THE SOCIAL UTILITY OF SURROGACY*

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Surrogacy lends itself to a battle of abstractions. It inevitably invites combatants to invoke concepts like nature, natural rights, inalienability, personhood, and slavery. The peculiar political divisions among and between self-proclaimed liberals, conservatives, feminists, and libertarians on the surrogacy issue suggest to me that these concepts do little analytical work. Instead, they serve as empty vessels into which almost anything can be poured. I will therefore try to avoid this difficulty by evaluating surrogacy in terms of what we know about human sentiments, the social consequences of surrogacy, and techniques for controlling its genuine risks.

My position is that surrogacy can be a morally acceptable response to the deepest, most poignant human needs. If permitted and properly regulated by law, the social benefits that flow from surrogacy are likely to be immense. Although some risks are involved, they can be minimized by using standard regulatory techniques and specifically enforcing some but not all provisions of surrogacy agreements.

Although I will be addressing the topic of surrogate motherhood, I should note that the sale of sperm, which is quite routine under existing legal arrangements, raises many, but not all, of the same questions as surrogate motherhood. Yet interestingly enough, we have very few moral qualms about the donation or commercial sale of sperm. We must bear this in mind when assessing the moral arguments against surrogacy.

Before assessing those moral arguments, the social consequences of surrogacy, and the techniques for controlling its risks, let me state some of my background assumptions. I begin with the incontrovertible proposition that infertility is a personal calamity of enormous dimensions. According to the best data on the subject, infertility is increasing. In the United States, for example, one out of every six couples of childbearing age is infertile,[1] and a very large percentage of those infer-

* An expanded version of this argument appears in Schuck, *Some Reflections on the* Baby M *Case*, 76 GEO. L.J. 1793 (1988).

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1. *See* Mosher & Pratt, *Fecundity and Infertility in the United States 1965-82*, National Center for Health Statistics Advanced Data # 104, Feb. 11, 1985, Table 3.

tile couples desperately wants to have children.

A second morally relevant fact is that adoption today is considerably less available than it was in the past—even the recent past. Some reasons for this are the increase in abortions, the increased availability and use of contraception, and the reduced stigma of bearing children out of wedlock. Between 1971 and 1982, the number of legal adoptions each year dropped from 82,000 to 50,000.[2] During the same years, a sharp decline occurred in the proportion of agency adoptions relative to so-called independent adoptions.[3] Even as we speak, new impediments to adoption are increasing.[4] In short, adoption is a diminishing solution to the problem of infertility.

With these facts in mind, I turn now to consider the moral status of surrogacy. First, we cannot doubt that surrogacy is baby selling; the assertion to the contrary made by the trial judge in the *Baby M* case was simply disingenuous.[5] Surrogacy, however, is baby selling with a difference. It is different because the strictures against baby selling that arise in the adoption context do not necessarily condemn baby selling in the surrogacy context. Quite to the contrary, surrogacy advances some of the same values that the ban against baby selling in the adoption context is designed to promote. As with sperm or egg donation or sale, however, we seem to have very few moral qualms about adoption.

Yet surrogacy has several advantages over adoption from a moral point of view. First, with surrogacy the father and the adopting mother have the advantage of considerably more information about the natural mother, the surrogate, than is typically available in the conventional adoption case. Second, a surrogate mother—unlike an adopting parent or a mother who is placing a child up for adoption—knows from the outset that even as the fetus proceeds to gestation, she has no legitimate expectations of a continuing relationship with the child.[6] Obviously, that is not in itself an answer to the phenomenon of ma-

2. *See Adoption Market: Big Demand, Tight Supply*, N.Y. Times, Apr. 5, 1987, at A1, col. 1.

3. *See id.*

4. *See Over Mother's Protest, Navajo Baby is returned to Tribe in Bid to Cut Adoptions*, Washington Post, Apr. 17, 1988, at A3, col. 1.

5. *See* In re Baby M, 217 N.J. Super. 313, 372, 525 A.2d 1128, 1157-58 (Ch. Div. 1987), *aff'd in part, rev'd in part, remanded*, 109 N.J. 396, 537 A.2d 1227 (1988).

6. Some empirical evidence suggests that most surrogates know this emotionally as well as cognitively. *See* A. OVERWORD, SURROGATE PARENTING 130 (1988).

ternal bonding. It suggests, however, that there is a psychological overlay to the reglationship between a surrogate and the growing fetus that is decidedly different. According to some empirical evidence,[7] this difference seems to account for the fact that a surrogate will not feel the loss as keenly as a natural mother often feels when placing her child up for adoption.[8] Third, and perhaps most important, surrogacy, unlike adoption, is an arrangement that creates new life. It is not simply the reallocation of rights to existing children. It is a phenomenon that promises the creation of new, desperately wanted life.

Opponents often make natural law objections against permitting surrogacy.[9] One form of this objection is that the surrogate is using her body to produce and nurture a child for a stranger, a use of her body that opponents consider to be profoundly alienating. In assessing that claim, note that a similar use of the body is being made by one who sells or donates sperm or eggs, both of which practices are increasingly common. I recognize that there are differences between sperm donors and egg donors on the one hand and surrogates on the other. The question, however, is whether those differences rise to a moral dimension. I think that they do not.

A second kind of natural law claim against surrogacy emphasizes the fact that the surrogate is carrying the child for a fee; it is a commercial arrangement. Again, recall that eggs and sperm are sold and that state law sanctions those sales. We do not seem to have any moral objections to such sales, although they raise legal and administrative problems that must be addressed through regulatory means. That the service being provided by the surrogate is precious does not necessarily argue against allowing that service to be exchanged for a fee. Many things in life that are precious are produced for a fee, including health

7. *See id.*

8. I strongly agree with Professor Jackson that normally, society should encourage the maternal instincts that surrogates may develop. *See* Jackson, Baby M *and the Question of Parenthood*, 76 GEO. L.J. 1811, 1821, n.25 & 1822 (1988). But it is no more inconsistent for that same society to seek to curb maternal ties in the surrogacy context than it is inconsistent for society to value sexual attachments between married individuals while at the same time discouraging extramarital expression of those feelings.

9. I exclude natural law arguments of the kind recently advanced by Pope John Paul II, which are based purely upon theological concerns because I am not competent to evaluate them. *See Text of Vatican's Doctrinal Statement on Human Reproduction*, N.Y. Times, Mar. 11, 1987, at A15, col. 6.

care, child care, and many other services.[10]

A third type of natural law claim against surrogacy is that it is involuntary. Opponents of surrogacy point to the complex psychological relationship that occurs between the surrogate and the growing fetus, a relationship that creates feelings that no woman prior to this experience can anticipate. Thus, the argument goes, contractual consent can never really be informed consent. Empirical evidence, however, refutes these claims.[11] Interestingly enough, most surrogates have already had their own children.[12] They have been through the process of pregnancy. They know what feelings to expect. It may be true that after delivering the child, a surrogate may experience regret regarding her decision to enter into the agreement, but the possibility of regret is ubiquitous in life and accompanies many of the major decisions that we make.[13] Further, it is possible to minimize the risk of regret by making improved information about the experiences of former surrogates available to women intending to become surrogates themselves. Many surrogates apparently conclude that having undergone the experience, they rather liked it and would do it again.[14] They feel that they are performing a priceless, albeit compensated, service for people who desperately desire their own children.[15] Some surrogates, of course, feel differently.

Surrogacy creates ardently wanted life. Morally speaking, this is the decisive factor in evaluating surrogacy. The benefit of children being born to parents who cherish them; the benefit of

10. That nonprofit providers also sometimes furnish these goods does not alter the point. The differences between profit and nonprofit provision are often unimportant and certainly do not rise to the level of moral differentiation. *See* Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416, 1417-18 (1980); Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 881 (1980).

11. Another related form of this claim is that surrogate mothers are poor and therefore under some economic coercion. As a result, the surrogacy agreements are not entirely consensual. Surveys, however, suggest that surrogate mothers are not members of an underclass. They are generally not wealthy or even in the upper middle class, to be sure, but they are not low-income people. *See* J. Einwohner, Surrogate Motherhood: Motivations and Dynamics (1987) (unpublished paper presented at American Psychological Association Annual Meeting).

12. *See id.*

13. This does not mean that the possibility of the surrogate's regret is not a matter for social concern. Indeed, I argue elsewhere that regulation of surrogacy contracts should squarely address and reduce this risk. *See* Schuck, *Some Reflections on Baby M*, 76 GEO. L.J. 1793, 1804-10 (1988).

14. *See* Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117-18 (1983); J. Einwohner, *supra* note 11, at 8-9.

15. *See* J. Einwohner, *supra* note 11, at 8-9.

creating life that would not otherwise exist; and the benefit of allowing women who wish to become surrogates to reap both economic and altruistic rewards for bestowing one of life's greatest gifts—these considerations argue very strongly against the natural law attack on surrogacy. We should be very reluctant to censure on moral grounds a practice that generates these kinds of values.

It should also be relevant to our moral debate that there have been very, very few problems with surrogacy arrangements relative to the overall number that have been undertaken. We have read a great deal about the *Baby M* situation and a couple of others, but according to recent data, the number of instances in which problems have arisen is well under a dozen, notwithstanding that more than 600 surrogacy contracts had been entered into as of about two years ago.[16]

I would now like to turn from what we know about surrogacy to what we can reasonably predict about its consequences. The appropriate context for evaluating these consequences is a legal regime that seeks to maximize the social benefits of surrogacy and minimize its social risks. The first question then becomes: How highly do infertile couples value the prospect of having a child? We have some evidence bearing on this question because we know that couples typically pay a minimum of $8,000 per child in the case of agency adoption and a good deal more in the case of so-called independent adoption.[17] We also know that there are about 500,000 to 1 million infertile couples who are likely to seek adoption.[18] The economic value of the benefits produced, in terms of couples' willingness to pay, must be many hundreds of millions of dollars. This estimate is a very conservative one because parents would be likely to pay a good deal more for a child with whom they have, as a result of surrogacy, a genetic relationship. In addition, surrogacy produces added value by reducing the amount of time needed to obtain a child.

The massive benefits of surrogacy certainly do not resolve

16. According to Noel Keane of the Infertility Center, nine problem situations have arisen in the approximately 600 surrogacy arrangements of which he and his colleagues are aware; only four of those cases (including *Baby M*) went to court. Telephone interviews with Noel P. Keane, Executive Director, Infertility Center (Feb. 25 and 29, 1988).

17. *See* Cole, *The Cost of Entering the Baby Chase*, N.Y. Times, Aug. 9, 1987, at F9, col. 1.

18. *See Baby M*, 217 N.J. Super. at 331-32, 525 A.2d at 1136-37.

the moral question. They do not even resolve the utilitarian question. But they do suffice, I think, to shift the burden of proof to surrogacy opponents to justify withholding benefits of this kind and magnitude from people who are willing to pay for them and from the society that shares them. These benefits create a strong presumption that we should regulate surrogacy rather than ban it, especially if regulation can minimize its risks.

Surrogacy's major risks are inadequate information and the possibility of people changing their minds as the child develops in the womb or after the child is delivered. These risks, however, can be minimized through straightforward regulatory methods. The state can, at relatively low cost, increase the amount and quality of information that individuals have concerning surrogacy, the obligations that will flow from surrogacy arrangements, and how those obligations will be enforced. It can require standardized contract provisions. It can reduce the considerable uncertainty that now surrounds the legal status of surrogacy contracts and the extent to which they will be enforced. The law must also protect the child from the risk of abandonment in the event that the people who entered into the surrogacy arrangement change their minds. If these measures are adopted, the residual risks of surrogacy are likely to be very low, especially when compared with the benefits.

A related, very important issue is the extent to which specific performance of the surrogacy contract provisions should be enforced by the law. The best way to approach this question is not on a categorical basis but provision by provision. There are certain contractual undertakings that we should not specifically enforce. For example, we should not specifically enforce the surrogate's obligation to surrender the child to the father.[19] There are other contractual provisions , however, that I believe should be specifically enforced.[20]

The crucial point to be made in conclusion is that surrogacy may potentially generate enormous individual and social values while posing minimal risks, which can be addressed through a limited regulatory apparatus. The principal obstacle to realiz-

19. Evidence that the unavailability of specific performance would deter infertile couples who were otherwise anxious to enter into such contracts might alter this principle.

20. These include contractual provisions central to the integrity of the arrangement, such as a mother's duty to submit to *in vivo* testing of the fetus or the father's obligation to take the baby from the surrogate mother when she offers it.

ing such benefits is the legal uncertainty that presently envelops surrogacy. This uncertainty is something that the law can and should do something about.