



Is there a right to gestate?

John A. Robertson[†]

Vinson & Elkins Chair in Law, University of Texas Law School, Austin, Texas, USA
Corresponding author. E-mail: jrobertson@law.utexas.edu

[†]*After the acceptance of this response, the editorial team of the Journal of Law and the Biosciences was saddened to learn of the death of Professor John Robertson. Professor John A. Robertson was the holder of the Vinson & Elkins Chair at the University of Texas at Austin, a prolific author and influencing scholar.*

Since the inception of the Journal of Law and the Biosciences, Prof. Robertson actively contributed as a prolific author and member of the Editorial Board. The Editorial team is planning a special issue (in 2018) to honor Professor Robertson and his contribution to the bioethics field.

Since a successful birth in Sweden in 2014, physicians have embarked on experiments with uterus transplantation (UTX) to enable women with uterine factor infertility to bear and rear their own genetic child. While gestational surrogacy might also satisfy that goal, that practice is legally unavailable in many places, or if available, so socially fraught or morally distasteful that some women would prefer bearing their own child through UTX.¹ The medical, ethical, legal, and social issues are complex, but they have been sufficiently aired to provide an ethical framework to study the safety and efficacy of UTX.

With further progress, other issues will arise. Professor Amel Alghrani's perceptive Comment² on my earlier article³ raises the question of whether procreative liberty includes a right to gestate that would (1) entail a positive right to insurance coverage for the procedure, (2) the use of UTX by transgender women, and (3) possible extension to male gestation.

¹ John A. Robertson, *Other Women's Wombs: Uterus Transplants and Gestational Surrogacy*, 3 J. LAW & BIOSCI. 68–86 (2016).

² Amel Alghrani, *Uterus Transplantation: Does Procreative Liberty Include a Right to Gestate?* 3 J. LAW & BIOSCI. 636–641 (2016).

³ Robertson, *supra* note 1, at 68–86.

To engage her points, one must first clarify the meaning of procreative liberty, a concept which includes both the right to procreate and the right to avoid procreation. Focusing only on engaging in reproduction, the key issue concerns the scope and extent to which a person's interest in having genetic offspring should be valorized as a legal or social right. Reproduction is a time-honored important component of human flourishing, and has long been recognized in coital—and increasingly in noncoital settings—as having special protection.⁴

Such a right at a minimum should entail a negative liberty right to engage in activities necessary to achieve that goal, without interference by the state or others unless the reproduction harms unconsenting others in specific ways. One might also argue for a positive right of procreative liberty, such that the state or insurers are obligated to provide the resources or means to enable genetic reproduction to occur. This view of procreative liberty extends both to coital conception and pregnancy and assisted reproduction when coital conception or other barriers to genetic reproduction exist.

DOES A POSITIVE RIGHT TO GESTATE FOLLOW?

Professor Alghrani presumably does not quarrel with the claim of a negative right to coital or noncoital reproduction where gestation is concerned.⁵ In this comment, however, she focuses on whether a positive right to gestate should also be recognized when financial support or services are needed, at least when other reproductive techniques that enable a person/couple to have genetic offspring are covered.⁶ Her argument is that if the state has decided to fund some assisted methods of reproduction, such as in vitro fertilization (IVF) and procedures to enable production of gametes, then it should also fund or facilitate gestation itself since the gestational experience is such an important part of reproduction.

I agree with Professor Alghrani's implication that procreative liberty should include a right to gestate when gestation is essential to or part of a person's way to have genetic offspring for rearing, just as use of IVF, embryo freezing, sperm and egg freezing, and related activities are. They all enable a person to reproduce, ie, produce genetically related offspring. On this view, UTX should be recognized as both a negative and positive right. Because of the woman's uterine infertility, she cannot have her own genetic child unless she resorts to surrogacy, which may not be legally available or be so socially or morally fraught that a choice to gestate oneself via UTX is acceptable. In addition to recognition as a negative right, there is a strong argument that UTX should be included in coverage generally of reproductive services if it meets the safety and efficacy standards of other covered procedures. However, this does not mean that gestation *tout court*—gestation unrelated to one's own genetic reproduction—should be covered.

⁴ One needs to unpack the various components or situations involving procreative liberty to see where consensus or conflict exists. For example, person may differ over whether the right not to procreate extends to previability abortions even if they agree that a person has a right to use contraception or not engage in sex at all. Similarly, agreement about a right not to be sterilized is not the same as agreement over the use of gestational surrogacy.

⁵ This would include objection to mandatory sterilization, contraception, and abortion because they interfere with the right to conceive and gestate genetic offspring, as would barriers to use of assisted reproduction in the case of infertility.

⁶ Amel Alghrani, *Yes, Uterus Transplants Should Be Publicly Funded!* 42 J. MED. ETHICS 566–567 (2016).

On this view of procreative liberty, it follows that gestational surrogacy should also have negative and positive right status. Gestational surrogacy is reproductive for a couple/woman who lack a functioning uterus or who cannot gestate for other reasons. The surrogate gestator would be carrying the embryo created from the egg of the initiating woman and sperm of her partner. Although the carrier is not herself genetically reproducing, she is enabling another to do so. Because gestational surrogacy is essential for genetic reproduction when a woman is unfit or unable to gestate, a robust conception of procreative liberty should extend to gestational surrogacy as well.

Many persons, however, object to engaging another woman to gestate, especially if she is paid for her services. Others think that it is acceptable, as long as the rights of the parties are fully disclosed in advance and other protections provided. As a result, many countries either ban surrogacy altogether or ban paying a surrogate beyond medical expenses, thus making it unavailable as a practical matter.⁷ Even where paid or unpaid surrogacy is permitted, no one to my knowledge has argued that the state or insurance carriers should include gestational surrogacy in their reproductive benefit package. Strictly speaking, however, if procreation is a positive, and not simply negative right, then it should be covered as well, unless the costs are prohibitive and other high-priced assisted reproduction is not covered.⁸

An important implication of this position is that gestation is part of procreative liberty only when it is tied to a woman's own genetic reproduction. Thus, a woman's claim of a right to be a surrogate gestator for others would not be an aspect of her own procreative liberty because she is not herself reproducing. Her right to be a surrogate is derivative of the right of another person/couple to reproduce who need her gestational collaboration to do so. Nor would the recipient of an egg donation who then gestates be exercising procreative liberty. She is enabling the egg donor to reproduce, but the recipient will be gestating and rearing the resulting child, though she herself is not reproducing. Similarly, persons who arrange for an embryo, egg, or sperm donation so that another woman may gestate and the initiating person/couple then rear are not themselves exercising protective liberty, for they have no direct genetic link in the game. Although the child would not exist, but for their efforts, they are arranging for reproduction by the gamete donors, even though they have parental duties and rights concerning the child.⁹

This explains the different legal status of traditional surrogacy, in which the surrogate provides the egg and gestation of an embryo created with sperm provided by another.¹⁰ Since the traditional surrogate is reproducing and then relinquishing her child for rearing by another, she is reproducing. As a result, that arrangement is generally treated as adoption and does not by contract alone result in a transfer of parentage to the sperm provider or other originator.¹¹ Support for use of donor sperm or eggs or traditional surrogacy is claim of access to a child for rearing but not to reproduction per se. This is true even if the egg donation enables one to gestate and rear a child, because that

⁷ Robertson, *supra* note 1, at 80–84.

⁸ I am simply following the logic of those who argue for coverage of technologies that enable infertile persons to have their own genetic offspring. The politics of the question would be very different.

⁹ See *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (1998).

¹⁰ That other person might be providing his own sperm with the intent to rear himself or the sperm of another person that he or she has obtained by donation.

¹¹ *In the Matter of Baby M*, 109 N.J. at 396, 357 A.2d at 1227 (1988).

child has no genetic relation to the gestating and rearing person. One may argue that such activities are important for human flourishing and should be equally supported on that basis, but it is important to recognize that they are not directly reproductive for those using these techniques. Thus they do fall under the canopy of procreative liberty because they do not involve the rearer's genetic offspring.

This discussion shows that in answering the question of whether reproductive/procreative liberty includes a right to gestate, one must first answer the question of what counts as 'reproduction'. I have argued that reproduction is having or rearing offspring with of one's own genes. It does not include a right to gestate via a donated egg because the gestator has no genetic connection to the future child. If one disagrees, then a nongenetic conception of reproduction would extend to obtaining and rearing a child who might not have any genetic connection at all. Such a view morphs into a claim of a right to adoption—a right to rear a child—without a genetic connection at all. Perhaps the opportunity to raise an unrelated child should be supported financially and protected legally. But the interest in rearing children is not per se a reproductive interest. It may be protected on some other theory of human flourishing, but it does not follow from procreative liberty as I use the term.

Insurance coverage is a key issue for UTX, for many women will not have the means to pay for such an expensive procedure. The transplant procedure for the recipient is highly expensive and intrusive, and possibly doubly so if a living donor is used. This will give pause to insurance and public funders, who might decide that it is too costly to include in infertility benefits. This position, however, would conflict with a notion of equal access to technologies to overcome infertility, such as coverage for IVF and diagnostic and corrective procedures to enable production of gametes, when they are determined to be safe and effective.

The prospect of UTX is a variation on these questions. Once established as safe and effective, it provides a means for a woman to have her own genetic child by gestation with a donor uterus. This is especially important in countries in which gestational surrogacy is not available. Even where surrogacy is an option, there are understandable reasons why a woman—and society—might prefer that she gestate herself via UTX and not transfer that burden to another.¹² If so, this makes a plausible case for public and insurance support of UTX for women capable of providing eggs but not capable of gestating, or who could gestate with the help of a UTX but who are morally against using a surrogate gestator. Although funding for UTX (or any medical services) is not a constitutional right in the USA, it might well meet statutory standards for funding of assisted reproduction in the UK and other countries.¹³

Such a position, however, does not entail support for gestation *tout court*, as might occur if a woman claimed that gestation is so important to her sense of being a woman that she should have her expenses in gestating for another person or couple supported as well. Nor would it extend to cases in which a woman without eggs or a uterus wants a UTX so that she might receive donor gametes/embryo and gestate the child that she will then rear. In neither case will the woman herself be reproducing—the UTX is not performed to enable her to have her own child. In the first case, she will not be raising

¹² She would, however, not be obligated to use UTX rather than an available surrogate. See Robertson, *supra* note 1, at 75, 76.

¹³ Alghrani, *supra* note 6, at 566–7.

the child at all. In the second, she will be raising the child but will have only a gestational and not a genetic connection. If there is a right to gestate, it is only when it is integral to the gestator's own genetic reproduction.

UTERUS TRANSPLANT FOR TRANSGENDER WOMEN

Professor Alghrani's second point raises the question of whether transgender women should be provided with a uterus transplant so that they might also gestate their own child.¹⁴ Medical or surgical treatment may relieve the pain and suffering of gender dysmorphia, but the reproductive interests of transgender persons still remain. Professor Alghrani reports that such individuals are still constrained in their reproductive capacity, and among transwomen there may be a strong desire to parent and gestate a genetically related child.¹⁵ Ms. Alghrani focuses here on a transwoman's use of her sperm stored prior to sex reassignment surgery to create an embryo with a donated egg that she could then gestate in a transplanted uterus.¹⁶

To assess this question, one must first recall that transgender persons have the same right to have genetic offspring that other persons have. A transgender woman should be free to use sperm that she stored before sex reassignment surgery to reproduce. Similarly, a transgender male may use eggs that he had stored before surgery. In both cases, they will need an egg or sperm from another person/donor, and then a surrogate gestator to undergo pregnancy so that they may then have their own genetic offspring. If they have cis-partners, those partners will not be reproducing because in this scenario the transgender person will be providing the needed male or female gamete.¹⁷ If they have a transpartner, then the transperson not providing the gametes will not be reproducing but the one who is, will be. As Sonia Suter has shown, the ability to induce gametes from a person's own somatic cells will greatly complicate the ethical and legal issues.¹⁸ It would eventually enable a transgender individual to produce gametes of either sex to use to fertilize gametes that were stored prior to sex reassignment. Since those complexities are so much further in the future, I will not pursue them here.

The point Ms. Alghrani raises is whether a transwoman has the right not only to have a surrogate gestator for an embryo created with her earlier stored sperm, but also to gestate that embryo herself by means of a UTX once safety and efficacy concerns are met. She is asking whether 'transsexual women are legally entitled to be treated consistently with their female counterparts', as British law requires, in this case, by receiving a UTX when that is provided to women with uterine factor infertility.¹⁹

At the present time, the question is largely theoretic. Not only is UTX itself experimental, but even if found to be safe and effective for women with uterine infertility, even greater technical barriers would remain to make UTX work in transwomen who have a phenotypic male pelvic structure and abdominal and hormonal features probably not conducive to a successful UTX. Still, the question is an interesting one because it raises

¹⁴ Alghrani, *supra* note 2, at 638.

¹⁵ Anne A. Lawrence et al., *Health Care Needs of Transgendered Patients*, 276 J. AM. MED. ASSOC. 874 (1996).

¹⁶ She is not arguing for UTX for transwomen so that they might then serve as a gestational surrogate or that they might gestate an embryo not created with their gametes.

¹⁷ I assume here that the cis-partner has the gender opposite of his or her transpartner. I defer to grappling with the complications that arise if the cis-partner and the transpartner have the same gender.

¹⁸ Sonia M. Suter, *In Vitro Gametogenesis: Just Another Way to Have a Baby*, 3 J. L. & BIOSCI. 100–119 (2016).

¹⁹ Alghrani, *supra* note 2, at 32.

the question of how far society must go in treating transwomen as other women when technology enables that similar treatment. If safety and efficacy concerns are met, the question will be how similar the gestational experience will be, when the pelvic cavities are different and the other systems for nourishing a pregnancy are not there. The need for a Cesarean delivery alone would not disqualify, since many women will need surgical deliveries, with that need known from the very start.

So the question may ultimately turn on whether the gestational experience per se is so important to the well-being of women and transwomen that it should be funded despite its 'inconsistency' with women who have female body structures from the start. At a certain point, one may begin to wonder whether this need is so compelling. Denying it may not be invidious, but practical concerns, such as organ shortages, might make it less appealing, just as it would for cis-males desiring to gestate.

Indeed, a transgender male might be better situated biologically to become pregnant, since he had been born with and still has a uterus. To become pregnant, however, it might require drugs and other treatments that risk reversing the sex reassignment that he has undergone. Nor could a transgender man argue that gestating a pregnancy is an essential part of the male experience, as the transgender female might claim for one who though born a male, has now become a transwoman. If there were no other way for the transgender male (and female) to reproduce, the case for UTX would be strongest for transmen.

MALE PREGNANCY

Professor Alghrani also asks what the implications are of UTX for male pregnancy.²⁰ If a uterus could be transplanted and made to function in a male body, would a man have a right to gestate by means of UTX? Although now highly speculative, it is a useful thought experiment to draw out basic assumptions about male and female identity, which a technological innovation such as UTX might further confuse.

Without knowing more about how and why such an innovation would occur, I think that there is a strong presumption against such a right. Not only are the medical and technical hurdles high, but there are also few instances in which a plausible case for doing so would arise. As discussed above, a right to gestate as part of procreative liberty is coherent only when it is integrally related to the gestator's own genetic reproduction. In many cases a phenotypical male who can produce sperm would not need a UTX to do so, since partners or gestational surrogates would be available. In that situation, the desire alone to experience what women feel in carrying and delivering a child would not be a strong enough reason to undergo the burdens and costs, not to mention the use of a scarce organ, simply to have a gestational experience unnecessary for his reproduction. Just because women reproduce through pregnancy does not mean that men should be

²⁰ Alghrani, *supra* note 2, at 640.

able to do so as well.²¹ Not all whims or even strong desires about passing on genes merit protection as part of procreative liberty.²²

If there were no partner or surrogate available, the case might be stronger but still not strong enough to justify the gender conflation that might then occur. Like a transgender woman who is seeking gestation because it is allied with the new gender role she has been given, the body of the cis-male seeking to gestate will be anatomically unfit for gestation. Even if medical barriers are overcome, there is still the oddity of one seeking to reproduce like a woman, when he is a man. Gestation by a man is less sympathetic even than gestation by a transgender woman. However, if a high priority is given to enabling persons to have and rear their own genetic offspring; safety and efficacy have been established; and there is no other alternative for having genetic offspring, a rare case of male pregnancy as an aspect of procreative liberty might arise.

CONCLUSION

Professor Alghrani's provocative comment has spurred my thinking about whether procreative liberty implies a right to gestate. I hope my response has shown that both a negative and positive right to gestate is intrinsic to procreative liberty only when that gestation is essential for the gestating person to reproduce. Shifting that burden to surrogates may be justified, but it does not endow the surrogate or recipient of an egg donor herself with a right to gestate as part of her own procreative liberty. The desire to have the experience of gestation *tout court*, without genetic reproduction, is not itself procreative.

The case of a transgender woman desiring a uterus transplant so she could have the woman-specific experience of gestation is also weak. The medical and technical hurdles to enable her to overcome her phenotypic male anatomy and accommodate a functioning uterus might simply be too high. Still, if safety and efficacy could be shown, she might have a claim to do so only if no other carrier were available. The same analysis would apply to a man desiring a UTX who has no other way to reproduce because a partner or surrogate is not available.

These speculations offer interesting thought experiments which deconstruct the nature and implications of male and female genotypes beyond that which sex reassignment itself has already done. Interesting thought experiments, however, should not affect policy and justice in more realistic settings. Their distant drumming should have no effect on the development of UTX to enable women without a functioning uterus to have genetic offspring.

²¹ The obverse of this arises in the argument that some women have made for surrogacy for convenience (when there is no medical necessity). That argument is that if men can reproduce without gestation, then women should be free to do so as well. In that case, however, a man could not gestate while a woman with uterine function could. That answer, however, assumes a man or woman's mode of reproduction is determined by nature, and does not take account of how assisted reproductive technologies undercut the authority of nature.

²² For further discussion of this point, see John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J. LAW MED. 439, 449, 452, 472, 480 (2003).