the following analysis and ultimate conclusion, however, illustrate that there is merit in digging deeper into the employment law model of regulation for gestational carriers. With more meaningful engagement with the idea that what they do is 'work', it becomes possible to conceptualise a strike that would help aggrieved surrogates reassert their bargaining power. This could go some way to correcting the problems with commercial surrogacy as currently conceived.

[20] For exceptions, see M Sarkar, When Maternity is Paid Work: Commercial Gestational Surrogacy at the Turn of the Twenty First Century, in Women's ILO: Transnational Networks, Global Labour Standards and Gender Equity, 1919 to Present, E Boris et al. (eds.), *(Leiden: Koninklijke Brill),* (2018); Z Baines, Signed, Sealed Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy, *Vanderbilt Law Review 71,* (2018).

[21] S Lewis, Full Surrogacy Now: Feminism Against Family, (2019), p84.

The Strike as a Legal Tool

The 'realization' to which Lewis refers is not entirely novel to scholars of social reproduction theory. 'Strike' action has long proved a popular means by which reproductive labourers might challenge feminised expectations of acquiescence and reclaim their identity as a 'worker' to establish better conditions for themselves. Perhaps most famous is International Women's Day – originally premised on the idea that all women would 'down tools' to force recognition of their often invisible efforts.[22] More radical is the Birth Strike Movement – which seeks to pressure governments into better maternity care by forcing the birth rate down.[23]

Yet while such movements have doubtlessly made great strides in highlighting the importance of social reproduction generally, they are not 'strikes' as legally understood. Often simultaneously relying on lobbying or marches and seeking wider political change, they are more akin to civil society activism or protest. When asking whether labour law might be a productive legal avenue for regulators to explore for surrogates, however, it is not enough to simply show that they can protest or be disruptive. Rather, the question is whether it is possible to interrupt a surrogate's labour within the context of a bilateral employment relationship, in a way that is consistent with traditional understandings of a labour strike.

To answer this question, it is first necessary to move away from radical, social movements and instead engage more deeply with when and how strikes are successful in the workplace. To begin to build a picture of how strikes help to bolster the bargaining power of workers, but also their limitations, three core questions are first addressed: what constitutes strike action, what do strikes seek to achieve, and when are they viable? It is only once these are answered that the question of whether and how surrogates might strike is asked.

[22] Global Women's Strike, Home, available from: <https://globalwomenstrike.net/>, [accessed 22nd March 2021].

[23] J Brown, Birth Strike: The Hidden Fight Over Women's Work, *(California: PM Press),* (2019).

What Makes a Strike?

(1) What Constitutes Strike Action?

Questions of power have long been at the heart of labour law.[24] As the most radical tool of the discipline, strikes are certainly no exception to this. They are an effective means of workers strengthening their bargaining power because they subvert the control that is ordinarily assumed to be inherent in the wage-work relationship. They remind an employer that ultimately, it is workers who hold the labour power which determines whether an enterprise functions or not. This illustrates that they are not mere automatons, but rather retain a sovereignty over themselves and their bodies which they can exercise. What constitutes strike action, therefore, is a worker refusing to work and fulfil contractually agreed expectations.

Ordinarily, this is associated with the image of a walk out – an absolute refusal to continue working which leads an employee to exit the workplace. There are also, however, 'lesser' forms of industrial action. Examples include working to rule or go slows. In such instances, the manner and extent to which employees withhold their labour varies. Invariably, however, by refusing to perform their contract of employment either completely or to the best of their ability, a worker seeks to challenge the control of their employer – thereby exerting their bargaining power.

(2) What Do Strikes Seek to Achieve?

The idea that a strike requires a worker to be able to withdraw their labour does little to set the employment context aside from more radical social action. As will be shown however, perhaps the main difference between the two is what they seek to achieve. Though both aim to improve the lived conditions of the person on strike, in the workplace context the goal is to realise long term improvements within their particular bilateral employment relationship. This necessarily limits the steps that a worker can take, as they must not create circumstances in which they are unable to go back to their job at the end. Any workplace strike must be temporary. Whilst social activists may be willing to be radical in their actions, therefore, strikes as understood by labour law should not be conflated with a worker simply quitting and entering into a new contract elsewhere. Strikes are designed to offer an alternative to those who are unhappy with their conditions but do not wish to do so – for instance due to the practical difficulties or, the social and human capital they may have already invested in that particular workplace. It is for similar reasons that strike action is protected as a matter of law, ensuring that employers cannot simply dismiss workers engaged in such

[24] One of its oldest justifications is to correct the inequality of bargaining power inherent in these arrangements: P Davies, M Freedland, Kahn Freund's Labour and the Law, *(London: Stevens),* (1983), p8.

disruption. Regardless of whether their demands are ultimately met, their original role should remain in some form.

(3) When are Strikes Viable?

Whether strike action will ultimately be successful is generally difficult to predict. What is an important question to ask when considering how a new industry might respond to labour law, however, is when a strike will be viable. Strikes would not be effective if they did not in some way harm the interests of the employer. As they are an action of last resort, if workers are on strike it is to be assumed that appeals to their beneficence have failed, such the only way of forcing them to improve worker conditions is to cause disruption to their own interests. Causing this damage, however, is not always easy for the workers themselves. A strike will only be viable, therefore, if the potential benefits outweigh the cost - as assessed by the parties considering strike action. Inevitably, the more significant the risk is to a worker, the less likely it is that they will exert their bargaining power in this way.

The nature of the risk to which workers expose themselves to varies considerably depending on the nature of their work. Almost inevitably, they will suffer loss of wages. The non-instrumental losses they are likely to incur, however, also should not be overlooked. Strikes may, for example, do damage to their relationship with their employer. Similarly, those who work with vulnerable parties such as children or patients may also suffer identity conflict in taking this decision. With each new form of work that labour law might recognise, these factors must be borne in mind when considering whether and how industrial action might offer opportunity to strengthen their bargaining power. To the extent that the risks outweigh the benefits, the viability of strike action (and thus meaningful empowerment) is significantly reduced.

So How Might Surrogates Strike?

Having distilled what it means to go on strike, the question naturally becomes how surrogates might put this into practice. How might they withdraw their labour in a temporary way, in which the risks do not outweigh the costs? Perhaps unsurprisingly, this is not a question with a straightforward answer. Nonetheless, it is ultimately suggested that it is possible for all three components to be met – going some way to supporting the idea that surrogates might better maximise their agency by adopting a labour law approach.

The Radical Proposal of Sophie Lewis

So far, only one (non-legal) academic has attempted to understand what a surrogate 'strike' might look like in practice.[25] Sophie Lewis is one of the most radical proponents of conceiving of surrogacy as work and was cited above as an advocate of adopting 'strike' action as a means of recalibrating the bargaining power of gestational labourers. Their suggestion is that surrogates should use abortion as a means of going on strike – forcing intended parents to consider their voice and needs through the threat or execution of gestational sabotage.[26]

It is easy to see how the question of 'what constitutes strike action' may initially lead to this conclusion. It is only by bringing the pregnancy to an end that a gestational labourer can entirely refuse to continue working. One of the most unusual, and indeed controversial, aspects of surrogacy is that it is acutely embodied in nature.[27] There is no clear line between the corporeality of a worker and the labour power that they exert. Whilst there are periods of intense physicality, not least the 'labour' itself, much of gestation is relatively passive. Other than abortion, there is little a surrogate could do to interrupt the passage of nutrients over the placenta, continued expansion of the abdomen. In order to absolutely 'down tools' in the way that has traditionally been associated with a strike, therefore, it would seem that gestational labourers would have little choice but to take this drastic step. As such, regardless of the hesitancy many may have about using abortion as a bargaining chip this way, it is important to consider whether this might be a means by which surrogates could 'strike' to capitalise on their status as a worker.

The suggestion here, however, is that there are significant incompatibilities between termination and the definition of a strike offered above. For this reason, there must be serious doubts over whether it would be compatible with a labour law model of regulation. Taking first the question of what constitutes strike action, on closer inspection it is not in fact clear that an abortion could be considered a withdrawal of labour. Clearly, it is a step in this direction – once complete, the surrogate will no longer be subject to the burden of pregnancy. Yet even so, it is difficult to see that terminating a pregnancy, particularly in its later stages, can be analogised to the traditional downing of tools. On the contrary, abortion itself can be a laborious process. Intrusive, painful, and with a potentially high level of physical risk depending on the stage of the pregnancy, even if it can be accessed safely it is difficult to conceptualise it as a 'strike'. Indeed, to do so seems to simply rebrand the long-criticised failure to recognise gestational labour as work; once again

[25] Though others have explored examples of surrogate 'resistance' and negotiation, this again has not been translated into consideration of how might be used to improve conditions more systemically. (See A Pande, Wombs in Labour: Transnational Commercial Surrogacy in India, (2014), p107.

[26] S Lewis, Full Surrogacy Now: Feminism Against Family, (2019), p89.

[27] A Pande, Wombs in Labor: Transnational Commercial Surrogacy in India, (2014), p104.

impose a passivity onto a reproductive process that in fact is itself an arduous undertaking. Hesitance is thus needed before this is recommended as a form of 'strike'.

Arguably, this view of strikes as a straightforward, spontaneous downing of tools is simply an overly naïve understanding of how industrial action works in the 21st century. The huge rise in atypical forms of work has triggered change and development in every aspect of labour law – with strikes no exception to this. In the gig economy, for instance, workers are documented as having invested a great deal of time and energy into calculating how to manipulate the algorithms to benefit themselves. They may organise mass log-outs to trigger demand surges, exploit free food offers then encourage the deliverer to strike themselves.[28] Such activity is not passive or easy; illustrates the importance of adapting understandings of industrial action to the changing world of work. To this extent, perhaps it is necessary to accept that the withdrawal of labour may in some instances demand effort.

Yet even if this is the case, the acute physicality of abortion nonetheless remains relevant to the question of when a strike will be viable – and the importance of the benefits outweighing the harm. It is difficult to conceive of another profession in which the decision to go on strike may potentially put the life of the worker at direct risk. Though in many countries early terminations can be accessed safely, there is also no avoiding the fact that unsafe abortion remains one of the five leading causes of maternal mortality worldwide.[29] Depending on the stage of the surrogate's pregnancy, their ability to access safe services, and the legality of reproductive healthcare in their country, there are doubtlessly potentially significant risks involved in this 'solution' which may well deter surrogates from making this decision. This is particularly so when it is considered that the contractual responsibility of intended parents to cover a surrogate's medical bills would not extend to such violations of the contract – potentially further minimising their ability to access safe abortion care. With this in mind, it is difficult to characterise this as an empowering option which would strengthen the surrogate's position. To the extent that the physical (and potentially, psychological) risk outweighs the gains, it is difficult to accept abortion as a viable strike tactic.

Neither of these, however, are the most fundamental incompatibility with surrogacy and a 'strike' as conceptualised by labour law. Rather, this is temporal. Using abortion as a form of 'strike' would be tantamount to terminating the working relationship – not pushing for improvements within its framework. As illustrated however, if industrial action leaves a worker without a job to go back to then it cannot be understood as a true strike. Ending a contract pregnancy, therefore, is not compatible with labour law's understanding of empowerment. Abortion cannot be considered an industrial action strategy that would

[28] J Shenker, Strike 2.0: how gig economy workers are using tech to fight back, *The Guardian,* (31st August 2019).

[29] Medicins Sans Frontieres, Unsafe Abortion: A Forgotten Emergency, *MSF,* (7th March 2019).

guarantee surrogates a voice or strengthen their bargaining power as a worker, even if they were granted the right to strike. An alternative means of withholding labour will have to be found if this is to be achieved.

Understanding the Work of a Commercial Surrogate

Ultimately, Lewis is not arguing for a labour law model of regulation for surrogacy.[30] The goal of 'Full Surrogacy Now' is to explore how the practice of commercialising pregnancy might help to re-evaluate gestation as a whole, with an overarching desire to abolish the family. Given the reach and radicalism of its proposals, it is unsurprising that its conceptualisation of a 'strike' is inconsistent with current understandings of strikes by labour law. What has to be questioned, however, is whether this can be the case at all. Is there a way by which this form of reproductive labour might be withheld as a bargaining tool?

It seems necessary to accept that surrogates will never be able to go on 'full' strike. There can be no temporary withdrawal from workplace responsibilities. That is not to say, however, that they may not still benefit from this strategy. Though gestational labour may be the essence of a commercial surrogacy agreement, it is not the only form of 'work' that these arrangements involve. Rather, it is suggested here that two other forms of labour can be identified: 'behavioural' and 'emotional'. Though again not often discussed by labour lawyers, these also merit consideration when asking whether a surrogate might 'strike' in a manner compatible with the discipline.

By 'behavioural' labour, what is referred to are the additional demands that are imposed on surrogates to maximise the chances of a healthy child being delivered at the end of the process. It is not uncommon for commercial surrogacy contracts to be 30, 40, 50+ pages long – with extensive explanations of what surrogates may or may not do.[31] As examples, they generally cannot drink alcohol or smoke, engage in dangerous activities, or be exposed to potentially toxic environments such as nail salons. There are restrictions on who they can engage in sexual intercourse with and when, where they may travel and until what point in the pregnancy. These additional obligations are acutely onerous in their own way – often placing significant limitations on the freedoms of a surrogate. Some intended parents also make positive requests of their surrogate. For instance, they may request that they practice yoga, or eat only organic foods.

[30] S Lewis, Full Surrogacy Now: Feminism Against Family, (2019).

[31] For discussion in the US context, see: H Berk, (2013), The Legalization of Emotion: Risk, Gender, and the Management of Feeling in Contracts for Surrogate Labor, available from: <https://digitalassets.lib.berkeley.edu/etd/ucb/text/Berk_berkeley_0028E_13203.pdf>, [accessed 14th November 2019], p79.

Without doubt, complying with these contractual expectations are an important part of the 'work' they are expected to perform.

In discussing the gestational and behavioural obligations that a surrogate agrees to assume, however, it is also important not to overlook the final form of labour involved in these arrangements: the emotional. Both unseen and largely uncontracted for, this is easily invisibilised. Nonetheless, its arduousness has been emphasised by extensive academic literature.[32] Research highlights not only the way in which surrogates navigate their bond to the foetus, but also the intended parents – a complex, quasi-familial connection for which there is no blueprint. Moreover, particularly when working with heterosexual couples who have often experienced significant loss prior to turning to surrogacy, anxiety and difficulties with relinquishing control are rife. The sensitivity, tolerance and patience of surrogates are critical to the success of these arrangements. It will ultimately be argued that it is this labour which presents the greatest opportunity for surrogates to meaningfully exercise their bargaining power.

A Strike of Behavioural Labour?

Compared to gestational labour, it is much easier to see how a surrogate might breach their behavioural obligations if unhappy with the commissioning parents. Unlike a termination, this could be done with relative ease. A surrogate could simply choose to drink a glass of wine; skip their yoga class. Albeit partial, this could still be conceptualised as a withdrawal of labour. Such decisions would allow a surrogate to tangibly demonstrate the extent of their frustration with the intended parents – marking a conscious refusal to meet their contractual demands or expectations unless and until changes are made.

As well as refusing to work in line with their contractual obligations, they are clearly doing so to seek leverage over the intended parents within the context of their bilateral arrangement. These decisions do not have to bring the relationship to an end in the way that an abortion would. Rather, as with traditional labour law, the goal is to catalyse a discussion of how to move forward in a way that is in the interests of both sides. To this extent, challenging behavioural limitations may seem an effective means by which surrogates could exert their bargaining power and strike against the intended parents.

It is the idea that the worker must be willing to accept the costs of a strike for it to be viable, however, which again gives rise to significant cause for concern with this approach. Ordinarily, strikes impact the

[32] For examples, see: A Russell Hochschild, Global Care Chains and Emotional Surplus Value, in 'On the Edge: Living with Global Capitalism', W Hutton and A Giddens (eds.), *(London: Jonathan Cape),* (2011); E Teman, Birthing a Mother: The Surrogate Body and the Pregnant Self, *(California: University of California Press),* (2010).

commercial interests of an employer – whether these be financial or reputational. Notably different, however, is that in violating their behavioural responsibilities a surrogate may jeopardise the development of an unborn child. Of course, there are degrees of potential harm that may result. A meal from a prohibited fast-food restaurant is clearly very different to the deliberate consumption of a narcotic. Yet for the intended parents to be sufficiently concerned as to change their behaviour, surrogates may have to be willing to make fairly serious contractual violations. Ultimately, this seems unlikely in practice. Myriad psycho-social investigations into surrogacy have shown that a key motivator for their decision is the desire to help another start a family.[33] Whether this is because they have witnessed a family member struggle with infertility, or simply because they want others to experience the joy that children have brought them, they are doubtlessly willing to make considerable sacrifices in order to make this happen. That they would really be willing to take measures which may harm the child, therefore, seems doubtful. Changing from a 'labour of love' to 'work' narrative may strengthen their bargaining power, but it will not alter their fundamentally caring identity.

This conclusion is supported by research into other professions with a pastoral element. Research shows that nurses, for instance, rarely go on full strike.[34] Concern for their innocent and vulnerable patients mean that though attempts are made to disrupt care, there is reluctance to abandon the workplace entirely. This is the case even if it means limiting the effectiveness of the strike. It is likely that similarly, most surrogates would conclude that with a strike of behavioural labour the risks are too significant to justify the benefits. Again therefore, this model is unlikely to do much to bolster the bargaining power of surrogates in practice.

A Strike of Emotional Labour?

This leaves one final possibility to be explored – namely a strike of emotional labour. There are two parts to a contract of employment.[35] Most obviously, there are express terms and conditions – in this instance, the agreement to carry a child in accordance with the behavioural restrictions. Beyond this, however, there is also an implicit framework of expectations. Though these are not stipulated, it is nonetheless assumed employees will comply with them. Common examples include 'service with a smile' or office 'professionalism'. Failure to conform to these can be grounds for sanction due to frameworks of implied terms that undergird employment contracts – which may include reasonable performance, good faith, or mutual trust and confidence.

[33] A Campbell, Law's Suppositions about Surrogacy against the Backdrop of Social Science, *Ottawa Law Review 43,* (2011); J Ciccarelli and L Beckman, Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy, *Journal of Social Issues 61(1),* (2005).

[34] G Strachan, Not Just a Labour of Love: Industrial Action by Nurses in Australia, *Nursing Ethics 4(4),* (1997).

[35] A Furnham, The Talented Manager, *(London: Palgrave MacMillan),* (2012), p88.

To describe and discuss the psychological burden of such displays of commitment, Russell Hochschild coined the term 'emotional labour'[36] – highlighting the ways in which the employment market increasingly commodifies feelings through such demands. Just as in 'traditional' work, research into surrogacy has shown that it similarly is not purely 'task oriented'. On the contrary, it is also expected that this labour will be performed in a particular way. Perhaps most controversial is the idea that surrogates will care for the child without bonding to them as a mother. More than this, however, it is also commonly expected that surrogates will keep the intended parents in the loop; be on hand to update them and allow them to vicariously experience the pregnancy as much as possible. Some of this is contractually stipulated – and even such regular contact can be demanding, particularly where the intended parents are anxious.[37] Oftentimes, however, surrogates go beyond this. This may be a responsibility they naturally assume – for instance those who write letters to the intended parents from the perspective of the baby.[38] Alternatively, it may be facilitated by agencies and brokers, who encourage surrogates to show the parents their bump over video call or give them recordings of their voices to play.[39] At least in part, these efforts are to give the intended parents peace of mind that they will not go back on their word.[40] This external illustration of commitment is a classic example of emotional labour.

It is this final dimension of a surrogate's labour which, it is suggested, holds most potential for strike action. Focussing on the physical labour of the surrogate inevitably means that the foetus will become collateral damage. Symbiotic with the surrogate, any bodily choices they make will necessarily also directly impact it. To the extent that this is incompatible with the definition of a strike offered – either as it terminates the working relationship or makes it unlikely that they will be undertaken at all – this is problematic. By contrast, a strike of emotional labour offers surrogates the possibility of targeting only the intended parents, avoiding such problems of ineffectiveness or unviability.

What is proposed, therefore, is that for frustrated surrogates the most effective means of exerting their bargaining power may be to refuse to comply with the intended parents' expectations of emotional labour. Rather than empathising with their anxieties and accommodating their desire to participate in the process,

[36] This is the core idea of her book: A Russell Hochschild, The Managed Heart: Commercialization of Human Feeling, Third Edition, *(California: University of California Press),* (2012).

[37] Some surrogates in the US, for instance, report specifically asking to be placed only with same-sex commissioners – wary of the fears of infertile heterosexual pairs (S Page, They were gay and wanted a baby. She loved being pregnant. They made a deal, *National Post,* 17th September 2018).

[38] E Teman and Z Berend, Surrogate Non-Motherhood: Israeli and US Surrogates Speak About Kinship and Parenthood, *Anthropology & Medicine 25(3),* (2018), p301.

[39] A Pande, Blood, Sweat and Dummy Tummies: Kin Labour and Transnational Surrogacy in India, *Anthropologica 57(1)*, (2015), p58.

[40] H Jacobson, Labor of Love: Gestational Surrogacy and the Work of Making Babies, (2016), p111.

surrogates would consciously and deliberately withhold all information. They could exclude the intended parents from the process until they have shown willingness to listen to and engage with their concerns. Though not terminating the arrangement in its entirety, in this way surrogates would force intended parents to recognise that they themselves have agency and are not solely a vessel for the realisation of their wants and needs. This would build on the normalisation of push back that has evolved in the context of employment, but which is currently stifled by the current surrogacy narratives - without ending the agreement entirely or causing disproportionate harm to the child. In practical terms, this is likely to be the most effective way by which surrogates could strengthen their bargaining power over this work.

Limitations

Clearly, this possibility could go some way to assisting aggrieved surrogates. Opening the possibility of a strike would recentralise focus onto their needs and agency, as well as offering them the opportunity to challenge the unrealistic expectations of altruism currently placed on their shoulders. That is not to say, however, that it is not without its problems. Though a withdrawal of emotional labour may come closest to the image of a labour law strike, so too must its limitations be acknowledged if this possibility is to be given further exploration. Three types are considered here: practical, conceptual, and legal.

Practical

Practically speaking, the main limitation is that this approach will not be effective in all potential disputes. The headline cases with surrogacy – the image of a carrier who wants to keep the baby,[41] or who is being asked to abort against their will[42] – are not well suited to this idea. Such situations are time sensitive, and unilateral action is likely to do more harm than good.

It is now well established, however, that these 'headline' issues should be resolved prior to the contract being entered into. Parents who are pro-choice should not be matched with a pro-life surrogate; gestational carriers undergo extensive screening to minimise the likelihood that they will bond with the child. What surrogacy stories indicate is more likely to be problematic to the harmony of surrogacy arrangements, however, is the banal every day – which is also much more difficult to prepare for. These contracts are necessarily incomplete. The highly unpredictable nature of pregnancy, and the scope for changes to the

[41] E.g. Mary Beth Whitehead in the Baby M case (In re Baby M, 537 A.2d 1227, 109 NJ 396).

[42] E.g. Crystal Kelley – for discussion see: D Forman, Abortion Clauses in Surrogacy Contracts: Insights from a Case Study, *Family Law Quarterly 49,* (2015).

circumstances in the lives of either side, mean that despite the length of these arrangements, requests may nonetheless be made which had not been previously agreed. More than this, terms which are open-ended may be subject to varied interpretation by the parties. If the surrogate agrees to avoid 'risky activities', for instance, how far can this extend? How quickly might they be expected to reply to messages from the parents; what if they miss a call? Particularly if the expectations of both sides are not adequately managed, these contracts offer fertile ground for friction and disagreement. Though this has long been known, it has become all the more pronounced with the ever-evolving advice and medical implications of Covid-19. In the context of these highly emotional, trust-reliant relationships, it is such questions which often give rise to the most concern. If the parties have divergent expectations – and perhaps more importantly are not willing to take the perspective of the other side into account – there is a real risk that these arrangements will deteriorate.

This is also true, however, of employment contracts. Indeed, it is perhaps because they are similarly open-ended and incomplete that the labour law discipline is so committed to procedural as well as substantive protections: the centralisation of alternative dispute resolution, the right to take more drastic strike action when this fails. In no small part, this too is to ensure that incomplete contracts do not equate to exploitation; that workers have ongoing say in their working conditions. Though perhaps not appropriate for all surrogacy disputes, therefore, strikes may nonetheless assist with some of the most common. As a method of last resort, they could help to restore much of the agency that surrogacy opponents fear will be lost by allowing these arrangements.[43]

This assessment also goes some way to assuaging a second practical concern – namely that a strike of emotional labour is unlikely to be effective where the surrogacy relationship is already one of arm's length. Not least due to the lack of consensus over the appropriate moral framework for this industry, there are those parents who see these arrangements as economic transactions; are reluctant to engage much with the surrogate themselves. Again, this is visible in the matching process – with both sides being asked the nature of the relationship they prefer. In such distanced relationships, it is difficult to imagine that the withdrawal of emotional labour would have much impact. Given that surrogacy disputes often seem to arise in the context of overbearing commissioning parents, however, then so long as well-matched it seems that such relationships are simply less likely to be problematic. By naturally retaining their agency, the likelihood of surrogates needing to reclaim it through strike action is minimised.

[43] In three party cases, where an agency is used for example because of a language barrier, the same analysis could apply – however the surrogate would have to withhold information from them rather than the parents directly.

Conceptual

Even with these practical concerns resolved, however, conceptual disjuncts remain between the proposal here and the labour law understanding of a strike. A particularly obvious difference is that surrogates would not be engaged in 'collectivism'. Ordinarily, strikes rely on strength in numbers. The proposal here is not, however, that all surrogates will cut their intended parents off because one has had a disagreement even in states where secondary strikes are permitted. Rather, it is assumed that surrogates will act unilaterally, and only in response to their own problems.

Though collectivism is often what allows workers to successfully subvert the power structure between a worker and their employer, however, it is not a precondition for success. Though unusual, it is possible to imagine a workplace with just one employee. The fact they do not have colleagues does not deprive them of their right to strike if they feel aggrieved. Nor, necessarily, would it diminish their reclamation of bargaining power. Mass strikes are effective as they strip employers of the labour power they need to keep their enterprises running. If said enterprise is reliant on just one worker, however, then there is no reason to think that they alone withdrawing their labour would not have the same effect. Similarly, no matter how many satellite actors may be involved in this practice – including doctors, agencies and lawyers – refusal by the surrogate to cooperate will cause significant disruption to the process. Though one-person industrial action may be unusual, this does not necessarily pose a fatal conceptual obstacle to this understanding of how surrogates might strike.

Legal

Doubtlessly, there are other potential obstacles. Perhaps most obvious are the practical steps that would have to be taken – particularly the Unionisation and collective organisation of surrogates. Notably, however, strong surrogacy communities already exist. Sometimes these are in situ (such as the dormitories of India),[44] more commonly they are built through online groups and forums.[45] When other atypical groups, notably sex workers, have proved that collective organisation of new industries is possible,[46] these challenges do not seem insurmountable. The same is true of the range of technical demands that often have to be complied with before a strike – such as notification of officials, democratic balloting, and proof of lawful purpose.

[44] Documented by A Pande, Wombs in Labor: Transnational Commercial Surrogacy in India, (2014).

[45] [45] Z Berend, The Romance of Surrogacy, (2012), p914.

[46] See G Gall, Sex Worker Unionization, *(London: Palgrave MacMillan),* (2016).

What may hold surrogates back in at least some states, however, is the illegality of partial strikes. Not all countries allow industrial action that amounts to less than an absolute walk out. It would remain to be seen how states might respond to the idea of an emotional labour strike, and whether there would be willingness to respond flexibly to the unique nature of surrogacy. Whilst severing contact from their intended parents could be analogised to abandoning the workplace, for instance, it may also be considered an example of 'working to rule' or a 'slowdown' – which may pose challenges to surrogates in states with more restrictive attitudes towards industrial action.[47] When labour law has long been slow to respond to and acknowledge the importance of emotional labour in the workplace,[48] it is unsurprising that there is no precedent to help resolve this. These practical questions cannot be answered, however, whilst surrogacy continues to be regulated as a 'labour of love'. Just as with any other worker, meaningful consideration needs to be given to how best to ensure that their voices are heard.

Conclusion

The happy reality is that most surrogacy arrangements run smoothly, with many parties remaining in contact long term.[49] Yet doubtlessly, the highly sensitive and incomplete nature of these contractual arrangements does mean there is considerable scope for friction, tension, and unhappiness. If surrogacy is to operate legitimately, it is critical that gestational labourers have sufficient scope to ensure that their voice is heard, and to bargain in their own favour. It is partially with this in mind that sociological and anthropological literature have begun to frame these arrangements as 'work'. Neither regulation nor legal scholarship, however, has followed suit.

The question that has begun to be explored here is whether a labour law model of regulation might offer opportunities for surrogates to strengthen their bargaining power. In particular, it has explored the 'strike' as a potential means of doing so. It has been suggested that despite initial appearances, it is possible to conceptualise a withdrawal of this labour that complies with labour law's understanding of industrial action. Following a three-part understanding of a strike, it has concluded that contrary to more radical proposals, the most productive approach is likely to be the withholding of emotional labour. Though questions remain, exploring this avenue offers at least an opportunity for surrogates to exert their bargaining power in a way not yet often seen. In an industry so focussed on empowerment, the significance of this cannot be overlooked.

[47] Examples including the UK and France.

[48] Visible, for instance, in the constant devaluation of reproductive or feminised labour.

[49] S Imrie and V Jadva, The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements, *Journal of Reproductive Biomedicine Online 29,* (2014).

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Commentary

By Jessica A. Albrecht

"Surrogates on Strike" is an engaging and illuminating paper on an aspect which has often been argued for by popular and academic scholarship on surrogacy. The argument usually goes that if we see surrogacy as a form of labour / work, then the possibility of strike opens up to create a new agency for the worker.

As the author rightly demonstrates, this call for strike and its implications has not yet been fully thought through. By firstly engaging with theories of labour and strike and applying them on the particularities of surrogacy, this paper then concludes that there are only two possibilities of strike open to the surrogate: strike of behavioural labour and strike of emotional labour. However, only the latter one seems to be sufficient, on the one hand, and fitting for the labour at stake, on the other.

Nevertheless, in the end the author has to acknowledge that even strike of emotional labour might not be effective or even executable due to practical, conceptual or legal limitations. The author concludes that this leaves only a narrow set of options for empowerment and gaining bargaining power, even if this might be needed for enhancing the rights and treatment of surrogates – viewing them as workers.

However, there are two aspects on which I want to draw more attention. The author mentioned the necessity for unionising and collective organisation in order to lift an individual action to the status of a strike. Even though there might already be communities in place, as the author has also said, there is, of yet, no union or collective representation of surrogates – in particular not in the global scale it would be required to be. A transnational collective with more legal power than online forums, however, might lead to solving some of the issues posed by the author, especially that of evaluating the role of emotional labour in surrogacy; which, for now, is solely dependent on the individual relationship to the parents.

Secondly, the author unfolds their argument by drawing on the work of Sophie Lewis and others who claim that surrogacy needs to be viewed as labour – in order to then either enhance the working conditions of the surrogate or to think about carrying a child, labouring and giving birth in general in different and challenging ways. However, concluding that acknowledging surrogacy as labour then leads to the possibility of striking might be the problem at stake here. As the author has also mentioned, many caring labour activities share similar problems with striking. Maybe it is the concept of strike as the sole (collective) agency of workers that needs to be rethought. What the conclusion of this article might actually call for might be a rethinking of the concept of the worker and her agency.