PUBLIC POLICY AND ASSISTED REPRODUCTIVE TECHNOLOGIES

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Assisted Reproductive Technologies (ART) entail various ethical ambiguities and complications, and politicians have been wary of taking strong stances on these issues. Public policy regulations have therefore been muddled and inconsistent. As the number of people utilizing ART continues to grow, the need for a cohesive ideology to direct public policy legislation and judicial proceedings becomes increasingly clear. In this paper, we will discuss two prevalent issues in the debate over ART: first, ownership and parenthood, and second, distributive justice. We will address the specific forms of ART that are relevant to these overarching issues and suggest how public policy ought to respond to them. We will ultimately argue that all public policy relating to ART should be guided by the goal of maximizing the autonomy of the individual with regard to his or her reproduction.

A recent addition to Amazon.com's book collection is a children's story about a family of rabbits. A picture of two loving bunny parents hugging their bunny child sits cheerfully below the title, An Itsy Bitsy Gift of Life: An Egg Donor Story.[1] This book and others like it illustrate the growing prevalence of egg donation and other forms of assisted reproductive technologies (ART) in American society. In the year this book was published (2005), close to 15,000 donor eggs were transferred to women of all ages in the United States, hundreds more than in the previous year.[2] Indeed, the past decade has seen a consistent trend of increased availability and use of ART.

ART includes a variety of procedures intended to aid couples facing obstacles to natural reproduction. By far the most common of these is in vitro fertilization (IVF), in which the sperm and ova are combined in a petri dish instead of in the woman's body. If fertilization occurs, the resulting embryos are transferred into the woman's uterus. IVF may be performed using the intentional parents' own gametes or using donor sperm, eggs, or embryos. Variations on IVF include zygote intrafallopian transfer (ZIFT), in which zygotes are transferred to the fallopian tube instead of the uterus, and gamete intrafallopian transfer (GIFT), in which unfertilized ova and sperm are transferred into the fallopian tube and left to fertilize independently.[3] Embryos created in vitro may be used immediately or frozen for use at a later date. Any of these methods can be carried out by implantation in the intentional mother or in a surrogate mother.

Because ART entails various ethical ambiguities and complications, politicians have been wary of taking strong stances in this realm of issues. Public policy regulations have therefore been muddled and inconsistent. As the number of people utilizing ART continues to grow, the need for a cohesive ideology to direct public policy legislation and judicial proceedings becomes increasingly clear.

In order to satisfy this need, there must first be a clear distinction between the respective position of federal law, state law, and court jurisdiction. We contend that these roles with respect to IVF are as follows: legislation ought to be created in accordance with the existing societal ethical framework, and should respect and promote the moral edicts laid out by society. Furthermore, all of this legislation ideally ought to be instituted on a federal level, so people have access to the same reproductive opportunities and are subject to the same regulations regardless of their place of residence, which is not significant in this matter. All policy suggestions outlined in this paper will consequently refer to federal legislation.

In this paper, we will discuss two prevalent issues in the debate over ART: first, ownership and parenthood, and second, distributive justice. We will ultimately argue that all public policy relating to ART should be guided by the goal of maximizing the autonomy of the individual with regard to his or her reproduction.

I. Ownership and Parenthood

Within the broader topics of ownership and parenthood, there are three separate issues that each deal with a different type of ART: gamete ownership during egg and sperm donation; ownership of unimplanted embryos resulting from IVF; and ownership of implanted embryos, especially when a surrogate mother is used.

Ownership of Gametes

Issues surrounding egg and sperm donation range from legal worries, such as the definition of the family and parents, to ethical worries, such as the dangers of commodification. From a legal standpoint, the fact that the child's biological parents are not his "psychological" parents has forced society to decide "who will be considered to be the 'legal parent' of the child."[4] In the case of sperm donation, the 1973 Uniform Parentage Act (UPA), released by the National Conference of Commissioners on Uni-

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form State Laws (NCCUSL), defines the husband of the wife receiving insemination as the child's legal father.5 Donors are "legally absolved of all parental responsibility."[6] The UPA was the first attempt by the federal government to enact a single policy regarding parentage and ART that would ideally by adopted by all the states. However, only 19 states adopted it. The UPA was revised in the year 2000 to include egg donation, but only four states had adopted this revised UPA as of July 2004.7

Still, even states that did not adopt the UPA included ideas in their own legislation that were essentially identical to those expressed by the UPA about gamete donation and parenthood. While there ideally ought to be a uniform national policy, independent state legislation seem to have a formed a sufficiently consistent and uncontroversial approach to gamete donation throughout the country. Furthermore, the current policies work well to maximize the autonomy of all people involved: the intentional parents can be free to conceive a child without worrying about others attempting to claim parenthood, and the donors can be free to donate gametes and help infertile couples without assuming any parental responsibilities. We therefore do not consider it a priority to make a strong push for federal legislation at this time.

An ethical concern worth noting is that of gamete commodification. Some are concerned that the practice of paying donors actually serves to assign monetary value to gametes and therefore ought to be prohibited. As Ruth Macklin discusses, though, eliminating donor compensation would drastically decrease the supply of donor gametes available to infertile couples, and might even drive such donation underground, resulting in the formation of a "black market" for gametes.[8] While certain restrictions must certainly be placed on payments to donors – exorbitant sums may exploit the poor by coercing them to donate – some form of compensation must exist for gamete donation to realistically continue.[8] Macklin concludes that the best solution is to gear payment towards compensation for time and inconvenience, but not for the genetic material itself. In 1990, the American Fertility Society in fact stated that "there should be no compensation to the donor for the egg,"[9] and in 1993 further clarified their position by stating that "donors should be compensated for direct and indirect expenses associated with their participation, inconvenience, time, risk and discomfort."[9]

We suggest that the American Fertility Society's guidelines be put into law. Donors should be paid for their participation, inconvenience, and other related factors, but not for the number or quality of gametes received. This policy would both reduce accusations of commodification and increase gamete owners' ability to make an independent choice about whether and how often to donate.

Ownership of Unimplanted Embryos

Ownership of embryos, both unimplanted and implanted, is much more contentious than that of gametes. Unimplanted embryos are produced when intentional parents choose to freeze some of the fertilized eggs created during the IVF procedure. This allows couples to repeat implantation attempts at convenient later dates without having to undergo the stressful and expensive processes of ovary stimulation and egg "harvesting" again. While couples generally define ahead of time how their frozen embryos are to be used, "couples who successfully have children using IVF may effectively 'abandon' embryos that remain frozen."[10] In this case, the existence and identity of "owners" or "parents" can become extremely ambiguous.

This uncertainty allows for various issues to arise. One example can be seen in a California clinic in 1994, where doctors transferred numerous eggs and embryos of unknowing, un-consenting couples to other women. The doctors directing the clinic at the time were charged on various counts, but not with "embryo theft;" no law existed to explicitly ban this type of activity.[10] Such a law was later passed in the state of California, but not federally. Another example is the case examined by the Supreme Court of Tennessee in the trial of Davis v. Davis. In this case, a divorced couple disputed the fate of seven frozen embryos that had been created while they were married: the former wife wanted to donate the embryos to other couples, but the former husband wanted to discard them.[11] Noting that there was no law or consistent precedent on this issue, the court ultimately ruled in the former husband's favor.

Both of these situations demonstrate the need for some policy establishing reliable guidelines for dealing with frozen embryos in unclear cases. In order to most effectively promote individual parental autonomy, this legislation ought to mandate the creation of contracts at the beginning of the IVF process. These contracts must describe a course of action approved by all parties involved that will dictate who ought to be responsible for the embryos created through IVF, even under unexpected circumstances such as divorce or death. There can consequently be little confusion about the most appropriate way to manage frozen embryos.

Ownership of Implanted Embryos

The primary issue concerning the parenthood of implanted embryos is whether or not surrogacy contracts ought to be legally enforceable. Currently, only 25 states have passed laws about surrogacy, and the legislation is largely "conflicting and inconsistent."[12] Some of the laws ban compensation for surrogacy, others view written contracts as illegal, and the remaining 25 states lack legislation on the issue completely. Even in those states without legislation, though, existing laws against "baby-selling" present

problems for parents wishing to employ a surrogate.[12]

One argument against making surrogacy contracts legally enforceable insists that "contract motherhood…commercializes reproduction" and effectively translates into baby-selling.[13] To avoid this problem, the government could establish legislation similar to that suggested earlier to prevent gamete commodification: allowing compensation for risk and inconvenience but not for the "goods" themselves.

A more powerful argument against enforceable surrogacy contracts comes from the increasingly ambiguous definition of the family. The egg for the surrogate pregnancy may come from the intentional mother, from the surrogate herself, or from a donor. Since it seems almost random to choose one of these as the child's only "real" mother, some believe that the surrogate should have some flexibility in her commitment to give the baby away after birth.[14] The New Jersey Supreme Court exemplified this view in its 1986 ruling on the Baby M case. In this trial, the surrogate mother (who was also the genetic mother), Mary Beth Whitehead, sought custody of the child, and she appealed a lower court's decision that declared the surrogacy contract was valid and awarded custody to the Sterns, the intentional parents. In 1988, the appeal court ruled that Whitehead was the legal mother of the child. Since the intentional father's sperm was used for insemination, he was named the child's legal father. But the intentional father's wife, who had planned to be the child's mother, was deemed to have no legal relationship with the child.[15]

Many philosophers and legal scholars have disagreed with this verdict and with its underlying mentality. Richard A. Posner, for example, believes that surrogacy contracts ought to be legally enforceable, largely because "such contracts would not be made unless the parties to them believed that surrogacy would be mutually beneficial...[and that] all the parties to the contract are made better off. The mutual benefits, moreover, depend critically on the contract's being enforceable."[16] Both parties agree of their own free will to the contract, so allowing the surrogate mother to back out of the agreement may be detrimental for multiple reasons: this action violates the surrogate's initial intent, it violates the intentional parents' initial intents and costs them large amounts of time and money, and it sets a bad precedent that will only deter other couples from utilizing this option and reaping the clear benefits offered by surrogacy.

Posner's view has become more popular over the past decades and was supported by the 1993 California Supreme Court case of Johnson v. Calvert. Anna Johnson, the gestational mother for the Calverts, sought custody of the child she had borne. However, the court ruled that the Calverts maintained custody of the child because the intent of the surrogacy contract was clear – that "the Calverts had intended to become parents and initiated steps to achieve this."[7] A similar case is that of In re Marriage of Buzzanca, which dealt with the Buzzancas' attempt to conceive a child using both a surrogate and donated gametes. The Buzzancas divorced before the child was born, and neither the Buzzancas nor the surrogate sought custody of the child after its birth. The California Court of Appeals ruled that the Buzzancas had intended to become the child's parents, and therefore custody ought to lie with them.[17]

After considering the goal of maximizing reproductive autonomy as well as the conflicting perspectives for and against enforcing surrogacy contracts, two conflicting but equally tenable options for legislation seem to arise. The first would attempt to maximize the autonomy of the intended parents, and it advocates that a policy ought to be instituted that declares the surrogacy contract legally binding. This would maximize parental and surrogate autonomy according to the notion that all had voluntarily consented to the initial agreement established in their contract. In this situation, to help minimize cases in which the surrogate mother does wish to appeal for custody, we would recommend that all parties receive extensive education on possible psychological issues that may arise. Intentional parents may be encouraged to use surrogates who have had children of their own, and thus may better understand the psychological issues involved in such a separation.

The second policy suggestion would focus on maximizing the autonomy of the surrogate mother by allowing her to change her mind and appeal for custody if she so chooses. Requiring contracts to be legally enforceable might be unnecessarily restrictive to surrogates, and allowing the surrogate to appeal increases her agency. This policy would not mean that a surrogate plea for custody necessarily means that she receives sole custody; it does, however, imply that her new interest in retaining parental rights will be considered and may carry some weight.

Even while these two possible routes for legislation directly conflict, they both serve to maximize reproductive autonomy in some way and are consequently both defensible. We therefore do not feel comfortable conclusively choosing one option over the other according to criteria outlined in this paper. This may be a possible source of the inconsistent policy existing today on this issue.

II. Distributive Justice

The second important realm of issues associated with ART is that of distributive justice, or who has access to available resources and technologies. Currently, ART is not subsidized in the United States by the government or by most insurance agencies. This is not true universally – in England, for example, one full round of IVF for infertile couples is paid for by the NHS.[18] In America, though, patients pay an estimated 85% of IVF costs. Since the estimated cost per live birth is $58,000 for IVF, this procedure is

primarily limited to those wealthy enough to afford it.[19]

Is Reproduction a Right?

Is there a role for state or federal governments in subsidizing ART, perhaps grounded in the "right to reproduce?" While respect for individual autonomy generally does grant people the right to reproduce naturally as they see fit, this does not imply that accessing costly government resources is a right. As evidenced by the general lack of pre-natal care for the nation's poor, the current U.S. healthcare system clearly does not promote the right to reproduce. There is therefore is no basis for government subsidies for these procedures. Furthermore, because there is no current U.S. policy of universal healthcare, uninsured individuals do not have a right to any healthcare according to society's current structure. Subsidizing a nonessential (though by no means trivial) procedure would therefore be a violation of the existing ethical edicts demonstrated by existing legislation. There is a valid argument to be made that the ethics currently determining healthcare accessibility are flawed, but the courts would need to rule that healthcare is a universal right before public policy could justifiably direct large sums of money to provide IVF universally.

One alternative to help ease this distributive burden would be to require insurance agencies to subsidize at least some of the costs of IVF. This would make IVF more available to the many individuals who have insurance but cannot afford the high out-of-pocket expenses for IVF. Of course, this policy would carry its own problems, mainly shifting the distribution barriers further onto individuals without medical insurance, or even raising insurance costs to rates that cause more people to be uninsured.

ART and Exploitation

The other distributive problem with ART arises through the feminist assertion that women and their bodies are "exploited" through these processes. One argument is that paying women to be gamete donors is morally objectionable because it violates the Kantian imperative of never treating others as a means only. However, there are a few problems with this argument, as John Harris describes in Macklin's essay. Using others as a means to an end is acceptable, he writes, when "those others have autonomously accepted the project as their own and have not been coerced in some way into becoming an instrument."[20] Thus, the mutually beneficial relationship between the consenting paid surrogate or gamete donor and the recipient is not inherently coercive. Furthermore, since society tolerates adults' judgments regarding money and inconvenience of other sources of income (such as the costs and benefits associated with being a coal miner), it is rather paternalistic to violate the autonomy of women engaging in IVF by denying them this same ability to choose whether or not to participate.

Others may argue that surrogacy or gamete donation may unduly burden women of lower socioeconomic classes. However, because of the recipient's desire to receive good genes from healthy women, donors are as likely to be from the middle classes as the lower classes.[21] Thus, the distributive burden is overstated here.

Conclusion

In summary, our public policy proposals seek to maximize the individual's reproductive autonomy. Our stance on gamete donation, IVF, and surrogacy all place the government in a restricted regulatory role. We also believe that ART policy is not the forum to resolve distributive justice problems.

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Editors Note: Parentheses indicate specific page from source that reference came from.

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