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Book reviews

Review article: Warnock and surrogacy

A Question of Life: The Warnock Report on Human Fertilisation and Embryology

Mary Warnock, 110 pages, Oxford and New York, £4.95, Basil Blackwell, 1985

This book contains the Warnock Report together with a new introduction and conclusion by Mary Warnock. The Warnock Committee was set up to consider the moral, social and legal implications of new developments in medicine and science relating to human fertilisation and embryology and to make recommendations to Government. The first part of the report deals with treatments and remedies for infertility including artificial insemination by husband (AIH) and by donor (AID), *in vitro* fertilisation (IVF), embryo transfer, egg donation, embryo donation and surrogacy. The second part is concerned with aspects of the pursuit of knowledge including the issue of embryo research.

Faced with issues which generate strong moral feelings the committee's avowed aim is to argue for the positions it adopts giving due weight to the counter arguments where they exist. Disappointingly, the result is often little more than a catalogue of diverse arguments followed by the committee's own position. For the most part the arguments in the report draw on familiar concepts and principles but it would not be surprising if the new developments required radical shifts in our existing modes of thought. Indeed it might be surprising if they did not. Surrogacy seems to be a case where new thinking is needed.

The committee is vehemently opposed to surrogacy. It recommends the use of criminal law to suppress or strongly discourage it in all its forms – not just commercial surrogacy. From the report (8.17) the main concern would appear to be the possible exploitation of women, but in her new introduction Mary Warnock says that the committee disapproves of surrogacy 'largely because of possible consequences for the child'. On the other hand non-profit surrogacy for the relief of infertility is rejected on the ground that it would 'encourage the growth of surrogacy' – although two members dissented on this issue (*vide* Expression of Dissent: A).

Some of the committee's views on other remedies for infertility are relevant to surrogacy. It is argued that most of them should be accepted and brought within the scope of the law where safeguards might be imposed and protection given. AID, egg donation and embryo donation (the last two being made possible by the development of IVF and embryo transfer) are considered to be acceptable practices. These all generate questions as to who are the resulting child's true parents.

Under existing law a sperm donor is the father of the child. He could be made liable for its maintenance and could ask a court for custody or access. The AID mother's husband, who would commonly wish to be the child's father, cannot be recognised as its legal father. This seems unjust and the committee recommends changes in the law to allow the mother's husband to be the child's legal father and to remove all parental rights and duties from the sperm donor.

If a woman has a child by egg donation or embryo donation there is a question of whether she or the genetic mother is its true mother. The Warnock Committee adopts the rule – hereafter referred to as the 'Warnock rule' – that the woman who gives birth to the child is its true mother. And, as with AID, it is recommended that donors should lose all parental rights and duties with respect to the child.

It is natural to take the donation of gametes or an embryo to involve the surrender and transfer by the donor of all her rights and duties in respect of the resulting child. Clearly this is both the intention of donors and what the recipients of the donated materials expect to be the case. This is why we see injustice in the present law under which a sperm donor could be made liable for the maintenance of the child or could ask a court for custody or access to it. It would be similarly unjust if the law held that donors of eggs and embryos retained such rights and duties with respect to the child. So in these cases the Warnock recommendations would have the effect of codifying our intuitive understanding of what is involved in donation, although this is not made clear in the report.

The Warnock rule is questionable when it is applied to surrogacy. For the moment we can leave aside the familiar case where the surrogate has her own genetic child for the commissioning parents – I shall call that 'genetic' surrogacy. The most difficult case for the Warnock rule is 'gestatory' surrogacy (my term) where the surrogate gestates an embryo for the commissioning parents, the embryo being transferred to her uterus for gestation but not donated to her. Many people would think that this kind of surrogacy might be acceptable on a non-profit basis as a relief for infertility. It need not be exploitative of the surrogate nor need it involve dangers for the child.

Because the embryo which is physically transferred to the gestatory surrogate for gestation is not donated to her,

the commissioning parents cannot be considered to have voluntarily surrendered their rights and duties with respect to the child. Indeed it would be their wish and intention to retain their parental status, as they wish to raise the child as their own. Consequently, an independent argument would be needed to show that they lose their parental rights and duties and that the gestatory surrogate who gives birth to the child acquires them, if that is the case. In the absence of such an argument the commissioning parents must be assumed to have a natural claim to the child. However, the committee recommends an *ad hoc* application of the Warnock rule – 'for the avoidance of doubt'.

It seems that two unacknowledged but fundamental principles are involved here:

(1) that genetic parents are the initial holders of parental rights and duties as the producers of gametes, and
(2) that these rights and duties can be surrendered and transferred by the donation of gametes or embryos.

These principles support the earlier recommendations concerning donations but not the application of the Warnock rule to gestatory surrogacy. We shall see that they have far-reaching consequences.

The Warnock Committee says that all surrogacy agreements should be made illegal. However, no serious consideration is given to the real nature of surrogacy agreements.

The idea of a surrogacy agreement is clearest in what I term 'total' surrogacy, where a married couple have a child for another couple, supplying all the functions of reproduction for them. Whether total surrogacy is practised or not, it is of considerable theoretical interest. If the commissioning parents have any claim to the child it must be because of the agreement, as nothing else is relevant in total surrogacy. It is plain that the essence of the agreement is that the child will be handed over to the commissioning parents for them to raise as their own. But they could not hope to become its legal parents under existing law except by adoption. This raises a problem because privately arranged adoptions are illegal. Adoptions are possible only by a court adoption order and no court would be likely to allow a surrogacy agreement to preempt the question of whether an adoption order should be made. For one thing, the court is bound by the principle that the child's interests are paramount.

Built into the law is the principle that children are not transferable by individual parents. This principle is also rooted in much of our moral thinking and it underlies many objections to surrogacy arrangements. Given the principle, it seems to follow directly that both total surrogacy and genetic surrogacy are unacceptable. However, gestatory surrogacy would not fall foul of it if the commissioning parents in gestatory surrogacy were recognised as the true parents of the child, as I have argued they should be. There would then be no question of the child having to be transferred to them.

Genetic and total surrogacy seem to violate the principle that children are not transferable only because it is assumed that in those cases the child belongs to the woman who gives birth to it, or to her and her husband. But we know that the Warnock rule does not always hold. We also know that the donation of eggs and embryos results in a transference of parental rights and duties.

Our picture of genetic and total surrogacy would change dramatically if the surrogates could be considered to have donated their gametes, or embryos, to the commissioning parents. The effect would be a transference of the surrogates' parental rights and duties so that the embryos and resulting children would belong to the commissioning parents from the outset, much as is the case in gestatory surrogacy. There would then be no question of the child having to be transferred at birth except in a purely physical sense.

The main difficulty here is that in genetic and total surrogacy neither the egg nor the embryo are removed from the surrogate's body, so if they can be said to have been donated it must be while they were still in her body. I shall call this *in utero* donation, using the term *'in utero'* in a wider sense than it has in current medical use.

At first sight the idea of *in utero* donation might seem absurd but it is not logically incoherent. There could be a question of whether donation *in utero* is possible in our society. Comparison with the idea of 'child donation' might help here. This notion is not incoherent but it is plain that nothing would count as child donation in our society because nothing is allowed to do so. It would be ruled out by the more general principle that children are not transferable. However, the principle that gametes and embryos are transferable by donation has already been accepted. So it is difficult to see what reason there could be for rejecting donation *in utero*.

Acceptance of donation *in utero* would change the concept of surrogacy. Instead of a surrogate mother being understood, as at present, to be a woman who has a child of her own for the express purpose of handing it over to the commissioning parents, which would certainly violate the principle that children are not transferable, it would be more correct to say that she donates her egg or embryo to the commissioning parents and provides the function of gestation for them. In total surrogacy the couple producing the child donate their gametes, or the embryo. In gestatory surrogacy, of course, the embryo already belongs to the commissioning parents so the question of donation does not arise. Under this new concept of surrogacy the child belongs to the commissioning parents during gestation in all cases and not to the woman who gestates and gives birth to it. Consequently there would be no question of adoption.

It will be necessary to draw a line between embryos that can be donated *in utero* and fetuses or children that cannot be donated. Otherwise, the principle that embryos can be transferred or donated and the principle that children are not transferable will come into conflict. However, it is unlikely that there will be an agreed way of making the necessary distinction in terms of the development of the embryo. Therefore, the most rational and reasonably practical place to draw the line is before conception.

A simple rule would be that embryos can be donated only by agreements entered into at a point clearly before conception. Therefore for practical purposes many surrogacies could be considered to involve donations of gametes rather than embryos. This simple rule fits with the general understanding that a surrogacy agreement is drawn up before the pregnancy is under way. It is not envisaged that women should be given pregnancy tests before embarking on surrogacy. A requirement that some specified period – a year, say – must have elapsed between the registration of the surrogacy agreement and the birth of the child as a condition of the commissioning parents being able to register the child as theirs would be a sufficient safeguard.

A clear distinction between surrogacy and adoption now emerges. It is partly that surrogacy does not involve the transference of a child as adoption clearly does. It is also that whereas the primary purpose of adoption is to provide for existing children who need

parents, the essential aim of surrogacy is to bring children into existence for parents who want them. In this way parenthood by surrogacy would be closer to normal parenthood than adoption can be, retaining to some degree the element of creative responsibility for the child coming into existence and the possibility of a genetic link, depending on the form of surrogacy, between the commissioning parents and the child. This would suggest that institutional support for a practice of surrogacy should be kept apart from arrangements for adoption and fostering.

This analysis is not complete, but it is perhaps sufficient to show that surrogacy deserves closer attention than the Warnock Committee has given it before measures are taken to suppress all forms of it, particularly non-profit surrogacy. (A fuller discussion appears in my Donation, surrogacy and adoption. *Journal of applied philosophy* 1985; 2/2.)

The two new chapters in *A Question of Life* are concerned with philosophers' questions – the introduction with questions about the nature of morality, the conclusion with questions about the standing of committees of inquiry such as the Warnock Committee. All philosophers acknowledge that moral disagreements can seem irreconcilable in the sense that no solution that will satisfy everyone can be found and that people are sometimes inclined to say 'I simply feel that it is wrong'. Mary Warnock dignifies such disagreements by calling them conflicts of 'fundamental values', thus stopping the demand for rational justification.

Whatever the philosophical merits of this theory – and it cannot claim general agreement among philosophers – it is dangerous, particularly when imposed on a committee of inquiry. There is no clear test to tell us when fundamental values have been reached, and people with strong convictions or entrenched positions may be encouraged by the theory to abandon the rational process too soon. That might have happened in the Warnock Committee.

Warnock makes much of the fact that in morality there are no finally 'correct' judgements. This fits with, and she might even think it implies, her particular theory of 'fundamental values'. She certainly seems to think it means that committees of inquiry may sometimes have to leave it to Parliament to decide between conflicting values. And, of course, they may. But how on her theory is Parliament to decide? Do we have any protection there against the 'fundamental values' of dogmatists and absolutists?

Such a theory can seem all right at the level of individuals. We can agree to differ so long as other people's values do not impinge on us. But in matters of government and legislation there must be a clear commitment to rationality, that is, a commitment to the idea of rational justification of policy and legislation. This Mary Warnock herself appeared to recognise when she inveighed against the moral absolutism of Enoch Powell in an article in *The Times*.

References

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EDGAR PAGE
Lecturer in Philosophy, University of Hull

Child Sexual Abuse Within the Family

Editor, Ruth Porter, 156 pages, London, £6.35, Tavistock Publications, 1984

This book was written by a multidisciplinary study group including a policeman and a barrister who met on 17 occasions between September 1981 and March 1984 at the Ciba Foundation. The aim was to provide guidance for different professional groups when confronted with cases of child abuse in the family. It is only in the last few years that the extent of this problem has begun to be recognised and in this country help for victims, assailants and their families is still patchy and ill-co-ordinated.

The group looked at the way these cases were presented to the different professionals and guidelines are suggested for dealing with them, emphasising the need for careful planning and co-ordination of efforts. They consider a multidisciplinary approach vital. The book ends with some illustrative case reports.

The group stress that the first need is for education of all the professions involved into the extent of child sexual abuse and the need to be alert to its possibility. When cases are recognised workers should have access to therapy teams who can cope with the children, the assailant and all members of the family and they emphasise the need for better liaison between workers so that no one person is coping with one bit of the problem in ignorance of the whole situation.

The idea of joint responsibility can cause problems to many professionals – most of us become over-possessive of our patients, particularly perhaps the medical profession, and most controversial of all is involvement of the law. We are trained to put the needs of the patient before all else, but unfortunately the best interests of the child may not always be served by involving the law, since questioning and examination in a police station and appearance in court can be more harmful than the offences themselves. This often drives general practitioners, for example, to keep quiet about their suspicions, but unfortunately if the father is the assailant and the mother refuses to accept the child's story, as often happens, the only way to get a child to a place of safety may be to involve the law. The police, on their part, are trained to concentrate on convicting offenders and have in the past ignored the plight of victims, but ways must be found to make court appearances less traumatic for the latter.

To aid co-ordination the suggestion is made that child sexual abuse liaison officers should be appointed by the police in all areas to liaise with the child abuse co-ordinators already appointed by social services departments and in some areas this has already been done. They suggest more use be made of probation to prevent the disruptive effect of a prison sentence on the family, but they also emphasise that the first priority must be to get the child to a place of safety.

Finally, the suggestion is made that all children should be alerted to the dangers and told how to avoid allowing anyone, even members of the family, abusing them. They point out also that there are few crisis telephone lines or self-help groups where the children themselves can independently seek help.

The message from this study group is loud and clear. These are very serious problems and need the co-operation of us all; we must try to come to terms with the difficult ethical problems they pose so that the best possible help can be given to all members of the families involved.

This is a book to be read and discussed by all those working in this difficult field.

MAY DUDDLE
Consultant Psychiatrist, University Hospital of South Manchester