

What is Wrong with Gestational Surrogacy?

Gestational surrogacy is the arrangement by which a couple arrange to fertilize the woman's egg with the man's sperm then have the fertilized ovum implanted and gestated in another woman's womb. In the U.S. the practice is regulated by state law, illegal in some states, legal in others, which means in practice legal, since the couple can arrange to do it in a state that permits it.

While it is legal *de jure* for an American couple to arrange for surrogacy abroad — favored destinations at present seem to be the Ukraine, the country of Georgia, and Columbia — it is made difficult *de facto* by administrative obstacles put in the way of bringing the resulting infant back to America. In most other countries it is illegal. The U.K. is a partial exception; gestational surrogacy is legal but only if it is altruistic, only if the host mother is not paid for undergoing the inconvenience and risk of bearing another woman's child.

The obvious question is why anyone would be against the arrangement. In many cases, it makes it possible for a couple to have their own child when they otherwise could not. Even in those cases where the biological mother could bear her own child, why should anyone else object if she can find another woman willing to do it for her on mutually acceptable terms?

There are a number of possible answers, although none that in my view justify the restrictions. One is that the decision to be a host mother is not freely made since it is compelled by poverty. This sort of argument is common in a variety of contexts, but I find it hard to make sense of it. Put in its simplest terms, the claim is that if the potential host mother does not accept the offer she will starve to death, hence accepting the offer is not really a free choice, hence she should not be permitted to make it. Which, if the starting point is correct, means that out of our generous concern for a poor woman we will compel her to starve to death.

It is possible to make the argument logically coherent by assuming that the reason poor people are poor is that rich people want them to be. If gestational surrogacy is legal, rich couples who are unable to produce their own child benefit by the existence of poor people they can hire as host mothers. The same argument can be used against any transaction between rich and poor that benefits both, where the transaction is made possible by one party's poverty. I find the assumption implausible, indeed paranoid, but some would disagree.

Both versions of the argument provide a possible explanation for countries such as the U.K. where gestational surrogacy is legal but payment for it is not. That is, of course, the legal status of sexual intercourse in many countries, including the U.S.: It is legal to do it, illegal to pay for it. It may also explain the rule in both Georgia and the Ukraine that surrogacy is legal for married heterosexual couples where the wife is unable to bear a child but not for ones where the wife merely wishes to transfer the burdens of pregnancy to someone else.¹

A second possible explanation to bans on gestational surrogacy, following a line of argument originated in the context of prostitution by professor Margaret Radin of Stanford Law School, is that by permitting a woman to rent out the use of her womb (body) we "commodify" motherhood (sex), cause people to think of it as something to be bought and sold, and so cheapen the human experience. Restated, the claim is that the transaction of buying sex or renting a womb is both an exchange and a statement. The exchange is one that, in Radin's view, should be permitted, since the woman owns her own body and so is entitled to decide how it is employed. But the statement,

¹ Neither country permits surrogacy by a same sex couple or a would-be single parent. Columbia, however, does.

because of its effect on other people's view of their lives, is one that ought not to be made, hence the transaction may, arguably should, be prohibited.

What is strange about this argument is that it was made by an American law professor. The American constitution, as routinely interpreted by judges and law professors, contains a very strong protection for freedom of speech, making it a violation of the constitution to prohibit an act, such as flag burning, which is also speech. Following out that principle, Radin's argument ought to imply that even if there were good reasons to prohibit surrogacy or prostitution, the fact that both are speech as well as acts ought to protect them. She, along with those who accept her argument, reaches precisely the opposite conclusion.

A somewhat better argument that might be made against surrogacy is that permitting a couple to produce a child when they otherwise could not means that they will have no need to adopt, hence prohibiting surrogacy benefits children in need of parents. The argument is logically defensible but morally dubious. Surely a legislator willing to forbid a couple from producing their own child in the only way they can in order that they will have to adopt someone else's ought at least to feel obligated to refrain from producing any children of his own until he has adopted at least one.

Finally there comes what I suspect is the real reason. Natural is good, and surrogacy (like IVF before it, and many other things as well) is unnatural. Our grandparents didn't do it, our pre-human ancestors didn't do it, so there must be something wrong with it, something wicked, sinful. Icky.

And worse still if done for money.

On the principle of full disclosure, I should mention that my granddaughter Iselle might not have come into existence were it not for surrogacy. A hard argument to rebut.

