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Reproductive surrogates, risk, and the desire for genetic parenthood

Kimberly Mutcherson*

Rutgers Law School, Camden, NJ 08102, USA

* Corresponding author. E-mail: mutchers@camden.rutgers.edu

In the realm of scientific advances in reproductive medicine, following quickly on the heels of every exclamation of ‘What will they think of next?’ should be the question, ‘At what point, if any, will they have gone too far?’ In this arena, as is true in a range of scientific endeavors, progress frequently invites concerns about peril. We fret about changing family structures, about predicting risks to future children, about coercion and exploitation of those who sell and donate services and products in reproductive markets, and what consequences new techniques will have on women’s lives and women’s bodies. It is vital to center women in most conversations about advances in reproductive technology because until an artificial womb becomes available, women will always bear the ultimate physical burden of pregnancy, no matter how that pregnancy is created. Given this necessity, in his article, *Other women’s wombs: uterus transplants and gestational surrogacy*, John Robertson does a more than admirable job of covering a wealth of bases. It is, of course, impossible to cover all of the complications of the issues involved here in a small space and a commentary also has little space to deal with those same complexities. Therefore, my goal is to flesh out some of the unavoidably more bare bones discussion in Professor Robertson’s piece to complicate further this new terrain of assisted reproduction.

From its start, Professor Robertson’s article challenges readers to consider just how different uterus transplants and gestational surrogacy actually are. While both aim to create pregnancies, the reference to other women’s wombs in the title evokes a disembodiment that is only true in the case of uterus transplants. By this, I mean that a uterus transplant removes from one woman the organ in which a fetus can grow and deposits it in the body of another. Thus, what happens to the donor, the provider of the necessary reproductive organ, removes her from the physical act of gestation and gives that desired responsibility to another woman. In contrast, a gestational surrogate’s body is fully encompassed by her role as a gestational carrier. Her act requires months of

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bodily participation in a way that is decidedly more invasive and, in ways that Robertson acknowledges, more fraught with potential for emotional and psychological difficulties for multiple parties. Consequently, to talk of ‘other women’s wombs’ does a disservice to the reality of what it takes to engage in gestational surrogacy as what is at issue is more than just a woman’s womb. Thus, as a starting point, this commentary takes the position that the stakes in gestational surrogacy, as others have noted, require in many respects a different kind of calculation than what is required when thinking about uterus transplants and transplant ethics.

Despite the contrast between gestational surrogacy and uterus transplants, Robertson’s piece covers wide territory in its defense of both practices, but his discussion of surrogacy regulation and its unfair burdens also misses a few beats. He writes at one point, ‘To date, nothing has emerged to suggest that the surrogacy experience in the USA has been problematic.’¹ It is unclear what would count as problematic for Robertson. There have been very high-profile cases of surrogacies gone wrong.² There has been at least one agency that shut down with the owners facing criminal charges after they defrauded both intended parents and gestational carriers.³ There have been a number of custody and parentage disputes involving surrogate pregnancies.⁴ And there is no way to tell what kinds of disputes have taken place without airing in the courts or in news outlets. It may well be the case that the vast majority of gestational surrogacies that take place in the USA proceed more or less smoothly, but given the nature of the exchange here it seems naive to suggest that the USA has cornered the market on doing surrogacy right.⁵

Robertson ultimately makes a robust case for the ethics of uterus transplants and access to gestational surrogacy for women seeking to have genetically related children, noting many of the difficult issues involved in both practices. There are two aspects of Robertson’s account to which this commentary now turns; the factors involved in the calculation of risk and the combined force of genetic tie and preference for gestation as components of the justification for transplants.

I. THE RISKS IN THE RISK BENEFIT ANALYSIS

That uterine transplants do not involve the same type of bodily invasion that pregnancy and gestational surrogacy involve does not mean that donor participation in a transplant is without physical risk. Robertson faithfully recounts many of those risks for living donors who will have to endure a radical hysterectomy to remove the uterus

¹ John A. Robertson, *Other Women’s Wombs: Uterus Transplants and Gestational Surrogacy*, 3 J. L. & BIOSCI. 16 (2016).

² Jessica Grose, *The Sherri Shepherd Surrogacy Case Is a Mess. Prepare for More Like It*, SLATE, Apr. 28, 2015.

³ Stephanie Saul, *Would-Be Parents Find Surrogate Agency Closed*, N.Y. TIMES, Mar. 20, 2009.

⁴ See eg *In re Baby M.*, 537 A.2d 1227 (1988); *Johnson v. Calvert*, 851 P.2d 776 (1993); Stephanie Saul, *New Jersey Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES, Dec. 30, 2009.

⁵ Numerous other factors further complicate the legal landscape of surrogacy in the USA. The practice is regulated on a state level and most states have no regulation of the practice at all, which leaves all involved parties on shaky ground. Insurance coverage for the practice is not widespread and public insurance does not cover the cost, which creates significant access gaps. Some states require marriage or that the intended parents use their own gametes or that they first establish medical infertility, all requirements that work to exclude. Surrogacy contracts routinely include clauses about pregnancy termination that while technically unenforceable, can be used to pressure women into making pregnancy termination decisions. So even where there is surrogacy friendly legislation, problems remain.

because of the need to preserve the organ for transplant.⁶ This entails known and well-documented surgical risks including negative and potentially deadly reactions to anesthesia or post-surgery infections. He also considers the physical risks to recipients including lengthy surgery, the necessity of taking immunosuppressing drugs to avoid rejection of the transplanted organ, potential harm to a fetus growing in a transplanted womb, and as always, the emotional weight of participating in what is now still an experimental procedure with an unknown outcome.

As Robertson rightly stresses, uterus transplants are not life-saving transplants, but they are life-enhancing in the same way as hand, face, penile, and other types of transplants. That they are not life-saving transplants must weigh significantly in our balance of whether women should put themselves at risk in order to donate them. The UK, which has close regulation of reproductive technologies in general, presently forbids live donor transplants because the risk benefit analysis tips toward only using uteruses harvested from cadavers.⁷

Beyond the physical risks, we should rightly have concerns about others ways in which the uterus transplant world might coerce or exploit donors or recipients. From the donor side, just as we have legitimate concerns about how familial coercion or pressure might weigh on a woman asked to be a surrogate for a close friend or family member, the same concerns exist in the context of uterus transplants. The lack of compensation does not mean that there will not be pressure to participate in a process that a woman might otherwise identify as completely unworthy of consideration.

Other less tangible, but no less concerning, emotional risks include the need to ensure that donors and recipients have access to adequate support systems to assist them not only through surgery, but the long period of recovery that will follow it. And, of course, the potential devastation that could be experienced when, inevitably, some transplants fail and have to be removed,⁸ when pregnancy cannot be achieved even after a successful transplant, or when a fetus is miscarried or stillborn. Not all women who use a transplanted uterus will emerge having experienced improved 'well-being and human flourishing in a significant way'.⁹ Of course, women should be informed of the risks and benefits of this still experimental procedure and the many possibilities of failure, but given how fraught the context is and, in some cases, how deeply desired pregnancy may be, it is inevitable that the free nature of consent will be compromised on some occasions.¹⁰

II. GENETICS AND GESTATION ABOVE ALL

The social risks of uterine transplants, at least as argued for by Robertson, include reifying genetic ties and treating gestation by a future parent as an elevated path to motherhood. Robertson makes clear early in his article that he is fundamentally focused on ensuring that women with uterine infertility are not barred from having genetic

⁶ Robertson, *supra* note 1, at 4.

⁷ *Id.* at 2.

⁸ Merritt Kennedy, *1st U.S. Uterus Transplant Fails Amid 'Sudden Complication'*, NPR NEWS, Mar. 10, 2016.

⁹ Robertson, *supra* note 1, at 6.

¹⁰ Ruby Catsanos, Wendy Rogers & Mianna Lotz, *The Ethics of Uterus Transplantation*, 27 *BIOETHICS* 65–75, 70 (2013).

offspring when safe and effective techniques exist for alleviating their condition.¹¹ His defense of uterine transplants on the basis of the importance of genetics and gestation are not unique to the uterine transplant setting. Both of these issues are well-traveled territory in the long-standing scholarly discussion of assisted reproduction, but neither topic gets much airing from Robertson. It is worth a bit more exploration of whether there are unique aspects of uterine transplants that make them any more or less problematic than other reproductive technologies or, whether their existence simply provides a present day opportunity to re-visit concerns that have never and likely will never be fully resolved.

Robertson's piece conflates genetics and gestation without giving an account of why the two might hold different levels of importance for different women. The two experiences most often intertwine, no doubt, but they are worthy of being thought of as distinct.¹² It is especially odd to ignore the importance of gestation without genetics or parentage without genetic tie given how often people pursue these scenarios in the fertility market. It is not an uncommon practice for a woman to gestate embryos that have no genetic connection to her even if she intends to parent the child to whom she will give birth. Lesbian couples buy sperm from anonymous men and make children who will be raised without knowing their genetic fathers. Opposite sex couples buy eggs from young women to be fertilized by the sperm of the intended father and gestated by the intended mother, whose tie to her child will be gestational, not genetic. Gay men hire gestational carriers to gestate embryos from purchased ova and the sperm of the intended father(s). Gestational carriers agree to gestate children to whom they have no genetic tie but with whom they expect to have a special, albeit non-parental bond. Opposite sex married couples 'adopt' embryos from people who for a variety of reasons will not use those embryos to create their own genetically related children who they will parent. In all of these scenarios we are called to dispute the pull of genetic tie and imagine a world in which the ties that bind are more external than internal.

Just as every gestational surrogacy does not include the creation of a child with genetic connection to both intended parents, it is not clear that uterine transplants would necessarily have such a requirement, at least not in the future world that Robertson posits in which such transplants are established as safe and effective. We have ample evidence, anecdotal and otherwise, of the deep bonds of love and affection that grow between parents and children without the tie of genetic closeness. Even as a person in agreement with Robertson's background premise that 'procreation and child rearing [are] fundamental human right[s], and uterine infertility should not bar individuals from having genetic offspring when safe and effective techniques exist for alleviating their condition,'¹³ Robertson's exclusive emphasis on uterine transplants as a means

¹¹ Robertson, *supra* note 1, at 2. Robertson's emphasis on genetics is significant enough that it begs the question of whether his ethical case for uterus transplants fails if the transplant recipient does not intend to use her own eggs or the sperm of her husband or male partner to create embryos.

¹² Kimberly M. Mutcherson, Procreative Pluralism, 30 *BERKELEY J. GENDER L. & JUST.* 22 (2015); Kimberly M. Mutcherson, *Transformative Reproduction*, 16 *J. GENDER, RACE & JUST.* 187 (2013).

¹³ Robertson, *supra* note 1, at 2. I slightly altered Robertson's quote here so as to make clear the position of this commentary which is that procreation and child rearing should be recognized as separate and independent rights, not as one seamless fundamental human right. There are those who procreate or at least gestate with no intention to parent, like gestational carriers, and there are those who parent and rear children without procreating and without having a genetic link to a child.

to forge genetic connections with future children, while it need not be the case, unwittingly elevates genetic connection as more important than other ways in which would be parents forge ties with their non-genetically related children.

However well-intentioned, emphasizing genetics and gestation has the potential impact of increasing pressure on women to consent to risky and potentially dangerous new techniques for pregnancy creation in order to mimic as closely as possible a 'natural' procreative process. But, given how many ways families can be formed and cherished, it is vital that all societies continue to reject messages that pit women against their own bodies and their own self-interest.

This commentary ends by going back to the start of Robertson's piece where he writes that uterine transplants are a 'technology less dramatic in [] scope'¹⁴ than other earlier advances such as in vitro fertilization. I am not quite sure what he means by this. If it refers to the number of women who will likely end up availing themselves of the option of uterus transplants as contrasted with the women who will participate in IVF cycles, then his statement makes sense. However, the scope of the impact of uterus transplants is, as this commentary has argued, broader than simply how many women will participate in the transplant process as donors or recipients. Like many forms of assisted reproduction including the process of egg retrieval and the experience of pregnancy itself, this is yet another set of circumstances in which women's bodies are being subjected to physically taxing and risky invasive procedures that men will never experience. This is major surgery with all of the risks attendant to that kind of surgery including the potential for life-ending reactions to anesthesia, post-surgical complications including rejection of the transplanted organs or infections, and scar tissue buildup, plus a second surgery to remove the uterus when it is no longer needed.

Robertson writes of uterine transplants as a way to reduce reproductive suffering with too little consideration of the broader context in which such suffering takes place. No doubt, many women who seek out assisted reproduction do so because of a deep urge to procreate, but we should not ignore the components of that urge that are potentially socially constructed. Women should be able to pursue procreation, even if sometimes at their peril, as long as they do so with wide access to information about risks and benefits. But each new technology renews the opportunity for a broader cultural conversation about the circumstances under which it might be wise to help someone disentangle her desires from the pressures of the cultural milieu in which those desires have been shaped. Not every woman wants to parent. Not every woman should parent. Not every woman wants to parent at all costs. Not every woman thinks that her claim to motherhood is diminished if she parents children to whom she has no genetic or gestational tie. At some point, it is worthy to invite people who work in the fertility industry to engage in a serious discussion about how to make the world a place in which it is much easier for women to walk away from technology and maybe even walk away from the dream of having children at all or children to whom/with whom they have a biological connection. Fertility treatment, while no doubt exceedingly important to so many people, is not life or death. Women deserve to live in a world in which the fullness of their lives is not judged by their status as gestational and genetic mothers.

¹⁴ Robertson, *supra* note 1, at 2.

III. CONCLUSION

Each new assisted reproductive technique creates new risks, new rewards, and new pressures for women who experience medical infertility. The motherhood imperative remains strong and the shaming of women who fail to produce children from their own bodies is also quite strong. It is absolutely the case that there are many women, and their families, who will benefit from uterus transplants. It is equally the case that there are some women for whom the offer of transplant or the hope of a successful transplant will serve only to prolong or even enhance their suffering. It is long past due for the fertility industry to speak openly and with candor about the number of people who do not find success and who do not achieve happy endings even after months and years of effort and psychological and physical strain. Even as we forge ahead with newer and better techniques for creating pregnancies, the industry and those of us who support it and critique it through our scholarship must continually ask how we can be supportive of women's choices while also helping to create a more just world in which those choices get made.