

# Ethical and legal dilemmas of surrogacy

[Sociology](#), [Human Rights](#)



Many individuals have a life plan consisting of college, marriage, and then children. After numerous methods of conception, many couples are still unable to conceive a child. A woman who enters into a contract with a couple, agreeing to carry and birth a child, then hand that child over to the contracted couple, who is often unable to conceive own their own naturally is considered surrogacy (Pozgar, 2012). Surrogacy raises many ethical and legal issues for all parties involved. Is it moral or immoral to enter into an agreement with a woman to birth a child formoney?

What are the legal rights of the woman conceiving or of the couple? Should the child be aware of the process in which he or she was born? Does the child have rights to access the confidential records of the process? These are a just a few questions that will be addressed throughout this paper.

Discussed below is the history of surrogacy, the ethical and legal dilemmas that surround surrogacy, alternative solutions to surrogacy, and the potential effects and future implications of how surrogacy may be addressed. There are two types of surrogacy arrangements to consider. These types of surrogacy are genetic and gestational.

Genetic or traditional surrogacy is where the surrogate mother contributes her genetic makeup to the offspring, whereas gestational surrogacy consists of the genetic makeup of the intended parents (Greene, 2013). Of the two, gestational surrogacy accounts for 95% of the surrogate pregnancies in the United States of America (Covington & Patrizio, 2013, p. 277). One of the first accounts of surrogacy dates back to the story of Abraham and Sarah in the Bible. Sarah, who was well beyond child-bearing years and having being barren of child-bearing years sought to have a child.

Abraham had intercourse with Hagar, a handmaid and gave birth to Ishmael, which she then gave to Abraham and Sarah to raise (King James Bible, Genesis 25: 12). While surrogacy continued throughout history, it became more prevalent in the last half century or so. Altruistic surrogacy is when a friend or family member is the surrogate without being paid; however, the most common is commercial recruitment of women who are paid to be a surrogate (Covington & Patrizio, 2013, p. 277). Noel Keane was a broker who made the first commercial surrogacy agreement in the case of Baby M (Cassidy, 2012).

The details of this first legal case began raising ethical dilemmas with surrogacy. The application of autonomy and distributive justice are at work with surrogacy. Autonomy is the acknowledgment of a person's right to make their own decisions and distributive justice is equal and fair treatment to all (Pozgar, 2012). Principle number four in The Medical Code of Ethics states requires respect for the patient's right (American Medical Association, 2001). In surrogacy issues, whose rights should be placed first? The surrogate who is carrying the child?

Should the emotional ties that she can accumulate over the course of ten months be placed first or the rights of the adopting parents? Is there a possible outcome for justice to be distributed among all the parties involved? In attempting to define ethical decisions, Jones writes that " An ethical decision is a decision that is both legally and morally acceptable to the larger community. (Jones, 1991, p. 387)". Thus, Jones explains that decisions such as surrogacy are often resolved using the perspective of a utilitarian.

Utilitarianism is considered a moral theory in which individuals and governmental action should be directed at providing the greatest good for the greatest number of people (Mosser, 2010). One question remains: Can an action be placed on the issue that provides good to all? An ethical dilemma placed with surrogacy is dehumanization and exploitation. For people who oppose surrogacy as means of conception, it is viewed that women who are living in poverty are exploiting their bodies to profit (in cases of gestational surrogacy) financially (Surrogacy, 2008).

On the flipside on the issue, can it not also be viewed that allowing these women to do as they see fit with their bodies as economic empowerment? The money provided to these women can be used for various financial means outside of taking care of medical health care for themselves and the child. The amount provided to each female varies depending on what she and the couple feel is sufficient, therefore any extra monetary compensation can be used to help the women relieve themselves from other debts.

Autonomy does provide the right that women get to choose their reproductive rights and that includes bearing children for those who cannot do so or for monetary stability. Suggesting that surrogacy dehumanizes her is another form of paternalism. Paternalism limits one's autonomy for their own good (Pozgar, 2012). Some view altruistic surrogacy as a form of exploiting the surrogate. There is no monetary compensation to women placing her health and well-being on the line for another's benefit. However, it can also be held that the woman knowingly entered into the agreement with full disclosure of the risks and benefits to her health and body.

Again, autonomy and justice are extremely prevalent ethical principles to explore when discussing the topic of surrogacy. Same-sex marriage has become a hot topic in the United States in the last few years. The idea of raising a family by homosexual couples brings about other ethical issues of surrogacy. Should those of same-sex marriages be allowed to have children? How will their relationship affect the child of the couple? A recent article in the American Bar Association's (ABA) journal tells of a same-sex couple whose case is similar to that of the Baby M case (Hansen, 2011).

The United States, unlike many other countries have no policies governing surrogacy, as it is a state-by-state policy (Hansen, 2011). In places such as India, commercial surrogacy is legal and often seen as a popular place of fertility tourism because the costs are one third of that in the United States (Saxena, Mishra, & Malik, 2012). In some cases, children have been placed in orphanages until paternity has been established or in some instances disowned when a child is conceived naturally by the parents, as with Ishmael from the Bible.

Women of poor and illiterate backgrounds stricken by poverty are sometimes coerced by intermediaries or spouses to become surrogates. In such cases, fidelity among the couple has been cast aside. The women may feel that they cannot trust their spouse to stand by them if they do not comply with their wishes. Unlike the United States where psychological screening and legal counseling is mandatory to be surrogates, in India women are placed in hostels for the duration of their pregnancy by recruitment commercial agencies (Saxena, Mishra, & Malik, 2012).

Back to the case of Baby M and the same sex couples, who after waiting for their bundle of joy begin having legal issues. It is important to know that the surrogate has the legal right to keep the child she has bore, regardless of genetics (Human Fertilisation & Embryology Authority, 2009). In other words, the birth mother is considered the legal parental unit of the child until such documentation states otherwise. She has the right at anytime to change her mind, therefore it is important to have knowledge and fidelity with your surrogate. Understanding the meaning of how the Surrogacy Arrangements Act 1985 reads is important.

If you are having problems comprehending or deciphering parts of the act, speak with a lawyer. It reads, " an Act to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers," (Surrogacy Arrangements Act 1985). As far as legal rights of the father, if the woman did so in a licensed clinic and has no partner, the child will have no legal father; however, the surrogate's husband or civil partner is the child's legal father, unless it is shown that the partner did not consent to the procedure (Human Fertilisation & Embryology Authority, 2009).

The intended parents have a course to follow concerning rights as well. If they wish to become the legal parents of the child, they can adopt or file for a paternal order. Provided certain conditions are met, the rights and parentage are transferred with the order, this must be done within six months of the child's birth and at least one individual of the commissioning

couple needs a genetic link for a paternal order (Human Fertilisation & Embryology Authority, 2009).

If there is no genetic relationship with the child in question, adoption is the only legal route. In this case, an adoption agency will get involved, so it is important to know the legal aspects of surrogacy. An article in the British Medical Journal argues that the only way to resolve such issues of legality is through legislations and regulations of international laws (Ramskold & Posner, 2012).

The ethical responsibilities for physicians of surrogates can be seen as: advising couples who are considering surrogacy, counseling women who may wish to become surrogates, providing obstetrics to women engaged in surrogacy, or offering assisted reproductive technologies (ART) related to surrogacy (Committee on Ethics, 2008). Physicians should not treat the intended parents of a surrogate child while also treating the surrogate mother, as conflicts may arise and not all parties may be treated fairly and the physician should.

As in all other aspects of medical care, physicians should be certain that there would be a full discussion of ethical and legal issues as well as medical risks, benefits, and alternatives, many of which have been addressed in this statement (Committee on Ethics, 2008). Physicians may decline to participate in surrogacy arrangement, as with any other treatment of a patient because of personal, ethical, medical, or religious views as per the AMA Code of Medical Ethics (AMA, 2001).

A physician should apply the same legal and ethical aspects to the surrogate as with the intended couple. This includes screening and counseling the surrogate and intended couple; referral for mental health testing for the surrogate to evaluate the possible outcomes and effects, as well as evaluate psychological risks, vulnerabilities and benefits, and the possible effects of existing relationships with existing children (Committee on Ethics, 2008). It is important that confidentiality be maintained between the physician and the patient.

The intended parents may only access the pregnant woman's medical records if the woman has given explicit consent. This is guaranteed in the Patient's Bill of Rights and the Constitution (Right to privacy, n. d. ). This would also address whether or not the child would have any legal right to know his or her birth mother without her consent. Two alternatives to surrogacy are natural conception and adoption. When a couple conceives naturally, there is no need for a surrogate. This can be done through sexual intercourse or through in-vitro fertilization.

In-vitro fertilization (IVF) is a medical procedure in which mature eggs are obtained from the female's ovaries and are fertilized by the male's sperm, then the eggs are implanted into the uterus (Mayo Clinic Staff, 2013). This option is usually applied due to infertility. Adoption, as an alternative to surrogacy can also be very beneficial to involved parties. Children without parents, due to unforeseen circumstances are provided homes with caring, loving families. A couple adopting may not have genetic links to these



children, but loving relationships can emerge and often treat the child as their own.

In my personal opinion, I think surrogacy will continue to increase the numbers of childless couples. In such cases where altruism is applied, I think the emotional ties are easier severed because the woman is volunteering her services to a couple she sees in need. I speak of this from somewhat of a personal viewpoint. I have two healthy children and am currently pregnant with my third with no complications during either pregnancy; however, my sister has been trying to conceive naturally for almost 4 years now and has had no luck.

I would gladly consider being a surrogate for her should she ever ask. I know from her interactions with my own kids that she would be a great mother to a child. I do not know her medical history or what medical advice she has sought regarding her problem, but I know that I could help a family member in need and not want monetary compensation for doing so. However, I will acknowledge that this is not the best road for all women. The emotional involvement may make it hard to part with the child after carrying it for nine months.

I would only recommend this to a woman who has decided that she no longer wants to have children or does not wish to raise any more children of her own. I also see gestational surrogacy still being the most common between the two types of surrogacy because of the emotional detachment. I think that some people feel that not having a genetic link to a child makes it easier to part with after birth. I feel that some women need to be able to look at

their child and see similarities in physical features to know that they are part of a child. Gestational surrogacy requires no genetics from the surrogate, only from the intended parents.

Considering both types of surrogacy and the current state of how the legal issues around the topic are addressed, I think improvements need to be made. From research, the surrogate has more legal rights than anyone. This provides a very limited window for the intended couple who has long awaited a child. Legislations need to be enacted that provide more rights to intended parents of the child, especially during a gestational surrogacy. I do not think that it should be legal and find it unethical that a surrogate still has legal rights to a child with no genetic link.

I find hope in the future that additional regulations in how surrogacy is handled will be sought. While surrogacy has been around since Biblical times, it has made a splash as headline news in the last half century. The legal and ethical dilemmas surrounding the topic derive from the rights of the surrogate, the intended couple, and for the children that are involved with the procedure and process. The alternatives to surrogacy do not necessarily provide additional benefits and in some instances, do not always apply to those wishing to have a child.

While no one can predict the future, surrogacy in my opinion, will continue to flourish among couples; not just infertile couples or same-sex couples, but among women who do not wish to go through the process of labor and delivery. Women who live in poverty may continue to see the benefits of surrogacy for economic gain for themselves and their families. There are so

many ethical elements at play with surrogacy that the issue will remain to have legal and ethical complications, now and in the future.