1989

The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood

Richard A. Posner

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My topic is surrogate motherhood, and specifically the issue—the central issue in the controversy over surrogacy—whether contracts of surrogate motherhood, that is contracts whereby a woman agrees, in exchange for money, to become impregnated through artificial insemination and to give up the newly born child to the father, should be legally enforceable, whether by damages or specific performance. I shall not consider whether such contracts *are* enforceable under existing law, nor the intricate legal questions that such contracts even when enforceable could be expected to raise,[1] but whether they *should* be enforceable. To this question of policy, issues of economics and ethics are central, and are the focus of this paper.

My interest in the question stems from a long-standing interest in the law and economics of the family and adoption, an interest that has resulted in false charges that I advocate "baby-selling."[2] For any readers who may wonder at the sources of that interest, let me make clear that it is purely professional. I am not an adopted child, my children are not adopted, I have never tried to adopt a child, no one in my family has ever been involved in adoption, surrogacy, *in vitro* fertilization, or any other atypical familial arrangements. My interest in surrogate motherhood is at least a disinterested one.

The question of the enforceability of contracts of surrogate motherhood became front-page news with the *Baby M* case, to which I shall return. The case and the controversy it aroused are a byproduct of the increasing fre-

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This article is the lightly revised text of the Brendan Brown Lecture delivered at The Catholic University of America, The Columbus School of Law, on November 17, 1988. I realize that the term "surrogate motherhood" might be thought to belittle the surrogate mother, who is, after all, the biological mother-not just a stand-in or incubator. But I shall stick with what has become the accepted term.

1. *See, e.g.*, Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW. ENG. L. REV. 639, 652-64 (1983).

2. *See* Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59 nn. 1-2 (1987).

quency of contracts of surrogate motherhood. Although statistics are hard to come by, it appears that by the end of 1986 at least 500 surrogate contracts had been made;[3] the number may be much greater today, despite efforts in a number of states to make such contracts unenforceable, and the resulting uncertainty that surrounds the practice of surrogate motherhood.

I conjecture that three factors are key in explaining the growing popularity of the practice. The first is scientific advances in the field of reproduction, which make infertile couples less prone to resign themselves to their infertility. The second (and I think related) factor is the decline in conventional attitudes toward sex and the family. The third, and perhaps most important factor is the acute shortage of babies for adoption. (I mean of healthy, white infants—there is no shortage of black, or handicapped, or older children for adoption, but this is because there is, unfortunately, very little demand for such children.) The extent, character, and causes of the shortage of babies for adoption are the subject of my writings on the gray and black markets in adoption, in other words, on "baby-selling", a practice that, contrary to the impression fostered by the media and others, I have not advocated but have merely tried to explain.[4] The irony is that those who attack surrogate motherhood out of a general hostility to free markets do not realize that surrogate motherhood is itself a product, in part, of the interference with a market—the market in adoption. Yet even if there were no shortage of babies for adoption, there would be a demand for surrogate motherhood. People (a biologist would say their genes) desire genetic continuity, and surrogacy enables the man (although not his wife) to satisfy this desire.

The case for allowing people to make legally enforceable contracts of surrogate motherhood is straightforward. Such contracts would not be made unless the parties to them believed that surrogacy would be mutually beneficial. Suppose the contract requires the father and his wife to pay the surrogate mother $10,000 (apparently this is the most common price in contracts of surrogate motherhood[5]). The father and wife must believe that they will derive a benefit from having the baby that is greater than $10,000, or else they would not sign the contract. The surrogate must believe that she will derive a benefit from the $10,000 (more precisely, from what she will use the money for) that is greater than the cost to her of being pregnant and giving birth and then surrendering the baby. So *ex ante*, as an economist would say

3. *See* M. FIELD, SURROGATE MOTHERHOOD 5 (1988).

4. *See* Posner, *supra* note 2; Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); R. POSNER, ECONOMIC ANALYSIS OF LAW § 5.4 at 139-43 (3d ed. 1986).

5. *See* Field, *supra* note 3, at 25-26.

(*i.e.*, before the fact), all the parties to the contract are made better off. The mutual benefits, moreover, depend critically on the contract's being enforceable. If it is unenforceable, the father and his wife will have no assurance that they will actually obtain a baby as a result of the contract even if the surrogate becomes pregnant. For if the surrogate, having become pregnant and given birth, changes her mind about giving up the baby, the father and wife will have lost almost a year in their quest for a baby (the period necessary for the surrogate to become pregnant plus the period of gestation); they will also be intensely disappointed. Because surrogacy is so much less attractive to the father and wife when it is not enforceable, they will not be willing to pay nearly as much as they would if it were enforceable—so the surrogate is hurt. After all, the surrogate always has the option of offering to accept a lower price in return for retaining the right to keep the baby if she wants. If she surrenders that right in exchange for a higher price, it is, at least presumptively, because she prefers the extra money to the extra freedom of choice. Her preference is thwarted if the contract is unenforceable.

There are various objections to this simple economic analysis. The one that fits the framework of economic theory most comfortably is that the analysis fails to consider that a contract of surrogate motherhood has effects on nonparties, in particular on the baby that the surrogate gives birth to. The presence of an affected but nonconsenting third party makes it difficult to say that the transaction is Pareto superior (*i.e.*, that at least one person is made better off by the transaction and no one is made worse off)—the strongest normative concept of efficiency. In fact, however, it is very likely that the baby is made better off by the contract of surrogate motherhood, and certainly not worse off. For without the contract the baby probably wouldn't be born at all. With the contract, he (or she) becomes a member of a family consisting of the biological father and his wife. The baby's position is much like that of a baby whose mother dies during the baby's infancy and whose father then remarries. If there is any evidence that such babies, when they become adults, decide they'd rather not have been born, I am not aware of it. The surrogate baby's position is also much like that of a baby whose mother was inseminated artificially with the sperm of a man other than her husband, because he was infertile. Do such babies grow up to be miserable? So miserable that they derive a net disutility from life—would rather never have been born? Again, I am not aware of any evidence they do, and it seems unlikely that they do. Although there is some evidence that adopted children are occasionally maladjusted, the best evidence seems to be that, on average, adopted children are no more unhappy or unstable than natural

children.[6] And the child of a surrogate mother is only half-adopted. He is the natural son of his father, and, in effect, the adopted son of his mother (that is, the father's wife).

The remaining possibility is that knowledge that surrogate mothers are paid will blight the child's life. The child will know that his natural mother gave him up for money. But this knowledge will surely be less wrenching than knowledge that one's mother had *sold* one (as in baby selling). For the mother had agreed from the outset to bear the child for the father and the father's wife. Are children conceived after artificial insemination with sperm obtained from a sperm donor devastated to learn that their parents had *bought* the sperm? Are children embarrassed or distressed to discover that they are the product of *in vitro* fertilization which may have cost their parents thousands of dollars? The world is changing, and practices that seem weird and unnatural to members of the current adult generation will seem much less so, I predict, to the next generation.

A subtler third-party effect of surrogacy is on those unfortunate children who are available for adoption but whom very few people want to adopt. If surrogacy were unavailable, the comfortable white middle-class couple that turns to surrogacy because there are so few healthy white infants available for adoption might turn back to the adoption market and adopt a black or handicapped or older child. This is not likely to happen very often; an alternative of course is that the husband will abandon his wife for a woman who is fertile. Even if forbidding the enforcement of surrogacy contracts would drive a few couples into the market for adopting unwanted children (and no doubt it would), one could well question the appropriateness of placing what amounts to a heavy tax on the infertile to correct a social problem—that of unwanted children—that is emphatically not of their creation. Are the *infertile* to be blamed for a glut of unwanted children? If not, should they be taxed disproportionately in order to alleviate the glut?

The most frequent argument one hears against contracts of surrogate motherhood is that they are not truly voluntary, because the surrogate mother doesn't know what she is getting into and would not sign such a contract unless she was desperate. The first point has a more secure foundation in economics than the second. Information costs provide a traditional reason for doubting whether a particular contract is actually value-maximizing *ex ante*. If women who agree to make surrogate contracts don't know how distressed they will be when it comes time to surrender the baby, then the contracts may not result in a net increase in welfare. To put this differ-

6. *See, e.g.*, Andrews, *Surrogate Motherhood: The Challenge For Feminists*, 16 LAW, MED. & HEALTH CARE 72, 77 (1988).

ently, the tendency in economics to evaluate welfare on an *ex ante* rather than *ex post* basis depends on an assumption that expectations are not systematically biased. Contracts cannot be depended on to maximize welfare if parties signing them don't know what they're committing themselves to.

However, there is no persuasive evidence or convincing reason to believe that, on average, women who agree to become surrogate mothers underestimate the distress they will feel at having to give up the baby. Granted, Mrs. Whitehead, the surrogate mother in the *Baby M* case, underestimated that distress. But we must be wary of generalizing from a single case. There is no indication that Mrs. Whitehead's experience is typical of surrogate mothers. Hundreds of babies have been born to surrogate mothers, and since very few of these arrangements have been drawn into litigation one's guess is that most surrogate mothers do *not* balk when it comes time to surrender the baby. Newspaper and magazine interviews with surrogate mothers confirm this impression. Oblique but important corroborative evidence is that most surrogate mothers already have children and that few are under 20 years of age.[7] A mature woman who has borne children should be able to estimate the psychic cost to her of giving up her next baby. Finally, the enormous publicity that the *Baby M* case has received should provide additional warning of the perils of surrogacy, if any is needed, to women contemplating it.

Are these *desperate* women—women who value $10,000 more than a baby only because society has failed to spread a safety net under them? Even if they were, this might not justify a ban on the enforcement of surrogate contracts. To someone who is desperately in need of $10,000, a court's refusal to allow her to obtain it will seem a hypocritical token of concern for her plight, especially since the court has no power to alleviate that plight in some other way. At all events, there is no evidence that surrogate mothers are drawn from the ranks of the desperately poor, and it seems unlikely they would be. Mrs. Whitehead was not poor. A couple would be unlikely to want the baby of a *desperately* poor woman; they would be concerned about her health, and therefore the baby's. Interviews with surrogate mothers indicate not only that they are not poor, but that they have made a careful tradeoff between the use they can make of $10,000 (or whatever the contract price is) and the costs (including regret) of bearing a child for another couple.[8] When asked what they plan to do with the $10,000, they give standard middle-class answers (home improvement, a new car, a better educa-

7. *See* Field, *supra* note 3, at 6.

8. *See, e.g.*, Chapman, *Surrogacy Successes Make New Laws All the More Ill-Advised*, Chi. Trib., July 31, 1988 at 3, col. 1.

tion for their children). For many surrogate mothers, moreover, regret at giving up the child is balanced by empathy for the father's infertile wife. This is particularly likely where the surrogate mother has already had children—but that is, as I have noted, usually the case with surrogate arrangements.

There is, in short, no persuasive evidence that contracts of surrogate motherhood are less likely to maximize value than the classes of contracts that the law routinely enforces. However, other arguments are also made against the enforcement of surrogacy contracts. One is that such enforcement is inequitable because only middle-class couples can afford the price of a surrogate contract and because invariably the surrogate mother comes from a lower income class than the father and his wife. But society does not forbid contracts for luxury goods or contracts that involve the purchase of services from persons lower on the income ladder. Only wealthy people employ butlers, and butlers are invariably less well off than their employers. Nevertheless employment contracts with butlers are enforceable. Moreover, while probably no truly poor person could afford the price of a surrogate contract, it is hardly the case that only wealthy people can pay $10,000 for a good or service. Most Americans can afford a new car, and most new cars cost more than $10,000. In any event, unless envy is very intense and widespread, it is very difficult to see how people who can't afford to pay for surrogate arrangements are helped by a law that forbids those who can afford to pay to enter into enforceable contracts of surrogacy.

Next it is argued—and not only by Marxists as one might have expected—that to enforce surrogacy contracts is to endorse the "commodification" of motherhood. It is true that our society does not permit every good or service to be bought and sold, even where there are no palpable or demonstrable third-party effects. People are not permitted to make contracts of self-enslavement, to enter into suicide pacts, to agree to enter gladiatorial contests (or even to box without gloves), or to sign loan agreements enforceable by breaking the borrower's knees in the event of default. And some forms of "commodification" that are permitted, such as the sale of blood to blood banks, are heavily criticized. Apart from objections, based on a variety of grounds unrelated to surrogate motherhood, to specific forms of "commodification," there is a widespread aversion, particularly but not only among intellectuals, to placing all relations and interactions in society on a strictly pecuniary basis. It is feared that pervasive reliance on the "cash nexus" would extinguish altruism and foster anomie, anxious privatism, and other alleged ills of a capitalist system.

I am skeptical. People are what they are, and what they are is the result of

millions of years of evolution rather than of such minor cultural details as the precise scope of the market principle in a particular society. I don't think we would be more selfish than we are if the market sector in this country were larger than it is, or less selfish if it were smaller. People in countries that have less "commodification" than we—countries ranging from Sweden to Ethiopia—do not appear to be less selfish than Americans. Anyway, allowing the enforcement of contracts of surrogate motherhood isn't going to have any significant effect on underlying norms and attitudes in our society. Very few fertile couples will be interested in surrogate motherhood; most couples are fertile; and the fraction of infertile couples is bound to decline with continued advances in medical technology, even as women marry later (fertility problems increase with age).

The last ethical argument that I will consider against the enforcement of surrogacy contracts is mounted by feminists. They argue that surrogacy is akin to prostitution in that it also involves the sale of female sexuality; and just as prostitution is widely regarded as exploitive of women, so surrogacy is (these feminists argue) inevitably exploitive of the deluded women who agree to market their reproductive capacity. Moreover, there is a small but irreducible risk of death or serious illness to the surrogate mother.

The argument is unconvincing. It overlooks, to begin with, the fact that the surrogates are not the only women in the picture. There are also the infertile wives to be considered. Not only are they hurt if their ability to obtain a baby (necessarily not borne by them) is impeded by a ban on the enforcement of contracts of surrogate motherhood, but their already weak bargaining position in a marriage to a fertile husband is further weakened, for under modern permissive divorce law he is always free to "walk," and seek a fertile woman to marry.[9] Beyond this, the idea that women who "sell" (really, rent) their reproductive capacity, like women who sell sexual favors, are "exploited" patronizes women. Few would argue that a gigolo or a sperm donor or a man who marries for money or a male prostitute is "exploited." These men might not be admirable, but they are not victims. The idea that women are particularly prone to be exploited in the marketplace hearkens back to the time (not so long ago) when married women were deemed legally incompetent to make enforceable contracts. I am surprised that feminists—not all of them, however[10]—should want to resurrect the idea in the surrogacy context. It is only worse when the argument is bolstered by pointing out that hormonal changes incident to pregnancy may

9. I realize that not all wives who want to hire surrogate mothers are infertile. Some may be fertile but endangered by pregnancy; others may simply not want to take time off from work to bear a child. The latter reason will strike many as frivolous; it is in any event rare.

10. Andrews, *supra* note 6, presents a powerful feminist defense of surrogate motherhood.

induce a regret at parting with the baby that the surrogate mother could not have foreseen when she signed the contract. The idea that women are peculiarly dominated by their hormones (and not men by their testosterone?) is a traditional rationalization for limiting women's access to responsible employment.

The feminist criticisms of surrogacy are inconsistent with mainstream feminist thought. They reinforce the anti-feminist stereotype summed up in the slogan, "biology is destiny." The unintended implication of the feminist position on surrogate motherhood (but I emphasize that this is the position of some, not all, feminists) is, if you're infertile, you shouldn't have a baby; and if you are fertile, and have a baby, you should keep it. A main thrust of modern feminism has been to deny that biology is destiny, that it is woman's predestined lot to be a bearer and raiser of children. Some women don't want to have children; some want to have children but not in the traditional setting of heterosexual marriage; some want to have but not bear children and some, finally, want to bear but not have children (or more children)—they are the surrogate mothers. Feminism seeks to expand the opportunities of women beyond the traditional role, felt as stifling by many, of being a housewife and mother who makes a career of bearing and raising children. The opportunity to hire a surrogate mother and the opportunity to be a surrogate mother are two unconventional opportunities now open to women. It is curious that feminists, of all people, should want to close the door on these opportunities.

The last and least argument against surrogate motherhood is that it is just another form of "baby selling." This is argumentation by epithet. The surrogate mother no more "owns" the baby than the father does. What she sells is not the baby but her parental rights, and in this respect she is no different from a woman who agrees in a divorce proceeding to surrender her claim to custody of the children of the marriage in exchange for some other concession from her husband—or from a sperm donor who receives cash, but no parental rights, in exchange for his donation.

I have reviewed the arguments pro and con for the enforceability of surrogate contracts and have made no secret of how I believe the balance inclines. But in a matter that has aroused such strong emotions, argumentation *a priori* will not provide a fully convincing resolution. Evidence is more important than argument. I have mentioned evidence that surrogacy is not exploitive in the sense of making the surrogate mothers worse off, but the evidence is casual and anecdotal and a more systematic study is necessary and indeed urgent. Efforts should be made by scholars to identify and randomly sample surrogate mothers for purposes of determining the demo-

graphic and other relevant characteristics of the parties to the contracts and the experience with surrogate contracts. Are the surrogates responsible adults making apparently rational decisions? Are parties to surrogacy contracts generally satisfied? Do the contracts contain adequate safeguards of the surrogate mother's interests? What is the average price and the range of prices? How many surrogate mothers experience profound distress at giving up the baby? How many balk and have to be dragged into court? Are the children healthy and happy? These questions are answerable. Until they are answered, with greater confidence than is possible at present, the public policy issue examined in this lecture will not be resolved. It would, though, be a tragedy if the states or Congress sought to extirpate the practice before a rational judgment of its pros and cons could be made.

I want to close with a brief examination of the *Baby M* opinion itself.[11] Celebrated as that opinion is in some quarters, its discussion of the ethical and economic implications of surrogacy is nothing short of an intellectual disaster. I shall give ten representative quotations and a brief commentary on each. I hope to persuade the reader that, whatever the ultimate merits of surrogacy, some of its most distinguished opponents have not demonstrated an ability to think rationally about it.

Here are the quotations. One, "[a] child, instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father."[12] But this tug-of-war is an artifact of legal uncertainty. If the enforceability of surrogate contracts were settled, Mrs. Whitehead would have had no grounds for challenging the Sterns' custody of the baby. Two, "[t]he whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother."[13] The court neglects an obvious point: no contract, no child. It's not as if there were a baby and the mother was being asked to give up her rights in it. There was no baby when the contract was signed; the "whole purpose" of the contract was not to destroy the mother's rights, but to induce a woman to become a mother. Third, "[h]ere there is no counseling, independent or otherwise, of the natural mother, no evaluation, no warning."[14] This is patronizing. We don't make people undergo counseling before signing a contract; we certainly don't require women to undergo counseling before they become pregnant. Fourth, "[s]he [the surrogate mother] never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most impor-

11. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).
12. *Id.* at 435, 537 A.2d at 1247.
13. *Id.* at 436, 537 A.2d at 1247.
14. *Id.*

tant sense, uninformed."[15] This is a particularly absurd statement because it questions people's competence to make *any* contract. Contracts are made before, not after, they are performed. If this ineluctable fact is thought to undermine the voluntary character of contracts, the whole enterprise of contracting is placed under a cloud. By the court's logic, no major surgical procedure ever is done with the patient's informed consent, for one can never know in advance how one will feel about the procedure after it is done. Fifth, "[w]orst of all, however, is the contract's total disregard of the best interests of the child."[16] But, once again, no contract, no child. It is apparent from this and other passages I've quoted that the court fails to understand the *productive* function of contracts. Contracts do not merely, or mainly, allocate consequences after an event has occurred. They create the incentives to bring about the event, in this case, the birth of Baby M. Sixth, "[i]n surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability . . . ."[17] But that isn't how a market works—there is competition among would-be surrogates too, so it is not a case of auctioning a tiny supply of surrogate mothers to the high bidder in the manner of the auction of a Van Gogh. Seventh, "[t]he demand for children is great and the supply small. The availability of contraception, abortion, and the greater willingness of single mothers to bring up their children has led to a shortage of babies offered for adoption. The situation is ripe for the entry of the middleman who will bring some equilibrium into the market by increasing the supply through the use of money."[18] But that's how markets work—and the shortage is, as noted earlier, an artifact of regulation. The court's hostility to middlemen is primitive. They provide an essential function in markets. Eighth, "we doubt that infertile couples in the low-income bracket will find upper[-]income surrogates."[19] But how will infertile low-income couples be helped by a law that forbids upper-income couples to hire lower-income surrogates? This is the jurisprudence of envy. Ninth, "[t]here are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life."[20] But how are those values served by prohibiting surrogacy? Tenth, surrogacy "totally ignores the child."[21] On the contrary, surrogacy is a method of encouraging the conception of the child.

15. *Id.* at 437, 537 A.2d at 1248.
16. *Id.*
17. *Id.* at 438, 537 A.2d at 1248.
18. *Id.* at 439, 537 A.2d at 1249 (citation omitted).
19. *Id.* at 440, 537 A.2d at 1249.
20. *Id.* at 440-41, 537 A.2d at 1249.
21. *Id.* at 442, 537 A.2d at 1250.

So deficient is the court's reasoning that the explanation of its result must be sought elsewhere than in the analytical pros and cons of enforceable contracts of surrogate motherhood. The elsewhere, I think, is in the hostility to markets, a hostility characteristic of American intellectuals, including some judges; and in the fear of novelty, which is a common characteristic of middle-aged persons in general and middle-aged judges in particular. I think our judicial systems can do better. And the beginning of wisdom is a determination to evaluate surrogate motherhood rationally.