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## Book Review

# *The Ethics of Commercial Surrogate Motherhood: Brave New Families?*

by Scott B. Rae

Westport: Praeger, 1994. 192 pp.

With his recent book on commercial surrogate motherhood, Professor Scott B. Rae enters the lively debate (theological, moral, legal, medical, and political) surrounding one of the new reproductive technologies. Despite the promise of its title and the correctness of its principal conclusion, this effort ultimately leaves the reader unsatisfied.

In his introduction, Professor Rae points to both the importance and relative paucity of moral analysis in the area, and presents his book as a recognition of the former and a remedy for the latter. To that end, he proceeds to undertake a moral analysis of what he identifies as the two most contested issues concerning surrogate motherhood: (i) the commercial aspect of most surrogacy agreements; and (ii) the assignment of parental rights arising out of surrogacy relationships.

Professor Rae defines commercial surrogacy as the payment of a fee (or other valuable consideration) to the surrogate beyond medical expenses associated with, or lost wages resulting from, her pregnancy in exchange for the relinquishing of her parental rights to the child, and concludes that such a practice conflicts with the fundamental right of a child not to be an object of barter. In addition, Rae argues that the legally enforced transfer of parental rights from a(n) (unwilling) surrogate to the contracting couple conflicts with the fundamental right of the surrogate (who should be deemed the mother of the child) to associate with her child.

To establish these claims, Rae first reviews the legal development of a right of procreative liberty (Chapter 1), and then turns his attention to the ethics of commercial surrogacy (Chapter 2) and the assignment of parental rights in surrogacy situations (Chapter 3). In Chapter 4, Rae analyzes the leading court decisions and legislative responses to surrogate motherhood in light of the conclusions reached in chapters 2 and 3, and he concludes his examination of commercial surrogacy by appending a model statute.

Before turning to its merits, it may be helpful to specify what this book is not. First, the focus of the study is commercial surrogacy in the strict sense. What Rae terms "altruistic surrogacy" (i.e., surrogacy services which are *not* provided for consideration in excess of medical expenses or lost wages resulting from the pregnancy) is largely outside the scope of his analysis. Although he concedes that there are threats posed by non-commercial surrogacy, Rae does not systematically identify the nature of these dangers, nor does his argument against commercial surrogacy easily translate to a general condemnation of surrogacy itself. This latter point leads to the second cautionary note: Rae does not present a comprehensive moral analysis of surrogate motherhood. Those interested in the more properly bioethical issues arising from surrogate motherhood will be dissatisfied with the narrowly legal framework within which Rae works. True to his word, Rae focuses exclusively on the questions of commercialization and the assignment of parental rights. Third, Rae does not move beyond the current legal debate in his moral analysis of commercial surrogacy, despite his clear intention to highlight the ethical implications of the practice. He accepts the terms of the legal debate as it has already been defined and argues that commercial surrogacy ought to be banned based on the relative merits of the (legal) arguments presented.

Turning to the text itself, Professor Rae immediately situates commercial surrogacy within a legal framework by examining what he refers to as "The Legal Tradition of Procreative Liberty" in chapter 1. Rae sketches the legal foundation of a right of procreative liberty by reviewing a series of eight United States Supreme Court cases, beginning with *Meyer* in 1923 and ending with the 1977 *Carey* decision. (Conspicuously absent is *Roe* and its progeny.) These cases are then analyzed, with Rae concluding that the right of procreative liberty extends to the use of both third parties and non-coital forms of reproduction. Professor Rae brings the chapter to a close by identifying what he believes to be constitutionally acceptable limits on the rights of procreative liberty, the most important of which is the proscription of commercial surrogacy.

But for the concluding chapter setting forth a legislative proposal, chapter 1 is the shortest (and

the most unsatisfactory) in the book. The summary of Court decisions is flawed in a number of respects. First, Rae frequently fails to provide facts material to a proper understanding of the case under review. Since legal rulings are generally quite narrow and often fact-specific, one cannot determine the scope of the principles enunciated in the absence of an adequate statement of facts. The upshot is that one is left with a series of rather abstract statements concerning constitutionally-protected values with no clear sense of the scope of these rights.

Second, Rae adopts what is perhaps the controlling interpretation of these cases, but it is by no means one that is universally held. For example, Rae accepts the following propositions: (i) there is a right to privacy in the United States Constitution; (ii) this general right to privacy includes the right of procreative liberty; and (iii) the right of procreative liberty extends to the use of third parties in the reproductive process (e.g., surrogacy), albeit with some limitations. Anyone familiar with constitutional debate during the thirty years since *Griswold* will appreciate just how controversial these claims are and realize that reputable scholars may be found who would deny one or more of them. One might, for instance, concede that a right of procreative liberty exists, but quite reasonably hold that it does not extend to the use of third parties to actualize that right. By assuming that it does, and failing to challenge the correctness of such an assumption, Rae dramatically reduces both the effectiveness of his ethical analysis (the scope of which he permits the legal context to define) and the political options he is willing to consider.

Third, Rae holds an unusually static view of the law. He seems to assume that the right to privacy will be read in broad terms by the Court, and that the explosion of privacy-based rights will continue. Even if Rae's understanding of precedent and its application to the case of surrogate motherhood were correct, he need not accept the present doctrine as fixed. Moreover, even if the constitutional doctrine concerning procreative liberty were conclusively established as Rae believes, one must wonder why Rae does not subject *that* doctrine to moral scrutiny. Indeed, one of the more glaring defects in the book is the fact that Rae is unwilling to do anything more by way of ethical analysis than to evaluate the existing legal arguments, which he seems to accept as exhaustive or controlling.

Fourth, the deliberate omission of *Roe* and the other abortion cases is striking. Rae defends the choice on the grounds that the abortion decisions treat the termination of pregnancy and not conception itself; thus, commercial surrogacy involves issues of procreative liberty temporally prior to those addressed by the abortion cases. While it is certainly true that surrogacy raises issues distinct from those presented by abortion, it must also be admitted that the right of procreative liberty has been most fully elaborated upon in the contraception/abortion line of cases, as Rae himself seems to acknowledge in his subsequent (albeit generic) use of these opinions to analyze the nature of the right of procreative liberty. One suspects that Rae has omitted *Roe* not because it is irrelevant to the discussion, but rather because the controversy surrounding abortion might threaten the consensus he is seeking to build with respect to commercial surrogacy. Indeed, it would seem that Rae's desire to achieve consensus on the question of commercial surrogacy is driving not only his ethical analysis, but his presentation of the legal background as well.

With the legal framework in place, Rae turns to a more properly moral consideration of commercial surrogacy in the middle chapters. Chapter 2 is without question the most effective in the book, as Rae examines the nature of the commercial surrogacy agreement. The chapter is divided into two sections of unequal length. The first and longer section presents the leading arguments in favor of commercial surrogacy, with each argument followed by an evaluation of its merits; the second part of the chapter sets forth the principal arguments against commercial surrogacy. Six arguments in favor of commercial surrogacy are restated, with Rae devoting most of his attention to the first two; the first contends that the fee is paid to the surrogate for gestational services *only* and not for the sale of the baby, while the second claims that even if the fee paid is for more than gestational services rendered, the commercial aspect of the transaction is harmless in the surrogacy context.

With respect to the former, Rae argues persuasively that commercial surrogacy agreements are not structured to pay the surrogate for her services, but rather to the delivery of a child and the transfer of parental rights from the surrogate to the contracting couple. The dissection of this first argument is skillfully executed and warrants a close reading. As to the latter, Rae contends that commercial surrogacy arrangements are akin to black market adoptions, and any differences which might exist are either trivial or irrelevant. Although Rae's reply to this argument is somewhat less compelling than his response to the first, he does identify a number of reasons to look sceptically

upon commercial surrogacy agreements.

Although the arguments presented are by no means definitive, Rae is careful to present the arguments fairly, thorough in his replies to these arguments, and correct in his judgement that (a) commercial trade in children is morally objectionable and (b) commercial surrogacy is just such a transaction.

Professor Rae takes up the question of parental rights and the definition of motherhood in chapter 3, a chapter which can only be described as disappointing. Rae opens the discussion by observing that the modern ability to separate the genetic, gestational, and social aspects of motherhood makes the assignment of parental rights one of the more difficult legal tasks concerning surrogate motherhood, and one which remains even in cases of altruistic surrogacy. Contrary to many others who have written on the subject, Rae wisely undertakes to define motherhood as a necessary condition for addressing the question of parental rights.

Given the relative lack of attention to the concept of motherhood in the literature, a lacuna he notes and promises to address in his Introduction, it is unfortunate that Rae lapses into a consideration of the standard legal arguments adduced in support of one of the (potentially) three claimants to the title of "mother:" the genetic contributor (usually the surrogate or the contracting woman); the gestational mother (i.e., the surrogate); and the woman who intends to serve as mother to the child (i.e., the contracting woman). The principal arguments in favor of each claimant are presented and evaluated, with Rae concluding that gestation should determine motherhood based on the bond between mother and child which develops during pregnancy, the contribution the pregnant mother makes to the physical and psychological development of the child, and the effort the gestational mother has invested in the child.

I do not wish to take issue with Rae's analysis in this section, for it is unlikely that a stronger argument could be made in support of the gestational mother, or that the other candidates possess demonstrably superior claims. No, the defect lies not so much in the argumentation, but in the approach. The reason no one of the claimants can present clearly superior arguments in favor of her position is that motherhood is a unified concept, rooted in biology but rising to the personal (and therefore moral) order. Rae accepts the technological capacity to separate certain elements of motherhood as the framework for his ethical and legal analysis, thereby inverting the proper relationship between science and morality. As a consequence, he fails to appreciate fully the integral unity of motherhood, a concept which encompasses and transcends the genetic, gestational, and social components of motherhood. In contrast, *Donum vitae* recognized this unity when it condemned surrogate motherhood for, *inter alia*, establishing "a division between the physical, psychological, and moral elements which constitute . . . families."<sup>1</sup>

The remainder of the chapter is devoted to a summary treatment of the (defeasible) right of a parent to associate with his or her child and its implications in the surrogacy context. Building upon his conclusion that parental rights vest in the gestational mother (i.e., the surrogate), Rae argues that any agreement to waive parental rights prior to the birth of the child should be void and unenforceable. Such an argument has force, but only once one is compelled to adjudicate between competing claims of parental rights to a child (i.e., once a child has been born of a surrogacy relationship).

Chapter 4 evaluates judicial decisions and state legislation in the area, as well as legislative approaches to surrogacy in Canada, Australia, Israel, and Europe. The survey of judicial and legislative responses to surrogacy is useful as a sign of current legal thinking on the subject, but the chapter itself is unremarkable. The presentation of each opinion or statute is concise, but the evaluative component simply applies the previously established conclusions to the decision or statute in question (e.g., Nevada prohibits the payment of consideration in connection with adoption but makes an exception for surrogacy, thereby making the child an object of barter and conflicting with the conclusion reached in chapter 2).

The book concludes with a model statute which prohibits commercial surrogacy entirely and provides for the assignment of parental rights. The key provisions are to be found in section 2, which prohibits persons from entering into or arranging commercial surrogacy contracts, and section 3, which names the surrogate the legal mother of the child and applies adoption-law principles to the transfer of parental rights and custody questions. Section 4 enumerates the privacy rights of the surrogate, and section 5 establishes commercial surrogacy as a misdemeanor offense punishable by a

fine of not more than \$5,000.

The proposed statute is therefore a straightforward application of the conclusions reached in chapters 1 through 3. The proscription of commercial surrogacy is well-founded, but questions remain concerning non-commercial forms of the practice. The criminalization of commercial surrogacy would most likely reduce the incidence of surrogacy more generally, and, as such, demands support. Section 2 of the statute, however, declares that "[n]othing in this statute shall be construed to prohibit non-commercial surrogacy contracts," and such a provision might be read as a statutory validation of altruistic surrogacy. Some Catholic scholars have already endorsed legislation materially similar to that proposed by Rae, relying in part upon the Thomistic principle that civil law need not proscribe every vice.<sup>2</sup> *Donum vitae*, however, cites these same principles and concludes that "[l]egislation must also prohibit, by virtue of the support which is due to the family, . . . surrogate motherhood."<sup>3</sup> In short, the Vatican Instruction considers both commercial and non-commercial forms of surrogate motherhood to be sufficiently harmful to the common good that the state has an obligation to proscribe them. (It is worth noting that France, Spain, Israel, and certain Australian states have already banned both forms of surrogacy).

One's opinion of this book will undoubtedly turn on one's purpose in reading it. Although Rae seems to present his book as ethical analysis of commercial surrogate motherhood, and moral evaluation does inform the work, it reads less like a rigorous ethical examination of the practice and more like a carefully crafted attempt to influence public policy by treating only those issues necessary to his conclusion — and then only in the least controversial fashion possible. Rae considers only those arguments which are currently part of the legal debate, and he consistently refuses to expand the scope of his (purportedly moral) analysis to include more disputed issues which are nevertheless essential to a complete ethical assessment of commercial surrogate motherhood. Rae does not, for example, address the morality of in vitro fertilization and artificial insemination. The exclusion of these practices as morally impermissible would serve to render both altruistic and commercial forms of surrogacy objectionable. Similarly, Rae acknowledges that broader ethical issues are at stake in surrogacy (e.g., the nature of the family and forms of personal fulfillment), but he never pursues these issues. One would look in vain to find references to the requirements of conjugal love, the relationship between conjugal love and children, or that between the dignity of the human person and the right of the child to be conceived in an act of loving union between husband and wife. Instead, Rae adopts the existing legal frame of reference and attempts to sort through the relative merits of the various arguments which have been put forward.

Rae is, of course, right to reject commercial surrogacy as the moral equivalent to baby-selling, but a more far-reaching critique of surrogacy may be made if one looks beyond the narrowly commercial dimension. The moral analysis of commercial surrogacy presented in this book, then, is not so much flawed as extraordinarily cramped.

As a result, one is left bewildered as to the precise nature of the audience Rae was seeking to address. It is perhaps most useful as a primer of current legal thought on the question of commercial surrogacy. Although the review of legal cases in chapter 1 is weak, it may serve as an adequate introduction to the legal context for non-lawyers. The analysis of the commercial aspect of surrogacy (chapter 2) is the strongest section of the book, while the definition of motherhood (and all that Rae draws from it) in chapter 3 is substantially less compelling. Once again, the discussion may serve as a suitable introduction to the area, but, as moral analysis of commercial surrogacy, ethicists and moral theologians will find the treatment wanting. Chapter 4 simply assesses legal responses (judicial and legislative) to surrogacy in light of the preceding analysis, with its primary benefit as a research source. Finally, Professor Rae proposes model legislation to prohibit commercial forms of surrogate motherhood. Perhaps one may be led to support such a statute as the lesser evil, but it does not seem to fully satisfy the requirements of *Donum Vitae*, and Catholics must evaluate the adequacy of any such proposal in that light.

In sum, then, the book is most nearly akin to a sustained law review. Students note: an admirably clear and generally useful introduction to a well-defined area of the law and a rich bibliographical tool, but a limited, and ultimately inadequate, moral evaluation of the subject.

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#### REFERENCES

1. Sacred Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation* 26 (St. Paul: Boston, 1987).
  2. See, e.g., Wagner, "The Ethical and Legal Implications of Hired Maternity," 35 *Am. J. Jurise.* 187, 199-200 (1990).
  3. See, *supra* note 1, at 37.
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