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RESEARCH ARTICLE

Applying Rawls' Theory of Public Reason to Controversies over Parental Surrogacy

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Abstract

Parental surrogacy remains a highly controversial issue in contemporary ethics with considerable variation in the legal approaches of different jurisdictions. Finding a societal consensus on the issue remains highly elusive. John Rawls' theory of public reason, first developed in his *A Theory of Justice* (1971), offers a unifying model of political discourse and engagement that enables reasonable citizens to accept policies that they do not necessarily support at a personal level. The theory established a promising framework for private citizens with distinct moral positions on the subject to find common ground and, in doing so, to negotiate a consensus regarding the degree and nature of regulation that is palatable to all rational citizens.

Keywords: bioethics; John Rawls; parenthood; procreation; public reason; surrogacy

Introduction

Parental surrogacy, often referred to in the literature as "surrogate motherhood," is a technological development that allows a person to carry to term the future child of an outside party or parties with the intention of turning that child over to the third party or parties after birth for the latter to raise the child as its parent(s). Various forms of parental surrogacy have been used to overcome barriers to reproduction, including infertility and potential medical risks of pregnancy to the intended parent.[1] More recently, same-sex male couples have resorted to surrogacy in the procreation process.[2] Although traditional forms of surrogacy by formal agreement have likely existed since the nineteenth century, often sub rosa, the first known effort to draw up a legal contract for surrogacy did not occur in the United States until 1976, while the first surrogate-birthed child conceived through embryo implantation (i.e., gestational surrogacy) was born a decade later.[3,4] Yet from the late 1970s through the early 1990s, various manifestations of surrogacy drew both support and criticism, fueled by public debates on *The Phil Donahue Show* and *60 Minutes*, as well as the legal controversies surrounding "Baby M" and Anna Johnson. Initially, opposition to parental surrogacy focused primarily upon threats to either the psychological well-being of the child or the societal consequences of claimed damage to societal family structures. More recently, additional objections raised by human rights advocates, feminist scholars and anti-colonial activists, have come to focus upon the exploitation of gestational parents, especially women in the Global South. Throughout all of these debates, broader concerns have existed regarding the legal status of such offspring and their various purported parents, challenges that have only increased as surrogacy has become an international enterprise crossing political boundaries and implicating the regulations of multiple jurisdictions. Whether these differences can be surmounted—either in the domestic or transnational arenas—remains an open question.

This article proposes one approach to bridging the gaps between supporters and opponents of both traditional and gestational forms of surrogacy. American philosopher John Rawls' "theory of public

reason," first advanced in its full form in his seminal volume, *A Theory of Justice* (1971), is what Rawls describes as "an ideal conception of citizenship for a constitutional democratic regime" that "presents how things might be, taking people as a just and well-ordered society would encourage them to be."[5] As such, it cannot possibly resolve *all* controversies surrounding parental surrogacy. Needless to say, as discussed below, parties not interested in the public welfare or those not acting out of the public good—whether motivated by self-interest, fanaticism, or an overt rejection of democratic ideals—simply will not fall under this umbrella. In contrast, this article assumes that most parties engaged in the bioethics and civic debates surrounding parental surrogacy are sincerely interested in furthering societal welfare yet have differing conceptions of what ideal policy might look like regarding this complex and nuanced issue. Under these circumstances, particularly in the domestic arena—and potentially, across the boundaries of other democratic nations—the theory of public reason may help achieve consensus toward a path forward. This paper makes no attempt to propose a specific approach to the policy arguments surrounding surrogacy but rather to demonstrate that a plausible framework in which those debates may be resolved.

Surrogacy

Defining the enterprise

The very definition of parental surrogacy has proven extremely controversial since these various practices received widespread public attention during the 1980s. Traditional surrogacy, which has also been called (misleadingly) "natural surrogacy" or "partial surrogacy"[6] has historically referred to a range of practices in which a woman is impregnated by a man—either through natural or artificial insemination, with the understanding that the gestating female will surrender parenthood either to the male inseminator or to that individual and a third party, such as his spouse, who will assume parenthood. Under such circumstances, surrogacy may be said to be either "open" or "closed"—depending upon whether the gestating female will continue to be known to, and potentially to play a role, in the subsequent life of the offspring. More recently, some commentators have come to consider only surrogacy through artificial insemination as a form of traditional surrogacy, while relegating traditional surrogacy through natural insemination to the moral and legal umbrella of untraditional adoptions. Doing so avoids conflating ethics issues surrounding surrogacy with empirical issues surrounding determination of intent, particularly as some states do not view traditional surrogacy via natural insemination any differently from other traditional forms of parenthood for the purposes of public benefits, child support payments, and so forth However, all forms of traditional surrogacy may have implications for public benefits and child support payments in some American jurisdictions.[7,8,9] Of note, the existing literature and this paper generally exclude discussion of cases in which both the sperm and egg are genetically unrelated to the intended parents and conception occurs through natural intercourse, as this form of pregnancy is best considered under adoption law and raises serious policy concerns regarding the sale of newborns, both ethical and empirical, well beyond the scope of this paper.

Gestational surrogacy, in contrast, is a more recent development made possible by in vitro fertilization (IVF), in which an embryo is created extra-uterinely and implanted in the surrogate's womb. Many forms of gestational surrogacy are possible. These include those in which the future offspring is the genetic child of both of the intended parents (i.e., the embryo is formed with one intended parent's sperm and another intended parent's egg), those in which one of the future parents is also the genetic parent of the offspring (that is, either the egg or sperm of one intended parent and the gamete of a non-intended parent is used), or those in which two non-intended parents supply both sperm and egg. These third-party non-intended parents may be relatives or friends of the intended parents or may be strangers; even the surrogate may provide the egg, although such an approach may raise additional legal complexities in some jurisdictions.[10] Gestational surrogacies may also be handled as either "open" or "closed" arrangements in many jurisdictions. All forms of surrogacy, both traditional and gestational, may be either compensated or uncompensated (often termed "altruistic surrogacy"), although uncompensated surrogacy has tended to generate far less controversy.

One further consideration must be noted. Historically, discussions of parental surrogacy have been highly gendered—with the assumption that all gestating parties would be legally female. The social and legal revolution that has led to the recognition of transgender rights in many communities and jurisdictions, as well as medical advances in gender affirmation, has increasingly rendered this approach problematic. The prospect of male uterine transplants may render gender-based language even more archaic.[11] As such, this article will use "parental surrogacy" or "surrogate parenthood" except in historical or legal contexts in which gendered terminology remains an accurate description of past usage or existing regulation.

Terminology in this field is itself highly fraught.[12,13] For instance, Mary English et al. have noted that "[l]inking traditional surrogate motherhood with gestational surrogate motherhood…only serves to confuse the latter arrangement," while the use of the term "'gestational surrogate motherhood' forces the medical community and the layperson alike to ascribe motherhood to the act of gestating."[14] In using "parenthood" and "parent" in this article, the author's intent is not to assign that role, either legally or ethically, to any particular party, but rather merely to acknowledge that multiple parties involved in the genesis of the relevant offspring may, or may not, have legitimate claims to parenthood. One leading authority, Michael H. Shapiro, ascribes some of this controversy to errors in "taxonomy."[15] That indeed may be accurate. However, the following analysis operates under the assumption that at least a considerable portion of the disagreement surrounding various forms of parental surrogacy relates to differing conceptions of public welfare and policy, rather than merely disputes over semantics or false classifications. After all, as Anita Allen has argued in relation to classifying surrogacy, "The concepts of property and ownership are elastic enough to let us buy and sell anything we want. We cannot simply look to the language of law to know where to draw the lines. We must first draw the lines where we want them to go and then make those lines into law."[16] To the degree that changes in terminology can resolve this issue, the author raises no a priori objection. To the extent that they cannot, public reason analysis may prove beneficial.

History

The history of ethics debates surrounding parental surrogacy and its legal regulation, particularly the fragmented manner—both chronological and jurisdictional—in which attempts to address the issue have arisen in the United States, is highly relevant to achieving future consensus. This uneven history differs substantially from that of other touchstone issues. For instance, the United States Supreme Court's landmark abortion decision in *Roe v. Wade* (1973) in essence imposed national standards on abortion regulation that severely curtailed jurisdiction differences while both jumpstarting and reshaping discourse on the subject. Similarly, the passage of the federal National Organ Transplant Act (NOTA) of 1984 both established nationwide law and so fundamentally reshaped policy in the area of solid organ procurement and donation that the prior debates immediately proved far less relevant. In contrast, the piecemeal manner in which various forms of surrogacy have been regulated, almost entirely at the state level, and the lengthy time period over which this still ongoing legal framework has been implemented have resulted in a wide range of inconsistencies, uncertainties and sources of conflict that lend themselves well to resolution through public reason—hence the necessity for a brief review.

Although the legal recognition of traditional surrogacy occurring through "natural" insemination dates back to Babylonian law and is to be found in the Judeo-Christian Bible—the triad of Abraham, Sarah and Hagar in the Book of Genesis may be the most well-known Old Testament instance—modern debates over surrogacy largely stem from advances in reproductive technology rooted in the eighteenth and nineteenth centuries.[17] British surgeon John Hunter (1728–1793) and American physician William H. Pancoast (1824–1887) demonstrated the efficacy of artificial insemination and third-party artificial insemination under ether, respectively, opening the door to traditional surrogacy through a woman with whom the sperm provider did not have intercourse—and also debates over its morality.[18,19,20] Yet the practice of "hiring" traditional surrogates did not become widespread until the early 1980s, largely as a result of the independent efforts of Michigan attorney Noel Keane and of Surrogate Parenting Associates,

Inc., a Kentucky-based organization founded by physician Richard Levin and attorney Katie Brophy.[21] Keane, who might be thought of as a Jack Kevorkian of surrogacy for his willingness to push legal boundaries in the field, drew up the first traditional surrogacy contract in 1976 and, in the ensuing decade, opened offices in California, Indiana, Michigan, New York and Nevada.[22,23] Meanwhile, Levin and Brophy embarked on offering brokerage services between surrogates and intended parents. Unfortunately, their first paid surrogate, a woman named Elizabeth Kane, grew to regret her involvement, eventually condemning the practice as profiteering by "baby brokers" who use women as "reproductive toys," and reflecting that in the future, her "son might be forced to carry the burden of knowing he was purchased for the price of a new car."[24] Then in 1985, the seven-year-old practice of IVF led to the birth of the first child conceived through a gestational surrogacy contract.

This history matters because policymakers struggled to keep up with changing developments in technology. By the time of the most well-known case in the history of American parental surrogacy, *In re Baby M* (1988), a custody dispute in which a New Jersey traditional surrogate, Mary Beth Whitehead, did not wish to relinquish "Baby M" (later identified as Melissa Stern) to intended parents William and Elizabeth Stern, an inconsistent and uncertain patchwork of state rules had developed to govern parental surrogacy.[25] In some jurisdictions, it even remained unclear that the parties might not be criminally or civilly responsible for adultery, defined as "the voluntary relinquishment of one's reproductive capacities to an illicit partner"[26] In 1988 alone, 27 state legislatures considered 73 separate (often contradictory) bills on the issue, with Louisiana banning surrogacy agreements as "null, unenforceable and contrary to public policy" while neighboring Arkansas saw the legislature's attempt at legalization vetoed by the governor.[27] Both the Baby M. ruling and a subsequent decision in *A.G.R. v. D.R.H & S.H* (2009), which extended the court's conclusions to gestational surrogacy, in essence undermined such contracts in New Jersey. In contrast, the California Supreme Court reached the opposite conclusion in *Johnson v. Calvert* (1993), upholding the authority of the intended parents and validating the surrogacy agreement over the objections of commercial surrogate Anna L. Johnson, who wished to retain custody of the offspring.[28] Debates surrounding the issue did not—and largely still do not—break down across familiar liberal-conservative or Democratic-Republican lines. Instead, opinions differed substantially within demographic and ideological groups, leading both to sincere legislative debate and to widespread variations in policies. Such variation risks "inefficiency, confusion and unfairness" as relationships that are legally recognized in one state might prove prison offenses in another.[29] Laws have evolved on the subject and, at present, commercial surrogacy remains illegal in all circumstances in three states (Louisiana[30], Michigan[31] and Nebraska[32]) and largely unenforceable in two states (Arizona and Indiana).[33] A number of states impose tight restrictions upon when surrogacy contracts can be signed or enforced. However, trends on the subject have been highly unpredictable. In an early study, even many of those Americans surveyed who opposed legalizing parental surrogacy favored awarding the offspring of such contracts to the intended parents, indicating complex and conflicting values on the issue.[34] This ongoing fluidity also strongly suggests an arena in which an appeal to public reason may help achieve consensus.

The surrogacy debate

Objections to commercial forms of parental surrogacy at present largely divide into two classes: "One focuses on wrongs done to the surrogate [parent], while the other focuses on wrongs done to the child."[35] Each of these requires further discussion. A third set of objections transcends both parent and child and raises concerns regarding the impact of such practices upon society as a whole. Historically, these societal concerns often focused upon the supposedly sacred nature of the traditional family. Leon Kass, an early critic, observed that "the largely universal taboos against incest, and also the prohibition against adultery, suggest that clarity about who your parents are, clarity in the lines of generation, clarity about who is whose, are the indispensable foundations of a sound family life, itself the sound foundation of civilized community."[36] Objections that revert to either religious dogma or natural law generally fit poorly into public reason analysis. Fortunately, empirical polling data suggests that even among those who are deeply religious, a significant percentage still favor surrogacy, indicating that opposition specifically

grounded in religious doctrine is no longer embraced by a majority of opponents.[37] In contrast, a more recent set of societally focused objections concern themselves with the impact of surrogacy not just upon the individual, usually female surrogates, but upon the collective effect of the process on the status and welfare of women more broadly. These arguments *do* merit further consideration.

A range of objections have been raised regarding the impact of commercial surrogacy on the surrogate parent. Stephen Wilkinson enumerates the two most salient of these concerns, both grounded in fears of exploitation: (1) "that surrogate mothers are highly likely to be underpaid, both relative to the benefits accruing to the commissioning parents" and "relative to the kind of risks to which the surrogate must subject herself"; and (2) that indigent women are more likely to be attracted to surrogacy out of financial need, and that under such duress, such an indigent woman can "in effect be forced to act as a surrogate."[38] The first objection implicates broad concerns about justice, while the latter, in addition to its evident inequity, also raises the possibility that such duress may compromise the surrogate's autonomy. Surrogate contracts that either explicitly or implicitly restrict the gestating parent's right to terminate the pregnancy or endanger the fetus through volitional conduct (i.e., smoking cigarettes, drinking alcohol, etc.) limit the gestating parent's liberties significantly, so, at a minimum, such agreements ought to be entered into with meaningful free will. At the same time, some forms of consensual agreements sacrifice future autonomy so significantly that they may still prove objectionable and against sound public policy. Ulysses-style contracts that extensively or permanently sacrifice freedom or bodily integrity often fall into this category.[39] After all, by analogy, one may not meaningfully appreciate the state and consequences of having sold oneself into slavery or having sold one's corneas until one has done so. (Of course, just because one cannot anticipate one's future state as a surrogate does not necessarily mean surrogacy is unethical.[40]) Even in its most benign form, gestation entails a loss of freedom through "loss of control over [one's] body and daily activities during pregnancy," compounded in cases of surrogacy by "the psychological harm such powerlessness…which may be caused by being required to give up a child to whom one may have formed a deep attachment…."[41] The bonding experience of pregnancy and the emotional cost of surrendering a child may also be so high and so distinctive that it cannot be meaningfully anticipated in a way that still permits genuine autonomy.[42]

Another set of objections raised is that commercial parental surrogacy "can be harmful to the children who are produced."[43] Some of these concerns are grounded in either appeals to natural law or, more frequently, the claim that since commercial surrogacy is essentially baby selling, the transaction as a whole reflects "a sale of services through birth" and "and, after birth, the sale of a living child," thereby running the practice afoul both the Thirteenth Amendment to the Constitution and of ethics norms against human chattel slavery.[44] However, the ethics arguments here are not truly reasoned arguments in themselves, but rather sematic slights of hand: Rather, the ethics question to be answered is: Regardless of whether or not this practice is classified as baby selling or slavery, is this particular form of baby selling or slavery morality different in kind from other forms of involuntary servitude? After all, reasoned arguments have been advanced for a market in newborns[45] (regarding which this article remains agnostic), so such a classification then requires a refutation of such arguments, rather than an assumption that such a classification renders the transaction ipso facto unethical. How one resolves the underlying ethics controversy may, although it does not inherently, depend upon one's answer to questions of categorization. Yet while classification schemes can speciously circumvent the issue, the terminology itself cannot resolve the moral or political controversy. Yet just because "slavery" arguments are not persuasive does not mean that the practice might not pose other potential threats to the offspring. Among those harms frequently noted are the future psychological impacts of discovering that one has been exchanged via contract and that of being separated from one's biological or birthing parent, as well as the practical consequences of not knowing one's lineage.[46] Of note, although concerns about the physical health of children born via surrogacy have been raised in the past, empirical evidence suggests that the risks are no greater than those of other births.[47]

A third set of harms, raised more recently by a range of scholars of a feminist bent, is that of the collective damage done to women by the commodification of their bodies and of their reproductive abilities. University of Michigan philosopher Elizabeth S. Anderson was among the first to raise these concerns, arguing that commercial surrogacy is a "degrading practice" in which gestating parents are

debased into "hatcheries," "plumbing" and "rented property," and which, as a result, reduces "civil respect" for women.[48] This in turn may affect society's conception of women's roles more broadly.[49] By turning the "womb into a commodity," some feminist scholars "fear that society will once again value women primarily for their reproductive capacities."[50] Similarly, scholars who view the practice through an anti-colonialist or anti-racist lens object to the impact of structural injustices at the international level. Lisa Lau argues for "positioning transnational surrogacy as another instance of imperialism, as yet another form of cultural colonisation, othering, subalternising and peripheralising working-class Indian surrogate women in the twenty-first century."[51] To these scholars, opposition to at least certain forms of parental surrogacy becomes a matter of fundamental human rights.

Defenders of parental surrogacy, on the other hand, argue that the practice promotes both autonomy and utility. The autonomy of the intended parents and that of the surrogate are implicated. For the former, advocates claim that the intended parents' "right to 'procreative autonomy' includes the right to contract with consenting collaborators for the purposes of bearing a child," while their "right to 'genetic continuity' and to rear offspring are all part of the right of reproductive choice for the contracting intended parents."[52] At the same time, the surrogate is permitted full authority to contract for the use of her body as she sees fit. It might also be worth noting that paternalistic societies frequently criminalize a range of economic practices from prostitution to pornography in which female suppliers have an economic advantage over males in the marketplace. Prohibiting surrogacy would reflect yet another effort to limit a financial opportunity from which many more women than men may potentially experience pecuniary benefit and may thereby raise equity and justice concerns of its own. Consequentialist and utilitarian arguments in favor of surrogacy claim that the practice ensures that infertile couples are able to produce partially genetic offspring and raise families and that children are raised in environments where they are wanted, all of which have a net benefit to these parties.[53] At the same time, gestating mothers gain economically, possibly in a manner that increases their own autonomy or that gives them the financial freedom to bear and raise offspring for themselves.

What is most striking about the debate surrounding surrogacy is that the various arguments generate strange bedfellows on both sides of the issue. Some conservatives have condemned the practice as creating so-called unnatural family arrangements, while others have touted the process for filling a need for infertile couples wishing to raise children. Pro-surrogacy feminists view the autonomy of the gestating parent to choose to contract her womb as paramount, while anti-surrogacy feminists see that process as inherently coercive and detrimental to the overall well-being of women and society. Supporters of gay rights and of women's rights, often aligned, may find themselves clashing. To suggest that a liberal or conservative position on the issue exists at all would be a stretch and an oversimplification; to the author's knowledge, no universal or even widely held Marxist or Freudian or Christian or Jewish or utilitarian position on the issue exists. Certainly, some institutional entities, like the Catholic Church and the Church of Jesus Christ of Latter-day Saints, have historically endorsed particular positions, but these are far from universally embraced by believers or even by their own clergy. Moreover, many individuals support surrogacy in some contexts, such as non-commercial circumstances, but not others. These unlikely alliances have spared the issue from being linked to larger political movements or ideologies, which, even in the divisive and radicalized political context of the contemporary United States, opens the door to reasoned discourse, mutual understanding and compromise.

The goal of this paper is not to enumerate all possible arguments in favor of or against parental surrogacy—and certainly not to resolve these issues. Rather, the purpose is to demonstrate that public-minded disagreements regarding surrogacy can be overcome. Examining these concerns through the framework of public reason discourse may help demonstrate that such progress on building a consensus is possible in a democratic society.

A theory of public reason

A full analysis of John Rawls' theory of public reason stands well beyond the scope of this article. However, some general observations may prove helpful in situating that theory in order to apply it to the

debates surrounding surrogate parenting. The model, originally explicated in its full form in Rawls' *A Theory of Justice* (1971), proposes a unifying scheme for peaceful political engagement in a pluralistic society. It is not, in itself, a policy proposal or an algorithm. Rawls makes a point of emphasizing that his approach is aimed at addressing "'constitutional essentials' and questions of public justice" rather than issues that do not "concern those fundamental matters," among which he enumerates, non-exhaustively, tax laws, property regulations, pollution control, "establishing national parks and preserving wilderness areas and animal and plant species" and "laying aside funds for museums and the arts."[54] So while public reason may prove helpful in resolving issues in bioethics, these challenges are arguably not at the core of Rawls' project. Of course, whether one views parental surrogacy as such a fundamental question depends, in part, upon how one approaches the underlying ethics. Those who see in the practice a threat to autonomy or equity may view the practice as fundamental, while others, who do not see the endeavor as particularly novel or distinct in kind from traditional adoption, such as the late John Robertson, may in turn recognize no such issues of public justice implicated.[55] So rather than view the theory of public reason as a means for "solving" the ethics challenges of surrogacy, it makes far more sense to view it as a basis for believing that future consensus on the subject is possible.

Another consideration requiring comment is the specific socio-political context that gave birth to Rawls' theory. While the modest Rawls acknowledges "a long history" leading to his theory, crediting Kant, among others, to the degree that the theory largely reflects his own imprimatur, it is also very much the product of the social milieu of its author's upbringing and early professional life.[56] Rawls (1921–2002), a product of the East Coast Establishment that dominated American politics, culture and intellectual life for much of the twentieth century, should be read in the context of these influences (Episcopal Church, Kent School, Princeton University) and the exceptional nature of the tranquility, both foreign ("Pax Americana") and domestic (post-war liberal consensus), of the years in which he developed the theory. The context of its origin does not mean that the theory does not have applicability to the more pluralistic, populist and confrontational political milieu of the present day—any more than the Constitution is irrelevant because Madison lived in a world of constrained suffrage, chattel slavery, and state-sanctioned churches. At the same time, the notion that the theory of public reason fits today's society as neatly as it did Rawls' is also far-fetched—and not even his own contention. Rather, the theory is applicable to the degree that the socio-political context of our time, conceptually if not in the particulars, continues to reflect not just the values but also the social structures of his own milieu or of the idealized milieu he envisioned that in many ways mirrored his own reality.

Conditions for public reason

Rawls defines public reason as "citizens' reasoning in the public forum about constitutional essentials and basic questions of justice."[57] Certain conditions are necessary for such reasoning to transpire. First, Rawls assumes the very existence of a democratic society defined by "political liberalism" and "free and equal citizens."[58] Thus, to discuss the use of public reason in Russia, where surrogacy is legal, or Iran, where it is unregulated, is not a productive enterprise, nor are conflicts related to the transnational regulation of surrogacy across the boundaries of autocratic nations likely to be resolved through public reason. Second, Rawls assumes that a "diversity of reasonable religious, philosophical and moral doctrines found in democratic societies is a permanent feature of the public culture and not a mere historical condition soon to pass away."[59] To the degree that doctrines become unreasonable or fanatical, the prospects for overlapping consensus decrease. Leaving aside the question of how one might establish a distinction between reasonable and fanatical (after all, Torquemada and Robespierre likely considered themselves reasonable men), what matters for this analysis is that the mainstream positions on surrogacy in the United States largely fall under the rubric of reasonable. Third, and arguably most important, Rawls demands that policy positions conform with the "liberal principle of legitimacy" in that "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals accepted to them as reasonable and rational."[60] Fourth, public reason requires that

advocates for different positions be able to explain and advance those positions in a rational and reasonable manner. Finally, since different views on a contentious issue like parental surrogacy may lead those with differing beliefs to "come to doubt the sincerity of one another's allegiance to fundamental political values," it is essential for the opposing groups to be able "to present in the public forum how their comprehensive doctrines do indeed affirm those values." So if supporters and opponents of legalizing a particular form of parental surrogacy each believe that their approach furthers autonomy or equity or justice, it behooves them to show that the policy outcome they seek does indeed uphold that ideal or set of principles. Underpinning this entire framework is the foundation that deliberations must occur within the context of each citizen advocating for "what he or she sincerely regards as the most reasonable political concept of justice, a conception that expresses political values that others, as free and equal citizens[,] might also be expected to endorse."[61] Of note, although Rawls' own argument advances an approach that proposes "what would be agreed to" in the so-called "original position," a hypothetical a priori state in which a veil of ignorance shields one from one's actual role in society, he concedes that this approach may be only one of many.[62] Nothing in this article will attempt to sort out whether Rawls' own conception of justice or an alternative approach is preferable.

Applicability

Having clarified both the ethical issues surrounding surrogacy and the context in which the theory of public reason may have validity, the question one must address is whether this theory is of value in developing a path forward on the issue. Bioethicist Ruth Macklin offers a useful rubric for addressing this question. Macklin divides issues into those, which can be resolved once "legal and regulatory details" are worked out, such as IVF, and those upon which no consensus is likely ever to emerge because all of the facts are known and the underlying, value-based disagreements are fundamental, such as abortion. She asks, "Is surrogate motherhood more like the issue of in vitro fertilization or more like abortion? Is it simply a novel social situation, which requires us to establish safeguards against abuses and to resolve the question of who has rights to what in surrogacy arrangements? Or is it a practice that raises profound moral considerations that may forever resist resolution?"[63]

Of course, a third possibility might exist between these two poles: It is possible that while the larger issue is one that is resolvable, some of the particular arguments and disagreements are such that certain rules or the lack thereof may reflect insurmountable value disagreements. For example, a critic fundamentally concerned with the purported colonialist or racially and economically exploitative nature of surrogacy in certain contexts may never be willing to accept the hiring of female Indian surrogates by white Europeans but may not have the same value-based objections to the practice of altruistic surrogacy by wealthy white Europeans among themselves. Some of the objections to parental surrogacy in particular contents or between certain parties may never prove transcendable. Others, however, may prove transcendable when viewed from the vantage point of social benefits that may support a societal ideal to a greater degree than an opponent believes that this act of surrogacy is detrimental to that ideal. For instance, a feminist critic concerned with issues of gender-based equity and social justice may have serious concerns about the potentially exploitative nature of womb commodification upon women—in the critic's view, a threat to gender-based equity and hence justice. At the same time, that critic may also recognize that parental surrogacy may afford opportunities for gay couples to sire partially genetic offspring, achieving a different form of gender-based equity and thereby supporting the same underlying value. While on the surface, the two positions may appear incompatible, one might establish a particular surrogacy arrangement (e.g., between an altruistic surrogate, known to the intended parents, who possesses considerable social capital of her own and thus is situated in a position to resist economic exploitation) in which the safeguards elevate the societal benefits of gay parenting over the harms of womb commodification as regards to the overarching goal of gender-based equity in that particular instance. Such an approach does not resolve the underlying conflict, but it does surmount it in favor of a larger public good.

One particular area in which a consensus on larger values may coalesce is that of consistency surrounding the consequences of conflicts of laws between jurisdictions.[64] In many contexts, as Justice

Brandeis noted, "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[65] However, this laboratory of the states is more conducive to progress on some issues than others. With regard to parental surrogacy, conflicts between jurisdictions can lead to a range of injustices. For instance, a couple who acquires a child through surrogacy in one state may be restrained in their travel, fearing that relocation to another state—even temporarily—may place their parental rights in jeopardy or, in the extreme, might expose them to charges of baby-selling.[66] A common belief in the overriding importance of such values as the rule of law, consistency of outcomes, and regulatory certainty may override particular concerns for at least some supporters or opponents, ensuring a fertile ground for compromise.

What is essential to articulate here is that supporters and opponents of parental surrogacy generally share a common set of overarching goals: the well-being of parents, surrogates and offspring and the overall welfare of society. How they value each of these interests in specific contexts may vary vis-à-vis the others, but they are not inherently a zero-sum game. Rather, proponents and critics merely disagree upon the means to achieve those goals. One might draw an analogy to Cold War foreign policy: both so-called "hawks" and so-called "doves" sought peace; they simply disagreed upon the most effective strategy for achieving it. That both supporters and opponents are likely to be repeat participants in the democratic process, where particular approaches can be measured against ideals and modified or even reversed, strongly suggests that compromise is possible. In fact, the slow trend toward the loosening of state legal restrictions upon surrogacy likely reflects, at least in part, changing views based upon empirical observations on how surrogacy regulation has played out in practice in various locales.

So how to resolve Macklin's essential inquiry? Does parental surrogacy belong to the province of those issues that can be negotiated or those where differences are so fundamental that, at the end of all debate, moral impasse is inevitable? One possible way to answer this question is to work backwards: In other words, to ascertain whether there is *any* set of safeguards, guideposts and contexts that would make surrogacy palatable to the bulk of its critics. (One might also attempt the opposite approach, of course, seeking to determine whether there is any set of circumstances in which even its strongest advocates believe the practice should be prohibited—but finding such examples seems intuitively obvious and highly unfruitful as a line of inquiry because no one is reasonably considering permitting surrogacy in such contexts.) By doing so, one can establish that no insurmountable barrier exists conceptually between supporters and opponents of the practice. In contrast, finding such examples regarding disagreements over abortion or other intractable value disputes is generally not possible (barring highly contrived and far-fetched hypotheticals.[67]) Once at least one such plausible scenario is established, the path is open to negotiating the dividing line between permissible and impermissible. Or, to phrase the matter more colloquially, we have established that a bargain is possible, and now we are just haggling over the price. A critic might suggest that defining "surrogate parenthood" as a unified concept is problematic in this regard in that, for instance, such a palatable example might be demonstrable for one form of surrogacy (e.g. traditional surrogacy) but never for another (e.g. commercial surrogacy). That is indeed a fair concern. Yet such a granularization of debate, in extremis, would render public reason theory unworkable in nearly all contexts because eventually one will reduce any larger issue to a set of particulars upon which neither side can compromise without reference to building a broader consensus around the larger issue.

A number of scenarios likely exist in which surrogacy can meet the objections of its opponents. One will be enumerated here to advance the prior argument, but others are certainly possible: An infertile couple, X and Y, arrange a surrogacy agreement with Z, Y's sister, to gestate an embryo conceived in vitro from X's sperm and Y's egg. The transaction is non-commercial, except that X and Y, both of whom are wealthy, agree to cover any medical bills or other incidental costs that Z accrues as a result of the pregnancy. Since Z is also wealthy, this offer is simply a matter of courtesy, rather than an effort to address any meaningful economic risk or opportunity cost. Z is the parent of multiple children already, both boys and girls, so she understands the nature of pregnancy and childbirth. She also gave away a child years ago via a closed adoption and has no regrets, so she understands the sacrifice involved in turning over a child to another party—but she is happy that she did so because she did not want a child at that time, and she believes she has helped another couple achieve their goal of raising a wanted child and building a family. The proposed surrogacy agreement permits Z to terminate the pregnancy, if she so chooses, up until the point where doing so is not legal in the

jurisdiction. It imposes no other restrictions on Z's behavior or travel—but as she does not drink alcohol, smoke tobacco or engage in any high-risk endeavors, neither X nor Y is particularly concerned. Finally, the surrogacy arrangement is to be fully open, and the child will be informed at an appropriate age of both the arrangement and any relevant medical and genetic history. However, nobody except the contracting parties and their medical providers will be informed of the arrangement. Arguably, such an arrangement satisfies nearly all of the public-minded objections raised earlier regarding surrogacy. The risk for the exploitation of Z appears extremely low, given her economic status, knowledge of both pregnancy and child surrender, and absence of limitations on conduct during gestation. Any potential harms to the offspring have been minimized by the facts that the child will not be separated by the gestating party, will have full knowledge of its own lineage, and will understand the altruistic motives of Z. Finally, since the agreement will not be publicized, larger concerns regarding the impact of womb commodification upon gender equity or social perceptions of women are not implicated. The few objections to surrogacy not met by this admittedly contrived scenario are likely to fall beyond the realm of reasonable, public-oriented positions, grounded either in fanaticism, religious dogma or natural law.

Let us be clear: The above scenario does not establish that consensus can be built regarding all or even most cases of parental surrogacy. Rather, what it does demonstrate is that the practice falls into Macklin's second category, where the dispute is largely about regulatory details and contexts rather than the underlying acts. Once that fundamental has been established, that is where the democratic process and public reason can then take over: Supporters and opponents of varying forms of surrogacy can debate the particulars in the public forum and strive to determine a path toward an overlapping and uniformly supportable consensus. In the arena of bioethics, that is the most for which a supporter of Rawlsian theory and political liberalism can hope.

Conclusions

Parental surrogacy raises knotty and nuanced questions in both ethics and law, many of relatively recent origin. The prospect of building an across-the-board consensus on the underlying ethical issues is likely to remain elusive. Fortunately, doing so is not necessary; if we are to live in a pluralistic society defined by civil discourse and a rich marketplace of ideas, it is not even clear that such uniformity is desirable. Rather, a more modest and plausible goal is to develop agreement regarding policies on the subject of parental surrogacy that reasonable citizens can accept—even if they do not necessarily support them at a personal level in all particulars. An analogy might be drawn to divorce, a once highly contentious political issue in the United States: while many individuals and religions continue to oppose divorce on a personal or moral level, few, if any, advocate against its secular legality. That differs overtly from another contentious political issue, elective abortion, regarding which many individuals continue to believe that state regulation should mirror their own personal or moral beliefs. Public reason offers a framework for hoping that private citizens with distinct moral positions on parental surrogacy can find enough common ground to negotiate a political consensus regarding the degree and nature of regulation on the subject that all reasonable and rational citizens can accept. The distinctive nature of the political landscape on the issue holds out strong promise that such discourse will avoid the sort of blind partisanship that has come to dominate much of our public debate on other topics. For if public reason cannot carve a path forward on an issue ideally suited for its use, what hope is there of compromise on the many far more contentions, but theoretically resolvable, issues that continue to divide us?

Notes

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