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Marci L. Smith

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Surrogacy Agreements

Birth Power. By Carmel Shalev. Yale University Press 1989. Pp. ix - 201.

I. INTRODUCTION

Medical technology has allowed people to control reproduction for several years. The introduction of contraceptive devices enabled couples to decide when or whether to have children. More recently, technology remedied the opposite situation—childless couples could succeed in having children through the use of sperm banks and surrogate mothers. Most of these options are a phenomena of the last decade. *Birth Power*,¹ by Carmel Shalev, analyzes the legality and enforceability of surrogacy agreements. The book contains an impassioned plea that the law free women from the male dominated medical profession and current paternalistic laws and allow them to reclaim the power over their wombs.

Shalev advocates a contractual approach to surrogacy agreements, concluding that they should be legally binding on both the surrogate mother and the childless couple. The bases for her conclusion are several; however, the central support is that surrogacy agreements must be enforced or a double standard of sexual morality and conduct will continue.² This double standard refers to the basic notion that men and women are held to different societal standards with respect to sexual conduct. Throughout history, societal mores have allowed men more sexual freedom than women. Currently, the law treats surrogacy contracts as legal but unenforceable.³ Shalev sees the legal status of surrogacy agreements as “one more facet of the double standard.”⁴ Refusing to legally bind the birth mother to the terms of a surrogacy agreement “implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive activity.”⁵ Shalev contends that al-

1. C. SHALEV, *BIRTH POWER* (1989).

2. *See id.* at 11.

3. *See, e.g., In re Baby “M”*, 217 N.J. Super. 313, 525 A.2d 1128 (1987).

4. C. SHALEV, *supra* note 1, at 11.

5. *Id.*

lowing women to be bound by surrogacy contracts would be a step forward in ultimately reaching a just, egalitarian society.⁶

While criticism of the double standard surfaces throughout the book, other factors also support Shalev's conclusion that surrogacy agreements should be enforceable. First, her view of the law influences her conclusion. According to Shalev, the law operates under a "tension between the ideal and the real."⁷ She feels that the law should embrace the ideal—that promises will be kept and rescission will be the exception.⁸ Second, her faith in the human race to act responsibly supports her argument.⁹ Finally, she rejects the notion of a gestational bond, finding that the concept of gestational bonding "binds and confines women to a biological destiny and impedes their individuation as autonomous persons."¹⁰

The book begins by relating the highly publicized *Baby "M"* case,¹¹ which provides an excellent introduction into the difficult legal issues raised by surrogacy agreements. Shalev poses several questions.

Is enforcing surrogacy agreements "tantamount to the sale of a baby? Does not a woman have an inalienable 'natural' right to the fruit of her womb? Will a caste of breeder women be created if surrogacy agreements are enforceable? Ought not the law protect women and restrain the market . . . from encroaching on . . . the realm of family relations? If so, is criminalization of surrogacy the answer? Would this not merely expose women to exploitation and victimization with no form of legal protection?"¹²

After exposing the reader to these fundamental policy concerns, Shalev applies three existing legal models to these policy concerns: (1) the "adultery—illegitimacy" model; (2) the "adoption" model; and (3) the "donor artificial insemination" model.¹³ The first half of Shalev's work is devoted to a discussion of these three models. The second half directly addresses surrogacy contracts.

6. *Id.* at 19.

7. *Id.* at 20.

8. *Id.*

9. *See id.*

10. *Id.*

11. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (1987).

12. C. SHALEV, *supra* note 1, at 10.

13. *Id.* at 8.

Each discussion in the first half of the book highlights the law's inequitable treatment of women, both in the past and in the present. Shalev interweaves three analyses: she describes existing regulations, criticizes them, and prescribes alternatives. Ultimately, Shalev concludes that surrogacy agreements should be governed by contract laws similar to those governing artificial insemination. That is, like the sperm donor, the surrogate mother should be allowed to divest herself of all parental rights and responsibilities prior to the birth of the baby.¹⁴

II. EXISTING LEGAL MODELS

A. *Illegitimacy—Adultery*

The first model—illegitimacy and adultery—is discussed in a chapter termed “The Biological Family.”¹⁵ According to Shalev, norms surrounding the biological family regulate reproductive relations.¹⁶ Thus, adultery and illegitimacy were the applicable legal concepts in the early development of divorce and family law. Much of the discussion in this section is historical in context, examining the conditions and events which resulted in the birth of the monogamous family and the “subjugation of the female sex to male supremacy.”¹⁷ Shalev points out that the monogamous family emerged as a result of the primitive male's desire to overthrow what was known as the “mother right,” which regulated inheritance. As paternity was uncertain in primitive societies, where group marriage was the norm, descent could be proved only on the mother's side. When a man died, his estate went to his birth family—the blood relations on his mother's side. This was known as the “mother right.”¹⁸ Because the male wanted his biological children to inherit his wealth, there was an incentive to overthrow the mother right.¹⁹

The monogamous marriage later evolved into “a transaction between a woman's father and her prospective husband to trans-

14. *Id.*

15. *Id.* at 21.

16. *Id.*

17. *Id.* at 24.

18. C. SHALEV, *supra* note 1, at 24 (quoting F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE*, ch. 2 (1884 & reprint 1942)).

19. *Id.*

fer ownership of the woman."²⁰ Women were treated as a chattel, unable to hold or transfer rights.²¹

The double standard of sexual activity thus had its beginnings in the male's desire to make paternity known. The double standard continued in the monogamous marriage as evidenced by early adultery laws. For example, in some nineteenth-century American jurisdictions, divorce statutes require the woman to prove that the husband "lived in adultery" while the man only had to prove one adulterous act by his wife.²² Shalev suggests that the modern paternity action is continuing evidence of a double standard.²³ She characterizes the current paternity action as "a legal arena in which the welfare authority and the putative father as the adversaries pit their wits in an attempt to evade responsibility for the illegitimate child at the expense of the mother's social reputation and the child's welfare."²⁴ Shalev recommends that courts give more credibility to the mother's testimony and presume paternity rather than non-paternity.²⁵ Finally, she asserts that if the courts continue to presume non-paternity, absolving men of responsibility for children, the double standard of sexual morality will be perpetuated.²⁶

B. Adoption

Shalev discusses briefly the second existing legal model, focusing mainly on existing adoption laws.²⁷ Shalev criticizes closed adoptions and recommends an open system.²⁸ She cites several reasons for an open adoption system: studies showing the profound psychological isolation of being unrelated to any person; the right of adoptive children to know their origins; and the lack of genetic information in the adoptive child's medical history.²⁹ Moreover, societal attitudes are changing from the view

20. *Id.* at 26.

21. *Id.* at 26 (citations omitted).

22. *Id.* at 28 (citing M. O'BRIEN, *THE POLITICS OF REPRODUCTION* 21-22, 29-30 (1981)).

23. *Id.* at 32-35.

24. C. SHALEV, *supra* note 1, at 35.

25. *Id.*

26. *Id.* at 35-36.

27. *Id.* at 37.

28. *Id.* at 41.

29. *Id.* at 46-49.

that the birth mother strikes a bargain with society by giving up her child in exchange for her restored virtue.³⁰

In addition to advocating open adoption, Shalev probes adoption issues which are particularly pertinent to analysis of surrogacy contracts. One such issue is the birth mother's consent.³¹ Currently, no state enforces a woman's prenatal consent to adoption or termination of parental rights.³² According to Shalev, such non-enforcement "belies a paternalism that . . . constrains the autonomy of the person making the decision to relinquish the child."³³ Dilemmas faced by the birth mother, she says, are certainly not diminished by birth of the child.³⁴ Shalev concludes that although a child obviously cannot be physically surrendered before birth, the decision to do so can be finalized before the event.³⁵ This conclusion is crucial to Shalev's ultimate conclusion that surrogacy agreements should be enforceable.

C. Artificial Insemination

Artificial insemination, the third legal model, is the last topic discussed in the first half of the book.³⁶ When courts first confronted artificial insemination issues, adultery and illegitimacy were commonly used legal analogies.³⁷ Indeed, the result of artificial insemination is a child born outside the bonds of marriage. Courts thus concluded that artificial insemination was the equivalent of adultery.³⁸ Eventually, states rejected the legal models of adultery and illegitimacy and enacted statutes which automatically divested the father, the sperm donor, of any parental rights.³⁹

Thus, the law ultimately developed a scheme tailored to the needs of artificial insemination rather than relying on laws surrounding adultery and illegitimacy. With respect to surrogacy agreements, the law once again lags behind technology. The double standard becomes blatantly clear when artificial insemination law is compared with adoption and surrogacy agreement

30. *Id.* at 41.

31. *Id.* at 54-57.

32. *See id.* at 55-56.

33. *Id.* at 56.

34. *Id.* at 57.

35. *Id.*

36. *See id.* at 58.

37. *See id.* at 77-79.

38. *See id.* at 86.

39. *Id.* at 81-84.

law. Why shouldn't a birth or surrogate mother be allowed to divest herself of legal rights when a sperm donor can? Shouldn't the logic be applied equally? Shalev concludes that it should.⁴⁰

This conclusion would appear to make perfect sense. However, it is not difficult to accept a conclusion that the law should be applied equally. Thus, one should ask whether the premise of Shalev's conclusion is wise. The premise of the conclusion is that men can decide, in advance of their child's birth, to divest themselves of legal parental rights. Perhaps it was a mistake to allow men such privileges. Simply because the courts have accepted this divestiture of parental rights does not, by itself, provide adequate support for enforcing surrogacy agreements. Unfortunately, Shalev does not fully discuss the soundness of allowing sperm donors to divest themselves of these rights.

She does pause briefly to acknowledge some problems with the practice of sperm donation.⁴¹ Sperm donors, for the most part, appear to give little thought to their actions.⁴² Several donors have said they felt that donating their sperm was the same as giving blood.⁴³ Shalev criticizes this particular attitude and compares the sperm donor to the virile sailor.

The donor relinquishes his parental obligation through the quasi-adoption service of a mediating physician, who undertakes to "place" the sperm with a parent who remains unknown to the donor but whose parental fitness is assured by the physician; the sailor leaves a child with a woman who probably appreciated the risk of pregnancy when she agreed to consort with him and knew that he would be unavailable to assist in raising the child.⁴⁴

According to Shalev, neither the sailor nor the donor has acted responsibly⁴⁵ and she therefore seems to partially concede that artificial insemination law cannot be used as sole support for the enforcement of surrogacy contracts. However, her analysis and discussion on this particular point is sparse. Shalev simply states that "if a claim for equal treatment of sperm donor

40. *See id.* at 85.

41. *See id.* at 72-75.

42. *Id.* at 72.

43. *Id.* at 72 (citing R. SNOWDEN & G. MITCHELL, *THE ARTIFICIAL FAMILY: A CONSIDERATION OF ARTIFICIAL INSEMINATION BY DONOR* 70 (1983)).

44. C. SHALEV, *supra* note 1, at 74.

45. *Id.* at 74-75.

and surrogate mother is made, by no means is the intention for women to imitate men's behavioral irresponsibility."⁴⁶

The book attempts no further discussion of the soundness of sperm donation. In effect, Shalev ties this issue up with a statement that law should embrace the ideal and that we should put our faith in humankind to act responsibly:⁴⁷ "The idealistic tone that accompanies my argument in favor of the rule of enforceability is a consequence of a faith in the human potential to transform reproductive consciousness and make a better future for our daughters and sons."⁴⁸ One wonders if Shalev has placed too much faith in humankind. The attitudes of sperm donors are revealing; perhaps they indicate that artificial insemination is not altogether sound, or that people do not always act responsibly. At any rate, the issues surrounding irrational and irresponsible human behavior cannot be resolved simply by placing one's own faith in humankind and advocating that the law also places its faith in humankind.

The issue becomes more perplexing when one considers the monetary element in surrogacy agreements. With the influence of economics, it seems all the more likely that people will not act responsibly.⁴⁹ Perhaps a caste of breeder women would in fact be created. Shalev attempts to quiet this fear by pointing to a survey of surrogate mothers who stated that financial gain was not the only factor in their decision to become a surrogate mother.⁵⁰ This is the only evidence provided for Shalev's argument that monetary gain will not unduly influence potential surrogates. This evidence is highly unsatisfactory. It fails to anticipate people's reactions to the concept of a legally binding surrogacy agreement. Perhaps the wealthy—guaranteed a child if they can only find a willing, fertile woman—will actively solicit the poor and disadvantaged as their potential surrogates.

III. SURROGACY CONTRACTS

At any rate, the first half of the book provides an excellent backdrop for the discussion of surrogacy contracts in the second half. Shalev begins the discussion of surrogacy contracts by pos-

46. *Id.* at 76.

47. *See id.* at 19-20, 164-66.

48. *Id.* at 20.

49. *See id.* at 148 (quoting A. DWORKIN, *RIGHT WING WOMEN* (1983)) (Dworkin characterizes surrogacy agreements as a new form of prostitution.).

50. C. SHALEV, *supra* note 1, at 101-02 (citation omitted).

iting that human life should be governed by contract rather than biological status.⁵¹ Surrogacy agreements, therefore, "should be determined as a matter of contract in accordance with the expressed intention of the [collaborating parties]."⁵² Reproductive agency would then be equalized among the sexes. Currently, the law's paternalistic refusal to force the surrogate mother to keep her promise denies female reproductive agency.⁵³

With this criticism of the current state of the law, Shalev envisions a world governed by contract. In this world, families would not necessarily be defined by biological lineage. The current definition of "family" would undergo fairly radical changes. The biological family, or "the blood institution,"⁵⁴ would be replaced by the legal family. The terms "mother" and "father" would not be based on biological lineage but rather on contractual rules and definitions. The "blood institution" would become a thing of the past and individual autonomy would govern destiny.

While others hesitate,⁵⁵ Professor Shalev seems quite ready to plunge into this strange world. She neither fears⁵⁶ nor ignores the options medical technology has presented. Indeed, much of the book's value lies in Shalev's straightforward approach to surrogacy issues and her careful, detailed discussion of what sort of world would be created if surrogacy contracts were legally binding. Shalev is extremely thorough in suggesting how the law should address the various problems raised by surrogacy agreements.⁵⁷ For example, she suggests certain safeguards for the surrogate mother: she should be of legal age, have already borne children, receive mandatory counseling and have her fee regulated.⁵⁸

In addition, Shalev anticipates several arguments against her contract approach to surrogacy agreements. First, she recog-

51. *Id.* at 99.

52. *Id.* at 99.

53. *Id.* at 95.

54. Shalev defines the "blood institution" as "a social construct that employed a double standard of sexual-reproductive conduct, resting on patriarchal notions of biological gender and female inferiority." *Id.* at 11.

55. See, e.g., M. FIELD, *SURROGATE MOTHERHOOD* (1988).

56. Consider Shalev's closing sentence. "We need not fear our experiments so long as we hold ourselves personally accountable for their consequences." C. SHALEV, *supra* note 1, at 166.

57. See *id.* at 130-40.

58. *Id.* at 144.

nizes the fear that surrogacy contracts will "commodify" human life.⁵⁹ She replies, however, that human life will not be commodified because a surrogacy contract is a contract for the sale of personal services, not the sale of a baby. "The notion of designer kids, made to order with various specifications and rejected when not born as warranted, haunts and captures our imagination."⁶⁰ In the eyes of Shalev, such a world would not come to pass. Surrogacy contracts simply serve to define social and legal relations before birth.⁶¹

Shalev discusses particularly well a second argument against the application of contract law: a contractual agreement cannot force a mother to give up her child because it is a personal services contract. The law will only grant specific performance if damages are inadequate. Shalev responds that on its face this rule would seem to allow the woman to keep her child.⁶² However, she compares the surrogate mother with a sculptor who has been commissioned for her services.⁶³ The sculptor cannot be forced to actually sculpt the piece, but once she has, the law forces her to give it up. Likewise, a surrogate mother cannot be forced to actually go through with the agreement before conception. However, once she has the child, she, like the sculptor forced to part with her work, is forced to give up her baby.

When her world of legal relations has been fully explained, Shalev concludes that surrogacy contracts must be enforced if women are to become full fledged members of society.

IV. CONCLUSION

After reading *Birth Power*, one can't help but wonder if Shalev is simply a step ahead of the courts and the law. The law is slow to change; it often lags behind technology. Often, some new feature or concept created by technology will be forced into existing constructs of law, regardless of how awkward the fit. So it seems that surrogacy contracts are being forced into current legal frameworks⁶⁴ without regard to their own particularities.

59. *Id.* at 102.

60. *Id.* at 102.

61. *Id.* at 103-04.

62. *Id.* at 139.

63. *Id.* at 139-40.

64. *See id.* at 86 ("[T]he frame for legal discussion of surrogacy has been dominated by the adoption and artificial insemination statutes.").

Courts and legislatures would be well advised to directly address the issues Shalev raises in her book.

Reviewed by Marci L. Smith