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Surrogate Parenting: Social, Legal and Ethical Implications

Robert Barnett

The author, a Reno, Nevada physician, wrote the following article for a class in Theological Ethics at the University of Notre Dame where he has been studying for a master's degree.

New reproductive technologies, including artificial donor insemination, in vitro fertilization, embryo transfer, the use of frozen embryos and "surrogate motherhood" have raised numerous ethical and legal questions. The "Baby M" melodrama in New Jersey thrust the surrogate issue into the daily newspaper and evening TV broadcasts. The New Jersey case centered primarily around the issue of fit parenthood and contract law and became a custody battle rather than a forum for the discussion of substantive ethical issues.¹ A myriad of legal and ethical issues has come to the forefront. Surrogate arrangements alter the traditional personalized reproductive relationship and create a separation or redefinition of gestational, genetic and social parenthood. The motives of the biological mother, as well as those of the biological father and, potentially, both spouses, as well as the effects on other family members are now being considered, dissected and questioned. The impact on the child itself is just beginning to be examined.

Reproduction in humans at this point in time still remains collaborative. Traditionally, human reproduction has involved collaboration between a male who provides the sperm and a woman who produces the ovum. Artificial insemination, embryo transfer and surrogate parenthood have expanded the number of individuals involved in this collaborative activity and have added new psychological, legal, social, ethical and practical dimensions. Attorneys, physicians, judges and even guardians are now participants. The traditional understanding of parenthood has been blurred and new terms have been introduced so that we now speak of social, gestational, biological and genetic parenthood; some authors have even described the biological mother as "the uterine mother."² The use of this latter term not only ignores the biological unity of pregnancy for the mother, but also the psychological bonding which takes place. The utilization of such terms reinforces the concern of those who fear the

commercialization of reproduction, and both the potential and real exploitation of the biological mothers.

Terminology

"Surrogate", as commonly used today, is not a precise term. The origin of the word is based on its usage in English law, in which a "surrogate" is appointed as a substitute or stand-in for another. The woman, however, who bears the child in surrogate parenting is the source of the egg, carries the child and gives birth.³ She is in no sense a "substitute" mother and is typically both the biological and genetic mother. Under these circumstances then, she is clearly *not* a substitute. The mother who is the gestational mother is best identified not as a "surrogate mother" but as a "biological mother". In order to clarify terms further, we will describe the man who provides the sperm as the "biological" or "genetic" father.

Since there are multiple possible arrangements, all of which involve some sort of substitution, it is also appropriate to use the term "surrogate parenting" to describe the entire topic. Although it might be argued that the biological mother is really a "substitute spouse", since there is no marriage between the two parties, that is an inappropriate designation for either. There are obviously numerous possible variations on surrogate parenting, some of which do not involve a spouse either of the biological mother or the biological father, as we shall see shortly. In an attempt to keep clear the identifications of the various individuals involved, we will use the term "adoptive mother" to identify the spouse of a biological father when those two individuals plan to take over the primary parenting ("raising") of the child.⁴

Let us next review several other possible arrangements. The most typical situation is the one in which there is a married couple who wish to have a child with a genetic link to the father. The man supplies the sperm to be utilized in the fertilization of a woman who supplies the ovum and will bear the child. That woman is commonly married (although not always) and has a husband who has a peripheral, but not disinterested, relationship with the biological mother. In this first and most typical example, the biological mother is also the genetic mother.

The second common arrangement is one in which there is a married man who supplies the sperm, and a genetic and biological mother is unmarried. Both of these arrangements may also involve siblings on either side of the biological tree. The complexity of the family structures will, of course, also vary, depending upon what the prior marriage and reproductive history is of all the members involved. What is clear is that a vast number of individuals may be both involved and affected by surrogate arrangements.

Although we will deal primarily with these first two most common categories, other possibilities include two adopting parents and a genetic and biological mother using a donor sperm. In such a case there is no direct genetic tie of the child with either the adopting father or adopting mother.

A fourth possibility is that there is a single adopting parent (either male or female) and the genetic and biological mother provides the child which is the result of her ovum and a "donor" sperm. There is always the possibility, however, that the fertilizing sperm is that of either a consort or spouse. That fact may remain unknown to some or all of the collaborating parties.⁵ A fifth category is when there is a biological adopting father who is a "single parent", in which case the child is a result of an ovum from the biological (and therefore genetic) mother and his sperm. A sixth category in which in vitro fertilization is possible is that in which the biological mother has no genetic link and some variation of the genetic father, genetic mother, nongenetic father, nongenetic mother is present. This latter category is less frequent, involves embryo transfer or donated egg and will not be a major consideration in this discussion.

Legal Consideration

With proper safeguards, there appears to be no uniform legal prohibition at the present time against surrogate parenting in principle. The procedure, when commercial, has been made illegal in Great Britain. In the United States, there is no firm consensus on its legal status. There are currently some moves directed at placing legal constraints on the practice, primarily for the protection of the child. The Victoria, Australia Infertility Act of 1984 (Act No. 10163) prohibits anyone from publishing an advertisement seeking or offering a woman's services as surrogate mother, as well as giving or receiving payment for surrogate arrangements. This legislation also involves the possibility of two years imprisonment and declares void any "contract under which a woman agrees to act as a surrogate." The Kentucky Supreme Court in 1986 declared that surrogate parenting did not violate statutes (which exist in all states) against "buying and selling of children." Dissenting opinions were expressed at the time, but the procedure is not outlawed. In Michigan, the State Court of Appeals (1981) ruled that surrogacy arrangements which involved a "payment of money" were not allowed. A subsequent decision in the Michigan Supreme Court (1985) appeared to give legal standing to surrogate children, as the biological father was allowed to have his paternity entered into the child's birth certificate. The Warnock Report of Great Britain (1984) made strong comments on surrogacy, recommending that the matter be considered criminal, and further, that "actions of professionals engaged in surrogate arrangements" should be criminally liable.⁶ Potential legal considerations include questions of the consent of the husband of the biological mother, the nature of the contract, the consent of the wife of the sperm donor and provisions for unexpected contingencies, some of which have already arisen and resulted in controversy. Some of these might have an impact on the contractual relationship, but also may involve significant unanticipated and problematic future responsibilities. Among these are the birth of a deformed child, illness of the biological mother during pregnancy, or

death of the biological father before the birth. (Surrogate contracts typically give the biological father the right to demand abortion if a defective child is detected during the pregnancy. In the "Baby M" case, the judge ruled this portion of the contract invalid).

Other legal considerations involve the possibility of divorce and subsequent custody arrangements. Does the biological mother have greater rights in custody matters than the biological father or the adoptive mother? If the biological father dies during (or following) the pregnancy, what is the fate of the child? Add to the question of custody matters of both property rights and support responsibilities, and it is obvious that the legal implications are endless. None of these matters are really new issues in themselves, of course, but with surrogacy the complexity expands enormously, and with it, the probability of more adverse social and psychological harm to the child.

An additional legal concern is that the lawyer involved typically recruits the biological mother and represents the adopting parents. The opportunity for conflict of interest, especially to the disadvantage of the gestational mother, is very real.

Social and Psychological Considerations

Considerations, however, which may create problems are not limited only to those legal aspects directly associated with the pregnancy, the birth, parental rights and obligations, but also the future health and welfare of the child and family (families). As has become apparent in the "Baby M" case, there are multiple other potential difficulties which have broad implications. These include the following:

A) Social considerations:

- 1) Visitation rights of the biological mother.
- 2) Rights of the child to information about the nature of its origins (i.e., the surrogate arrangement).
- 3) Rights of the child to information about the biological mother (as well as siblings).
- 4) Value judgments in terms of who is acceptable, either as a biological mother or as an adopting parent.
- 5) Entrepreneurism (which includes the motivation not just of the principals but also of both the medical and legal profession).

B) Psychological impact on:

- 1) the child
- 2) the biological mother
- 3) the family of the biological mother
- 4) the biological father
- 5) the family of the biological father

The ramifications of these are, of course, endless and uncertain. The resolution of most, at best, is problematic. Many, if not all of these, are problems which occur (especially in traditional adoption) independent of the changes associated with modern reproductive technology. They can, however, be anticipated to be more central in the current arena of

surrogate parenting. In surrogacy, the pregnancy is deliberate with a specific purpose. In adoption, there is an attempt to find a desirable outcome for a typically unplanned pregnancy. Adoption is an answer for the mother, the child and the adopting parents. It is not a system that has as central to its operation financial gain to the mother, nor the attorney and involved physicians.

Adoption is not a parallel to either surrogacy or artificial insemination, both of which make the desire for a child so dominant that the pregnancy is separated from the marriage and becomes an end in itself. In traditional adoption, there is mutual participation in an action in which individual biological fulfillment is set aside to provide a home for another's child. This can be an especially loving and unifying act of commitment for a couple. With older, handicapped, mixed race and minority children often in need of a home, a decision to adopt can be especially important.

It has been argued that, in order to protect the individuals involved, surrogacy arrangements should be legalized and controlled. It is probable that such acts will legitimate the entrepreneurial aspects and further extend the process with widened opportunity for social and psychological harm. Surrogacy may have a negative impact on existing adoption arrangements. Publicity about surrogacy, especially the exchange of money, may have an effect on mothers who once would have placed their babies for adoption, and encourage them to seek "fees for service."

Under most current state laws, the surrogate child would be classified as illegitimate, recognizing it is a child born outside of marriage. There is extensive case law which provides for the welfare of children in such situations. The provisions of these existing laws could be applied if the contracts were not made legal. Such action would protect the child and, at the same time, allow the removal of financial incentives to third parties and discourage women from having children primarily for their own financial gain.

Justification of Surrogacy from the Standpoint of the Adopting Parents

Inherent in the issue of surrogacy is a desire to provide children to couples or individuals who otherwise might be either unable to have children or able to have them only under circumstances unacceptable to them. In some instances, this may satisfy that natural desire simply to be a parent. From the biological father's standpoint, surrogate parenting might satisfy the desire for continuation of his genetic line; if married, this may be genuinely encouraged by his spouse. In some instances, it might be justified on the basis of the argument that there was an element of "insurance" (or assurance) that, in contrast to the usual adopting situation, at least some portion of the genetic pool (that portion contributed by the father) would be "known." It might be argued that this is more desirable than the situation in which an adoptive child might be brought into a family with either no, or only limited, knowledge of the genetic pool. The

uncertainty of that justification is made clear by the fact that in the "Baby M" case, Mary Beth Whitehead is said to have been selected as most desirable out of a group of over 300 women to bear Mr. Stern's child. The irony is that in the court pleadings, the Sterns, in part argued that because of *her inadequacies*, her parental rights should be terminated, and that they, not she, should be given custody.

The desire of some couples to have children often has deep psychological and societal roots. It is understandable that when couples are faced with frustration and delays because of the difficulties in fulfilling these desires, surrogate parenting may seem a feasible or even expedient alternative. John Robertson seems to imply that surrogate parenting is more desirable than agency or independent adoption for the child, since adopted children often suffer identity problems because "they are not able to know their mothers."⁷ It would seem to follow, then, that he assumes surrogate children would not only be fully informed about their origins, but would also have the opportunity to know their biological mother. His further justification is that the surrogate children are "benefited, or at least not wronged, for without the surrogate arrangement, (they) would not have been born at all." The logical extension of this argument would appear to be that regardless of the circumstances, it is appropriate to bring as many children as possible into existence simply so that they have the opportunity of existence. Consideration of the previously mentioned social and psychological ramifications would seem to create a serious challenge to any argument that such surrogate children are not often wronged, even in contrast to adopted children.

Emotional insecurity may be at the basis of the desperation which leads some to consider surrogacy. The woman may feel "less a woman" because she cannot bear her husband's child. He may feel "less a man" if he has no progeny. Either may be "less fulfilled" if not a parent. To recognize these factors and to deal with them may help couples not only to avoid the pitfalls of surrogacy, but also to reach a new maturity.

Certainly resentment on the part of the adopting mother may become a future possibility. The relationship between the biological father and biological mother is one prone to ambivalence; in time the same may be true of the child and the adopting mother.

Justification on the Part of the Biological Mother

There is limited data on what factors motivate women to become involved in surrogate parenting and to assume the role of biological mother. An obvious possibility, of questioned validity, is simple economic gain. Currently the total cost to an adopting parent for a surrogate arrangement is estimated to be in the range of \$25,000 to \$30,000.⁸ A significant portion of this is allocated for physicians' and other medical expenses, some to legal fees, and typically, approximately \$10,000 to the biological mother.⁹ Other motivating factors which have been mentioned in the limited studies done include "the enjoyment of pregnancy and

associated attention", response to "guilt over past pregnancies, especially those which may have ended in abortion or adoption", and the feeling of having done "good" by providing "the gift of life" to others.

From the biological mothers' standpoint, it is apparent there is a combination of altruistic, financial and psychological motives which are possible. As the "Baby M" case has demonstrated, the description of the biological mother simply as a "uterine" mother is inappropriate. The bonding that takes place during the pregnancy, as movement develops and the mother becomes aware of life, are typical experiences in pregnancy. It is highly probable that post-partum contact with the child and breast feeding will establish or further that bonding process.

Potential negative factors, first of all from both an ethical and psychological aspect, involve the obvious separation of sexuality and reproduction. Such an arrangement typically involves what is, technically at least, conceptional adultery.¹⁰ In addition to the question of exploitation of the biological mother, other issues which have been suggested in some of those instances which have been publicized, include the tendency toward an elitism which favors the adopting parents. In surrogate parenting, the social parents are typically more affluent in contrast to the typically less affluent, disadvantaged, biological mother. As a *New York Times* editorial bluntly put it: "The rich get kids and the poor get pregnant."¹¹

The "Baby M" Decision

The March 31, 1987 decision of Judge Harvey R. Sorkow in Hackensack, New Jersey, awarded the child of Mary Beth Whitehead and William Stern to the father. Judge Sorkow listed as the primary issue the interests of the child. He, however, went beyond the matter of custody and upheld the surrogate contract as binding. There can be no quarrel with his desire to do what is best for the child. On the one hand, the Sterns were described as having a "private, quiet and unremarkable life which augurs well for a stable household environment." The judge noted that the Sterns showed "sensitivity to the child's physical and emotional needs. They would be supportive of education and have shown at least in their own lives a motivation toward learning. It can be concluded that they would initiate and encourage intellectual curiosity and learning for the child." Sorkow described Mrs. Whitehead as "manipulative, impulsive and exploitive."

Given the choice between a couple who are well educated, affluent, and on the surface emotionally stable, and a woman with a past history of emotional instability, minimal education and financial insecurity, the awarding of the custody to the father was not surprising. The values chosen were those which have the highest rank in our society. Whether a life with Mary Beth Whitehead and her emotional lability and pandas to hug would have been better than the quiet Stern household with its pots and pans, no child psychologist can predict. What is clear is that it would

have been better if the choice were one that never had to be made.

Judge Sorkow's decision to terminate all parental rights for Mary Beth Whitehead and to deny her any visitation appears to be an attempt by him to legitimize surrogacy, rather than only to serve the best interests of this child. Although perhaps intended to prevent confusion and psychological stress on the child, it was an unusual move if the decision is considered in the context of typical custody disputes. The decision appears to be one based not on social, psychological and ethical considerations, but rather one based on contract law, a concept more appropriate to stocks, commodity trading and real property.

Ethical Considerations

There is a strong position which argues against the use of artificial insemination, which is a first step in the entire process of surrogate parenting. There is still debate about the moral acceptability of artificial insemination and in vitro fertilization. This discussion has centered primarily on questions involved in surrogate parenthood. What is clear in the entire field of reproductive technology is that there is a definite tendency for procreation to be depersonalized at the same time that there is a separation of the unitive and procreative aspects of marriage. With that comes not only questions about personal sexual morality, but also much broader social implications which involve disruption of normal parenting patterns, and traditional family structure.

The Vatican Document on Human Reproduction¹² of February, 1987, continues in the tradition of earlier writings which emphasize the importance of maintaining the exclusive place of reproductive acts in a relationship between husband and wife. The importance of the marriage is defended not only on religious, but also on social grounds. The document briefly discusses the question of surrogacy, pointing out "an objective failure to meet the obligations of maternal love, of conjugal fidelity, and of responsible motherhood; it offends dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by its own parents; it sets up to the detriment of the families a division between the physical, psychological, and moral elements which constitute those families." It is apparent that from a wide range of views, including those of many feminists concerned about the exploitation of women, there is strong agreement with the Vatican's position on surrogacy. Not only natural law arguments but also utilitarian arguments interdict the legitimization of surrogate parenting.

An argument which appeals to the "right to have children" as a justification for surrogacy must recognize that even if such a right does exist, it is not an absolute right. It is most likely that if a valid argument can be made, there is a derivative right that couples cannot be prevented from having children. Just as a "right to health care" would not entitle one to health, there is no entitlement to a child. Even our constitutional right to free speech is limited by the mandate that we cannot exercise it in a way which would harm others.

Conclusion

The consideration of surrogate arrangements by individuals who desire to have children and who have no other avenue readily available to them is understandable. Alternatives such as adoption may not satisfy the desire for genetic continuity, even though surrogate parenting does not guarantee that. Neither natural parenting patterns, surrogate parenting, nor adoption guarantee the ideal child or the ideal family environment. All are uncertain and, at times, painful. Yet surrogacy for some seems to offer special hope. But the core of marriage, Christian or otherwise, should not be either the physical act or biologically related offspring. What should be central is the mutual love for each other. Both the marital act and children should be an expression and fulfillment of the mutual love.

Children born outside a marriage or conceived with the assistance of modern reproductive techniques may, regardless of the circumstances, be no less a blessing than other children. They, in fact, at times are more fully an expression of human love than some children born in "legitimate" unions. They *may* reinforce the marriage bond and may well contribute to the community and God's world more than many. Surrogacy arrangements of one kind or another existed in various cultures at various times over the centuries. Since insemination, artificial or otherwise, requires no special scientific or medical knowledge and can occur without medical intervention, it is obvious that surrogacy will continue. What is most important is, such children should be treated by all members of society as any child brought into the world, that is, with care, love and compassion.

What is different about commercial surrogate parenting is that it is associated with deliberate, planned separation of the genetic, gestational and social parenting and, by its very design, is at variance with cultural and religious understanding of maternal love, conjugal fidelity, and traditional parenting patterns. The possibility of changing a religious and cultural tradition, in the light of reflection on human experience and new scientific knowledge, cannot be denied. However, the disruption of the marital relationship for the couple, the calculated abnormal family structure for the child, and the dehumanizing exploitation of biological mother involve such fundamental distortion of marriage, pregnancy and family that surrogacy is clearly unacceptable. Commercial surrogacy institutionalizes and medicalizes the process and subjects it to entrepreneurial forces. Opportunities for grave social and psychological harm, including the exploitation of women and infertile couples, are almost certain to increase with the spread and legitimatization of this practice. Attitudes which tend to dehumanize the woman, pregnancy, and the infant can be anticipated to be more prominent.

Surrogacy has inherent in it confusion over family and individual identity for the child. In commercial surrogacy the child becomes an object of a transaction which involves potential or real exploitation of not only

the biological mother, but other individuals involved. Although economic security is often a consideration when couples undertake any pregnancy, in commercial surrogacy economic factors are much more central. Entrepreneurial motivation on the part of the legal and medical profession cannot be discounted.¹³

There is something both strange and sad about a society which would disembody and commercialize the very beginning of life. Part of the tragedy in acceptance of surrogacy is the lack of recognition of limits and a misunderstanding of the human condition. The desire for a child becomes so dominant that its conception and development are no longer rooted in mutual love and giving. The child is separated from that union and becomes an end in itself. Life as sacred is displaced by life as a commodity. With that change comes confusion, dehumanization and often exploitation.

References

1. On March 31, 1987 Judge Harvey R. Sorkow upheld the surrogate contract, awarded custody of the child to the biological father (William Stern), terminated all parental rights of the biological mother (Mary Beth Whitehead) and arranged an expeditious adoption by Mrs. Stern on the same date. The case at the time of this writing is under appeal. On April 10, 1987 the New Jersey Supreme Court ruled that Mrs. Whitehead could resume weekly visits. The Court is scheduled to hear the appeal in September, 1987.

2. See Michael Bayles, *Reproductive Ethics*. (New Jersey: Prentice Hall, 1984), pp. 23-24. Diana Brahams, a British lawyer, has also described the surrogate child as being "hatched." (See Brahams, D. "The Hasty British Ban on Commercial Surrogacy", *Hastings Center Report*, February, 1987. Vol. 17, No. 1, p. 17).

3. In *in vitro* fertilization, a donated egg is utilized and placed in a recipient uterus. This does not necessarily involve a genetic link between the infant and the adoptive father nor the gestational mother. In this specific instance it might be thought that the term "surrogate mother" is appropriate. If the "reproductive apparatus" were disembodied from the woman's hormonal, physiological and psychological makeup, she might, in some sense, be a surrogate. Such a separation does not occur even though there may be no obvious genetic linkage in this instance. What is clear is that in virtually all pregnancies a bonding between the mother and child does take place. What is less clear but still important is *even though there may be no genetic linkage* there may still be an "imprint" (psychological, biochemical etc.) of the mother on the child. Our discussion, however, will deal primarily with the typical situation in which the ovum comes from the biological mother.

4. Although "parent" has its origin in "begetting" (*parens*: to give birth), usage has come to associate it with the idea of raising or rearing. Mother or father has perhaps a closer link to biological origins. Although admittedly not precise, we will nonetheless use parenting in the sense of raising.

5. This occurred in at least one instance after the birth of a severely defective child. The child was rejected by the potential adopting couple and was shown to be the child of the spouse of the biological mother, not the contracting male who had also provided sperm.

6. In 1985 the *Surrogacy Arrangements Act* was passed which made it a criminal offense for third parties to benefit from commercial surrogacy.

7. Robertson, J.A., "Surrogate Mothers Not So Novel After All", *The Hastings Center Report*, Vol. 13, No. 5, Oct. 1983, p. 29.

8. Noel Keane, the attorney who arranged the baby in the "Baby M" case, is reported to have received a \$10,000 fee. An additional payment to the woman of \$10,000 and \$5,000 for

"insurance, medical bills and maternity clothes" is typically involved. (*New York Times Magazine*, March 29, 1987, p. 35).

9. C.F. Robertson argues that although the \$25,000+ fees required make surrogate parenting a "consumption item for the middle class", it is "not unjust to poor couples, for it does not leave them worse off than they were". Although there may be some apparent initial *financial gain*, harm done not only through social and psychological channels, but also health risks, are very real considerations. Robertson also notes later, in seeming contradiction to his initial statement, that "the money is hardly adequate compensation" (p. 32).

10. This is meant in the physical or reproductive sense and not to indicate "intellectual lusting." Conceptional adultery refers then to the impregnation of someone other than his spouse by a married man. It has both ethical and legal meaning.

11. *New York Times*, March 8, 1987.

12. John Paul II, Pope, *Instructions on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*. Feb. 22, 1987.

13. See *Reno Gazette-Journal*, Jan. 26, 1987, quoting Dr. Geoffry Sher, co-director of the Northern Nevada Fertility Clinic, discussing in vitro fertilization: "Some say we have no right to make a profit . . . but that is ludicrous. The profit motive is what drives this country." ". . . What we are doing will be a big industry in the future, and we want to be there when it happens. We see the future as being very profitable." (p. E7).