Introduction

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THIS BOOK IS ABOUT SURROGACY and, more specifically, surrogate motherhood.[1] It is a collection of essays that aims to provide a contemporary and international picture of a practice, traceable to ancient times, devised to solve the problem of childlessness. The collection, which explores surrogacy from a variety of perspectives including law, policy, medicine and psychology, is timely. For although there is nothing new in the notion that a woman might bear a child for someone else, there is some evidence that the incidence of surrogacy is increasing[2] and technology has developed to make ever more complex arrangements possible.

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[1] **Surrogate** *n*. a substitute: ... a person or thing standing, for another person or thing, or a person who fills the role of another in one's emotional life. – **surrogate mother** a woman who bears a baby for another, esp. childless, couple, after either (artificial) insemination by the male, or implantation of an embryo from the female. *Chambers Concise 20th Century Dictionary*. For Warnock (1984) surrogacy was "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth". The difficulties associated with the terms in use in this area, and the ways in which the terms may be used, have been addressed by Morgan (1990) and Tangri & Kahn (1993), amongst others. In contrast, "surrogacy" has a number of other meanings in psychology and medicine and therefore is used here only as a shorthand to mean transactions where a surrogate mother is used.

[2] See British Medical Association (1996). More than 10 years ago, Morgan (1990) reported that since 1976 there had been "between 29 definite, 38 probably and 43 possible cases of *known* surrogacy arrangements" in Britain. It is extremely difficult to calculate the extent of surrogacy, particularly in countries where it is unregulated. There is no evidence that it is taking place on a wide scale, however, and there seem to be no sign that 'surrogacy for convenience' is becoming common or even more common.

The simpler process of "partial" surrogacy involves the insemination of the surrogate mother with sperm of the "commissioning" (or "intended") father. By contrast, "full" (or "gestational") surrogacy requires medical intervention, and entails *in vitro* fertilisation (IVF) using the egg and sperm of the "commissioning couple" (or "intended parents").[3] While partial surrogacy can, and often does, remain a private or even secret arrangement, the involvement of medical personnel and clinics in full surrogacy has meant that the procedure has become a matter of public concern. This concern deepened in places such as the UK and the USA when surrogacy was catapulted into the headlines by a small number of contentious cases. Many commentators called for state controls to be introduced. Committees have been set up in a number of countries to assess whether regulation is necessary and, if so, what the nature of such regulation should be. Different jurisdictions have responded in different ways to the issue. Some ban surrogacy altogether. Some have opted for partial bans whilst introducing rules to designate and regulate what is permissible. Some have voluntary guidelines and some have eschewed any form of regulation at all.

A recent survey gives us an idea of the current state of acceptance worldwide (American Society for Reproductive Medicine (2001), Chapter 10, S26). Twenty-six of the countries or states surveyed have legislation in place which deals with aspects of assisted reproductive technology and/or IVF, eight have voluntary guidelines and eight have neither of these. More specifically, surrogacy is permitted and regulated by means

[3] In this volume, different terms are preferred by different authors. For some, the notion of "commissioning" is too commercial, and "intended" parents is preferred. There is controversy over many of the terms in this arena, not least the term "surrogate mother". Whilst partial surrogacy of one kind or another is most commonly a private transaction

of legislation in Australia (Victoria), Brazil, Hong Kong, Hungary, Israel, the Netherlands, South Africa and the United Kingdom. Australia (5 states), Korea, and some states in the USA have introduced voluntary guidelines. Surrogacy is also practised in a number of countries where no legislation or regulations, either permitting or banning it, exist: Belgium, Finland, Greece, India. Currently, IVF surrogacy is not permitted in Australia (South or West), Austria, China, the Czech republic, Denmark, Egypt, France, Germany, Italy, Jordan, Mexico, Norway, Poland, Portugal, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey, and some US states. Finally, it has been permitted in Saudi Arabia, if it took place between two wives of the same husband, but is now no longer allowed. The most severe penalty for violation of legislation is imprisonment (e.g. as in the UK and Norway). Jones & Cohen (2001) note that we do not see significantly different practices operating in those nations and states that do not have guidelines or legislation.

What emerges from any consideration of the ways in which surrogacy is dealt with in different jurisdictions, is that a sense of profound anxiety and ambivalence has tended to pervade the thinking of professionals, policy-makers and legislators where surrogacy is concerned.

This ambivalence appears, for example, in the debates surrounding surrogacy in the UK (see Jackson, 2001). Rao (chapter 2, this volume) points to a similar ambivalence in the USA. Jackson (2001:262) argues that the UK legal position is unclear and that this is, in part, attributable to a lack of clarity about the purpose of regulation in the Warnock Report, the precursor to the Surrogacy Arrangements Act

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and may have a long history, full surrogacy's dependence upon IVF technology meant that the first reported case was not until 1985 in the US and 1988 in the UK (Utian *et al*, 1985; Brinsden *et al*, 2000).

1985. The majority of the Warnock Committee apparently was of the view that surrogacy is "almost always unethical" **Ref in Warnock? Para 8.17? checkk)).** However it recognised that people would continue to make "privately arranged surrogacy agreements" and decided that children born as a result should not have their mothers "subject to the taint of criminality" (para 8.19**check**). The judgement that surrogacy was "flawed but inevitable" says Jackson (2001:262), led to legislation with "two disparate goals": protection of the vulnerable (primarily women and children) and the discouragement of surrogacy. Also in the UK, the more recent Brazier Report (Brazier, Campbell and Golombok (1998)), while stating that the existence of surrogacy is now "accepted" (para 4.5) and that it had to be regulated, also expressed reservations. It indicated that "surrogacy should remain an option of the last resort" (para 8.9) and only used where pregnancy would be impossible or very risky. The British Medical Association and the Human Fertilisation and Embryology Authority too have adopted the position that surrogacy is acceptable but only as a "last resort" (see British Medical Association (1996) and Jackson (2001) p.292).

In jurisdictions where the official policy is to do nothing, like some parts of the USA and New Zealand (see Daniels, chapter 4, this volume), it appears that underlying the inaction - what Rao (chapter 2, this volume) calls "passive resistance" - is a deep hostility towards surrogacy. In the UK, recognition of the practice has been, at best, grudging. The Warnock Report, for example, expressed fears that regulation might appear to give official endorsement to surrogacy (see Jackson (2001) p.281) and the majority of the committee decided against setting up a surrogacy service lest this encourage the growth of the practice (para 8.18). The Brazier Report rejected non-

regulation as an option in the belief that this might lead to "procreative tourism"[4] **(CHECK REF IN BRAZIER)** but it opted for what has been described as a "policy of containment" (Brazier (1999) p.183 cited in Jackson (2001) p.283)). The Brazier proposals, like the existing law in the UK as well as regulations in other jurisdictions, reflect some of the widely held concerns about surrogacy. This book is intended to inform debate about those concerns and to explore their broader and deeper significance.

1. SURROGACY: SOLUTION OR PROBLEM?

Whilst surrogacy is represented as a last resort medical 'solution' to the problem of infertility, the varying international responses to its regulation (or prohibition) plainly indicate that is more often perceived as a social 'problem'. What is clear from the chapters in this book is that we cannot fully understand the "problems" that surrogacy seems to pose for so many societies without some appreciation of the moral, social and political contexts in which surrogacy takes shape as a specific kind of "problem". We, in the developed world, live in an age of ambiguity. Where once we relied on scientific discoveries and technological advances to promise both progress and certainty, we are now finding that they might not be the answer at all. On the contrary, they are increasingly likely to be seen as bringing us new problems and as raising pressing moral questions. Nowhere is this ambiguity – this moral uncertainty – more obvious, and more acute, than in the area of reproduction. Here, technical progress and rapid social change have heralded, not certainty, but a profound moral unease. Developments in Assisted Reproductive Technologies, coupled with the possibilities afforded by the so-

[4] This notion is discussed further by Morgan, chapter 5, this volume.

called “revolution” in human genetics, may deal the final blow to the grandest of grand narratives of Euro-American modernity – that of “the family”. For it is in the sphere of the family that scientific, technical and social change have arguably had the most dramatic – and apparently the most worrying – impact.

For some, this state of affairs is viewed with trepidation. The alleged demise of “family values” has been seen, for example, as signifying a moral decline, with “civilisation” as we know it at stake.[5] Others[6] represent the changes in more positive terms, seeing them as signifying something less threatening– the possibility of acknowledging diversity and encouraging tolerance and respect, perhaps. As far as reproduction is concerned, it is clear that we live in uncertain times and we are unsure where the road might take us. Perhaps not surprisingly there is a deep anxiety attached to this, and no dearth of attempts to frame the uncertainties in narratives that make them more manageable and less anxiety provoking. In this moral landscape, issues and events, including surrogate motherhood, become susceptible to a range of meanings.

Surrogacy is a “problem” for so many societies because it renders the familiar ambiguous and forces us to think anew about our values, and about the basis of those values. Friedman and Squire (1998) identify surrogacy as the contemporary issue that encapsulates many of the moral ambiguities of our age. In a very obvious way, surrogacy foregrounds the shifting patterns of “family”, intimacy, parenthood, gender relations and sexuality that are the hallmark of post World War II Euro-American societies. Surrogacy is problematic for traditional notions of “mother”, “father” and “family” when it introduces a third (or even fourth) party into reproduction, when it introduces

[5] **Patricia Morgan ?1996? CHECK**

[6] **do we need a reference here? R**

contractual "public" arrangements into "private" affairs and when it fragments motherhood. As Friedman and Squire (1998) show, surrogacy makes motherhood negotiable and confounds both social and biological bases of claims to parenthood. As family and kinship are increasingly being defined in terms of biology and genetic heritage, surrogacy disrupts these smooth elisions by making it possible for there to be either no biological links among family members or, alternatively, no social relations. Surrogacy both confirms notions of "nature" and disrupts them; it occupies an uncertain place in relation to the distinction between the "natural" and the "artificial", opening up the possibility that we might begin to think beyond this and other similar traditional dualisms.

These ethical confusions of surrogacy are reflected in the laws and policies that seek to regulate it. In the UK, for example, the Surrogacy Arrangements Act of 1985 largely side-stepped the ethical minefield and did little more than to outlaw "commercial" surrogacy. The Human Fertilisation and Embryology Act 1990 regulates surrogacy only incidentally and is, in any event, Johnson (chapter 6, this volume) argues, an inappropriate means of regulation. And as Jackson (2001:262) reminds us, most surrogacy arrangements are made in a regulatory vacuum; the ease with which a woman can inseminate herself undoubtedly undermines effective legislative control.[7] In the USA, as Rao (chapter 2, this volume) shows, different laws in different states exemplify four distinct approaches to surrogacy: prohibition (sometimes including

[7] In the UK, the Human Rights Act, 1998 may have an impact on the future of surrogacy. At the time of writing, surrogacy issues had not been considered by the Commission or the Court. Swindells et al. (1999:84) point out that Articles 8 (right to respect for private and family life) and 12 (right to found a family) could be employed in future to strengthen the position of the genetic intended parents.

criminal sanctions), inaction, status regulation and contractual ordering. Laws and policies inevitably embody ethical uncertainties that derive from broader cultural contexts and values.

Surrogacy, then, perhaps more than any other reproductive practice, throws into sharp relief our anxieties about the future of the family. It threatens accepted views what a family is, of gender-appropriate parental behaviour, and our ideas of what is natural in the realm of reproductive behaviour. Johnson, chapter 6, this volume, notes "deep unease at dislocations between genetic, gestational and post-natal parenthood." Whilst there are variations between countries in the specifics, we see these tensions reflected world-wide. There is unease about what is seen by many as a dangerous tampering with the natural order of things. There are fears that women might be exploited or demeaned and that children might be psychologically damaged. There is disquiet about the possible potential for the commodification of women's reproductive capacity and, more worryingly for many, the commodification of children.

2. NATURE VERSUS SCIENCE

Surrogacy evokes anxiety at least in part because it is seen, to a degree, as unnatural. First, it is the state of mind of the surrogate mother that is considered unnatural. The Warnock report, for example hinted at this when it, in effect, endorsed the opinion that when, **CHECK where**, as in surrogacy, "a woman deliberately allows herself to become pregnant with the intention of giving up the child to which she will give birth...this is the wrong way to approach pregnancy" (1985:45). The effect of this unnatural arrangement might, it is thought, impact on the resulting child in unforeseen and worrying ways: "It

is not known, for example, how a child will feel about having been created for the purpose of being given away to other parents" (Brazier *et al*. (1998) para 4.11).

Secondly, it is the commissioning mother who may be behaving unnaturally. There is widespread revulsion at the notion that women might use surrogacy as a convenience – a "career woman", for example, using another woman to have a baby while she continues to work. COTS (1999:11) "considers surrogacy objectionable if used ... as a convenience". This anxiety is also apparent in the Warnock report: "As we have already noted, the Warnock Committee unanimously condemned surrogacy for convenience and the majority regarded surrogacy as intrinsically objectionable in almost every case" (Brazier *et al*. (1998) para 4.2). Generally speaking, where surrogacy is permitted, it is only where there is *medically* diagnosed infertility that *treatment* is provided (see Brinsden chapter 7, this volume).[8]

Thirdly, even where medically indicated, the process and its outcome might be seen as unnatural, so warranting, at the very least, control and remedial measures. Lane (chapter 9, this volume) suggests that the exclusion of the surrogate mother after the hand-over of the child represents an attempt to ensure that the new family is more "natural", presumably because it would otherwise be obviously "unnatural". Strathern (chapter 18, this volume) argues that it is only when science can be perceived as serving nature and society that it is not threatening. The surrogate mother, she says, is seen as

[8] However, some directors of clinics consider surrogacy for convenience acceptable: Stern, Cramer, Garrod & Green's (2002) survey of assisted reproductive technology clinics in the US found that around 20% of clinic directors thought that surrogacy for convenience should be allowed.

assisting the "real" mother[9] to overcome a medical impairment. In the same way, medical technology can be seen as facilitating a natural outcome - an egg is fertilised, a child is born. As long as surrogacy is "simply giving nature a helping hand" then "it appears as a natural resource which can be put to the benefit of society". However, science, argues Strathern, can also be seen in a more negative light: as "fuelling a runaway world when its aims are presented as a substitute for Society's". An examination of the rules regulating surrogacy reveals what appears to be an attempt to rein in science so as to confine its effects to be compatible with society's goals and dominant values.

3. Regulating the Surrogate Family – for the children's sake?

Rao (chapter 2, this volume) contends that surrogacy "threatens the traditional understanding of families as the mere reflection of biological facts, revealing instead that they are social constructs" (see also Rao, 1996). She also notes that, by constructing the family through the marketplace, rather than through loving relationships, surrogacy arrangements "promote a world of private ordering" where family relationships are a matter of choice and so are "contingent and revocable". As Dewar (1998:483) says, what is "natural" becomes an act of creation and there is a pattern of inconsistency in the law, "reflecting wider uncertainties about what constitutes connections between individuals."

That surrogacy appears to provoke so much more anxiety than adoption is perhaps attributable to the perception that science may be running out of control and leaving dominant values behind. In any event, it is apparent that the law regulating

[9] See also Teman, chapter 17, this volume, for a discussion of the strategies employed by gestational and intended mothers alike to construct the intended mother's identity as the "real" mother.

surrogacy in the UK represents strenuous efforts, going beyond those relating to adoption, to ensure that the new family replicates as closely as possible the heterosexual, married, nuclear family.[10] These measures can be and are explained in terms of a particular construction of children's welfare. This is exemplified by s 13(5) of the HFE Act 1990 which stipulates that, "A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father)". Section 30 HFE Act 1990[11] provides for the making of parental orders to confer parental status on the commissioning parents without the need for adoption. It limits eligibility for an order to married couples. In addition, the embryo must have been created with the gametes of either the wife or the husband or both, so ensuring a genetic connection. Similar restrictions exist in other jurisdictions. In most countries, assisted reproductive technology is used only for the benefit of heterosexual couples who are married or in a stable relationship[12] (ASRM, 2001). For instance, Rao (chapter 2, this volume) points out that in the USA, in those states where surrogacy is regulated, there are generally limits placed on the age and marital status of the commissioning parent. There is also normally a requirement that surrogacy should be permitted only in the case of married, and therefore by definition, heterosexual, couples. In addition, many states "valorize

[10] See also Dewar (1998) p482

[11] See also s28 which seeks to attach a man as father to the child, provided he is married to the surrogate mother and consents or has received the treatment services together with the surrogate. Oddly, if no man falls within this section, it appears that the child is fatherless (see Dewar, 1998 p482), with the effect that legislation at least partly concerned with the maintenance of traditional family life should result in the creation of a new category of fatherless children.

[12] 'Stability' appears normally to be determined by length of relationship, rather than any specific assessment of the quality of the relationship.

genetic ties" by enforcing contracts only where there is a genetic relationship with child. Schuz, chapter 3, this volume, describing the law in Israel, observes that the law promotes a two-parent heterosexual model of the family: the intended parents must be a man and a woman who are spouses. In practice, cohabitants have been approved for surrogacy arrangements but single persons have not. In addition, and for reasons dictated by religious law, the sperm used must be that of the father.[13] In New Zealand too, the draft guidelines require that one of the parents should be a genetic parent (see Daniels, chapter 4, this volume). The rules in numerous jurisdictions therefore "radiate", as Dewar (1998:483) puts it, the message that children should be raised within the framework of a traditional family structure, preferably with genetic links with at least one parent.

Paradoxically, surrogacy presents policy-makers and regulators seeking to promote the two-parent family also with another problem - the practice can create too many potential parents. The law in jurisdictions that regulate surrogacy accordingly designates one person as the "real" mother and one as the "real" father (see Strathern, chapter 18, this volume). In the USA, the "real" mother is usually taken to be the genetic mother. Somewhat surprisingly, given the emphasis on genetic connection elsewhere in the law, the opposite is true in the UK, perhaps in recognition of the risks undertaken by the carrying mother.[14] In the UK, s27(1) of the Human Fertilisation and Embryology Act stipulates that the gestational mother is to be treated as the mother of the child while, in terms of s28, the father is her husband, provided he has consented to the arrangement. It has been argued that rather than specifying one exclusive legal mother,

[13] See also Schenker, chapter 16, this volume.

[14] See Diduck and Kaganas (1999) p111.

so reproducing the "one mother/nuclear family construct", we should "recognise the maternity of both the genetic mother and the gestational mother and involve them both in the child's social rearing" [15](Kandel 1994:168). COTS (1999) maintains that there is little difference between this situation and one where parents re-marry; it is not unusual to have more than two parent figures[16]. Lane, chapter 9, this volume, in a similar vein, points out that divorce and open adoption have

> already shown that legal systems and, to an increasing extent, public cultures can accommodate children with more than one maternal and paternal actor in their lives. What is paradoxical about surrogacy is the extent to which discomfort with it drives appeal to the most traditional of paradigms – marital privacy and all it entails – to understand and legitimate it, no matter that fewer and fewer couples marry and reproduce within that paradigm at all.

For Lane this is both a moral and experiential issue.[17] She shows that a powerful argument can be made that it is morally wrong to attempt to erase the past and to use the surrogate mother as a disposable means to an end. Moreover, to do so may harm the birth mother and her family.

However, it is perhaps unlikely that legal recognition would be afforded to both mothers, given the importance accorded to children's interests and given the dominant construction of children's welfare that prevails in the Western world. Children's well-being is seen as intimately tied up with the existence of a nuclear family unit. Even open

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[15] **Do we need a note here to the effect that** However, noting that some surrogate mothers are motivated by a desire to enjoy pregnancy and childbirth without the responsibility of raising the child, we should ask whether surrogate mothers or intended parents would want this kind of involvement, and therefore whether it should be imposed upon them.

[16] What we may lack are suitable terms to describe these different 'mothers'.

[17] See Teman, chapter 17, this volume for a discussion of the experiential issues based on interviews with surrogate and commissioning mothers.

adoption does not result in the sharing of parental status between the adoptive and biological parents. Nor does it impose enforceable obligations of the adoptive family. It seems that families which do not conform to the traditional model are viewed with suspicion. Like lone parent families, families that create multiple relationships[18] are perceived as being potentially damaging to children. For example, Brazier *et al* (1998) remarked that, "It is not known ... what the impact of two mothers will be on [the child's] social, emotional and identity development through childhood and into adult life" Brazier et al, 1998, Para 4.11).

4. PROTECTING THE BIRTH MOTHER

Surrogacy is seen as a risky business, not only for children but also for the adults concerned and, in particular, the birth mother. Fierce debate has raged over the ethical issues associated with surrogacy, with its connotations of baby-selling, and exploitation of host mothers.[19] Lane (chapter 9, this volume) draws our attention to a number of the arguments put forward and focuses, among others, on the feminist contributions to the ethical debate. Some feminists maintain that surrogacy commodifies women's reproductive capacity, reducing birth mothers to "paid breeders" or even to the equivalent of prostitutes. However, as Lane points out, not all objections are confined to commercial surrogacy. Some feminist scholars assert that the arrangements dominating all forms of reproduction in modern developed societies further the ends of patriarchy

[18] For full discussion of the relationships "spawned" by a surrogacy arrangement, see Schwarz, chapter 11, this volume.

by increasing control over women's reproductive powers. By contrast, there are other feminist writers who champion choice and who maintain that surrogacy could be used to transform gender relations by potentially empowering women to use their reproductive capacity as they choose. Taking on board these different views, Rao, chapter 2, this volume, points to the potential of surrogacy to both advance and undermine individual liberty.

The image of surrogate mothers as vulnerable and subject to exploitation appears to be the dominant one amongst policy- and law-makers. In the UK, the Brazier Report, for instance, represented surrogates as uneducated and in straitened circumstances: "There is evidence that the majority of surrogates ... have relatively low educational attainments. A number are unemployed, unsupported by a partner and responsible for children of their own. 'Professional' surrogacy may appear to be an attractive option for women in these circumstances ..." (para 4.19). It goes on to say that, "The issue of exploitation of the surrogate ... resolves into the fundamental question of her capacity to foresee the risks entailed'.

The Brazier report only considered exploitation in the context of payment[20] but, it has been argued, this might just as well occur in "altruistic" surrogacy:

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[19] See e.g Arditti, 1987; Rothman, 1986?; van Niekerk A& Van Zyl L, 1995, the ethics of surrogacy. Women's reproductive labour. J Med Ethics 21 345. (Lamb (1993) and Paulson (1995) and Bromham (1995) also discuss these issues; also Schenker and Eisenberg (1996); Schenker and Eisenber, 1997).

[20] Given this concern with the possibility of financial pressure, a major focus for researchers has been the motivations of surrogate mothers. Findings suggest that, whilst financial gain may be the only or the main motivation for some, most women report a number of emotional reasons behind their decision, including a wish for enhanced self-esteem or self-worth, an attempt to resolve feelings associated with previous reproductive losses and a desire to re-experience pregnancy and childbirth without the responsibility of rearing the child (see, for example. Franks, 1981;

> "It is assumed that, because there is no payment no exploitation can exist. However, subtle familial pressures may be more effective than financial reward in persuading a woman to enter into an altruistic arrangement. Relegating such decisions to the family not the legislature does not guarantee protection of women's rights because women are particularly vulnerable to exploitation within families" (New Zealand Law Commission (2000) para 534, p.195).

Moreover, fears extend beyond the vision of women impelled to agree to arrangements against their better judgement or in ignorance of the consequences. Concern extends also to the possibility of coercion being used to compel a surrogate against her wishes to give up the child she has borne. This possibility[21] too, highlighted in the much-publicised cases of Baby Cotton in the UK (Cotton & Winn (1985)) and Baby M in the US (see Friedman and Squire (1998)) is one that is not confined to commercial surrogacy .

Schuz, chapter 3, this volume, in her analysis of the law in Israel, notes that the legislation is designed in part to safeguard the interests of the birth mother. Starting from the premise that "potential birth mothers are not in a position to judge their own

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Parker, 1983; Einwohner, 1989; Reame and Parker, 1983; MacPhee and Forest, 1990; Fischer and Gillman, 1991; Blyth, 1993). **I've taken this out of the text again because I think it disrupts the flow - F**

[21] Jackson (2001) notes that there is not much evidence that many surrogates regret their decision: Andrews (1995) reports that less than one percent of surrogate mothers changed their minds about giving up the child and another small study of 14 women in the US reports that none of the surrogate mothers regretted their decision (Ciccarelli, 1997). **I've taken this out of the main text cos I think it disrupts the flow too - F**

suitability", the law requires that she be assessed by medical and mental health professionals. To ensure that her consent is "informed" and "genuine", she must be advised by a lawyer and be questioned by committee. There are also legal measures in place intended to protect her health, her privacy and her financial position. Israel is unusual in its approach; it regulates surrogacy quite stringently but, once all the requirements have been met, the law gives the birth mother little opportunity to change her mind.

In most jurisdictions, such as the UK, while there may be rules in place to provide for assessment of birth mothers,[22] there has been no attempt to introduce positive protective measures. Protection is largely negative in nature and, arguably, reinforces the image of the birth mother as vulnerable to exploitation and coercion. Most importantly, the surrogate mother is free to withdraw from the agreement; surrogacy arrangements are unenforceable. This state of affairs is criticised by Lane, chapter 9, this volume, who argues that, if women are to enjoy the reproductive freedom of engaging in surrogacy, it may be in their interests to have the protection of an enforceable contract. To ignore the agreement, she contends, is to ignore the parties' intentions. Women have several interests that need to be protected: They have:

> "an interest in being treated as contracting equals; an interest in the protection which contract can afford; an interest in being in control of the experience and the crucial decisions affecting any pregnancy they may conceive, including the possibility of terminating that pregnancy; and an interest in retaining parental status in relation to any child they bear until after that child's birth. The typical

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[22] **Ethics committees??? FIX See Daniels on the proposed measures in New Zealand.**

> public policy justification for thoroughgoing unenforceability, such as that adopted in the UK, does not take adequate account of the first two interests".

She goes on to argue, by analogy with contracts of service, that while specific performance should not be available, financial penalties should be imposed on a birth mother who fails to fulfil her promise.

Further protection is afforded by s30 HFE Act. This provides that a parental order cannot be made without the informed consent of the birth mother and consent cannot effectively be given until six weeks have elapsed after the birth. The legislation, says Johnson chapter 6, this volume, is perhaps designed to discourage surrogacy by disadvantaging those who choose that route to parenthood. But it is also consistent with Adoption law [23] and seems to rest on the assumption that, post-partum, women are irrational. Finally, commercial surrogacy is outlawed in the UK so that financially disadvantaged women will not be tempted into potentially exploitative arrangements for monetary gain.

5. SURROGACY AS A GIFT

The Brazier report states that, "We believe that the core value here, on which many social arrangements in the United Kingdom are based, including blood and live organ donation, is the 'gift relationship'" (Brazier *et al*, 1998:4.36). Nevertheless, as Jackson points out, while commercial surrogacy is forbidden, it is increasingly practised. This, she says, is because the courts are permitted to authorise payments made in contravention of the ban on commercial surrogacy retrospectively if it is the child's best interests to remain with the commissioning parents (**p 265?? Jackson??**). The Brazier

Report recommends that, at least in relation to parental orders, [24] this should change; access to such orders would be limited to those who have complied fully with the statutory rules and those rules would prohibit payment other than compensation for specified expenses.[25]

The Brazier report gives a number of reasons for rejecting payments to surrogates other than those for expenses actually incurred. First, it suggests that children will be harmed by the knowledge that their gestational mother has been paid. Secondly, it takes the view that altruistic agreements are less likely to break down than commercial ones. Thirdly, it predicts that surrogates might extort money from commissioning parents once the pregnancy is established. Finally, it suggests that, generally, the amounts paid would increase and that surrogacy would be encouraged as a result. All these reasons are criticised as speculative by Jackson (2001:284-5), who also points out that sperm donation and egg- sharing attract payment. Ragone, chapter 14, this volume, in turn, notes that doctors who assist infertile patients are paid and wonders why surrogate mothers cannot be paid too. COTS (1998) **REF??**notes that children may be "bought" in other ways in our society: foster parents, for example, are paid and there have been suggestions that fostering should be regarded as a profession. But it is the prospect of professional surrogacy that Brazier deplores, noting with disapproval that, (**as COTS note) WHAT IS THE REF _ BRAZIER OR COTS?** "There is evidence that some women view surrogacy as a form of employment" (5.17)

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[23] See s16 (4) Adoption Act 1976.

[24] The courts are permitted, in adoption proceedings, to authorise payments retrospectively (see 2 57 Adoption Act 1976)

The revulsion provoked by the practice of commercial surrogacy appears to be rooted then not only in the perception that it demeans women, with some commentators making comparisons with prostitution, but also because it is thought to commodify, and to harm, children. Yet, as Schuz, chapter 3, this volume, shows, these perceptions are not necessarily universal. In Israel, "the effect of the law is that surrogacy will invariably occur on a commercial basis"; for one thing, a relative of the intending parents cannot legally act as a surrogate. While trade in babies is illegal, payment of surrogates is not. Guidelines set out the expenses and heads of compensation for which provision must be made in the agreement by the intended parents. These include all medical expenses, legal expenses, the cost of counselling, the cost of insurance premiums and compensation for pain and suffering. For Schuz, these requirements provide important safeguards for carrying mothers and she points out that the courts and legislature have rejected the argument that surrogacy should not be permitted because its "unnatural" character affects children adversely. Children's interests are protected in the law and, she concludes, the Israeli experience "suggests that non-altruistic surrogacy can work well provided that adequate safeguards are introduced".

Stuhmcke (1996:2), in her criticism of the prohibition of commercial surrogacy in some Australian states, goes further. She rejects the distinction drawn between altruistic and commercial surrogacy. It is unclear, she says, "when an altruistic arrangement becomes commercial – for example an arrangement may include payment of the surrogate mother's medical, travel and home-help expenses yet remain classified as an altruistic arrangement". (1996:2) **IS THIS A QUOTE?** In addition, "[t]he use of the

[25] See, for full discussion Jackson p289-90

term 'altruistic' implies that these arrangements are done purely for love and are therefore somehow more acceptable than an arrangement entered into for commercial reasons."**REF??** However, the fact that the parties enter into a surrogacy agreement which provides for payment to the surrogate mother does not necessarily mean that the motivation behind the agreement is not altruistic. Similarly, the fact that there is no payment does not necessarily imply that the motivation for surrogacy is altruistic. Finally, it has also been argued that such acts can never be termed altruistic as the women who become surrogate mothers do this as a result of lack of self confidence and subordination[26]". **WHERE DOES THIS QUOTE BEGIN AND END??**

6. SURROGACY AND HUMAN RIGHTS

Morgan, chapter 5, this volume, makes reference to the difficulty that feminists have in addressing reproductive technology. On the one hand, as the words of Stuhmcke quoted above suggest, assisted reproduction may be seen as implicated in the exploitation of women and in reinforcing dominant patriarchal images of motherhood. On the other hand, to see it in this way is to deny women's ability to make their own decisions and to withhold from individual women the opportunity of having a family. Surrogacy, therefore, raises important questions about reproductive rights and autonomy. Morgan examines the notion of reproductive rights and considers whether the UK law is consistent with the Human Rights Act 1998. Drawing on the work of other scholars as well as judicial pronouncements, he argues that democratic ideals demand the recognition of "procreative liberty" and that this should not be interfered with except for

[26] **Footnote here is for E S Anderson (1990)**

good reason such as harm to others. However, he maintains, procreative liberty "implies a negative right against state interference"; it is not a positive right to be given the means or the resources to procreate. Nevertheless, although restrictions on the availability of treatment and on commercial surrogacy may not contravene the Art 8 right to family life, the status provisions of the HFE Act might.[27]

7. SURROGACY AND THE PROFESSIONAL

Surrogacy, then, raises issues of human rights as well as the potentially countervailing considerations of individual protection and public policy endorsement of particular family forms. There are some clear rules in some jurisdictions limiting the availability of surrogacy on the basis of factors such as age, marital status and sexuality. However, in many cases the law or guidelines also make provision for the medical and psychological assessment of both intended parents and potential surrogates. These assessments are, it seems, intended to reduce the potential for failed arrangements and, more specifically, to protect the interests of the adults concerned as well as any child born as a result of the arrangement. The crucial role of assessment means, in effect, that while the law stipulates a few general rules, it delegates to professionals the task of deciding who is suitable in individual cases. Thus the state leaves it to the professionals to make the decisions that it cannot make without being seen as trampling on individual liberties. And professionals may, in consequence, find themselves faced with the

[27] **In the UK, the Human Rights Act 1998 may have an impact on the future of surrogacy. At the time of writimg, surrogacy issues had not been considered by the Commission or the Court. Swindells et al (1999;84) point out that Articles 8 (right to respect for private and family life) and 12 (right to found a family) could be employed in future to strengthen the position of genetic/intended parents.**

dilemma of whether, and how, to avoid becoming implicated in what might be regarded as social engineering.

Edelmann (chapter 10, this volume) describes the internationally highly visible cases of *Baby Cotton* in the UK, and *Baby M* in the US, to highlight some of the difficulties in surrogacy and the potential role for psychological assessment. He notes the need to protect the surrogate mother, the role for the psychologist or counsellor in facilitating decision making and the development of a working relationship between the surrogate mother and the intended parents. He argues that although there are concerns about psychological issues such as the emotional stability of intended parents, it is not the role of the psychologist to act as gatekeeper and make decisions about rejection and acceptance of surrogacy participants.[28] Rather, the psychologist should facilitate decision-making and permit parties to screen themselves, consistent with the 'permissive' nature of access to surrogacy in Britain[29]. Edelmann's argument is an important one, as it highlights the blurred boundary between psychological "assessment" and social "control"[30] that also, as Cook (chapter 12, this volume) demonstrates, assumes significance in the counselling process. It is in the *psychological* arenas of "assessment", "support" and "counselling" that there arises the opportunity for particular discursive constructions (such as what constitutes a "good" parent, or an acceptable family form) to frame the practice and the experience of surrogacy. These

[28] For an alternative view, see Schwarz, chapter 11, this volume.

[29] Identified by Brazier (1999).

[30] See, for example, Burman 1994, Morss 1995.

discursive constructions may thus be said to "govern"[31] both actions and feelings in areas where specific legal provisions would fear to tread.

As Cook (chapter 12, this volume) shows, these tensions form the inevitable backdrop of the psychological aspects of surrogacy arrangements. For some, counselling is the only appropriate way of addressing the "emotional minefield" that surrogacy represents (Appleton, chapter 13, this volume). Dodd (chapter 8, this volume) offers another perspective on the tension when she observes that it is unlikely that individual health professionals will have experience of surrogacy and for this reason, she argues that the "patient", in a role reversal, needs to become the "expert". Appleton (chapter 13) notes the difficulty of linking "assessment" with "counselling" and it is clear from his account of his many years of experience as a counsellor, that the counsellor will develop a view on the viability or wisdom of the arrangement, but can do no more than make recommendations. In the processes of "assessment" and "counselling" we see the language and the practice of (individual) psychology being used to address social issues of morality and legal issues of regulation. There is yet much scope for further framing surrogacy as an issue of some psychological significance, as the current dearth of systematic research evidence across the developed world indicates.[32] **WHAT DOES THIS SENTENCE MEAN - IS IT NECESSARY HERE?**

CONCLUSION

[31] See Rose, 1990

[32] The little evidence about surrogacy that does exist comes almost exclusively from research that has been driven by practical concerns and carried out in the United States; more recently there have been a few studies in the UK e.g. Blyth; van den Akkker; MaCallum and Golombok.

The essays in this volume illustrate many of the uncertainties and dilemmas of surrogacy. In them we see different societies formulating the "problem" in different ways, and attempting to put in place "solutions" that are appropriate for them. But these essays make it clear that making laws or rules, and putting policies into practice in an area that is characterised by such a profound moral uncertainty, can generate further problems that demand yet other solutions. The difficulties are undoubtedly compounded by the lack of systematic research into the social and psychological aspects of surrogacy and its consequences, the ways in which laws work, and the pitfalls of translating policies into practice. Despite the acknowledgement that surrogacy agreements are fraught with psychological and social dilemmas, there has been, for example, almost no systematic research into the consequences for participants. **Blyth notes this in one of his papers – he talks about the empirical vacuum– we are in danger of making this mistake ourselves**. The 1996 British Medical Association report on the practice of surrogacy drew attention to the fact that we have almost no information about outcomes for those involved in surrogacy arrangements; what little information we do have is unsystematic and anecdotal (BMA, 1996). Similarly, the recent Department of Health review of surrogacy regulation pointed to the absence of empirical data in this area, and the consequent impossibility of assessing the psychosocial consequences for those involved (Brazier et al, 1998). This lack of research evidence poses problems for screening, counselling and informed decision-making as well as for wider questions of legislating and policy-making. And as Dodd shows in her chapter, the participants in surrogacy arrangements often lack accurate information about the process.

Yet, because of the moral ambiguity surrounding surrogacy, as well as the social anxieties and emotional ambivalences it provokes, it seems that we are compelled to try to tame and confine it whenever it rears its head. For this reason, a lot has been said about surrogacy on very tenuous empirical foundations. Surrogacy is often in the headlines, a situation that is unlikely to change in the foreseeable future. Surrogacy will continue to highlight the dilemmas of our changing relations with technological developments, our changing notions of rights and responsibilities, and our changing values of individual, family and community. Across the world, surrogacy remains a divisive issue, and there can be no recourse either to science or to any moral consensus to settle the score.

As Morgan, chapter 5, this volume, observes: surrogacy is socially and ethically divisive precisely *because* it does not attract universal opprobrium, and because it may be seen as a natural and beneficial product of the reproduction revolution as much as an unnatural and abnormal artefact of it. In short, surrogacy occupies a terrain of profound moral uncertainty, social anxiety and emotional ambivalence. The contours of this uncertain terrain are mapped out in the essays in this book. In them we see the potential for differing and conflicting moral, legal and experiential positions that surrogacy poses. The law governing surrogacy differs between jurisdictions but, crucially, the laws of individual jurisdictions contain gaps and internal contradictions and inconsistencies that may be manifested as policies are translated into practice, and as individual surrogates and intended parents negotiate the uncertain and shifting boundaries of "family". Dewar (1998:484) has argued that legislators, by seeking to re-constitute a sense of collective family values, has created a set of inconsistent principles, "whether between rights and utility, or autonomy and community – while at the same time using

law to give the appearance of having created shared values; and then have off-loaded the detailed working out of those contradictions to the legal system". Indeed, in relation to surrogacy,as in other fields, the legislators have off-loaded the working out of these contradictions also onto medical and mental health professionals.

The legislation relating to surrogacy attempts to reconcile a number of conflicting principles. These include the importance of genetic links as well as the significance of social parenting; the autonomy of the family and the individual as well as the public policy implications of permitting non-traditional family forms; and the rights of individuals as well as the welfare of those perceived as vulnerable. The law, as Dewar (1998:485**)** says, "seeks to describe good behaviour" by recognising some relationships while withholding recognition from others, and also by seeking to constrain the influence of the market within the family. However, ultimately, surrogacy must be a very good example of what he calls the "normal chaos[33] of family law".

[33] See Beck and Beck-Gernsheim, 1995.

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