Report from America

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Surrogate mothers: private right or public wrong?

The success of *in vitro* fertilisation has given hope to many childless couples, but it has not eliminated all problems of infertility. In the US, it is reported that many couples unable or unwilling to adopt are employing surrogate mothers to have children. That the practice is becoming more common is problematic because there are numerous unresolved legal and moral questions.

It is not clear whether contracts to bear children are legally permissible. They may, in fact, violate criminal statutes that prohibit 'baby-selling'. But even if they are permissible, they may not be binding. The surrogate may legally change her mind and decide, for example, to abort the pregnancy or to keep the child herself. It is also unclear whether the woman's right to privacy in matters of procreation – recognised by the US Supreme Court in its decisions on abortion – essentially legalises the practice of surrogate mothering and significantly restricts any claims of the sperm-providing father. Beyond these legal problems, moral questions loom. Does the practice of surrogate motherhood violate fundamental principles of morality? Or does the practice promote certain moral values such as personal autonomy, or greatly increase the happiness of specific persons at little or no cost to others?

These questions were discussed at the May, 1981, UCLA Medicine and Society Forum. In two American states, surrogate motherhood has been declared to be illegal baby-selling, and a recent case in Los Angeles was expected to provide additional legal interpretation. This case involved a surrogate mother who had agreed originally to be a surrogate for no fee other than the expenses of insemination and the pregnancy. Later, after learning of fees paid to other surrogate mothers, she asked for more money. When the prospective adoptive parents balked at additional payment, the surrogate mother refused to relinquish custody to the prospective parents. At the time of the child's birth, the prospective father/sperm donor sued the surrogate mother for custody. Immediately before the trial, however, the prospective parents withdrew the suit when it became known that the prospective adoptive mother had undergone transsexual surgery several years earlier. Thus, the legal issues were not further clarified. This somewhat bizarre case is intriguing

in terms of the questions it raises about eligibility standards for being an adoptive parent and the state's role in regulating non-traditional adoptions. But it is also interesting in that it reminds us of other potential problems of family relationships, including personal identity problems for the child and privacy rights of the surrogate mother: problems analogous to but different from the problems associated with customary adoptions.

The moral questions raised by surrogate motherhood are subtle and the answers to them are uncertain. The paucity of empirical data germane to the psychological issues and the lack of consensus on the moral questions reinforces the conclusion that social experimentation with surrogate motherhood should proceed slowly. The practice has a potential for economic exploitation, moral confusion and psychological harm to the surrogate mothers, the prospective adoptive parents and the children. It does not *necessarily* lead to such problems, but the serious risks of abuse are sufficient to suggest moving forward only with caution. Further research may provide information about the motives of the key participants and the results of the practice. Further reflection may clarify moral confusion and create rational moral consensus. But until more evidence has been collected and the moral arguments analysed, the verdict on the practice of surrogate motherhood should be delayed.

The law should, therefore, play neither a reactionary nor a revolutionary role. This means that the practice should be legally permitted but cautiously regulated, and morally tolerated but carefully scrutinised. The psychological ramifications must be studied in the most rigorous scientific manner possible.

Legal issues

A judge in Michigan and the Attorney General of Kentucky have ruled that surrogate motherhood constitutes illegal baby-selling, thereby violating criminal statutes. Baby-selling statutes were intended to protect poor women from being coerced into selling their children and to prevent economic exploitation of such babies as well as of adoptive parents. It has been frequently argued that surrogate motherhood does not occur among socially or economically disadvantaged groups. However, a recent report of a survey of surrogate

mothers claims that over 40 per cent of surrogate mothers were unemployed or on welfare (1). Even so, the selling of babies already conceived or born is very different from entering into an agreement to have a baby *for the purpose* of giving it up for adoption. Although an economic incentive might influence a woman's decision to become a surrogate mother, she would not be as susceptible to economic coercion as she would be under the prospective stress of the responsibility of rearing a child. One can view the payment of expenses and a fee of \$5,000–10,000 to a woman for the inconvenience and risks of insemination, pregnancy and childbirth to be, at best, modest compensation. This is compatible with the reports that economic motives are usually not the primary motive for women who volunteer to be surrogates. One wonders, however, whether fair compensation for being a surrogate mother should be determined simply by market forces.

Even if one agrees that criminal prohibition of surrogate motherhood is inappropriate, further questions arise about whether contracts to bear a child should be legally permissible. It could be argued that such contracts should be declared to be contrary to public policy and legally invalid. However, such a strong legal position need not be taken because legal contracts to bear a child, even if legally permissible are difficult, if not impossible, to enforce. Just as a parent could not be required to carry out an agreement to put up a child for adoption, so also surrogate mothers could revoke their contracts until such time as the adoption process is completed. The decision to give up legal rights to custody of the child rests upon the mother's informed consent as well as her psychological willingness to honour the contract after the child is born. Moreover, in the light of the constitutional privacy rights of the mother, the sperm donor, even though he may desire to be the legal father of the child, may have no greater claim to custody (or obligation of support) than an anonymous sperm donor. In the interests of the unborn child, it may be desirable to reconsider whether the rights of the sperm donor in the surrogate mother situation should turn, at least in part, on his desires and intentions. At this time, the rights of the surrogate mother are clearly strongly favoured by American law. Therefore, contracts to bear a child place most of the risks on the prospective adoptive parents. Yet it is difficult to imagine that surrogate mothers would enter into such contracts merely to become pregnant, when there are much less complicated means of achieving the same goal. Such contracts should be permitted even if courts are not likely to require specific performances.

Moral issues

One way to consider the morality of surrogate motherhood is to assess the benefits and harms that results. The potential beneficiaries are the surrogate mother, the prospective adoptive parents and the child born to the surrogate mother. The surrogate mother benefits economically if a fee is received. If no fee is sought, the surrogate benefits from the satisfaction of performing a supererogatory act. For some women pregnancy and childbirth is not only a positive experience but is also a truly creative act. Presumably those women who volunteer to be surrogate mothers are among those who feel this way about pregnancy and childbirth. The prospective adoptive parents benefit because they truly want a child, are able to establish a partial genetic tie, have some choice in selecting the mother and can avoid the long waiting period necessary for state administered adoptions. The economic burden to the prospective parents, though real, is for many persons outweighed by the benefits. Of course, if complications in the pregnancy or in the consummation of the contract develops, the burdens might be thought to outweigh the benefits.

Beyond these ordinary complications the practice of surrogate motherhood raises profound questions about alternative family structures for future generations. For example, single men who do not want to risk losing custody or who simply want children might contract with a surrogate mother. A woman who wants a child but does not want a pregnancy might even seek to have an ovum fertilised by her husband transplanted into the uterus of a surrogate for the course of pregnancy and child birth. These possibilities are technologically feasible but are they morally desirable?

Surrogate motherhood is medically an uncomplicated and low-risk procedure. But it has both broad and deep moral and legal implications, few of which have been carefully analysed. Because the practice is a response to a genuine need and legitimate desire of childless couples it should be treated with respect. However, entrepreneurial zeal as well as unregulated and unresearched practices in such a sensitive area are potentially dangerous not only to specific persons but also to the fabric of society. Therefore, it is essential that critical reflection precede both legal reform and moral revision.

Reference

- (1) Timnick L. Surrogates: money, atonement researches into the motives of mothers for hire. *Los Angeles Times* 1981 June 7.