

A Commentary on Moore's and Mulgan's Open Letter to NECAHR

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In the full version of Moore and Mulgan's Open Letter they begin by describing their reason for becoming involved in public debate on this issue as the belief that non-commercial IVF surrogacy should be "debated widely and in the light of better ethical analysis". I share Moore and Mulgan's concerns and would like to enter into the debate about this issue.

In the introduction to the areas of ethical concern involved with AHR I gave a brief sketch of the breadth and complexity of arguments involved with AHR. Non-commercial IVF surrogacy is an issue that involves similar complexity. NECAHR's policy document does suggest that its primary obligation is to consider the well-being of the child and its primary objection to non-commercial surrogacy does also seem to be from a concern for possible harms to children born of non-commercial IVF surrogacy. It is for this reason that Moore and Mulgan confine themselves to a careful analysis of NECAHR's harms to the child arguments. In doing so they have made a significant contribution to the debate about this issue. They are aware of the other ethical arguments that can be brought to bear on non-commercial IVF surrogacy, but for brevity's sake and because these sorts of arguments do seem to be NECAHR's primary objection they do not discuss these in their Open Letter (or their summary).

There are of course other relevant ethical arguments that come to bear upon non-commercial IVF surrogacy. But also for the sake of brevity, I shall confine myself to a discussion of the "harms to

the child" arguments. In the rest of this reply I will sketch some responses that NECAHR could make to Moore and Mulgan's objections to their harms to the child arguments.

Moore and Mulgan do explicitly address the arguments that NECAHR itself puts forward. As an objection to their stated policy this is a reasonable strategy. If Moore and Mulgan's arguments are taken seriously by NECAHR then it could mean a couple of things; either NECAHR answers the criticisms and strengthens their own justifications or they admit that Moore and Mulgan are right and reverse their policy on non-commercial IVF surrogacy. If NECAHR took the second option then the net effect of Moore and Mulgan's Open Letter would be NECAHR allowing this form of AHR. As it seems possible that the effect of their Open Letter could be the reversal of public policy it seems reasonable that it does so on the basis of a careful consideration of all of the ethical issues. In other words Moore and Mulgan's Open Letter should not be considered the final word on non-commercial IVF surrogacy.

It is possible to draw a distinction between Mary and Joseph's attempt at reproduction and what we ought to think if they were considering non-commercial IVF surrogacy. The first distinction that we might draw is that this is a highly unrealistic scenario. It is of course possible to imagine a couple who went before a committee when thinking about reproducing, but any couple that actually did this would be very odd (possibly so odd that we might have reservations about their suitability as parents). This does not mean that this analogy is irrelevant, but it does suggest we should be careful about drawing a principle from a scenario which is so far removed from real life.

Mulgan and Moore correctly identify that there are all sorts of potential harms from conventional reproduction. What they don't mention is the obvious point that we don't think of these harms as being a good thing. The harms that might result from conventional reproduction

include, being born into a family where one is not really wanted, being born into a family which is too poor to make sure you are adequately fed and cared for; for Mary and Joseph "the disruption of bonding which might occur during gestation and the possibility of a custody conflict if the couple do not agree after birth". All of these harms are things which, if possible, it would be better to not have. Moore and Mulgan's point is that the last two harms, at least, do not seem sufficient for advising Mary and Joseph to not go ahead. Of course if we knew that Mary and Joseph were going to have a bitter custody row after having a child and that this was going to harm their child it seems much more tempting to advise them against having a child. When thinking about the harms that might result to a child from non-commercial IVF surrogacy we would not have this kind of certainty. (We would not know for a fact that this child would suffer harms as a result). However what we would know is that if such harms did occur (and that there is a real probability of them doing so) then these harms would be a direct result of the assistance they were given in the process of reproduction. Thus the decision to intervene in this way seems causally responsible for the infliction of this harm. In other words an explanation about the reason for the harms would be of the form "because X was born by non-commercial IVF surrogacy". Mary and Joseph's conventional reproduction is not necessarily responsible in this way for the break up of their marriage and the resulting harm to their child. If harms resulted to their child after their marriage break up, an explanation of the harms to the child would take the form "X has been harmed because of the marriage break up". It would be very odd to say "X suffered after the marriage break up because X was born".

Lets assume for argument's sake that the harms of Joseph and Mary's break up are roughly equivalent to those produced by non-commercial IVF surrogacy. It seems ethically salient that the harm in one case is produced as the result of a technological

intervention in reproduction, sanctioned and possibly funded by the state and a harm produced by the unintended, unforeseen and unfortunate break down of a couple's relationship. It's an open question to how much ethical importance one attaches to the cause or explanation of harm, but it does seem an important consideration and it is not one which Moore and Mulgan consider in their Open Letter. It is a consideration that NECAHR could develop if they chose to rework their policy document.

Mulgan and Moore derive a number of strong intuitions from their story about Mary and Joseph, one of which is particularly important. Moore and Mulgan claim that it is important in a democracy such as New Zealand for there to exist, and for it to be perceived to exist, equal treatment for equal cases. Thus if NECAHR was to say no to people wanting non-commercial IVF surrogacy then to be consistent they should also say no to Mary and Joseph's conventional reproduction. They are right in their stressing of equality in policy matters, however this situation is more complex than first meets the eye.

I have already mentioned that the certitude that we hold when thinking about the harms of Mary and Joseph's reproduction is important. If we knew or had a good idea that their relationship was going to end then this makes a difference in how we see this situation. It might be possible for the state to actually get committees going that talked to potential parents before they had children. The state might structure these committees in such a way as to test the likelihood of a couple having a break up after the birth of their child. Assume that it's possible for these committees to determine couples that are going to break up. The harms from such break ups certainly have big implications for children. It seems hard to argue that avoiding these harms for children would not be a good thing. Assume for arguments sake that the level of harm to children from the unstable conventional reproducers is about the same as that posed by non-commercial IVF surrogacy.

The reason why the state doesn't do this is for very obvious reasons. Imagine the chaos that would result from the state setting requirements on those who could take part in conventional reproduction? Apart from the intolerable harms this would do to parents, families and the fabric

of society as a whole it would be totally impractical to form such committees and to police the resulting decisions.

We can describe the reasons why the state could not take these measures as "feasibility constraints". By this I mean that in situations where the possible means of correcting an initial harm or limitation of an individual's liberties involves inflicting a greater limitation upon other individual's liberties or causing them greater harm to an intolerable level, then it is not feasible for the state to intervene. Because non-commercial IVF surrogacy involves novel medical intervention, is often partially funded by the state and is presently assessed for harms by NECAHR, feasibility constraints do not apply.

Another example of this sort of justification was written by political philosopher Will Kymlicka in *Liberalism, Community and Culture*. Amish communities often place restrictions upon the activities that their children may partake in. Amish children are often restricted in the schools that they can go to, the people they may socialise with, the clothes they may wear, the careers towards which they may aim. It's possible to argue that the strict limitations placed upon Amish children may limit the choices they can make about the life that they would like to lead. Conforming to the requirements of their community is a necessary condition for remaining a part of the their community. Of course life for most in Amish communities is meaningful and rich. However, from the perspective of maximising liberties (which is something liberal philosophers are very keen on) some of the Amish practices seem less than desirable. However it is obvious that if the state were to become involved and instruct the Amish community that they ought to revise their practices, the resulting damage to the Amish community would mean such interference was not feasible or desirable.

It might be possible to predict which parents would provide a less than optimal environment for their children. It might be possible to predict that if some people have children that will not be loved, provided for, or would be harmed. In extreme circumstances the state might intervene in a limited way (in cases of child abuse we have legislation and social services that enable intervention), however for the vast

majority of cases such interference would have disastrous effects that would offset the correction of the original problem. Imagine what would happen if there was a special branch of social welfare that vetted all potential parents for their suitability as prospective parents! However if we consider the desirability of avoiding harms for children born into less than optimal situations and the impingements upon the life chances (hence liberties) of children this seems a situation that is less than desirable.

In our introductory piece on AHR we considered some of the arguments that feminist authors have made about the limits of autonomy. One of the major concerns was that women and couples may be driven to AHR because of socially defined roles. Moore and Mulgan assume that "the probability at the time of conception that the child will be wanted and loved is pretty nearly 100%". This may be so, but it is a very different claim from saying that nearly 100% of IVF children will be loved and cared for. If there is something in feminist arguments and couples are driven to these therapies by a desire to fill socially prescribed roles (in particular fertility) then it seems that it is toward a successful conception that these people will be driven and not necessarily towards having family for which they must provide, care and make sacrifices.

Summary

The issue of IVF non-commercial surrogacy is one which involves many issues, most of which are very difficult to think through. In both of these comments upon IVF non-commercial surrogacy important issues have been touched upon briefly and many others have not been discussed at all. The other issues include such things as family dynamics, the roles of women, the costs to the state, the emotional entanglement of those involved and the commodification of children. These need to be attended to in a full discussion of non commercial IVF surrogacy. Moore and Mulgan do identify points of NECAHR's report that could be developed. However their principle objection is not as strong as it would first appear, as there are plausible refinements that NECAHR could make to their "harms to the child argument" that escape Mary and Joseph's immaculate conception.

Editor's note.

These articles are the first in a series that we intend publishing in the Otago Bioethics Report on the ethical issues of AHR. In the next issue we will be including a commentary written by Ken Daniels.