

Ethical controversies in maternal surrogacy

Abstract

Surrogacy, nowadays considered a form of assisted reproductive technology (ART), has historical roots that can be traced to ancient times. Although surrogacy is still the exception rather than the rule when it comes to ARTs, its rising popularity has attracted the curiosity and concerns of the media and society, who were unfamiliar with it beforehand. The advent of the first baby born after in vitro fertilization conception in 1978 offered many opportunities for infertile couples wanting a child of their own, one of which was the possibility of resorting to a gestational or traditional surrogate mother, instead of relying solely on adoption. The purpose of this article is to analyze the morality of surrogate motherhood through three apparently contrasting ethical theories: kantian deontology, utilitarianism, the rawlsian theory of justice. We will try to apply these concepts to three famous surrogacy cases and analyze their strong and weak points.

Keywords: surrogacy; ethics; morality; assisted reproductive technologies

Introduction

Surrogacy, nowadays considered a form of assisted reproductive technology (ART), has historical roots that can be traced to ancient times. One of the earliest registered records of surrogacy, dating back to around 1910 BC, is the biblical story of Abraham and Sarai and their maidservant, Hagar. Unable to have a child of her own, Sarai urges her husband, Abraham, to conceive one with Hagar, in what is considered a case of traditional surrogacy⁽¹⁾. In another biblical example and in what are considered the second and third recorded cases of traditional surrogacy, Rachel, unable to bear her husband Jacob children, arranges for him to conceive two boys with her maid, Bilhah⁽¹⁾. One of the earliest discovered law codes, dating back to around 1860 BC, the Lipit-Ishtar Code of Mesopotamia regulated the practice of surrogacy by allowing the man whose wife was infertile to use the services of a "harlot" for child bearing. In return, the harlot received "grain, oil and clothing", acknowledging and paving the way for commercial surrogacy⁽²⁾. The Babylonian Code of Hammurabi, thought to postdate the Lipit-Ishtar Code by about a century (1772 BC), controlled surrogacy by forcing the surrogate mother to relinquish all parental rights after giving birth⁽³⁾. In Ancient Egypt, surrogacy was quite common, and pharaohs frequently resorted to their concubines for conception. Although their rights were more restricted compared to those of royal heirs, children of surrogates could still ascend to the throne when no other "nobler and more legitimate" children pretended to it⁽⁴⁾. Surrogacy was also common in ancient Greece and Rome. Plutarch recounts the story of King of Galatia Deiotarus and his infertile wife Stratonice who personally chose a prisoner named Electra to bear her husband's children, which she then raised as her own⁽⁵⁾.

New developments in the last forty years in assisted reproductive technologies have sparked heated debates in which heterogeneous groups of biomedical researchers, physicians, judges, policymakers, ethicists and religious workers have re-analysed the concepts of kinship and family bonds and

relationships. Perception and usage of ARTs are complex and conditioned culturally and locally, making discussions even more confrontational⁽⁶⁾. Although surrogacy is still the exception rather than the rule when it comes to ARTs, its rising popularity has attracted the curiosity and concerns of the media and society, who were unfamiliar with it beforehand. The advent of the first baby born after in vitro fertilization conception in 1978 offered many opportunities for infertile couples wanting a child of their own, one of which was the possibility of resorting to a gestational or traditional surrogate mother, instead of relying solely on adoption. Throughout history and in modern times, surrogacy intermingled strongly with adoption. Adoption has been in almost every case the next step taken after surrogacy, with the surrogate mother relinquishing her maternal rights in favor of the social or, with the advent of gestational surrogacy, the genetic and social mother. Like adoption, surrogacy overlaps with issues such as children's rights and socio-economic class and inequalities. Unlike adoption, surrogacy deals with more provocative ethical and legal issues, such as propriety boundaries, purchasing and selling of oocytes, renting of reproductive functions and organs, reproductive tourism and the act of donation. Unlike adoption, surrogacy is not regulated in many countries of the world, and as such is either expressly forbidden or open to legal loopholes and debates. The purpose of this article is to analyze the morality of surrogate motherhood through contrasting ethical theories: kantian deontology, utilitarianism, the rawlsian theory of justice. We will try to apply these concepts to three famous surrogacy cases and analyze their strong and weak points.

Famous cases of surrogacy

Case 1. Baby M

One of the relevant surrogate mother cases is that of the Baby M. Mrs. Whitehead, married and with a son and daughter, was contracted by William Stern and his wife to carry a child for them. Artificial insemination

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was employed for conception, using Mr Stern's sperm and Mrs Whitehead's oocytes, making her a traditional, as opposed to gestational, surrogate. The baby girl was born on the 27th of March 1986⁽⁷⁾.

The contract stated that Mrs. Whitehead would receive \$10,000 after giving birth and that she wasn't allowed to have an abortion. After giving birth she insisted on keeping the baby. The baby's father and his wife sued Mrs Whitehead, and after a two-month long trial the judge established that the surrogate couldn't keep the child. The part of the contract that stated that she had to give up her parental rights was enforceable, while the part of the contract that stated that she couldn't have an abortion was not. The judge decreed that she could decide what to do with her body, but not with her daughter once she was born⁽⁸⁾.

After birth, the natural mother came to the legal parent's home asking to stay with the baby for a few more days, but after a few weeks she left the state with her. At that point, the parents got a court order giving them temporary custody. With the help of a private investigator, the parents located and retrieved the baby from the birth mother. The verdict of the second trial granted the parents legal custody and the genetic mother visitation and custody rights until the child turned 18 years-old. The Supreme Court's decision settled that surrogate mother contractual agreements are illegal in the state of New Jersey⁽⁸⁾.

Case 2. Sherry Shepherd

Following the Baby M case, most couples used either a donor's or the wife's oocytes for inseminating the surrogate mother, in order to decrease the risk of her wanting to keep the baby.

In 2014, actress Sherry Shepherd and her husband, Lamar Sally, resorted to a gestational surrogate mother for conception, using the husband's sperm and a donor's oocyte. During the surrogate's pregnancy they divorced and afterwards Shepherd claimed being tricked into signing the surrogacy contract and refused to be the child's legal mother. After the child was born, the surrogate mother's name was registered on the birth certificate, but the judge decided that the actress is the legal mother and will have to pay child support. She was awarded visitation rights and could seek custody if she wanted to. The judge pointed out Shepherd's intention behind signing the contract as justification for his decision, as not writing and signing the contract would not have resulted in the birth of the baby⁽⁹⁾.

Case 3. Baby Manji

Surrogacy has become even more problematic in recent years with the start/spread of cross-border surrogacy. One such example is the case of baby Manji, where the child essentially became an orphan due to the Indian legal system.

Japanese nationals Ikufumi and Yuki Yamada were unable to conceive, therefore they opted for surrogacy⁽¹⁰⁾. They obtained an oocyte from a Japanese anonymous donor and then went to India to find a gestational surrogate mother. In India the cost of surrogacy is approximately \$10,000 compared to \$70,000 in the US or \$35,000-\$45,000 in Russia⁽¹¹⁾. During the surrogate's pregnancy the future parents divorced and the ex-wife disowned the unborn baby, for not having any genetic ties to her. Mr Yamada wanted to keep

the baby, but wasn't allowed to due to India's legal system, which does not authorize adoption by the father. Even if baby Manji had three mothers, an anonymous biological mother, a surrogate mother, an abandoning social mother and a biological father, her legal status in India made her a parentless child to be sent at an orphanage. Any attempts to send the baby to Japan would have legally been considered child trafficking.

The grandmother was given temporary custody of the child and was issued a temporary passport by the Indian government valid only for Japan, with no mentioning of her nationality and mother's name. In Japan the baby was given a one-year visa pending the clarification of her legal status⁽¹²⁾.

Discussion

In a recent article we discussed the legal intricacies of surrogacy in Romania, in the absence of a clear legislation⁽¹³⁾. In this article we will try to analyze the morality of maternal surrogacy through various ethical theories.

The first element to analysed when discussing ethical issues of surrogate motherhood is whether the right to have children is universal⁽¹⁴⁾. In order to answer this question, we need to see whether this right is positive or negative. A negative right is defined as a right for which nobody should act (or have a legal obligation to act) in order for it to be assured. For example, the right to live is negative, as nobody has an obligation to do something in order for a certain person to be allowed to live. For other rights to be respected however, somebody has an obligation to act. For example, the right to free education incurs an obligation from the state to assure the means for it. According to the European Convention on Human Rights, "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"⁽¹⁵⁾. Therefore, the respect for family life is a negative right, for which the state is not mandated to specifically intervene in order for it to be respected. However, in the Romanian Civil Code it is stated that "The state is obliged to support, through economic and social measures, the marriage and also the development and consolidation of the family" (Art 258(3))⁽¹⁶⁾. Therefore it seems that the state is obliged to assure the means for the development of the family, which includes having children. Even if these two articles seem contradictory in relation with the type of right, they aren't - the European Charter is saying that the respect for family is negative (and no one should interfere with the right to have a family), whilst the consolidation of the family should be supported by the state (i.e. therefore it is a positive right). The right to have children is derived primarily from the consolidation of the family, and therefore it seems to be a positive right. Being a positive right we need to see how much should the state be involved in it, or more exactly what is the limit of the state's intervention in the family right to

have children. There are some interventions that most agree should be performed, like financially supporting the couple to have children, supporting the mother and the child by giving them free access to healthcare, and so on. However, for couples who do not have the biological possibility to bear children things get significantly more complicated. Many states have specific regulations stating which assisted reproductive procedures are allowed and which are not. For example, in Romania only medically assisted reproduction with a third donor is explicitly legally permissible⁽¹⁶⁾. Other countries allow a higher number of procedures including surrogacy, posthumous reproduction, and so on^(17,18).

The second action we need to perform before analyzing the morality of surrogate motherhood is to deconstruct the issue into its main components. For the purpose of this article we will consider surrogate motherhood to have the following elements: persons involved, actions, and effects. In surrogacy we usually have at least four persons involved: the receiving couple, who will become the legal parents of the newborn, the newborn, and the surrogate mother. Additionally, we could also have an oocyte donor, a sperm donor, or even an additional legal guardian (see the Menji case). The actions involved are: the contractual relationship between the receiving couple and the surrogate mother, the renting of the uterus, the transfer of the baby and optionally the obtaining of the gamete. The effects are: the surrogate motherhood contract, the birth of the baby, the legal custodianship of the baby⁽¹⁹⁾.

Utilitarian morality states that an act is moral if it generates the maximum amount of happiness for a maximum amount of people⁽¹⁹⁾. Therefore, in order to assess the morality of an action we should analyze the effects; if an act generates more pleasure than pain, it should be considered moral. The surrogate motherhood contract allows the receiving couple to have a baby, which could be easily considered as a positive effect. However, the same action leads to the removal of a baby from its natural mother, which is often extremely difficult to handle (see the Baby M case), especially if the surrogate mother is also the donor of the oocyte. In order to minimize this burden most ethicists agree that it is better for the surrogate mother not to donate the oocyte, an action which could in theory decrease the bond between mother and child. Another method to decrease the postpartum stress generated by the severance of the mother-child bond is the requirement for the surrogate to already be a mother. And a third method is to include in the felicific calculus a potential remuneration. In some countries this is legal, however it might have a negative social effect as it might be considered a form to attribute a patrimonial value to the human body. The birth of a baby cannot normally be considered as anything else than a positive effect - a new life is born. The last main effect of surrogacy is the enlargement of a family, which will contain a new member, also a positive effect. Therefore, strictly from a utilitarian point of view the positive effects are significantly larger compared to the negative ones. Moreover, the negative effect can be easily minimized through additional measures, making the procedure ethically permissible⁽²⁰⁾.

One of the main disadvantages of the utilitarian theory of morality is that it often fails to take into account human rights. This was the main reason for which Immanuel Kant was highly critical on this approach of morality. In its “Groundwork for the Metaphysics of Morals”, Kant condemns Bentham’s utilitarianism arguing that morality isn’t about maximizing happiness but about respecting persons as ends in themselves⁽²⁰⁾. Kant argues that the ends of actions (i.e. wants, desires, pleasures) are variable and don’t allow a proper respect for the fundamental human rights. As Sandel argued, a Roman circus, in which Christians are thrown to the lions, might be considered as a moral thing to do according to the utilitarian ethics, as there is more pleasure derived from this act than pain generated for the ones thrown at the lions⁽²¹⁾. Kant argues that an action could be considered moral or not depending on the intention with which a certain act is performed⁽²¹⁾. The motive should be of a certain kind for an act to be moral. An act cannot be moral if it treats a moral agent as a means toward reaching a certain end, but only if it treats the moral agent as an end in itself. Moreover, in order for an action to be moral, it has to be considered as moral by every moral agent (i.e. the universality principle). Lying for example is immoral irrespective of the reason for it because the act of lying is immoral in itself⁽²²⁾. According to this theory of morality surrogacy apparently cannot be moral because it instrumentalizes the surrogate mother, which becomes only a means toward reaching the end of other persons (i.e. the receiving couple). However, what if the motive of the act is purely altruistic? - the surrogate mother wants to help a couple to have a child. Should her act of “renting the womb” be considered as a form of instrumentalization of a human body? Why should this be dissimilar with, for example, giving a kidney for transplantation? We could look to the end result of these two actions and consider that it is more important to save another life (i.e. with kidney transplantation), than to ensure a couple the right to a child through surrogacy. But this would mean to look to the effects and subsequently enter in the realm of utilitarianism. Another way to differentiate these two actions is to apply the universality principle from the Kantian philosophy. For this we should hypothesize that surrogacy is moral. In this case every woman could consider renting her womb as being a moral action. Therefore, every couple having the need for a surrogate should not find any difficulties in finding one. But this would also mean that not only sterile couples would be able to seek out surrogates, but any other couple who would like to have a child and not bear the stresses associated with it. Moreover, the universalization of this act might mean that every surrogate mother should consider the procedure as normal, without any significant adverse effects (i.e. moral, psychological, medical, social, and so on)⁽²³⁾. The end effect of these actions might be a complete dissolution of the family as we know it, with the externalization of maybe one of the most important parts of the creation of a family, childbearing; it is obvious that such actions are not moral per se, and therefore the initial action (renting the womb) cannot be considered moral, even if it is done for altruistic reasons. This is very clear

when we analyze the three cases presented in this article. A purely altruistic reason for bearing a baby for a receiving couple cannot be practical - the empathy that develops within the bearing mother and the unborn child almost always leaves the surrogate with regrets and difficulties of letting go. A commercial surrogacy contract leads to a “*de facto*” instrumentalization of the human body, which cannot be accepted within this ethical theory. Therefore, according to this principle, surrogacy cannot be considered a moral activity.

We saw that maybe the two most important theories of morality applied to medicine give contradictory results. In order to provide a solution we propose another way of looking to this problem - through Rawls’ theory of justice⁽²³⁾. According to Rawls, the basic principles of justice should be obtained through an approach coined original position, in which they should be developed under a veil of ignorance or, as Rawls said: “no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance”⁽²³⁾. If nobody knows anything about oneself, the just or moral actions are developed by taking into account two main principles. The first one states that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”⁽²³⁾; therefore there must be a set of general, basic liberties, that are available to everyone. The second principle states that social and economic inequalities should be dealt in a manner as “they are to be of the greatest benefit to the least advantaged members of society, consistent with the just savings principle”; therefore, people that are less advantaged at the lottery of life should receive more benefits compared to those that are more advantaged. A person who is unable to have children should therefore receive an additional advantage compared to a person who

is able to do so (she/he was disadvantaged at the lottery of life). Therefore, the society should allow ART in general, as they tend to correct a natural wrongdoing (the biological impossibility of a mother, or couple, to have children naturally). If there is no other way in which a person can have children, except for surrogacy, then surrogacy should be allowed, based on this principle. However, if other means of assisted reproduction are available for that couple, or if that couple can have children on their own, the procedure should not be allowed, because it would give an additional, undeserving advantage to that couple, at the expense of the surrogate, who is often from a lower socioeconomic class, and who often only accepts this procedure for a certain type of material reward. In cases in which the receiving couple does not want anymore the baby, as in the Shepherd case, the contract should be enforced as an additional protective measure for the surrogate mother, who was clearly disadvantaged by the couple’s decision of not adopting the baby. Menji’s case shows us that, even if noble intentions exist, they are often not enough as circumventing limiting laws is often extremely difficult to do.

Conclusions

In conclusion the morality of surrogacy is debatable. It could be considered moral depending on the type of morality theory one applies to the issue. Therefore, its acceptability should be clearly regulated, taking into account both the rights and needs of the surrogate but also the right to have children of the receiving couple. ■

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