

Ethical Problems of Gestational Surrogacy in India

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Cross border reproductive care, like medical tourism, is where potential parents travel from their home country to a country which will provide them with access to medical care, in this instance, gestational surrogacy. India has developed into a veritable Mecca for cross border reproductive care, particularly gestational surrogacy. This paper will limit its discussion of cross border reproductive care to gestational surrogacy addressing the complex ethical issues it presents. In the first part of the paper I will provide background information regarding gestational surrogacy in India. The information covered will provide the reader with context for the argument that follows. The second part of the paper will discuss whether there is a positive right to procreative assistance for the commissioning mother. In the third part of the paper I will discuss the ethical issues confronting the potential surrogate mother. Lastly, in the fourth part of the paper I will discuss the ethics of gestational surrogacy as they relate to the best interests of the child, and how the child's interests may serve as a limiting step in going forward with gestational surrogacy. I will discuss how the ethical principles associated with each participant in the gestational surrogacy relationship will conflict and a balancing test is needed to determine whether gestational surrogacy is ethically supportable.

Surrogacy occurs when a woman agrees to gestate a baby for another couple or individual. Gestational surrogacy occurs when a gestational carrier agrees to have an embryo implanted in her uterus conceived via in vitro fertilization, carries it to term, and delivers the baby. Gestational surrogacy can be altruistic or commercial. Where the commissioning party lacks ova, a third party may provide ova. The gestational carrier may not provide ova to prevent a claim to the child by the gestational carrier at the time of delivery.

Gestational surrogacy became popular in India due to advances in reproductive medicine, a large pool of impoverished women, and low cost compared to countries such as the United States, Canada, and Australia. Reproductive tourism in India alone is "valued at more than \$450 million a year" and was forecast by the Indian Council of Medical Research (ICMR) to be a \$ 6 billion a year market in 2008. According to KPMG's life sciences wing, the fertility industry in India is today worth Rs 750 crores. Surrogacy, which forms roughly seven per cent of that, stands at around Rs 54 crores. As estimated by the Confederation of Indian Industry (CII) India generates around \$2.3 billion a year from fertility tourism. CII also reveals that nearly 10,000 foreign couples visit India for reproductive services and nearly 30 per cent are either single or homosexual.^[i]

Reproductive medicine in general and surrogacy in particular raise the question whether there is a fundamental right to procreate. Procreative rights have been defined as the right to initiate a pregnancy and bring children into the world, as distinguished from reproductive rights which concern the timing and manner in which one reproduces.^[ii] The right to procreate involves a dual set of rights inquiries. These rights have been identified as negative (liberty) and positive (entitlement) rights claims.^[iii]

A negative right is a right of forbearance, such as the right to privacy which derives from the right to be let alone.^[iv] Negative rights include the right to bodily integrity, the right to not be touched in any manner without permission, and the right to choose one's own beliefs and have been extended to preclude government interference as long as the scope of the exercise of one's liberty does not infringe upon the liberty of others.

Positive rights have been defined as rights to assistance, resources and entitlement.^[v] Positive rights claims in gestational surrogacy are complicated because they implicate negative rights claims as a condition precedent. In order to exercise one's right to procreate people need to be free from interference described above in order to exercise their right to entitlement, in this discussion the right to travel to India to engage a gestational surrogate.

The right to procreate has been deemed a fundamental right within the conception of the negative right or liberty to choose to bring a child into the world free of interference. The exercise of a liberty right is distinct from exercising a perceived right to assistance or entitlement. It is one issue to be free from encumbrances to reproduce via coitus, and another to seek the need of the medical profession, and surrogate to bring a child into the world.

I argue procreative rights include the right to be left alone and maintain bodily integrity in choosing in a consensual manner to conceive a child but there is no fundamental right to seek out infertility treatment and gestational surrogacy. While there is a general right to receive assistance to in vitro fertilization there is no specific right held by anyone. This is consistent with the reasoning that the right of procreation is necessary for maintenance of the species, but does not apply to anyone specifically. In other words, the species will continue provided some but not all people reproduce.

It may be argued that achieving parenthood via surrogacy respects the autonomy of the person seeking to become a parent, and helping them achieve that goal is beneficent. Further, it may be argued as a matter of social justice people, because of their lack of access to the contents of conception, either due to medical infertility, sexuality, or being single should not be precluded from having a child. This is not a one sided analysis, however, because the rights of the surrogate and child require consideration.

In India, gestational surrogacy is legal as it is in California, Ukraine and Czech Republic. It is illegal in much of the United States, England, and Australia, which recognizes only altruistic surrogacy. Italy, France, Sweden, Norway, and Germany do not recognize any manner of surrogacy agreements.^[vi]

The gestational surrogate pool in India is comprised of uneducated women from poor rural backgrounds.^[vii] The decision to be a gestational surrogate is borne from the need to provide financial assistance to their families primarily, and secondarily as an act of altruism. Surrogates are warehoused in communities created solely for surrogate mothers during their pregnancy. There is a social stigma associated with surrogacy in India so maintaining surrogates in a distinct community separate from Indian society serves to protect the surrogate pool from public backlash. It has been reported these women bond and feel supported by each other during their time in these facilities. This is an incidental finding that can be expected when people share similar circumstances of physical and emotional isolation. Often women agree to become surrogates because of coercion from middlemen who operate on the internet working in conjunction with infertility clinics. Also, they may be compelled to become a surrogate by their husbands by their husbands or other male relatives. Women's independence in India is suspect in a large portion of the country. Women are still subject to following the directives of their husbands.

Since surrogacy arrangements are either not recognized or illegal in several countries around the globe it is necessary to consider the country of origins laws regarding surrogacy. Normally, a sovereign nation does not have to consider the laws of other nations regarding commerce within its borders. However, where the country is putting products into the stream of commerce, and in this case the product is a human infant, it is necessary to consider the laws of the country of origin for the commissioning party. The laws of the country of origin require consideration because the child may bear the burden of an illegal or unrecognized act which would leave them in limbo. The child produced as a result of the surrogacy agreement may be required to stay in India, either with the gestational carrier if she agrees, or be placed in an orphanage in India. The same may occur in the country of origin where children have been removed from their parents when it is believed their existence is the result of a gestational surrogacy.

India does not want to bear the burden of increasing numbers of children, conceived via surrogacy, and not granted visas to return to their parents' country of origin. The country of origin does not wish to bear the burden of raising a child whose existence is offensive to their laws, and may deny these children citizenship which occurred in France. France has banned surrogacy since 1991.^[viii] The Mennesson case arose in California when French consular officials in Los Angeles became suspicious the Mennessons engaged a gestational surrogate while in the United States.^[ix] The children conceived as a result of a gestational carrier

in California were denied French citizenship, and the parent's were unable to adopt their children under French Law. Surrogacy is legal in California, as it is in India, so the case provides notice to policy makers in India too. If the children were not granted visas to return to France, then California may have borne the burden of raising these children in the social welfare system. The same would be true for India, where it would be unlikely for a child conceived via surrogacy to remain with the gestational carrier. As discussed above gestational surrogacy bears substantial social stigma, and the child would not look like the gestational carrier. Rather than deal with the social stigma the gestational carrier would leave the child in an orphanage.

India and other countries may find laws similar to Frances repugnant as violating human rights. Unfortunately, they are laws promulgated by the legislature of a sovereign nation, and therefore require recognition. Failure to draft policy in India considering the laws of the commissioning party's country of origin theoretically could create a human rights crisis when infants are conceived, borne, and left to live in dire poverty because their parent(s) cannot return home with them. Some may see the commissioning party's circumvention of such laws worthy of praise as civil disobedience, but this view cannot be supported when a child may be banished to poverty because of their actions.

Does a right to procreate exist? Yes, but only in its negative right, that is, a person's right to be left alone. Advances in science, such as assistive reproductive technology, may result in overall benefit to society, but do not confer a right to benefit from those advances on any individual. Therefore, a party may seek to engage in assistive reproductive technology, such as in gestational surrogacy, but there is no right to it. This is consistent with the reasoning behind the right to an abortion in the United States. In the United States, a woman has a right to an abortion in accord with her right to privacy. The right to an abortion is a right of forbearance by the government in preventing her from seeking medical care. Further, while a woman's right to an abortion exists, there is no right of positive assistance by the government for the woman to obtain an abortion.

When a party seeks to engage in assistive reproductive technology such as in vitro fertilization and gestational surrogacy we are confronted by a conflict in ethical principles. As I have argued, a party may seek out a gestational carrier, but has no fundamental right to one. Since there is no fundamental right to gestational surrogacy, the autonomy of the commissioning party and the potential surrogate are in conflict. We respect the autonomy of the commissioning party to seek out a gestational surrogate to bear them a child. We do not respect their autonomous decision to engage a surrogate when their autonomy infringes upon the autonomy of the surrogate. The surrogate has a fundamental right to be left alone. When a fundamental right is infringed upon by another's actions those actions must yield to the fundamental right.

Regarding surrogacy in India we need to determine whether surrogacy contracts respect the autonomy of the potential surrogate. When women agree to enter into surrogacy contracts they do so in order to benefit their families.^[x] Additionally, the informed consent process is limited or non-existent. Potential surrogates are not informed of the potential risks related to the hormones they are required to take in connection with preparing their womb to receive the fertilized embryo. Nor are they informed of the potential risks associated with pregnancy itself. While the financial windfall to the potential surrogate and her family may be seen as respecting her autonomy, I believe it is an undue inducement at best, and coercive at worst. Further, it has been reported clinics in India pay the surrogate by trimester, and even withhold the funds after the child has

been delivered. The clinics justify this stating they are safeguarding the surrogate's money from her husband who may go on a drinking binge or other men in her family who simply may take the money. Another likely reason is the clinics keep the money for themselves.^[xi]

Many women in India are still considered subordinate to men. The social context of a woman's agreement to become a surrogate in India is also very important in assessing whether a woman's decision to become a surrogate in India is a true exercise of her autonomy or a result of her subordinate position as a woman in Indian society. If all the factors discussed above are true woman entering into a surrogacy agreement are likely the result of undue influence of coercion. The above analysis leads me into a discussion into whether contract law can be equitably applied in surrogate contracts in India. Contract law requires that for a contract to be valid there must be a "meeting of the minds." In other words the parties to the contract must be on equal footing, and understand the terms of the contract in order for it to be valid. For the reasons stated above, generally the surrogate mother lacks the education to understand the complex terms of a contract. Absent legal assistance there can be no meeting of the minds and the contract is void as unconscionable.

The most unequal party in the surrogacy contract is the child resulting from it. It will be argued that the unconceived child has no rights to enter or refuse to enter a surrogacy contract. As a matter of social justice their potential existence must be considered when forming the contract. Would a proxy for the child at the time of contract ameliorate this problem? It is unlikely, because the resulting child would be subject to the laws of the country of origin of the commissioning party. Only, if the proxy acts in accord with the laws of the country of origin will these issues be resolved. Namely, where the country of origin does not recognize surrogacy, or where it holds surrogacy illegal, the proxy must argue against conception. This would be an unusual argument to make- against life. Does a potential child have the right to argue against life and remain a non-being? Probably not but it presents us with a question as to whether using a rights approach is correct in this consideration. Perhaps, a social justice approach best serves the needs of a potential child during a contract negotiation where the potential child is represented by a proxy.

Social justice demands the contracting parties to reasonably consider the potential outcomes of the contract. From a social justice perspective the contracting parties would have to agree the potential child receive reasonable assurances that he/she will be able to reside in the commissioning party's country of origin; he/she will be considered the child of the commissioning party upon return home; that surrogacy is either legal or formally recognized in the country of origin; he/she will receive the benefit of reasonable parenting and medical care until the age of majority; should the commissioning party die prematurely monies exist for the support of the child and placement with a family member, preferably, is available; and should the commissioning party die while the potential child is in utero the gestational carrier will receive financial support for raising the child to the age of majority. Therefore, the proxy would have to use a best interest of the child standard to ensure the most reasonable outcome for the potential child.

Many would disagree with this position for a couple of reasons. First, potential children typically have not rights. Comparing a potential child's rights to a commissioning party's right to contract, the commissioning party's right to contract carries the analysis. Second, assuming arguendo that potential children have rights, these conditions present an unsurpassable barrier to forming a contract. I argue this is the high barrier that

must be set. The parties are not contracting to build widgets but human beings. Laws regulating surrogacy contracts should be drafted using the enumerated social justice concerns as conditions to be met in the formation of a valid contract..

Where states such as India permit parties to seek out assistive reproductive technology and surrogacy, the opportunity to do so is not a fundamental right and should be highly regulated to reflect this distinction. India is currently receiving substantial income from its assistive reproductive technology market, and as a result needs to step in and regulate this emerging market. They cannot equate bringing children into the world with other technology markets in the country. Tight regulatory oversight, it is argued, will reduce profits. This may be true, and it should be supported by the government where the subject of the market is human life. The parties traveling to India are not exercising a fundamental right but seeking to act autonomously for their own end despite the adverse effects their autonomous actions may have on potential surrogates, and potential children.

In conclusion, the right to procreate rests in the fundamental right to be left alone to choose whether to bring children into the world. The right to procreate does not consist of positive steps parties may take to have children when confronted by either infertility, or when they lack an aspect of the contents required for conception.

The autonomous decision to seek out assistive reproductive technology and gestational surrogacy is unethical when it infringes upon a potential surrogates fundamental procreative right. The right to contract is a separate right distinct from the right to procreate. When a potential surrogate has not received or unable to understand the material information her autonomy is infringed upon. Further, her autonomy is probably infringed upon simply as a result of her gender subordinating her to her male counterparts. The resulting contract is both unethical and void as a matter of law. There cannot be a "meeting of the minds."

The potential child which is the subject of the contract does not have rights as a matter of contract law. Therefore, surrogacy contract negotiations should include a proxy for the potential child. This is consistent with a social justice approach because it seeks to prevent harm to the future child as well as Indian society. It is incumbent upon India to ensure the well-being of the child resulting from the contract. India cannot afford to bear the burden of raising children conceived by in vitro fertilization, and born as the result of a surrogacy contract. Its profits would diminish if they had to bear the burden of raising children in state run facilities. They would also receive the brunt of international backlash if it is determined the surrogates themselves were manipulated into surrogacy, and the children born as a result were neglected, abused, or died. This is not a market where India should allow profits to drive the market.

Gestational surrogacy became popular in India due to advances in reproductive medicine, a large pool of impoverished women, and low cost. It remains largely unregulated, and as a result, large numbers of commissioning parties travel to India to take advantage of the open market. India has contemplated assistive reproduction technology legislation since 2008. Its continued failure to pass legislation regulating the market demeans the sanctity of life by allowing the market to dictate that life may be created for the right price.

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