

Preface

This book emerged from a puzzle we have been trying to solve for some years. Although there is growing public support for surrogacy itself, there is deep division on whether surrogates should be paid for what they do. It seemed to us to be deeply unfair to the women who act as surrogates not to compensate them in some way for their arduous undertaking. However, we could also see that there are significant problems with commercial surrogacy. Payment appears repugnant because it turns surrogacy into a business transaction. The public appears to want surrogates to have the right motives, that is, altruistic caring and selflessness, and it treats payment as a sign that they are only ‘doing it for the money’ or that they are selling themselves.

There is a wide diversity of views about which forms of surrogacy are acceptable and which are not. This suggests confusion among policy makers and legislators as to how best to regulate a phenomenon that has grown faster than anyone was prepared for. It also shows that a few moral issues have become the defining ones that everyone tries to solve, such as whether a woman can freely consent to bearing and relinquishing a baby in advance (that is, prior to establishing a pregnancy), whether surrogate mothers may or should be paid, whether

surrogacy necessarily involves a form of objectification, and whether all or some forms of surrogacy are inherently exploitative and/or immoral. However, regardless of the regulatory framework adopted in response to these questions, moral problems persist and more are generated by each attempt to restrict surrogacy to one tightly controlled form over another.

The legal regime states adopt is partly responsible for the persistence of moral problems. The issue of legal parenthood, that is, who should be recognized as the legal parents of babies born through surrogacy, creates an ethical minefield. The decision over whether surrogacy agreements should be enforceable, or even permitted, has significant ethical ramifications. In jurisdictions where surrogacy is permitted, the issue of who should be allowed to access it has profound implications for basic human rights to freedom and equality. Many jurisdictions restrict surrogacy to heterosexual married couples who are infertile or have a medical condition that precludes pregnancy. The increasing popularity of transnational surrogacy gives rise to the question of whether children born through surrogacy abroad should have their birth and citizenship recognised by the intended parents' home state. Again, the answer states give directly impacts the baby's human rights

In some jurisdictions, including Switzerland, Finland, Iceland, France and Italy, it is illegal to enter a surrogacy agreement. The prohibition of surrogacy in these countries is typically motivated by the perceived risk of psychological or physical harm to surrogates and children born through surrogacy, as well as the view that it involves objectifying surrogates and children.

Commercial surrogacy is permitted in a small number of US States, including California, New Hampshire, and Illinois, as well as in Russia, Ukraine, and Thailand. In most of these places surrogacy agreements are enforceable. The justification typically given for this approach is that the intended parents and the surrogate have the freedom to enter a legal contract from which both parties benefit.

In many other countries, such as Canada, England, New Zealand, South Africa and Australia (except for Northern Territory), unpaid or 'altruistic' surrogacy is permitted while commercial surrogacy is prohibited. This reflects a widely held belief that while commercial surrogacy

involves objectifying or commodifying babies and exploiting vulnerable women, altruistic surrogacy is motivated purely by love or kindness and involves freely giving the 'gift of life'. In most jurisdictions that only allow altruistic surrogacy, the agreement to relinquish the child is not enforceable. The surrogate and her husband/partner, if she has one, are recognised as the legal parents. She promises to allow the intended parents to adopt the child, but remains free to change her mind. Thus, one difficulty with this form of surrogacy is that legal parentage remains uncertain.

A notable exception is South Africa, where altruistic surrogacy agreements are enforceable on condition that they have been validated by the High Court prior to fertilization. This means that the intended parents will be recognized as the legal parents from the outset. This approach has the advantage of ensuring certainty over legal parentage, but it raises serious concerns about fairness: while the surrogate is required to relinquish the baby to the intended parents (and hence is not freely giving a gift), they have no obligations towards her. They are not required to give anything in return, and indeed, are legally prohibited from doing so.

We think there is an alternative to the commercial and altruistic models of surrogacy, one that recognizes the caring motives women have while at the same time compensating them for their work. The professions offer the guide we need. They provide services that are fundamentally ethical in nature, but professionals are not expected to care without compensation. Surrogates provide a service, a form of care that is inherently ethical, and should, therefore, be compensated.

The professional model needs to pass two tests. It has to have a rigorous theoretical underpinning drawn from the relevant empirical literature so that it truly reflects the way people tend to behave, the mistakes they are prone to make and how they could be effectively safeguarded. Second, it has to be practical and able to translate into a coherent, workable regulatory framework. We believe that it does pass these tests, but we present it here for readers to decide for themselves.

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