

The normative importance of pregnancy challenges surrogacy contracts

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Introduction

A surrogate mother is a woman who agrees to become pregnant and then carry to term and give birth to a child for whom other, designated, individuals will serve as social parents. Sometimes the surrogate is also a genetic mother, but in other cases the child is genetically unrelated to the surrogate and genetically related to one or both of the intended social parents. Many jurisdictions presently allow individuals to enter commercial surrogacy contracts (such as India, Russia and some of United States), while others restrict surrogacy arrangements to so-called altruistic surrogacy – that is, cases when the surrogate carries a child for another person – usually a relative – out of non-economic interests. Yet other jurisdictions (such as Quebec in Canada) prohibit all surrogacy, or at least rule them as void. Further, there is the question of the enforceability of surrogacy contracts: some jurisdictions do not attempt to enforce surrogacy contracts, such that, if and when the surrogate mother changes her mind and decides to keep the baby she is legally free to do so. (Perhaps after repaying whatever fees she has already received from the couple who employed her and, possibly, various pregnancy-related costs that the couple has supported.)

Whether or not surrogacy contracts should exist at all and, if yes, whether they should be enforceable or not will obviously turn on many questions. So far, most of the literature on the normative status of surrogacy discussed whether surrogacy is intrinsically exploitative or otherwise harmful to the surrogate and whether existing surrogacy practices, in the real world, are in fact exploitative of, or otherwise harming, surrogates. But a different set of equally important questions bearing on the matter regard the way in which individuals acquire a moral right to rear a child, and whether, once they acquire this right, they can transfer it to other individuals at will¹.

1 In this paper I use “right”, unqualified, to refer to legal rights. I always make it explicit when I refer to moral rights – and most of the discussion here is about moral rights. I assume that the existence of a moral right to x ought to be an important basis for a legal right to x, but that the translation may not be always straightforward.

This article engages with the last group of questions in order to make a contribution to the debate concerning the legitimacy of surrogacy contracts and their enforceability. I argue that pregnancy is normatively relevant to the question of who should have the moral right to rear a particular child. At least unless other people are highly likely to make better parents for the child in question and are willing to parent her or him, a gestational mother acquires the moral right to parent in virtue of having gestated the child. Moreover, the reasons for holding the right are such that the right cannot be transferred on to other individuals. The moral right acquired by the gestational mother is, of course, defeasible. As I will explain, the moral right is nullified if the woman in question fails to make a sufficiently good parent to her child; and the right does not exist in the first place – at least not in virtue of pregnancy – in case there is no mutual attachment between the mother and the newborn¹. If surrogates acquire a moral right to rear the children they gestate in virtue of an attachment formed during gestation, then surrogacy contracts ought not to be enforceable because their enforcement would violate a moral right of the surrogate. And if part of what explains this moral right is the newborn's own attachment to her or his gestational mother, then the surrogate's moral right to parent cannot, in principle be transferred to a third party and therefore surrogacy contracts ought to be always seen as void.

Some surrogates do indeed refuse to relinquish the child they have gestated. When the couple who had hired the surrogate continues to desire to become the social parent of the child custody battles are likely to ensue, and different jurisdictions will rule differently on such cases. Sometimes the law is on the side of the surrogate in acknowledging her as the legal mother of the child (which in turn may or may not result in custody rights), but – again – in different jurisdictions the reason for granting custody to the surrogate may be very different.

In 1988, in one of the first surrogacy cases to be brought to court in the United States, the surrogate, Mary Beth Whitehead, was eventually acknowledged as the legal mother of baby she gestated (“Baby M”) after being hired by the couple William and Elizabeth Stern (Sanger 2007). Baby M was conceived by artificial insemination and William Stern was her genetic father. (Custody rights were ultimately granted to the father, William Stern, based on the principle of the best interest of the child.) Importantly, in this case

¹ There might be other cases when the gestational mother does not have, all things considered, the moral right to rear the child she gestated. I explore the possibility that the moral right to parent a particular child is held by the best available parent (and how this relates to being a gestational mother) in Gheaus (2015b).

Mary Beth Whitehead has been an egg donor as well as a gestational mother, and her genetic relatedness to the child is likely to have influenced the decision. Indeed, in some jurisdictions the most important criterion used to decide disputes over parental status is genetic relatedness¹.

In other cases, however, genetic relatedness need not play a role in the decision to grant parental rights to the surrogate. In a more recent UK case, a surrogate who gestated a baby for a couple, and who has changed her mind concerning the relinquishing of the child, gained custody in virtue of the attachment that has been created between gestational mother and her newborn during pregnancy. In the words of the judge who decided the case, Mr. Justice Baker: “there is a clear attachment between mother and daughter. To remove her from her mother's care would cause a measure of harm. The natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child.”² The surrogate's very inability – or, more likely, unwillingness – to give up the child is part and parcel of what makes the surrogate more likely (other things equal) to best serve the fulfilment of the child's emotional needs.

The reasoning of Justice Baker, I assume, is sound – and the following analysis of the normative importance of pregnancy is meant to unpack this belief.

How pregnancy is normatively importantly – a phenomenological approach³

There are two general features of the majority of pregnancies that support a moral right of would-be adequate mothers to keep and rear their birth babies. First, pregnancies involve a variety of costs – physical, psychological, social and financial. Most of these costs can only be shouldered by pregnant women and, to some extent, their supportive partner if they have any. Second, and related, during pregnancy many, perhaps most, expectant mothers form a poignantly embodied, but also emotional, intimate relationship with their foetus. The two features are related because this relationship is fostered by bearing mothers' willingness to take on the costs of pregnancy and from the actual experience of its burdens. A strictly physicalist approach will say that the attachment between the pregnant woman and the foetus she carries

1 For a philosophical analysis, and defence, of this see Richards (2010).

2 “CW v NT and another [2011] EWHC 33”, Family Law Week blog, 2011 archive. Available online at: <http://www.familylawweek.co.uk/site.aspx?i=ed79071> (Accessed on the 5th of April 2016.)

3 This section draws substantially on Gheaus (2012)

results from oxytocin, a substance considered responsible for bonding and which is secreted during pregnancy. Whether one takes the phenomenological approach or the physicalist approach to analyzing bonding during pregnancy might make a normative difference, but not in this context. A physicalist might argue, for example, that we could, and in some contexts should, use oxytocin to help foster the emotional relationship between non-birth parents and babies. But this would not affect the present argument, which says that, one way or another, pregnancy itself fosters this relationship and hence taking babies away from their birth parents is morally wrong.

The two features of pregnancy discussed here can – together with other conditions¹ – ground a moral right to keep one’s birth baby – right which is simultaneously grounded in the interest of the parent and in the interest of the child.

Work on the phenomenology of pregnancy is very helpful for understanding both the numerous costs that pregnancy involves and the mechanisms through which it helps create an incipient intimate relationship between the foetus and the pregnant mother and her partner, if the latter is sufficiently involved. In exploring these claims, I rely on work done by several feminists and I refer, in particular, to Amy Mullin’s book *Reconceiving Pregnancy and Childcare*.

The costs of pregnancy are varied: physical, emotional, social and financial. They consist in the actual pain of childbearing and childbirth, in pregnant women’s reduced autonomy, in the health risks women take in order to carry their babies, in the worries about the mother’s and the baby’s health and in the daunting risk of miscarriage².

The physical burdens of pregnancy have a significant effect on many pregnant women’s ability to carry on with life as usual: “Fatigue, high blood pressure, excessive water retention in one’s hands and feet, nausea and vomiting, an inability to carry heavy objects, and other common symptoms of pregnancy do involve suffering and affect a pregnant woman’s ability to carry out her daily tasks, whether in paid employment, domestic work, childcare or interactions with friends and family, regardless of how accommodating her environment may be.” (Mullin 2005, 64). Some of the most important burdens of pregnancy result from the extent and pace of change undergone by pregnant women. Mullin’s book gives a very vivid sense of the many physical changes

1 I believe, but cannot fully argue here, that these conditions have to do with the would-be-mother satisfying certain criteria for parental adequacy.

2 On the serious harms that a miscarriage can entail for the pregnant woman see Ann J. Cahill, Kathryn J. Norlock, and Byron J. Stoyles (eds.) (2015).

undergone by pregnant women: “in visual acuity, pigment of her skin, the onset of rashes, nausea, heartburn, raised blood pressure, increased congestion, difficulty catching her breath, swollen hands and feet” (Mullin, 2005, 39). Many of these are relatively minor, but together they can entail significant pain and disruption of one’s normal life. These changes are experienced by the vast majority of pregnant women, and often contribute to a distinctive sense of losing control over one’s life and diminished ability to pursue other projects and interests during pregnancy as well as during recovery from childbirth. As Mullin notes, “at no other time will an otherwise healthy adult undergo such widespread, rapid and undesired change in the shape and size of her body, in the way she moves, eats and sleeps.” (Mullin, 2005, 67).

Many pregnant women also pay behavioural costs in the limitation of what they can eat and drink, the recreational drugs they can take and the sports and other physical activities which they can pursue. There are social costs to pay, such as patronising and uninvited familiarity: pregnant women are often “told that nothing they can do could be more important than their job of bringing a child to life.” (Mullin, 2005, 40). Generally, pregnancy alters the expecting parents’ relationships with their immediate family, friends, co-workers and, when the pregnancy is visible, even with strangers, in uncontrollable ways. Arguably, not *all* these changes count as costs, since in some cases pregnant women develop or strengthen welcomed relationships, based, for instance, on complicity, with other parents. But many of the changes are undesirable and, importantly for the present argument, many of the desirable changes are based on the assumption that the pregnant women/parents will carry on parenting their birth baby. Moreover, the costs of pregnancy would actually be *higher* if bearing mothers did not know whether they will be legally entitled to keep their birth baby. A frequent consolation given to pregnant women is that becoming a parent “is worth all the trouble and pain”.

Finally, gestational mothers have to shoulder specific emotional burdens such as fear of miscarriage and the anxiety of deciding whether to continue a pregnancy with significant health risks. A pregnant woman “needs to come to terms with her welcoming of a creature who is already transforming her body, her social interactions, and her habits, who will always radically transform her life and about whom she knows virtually nothing.” (Mullin, 2005, 43). While they cannot share all these costs, involved partners typically can and do share many of them. They often are the main source of emotional,

practical and financial support of their pregnant partner: they can accompany her to medical visits and support her during childbirth, share and try to soothe her worries, relieve her of some of her regular work and serve as an often needed interface between her and the insufficiently accommodating outer world.

Some, but not all the costs of pregnancy can be socially prevented or mitigated – I elaborate on this point in what follows. Pregnancy often involves specific benefits as well as costs. The benefits and joys of pregnancy however do not cancel out the costs, and do not turn pregnancy into an intrinsically desirable experience. Certain benefits of pregnancy, such as the increased attention and care that pregnant women often receive, are meant to alleviate its costs: if pregnancy did not involve specific costs, the benefits would not exist either (in this respect as well, pregnancy is similar to illness and disability). Other benefits of pregnancy, such as the joyous anticipation of the baby, are only valuable given the assumption that one carries a baby one will keep and raise. Importantly, the most salient positive aspects of pregnancy are conditional on expecting that, at the end of one's pregnancy, one will become a parent. If, contrary to the claims I advance in this section, pregnancy turned out to be intrinsically valuable, or if the benefits of pregnancy outweighed its burdens without being parasitic on an expectation that birth mothers will have the moral right to keep their babies, then one pillar of my argument for a moral right to raise the baby one has gestated would disappear.

Certain experiences of pregnancy, such as fragmented sleep and disrupted life patterns, may, precisely due to their hardship, prepare bearing parents to better care for their babies. Some authors think that pregnancy helps prepare mothers – and, when they are closely involved with pregnancy, their partners – to be ready for the major changes brought about by childrearing (Levesque-Lopman, 1983, 256). If this is correct, it means that, other things equal, birth mothers are better prepared to take care of a baby and so that there is a child interest in being raised by somebody who is also a birth mother. The burdens of pregnancy then generate a child-based reason for allocating the moral right to parent particular babies, alongside with a parental interest in raising one's gestated child.

There is a certain similarity between justifying a moral right to parent by appeal to the costs of pregnancy and the libertarian – or proprietary – argument according to which parents have some kind of ownership over children because children result from their parents' labour (Narveson 2002). By contrast, I do not argue that the costs of

pregnancy, including the efforts it requires, entail anything as strong as ownership rights.

The argument from the costs of pregnancy could provide *some* justification for a moral right to keep and raise the baby one has gestated, but it may perhaps be overridden by other reasons – such as considerations of race or gender fairness¹. Appeal to the costs of pregnancy *alone* cannot exclude legitimate baby shuffling between all bearing parents: the burdens of pregnancy entitle potentially adequate parents, who just gave birth, to parent a baby, but not necessarily the baby they gave birth to. Similarly, it is important to note that an argument appealing to the costs of the pregnancy alone, if that worked, would ground a moral right to rear that would be easily transferable on to third parties, thereby lending legitimacy to surrogacy contracts. If gestational mothers acquired the moral right to rear their birth baby merely in virtue of the costs of the pregnancy – thanks, perhaps, to the labour they put in the process – there would be no obvious reason against an entitlement to sell this right to another person.

A second feature of pregnancy, the fact that it facilitates the creation of an intimate relationship between the bearing mother and the future baby, does the main theoretical work. The two features of pregnancy – its significant costs, and its ability to provide a context for forging an intimate relationship with the future baby – are closely related. Because children come into existence through gestation, pregnant women and, sometimes, their supporting partners have to invest a significant amount of resources into having birth children; this is an often conscious, intentional process, akin to other projects in which people engage: it contains much anticipation and planning, thinking and hoping, imagination and projection. Granted, in the case of surrogate mothers some of these psychological processes may be absent: if the gestational mother does not expect to rear the child she may specifically try *not* to engage in any anticipation and planning, thinking and hoping. It is however not clear that it is possible to avoid any such engagement; surrogates, too, may undergo – albeit involuntarily, and possibly unconsciously – some anticipation, hoping and projection.

Through their bodily connection with the baby and their various psychological investments, pregnant women normally build a relationship with their future baby, relationship which is sometimes highly emotional and already quite developed at birth.

1 Because the question of who has the moral right to parent a particular child has to be an answer to an all-things-considered question. For the case in favour of the baby lottery see Gheaus (2012) and Earl (2015), work in progress.

Bearing mother and their newborns already share a common history including numerous embodied common experiences (“you kicked me on the 1st of March”, “you made me worry”, “you made me cry with happiness”). The fact that the body plays such a central part in pregnancy, makes pregnancy a uniquely privileged context for developing a bond that is at the same time physical and imaginative with the future child. Caroline Whitbeck has gone as far as to argue that people’s affection towards their own children, often explained by reference to a maternal/parental “instinct”, is actually rooted in bodily experiences: “parental affection or attachment is influenced by experience, and this experience is not confined to socialization experience but includes, in a large measure, bodily experiences that are the same cross-culturally; i.e. all women have special bodily experiences that are likely to enhance those feelings, attitudes and fantasies, which induce people to generally care for their infants.” (Whitbeck, 1984, 191). These experiences include pregnancy, labour, childbirth and post-partum recovery, which are unique to the bearing mother. Whitbeck concludes that, although the maternal ‘instinct’ is itself a myth, biology – though embodied experience – plays a very important role in creating a bond between newborns and their mothers. This argument might be soon verifiable, when enough people will be around whose bearing mothers are different from their genetic mothers. If true, then biology turns out to play an important role in parent-children relationships thanks to the biological processes of parenthood, independent of genetic connections.

Like in the case of paying the costs of pregnancy, pregnant women’s supporting partners are capable of being direct participants in the process of creating a relationship with the baby during pregnancy. With the help of medical technology they can see the foetus and hear its heartbeat as early as the bearing mother; during the last stages of pregnancy they can feel the baby, talk to it and be heard by it. Just like the mother, they can experience the fears, hopes and fantasies triggered by the growing foetus.

The phenomenology of pregnancy does not show that *all* pregnancies generate intimate relationships between bearing mothers and their newborns. It only shows that pregnancy can, and it is likely to, lead to bonding; the likelihood is very significant, since bonding can happen even if the pregnant woman knows she will not be permitted to keep the baby, as we know from cases of surrogate mothers who developed a strong attachment to their unborn, and then newborn, baby. Bonding during pregnancy provides a very solid reason why allocating babies to different social parents would

likely destroy already existing intimate relationships between newborns and their bearing parents.

The fact that the relationship with one's future child starts during pregnancy provides the missing step in the justification that some philosophers provided in favour of a moral right to keep and raise the baby one has gestated. The same fact of attachment created in the context of pregnancy provides an answer to the more general question of how to determine the moral right to parent a particular baby. (The answer is general, but not universal: in some cases the gestational mother will have died at birth, or be unwilling to exercise her moral right to rear the child she has given birth to. In these cases considerations other than an existing attachment will determine who has the moral right to rear the child.) Some philosophers who think that all adults who would make adequate parents have a moral right to become social parents – most importantly, Ferdinand Shoeman (1980) and Harry Brighouse and Adam Swift (2006; 2014) – have argued that it is impermissible to disrupt already established intimate relationships between parents and children. The reasons for this have to do both with parents' and with children's welfare. But no reason was provided why such relationships are permitted to develop in the first place – especially if other individuals may be willing to serve as the social parents of the child in case. My account of the normative value of pregnancy fills this gap: If the same process which brings babies into the world is also generating their first intimate relationships adults, relationships between birth parents and their babies need no justification: they are already there from the beginning.

It is important, to this analysis, to add the perspective of the baby, who also usually bonds with its mother whose voice, heartbeat etc., can recognise during the last phase of gestation (DeCasper and Fifer 1980; Beauchemin et al. 2011)¹. That the newborn, too, is usually attached to the gestational mother – as far as we can tell, and as far a newborn can be said to be attached – provides an additional, and child-centred justification, for the moral right to parent the baby one has gestated.

In conclusion, the particular way in which we come into existence is essential for determining who has the moral right to rear us. If we all came into the world in laboratories, created by scientists, there would be little reason for granting a right to rear us to the people who provided the genetic material². Indeed, elsewhere I argued

1 I am grateful to Jake Earl for bringing these articles to my attention.

2 I argue for this at length in Gheaus (2015a).

that there are reasons of fairness for redistributing babies between all potential adequate parents and, in certain social contexts a “baby shuffling” would help tackle historical, and deeply entrenched associations between race or gender and advantage (Gheaus 2012).

To answer this challenge, I offered an account of how people acquire the right to parent a particular baby. One element of such an account is provided by the existence of a moral right to keep and rear the baby that one has gestated. If, at the moment of birth, adequate gestational mothers (and sometimes their involved partners) have already paid significant costs for becoming parents, and, partly in virtue of this process, have developed an incipient intimate relationship with the baby, then they are more entitled than other, equally good, prospective parents to parent the baby they have borne. This difference between adequate gestational mothers and other adequate prospective parents can provide the necessary justification for translating a fundamental moral right to be a parent in general (as defended by Shoeman, Brighouse and Swift) into a moral right of gestational mothers to parent their birth baby.

Conclusions

How exactly can adults acquire a moral right to parent a particular child is a very controversial question, which this short article did not attempt to settle¹. The available options include appeal to the interests of the child, appeal to the interests of the adults who wish to become social parents and appeal to both sets of interests. Here I argued that the facts of pregnancy – that is, its inherent costs and the high likelihood that pregnancy is a context where the gestational mother and her foetus are forming a mutual attachment – indicate that gestational mothers are very likely to hold a *pro tanto* moral right to parent their newborns on a variety of accounts of how one acquires the moral right to parent. (A notable exception is the account according to which it is one's contribution of genetic material that justifies the holding of the moral right to parent. This is a very influential account – both in popular morality and in legal practice – yet, I think, also very implausible².)

Certainly, gestational mothers do not always have the moral right to parent their birth child, because pregnancy does not in itself confer the right: rather, the right is held

1 For a helpful discussion on this see Swift and Brighouse (2014).

2 As I argue for this at length in Gheaus (2015a)

by gestational mothers in virtue of the attachment they usually form with the baby, and this attachment does not always exist. Moreover, other circumstances may defeat the moral right – as in cases when, for example, the gestational mother would not make a sufficiently good parent.

But law is, necessarily, a blunt instrument that cannot take into account all the normatively relevant features of every case it covers. If a gestational mother's right is not usually defeated, then surrogacy contracts ought not to be enforced against the gestational mother's wish to parent the child herself (unless special circumstances, like those mentioned above, apply.) Moreover, since the right is held in virtue of an attachment that is mutual, and because this attachment serves the interest of the newborn, the right cannot be transferred at will to other people who would wish to function as social parents of the child in question. This indicates that surrogacy contracts are illegitimate, and therefore void.

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