Motherhood: Beyond Patriarchy

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Abstract

Law works by precedent and by analogy.

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Introduction

Law works by precedent and by analogy. While that has shown extraordinary advantages in maintaining an orderly system and avoiding capriciousness, it has its limitations. The law has a hard time confronting something new. New things can be incorporated only by stressing their points of similarity to old things, to concepts already embedded in the law.

The "something new" to which I refer here is not so much surrogacy arrangements and new reproductive technology per se, as it is the issues and concerns, the interests, of women where those are not the same as, or analogous to, those of men.

American law has, since the time of the constitution, continually if haltingly expanded the definition of citizen, of individual entitled to full legal rights. The rights and privileges of the white men framers of the constitution have thus been extended to men of color, to native American men, and eventually to women. In the areas of employment, housing, education—all of the areas of what we think of as the "public sphere"—this has been an effective technique to achieve a more just society.

As new concerns arise around family and procreation—the areas we think of in America as "private life"—the limitations of the workings of the law become apparent. It is these limitations which I address here.

Patriarchy, Paternity and Maternity

Legal definitions of the family are reflections not of biological relationships, but rather of cultural values and ideology. The law reifies the values and beliefs of the law-makers. American family law has its roots

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in patriarchy, and in men's view of family relationships.

The term "patriarchy" is often used loosely as a synonym for "sexism," or to refer to any social system where men rule. The term has a more specific, technical meaning, however: the rule of fathers. It is that specific sense that I am using it here.

Patriarchal kinship is the core of what is meant by patriarchy: the idea that patriarchy is the definitive social relationship. A very clear statement of patriarchal kinship is found in the book of Genesis, in the "begat." Each man, from Adam onward, is described as having begotten a son in his likeness, after his image. After the birth of this firstborn son, the men are described as having lived so many years, and having begotten sons and daughters. The text then turns to that firstborn son, and in turn his firstborn son after him. Women appear as "the daughters of men who bore them offspring." In a patriarchal kinship system, children are reckoned as being born to men, out of women. Women, in this system of patriarchy, bear the children of men.

The central concept here is the "seed," that part of men that grows into the children of their likeness within the bodies of women. Such a system is inevitably male dominated, but it is a particular kind of male domination. Men control women as daughters, much as they control their sons, but they also control women as the mothers of men's children. It is women's motherhood that men must control to maintain patriarchy. In a patriarchy, because what is valued is the relationship of a man to his sons, women are a vulnerability that men have to keep these sons, men must pass their seed through the body of a woman.

While all societies appear to be male dominated to some degree, not all societies are patriarchal. In some, the line of descent is not from father to son, but along the lines of the women. These are called "matrilinage" societies: it is a shared woman that makes for shared lineage of the family group. Men still rule in these groups, but they do not rule as fathers. They rule the women and children who are related to them through their mother's line. In such a system, people are not men's children coming through the bodies of women, but the children of women.

Our society developed out of a patriarchal system, in which paternity was the fundamentally important relationship. Some of our social customs and traditions, as well as such laws as those defining "illegitimacy," reflected men's concern for maintaining paternity. But the modern American society's kinship system is not classically patriarchal. It is what anthropologists call a bilateral system, in which individuals are considered to be equally related to both their mother's and their fa-

cther's "sides" of the family.

We carry our history with us, though. Out of the patriarchal focus on the seed as the source of being, on the male production of children from men's seed, has grown our current thinking about procreation.

Modern procreative technology has been forced to go beyond the sperm as seed, to recognize the egg as seed also. But the central concept of patriarchy, the importance of the seed, was retained by extending the concept to women. Women too have seed, and women too can be said to have their "own" children, just as men do. In this modified system based on the older ideology of patriarchy, women's "rights" to their children are based on the unique relationship of pregnancy, the long months of gestation and nurturance, the intimate connections of birth and suckling, but on women's status as producers of seed. Women gain their control over their children not as mothers, but as father-equivalents. Thus the rights and privileges of men are extended to women. But there are costs, as we are increasingly coming to see.

Redefining Motherhood and Fatherhood

When biological paternity could only be assumed and never proved, the legal relationship between men and women in marriage gave men control over the children of women: any child of a man's wife was legally a child of the man. Motherhood was obvious; and fatherhood was reckoned by the relationship of the man to the mother.

Now that biological paternity can be brought under the control of science, with doctors both controlling paternity by moving insemination from the bed to the operating table or petri dish, and by proving paternity with newly definitive paternity testing, the legal relationship between men, women and their children has begun to shift.

A man's paternity need no longer be reckoned through his legal relationship with the mother of the child, but can now be ascertained directly. In consequence, we occasionally find ourselves reckoning maternity through a woman's legal relationship with the father. Consider here the newly available technology which permits a woman to carry to term a fetus not conceived of her own. There is nothing in in vitro technology that requires the fertilized ovum to be placed in the uterus of the same woman from whom the ovum was originally retrieved. We have, to put it simply, a technology that takes Susan's egg and puts it in Mary's body. And so who, we ask, is the mother? Is Mary substituting for Susan's body, growing Susan's baby for Susan? Or is Susan's egg, substituting for Mary's, growing into Mary's baby in Mary's body?
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The way American society has been answering that question depends on which woman is married to the baby's father. If Mary's husband is the father, then Mary is the mother, and Susan considered an "ovum donor," comparable to a sperm donor, with no recognized claim to the child. But if Susan's husband is the father, then Susan is the mother, and Mary the surrogate, the hired uterus, the incubator. There exist now in the U.S., birth certificates that list as the mother the ovum donor, and the name of the woman who carried the pregnancy and birthed the baby is nowhere on the birth certificate. Just as there exist birth certificates that list as the mother, the woman who carried the baby, and not the name of the woman who donated the egg. Legal motherhood is being determined by the relationship of the woman to the father.

Thus, while we have moved beyond traditional patriarchal definitions, we have not moved beyond the focus on seeds and genetics, and sperm and paternity specifically. This focus on the genetic connection between parents and their children is not a simple reflection of biological reality. The parent-child relationship is invested with social and legal rights and claims that are not recognized, in this society, in any other genetic relationship. And that is not because it is a uniquely divine relationship. If an individual carries a certain gene, the chances that a sibling will carry the same gene are fifty-fifty, the same as the parent-child relationship. Genetically, "there is nothing special about the parent-offspring relationship except its close degree and a certain fundamental asymmetry. The full-sib relationship is just as close."

The significance we claim for the parent-child relationship is rooted in our social heritage of patriarchy; that genetic connection was the basis for men's control over the children of women. The contemporary modification of traditional patriarchy has been to recognize the genetic parenthood of women as being equivalent to the genetic parenthood of men. Genetic parenthood is the only parenthood in which biological, and thus in our legal system, the only parenthood that is recognized for women. The significance of gestation, having no analogy to the experience of men's parenthood, is diminished.

Surrogacy: Beyond Baby M

It is in this context, in which genetic parenthood is acknowledged and pregnancy ignored, that the marketing of mothering services, commercial surrogacy, has developed.

Surrogacy, some people tell us, is not new; it is as old as the bible, as old as the story of Abraham, Sarah and Hagar. But Hagar was not a surrogate mother for Ishmael. She was unquestionably the mother of that child. Sarah was not Ishmael's adoptive foster, rearing, or social mother. She was Abraham's wife, and Hagar was the mother of the child, his child, the child of Abraham. If Hagar served as a surrogate, it was as a surrogate wife, bearing a child for Abraham, the child of his seed, in her body.

Abraham and Hagar were living in a true patriarchy; William Stern and Mary Beth Whitehead do not. Our society, recognizing the genetic tie between mother and child, understood Baby M to be "half his, half hers." But the child might just as well have grown in the backyard. The unique relationship of pregnancy, the motherhood experience, received no recognition. Even without a legal contract for a surrogacy arrangement, Stern had as much right to the child, in our modified patriarchy, as did Whitehead. Abraham claimed his child but acknowledged the mother. Stern claimed his child but recognized no mother, only a rented uterus, a human incubator. The court ultimately rejected his argument, but only to the extent of recognizing Whitehead's genetic tie to the child, not the significance of her mothering of that child through pregnancy and birth.

The "Baby M" case simply highlighted what is true for all mothers in this system: we are only recognized as half owners of the children of our bodies. Women have gained recognition of our genetic ties to our children, but we have lost recognition of our nurturance, our motherhood. In a sense, we have gained paternity rights at the cost of maternity rights.

And now that women's genetic parenthood can be split off from gestational parenthood, the costs of equating our parenthood with that of men comes clear. If parenthood is understood as a genetic relationship, divided equally between sperm and ovum donors, then where is the place for pregnancy?

The new reproductive technology permits the development of surrogacy arrangements quite different from that of the Baby M situation. What will happen as the new technology allows brokers to hire women who are not related genetically to the babies that are to be sold? Like the poor and non-white women who are hired to do other kinds of nurturing and caretaking tasks, these mothers can be paid very little, with few benefits, and no long-term commitment. The same women who are
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pushing white babies in strollers, white old folks in wheelchairs, can be carrying white babies in their bellies. Poor, uneducated, third world women and women of color from the United States and elsewhere, with fewer economic alternatives, can be hired more cheaply. They can also be controlled more tightly. With a legally supported surrogate motherhood contract, and with new technology, the marketing possibilities are enormous—and terrifying. Just as Perdue and Holly Farms advertise their chickens based on superior breeding and feeding, the baby brokers could begin to advertise their babies: brand-name, state-of-the-art babies, produced from the “finest” of genetic materials and an all-natural, vitamin-enriched diet.

In Sum: Beyond Paternity

We cannot allow the law to inch along, extending to women some of the privileges of patriarchy, but understanding the experiences of women only as they are analogous to those of men. What is needed is to move beyond the principles of patriarchy and beyond its modifications, to an explicit recognition of motherhood. Women are not, and must not be thought of as, incubators, bearing the children of others—not the children of men, and not the children of other women. Every woman is the mother of the child she bears, regardless of the source of the sperm, and regardless of the source of the egg. The law must come to such an explicit recognition of the maternity relationship.

Perspectives on Surrogacy: Risks, Rewards and Personal Choices

Noel P. Keane*

A little more than twelve years ago I was introduced to the concept of surrogate parenting, not by an attorney, a doctor or media event, but by a married couple who exhausted other avenues of overcoming the wife’s infertility and sought my advice on the legal possibility of having a child by artificial insemination of another woman. At first, the thought of such an arrangement seemed nothing less than incredible. I was not aware of the alarming percentage of married couples who suffered from infertility and the disparate treatment that these couples received.

A Not So Incredible Solution

After accepting the couple’s challenge, I realized that no legislation or case law existed on the issue. Nonetheless, a Michigan probate judge with whom I inquired indicated that the husband would be considered the legal father of a child so conceived by an unmarried surrogate, and the father’s wife could later adopt the child. The same judge opined that a fee payment would not be possible, but expenses incurred by the surrogate would be approved. Encouraged by the judge’s opinion and by a subsequent news report of a surrogacy arrangement by a California man, local newspaper advertisements for a volunteer surrogate were placed.

The placement of those first advertisements and the later conclusion that a fee for gestational services only was not contrary to existing law1 have changed my practice to the point where hundreds of infertile

The author arranged for the surrogate parenting of Baby M and is the author of The Surrogate Mother (1981).

1. It should be noted that by its definition of “surrogate parentage contract”, Michigan’s recently enacted Surrogate Parenting Act, P.A. No. 199 of 1988, Mich. Comp. Laws 722.851, does not on its face void those surrogacy arrangements where the surrogate is paid for gestational services only. The scope of this act’s prohibitions is the subject of recent litigation resulting in an opinion that failed to clearly delineate proscribed activity. Doe v. Att’y Gen. of Mich., No. 88-419032 CZ (Wayne County Cir.