

Surrogate Motherhood

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“Surrogate” motherhood dates back at least as far as Genesis, that is to say, to the earliest generations of recognizably human families. There Abraham’s long-barren wife, Sarah, sends her husband to “lie with” the slave girl Hagar, in the hopes that through her she can “found a family.” Jacob’s wife, Rachel, makes a similar arrangement with her slave girl, Billah, “so that she may bear sons to be laid upon my knees.” Despite the intense and bitter controversy surrounding contemporary cases of surrogate parenting, there is nothing particularly novel about the practice of one woman bearing a child for another.

But in the late twentieth century two dimensions to this practice *are* new. First, medical advances now allow for cases of what has been called “high tech” or “full-fledged” surrogacy, in which the surrogate is implanted with both sperm and egg drawn from an infertile couple; the genetic material for the fetus is contributed entirely by the receiving couple, with the surrogate “loaning” her womb to carry the fetus to birth. Second, recent years have seen the advent of commercial or contract surrogacy, childbearing for a fee. Contract surrogacy emerged in the mid 1970s; by the end of 1986 some 500 children had been born of such arrangements. The most famous, of course, is *Baby M*, the object of the landmark custody case that ensued when surrogate mother Mary Beth Whitehead refused to relinquish the child she had conceived and carried to term in a surrogacy contract for William Stern. *Baby M*’s custody battle riveted public attention for months,

posing in the starkest terms troubling questions about the very nature of parenthood.

The legal system's response to surrogacy can range across the spectrum from criminalizing it outright to upholding surrogacy contracts on a par with any others. Both of these extreme positions seem unpalatable alternatives. The problem with the first is that we are reluctant to ban *all* surrogacy, for sometimes one woman (a sister, or a friend) offers to bear a child for another purely out of love or a disinterested desire to relieve suffering. At most, then, we would consider banning surrogacy-for-a-fee, on an analogy to legislation against baby selling.

The other extreme, treating surrogacy contracts as standardly enforceable, has some support in public opinion: a majority of Americans polled about the trial court's decision to enforce the surrogacy contract in *Baby M* believed that surrogate mothers should be bound by the contracts they sign. But, as the New Jersey Supreme Court later ruled, overturning the trial court's decision, this response is poorly grounded in the law. In other contexts personal service contracts are usually not held to be enforceable by "specific performance," that is, by forcing the reneging individual actually to perform the promised service. Even contracts to marry are not held to be legally binding, and in an adoption situation, no state in this country binds a mother to give up her child because of a contract with prospective adoptive parents executed before the child was born. Thus the viable policy options involve either prohibiting commercial surrogacy altogether or else making surrogacy legal but unenforceable over the objection of the birth mother. This latter alternative is attractive to those who worry about the abuses that might attend black-market surrogacy, and so prefer the regulation of surrogacy to its criminalization.

The central question in deciding among policy options is whether we as a society want to encourage or discourage this form of child-bearing, and how strongly. To answer this we must look in turn at the concerns of the would-be receiving parents, of the contract mother, of the child herself, and of society more generally.

The Desire for a Biological Child

Prospective receiving parents usually come to a surrogacy arrangement after long and desperate years of infertility, when all hope of medical intervention has been reluctantly abandoned. According to the most recent data, from 1982, some 3.5 million couples — one in six couples of child-bearing age — are considered infertile. Insofar as surrogacy is seen as a way of responding to the anguish of childlessness, it may seem to serve a worthy end. Yet surrogacy would hardly seem the first-choice solution to childlessness in a society where so many existing children languish in institutional care. Why surrogacy rather than adoption?

Adoption, however, is easier said than done. The number of adoptions declined from 82,000 in 1971 to

50,000 in 1982, a 38-percent drop. In 1984 two million couples competed for the 58,000 infants placed for adoption; these couples experienced a waiting period of three to seven years. Of course, while the demand for healthy, white babies far exceeds supply, many minority babies, and certainly those with physical or mental disabilities, remain in need of loving homes. Yet it is understandable that prospective parents might not be willing to take on the challenge of a severely handicapped child or might be reluctant to cross racial lines in forming a family, given the entrenched racial prejudice of American society. Some agencies have gone so far as to remove children from homes in which they were thriving in order to avoid an interracial family.

But even if adoption were more readily available, the lure of surrogacy would remain, for it promises what many parents plainly desire: a genetic link to their children. Is such a desire worthy of respect or should it be rejected as narcissistic or egoistic? Martha A. Field, professor of law at Harvard Law School, cautions that "a desire to reproduce oneself is never the healthiest motivation for wanting to have a child." This is especially true in the surrogacy situation, for "the father in the surrogacy arrangement is focused upon only half the genes that will make up his child." The importance of the paternal genetic endowment is emphasized; that of the maternal genetic endowment is all but ignored. Yet, Field writes, "It seems odd that the couples using surrogacy should pay so little heed to the other half of the genetic material, since they are almost necessarily believers in the importance of the genetic tie."

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Mary Gibson, a philosopher at Rutgers University, suggests that contract motherhood is attractive to receiving parents because of a narrow and rigid notion of the family, "consisting of breadwinning father, nurturing mother (now possibly also a career woman/super-mom), and their genetic offspring (preferably, first a boy, then a girl) conceived, carried, and born the old-fashioned way. . . . Contract motherhood, if the contract mother is excluded, allows infertile couples to come as close as possible for them to the 'norm' and even appear to represent it." The desire for a child of one's "own" in such a context should have no special claim to our respect.

The desire for a genetic bond can perhaps be seen as well, however, as the expression of the need for some deep and non-arbitrary link to a child. The desire for a child of one's "own" might come down to a longing for a bond somehow stronger and more enduring than

those of marriage or friendship, one that can survive, as so many other ties do not, through sickness and health, good fortune and bad, grounding a lifetime of commitment. But Robert Wachbroit, research scholar at the Institute for Philosophy and Public Policy, remains skeptical about this characterization of the longing for a genetic link, doubting both how natural it is and how noble. After all, he points out, the ancient Romans placed no importance on genetic ties; the emphasis on "blood," and its "thickness" relative to water, is hardly universal. Wachbroit sees the desire for a "special" gene-linked bond as a cousin to concerns with racial purity, and so as morally questionable.

In any case, this kind of irrevocable link is ironically just what surrogacy in practice ends up undermining. Because of the commercial nature of the exchange, as we will see below, the child conceived in this way is particularly likely to be viewed as a commodity, special-ordered to fit the parents' preconceived idea of what a child of their "own" should be.

The Contract Mother

The motivations for agreeing to be a contract mother vary. They may involve an altruistic desire to help relieve the pain of childlessness in others or a yearning to work out some past psychological trauma; but certainly the desire to earn money is almost always central. In a January 1987 Gallup poll, 15 percent of the women questioned said they would consider becoming surrogates for the standard \$10,000 fee. After all, working class women still face bleak employment options.

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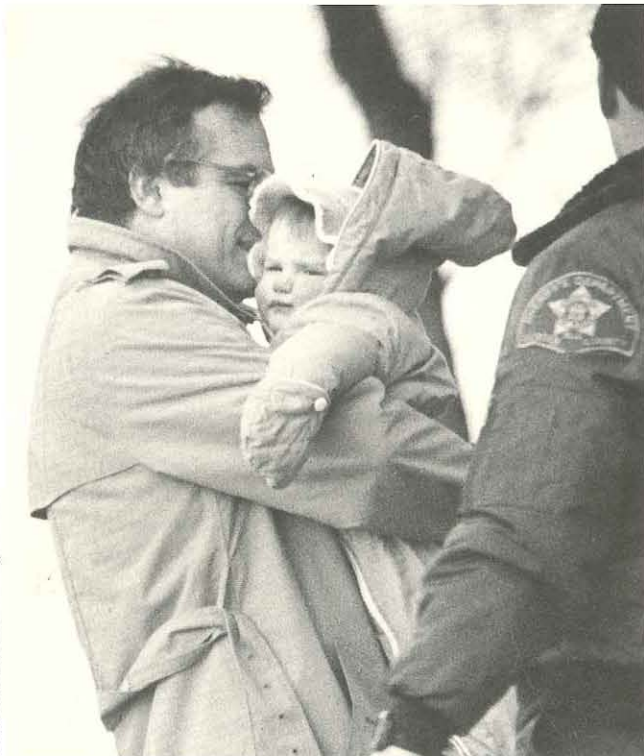


Mary Beth Whitehead

Pregnancy is work they can do either at home while caring for their other children or as the ultimate in moonlighting from another, likely low-paying, job. Some would argue that women should be as free to take on surrogacy "jobs" as any other employment; we no longer favor labor laws that, under the guise of protecting women from the rigors of the workplace, only limit their freedom to work. As Peter Schuck, professor of law at Yale Law School, argues, "A community that cherishes a woman's freedom and individuality should accord a high degree of respect to her choices, and should override them only when her decision is plainly uninformed or offends deeply and widely held social values."

Is the decision to become a contract mother fully informed and voluntary? While Schuck maintains that "the available data contradict the view that surrogates are members of an 'underclass,'" the paucity of the other options facing them undermines the claim that the choice of surrogacy is a fully voluntary one. And, voluntariness aside, we might nonetheless charge that the terms of the contracts are exploitative, that is, the receiving couple takes unfair advantage of the contract mother's willingness to serve or her straitened financial circumstances. The terms of Mary Beth Whitehead's contract with William Stern, for example, were appallingly disadvantageous to her. For her \$10,000 fee Whitehead was obliged to "assume all risks, including the risk of death, which are incidental to conception, pregnancy, childbirth, including but not limited to postpartum complications," with no compensation whatsoever in the event of a first-trimester miscarriage,

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William Stern and Baby M

and a mere \$1000 if she were forced to submit, on Mr. Stern's demand, to an abortion. Is such a contract fair to Mrs. Whitehead? Does a society like ours want to endorse it?

This poses a dilemma, however, for the better the terms of a surrogacy contract, the more its voluntariness is called into question: higher fees make surrogacy arrangements harder to resist for women who have few other means of livelihood. But Gibson points out, "If decent pay would constitute an undue inducement, it appears that the job of contract mother cannot be offered on morally acceptable terms: it will involve either direct economic exploitation or undue induce-

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The Interests of the Child

Arguments in favor of or against surrogacy on behalf of the child yet-to-be-conceived have an odd ring to them, for there is as yet no person who can be either benefited or harmed by the arrangements made. Arguments that it is good for an unborn child to be conceived, if taken seriously, would encourage a veritable population explosion in the purported interests of all those potential people clamoring to be born. Arguments that it is bad for an unborn child to be conceived, on the other hand, face the objection that unless the child's life is particularly miserable, life on any terms seems preferable to no life at all. We do better here to step back from inquiring whether surrogacy is in the interests of the actual children born in such arrangements and ask simply what special problems, if any, they face.

According to Schuck, far from facing special problems, such children are especially fortunate, to be so wanted that their parents would go to such lengths to bring them into the world. Field points out that children produced through "unusual arrangements" can grow up feeling secure and loved, as can adopted children. One pities Baby M not because she was born of a surrogacy contract, but because of the bitter battle waged for her custody. Thus Field cautions that "if we start generalizing what kind of families or situations it is detrimental to children to be born into, and make rules accordingly, we start down a long road fraught with peril for our civil liberties."

But if Baby M suffered from being a too-wanted child, a greater peril is posed to contract children who end up being unwanted, like Christopher Ray Stiver, conceived through a surrogacy arrangement between Judy Stiver and Alexander Malahoff. The baby was born with a smaller-than-normal head, usually indicative of mental retardation. Both parents renounced care of the baby; Mrs. Stiver agreed to accept him only when paternity tests revealed that her husband, and not the sperm donor, was the biological father of the child.

Of course, any child can be born with a handicap and face possible parental rejection. But Judith Areen, professor of community and family medicine at Georgetown University Law Center, argues that surrogacy increases the risk that less-than-perfect children will be abandoned at birth by both biological parents: "One parent in any surrogacy arrangement is supposed to view the child as a mere commodity, one that is to be transferred (abandoned) at birth. . . . If the child is physically or mentally handicapped, there is a real danger that both parents will view the child as a commodity, and thus abandon the infant emotionally and — if permitted by the law to do so — physically and financially. The surrogate mother will do so because that is what she is supposed to do; the father (and his spouse, if any) will do so because he is likely to feel that as a purchaser he has the right to reject 'damaged goods.' Treating children as commodities, as surrogacy does, thus poses significant risks to the children conceived." At least in the exceptional case, surrogacy can prove tragic for the children it creates.

The Interests of Society

While surrogacy has the potential to provide benefits to infertile couples and perhaps to contracting mothers, it is not clear that it promises any benefits to the rest of us. As Field points out, "we in this country, now at

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least, are not suffering from inadequate population; as a society we do not need more babies. There are no affirmative reasons for the state to promote surrogacy arrangements other than to fulfill the wishes of individuals who wish to use them." Does surrogacy, then, pose any dangers to society, or threaten, in Schuck's words, "any deeply and widely held social values?" It seems that it may.

One danger concerns surrogacy's possible impact on the prevalence of adoption. Some of its proponents may have done their cause a disservice by predicting that in time surrogacy will come to replace adoption,

Drawing by John Lawrence, from *The Blue Fairy Book* (Viking Press, © 1975)

Rumplestilzkin demands that the miller's daughter honor her contract

for it does not seem that the interests of society would be well served if surrogacy contributed to the neglect of existing children. But it is doubtful that its impact on adoption would be significant. How many of those to whom surrogacy is attractive would choose to adopt a baby with special needs if surrogacy were unavailable? One suspects only a few. Moreover, Field argues, "although it benefits society more for [infertile couples] to adopt an existing child than to conceive a new one, the same is true for fertile couples, who nonetheless are permitted to reproduce without any restriction by the state."

A greater danger is that surrogacy commercializes what we may feel should not be commercialized. We may cleave to the conviction that, as Field puts it, "there are some types of things that our society does not want to see measured in terms of money. Society may want to do what it can to help people keep these in a personal sphere that is distinct from the commercial; indeed it may even compel them to do so, to the extent that it can." She cites laws against prostitution and the sale of human organs — as well, of course, as laws against baby selling — as examples of our societal refusal to establish markets in certain intimate areas of life. But Schuck reminds us that we permit commercial markets in sperm and egg donation, and in child care services, although these, too, involve deeply private spheres. Our attitudes about the commercialization of child-bearing will depend in part on which group of analogies seems to us more apt.

Policy Conclusions

Surrogate motherhood is unlikely to disappear as long as there are couples who want babies and women willing to produce them for a fee. But the laws and regulations we establish may go some way toward encouraging or discouraging its spread. While Schuck, a staunch supporter of surrogacy, calls for legal measures to facilitate surrogacy arrangements, on balance it seems that there is no compelling reason for society to encourage surrogacy and considerable reason to discourage it. Gibson thus recommends that "commercial contract motherhood should be expressly prohibited. Commercial brokering should be a criminal offense. Paid private contracts should be void and unenforceable." Areen, too, would deny recognition to surrogacy contracts on the grounds that their legal recognition would in essence give a societal seal of approval to the practice.

For Wachbroit, the fundamental question to ask in setting policy here is whether and to what extent "underground" or black market surrogacy is worse than legalized surrogacy. Reasoning along these lines, Field would make surrogacy contracts legal (but unenforceable over the objection of the mother), because "it is possible that criminalizing surrogacy and thereby driving it underground would do more harm than good." This would open the way for regulation on such issues as compensation, access to surrogacy, and screening of potential surrogates. Wachbroit, however, doubts that the dangers in illegal surrogacy are great enough to outweigh the affront to human dignity posed by its legalization.

Surrogacy may be here to stay, but Gibson stresses that we should work both to address controllable causes of infertility (such as venereal disease, environmental and workplace toxins, and economic pressures to postpone childbearing) and to make surrogacy increasingly less attractive as a response to infertility. She argues, "Many of the features of our society that make contract motherhood, as a response to infertility, so very attractive to many people are the same features that make it so morally and politically troubling." If working class women had brighter employment options, if pervasive racism did not erect a bar to interracial adoptions, if we had a richer notion of what it is to be a family, surrogacy would hardly be as attractive as it is today. This is the moral paradox of surrogacy: "If there were a society in which contract motherhood would not be morally objectionable," Gibson concludes, it would also be a society in which "the practice would probably not exist."

The sources quoted in this article are: Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Cambridge, Mass.: Harvard University Press, 1988); Mary Gibson, "The Moral and Legal Status of 'Surrogate' Motherhood," invited address at the winter meeting of the American Philosophical Association, December 1988; Robert Wachbroit, interview; Peter H. Schuck, "Some Reflections on the Baby M Case"; and Judith Areen, "Baby M Reconsidered," *The Georgetown Law Journal*, vol. 76, no. 5 (June 1988).