

## International commercial surrogacy

### *Beyond feminist conundrums and the child as product*

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International commercial surrogacy (ICS) is a growing phenomenon in which the dynamics of global economic inequality between women are often reproduced in the effort to produce children. ICS, in which a commissioning parent(s) goes abroad to hire a surrogate mother to carry a child for them, confounds a number of ‘feminist’ interpretations and evaluations of the practice: while some believe it provides poor women with an opportunity to use their bodies to increase their wealth while providing a service, others see it as outsourcing reproduction through economic exploitation of surrogate mothers.

ICS thus raises interesting questions not only about the commodification of bodies – women’s and children’s – but the naturalisation of the woman–child dyad premised on the notion of motherhood. With new assisted reproductive technologies (ART) such as trans-border gestational surrogacy, successful physical reproduction in the form of giving birth to a child is actually a severing link between the surrogate mother who gives birth and the child, who is not genetically linked to the surrogate mother. Surrogacy thus challenges the ‘natural’ equation of woman/child with mother/child, shifting those relations through financial transaction.

Moreover, ‘the best interests of the child’ are often invoked in ICS arrangements to defend political positions that tend to reify the ‘natural’ genetic family – construed as heteronormative and patriarchal. The best-interest principle of children’s rights also highlights the lack of consideration for the actual politics of childhood in surrogacy: for example,

how children get frozen in time as babies – who are ultimately regarded as ‘products’ of ICS – and thus their *actual* interests are glossed over. This seldom-considered aspect of ICS may thus help inform feminist debates about the practice. This chapter will therefore attempt to move beyond the feminist conundrum of reproductive labour in ICS to consider the child as more than just a product and/or objective of the practice to thinking about them as persons with their own interests in it – not just in not/being born but in knowing the circumstances around their births and the women who birthed them. Can bringing feminist and childhood scholarship into conversation help to achieve social and economic justice for both women and children involved in surrogacy?

To address this question, after a brief overview of the terms used in surrogacy, I provide an overview of feminist and child-centred analyses of ICS. I then discuss how the phenomenon of ICS speaks to the main questions raised by the editors of this volume, considering how ICS is ‘good to think with’ in order to disrupt some of the fundamental assumptions about woman–child relationships. This allows me to turn to how a dialogue with childhood studies might help escape some of the quagmires created by feminist analyses of the practice.

## A brief history of surrogacy: terminology matters

It is important to note that the words used to describe surrogacy and its various participants have been highly contested, as they tend to reflect the values and ideologies that various speakers – scholars, activists, and policymakers – assign to them.<sup>1</sup> DasGupta and Das Dasgupta point out that the intermediaries of the surrogacy trade have controlled the discourse around it in a way that ‘purposefully ignores differentials in global economic and political power and assumes a level playing field’.<sup>2</sup> Bailey further warns that ‘extending Western moral frameworks to... surrogacy work raises the specter of discursive colonialism along with concerns about how Western intellectual traditions distort, erase, and misread non-Western subjects’ lived experiences’.<sup>3</sup> As in any other field, the words used to describe surrogacy are necessarily political. Moreover, battles over terminology demonstrate how ICS confounds the presumed naturalness of the mother–child dyad.

‘Traditional’ surrogacy emerged in the 1980s to refer to a scenario in which a woman uses her eggs and womb to bear a child for another woman. However, it was something of a misnomer: ‘...before the development of third-party reproduction, a woman who gave birth but did not

play other maternal roles, as in adoption, was referred to as the “birth mother” or “biological mother”, sometimes even with the single but contested word “birthmother”. These terms were applied to distinguish her from the “adoptive mother”,<sup>4</sup> who is technically a surrogate to the child in place of the birth mother. With advancements in ART, however, it became possible for women to become ‘gestational’ surrogates: in gestational surrogacy, a fertilised egg is implanted in a surrogate womb and brought to term there. Given the infamous child custody cases that arose from traditional surrogacy in the 1980s and 90s, gestational surrogacy – in which the surrogate mother has no genetic connection to the child, thus precluding any legal challenges over parentage – became a much more desired option and so makes up the bulk of surrogacy arrangements today, including virtually all ICS arrangements. Popular destinations for ICS have included the USA, India and Thailand, but with recent restrictions placed on ICS in India and a ban in Thailand the market is shifting to destinations such as Nepal, Mexico and the Ukraine.<sup>5</sup>

The terminology also obligingly expanded alongside ART to frame the various relationships between mother(s) and child(ren) in surrogacy. These terms either serve to distance or to associate women who act as surrogates and the children to whom they give birth. During the 2014 International Forum on Intercountry Adoption and Global Surrogacy in The Hague, participants noted that those who employ terms that acknowledge the maternity of the surrogate actually incorporated the term ‘mother’, while terms such as ‘gestational carrier’ focused more on the task performed by the woman giving birth to children within a surrogacy arrangement, obscuring not only her maternity but also in some cases her humanity.<sup>6</sup> Some examples of the former include ‘gestational mother’, ‘carrying mother’, and of course ‘surrogate mother’, while examples of the latter may employ the same modifiers but in these instances as nouns without the word ‘mother’: ‘gestational host’, ‘carrier’, or simply ‘surrogate’. Some terms such as ‘contract pregnancy’ have also come into usage specifically to further obviate any potential legal claims to motherhood by commercial surrogates.<sup>7</sup>

However, terms used to describe those who wish to become parents in surrogacy arrangements tend to circle around narrow definitions of genetically based biological connection, almost always including the term ‘parents’. This is because national and international laws generally privilege genetics in their definitions of relatedness. There is also emphasis on parental aspiration, e.g. ‘intended parents’. ‘Commissioning parents’ or ‘contracting parents’ have also been commonly used, but many proponents of surrogacy dislike the way these terms index the commercial

aspects of the practice. Interestingly, the Hague Conference's 2014 report on surrogacy and parentage contains a footnote explaining that they removed the term 'commercial surrogacy', used in their preliminary report, following criticism from intending parents' groups who found the term offensive.<sup>8</sup> The term must also be distinguished from 'altruistic surrogacy': in commercial surrogacy, the surrogate is paid to carry the pregnancy, while in altruistic surrogacy the intending parents only cover the surrogate's pregnancy-related expenses. It is important to note that the former is currently prohibited in most European countries. At the same time, though, few have placed explicit restrictions on their citizens seeking commercial surrogacy arrangements outside of their home country, both driving the demand for ICS arrangements and complicating international legal parentage and citizenship laws.<sup>9</sup> While several countries – the UK, Netherlands and Spain – do allow altruistic surrogacy, others including Germany, France and Italy have banned *all* forms of surrogacy.

Those lending genetic material (and who may or may not in fact be legally related to the resulting child) are typically referred to as 'donors', ostensibly positioning gamete providers – especially women offering their eggs – as altruistic, even where they may receive payment.<sup>10</sup> Baylis argues that such a term should only be used when someone actually provides gametes altruistically; if they receive payment, however, she advocates using terms that reflect the commercial nature of the transaction, such as 'provider' or 'supplier'.<sup>11</sup>

The resultant child has perhaps ironically received the least attention in debates around terminology, given that desire for a child is the whole point of any type of surrogacy arrangement. Beeson et al. posit that this may be because 'children play a more passive role in the process'.<sup>12</sup> In any case, those born through various forms of ART using gametes other than those of the people raising them tend to refer to themselves as 'donor conceived' – though this is not typically an accurate description of those born through ICS, as they are often conceived using at least one social parent's gametes but are gestated and birthed by a non-genetically related woman. The term 'surrogate-born children' has thus arisen, but even those who have used ART to create their own families agree that there is not yet a satisfactory standard language for describing them.<sup>13</sup>

In sum, even the terminology debates around surrogacy index the contested nature of mother-child relationships in the age of ART. In an attempt to remain as neutral and yet as accurate as possible, I will be using the term *surrogacy* to describe the broader practice and *ICS* to describe the prevalent cross-border gestational surrogacy arrangements that involve payment to the woman who acts as a surrogate – the primary

focus here. I will also interchangeably use *intended* and *commissioning* parents to describe those initiating surrogacy arrangements where appropriate. I will also use the terms *surrogate* for the women who carry *surrogate-born children*, with the caveat that we must always keep in mind that children grow up and become adults whose interests must also be considered over the life course.

## Feminist analyses of ICS

Feminist analyses of surrogacy tend to centre on the tensions between productive and reproductive labour resulting from the practice. A number of concerns arise in this debate, particularly regarding the marketisation of reproduction and the commodification of women and children. This in turn raises questions about the potential for exploitation, women's labour, and reproductive choice and justice.

Many feminist scholars have shown concern about the marketisation of international surrogacy and its implications for women. Some express objections to the late-capitalist commodification of women's bodies and the outsourcing of sexual and social reproduction from the West to developing countries.<sup>14</sup> When new markets for ICS opened in places like India, Mexico, Thailand and Nepal (largely due to restrictions on commercial surrogacy in Europe and North America), it created competition for the prohibitively priced US commercial surrogacy market. Suddenly, intending parents could access ICS at a fraction of the cost by utilising surrogates in developing countries who would work for less, opening the possibility of new incentives for the potential exploitation of poor women in developing countries by the upper classes who have the financial means to purchase such services.<sup>15</sup> Aside from concerns with the intersections of class and gender, many debates about ICS also invoke the language of 'choice' in sexual and reproductive labour. This debate inevitably elicits comparisons between commercial surrogacy and prostitution.<sup>16</sup> Whereas some feminist scholars invoke the right to bodily autonomy in both instances and draw parallels between the ability to earn through use of one's body in prostitution and in surrogacy, many pragmatists note that such 'choices' and the exercise of agency are often severely constrained by everyday circumstances of poverty such that what appear to be 'choices' might in fact constitute economic coercion.<sup>17</sup> Hewitson therefore concludes that 'Social reproduction is thus "both naturalised and reprivatized"' (Allon 2011: 138), and the vast inequalities which characterize these exchanges become reframed as disparate

human capital endowments and accumulations within a rhetoric of choice.<sup>18</sup>

Feminist debates thus end up going around and around in circles concerning the ethical implications of surrogacy for women. At the 2014 International Forum on Intercountry Adoption and Global Surrogacy, participants contested the ethics of the commodification of children's bodies as well, but this hinged on how surrogacy and its resultant offspring were framed in ICS contracts: whether the child is considered a product to be delivered as an indication of the completion of the contract, or surrogacy is considered a contracted 'service'.<sup>19</sup> Darnovsky and Beeson state that, '[i]f surrogacy arrangements are not to be seen as baby selling . . . payment to gestational mothers must not depend on the success of the pregnancy or the health of the child'.<sup>20</sup> But this again raises questions (similar to those raised by prostitution) about whether surrogacy is to be seen as (re)productive labour: are surrogates labourers who produce a product, or do they provide a service? Many scholars argue that children *cannot* be seen as a product because this would not only reduce the child to a commodity but also 'cheapen' the relational bond between mother and child by subjecting it to marketisation.<sup>21</sup> However one views it, Krawiec claims that commercial surrogacy contracts inevitably have the effect of increasing the role of intermediaries, who in turn stress the 'performance' of surrogates, on whom their own income is dependent. This performance necessarily includes the surrogates' successful delivery of a (healthy) child.<sup>22</sup> Thus, according to Hewitson, 'Consistent with the policy paradigms of the World Bank and the IMF, Indian surrogate mothers are acting as autonomous financialised economic actors maximising their lifetime utility by engaging in market exchanges. Without this sense of self, new reproductive technologies and the privatisation and marketisation of social reproduction in the form of transnational surrogacy could not take place . . .'<sup>23</sup> She concludes that ICS therefore contributes to global inequalities between women and families rather than challenging them.

Maniere has noted that feminist theorists tend to have a very different take on surrogacy than those who have engaged in empirical studies of the practice. Those who take an abolitionist stance have usually not engaged in fieldwork that examines the actual social practice of surrogacy, while those who have directly observed or interviewed surrogates<sup>24</sup> – though not disagreeing that the practice is highly problematic from a feminist perspective – tend to take a more pragmatic stance, calling for regulation rather than an outright ban. It is interesting that though feminist scholars express concern over the commodification and exploitation of women, few tend to pay much attention

to the child produced in surrogacy, beyond the very consideration of the child as ‘product’. Yet the surrogate mother and child are still implicated together, experienced together and cannot be separated until birth. In surrogacy, bodily integrity and ‘ownership’ of ‘production’ thus take on new meanings. By the same token, childhood studies scholars can also be reluctant to engage with the controversial question of when a foetus/child gains full legal and social personhood.<sup>25</sup> The next section thus considers what a childhood studies approach to ICS might look like.

## Formulating a childhood studies approach to ICS?

Unfortunately, childhood studies have yet to engage significantly with the issue of ICS. Scholars of childhood have not done much better than feminist scholarship at humanising the children produced through ICS. Twamley et al. write that theorists of childhood have described feminism as ‘adultist’, while feminist scholars have accused childhood studies scholars of neglecting the importance of gender relations;<sup>26</sup> this tension may account in some way for the paucity of studies on surrogacy from a childhood studies perspective. Many scholars have suggested that more research is needed on children’s actual experiences as surrogate-born people,<sup>27</sup> but few have done such research yet, perhaps also because it is still early days for children born from ICS arrangements. Actual research on children and surrogacy has focused on commercial surrogacy within national boundaries rather than ICS,<sup>28</sup> and there has been broader research in the US around the search for identity by donor-conceived children who have lately come of age.<sup>29</sup> Further, the research has been conducted by scholars who neither identify themselves as childhood scholars nor take explicitly child-centred approaches based in the discipline.

However, quite a number of scholars have considered the parallels and departures between ICS and intercountry adoption studies. On one level, this makes sense, as adoption and surrogacy are two main options people consider when faced with difficulties conceiving children. Intercountry adoption has steadily declined over the past decade while ICS has increased dramatically in recent years.<sup>30</sup> Despite their limitations, such comparisons indicate what adoption studies in particular can contribute to current thought about the status of the child in surrogacy, as well as children’s points of view about the circumstances of their births and/or parentage.

Scherman et al. recommend using the adoption triad framework (child, birth mother/family and adoptive mother/family) for studying mother–child relations in surrogacy.<sup>31</sup> However, Rotabi and Bromfield caution that the parallels between adoption and surrogacy are limited and therefore potentially problematic, especially in comparing birth mothers in adoption to surrogates.<sup>32</sup> For starters, birth mothers in adoption do not commence their pregnancies with the intention of giving up the children once they are born. They are also genetically related to the children they relinquish, as opposed to the people to whom they relinquish the child(ren), and birth mothers typically receive no payment for child relinquishment (or at least they are legally prohibited from doing so, or it would be considered child trafficking). Research with birth mothers in adoption typically reveals a continual sense of loss and regret long after relinquishing their children to adoption,<sup>33</sup> whereas surrogates talk somewhat more positively about the experience – even as a selfless act that helps others who are unable to have children.<sup>34</sup> Scherman et al. also point out that ‘Unlike their surrogate counterparts, birth mothers do not experience a strong sense of empowerment from their decisions to relinquish. Moreover, there is no evidence indicating that pregnancy or relinquishing children into adoption were ever considered forms of “work”.’<sup>35</sup>

The experiences of adoptees and surrogate-born children/adults can also vary widely. Whereas many adoptees may experience difficulties with identity formation due to lack of knowledge of their origins – which can also be true of donor-conceived children – current research as yet shows little indication of such problems for surrogate-born children.<sup>36</sup> Regardless, adoption practices gradually shifted from secrecy to openness, aiding adopted people in understanding their origins and identities through the lens of their adoptions; there is every indication that such openness will be of equal importance to children born through ICS arrangements. Consequently, one thing scholars and activists agree on is that preservation of records is vitally important in both cases;<sup>37</sup> not ‘to fetishize the genetic or gestational connection’ but ‘to acknowledge that these connections are meaningful and resonant to many people born of third-party assisted conception and [are] likely to continue to be so in the future’.<sup>38</sup>

## Feminism and the politics of childhood in ICS

While it is true that discussing women and children together runs the risk of reifying their relationship, the reverse is also true: discussing them separately produces a particularly antagonising tension between female

and child subjectivities.<sup>39</sup> Given the dimensions described above, surrogacy debates offer a compelling example through which to grapple with the central questions of this volume. Below, I focus on how surrogacy debates speak to three of the central issues raised by the editors.

## Ensuring the well-being of children and women

The issue of how to ensure the well-being of both women and children is central to surrogacy debates, as surrogacy itself is a context wherein their interests arguably appear to be at odds – at least in the way various feminists have critiqued it. Feminist scholars have argued that ICS especially is exploitative of poor women of colour in the global South, whose bodies are utilised to produce babies for wealthier white families in the global North. Many bioethicists have taken this stance, arguing that the medical risks taken on by surrogates jeopardise their health in favour of that of the children they carry for commissioning parents.<sup>40</sup> These include hormonal stimulation side effects, heightened medical risks from the non-medically indicated caesarean section births that are routine in surrogacy, lack of follow-up health care, and multiple psychological consequences related to stigmatisation, secrecy and immediate separation from the babies they have carried.<sup>41</sup> Feminist scholars thereby question the ethics of protecting the ‘product’ at the physical expense of the ‘producer’.

Children’s best interests in ICS debates tend to be framed within a children’s rights discourse. Elsewhere I have argued that such discourses, particularly in international law, are problematic for the ways in which children’s ‘best interests’ are often arbitrarily framed primarily by adults who seldom consult children for their actual views.<sup>42</sup> The Hague Conference on Private International Law, which is responsible for the 1993 Hague Convention on Intercountry Adoption, has been debating the establishment of a separate international convention for the regulation of surrogacy and legal parentage.<sup>43</sup> They claim that while states are not necessarily changing prohibitive policies on allowing domestic surrogacy or travel abroad to avoid national prohibitions on surrogacy arrangements, more and more courts are making decisions regarding legal parentage of children born through surrogacy arrangements ‘in the best interests of the child’ involved – often to prevent the children from being stateless (a violation of their rights). Yet these decisions constitute *ex post facto* checks once a child already exists as a result of ICS arrangements. Hence, ‘this is already too late to be able to exercise any meaningful control’<sup>44</sup> over the ethics or legalities of ICS. This also means that

'the best interests of the child' are effectively being usurped to defend the choices of intended parents. Such examples expose the limits of the 'child's best interest' principle, which sidesteps other issues of human rights and ethics in surrogacy to determine the best interests of a child who may not even have been conceived yet.

The paramountcy of children's best interests is an example of what Baird calls child fundamentalism, 'the ways in which "the child" is so often invoked as a discursive category with which one cannot disagree...'<sup>45</sup> This then gets cited in such a way that policymakers can utilise the 'best interests' of children who do not yet exist to argue for their own political views. Ruddick points out that such legal manoeuvres are often applied in debates about foetal rights, resulting in 'a paradoxical situation where the "fetus" is granted a more authoritative voice in terms of what it "wants" than is the child, whose wishes are perpetually called into question' in legal proceedings.<sup>46</sup> This was also the case in the 2009 New South Wales Surrogacy Bill in Australia. In debates about the bill, politicians invoked 'children's best interests' to make the (heterosexist) argument that allowing gay and lesbian couples to use surrogacy as a means of forming a family deprives children of a 'proper' family environment, which they interpreted as being composed of a heteronormative nuclear family<sup>47</sup> – a topic I return to later in this section.

### Challenging the mother–child dyad in ICS

The question of whether women's and children's interests are necessarily opposed or inevitably linked depends on the woman to whom one is referring in an ICS arrangement, as well as the underlying presumptions one makes about the primacy of the mother–child dyad. In the case of an intended mother, proponents evoke the right to motherhood and the cultural/legal primacy of genetic relatedness to justify the commissioning of a surrogate – and since surrogacy in Mexico or India is cheaper than in the United States (and is outlawed in much of Europe), ICS gives women who might not otherwise be able to conceive and/or carry a pregnancy the chance to become mothers. In the case of surrogates, many feminists argue that it exploits their reproductive labour, but in Pande's seminal ethnography of Indian commercial surrogate mothers, *Wombs in Labor*, the surrogates themselves often say that amidst dire poverty, surrogacy offers them their only viable option to help their own families as well as someone else's.<sup>48</sup> In fact, they often invoke their own self-sacrifice as mothers to justify being a commercial

surrogate by saying that they decided to do it in order to help provide for their *own* children.

ICS thus both denaturalises and reinforces the mother–child dyad in various ways – and with varying consequences for the relationships between women and children. On the one hand, ICS denaturalises the relations between women and children by offering new ways of understanding mother–child relationality; on the other, many women who cannot carry children themselves are driven by social reproductive imperatives that define womanhood through motherhood to seek alternative means such as surrogacy to have children. Thanks to ART, surrogate-born children can now have up to five ‘parents’: egg provider, sperm provider, gestational mother, and two intended parents – including up to four mothers.<sup>49</sup> The carrying of a child in the womb loses import as a type of relational, kin work/care – which in turn devalues women’s labour (literally) – while still placing primacy on the genetic relatedness of women and children. Moreover, Hewitson has claimed that – partly due to reproduction’s marketisation through surrogacy – ‘neoliberalism constructs and relies upon the family as a collection of intensely-bonded parents and children while also articulating the family members and surrogate mothers as self-actualizing, risk-managing consumers and entrepreneurs’.<sup>50</sup> Children themselves may no longer be seen (legally or culturally) as ‘property’ of parents, but they *are* commonly seen as beings that parents are meant to ‘invest’ in for the ‘production’ of a future adult who is him/herself a ‘productive’ person<sup>51</sup> – not to mention the incredible emotional investment with which children have come to be endowed, such that we typically efface the interplay of economy and affect in the commoditisation of children.<sup>52</sup>

Rosen has written about the issue of time and temporality in the construction of woman–child relationships.<sup>53</sup> One of the reasons surrogacy is controversial is because of the transience of surrogate motherhood, which seems to run counter to the notion of a permanent bond created between mother and child through the experience of pregnancy. However, while some surrogates are resigned to the contractual termination of the mother–child link upon delivery (as Rotabi and Bromfield state that many US surrogates are: in fact, they state that the child was never ‘theirs to give up’ in the first place because it always belonged to the commissioning parents<sup>54</sup>), some surrogates also contest this ‘unnatural’ temporality of motherhood in their conception of the practice. The surrogates in Pande’s study often talked of commercial surrogacy as ‘mothering’ along the lines of other forms of care work, and as ‘kin labour’, to counter the ephemerality of the transaction and their own disposability as workers (see Crivello and Espinosa, this volume, for a detailed

discussion of care labour and temporal vulnerability). They stated that even though they gave the child to the genetic parents, they have interminable connections by virtue of the pregnancy – and that these in fact (if not in law) override any genetic claim to a maternal bond. As one surrogate told Pande, ‘After all, it’s my blood even if it’s their genes.’<sup>55</sup>

What few studies there are of how surrogacy affects children report that both a surrogate’s pre-existing children and surrogate-born children tend to have overwhelmingly positive feelings about the circumstances of their births.<sup>56</sup> Though their sample of surrogate-born children was small, 13 out of the 14 10-year-old children in Jadva et al.’s study who were in contact with their surrogates reported that they liked them.

Meanwhile, donor-conceived offspring are reconfiguring kinship around new ART, using advances in genetics testing and information and communication technologies to establish mechanisms for identification of genetic relations such as the Donor Sibling Registry. Dempsey and Kelly report that ‘donor-conceived young people who form relationships with donor siblings often view them as equivalent to “extended family” with all the nuances of meaning that that term entails when applied to family of origin...’<sup>57</sup> It is doubtful that surrogate-born children would feel the same about others born from the same gestational surrogate, however – especially where relationships with surrogates (unlike with gamete donors) fall outside of patriliney and transgress racial, national, and class lines – but this is a crucial area for further study.

In sum, while the practice of ICS itself offers opportunities to denaturalise the mother–child dyad, the ways that the practice is construed and constructed by participants may in fact reinforce the ‘natural’ links between both surrogate and commissioning women and the children they birth or raise – often as a way to subvert the commercial context of the interaction.

### Contesting and reinforcing compulsory heterosexuality?

One of the shortcomings of surrogacy practice is that it does not necessarily challenge patriliney or the compulsory heterosexuality of the nuclear family. Though ICS arrangements themselves are arguably products of neoliberal economic policies that reinforce the heteronormativity of the patriarchal nuclear family,<sup>58</sup> surrogacy also decentres such heteronormativity in that many gay couples are using surrogacy as a means to form genetically related offspring. This confounds the compulsory heterosexism of presumed rights and entitlements to family. However, it is still problematic in that the state has both privatised and reified the

imperatives of social reproduction,<sup>59</sup> not just for women but for gay couples. Opening opportunities for gay and lesbian couples to form genetically related families through various ARTs also pulls gay couples into the marketisation of reproduction in ways that expose them to the same classed and gendered criticisms as heterosexual intending parents: of exploitation of poor women, and of reinforcing the patriarchal definitions of family through emphasis on genetic links, particularly to fathers.

## **Applying a childhood studies lens to ICS: toward a relational approach**

Attention to *actual* surrogate-born people's concerns is paramount in emergent ICS debates. The concerns of children born through ICS can help add a vital dimension to the above debates, and may even reconcile some schisms in feminist thinking about ICS. Because of the 'passive' role of children in ICS and the fact that they are yet unborn, childhood studies scholars, who tend to privilege children's 'voices', have as yet done little research on the topic. If adoption studies are any indication, though, surrogate-born children will also want access to information about their origins and/or contact with their surrogate mothers. This opens up an important opportunity not only to advance scholarly debates about surrogacy beyond the conundrums of feminist scholarship but to inform that same scholarship with a more holistic, relational approach. For example, we can expand the discussion of how – though surrogates and intended parents both tend to frame ICS as altruistic – intended parents might see the surrogate as having a more transient relationship with the commissioning parents and child rather than an enduring relationship with the family, as surrogates and surrogate-born children do. Here again, adoption provides an important model for refiguring the relationships between women and children while expanding the notion of family through the 'adoption triad'; we can also start to move toward similar openness in ICS by developing the concept of the 'surrogacy triad' to include children, commissioning parents and surrogate mothers in an ongoing relationship. Studies have shown that this model has been beneficial to all in adoption,<sup>60</sup> and preliminary indications are that openness in surrogacy is also largely positive for all involved.<sup>61</sup>

In order for childhood studies to effectively address issues in ICS around which feminists have continually circled, they will have to go beyond a simple children's rights discourse to consider children's lived experiences. Scholars like Darling and Crawshaw have written

extensively about the children's rights implications of commercial surrogacy,<sup>62</sup> making great in-roads especially in regards to challenges of statelessness and citizenship. But they tend to fall into the same quagmire of subjectivity as feminist analyses in that they rely on the highly subjective 'best-interest principle' in international law. Rather than assuming what is best for (imaginary) children in ICS, relying more on empirical evidence centred on the actual viewpoints and experiences of surrogate-born children and the adults they become can more realistically speak to the concerns ICS raises about the relationships between women and children. Further, a relational approach toward examining the connections between surrogate-born children and others in the surrogacy triad – their commissioning *and* surrogate mothers, as well as their relationships with their surrogates' other children – precludes the possibility of neglecting either women or children in the analysis.

It is still early days for ICS, though, and little empirical research has actually been conducted – but this also stems from prevalent assumptions that young children cannot respond to questions about the practice. Childhood studies scholars have developed effective qualitative methods for working with even very young children that could help remove this obstacle; it is not essential to wait until children grow up to see how a phenomenon such as ICS affects them.

On the other hand, it is also important to recognise that children *do* eventually grow up. It is thus important to consider the effects of surrogacy on children without reifying them as individuals or framing childhood as a static state. Early adoption studies as well as policies tended to fall into this trap: freezing adoptees in time as vulnerable children without adequate acknowledgement of the adults they eventually became.<sup>63</sup> Only as a result of adult adoptees lobbying for reform did changes in adoption law and practice occur to start reflecting adoptees' needs over the life course. Scherman et al. note that:

The field of surrogacy has the unique opportunity to do now what the field of adoption was painfully late in realising: plan for the adults that the children will eventually become. It is critical that the industry does not wait for the children of global surrogacy to grow up before establishing policies and laws that support and protect them not only as children, but also as the autonomous individuals they will become.<sup>64</sup>

Finally, we should embrace the opportunities for more collaborative work afforded by such topics as ICS that necessarily bring women and

children into contested contact. In so doing, we should not make undue assumptions of mutual exclusivity; one can be a feminist and a scholar of children and childhood, a scholar of women's studies and a children's advocate, etc. It is not a matter of constantly 'switching lenses' but rather of taking a relational approach that incorporates both feminist and child-centred concerns, working toward the common goals of social and economic justice. Considering the 'surrogacy triad' is one example of how this might be achieved.

## NOTES

- 1 Diane Beeson, Marcy Darnovsky and Abby Lippman, 'What's in a Name? Variations in Terminology of Third-Party Reproduction,' *Reproductive BioMedicine Online* 31 (2015): 807.
- 2 DasGupta, Sanyantani and Shamita Das Dasgupta, eds., *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Plymouth: Lexington Books, 2014): 191.
- 3 Alison Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy,' in *Globalization and Transnational Surrogacy in India: Outsourcing Life*, ed. Sanyantani DasGupta and Shamita Das Dasgupta (Plymouth: Lexington Books, 2014): 24.
- 4 Beeson, Darnovsky and Lippman, 'What's in a Name?' 807.
- 5 While this chapter focuses on ICS, it is important to note that wealthy domestic clients for surrogacy also exist in many countries. With the ban on ICS in India, for example, the market has now shifted back to Indian clients. In either case, ICS has important class implications, with poor women who typically have previously had little reproductive freedom or access to services becoming surrogate mothers for upper-class clients. See Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (New York: Columbia University Press, 2014).
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- 9 Hague Conference, 'Study of Legal Parentage'.
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