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## SURROGACY: WHOSE REPRODUCTIVE LIBERTY?

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*By Kate Galloway*

Changing notions of the understanding of “family” in Western culture have resulted in part from the increasing availability of assisted reproductive technologies.

Alongside technological innovation such as IVF, surrogacy has been increasing in visibility. Most Australian jurisdictions permit only altruistic surrogacy – it is unlawful to pay women to carry a baby other than to reimburse them for reasonable expenses. Consequently, many intending parents are looking overseas to engage women to have their babies.

The topic of overseas surrogacy arrangements hit the headlines recently in the case of Baby Gammy. The child was one of twins born to a Thai mother for an Australian couple. Gammy was born with Down’s Syndrome and while his healthy sister was taken by the commissioning couple, Gammy was left in Thailand with his mother. The case raises ethical dilemmas on almost every front: that he suffers a disability; that he was rejected in favour of his healthy sister; and that his mother was asked to have a late term abortion. In particular media have focused on Baby Gammy’s medical condition and the criminal history of the biological father, raising critical issues of child protection.

While these are important, somewhat lost in much public debate is the nature of surrogacy as intrinsically a gender issue. As only women can carry and birth a child, surrogacy raises questions of the woman’s autonomy in choosing to be a birth mother especially where the woman is poor. In particular, surrogacy is a question of competing reproductive liberties as between the commissioning parents and for the birth mother.

### **Motherhood**

One of the challenges in coming to grips with the ethics of surrogacy is that it separates dimensions of motherhood. “Mother” simultaneously has a genetic, biological and social dimension. In a “traditional” conception, gestation, birth and family structure, converge and we take the idea of “motherhood” as a unitary concept.

Sheila Jeffries, Professor of Sexual Politics at University of Melbourne has pointed out that separating reproduction from motherhood poses a risk of aiding trafficking in children. Her point is well made. But it is also problematic because it suggests that women who reproduce necessarily must adopt the social role described as motherhood. There is no essential link between women’s reproduction with the social role of motherhood. It is well known, for example, that single fathers or same-sex relationships can offer stable and loving family environments for children.

so called public sphere of work, need of their construction as mothers. This is not to say that women have necessarily called for a separation from reproduction itself. But women in the West have nevertheless increasingly achieved reproductive freedom, taking control of their own fertility and choosing when and if they become mothers. This has also involved the continuing struggle to find material support for mothering and the constant caring implicit in the role, beyond the romantic construction of “motherhood”.

The social construction of “motherhood” reflects the deeply held cultural expectations of woman as mother. Where society has internalised the elevated status of motherhood, women may believe that personal success, fulfilment and happiness will only happen through motherhood. This stereotype can result in discrimination against women who do not have children and reduces women who do to an essentialist role of child rearing.

If the cultural connotation of motherhood is part of women’s oppression, the question might be asked whether surrogacy can be justified –for intended mothers, genetic mothers or birth mothers. [Janice Raymond](#), for example, suggests that allowing surrogacy at all simply upholds essentialist notions of what it is to be a woman and that even an altruistic surrogacy arrangement between family members plays on social expectations of sisterly love to give freely what might be considered “the greatest gift of all”. On this basis, she argues, it should be opposed.

It is therefore important for women to be able to separate reproduction from mothering and its gendered connotations. Freeing women from the implications of social constructions of motherhood – what society expects of women who reproduce – can allow them to fully express who they are, and to exercise their autonomy and independent identity. Social attitudes about childless women – encapsulated in Senator Bill Heffernan’s notorious description of former Prime Minister Julia Gillard as “[deliberately barren](#)” – exemplify these expectations. In a double standard, pregnant women are [systematically discriminated against](#) in the workplace. When taken together these expectations indicate a strong social preference for women to procreate, but remain at home and out of the public sphere.

But it is likewise important to value the role of mothers. Part of this is recognition of the embodied experience of motherhood as integral to many women’s identity. Thus motherhood itself can be an expression of women’s independence and autonomy. This is particularly so in terms of women’s exercise of reproductive freedom. This idea is complicated, however, in the case of a surrogacy arrangement.

### **Whose reproductive rights?**

Implicit in the media reporting around the Baby Gammy case is the assumption of reproductive liberty. Reproductive liberty is the exercise by women and men of autonomy and self-determination in begetting and rearing children. An individualist, rights-based approach to reproduction, reproductive liberty justifies surrogacy along with any other mode of reproduction. It is perhaps more prevalent in jurisdictions such as the US with a stronger rights-based system but can also be seen to some extent in Australia.

A recent [review of surrogacy laws in Queensland](#) for example, supported surrogacy in principle as part of the “liberty of consenting adults to conceive a child and to parent”. As this indicates, one problem with a reproductive liberty approach to surrogacy is that the rights of the intending parents can outweigh the effects of the arrangements on gamete donors, birth mothers and children. A framework of legal rights alone can fail to acknowledge the social and emotional context of reproduction, which challenge the idea of “informed consent” to the arrangement.

For the birth mother, there is also a question of reproductive liberty. Is it not right that a woman can freely choose to have a baby? This is in one sense the ultimate expression of autonomy and control over one’s person. There are two possible barriers to a broad acceptance of a woman’s right to express her reproductive liberty through becoming a birth mother in a surrogacy arrangement. The first is the social construction of motherhood that impedes our understanding that a woman may choose to give up her baby. The second is whether this is an expression of a woman’s liberty or rather exploitation based on her vulnerability due either to her race, her class, her economic situation or a combination.

One way of considering the conflict between personal autonomy and possible exploitation is to differentiate between reproductive *rights* and reproductive *justice*. [Sarah London](#) for example, argues that reproductive rights of choice, privacy and autonomy, are necessary but not sufficient to achieve reproductive justice. A framework of reproductive justice considers the effect of power relations and differential resources of the parties to a surrogacy arrangement that opens potential for exploitation by powerful parties. It therefore opens the way to respect women’s social, mental, economic and political wellbeing associated with full self-determination in making reproductive choices.

In Australian jurisdictions the prohibition on commercial surrogacy is an attempt to prevent the exploitation of financially disadvantaged women – one measure perhaps of reproductive justice. In contrast, in the case of Baby Gammy, the fact of his mother’s poor financial status may imply that her “choice” to enter into a surrogacy arrangement was not a free one. While she may not have been coerced, her relative financial disadvantage calls into question the justice of the arrangement.

In a world where women are free from cultural and social expectations of motherhood and where structural barriers causing women's economic disadvantage are removed, would surrogacy still exist? There is still surely an argument that some people would seek to generate a family through surrogacy, and some women would willingly seek to have a child for another. In conditions of perfect equality, theoretically these arrangements could exist as genuine representations of reproductive liberty.

In the present world of inequality and exploitation, many argue that surrogacy should be regulated rather than shut down. Regulation is proposed in the interests of protecting the vulnerable from inevitable exploitation.

In these circumstances an explicit human rights-based approach can perhaps help remedy the shortcomings of liberty as the sole way to justify surrogacy. It offers the chance to consider the reality and context of the lives of real women facing difficult choices.

Importantly also, it seeks to ensure that the birth mother expresses her self-determination through fully informed consent in any arrangement rather than as a victim or exploited "other" serving the interests of those imposing their own reproductive liberties.

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