

Autonomy, Justice, and Injustice with Indian Gestational Surrogacy

Deborah Hamm

Keywords: autonomy, doctor, role, justice, gestational, surrogacy, reproduction

Bioethics developed in the United States within the context of rapidly advancing medical technology that presented new ethical challenges. In varying combinations, the four bioethical principles of autonomy, justice, beneficence, and non-maleficence have been collectively used to meet these challenges. As healthcare technology and research have grown into corporate interests for international export and development, bioethics has been exported along with it. However, the exportation of Western bioethics to developing countries has precipitated controversy regarding the universality of these principles and raised concern about ethical imperialism. Autonomy, the principle that guides the protection of individuals across cultures, serves a pivotal role in protecting research subjects, while issues of justice are more readily activated within contexts of healthcare delivery.

Advances in assisted reproductive technology (ART) have already outpaced the ability of bioethicists to meet the ethical challenges within the culture that developed it, the backdrop for international discourse. ART is largely unregulated within the U.S. and variably regulated within Europe. In the U.S., where individuals have more freedom and greater autonomy, ART flags the issue of justice, related to inaccessibility due to expense. Gestational surrogacy, a form of ART in which a woman's uterus is used to carry the embryo of another couple's baby to term, poses unique challenges in regard to autonomy, justice, and the balance between them. The procreative right and interest of a couple to have a baby are balanced against the autonomous right of a surrogate to contract free of coercion, with protection against harm. In the U.S., contract pregnancy is legally protected in only a few states. It is banned in some countries and remains unregulated in India, where it has grown with lightning speed into big business, expected to yield billion-dollar profits within the coming years. The cost of contract surrogacy in the U.S. ranges between \$40,000 and \$150,000, in contrast to India where it is typically lower, between \$12,000 and \$25,000, including travel expenses, with the surrogates receiving between \$2,000 and \$6,000 of this amount. Because India is an English-speaking country with cheap labor, well-trained doctors, and advanced healthcare systems in urban settings, it is ideal for medical tourism and has developed the infrastructure to support it.

Historically, women's rights and reproductive rights have developed in tandem, and India is a country with civil liberties, democratic traditions, and feminist movements. However, despite its pro-natal culture with liberal contraception and abortion rights, India has an enduring history of preferential male sex selection and discrimination against women, notably women of color, stratified within a rigid caste system. Most Indian women live in poverty, earn less than half of what men earn, have little or no access to medical care, and suffer the highest incidence of anemia in the world. Presumably this is due to gender-based discrimination in food, nutrition, and healthcare. The Center for Reproductive Rights' (CRR) and the National Human Rights Commission (NHRC) report alarming statistics regarding Indian maternal health linked to poverty, education, and social status. Less than half of Indian women have a skilled attendant when giving birth, with less than 40 percent of births occurring in hospital settings. Maternal morbidity and mortality cluster near the highest levels in the world.¹ How does one understand the phenomenal success of outsourcing contract surrogacy to a country where women's maternal health is so marginal?

Western attitudes toward Indian gestational surrogacy, including those of feminists, tend to fall within two camps: those who view it as autonomous decision-making that leads to mutually beneficial outcomes, and those who view it as coercive, colonial exploitation of women in developing countries who need rescuing. Both perspectives fall short of the complex reality of these arrangements, which have the paradoxical potential for simultaneously oppressing and liberating Indian woman. When the pristine lens of autonomy is superimposed over the decision-making process, one can readily conclude that Indian women are making autonomous choices that generally improve their lives. A new, ethnographic literature is emerging about Indian surrogacy that culturally embeds these arrangements within life narratives. Common unifying motivational themes are identifiable and include financial empowerment, access to healthcare, and improvement in the lives of family members, particularly children. Within nine months, a surrogate can earn wages that could take 10 to 15 years to earn in the only other jobs available to them. Many of the surrogates interviewed reported plans to use surrogacy pay for caring for their own children, including paying for education, medical care, and even dowries.

A brief description of Dr. Nayna Patel's Akanshka Fertility Clinic in Anand, Gujarat, is illuminating. Dr. Patel accepts impoverished, (usually) illiterate women from the surrounding villages into her clinic, where they live together in a dormitory-style setting under her watchful care, which includes good nutrition, rest, monitoring, and even supplemental education. To be accepted, a woman must have already delivered a child of her own, indicating that she has experienced a successful pregnancy and understands the risks undertaken. She must also be making an autonomous choice. Dr. Patel claims to be able to detect and avoid accepting women who are being coerced into surrogacy by husbands or relatives. Dr. Patel additionally prides herself on facilitating women's empowerment by helping them protect their finances. "For example, if she wants to buy a house, we'll hold her money for her until she's ready. Or if she wants to put it in an account for her children, we'll go with her to the bank to set up the account in her name." Sofia Vohra, a surrogate who works as a glass crusher for \$25 per month and is married to a "lazy drunk," was interviewed about her surrogacy experience. "It's exhausting being pregnant again." Then, in case her complaints are misunderstood, she quickly adds, "This is not exploitation. Crushing glass for 15 hours a day is exploitation."²

Narrow focus on the principle of autonomy can easily obscure the deep injustice behind Indian gestational surrogacy, which when revealed exposes an illusory aspect of so-called autonomous decision-making. Closer scrutiny and deeper analysis of ethnographic narratives reveal that many Indian women are choosing surrogacy as a basic survival strategy for obtaining access to food, shelter, clean water, and healthcare. This is not a moral choice; rather, it corresponds to what is philosophically understood as a forcing offer.³ A comparable Western analogy is when circumstances force a mother with a sick child to choose between a high-risk job that offers health insurance and a low-risk job that offers no insurance. Neither choice is desirable, but the mother can "autonomously" choose. Context critically shapes the ethical issue, shifting it from autonomy toward justice, with emphasis on the impingement of the structure of choice on the freedom of choice. This leads to a greater appreciation of the injustice underlying gestational surrogacy in India. Beyond reframing choice as a survival strategy for obtaining basic needs, this sheds light on what it means to be human.

The language used to invite women into surrogacy arrangements routinely casts women as little more than a function for delivering a baby, with all interventions (nutrition, monitoring, housing, health, etc.) focused on the baby's worth, with little value accorded to the woman apart from this function. If women miscarry, they are not paid. Virtually all deliveries are via C-section, which exposes women to higher surgical risk and complications. All medical care ceases at the point of delivery, with no follow up for complications that may occur. Death can happen. For example, Easwari, a second wife who was pressed into surrogacy in order to earn extra money for her family, died following delivery of a healthy baby. The Ishwarya Fertility clinic was reportedly unprepared to handle her post-operative hemorrhaging and she died en route to a nearby hospital, after her husband complied with instructions to independently secure transportation for her. A requested official investigation was reported as "perfunctory."⁴ Although surrogacy offers an option for women of darker color and lower caste a capitalist mechanism for climbing the economic ladder, its offering is limited. Despite having no genetic relation to a fetus,

women of darker color and lower caste have less negotiating power and are paid less than lighter skinned and higher caste women, implying that darker skinned women have inferior wombs.⁵Surrogacy work remains stigmatized in India, and life in a dormitory, potentially oppressive, offers women protective shelter from disapproving communities and villages. Ultimately, a woman's ability to obtain basic goods only within the context of carrying a baby for someone else, with little or no access to this for her own children, reveals troubling meaning about social worth.

The purpose of this essay is not to argue for or against Indian gestational surrogacy; nor do I want to diminish the importance of autonomy in ethical deliberation regarding these arrangements. The tone of this essay surely reveals my bias toward understanding gestational surrogacy as a vehicle through which marginalized Indian women can empower themselves, but with risks that mandate protective regulatory measures and underlying injustice that requires serious attention. Rather, my purpose is to highlight the necessity of looking beyond autonomy into issues of justice, and to use the lens of justice to reflect back on autonomy in order to better understand the degrees of freedom that constrain or enhance autonomous decision-making. I also believe that ethnographic analysis can anchor moral understanding within cultural contexts, yielding a deeper and more accurate picture of ethical complexity, without weakening the principles of autonomy and justice, or moral integrity. Finally, such analyses can better clarify analogous concerns within U.S. culture that escape detection or resist acknowledgment and discussion.

¹Bailey, A, "Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy," *Hypatia* 26, no.4 (2011): 26.

²Haworth, A, "Surrogate Mothers: Womb for Rent," *Marie Claire* 5, (2010).

³Ezorsky, G, *Freedom in the workplace?* (Ithaca: Cornell University Press 2007).

⁴Carney, S, "Cash on Delivery," *Mother Jones* 35, no.6 (2010).

⁵Bailey, et al.