



FARRAR, STRAUS AND GIROUX

NEW YORK

Farrar, Straus and Giroux
18 West 18th Street, New York 10011

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Distributed in Canada by D&M Publishers, Inc.

Printed in the United States of America

Published in 2009 by Farrar, Straus and Giroux

First paperback edition, 2010

The Library of Congress has cataloged the hardcover edition as follows:

Sandel, Michael J.

Justice : what's the right thing to do? / Michael J. Sandel.— 1st ed.

p. cm.

Includes bibliographical references and index.

ISBN: 978-0-374-18065-2 (hardcover : alk. paper)

1. Justice. 2. Values. 3. Ethics. I. Title.

JC578.S25 2009

172'.2—dc22

2009025438

Paperback ISBN: 978-0-374-53250-5

Designed by Abby Kagan

www.fsgbooks.com

7 9 10 8 6

4. HIRED HELP / MARKETS AND MORALS

Many of our most heated debates about justice involve the role of markets: Is the free market fair? Are there some goods that money can't buy—or shouldn't? If so, what are these goods, and what's wrong with buying and selling them?

The case for free markets typically rests on two claims—one about freedom, the other about welfare. The first is the libertarian case for markets. It says that letting people engage in voluntary exchanges respects their freedom; laws that interfere with the free market violate individual liberty. The second is the utilitarian argument for markets. It says that free markets promote the general welfare; when two people make a deal, both gain. As long as their deal makes them better off without hurting anyone else, it must increase overall utility.

Market skeptics question these claims. They argue that market choices are not always as free as they may seem. And they argue that certain goods and social practices are corrupted or degraded if bought and sold for money.

In this chapter, we'll consider the morality of paying people to perform two very different kinds of work—fighting wars and bearing children. Thinking through the rights and wrongs of markets in these contested cases will help us clarify the differences among leading theories of justice.

What's Just—Drafting Soldiers or Hiring Them?

In the early months of the U.S. Civil War, festive rallies and patriotic sentiment prompted tens of thousands of men in the Northern states to volunteer for the Union army. But with the Union defeat at Bull Run, followed by the failure the following spring of General George B. McClellan's drive to capture Richmond, Northerners began to doubt that the conflict would end quickly. More troops had to be raised, and in July 1862, Abraham Lincoln signed the Union's first draft law. A Confederate draft was already in place.

Conscription ran against the grain of the American individualist tradition, and the Union draft made a striking concession to that tradition: Anyone who was drafted and didn't want to serve could hire someone else to take his place.¹

Draftees seeking substitutes ran ads in newspapers, offering payments as high as \$1,500, a considerable sum at the time. The Confederacy's draft law also allowed for paid substitutes, giving rise to the slogan "rich man's war and poor man's fight," a complaint that echoed in the North. In March 1863, Congress passed a new draft law that sought to address the complaint. Although it did not eliminate the right to hire a substitute, it provided that any draftee could pay the government a fee of \$300 instead of serving. Although the commutation fee represented close to a year's wages for an unskilled laborer, the provision sought to bring the price of exemption within reach of ordinary workers. Some cities and counties subsidized the fee for their draftees. And insurance societies enabled subscribers to pay a monthly premium for a policy that would cover the fee in the event of conscription.²

Though intended to offer exemption from service at a bargain rate, the commutation fee was politically more unpopular than substitution—perhaps because it seemed to put a price on human life (or the risk of death) and to give that price government sanction. Newspaper headlines proclaimed, "Three Hundred Dollars or Your Life." Anger over the draft and the \$300 commutation fee prompted violence

against enrollment officers, most notably in the New York City draft riots of July 1863, which lasted several days and claimed more than a hundred lives. The following year, Congress enacted a new draft law that eliminated the commutation fee. The right to hire a substitute, however, was retained in the North (though not in the South) throughout the war.³

In the end, relatively few draftees wound up fighting in the Union army. (Even after conscription was established, the bulk of the army consisted of volunteers, prompted to enlist by bounty payments and the threat of being drafted.) Many whose numbers were drawn in draft lotteries either fled or were exempted for disability. Of the roughly 207,000 men who were actually drafted, 87,000 paid the commutation fee, 74,000 hired substitutes, and only 46,000 served.⁴ Those who hired substitutes to fight in their place included Andrew Carnegie and J. P. Morgan, the fathers of Theodore and Franklin Roosevelt, and future presidents Chester A. Arthur and Grover Cleveland.⁵

Was the Civil War system a just way of allocating military service? When I put this question to my students, almost all of them say no. They say it's unfair to allow the affluent to hire substitutes to fight in their place. Like many Americans who protested in the 1860s, they consider this system a form of class discrimination.

I then ask the students whether they favor a draft or the all-volunteer army we have today. Almost all favor the volunteer army (as do most Americans). But this raises a hard question: If the Civil War system was unfair because it let the affluent hire other people to fight their wars, doesn't the same objection apply to the volunteer army?

The method of hiring differs, of course. Andrew Carnegie had to find his own substitute and pay him directly; today the military recruits the soldiers to fight in Iraq or Afghanistan, and we, the taxpayers, collectively pay them. But it remains the case that those of us who'd rather not enlist hire other people to fight our wars and risk their lives. So what's the difference, morally speaking? If the Civil War system of hiring substitutes was unjust, isn't the volunteer army unjust as well?

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To examine this question, let's set aside the Civil War system and consider the two standard ways of recruiting soldiers—conscription and the market.

In its simplest form, conscription fills the ranks of the military by requiring all eligible citizens to serve, or, if not all are needed, by holding a lottery to determine who will be called. This was the system used by the United States during the First and Second World Wars. A draft was also used during the Vietnam War, though the system was complex and riddled with deferments for students and people in certain occupations, allowing many to avoid having to fight.

The existence of the draft fueled opposition to the Vietnam War, especially on college campuses. Partly in response, President Richard Nixon proposed doing away with conscription, and in 1973, as the United States wound down its presence in Vietnam, the all-volunteer military force replaced the draft. Since military service was no longer compulsory, the military increased pay and other benefits to attract the soldiers it needed.

A volunteer army, as we use the term today, fills its ranks through the use of the labor market—as do restaurants, banks, retail stores, and other businesses. The term volunteer is something of a misnomer. The volunteer army is not like a volunteer fire department, in which people serve without pay, or the local soup kitchen, where volunteer workers donate their time. It is a professional army in which soldiers work for pay. The soldiers are “volunteers” only in the sense that paid employees in any profession are volunteers. No one is conscripted, and the job is performed by those who agree to do so in exchange for money and other benefits.

The debate over how a democratic society should fill the ranks of the military is at its most intense during times of war, as the Civil War draft riots and Vietnam-era protests attest. After the United States adopted an all-volunteer force, the question of justice in the allocation of military service faded from public attention. But the U.S.-led wars in Iraq and Afghanistan have revived public discussion about whether it is

right for a democratic society to recruit its soldiers by means of the market.

Most Americans favor the volunteer army, and few want to go back to conscription. (In September 2007, in the midst of the Iraq War, a Gallup poll found that Americans opposed reinstating the draft by 80 to 18 percent.⁶) But the renewed debate over the volunteer army and the draft brings us face-to-face with some big questions of political philosophy—questions about individual liberty and civic obligation.

To explore these questions, let's compare the three ways of allocating military service we have considered—conscription, conscription with a provision for hiring substitutes (the Civil War system), and the market system. Which is most just?

1. conscription
2. conscription allowing paid substitutes (Civil War system)
3. market system (volunteer army)

The Case for the Volunteer Army

If you are a libertarian, the answer is obvious. Conscription (policy 1) is unjust because it is coercive, a form of slavery. It implies that the state owns its citizens and can do with them what it pleases, including forcing them to fight and risk their lives in war. Ron Paul, a Republican member of Congress and a leading libertarian, recently made this claim in opposing calls to reinstate the draft to fight the Iraq War: "Conscription is slavery, plain and simple. And it was made illegal under the 13th amendment, which prohibits involuntary servitude. One may well be killed as a military draftee, which makes conscription a very dangerous kind of enslavement."⁷

But even if you don't consider conscription equivalent to slavery, you might oppose it on the grounds that it limits people's choices, and therefore reduces overall happiness. This is a utilitarian argument against conscription. It holds that, compared to a system that permits

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the hiring of substitutes, conscription reduces people's welfare by preventing mutually advantageous trades. If Andrew Carnegie and his substitute both want to make a deal, why prevent them from doing so? The freedom to enter into the exchange seems to increase each party's utility without reducing anyone else's. Therefore, for utilitarian reasons, the Civil War system (policy 2) is better than pure conscription (policy 1).

It's easy to see how utilitarian assumptions can support market reasoning. If you assume that a voluntary exchange makes both parties better off, without harming anyone else, you have a good utilitarian case for letting markets rule.

We can see this if we now compare the Civil War system (policy 2) with the volunteer army (policy 3). The same logic that argues for letting draftees hire substitutes also argues for a full-market solution: If you're going to let people hire substitutes, why draft anyone in the first place? Why not simply recruit troops through the labor market? Set whatever wage and benefits are necessary to attract the number and quality of soldiers required, and let people choose for themselves whether to take the job. No one is forced to serve against his or her will, and those willing to serve can decide if military service is preferable, all things considered, to their other alternatives.

So, from a utilitarian point of view, the volunteer army seems the best of the three options. Letting people freely choose to enlist based on the compensation being offered enables them to serve only if doing so maximizes their own utility; and those who don't want to serve don't suffer the utility loss of being forced into the military against their will.

A utilitarian could conceivably object that the volunteer army is more expensive than a conscript army. To attract the requisite number and quality of soldiers, pay and benefits must be higher than when soldiers are forced to serve. So a utilitarian might worry that the increased happiness of better-paid soldiers would be offset by the unhappiness of taxpayers who now pay more for military service.

But this objection is not very convincing, especially if the alterna-

tive is conscription (with or without substitution). It would be odd to insist, on utilitarian grounds, that the cost to taxpayers of other government services, such as police and fire protection, should be reduced by forcing randomly chosen people to perform these tasks at below-market pay; or that the cost of highway maintenance should be reduced by requiring a subset of taxpayers chosen by lottery either to perform the work themselves or hire others to do so. The unhappiness that would result from such coercive measures would probably outweigh the benefit to the taxpayers of cheaper government services.

So, from the standpoint of both libertarian and utilitarian reasoning, the volunteer army seems best, the Civil War hybrid system second best, and conscription the least desirable way of allocating military service. But at least two objections can be made to this line of argument. One objection is about fairness and freedom; the other is about civic virtue and the common good.

Objection 1: Fairness and freedom

The first objection holds that, for those with limited alternatives, the free market is not all that free. Consider an extreme case: A homeless person sleeping under a bridge may have chosen, in some sense, to do so; but we would not necessarily consider his choice to be a free one. Nor would we be justified in assuming that he must prefer sleeping under a bridge to sleeping in an apartment. In order to know whether his choice reflects a preference for sleeping out of doors or an inability to afford an apartment, we need to know something about his circumstances. Is he doing this freely or out of necessity?

The same question can be asked of market choices generally—including the choices people make when they take on various jobs. How does this apply to military service? We can't determine the justice or injustice of the volunteer army without knowing more about the background conditions that prevail in the society: Is there a reasonable degree of equal opportunity, or do some people have very few options in

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life? Does everyone have a chance to get a college education, or is it the case that, for some people, the only way to afford college is to enlist in the military?

From the standpoint of market reasoning, the volunteer army is attractive because it avoids the coercion of conscription. It makes military service a matter of consent. But some people who wind up serving in the all-volunteer army may be as averse to military service as those who stay away. If poverty and economic disadvantage are widespread, the choice to enlist may simply reflect the lack of alternatives.

According to this objection, the volunteer army may not be as voluntary as it seems. In fact, it may involve an element of coercion. If some in the society have no other good options, those who choose to enlist may be conscripted, in effect, by economic necessity. In that case, the difference between conscription and the volunteer army is not that one is compulsory while the other is free; it's rather that each employs a different form of compulsion—the force of law in the first case and the pressure of economic necessity in the second. Only if people have a reasonable range of decent job options can it be said that the choice to serve for pay reflects their preferences rather than their limited alternatives.

The class composition of today's volunteer army bears out this objection, at least to some extent. Young people from low- to middle-income neighborhoods (median household income of \$30,850 to \$57,836) are disproportionately represented in the ranks of active-duty army recruits.⁸ Least represented are the poorest 10 percent of the population (many of whom may lack the requisite education and skills) and the most affluent 20 percent (those from neighborhoods with median household incomes of \$66,329 and above).⁹ In recent years, over 25 percent of army recruits have lacked a regular high school diploma.¹⁰ And while 46 percent of the civilian population has had some college education, only 6.5 percent of the 18-to-24-year-olds in the military's enlisted ranks have ever been to college.¹¹

In recent years, the most privileged young people in American society have not opted for military service. The title of a recent book

about the class composition of the armed forces captures this well: *AWOL: The Unexcused Absence of America's Upper Classes from Military Service*.¹² Of the 750 members of Princeton's class of 1956, the majority—450 students—joined the military after graduation. Of the 1,108 members of Princeton's class of 2006, only 9 students enlisted.¹³ A similar pattern is found at other elite universities—and in the nation's capital. Only 2 percent of members of Congress have a son or daughter serving in the military.¹⁴

Congressman Charles Rangel, a Democrat from Harlem who is a decorated Korean War veteran, considers this unfair, and has called for reinstatement of the draft. "As long as Americans are being shipped off to war," he wrote, "then everyone should be vulnerable, not just those who, because of economic circumstances, are attracted by lucrative enlistment bonuses and educational incentives." He points out that, in New York City, "the disproportionate burden of service is dramatic. In 2004, 70% of the volunteers in the city were black or Hispanic, recruited from lower income communities."¹⁵

Rangel opposed the Iraq War, and believes it never would have been launched if the children of policy-makers had had to share the burden of fighting it. He also argues that, given the unequal opportunities in American society, allocating military service by the market is unfair to those with the fewest alternatives:

The great majority of people bearing arms for this country in Iraq are from the poorer communities in our inner cities and rural areas, places where enlistment bonuses of up to \$40,000 and thousands in educational benefits are very attractive. For people who have college as an option, those incentives—at the risk to one's life—don't mean a thing.¹⁶

So the first objection to the market rationale for a volunteer army is concerned with unfairness and coercion—the unfairness of class discrimination and the coercion that can occur if economic disadvantage

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compels young people to risk their lives in exchange for a college education and other benefits.

Notice that the coercion objection is not an objection to the volunteer army as such. It only applies to a volunteer army that operates in a society with substantial inequalities. Alleviate those inequalities, and you remove the objection. Imagine, for example, a perfectly equal society, in which everyone had access to the same educational opportunities. In such a society, no one could complain that the choice to enlist in the military was less than free, because unfairly pressured by economic necessity.

Of course, no society is perfectly equal. So the risk of coercion always hovers over the choices people make in the labor market. How much equality is needed to ensure that market choices are free rather than coerced? At what point do inequalities in the background conditions of society undermine the fairness of social institutions (such as the volunteer army) based on individual choice? Under what conditions is the free market really free? . . .

Objection 2: Civic virtue and the common good

In the meantime, let's consider a second objection to the use of markets in allocating military service—the objection in the name of civic virtue and the common good.

This objection says that military service is not just another job; it's a civic obligation. According to this argument, all citizens have a duty to serve their country. Some proponents of this view believe this obligation can be discharged only through military service, while others say it can be fulfilled through other forms of national service, such as the Peace Corps, AmeriCorps, or Teach for America. But if military

service (or national service) is a civic duty, it's wrong to put it up for sale on the market.

Consider another civic responsibility—jury duty. No one dies performing jury duty, but being called to serve on a jury can be onerous, especially if it conflicts with work or other pressing commitments. And yet we don't let people hire substitutes to take their place on juries. Nor do we use the labor market to create a paid, professional, "all-volunteer" jury system. Why not? From the standpoint of market reasoning, a case could be made for doing so. The same utilitarian arguments raised against drafting soldiers can be made against drafting jurors: Allowing a busy person to get out of jury duty by hiring a substitute would make both parties better off. Doing away with mandatory jury duty would be better still; letting the labor market recruit the requisite number of qualified jurors would enable those who want the work to have it and those who dislike the work to avoid it.

So why do we forego the increased social utility of a market for jurors? Perhaps because we worry that paid jurors would come disproportionately from disadvantaged backgrounds, and that the quality of justice would suffer. But there's no reason to assume that the affluent make better jurors than those from modest backgrounds. In any case, the wages and benefits could always be adjusted (as the army has done) to attract those with the necessary education and skills.

The reason we draft jurors rather than hire them is that we regard the activity of dispensing justice in the courts as a responsibility all citizens should share. Jurors don't simply vote; they deliberate with one another about the evidence and the law. And the deliberations draw on the disparate life experiences that jurors from various walks of life bring with them. Jury duty is not only a way of resolving cases. It is also a form of civic education, and an expression of democratic citizenship. Although jury duty is not always edifying, the idea that all citizens are obligated to perform it preserves a connection between the courts and the people.

Something similar could be said of military service. The civic argument for conscription claims that military service, like jury duty, is a civic responsibility; it expresses, and deepens, democratic citizenship. From this point of view, turning military service into a commodity—a task we hire other people to perform—corrupts the civic ideals that should govern it. According to this objection, hiring soldiers to fight our wars is wrong, not because it's unfair to the poor but because it allows us to abdicate a civic duty.

The historian David M. Kennedy has offered a version of this argument. He argues that “the U.S. armed forces today have many of the attributes of a mercenary army,” by which he means a paid, professional army that is separated to a significant degree from the society on whose behalf it fights.¹⁷ He doesn't mean to disparage the motives of those who enlist. His worry is that hiring a relatively small number of our fellow citizens to fight our wars lets the rest of us off the hook. It severs the link between the majority of democratic citizens and the soldiers who fight in their name.

Kennedy observes that, “proportionate to the population, today's active-duty military establishment is about 4 percent of the size of the force that won World War II.” This makes it relatively easy for policymakers to commit the country to war without having to secure the broad and deep consent of the society as a whole. “History's most powerful military force can now be sent into battle in the name of a society that scarcely breaks a sweat when it does so.”¹⁸ The volunteer army absolves most Americans of the responsibility to fight and die for their country. While some see this as an advantage, this exemption from shared sacrifice comes at the price of eroding political accountability:

A hugely preponderant majority of Americans with no risk whatsoever of exposure to military service have, in effect, hired some of the least advantaged of their fellow countrymen to do some of their most dangerous business while the majority goes on with their own affairs unbloodied and undistracted.¹⁹

One of the most famous statements of the civic case for conscription was offered by Jean-Jacques Rousseau (1712–1778), the Geneva-born Enlightenment political theorist. In *The Social Contract* (1762), he argues that turning a civic duty into a marketable good does not increase freedom, but rather undermines it:

As soon as public service ceases to be the chief business of the citizens, and they would rather serve with their money than with their persons, the state is not far from its fall. When it is necessary to march out to war, they pay troops and stay at home. . . . In a country that is truly free, the citizens do everything with their own arms and nothing by means of money; so far from paying to be exempted from their duties, they would even pay for the privilege of fulfilling them themselves. I am far from taking the common view: I hold enforced labor to be less opposed to liberty than taxes.²⁰

Rousseau's robust notion of citizenship, and his wary view of markets, may seem distant from the assumptions of our day. We are inclined to view the state, with its binding laws and regulations, as the realm of force; and to see the market, with its voluntary exchanges, as the realm of freedom. Rousseau would say this has things backward—at least where civic goods are concerned.

Market advocates might defend the volunteer army by rejecting Rousseau's strenuous notion of citizenship, or by denying its relevance to military service. But the civic ideals he invoked retain a certain resonance, even in a market-driven society such as the United States. Most supporters of the volunteer army vehemently deny that it amounts to a mercenary army. They rightly point out that many of those who serve are motivated by patriotism, not only by the pay and benefits. But why do we consider this important? Provided the soldiers do their jobs well, why should we care about their motivation? Even as we relegate recruitment to the market, we find it hard to detach military service from older notions of patriotism and civic virtue.

For, consider: What, really, is the difference between the contemporary volunteer army and an army of mercenaries? Both pay soldiers to fight. Both entice people to enlist by the promise of salary and other benefits. If the market is an appropriate way of raising an army, what exactly is wrong with mercenaries?

One might reply that mercenaries are foreign nationals who fight only for pay, whereas the American volunteer army hires only Americans. But if the labor market is an appropriate way of raising troops, it's not clear why the U.S. military should discriminate in hiring on the basis of nationality. Why shouldn't it actively recruit soldiers from among citizens of other countries who want the work and possess the relevant qualifications? Why not create a foreign legion of soldiers from the developing world, where wages are low and good jobs are scarce?

It is sometimes argued that foreign soldiers would be less loyal than Americans. But national origin is no guarantee of loyalty on the battlefield, and military recruiters could screen foreign applicants to determine their reliability. Once you accept the notion that the army should use the labor market to fill its ranks, there is no reason in principle to restrict eligibility to American citizens—no reason, that is, unless you believe military service is a civic responsibility after all, an expression of citizenship. But if you believe that, then you have reason to question the market solution.

Two generations after ending the draft, Americans hesitate to apply the full logic of market reasoning to military service. The French Foreign Legion has a long tradition of recruiting foreign soldiers to fight for France. Although French law prohibits the Legion from active recruiting outside of France, the Internet has made that restriction meaningless. Online recruiting in thirteen languages now attracts recruits from throughout the world. About a quarter of the force now comes from Latin America, and a growing proportion comes from China and other Asian countries.²¹

The United States has not established a foreign legion, but it has taken a step in that direction. Faced with difficulties meeting recruiting

goals as the wars in Iraq and Afghanistan have stretched on, the military has begun recruiting foreign immigrants currently living in the United States on temporary visas. The inducements include good pay and a fast track to American citizenship. About thirty thousand noncitizens now serve in the U.S. armed forces. The new program will extend eligibility from permanent residents with green cards to temporary immigrants, foreign students, and refugees.²²

The recruitment of foreign troops is not the only way the logic of the market plays out. Once you view military service as a job like any other, there is no reason to assume the hiring must be done by the government. In fact, the United States now outsources military functions to private enterprise on a large scale. Private military contractors play an increasing role in conflicts around the world, and form a substantial part of the U.S. military presence in Iraq.

In July 2007, the *Los Angeles Times* reported that the number of U.S.-paid private contractors in Iraq (180,000) exceeded the number of U.S. military personnel stationed there (160,000).²³ Many of the contractors perform non-combat logistical support—building bases, repairing vehicles, delivering supplies, and providing food services. But about 50,000 are armed security operatives whose work guarding bases, convoys, and diplomats often draws them into combat.²⁴ More than 1,200 private contractors have been killed in Iraq, though they do not return in flag-draped coffins, and their numbers are not included in the U.S. military's casualty count.²⁵

One of the leading private military companies is Blackwater Worldwide. Erik Prince, the company's CEO, is a former Navy SEAL with an ardent faith in the free market. He rejects the suggestion that his soldiers are "mercenaries," a term he considers "slanderous."²⁶ Prince explains: "We're trying to do for the national security apparatus what Federal Express did for the postal service."²⁷ Blackwater received over \$1 billion in government contracts for its services in Iraq, but has often been at the center of controversy.²⁸ Its role first came to public attention in 2004, when four of its employees were ambushed and killed in

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Fallujah and two of the bodies were strung from a bridge. The incident led President George W. Bush to order the Marines into Fallujah in a massive and costly battle with insurgents.

In 2007, six Blackwater guards opened fire on a crowd in a Baghdad square, killing seventeen civilians. The guards, who claimed they had been fired upon first, were immune from prosecution under Iraqi law because of rules laid down by the American governing authority after the invasion. The contractors were eventually indicted for manslaughter by the U.S. Justice Department, and the incident led the Iraqi government to demand the withdrawal of Blackwater from the country.²⁹

Many in Congress and in the public at large object to the outsourcing of war to for-profit companies such as Blackwater. Much of the criticism focuses on the unaccountability of these companies, and their involvement in abuses. Several years before the Blackwater shooting incident, private contractors from other companies were among those who abused detainees at Abu Ghraib prison. Although the army soldiers involved were court-martialed, the private contractors were not punished.³⁰

But suppose Congress tightened regulations on private military companies to make them more accountable, and to hold their employees to the same standards of behavior that apply to U.S. troops. Would the use of private companies to fight our wars cease to be objectionable? Or is there a moral difference between paying Federal Express to deliver the mail and hiring Blackwater to deliver lethal force on the battlefield?

To answer this question, we have to resolve a prior one: Is military service (and perhaps national service generally) a civic obligation that all citizens have a duty to perform, or is it a hard and risky job like others (coal mining, for example, or commercial fishing) that is properly governed by the labor market? And to answer this question, we have to ask a broader one: What obligations do citizens of a democratic society owe to one another, and how do such obligations arise? . . .

Pregnancy for Pay

William and Elizabeth Stern were a professional couple living in Tenafly, New Jersey—he a biochemist, she a pediatrician. They wanted a baby, but couldn't have one on their own, at least not without medical risk to Elizabeth, who had multiple sclerosis. So they contacted an infertility center that arranged "surrogate" pregnancies. The center ran ads seeking "surrogate mothers"—women willing to carry a baby to term for someone else, in exchange for a monetary payment.³¹

One of the women who had answered the ads was Mary Beth Whitehead, a twenty-nine-year-old mother of two children, and the wife of a sanitation worker. In February 1985, William Stern and Mary Beth Whitehead signed a contract. Mary Beth agreed to be artificially inseminated with William's sperm, to bear the child, and to hand it over to William upon birth. She also agreed to give up her maternal rights, so that Elizabeth Stern could adopt the child. For his part, William agreed to pay Mary Beth a fee of \$10,000 (payable on delivery), plus medical expenses. (He also paid a fee of \$7,500 to the infertility center for arranging the deal.)

After several artificial inseminations, Mary Beth became pregnant, and in March 1986 she gave birth to a baby girl. The Sterns, anticipating their soon-to-be adopted daughter, named her Melissa. But Mary Beth Whitehead decided she could not part with the child, and wanted to keep it. She fled to Florida with the baby, but the Sterns got a court order requiring her to turn over the child. Florida police found Mary Beth, the baby was given to the Sterns, and the custody fight went to court in New Jersey.

The trial judge had to decide whether to enforce the contract. What do you think would be the right thing to do? To simplify matters, let's

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focus on the moral issue, rather than the law. (As it happens, New Jersey had no law either permitting or prohibiting surrogacy contracts at the time.) William Stern and Mary Beth Whitehead had made a contract. Morally speaking, should it have been enforced?

The strongest argument in favor of upholding the contract is that a deal is a deal. Two consenting adults had entered into a voluntary agreement that offered benefits to both parties: William Stern would get a genetically related child, and Mary Beth Whitehead would earn \$10,000 for nine months of work.

Admittedly, this was no ordinary commercial deal. So you might hesitate to enforce it on one of two grounds: First, you might doubt that a woman's agreement to have a baby and give it up for money is fully informed. Can she really anticipate how she'll feel once the time comes to give up the child? If not, it might be argued that her initial consent was beclouded by the need for money, and by the lack of adequate knowledge about what it would be like to part with her child. Second, you might find it objectionable to buy and sell babies, or to rent the reproductive capacity of women, even if both parties freely agree to do so. It could be argued that this practice turns children into commodities and exploits women by treating pregnancy and child-bearing as a money-making business.

Judge Harvey R. Sorkow, the trial judge in the "Baby M" case, as it came to be known, was not persuaded by either of these objections.³² He upheld the agreement, invoking the sanctity of contracts. A deal was a deal, and the birth mother had no right to break the contract simply because she'd changed her mind.³³

The judge addressed both objections. First, he rejected the notion that Mary Beth's agreement was less than voluntary, her consent somehow tainted:

Neither party has a superior bargaining position. Each had what the other wanted. A price for the service each was to perform was struck and a bargain reached. One did not force the other. Neither had ex-

pertise that left the other at a disadvantage. Neither had disproportionate bargaining power.³⁴

Second, he rejected the notion that surrogacy amounts to baby-selling. The judge held that William Stern, the biological father, had not bought a baby from Mary Beth Whitehead; he'd paid her for the service of carrying his child to term. "At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his."³⁵ Since the baby was conceived with William's sperm, it was his baby to begin with, the judge reasoned. Therefore, no baby-selling was involved. The \$10,000 payment was for a service (the pregnancy), not a product (the child).

As for the claim that providing such a service exploits women, Judge Sorkow disagreed. He compared paid pregnancy to paid sperm donation. Since men are allowed to sell their sperm, women should be allowed to sell their reproductive capacities: "If a man may offer the means for procreation then a woman must equally be allowed to do so."³⁶ To hold otherwise, he stated, would be to deny women the equal protection of the law.

Mary Beth Whitehead appealed the case to the New Jersey Supreme Court. In a unanimous opinion, the court overturned Judge Sorkow and ruled that the surrogacy contract was invalid.³⁷ The court awarded custody of Baby M to William Stern, on the grounds that this was in the best interest of the child. Contract aside, the court believed the Sterns would do a better job of raising Melissa. But it restored Mary Beth Whitehead's status as the child's mother, and asked the lower court to determine visitation rights.

Writing for the court, Chief Justice Robert Wilentz rejected the surrogacy contract. He argued that it was not truly voluntary, and that it constituted baby-selling.

First, the consent was flawed. Mary Beth's agreement to bear a child and surrender it at birth was not truly voluntary, because it was not fully informed:

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Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed.³⁸

Once the baby is born, the mother is in a better position to make an informed choice. But by then, her decision is not free, but is compelled by "the threat of a lawsuit, and the inducement of a \$10,000 payment," making it "less than totally voluntary."³⁹ Moreover, the need for money makes it likely that poor women will "choose" to become surrogate mothers for the affluent, rather than the other way around. Justice Wilentz suggested that this, too, called into question the voluntary character of such agreements: "We doubt that infertile couples in the low-income bracket will find upper income surrogates."⁴⁰

So one reason for voiding the contract was tainted consent. But Wilentz also offered a second, more fundamental reason:

Putting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy.⁴¹

Commercial surrogacy amounts to baby-selling, Wilentz argued, and baby-selling is wrong, however voluntary it may be. He rejected the argument that the payment is for the surrogate's service rather than for the child. According to the contract, the \$10,000 was payable only upon surrender of custody and the termination by Mary Beth of her parental rights.

This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. . . . [A] middle man, propelled by profit,

promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction.⁴²

Surrogacy Contracts and Justice

So who was right in the Baby M case—the trial court that enforced the contract, or the higher court that invalidated it? To answer this question, we need to assess the moral force of contracts, and the two objections that were raised against the surrogacy contract.

The argument for upholding the surrogacy contract draws on the two theories of justice we've considered so far—libertarianism and utilitarianism. The libertarian case for contracts is that they reflect freedom of choice; to uphold a contract between two consenting adults is to respect their liberty. The utilitarian case for contracts is that they promote the general welfare; if both parties agree to a deal, both must derive some benefit or happiness from the agreement—otherwise, they wouldn't have made it. So, unless it can be shown that the deal reduces someone else's utility (and by more than it benefits the parties), mutually advantageous exchanges—including surrogacy contracts—should be upheld.

What about the objections? How convincing are they?

Objection 1: Tainted consent

The first objection, about whether Mary Beth Whitehead's agreement was truly voluntary, raises a question about the conditions under which people make choices. It argues that we can exercise free choice only if we're not unduly pressured (by the need for money, say), and if we're reasonably well informed about the alternatives. Exactly what counts as undue pressure or the lack of informed consent is open to argument. But the point of such arguments is to determine when a suppos-

edly voluntary agreement is really voluntary—and when it's not. This question loomed large in the Baby M case, as it does in debates about the volunteer army.

Stepping back from the cases, it's worth noticing that this debate, about the background conditions necessary for meaningful consent, is actually a family quarrel within one of the three approaches to justice we consider in this book—the one that says justice means respecting freedom. As we've already seen, libertarianism is one member of this family. It holds that justice requires respect for whatever choices people make, provided the choices don't violate anyone's rights. Other theories that view justice as respecting freedom impose some restrictions on the conditions of choice. They say—as did Justice Wilentz in the Baby M case—that choices made under pressure, or in the absence of informed consent, are not truly voluntary. We'll be better equipped to assess this debate when we turn to the political philosophy of John Rawls—a member of the freedom camp who rejects the libertarian account of justice.

Objection 2: Degradation and higher goods

What about the second objection to surrogacy contracts—the one that says there are some things money shouldn't buy, including babies and women's reproductive capacities? What exactly is wrong with buying and selling these things? The most compelling answer is that treating babies and pregnancy as commodities degrades them, or fails to value them appropriately.

Underlying this answer is a far-reaching idea: The right way of valuing goods and social practices is not simply up to us. Certain modes of valuation are appropriate to certain goods and practices. In the case of commodities, such as cars and toasters, the proper way of valuing them is to use them, or to make them and sell them for profit. But it's a mistake to treat all things as if they were commodities. It would be wrong, for example, to treat human beings as commodities, mere things to

be bought and sold. That's because human beings are persons worthy of respect, not objects to be used. Respect and use are two different modes of valuation.

Elizabeth Anderson, a contemporary moral philosopher, has applied a version of this argument to the surrogacy debate. She argues that surrogacy contracts degrade children and women's labor by treating them as if they were commodities.⁴³ By degradation, she means treating something "in accordance with a lower mode of valuation than is proper to it. We value things not just 'more' or 'less,' but in qualitatively higher and lower ways. To love or respect someone is to value her in a higher way than one would if one merely used her. . . . Commercial surrogacy degrades children insofar as it treats them as commodities."⁴⁴ It uses them as instruments of profit rather than cherishes them as persons worthy of love and care.

Commercial surrogacy also degrades women, Anderson argues, by treating their bodies as factories and by paying them not to bond with the children they bear. It replaces "the parental norms which usually govern the practice of gestating children with the economic norms which govern ordinary production." By requiring the surrogate mother "to repress whatever parental love she feels for the child," Anderson writes, surrogacy contracts "convert women's labor into a form of alienated labor."⁴⁵

In the surrogate contract, [the mother] agrees not to form or to attempt to form a parent-child relationship with her offspring. Her labor is alienated, because she must divert it from the end which the social practices of pregnancy rightly promote—an emotional bond with her child.⁴⁶

Central to Anderson's argument is the idea that goods differ in kind; it's therefore a mistake to value all goods in the same way, as instruments of profit or objects of use. If this idea is right, it explains why there are some things money shouldn't buy.

It also poses a challenge to utilitarianism. If justice is simply a matter of maximizing the balance of pleasure over pain, we need a single, uniform way of weighing and valuing all goods and the pleasure or pain they give us. Bentham invented the concept of utility for precisely this purpose. But Anderson argues that valuing everything according to utility (or money) degrades those goods and social practices—including children, pregnancy, and parenting—that are properly valued according to higher norms.

But what are those higher norms, and how can we know what modes of valuation are appropriate to what goods and social practices? One approach to this question begins with the idea of freedom. Since human beings are capable of freedom, we shouldn't be used as if we were mere objects, but should be treated instead with dignity and respect. This approach emphasizes the distinction between persons (worthy of respect) and mere objects or things (open to use) as the fundamental distinction in morality. The greatest defender of this approach is Immanuel Kant, to whom we turn in the next chapter.

Another approach to higher norms begins with the idea that the right way of valuing goods and social practices depends on the purposes and ends those practices serve. Recall that, in opposing surrogacy, Anderson argues that “the social practices of pregnancy rightly promote” a certain end, namely an emotional bond of a mother with her child. A contract that requires the mother not to form such a bond is degrading because it diverts her from this end. It replaces a “norm of parenthood” with a “norm of commercial production.” The notion that we identify the norms appropriate to social practices by trying to grasp the characteristic end, or purpose, of those practices is at the heart of Aristotle's theory of justice. We will examine his approach in a later chapter.

Until we examine these theories of morality and justice, we can't really determine what goods and social practices should be governed by markets. But the debate over surrogacy, like the argument over the volunteer army, gives us a glimpse of what's at stake.

Outsourcing Pregnancy

Melissa Stern, once known as Baby M, recently graduated from George Washington University, where she majored in religion.⁴⁷ Over two decades have passed since her celebrated custody battle in New Jersey, but the debate over surrogate motherhood continues. Many European countries ban commercial surrogacy. In the United States, more than a dozen states have legalized the practice, about a dozen states prohibit it, while in other states its legal status is unclear.⁴⁸

New reproductive technologies have changed the economics of surrogacy in ways that sharpen the ethical quandary it presents. When Mary Beth Whitehead agreed to undertake a pregnancy for pay, she provided both egg and womb. She was therefore the biological mother of the child she bore. But the advent of in vitro fertilization (IVF) makes it possible for one woman to provide the egg and another to gestate it. Deborah Spar, a professor of business administration at the Harvard Business School, has analyzed the commercial advantages of the new surrogacy.⁴⁹ Traditionally, those who contracted for surrogacy “essentially needed to purchase a single package of egg-bundled-with-womb.” Now they can acquire “the egg from one source (including, in many cases, the intended mother) and the womb from another.”⁵⁰

This “unbundling” of the supply chain, Spar explains, has prompted growth in the surrogacy market.⁵¹ “By removing the traditional link between egg, womb, and mother, gestational surrogacy [has] reduced the legal and emotional risks that had surrounded traditional surrogacy and allowed a new market to thrive.” “Freed from the constraints of the egg-and-womb package,” surrogacy brokers are now “more discriminating” in the surrogates they choose, “looking for eggs with particular genetic traits and wombs attached to a certain personality.”⁵² Prospective parents no longer need to worry about the genetic characteristics of the woman they hire to carry their child, “because they’re acquiring those elsewhere.”⁵³

They don't care what she looks like, and they are less worried that she will claim the child at birth or that courts would be inclined to find in her favor. All they really need is a healthy woman, willing to undergo pregnancy and to adhere to certain standards of behavior—no drinking, no smoking, no drugs—during its course.⁵⁴

Although gestational surrogacy has increased the supply of prospective surrogates, demand has increased as well. Surrogates now receive about \$20,000 to \$25,000 per pregnancy. The total cost of the arrangement (including medical bills and legal fees) is typically \$75,000 to \$80,000.

With prices this steep, it's not surprising to find that prospective parents have begun to seek less expensive alternatives. As with other products and services in a global economy, paid pregnancy is now outsourced to low-cost providers. In 2002, India legalized commercial surrogacy in hopes of attracting foreign customers.⁵⁵

The western Indian city of Anand may soon be to paid pregnancy what Bangalore is to call centers. In 2008, more than fifty women in the city were carrying pregnancies for couples in the United States, Taiwan, Britain, and elsewhere.⁵⁶ One clinic there provides group housing, complete with maids, cooks, and doctors, for fifteen pregnant women serving as surrogates for clients around the world.⁵⁷ The money the women earn, from \$4,500 to \$7,500, is often more than they would otherwise make in fifteen years, and enables them to buy a house or to finance their own children's education.⁵⁸ For the prospective parents who go to Anand, the arrangement is a bargain. At around \$25,000 (including medical costs, the surrogate's payment, round-trip airfare, and hotel expenses for two trips), the total cost is about a third of what it would be for gestational surrogacy in the United States.⁵⁹

Some suggest that commercial surrogacy as practiced today is less morally troubling than the arrangement that led to the Baby M case. Since the surrogate does not provide the egg, only the womb and the labor of pregnancy, it is argued, the child is not genetically hers. Ac-

cording to this view, no baby is being sold, and the claim to the child is less likely to be contested.

But gestational surrogacy does not resolve the moral quandary. It may be true that gestational surrogates will be less attached to the children they bear than surrogates who also provide the egg. But dividing the role of mother three ways (adopting parent, egg donor, and gestational surrogate) rather than two does not settle the question of who has the superior claim to the child.

If anything, the outsourcing of pregnancy that has occurred due in part to IVF has cast the moral issues in sharper relief. The substantial cost savings for prospective parents, and the enormous economic benefits, relative to local wages, that Indian surrogates derive from the practice, make it undeniable that commercial surrogacy can increase the general welfare. So, from a utilitarian point of view, it's hard to argue with the rise of paid pregnancy as a global industry.

But the global outsourcing of pregnancy also dramatizes the moral qualms. Suman Dodia, a twenty-six-year-old Indian who was a gestational surrogate for a British couple, had previously earned \$25 per month working as a maid. For her, the prospect of earning \$4,500 for nine months' work must have been almost too compelling to resist.⁶⁰ The fact that she had delivered her own three children at home and never visited a doctor adds poignancy to her role as a surrogate. Referring to her paid pregnancy, she said, "I'm being more careful now than I was with my own pregnancies."⁶¹ Although the economic benefits of her choice to become a surrogate are clear, it's not obvious that we would call it free. Moreover, the creation of a paid pregnancy industry on global scale—as a deliberate policy in poor countries, no less—heightens the sense that surrogacy degrades women by instrumentalizing their bodies and reproductive capacities.

It is hard to imagine two human activities more dissimilar than bearing children and fighting wars. But the pregnant surrogates in India and the

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soldier Andrew Carnegie hired to take his place in the Civil War have something in common. Thinking through the rights and wrongs of their situations brings us face to face with two of the questions that divide competing conceptions of justice: How free are the choices we make in the free market? And are there certain virtues and higher goods that markets do not honor and money cannot buy?

Notes

Chapter 4: Hired Help / Markets and Morals

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