PROTECTING HUMAN RIGHTS AND FAMILY FORMATION IN INTERNATIONAL SURROGACY ARRANGEMENTS

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ABSTRACT

Over the past three decades, advances in reproductive technologies have expanded possibilities for individuals and couples unable to conceive due to infertility, disability, or sexual orientation. International paid surrogacy, while providing many with the opportunity to create genetically related families, has also raised significant ethical, legal, and human rights concerns. The ease of travel, healthcare availability, and economic disparities between intending parents and surrogates have fueled a global surrogacy market, but its reputation has been undermined by allegations of exploitation and abuse. Current regulation largely depends on individual states, leading to a patchwork of policies: some jurisdictions ban surrogacy outright, others permit it under regulation, while many do not regulate it directly. Though proponents of free market and contract law argue that existing frameworks adequately govern the practice, recurring conflicts involving cross-border family law and human rights demonstrate otherwise. Calls for a global ban—such as Pope Francis' 2024 condemnation and the 2023 Casablanca Declaration—have not convinced surrogacy-providing states to enact such a ban. Meanwhile, the Hague Conference on Private International Law's Experts' Group has worked toward an international convention culminating in a 2022 report that this Article argues still cedes excessive power to private actors and intermediaries. This Article contends that effective regulation requires robust domestic legislation, aligned with states' human rights obligations, to complement international law and contract

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frameworks. It argues against bans and instead calls for regulation that prioritizes surrogates' autonomy, intending parents' right to family formation, and surrogate-born children's rights. Such an approach reframes surrogacy regulation away from notions of baby selling, toward a model that ensures dignity, accountability, and legal recognition for all parties involved.

TABLE OF CONTENTS

INTRODUCTION

The rapid advances in reproductive technologies[1] in the past three decades have been a boon for those who, because of infertility, disability, or their sexual orientation, have been unable to realize their desire for genetically related children.[2] Even though forming such families through surrogacy is cost prohibitive to many, for others the relative ease of travel, the availability of adequate healthcare infrastructure, and the availability of women willing to do this reproductive labor in less economically prosperous countries has led to the creation of families that would otherwise have remained dreams.[3] And yet, for all its benefits in forming families, the reputation of international paid surrogacy has been tarnished by charges of exploitation and abuse.[4]

International surrogacy has resulted in several types of controversies specific to cross-border arrangements involving conflicts

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1. *See generally* Jessica Hamzelou, *How Reproductive Technology Is Changing What It Means to Be a Parent*, MIT TECH. REV. (Oct. 21, 2022), https://www.technologyreview.com/2022/10/21/1062027/reproductive-technology-changing-parent/ [https://perma.cc/QTX9-6KYE] (discussing the possibility of babies born through assisted reproductive technologies having four parents and presenting some of ethical implications); Paul R. Brezina et al., *Recent Advances in Assisted Reproductive Technologies*, 1 CURRENT OBSTETRICS & GYNECOLOGY REP. 166, 167 (2012) (discussing advances in IVF and gestational pregnancy).

2. For an overview of commercial, gestational surrogacy and a summary of recent developments affecting international surrogacy markets, see *infra* notes 18–38 and accompanying text.

3. *See* Brian Salter, *Markets, Cultures, and the Politics of Value: The Case of Assisted Reproductive Technology*, 47 SCI., TECH. & HUM. VALUES 3, 4 (2022) ("Since the first baby was born through in vitro fertilization (IVF) in 1978, the number conceived by [Assisted Reproductive Technology] now exceeds four million and approaches 0.1 percent of the world's population[.]") (citation omitted); FIROUZEH NAHAVANDI, COMMODIFICATION OF BODY PARTS IN THE GLOBAL SOUTH: TRANSNATIONAL INEQUALITIES AND DEVELOPMENT CHALLENGES 48 (2016) (noting that individuals and couples seeking a surrogate are increasingly traveling to "high-tech low-cost countries" such as India and Thailand); Priya Shetty, *India's Unregulated Surrogacy Industry*, 380 LANCET 1633, 1633–34 (2012) (discussing the recent surge of Western couples seeking surrogate mothers in India).

4. *See, e.g.*, Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33 J. APPLIED PHIL. 125, 126–27 (2016) (analyzing claims of exploitation in international surrogacy as moral claims); Françoise Baylis, *Transnational Commercial Contract Pregnancy in India*, *in* FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES 265, 266–68 (Françoise Baylis & Carolyn McLeod eds., 2014) (arguing that international commercial surrogacy in India is exploitative and morally objectionable).

of family laws and human rights violations—conflicts that have arisen with greater frequency with the growth of the global surrogacy business.[5] For the past decade, many scholars and activists have called for international regulation to deal with these issues, but no consensus has been reached about what form such regulation should take.[6] For the most part, regulation of paid surrogacy has depended on individual states.[7] Some have banned the practice, others have remained silent on the issue, and still others have taken a middle ground with varying degrees of regulation.[8]

Some scholars have argued that the free market and contract law—the current primary means of ordering international

5. *See* Parentage / Surrogacy Experts' Grp., Hague Conf. on Priv. Int'l L., *Final Report: The Feasibility of One or More Private International Law Instruments on Legal Parentage*, ¶ 8, Prel. Doc. No 1 (Nov. 2022) [hereinafter HCEG Final Report], https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf [https://perma.cc/T6JB-P8H7] (summarizing prior research which found that "[c]ross-border problems are arising because of the differences in domestic approaches to surrogacy [and] in domestic approaches to the question of legal parentage" and noted "reported situations of abuses involving [international surrogacy agreements").

6. *See* Noelia Igareda González, *Regulating Surrogacy in Europe: Common Problems, Diverse National Laws*, 26 EUR. J. WOMEN'S STUD. 435, 437, 441–43 (2019) (discussing problems associated with disparate national legislation governing altruistic surrogacy but concluding that "altruistic surrogacy should be recognised and regulated at the national level"); Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL J.L. & PUB. POL'Y. 685, 685–88 (2018) (discussing the unregulated markets in both India and the U.S. and suggesting regulation); Cyra Akila Choudhury, *Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation*, OXFORD HANDBOOKS ONLINE (Dec. 5, 2016) [hereinafter Choudhury, *Transnational Commercial Surrogacy*], https://academic.oup.com/edited-volume/41331/chapter/352336725 [https://perma.cc/V2BM-LY9W] (exploring domestic and international legal approaches to common challenges in cases arising out of transnational surrogacy).

7. *See, e.g.*, González, *supra* note 6, at 436 (noting that the European Court of Human Rights has largely left the issue of regulating assisted human reproductive techniques to individual Member States).

8. Some have argued that even states ordinarily assumed to be well regulated are, in fact, not. *See, e.g.*, Valerie Gutmann Koch, *Norms Reborn: Controversies and Challenges for the Future of Reproductive Technologies*, 22 HOUS. J. HEALTH L. & POL'Y 1, 1 (2022) ("Despite its role as an international leader in technological and scientific advancement, the United States is notoriously underregulated in the field of reproductive research and the advancement of reproductive technologies. This notable lack of oversight has led these fields to be characterized as the 'wild west' of medicine.").

surrogacy—have been efficiently regulating the industry.[9] But the regular occurrence of hard problems arising from cross-border family formation—problems that cannot be resolved through reliance on contract alone[10]—demonstrate that more regulation is needed. There have also been calls for banning surrogacy globally, including in 2024 by Pope Francis[11] and in 2023 by a group of activists and scholars who promulgated the Casablanca Declaration for the Abolition of Surrogacy.[12] While a universal ban has failed to materialize,[13] international civil society has recognized the need for regulation; for example, the Hague Conference on Private International Law's Experts' Group on Parentage/Surrogacy (HCEG) has been working on a Convention addressing international surrogacy agreements for over a decade, culminating in a final report issued in 2022.[14] While the report and its recommendations are of value, the HCEG proposal still leaves too much to private actors, such as intermediary brokers and agencies, in surrogacy-providing states.[15]

This Article argues that public and private international bodies, human rights activists, and civil society organizations must press for more explicit and robust domestic legislation on surrogacy

9. *See generally* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. RACE, GENDER, & SOC. JUST. 423 (2014) [hereinafter Margalit, *In Defense of Surrogacy*] (arguing that modern contract law provides a "well-equipped framework and doctrines appropriate for dealing with" common problems arising in cases of surrogacy).

10. *See, e.g.*, *id.* at 438 (acknowledging that the "dilemma" surrounding modern surrogacy "centers on the question of how to execute such contracts in the best possible way in order to maximize their feasibility and durability at the state, federal, and international levels"); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2309–10 (1995) (summarizing "three types of objections" that might counteract full enforcement of a surrogacy contract).

11. Nicole Winfield, *Pope Francis Calls for a Universal Ban on Surrogacy. He Says It Exploits Mother and Child*, ASSOCIATED PRESS (Jan. 8, 2024), https://apnews.com/article/pope-surrogacy-vatican-russia-israel-ukraine-56acaa8500336db81ee18913a77ddc0f [https://perma.cc/3Y4R-QZ4A].

12. *Declaration of Casablanca for the Universal Abolition of Surrogacy* (Mar. 3, 2023) [hereinafter *Casablanca Declaration*], http://declaration-surrogacy-casablanca.org/index.php/international-declaration-for-the-global-prohibition-of-surrogacy [https://perma.cc/5M4H-8LQL].

13. *See infra* Section III.A (discussing recent attempts to ban surrogacy and arguing against such a ban).

14. HCEG Final Report, *supra* note 5, ¶¶ 1–2, 7–8.

15. *See infra* Section III.B (discussing the HCEG proposal for a Convention and Optional Protocol relating to surrogacy and noting several foreseeable issues arising from the current formulation).

and the enforcement of states' human rights obligations. These measures should supplement regulation provided by private international law and contract law to protect the rights of not only the child, but also the surrogates and intending parents.[16] While contract law may remain the principle legal framework for international surrogacy arrangements, domestic legislation that incorporates human rights obligations must also be implemented and enforced. Further, both domestic and international human rights bodies should advocate for such action and accountability.

This Article proceeds in four Parts. Part I briefly describes paid international gestational surrogacy in contrast to traditional and altruistic surrogacy and details some of the particulars of surrogacy contracting. Part II explains why more specific regulation of surrogacy in both international and domestic spheres is necessary by demonstrating how contract law is unable to address the problems raised by international surrogacy. Part III takes up the discussion of international regulation. It rejects the calls for a global or partial ban and examines the proposal for an international convention as suggested by the HCEG.[17] The Article suggests that international law aimed at protecting surrogates, surrogate-born children, and intending parents cannot operate without domestic legislation. To that end, Part IV first critiques the prevalent human rights framings that have informed the HCEG's final report and that currently drive domestic legislative priorities. It suggests a reframing of the normative approach to surrogacy regulation away from notions of baby selling and exploitation of women towards an enforcement of human rights that protects surrogates' autonomy and choice, intending parents' ability to form families, and surrogate-born children's rights to a family, while also allowing the surrogacy industry to operate legally.

16. *See infra* Part IV (advocating for a mixture of contract law, public and private international law, and domestic legislation and enforcement to protect parties involved in surrogacy).

17. This Article relies upon and updates the Author's Oxford Handbooks Online Article, *Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation, supra* note 6, in light of the HCEG's issuance of the final report on international surrogacy agreements in November 2022.

I. FACILITATING FAMILY FORMATION THROUGH PAID INTERNATIONAL GESTATIONAL SURROGACY

Two points of clarification are necessary as a threshold matter before discussing the legal regulation of international surrogacy. First, this Article confines itself to commercial, gestational surrogacy as opposed to altruistic or traditional surrogacy. Second, while domestic surrogacy contracts may be familiar to most, commercial international surrogacy agreements are typically less familiar and are more complicated because they often involve profit-making intermediaries like a broker and/or surrogacy agency in addition to the commissioning or intending parents and the surrogate. Thus, the distinction between commercial and altruistic surrogacy, as well as the process and terms of these multiparty, cross-border, surrogacy agreements are briefly described here to provide baseline context.

A. Commercial, Gestational Surrogacy in Brief

Altruistic surrogacy, in which the agreement to perform the service comes from a philanthropic impulse rather than monetary remuneration, has historically been more prevalent than its commercial form.[18] In an altruistic arrangement, the surrogate donates her services to help the intending parents form a family.[19] In return, the intended parents reimburse the surrogate for the costs of carrying the child, including paying for health care, days off work, living expenses, and necessities.[20] States that only permit altruistic

18. *See, e.g.*, Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6 (noting that, although statistics on the number of surrogacies are hard to find, very few states permit commercial surrogacy). States that allow only altruistic surrogacy justify their prohibition on commercial surrogacy on their normative condemnation of the commodification of women's reproductive capacity, but the distinction between the two is "neither self-evident nor natural." Sharyn Roach Anleu, *Surrogacy: For Love But Not for Money?*, 6 GENDER & SOC'Y 30, 31 (1992).

19. Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6. While not all children from surrogacy are genetically related to their commissioning parents, children often have a genetic tie to at least one. *See* Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 52 WILLAMETTE L. REV. 459, 465–72 (2015) (discussing the famous *Baby M* case and summarizing the ways in which different types of surrogacy impact the contractual relationship).

20. *See, e.g.*, González, *supra* note 6, at 437 (reporting that Portugal's law permitting only altruistic surrogacy provides that intended parents can reimburse the surrogate for provable expenses); Morrissey, *supra* note 19, at 539–40 (discussing the need to negotiate reimbursement schemes as part of a surrogacy contract and providing a sample reimbursement provision).

surrogacy do not allow the surrogate to charge for her reproductive services.[21] Commercial or paid surrogacy, on the other hand, covers the expenses associated with carrying the child while also paying the surrogate a fee for her gestational services.[22] This Article is limited to addressing issues relating to commercial surrogacy.

Additionally, the scope of this Article is limited to gestational surrogacy, as opposed to traditional surrogacy, because that is the form that prevails in commercial agreements.[23] In traditional surrogacy, the gestational mother is also a genetic mother through the donation of her eggs,[24] which, in the past, has given rise to claims of legal motherhood by surrogates.[25] To avoid such conflicts, there has been a shift from traditional to gestational surrogacy, in which the intending parent(s) donate either or both egg and sperm, or receive donated eggs and/or sperm.[26] Once fertilized, the ovum is implanted into the surrogate's womb; she has no genetic link to the fetus, which makes claims to parenthood in breach of the contract more difficult.[27]

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21. *See* Anleu, *supra* note 18, at 31 (noting that the United Kingdom and two Australian territories had outlawed commercial surrogacy but exempted altruistic surrogacy).

22. Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6. While surrogates may be partly motivated by altruism, it is undeniable that without the material remuneration most women would not enter into surrogacy in India. *See* Shetty, *supra* note 3, at 1633 ("Indian surrogates are often struggling to provide for the family they already have; they can't afford not to get paid."). Nor would surrogates be likely to enter into an unremunerated arrangement in the United States. "In those states that allow for altruistic surrogacy, surrogates are still paid substantial amounts, but the payment is characterized as a living subsidy, healthcare costs, and other benefits that are not tied to the actual production of the child." Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 VAND. J. TRANSNAT'L L. 1, 16–17 (2015) [hereinafter Choudhury, *Political Economy and Legal Regulation*].

23. *See, e.g.*, Kalantry, *supra* note 6, at 689 ("[I]n ninety-five percent of surrogacy contracts in the United States (and probably more in India), women engage in gestational surrogacy.").

24. Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6.

25. *See, e.g.*, *In re* Baby M, 537 A.2D 1227, 1234 (N.J. 1988) (invalidating a surrogacy contract and voiding the termination of the surrogate mother's parental rights).

26. *See* Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. HEALTH CARE L. & POL'Y 85, 88 (2015) (arguing that gestational surrogacy is more common and more accepted than traditional surrogacy).

27. *Id.* While having no genetic link makes claims to the child harder, some surrogates have made them. *See id.* at 93–94 (discussing the case of *Johnson v. Calvert*, which involved the enforceability of a gestational surrogacy agreement). These demands for recognition as a parent have given rise to a robust literature

While statistics on the number of surrogacies in any given country are hard to determine with accuracy, the tightening of international adoption regulation and advances in medicine have coincided with a rise in demand for surrogacy in general.[28] Some sources contend that "the commercial surrogacy industry is experiencing a global boom expected to reach $129 billion by 2032, exponentially higher than its estimated 2022 value of $14 billion."[29] This growth is remarkable and likely to continue as more countries enter the market.[30] In the last decade, several countries have begun to provide international surrogacy with minimal regulation.[31] Many

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on the bioethical and medical dimensions of surrogacy. *See, e.g.*, Paola Frati et al., *Bioethical Issues and Legal Frameworks of Surrogacy: A Global Perspective About the Right to Health and Dignity*, 258 EUR. J. OBSTETRICS & GYNECOLOGY & REPRODUC. BIOLOGY 1, 2–3 & fig. 1 (2021) (conducting a systematic review of 124 articles concerning bioethical issues in international surrogacy). These matters are beyond the scope of this Article, which is not concerned so much with the form that surrogacy takes, but rather the legal arrangements that bring hopeful parents, clinics, and surrogates into a relationship and the consequences of such arrangements.

28. *See, e.g.*, Pilar Álvarez, *In Spain, International Adoptions Plunge While Surrogacy Grows*, EL PAIS (Jan. 30, 2019), https://english.elpais.com/elpais/2019/01/30/inenglish/1548835396_594194.html [https://perma.cc/NME6-DRTR] (reporting a correlation between declining international adoption rates and an increase in the number of Spanish couples entering international surrogacy arrangements); Sarah Mortazavi, Note, *It Takes a Village To Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2250 (2010) (noting that surrogacy "has become increasingly more common" since the first surrogate baby was born in 1980 and reporting a global estimate of ten thousand children born through surrogacy as of 2005); Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES (Oct. 4, 2011), http://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html (on file with the *Columbia Human Rights Law Review*) (discussing the surge in surrogacies in India since commercial surrogacy was legalized in 2002).

29. Mary Whitfill Roeloffs, *It's Not Just Celebrities - Commercial Surrogacy Industry Expected to Grow Tenfold by 2032*, FORBES (July 14, 2023), https://www.forbes.com/sites/maryroeloffs/2023/07/14/its-not-just-celebritiescommercial-surrogacy-industry-expected-to-grow-tenfold-by-2032/?sh=2ef09b1b37f1 [https://perma.cc/HC6A-RTW5].

30. *See generally* Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 439 (Katarina Trimmings & Paul Beaumont eds., 2013) [hereinafter INTERNATIONAL SURROGACY ARRANGEMENTS] (discussing the growth of the international surrogacy market and providing several explanations for its rapid growth).

31. *See, e.g.*, *Where in the World Is Surrogacy Allowed?*, BRILLIANTBEGINNINGS, https://brilliantbeginnings.co.uk/international-surrogacy-

countries have enjoyed a booming business in producing children for others, including Ukraine,[32] Georgia,[33] Kenya,[34] Nigeria,[35] and Ghana.[36] Some states, like India, reacting to high profile controversies, have recently enacted bans on international commercial surrogacy but allow surrogacy for parents commissioning it domestically or among relatives.[37] Other countries—Cambodia and

options [https://perma.cc/DF39-7QUW] (noting a "pattern in which surrogacy grows due to the marketing of service-providers" in countries that do not formally regulate surrogacy but which then ban surrogacy following negative media attention thereby prompting surrogacy services to "move to another unregulated destination where the pattern repeats").

32. Madeline Roache, *Ukraine's 'Baby Factories': The Human Cost of Surrogacy*, AL JAZEERA (Sept. 13. 2018), https://www.aljazeera.com/features/2018/9/13/ukraines-baby-factories-the-human-cost-of-surrogacy [https://perma.cc/62SX-VEBR]. While most surrogates outside the United States cannot command the same expensive fees, surrogacy is nevertheless lucrative, with surrogates able to earn several thousand dollars for a surrogacy. For example, in Ukraine some surrogates are paid as much as $11,000 in addition to a monthly stipend, which combined amounts to three times the average annual salary. *Id.* These earnings often provide enough capital to purchase land and a house, as well as to pay for schooling for the surrogate's own children. *Id.* In the absence of other well-paid employment, surrogacy becomes an attractive alternative to subsistence labor. *See id.* (quoting one Ukrainian as citing the fact that "[i]t's hard to find a well-paid job in Ukraine" in explaining her decision to become a surrogate). In sum, while there may be exploitation, the monetary compensation is substantial, allowing surrogates to accumulate wealth that it might take decades to save otherwise.

33. Karen Gilchrist, *The Commercial Surrogacy Industry is Booming as Demand for Babies Rises*, CNBC (Mar. 7, 2023), https://www.cnbc.com/2023/03/07/womb-for-rent-more-women-are-working-in-commercial-surrogacy-industry.html [https://perma.cc/5LJP-YLYD]. In 2023, Georgia contemplated a ban on international surrogacy although it remains legal as of this writing. Cassy Fiano-Chesser, *As One European Country Looks to Ban Commercial Surrogacy, Another Takes Its Place,* LIVE ACTION (Mar. 3, 2024), https://www.liveaction.org/news/georgia-ban-commercial-surrogacy-albania [https://perma.cc/7ETP-Y53Y].

34. Hannah McCarthy, *Surrogacy: Hannah McCarthy Travels to Kenya and Finds a Growing Number of Surrogate Cases There*, JOURNAL (Aug. 7, 2023), https://www.thejournal.ie/readme/surrogacy-ireland-africa-6136532-Aug2023 [https://perma.cc/SR8C-KBGG].

35. Abiade Olawanle Abiola et al., *Perspectives on Surrogacy Practices and Law in Nigeria: A Call for Policy Intervention*, 11 WOMEN'S REPROD. HEALTH 988, 989 (2024).

36. Owusu Boampong et al., *Commercial Surrogacy: Invisible Reproductive Workers in Ghana*, 14 GLOB. LAB. J. 89, 94–95 (2023).

37. *New Laws in India Regulate Assisted Reproduction and Surrogacy*, CTR. FOR REPROD. RTS. (Aug. 16, 2022) [hereinafter *New Laws in India Regulate Surrogacy*], https://reproductiverights.org/assisted-reproduction-and-surrogacy-in-

Thailand, for example—have banned most forms of surrogacy entirely, pushing the business to neighboring Laos and Myanmar.[38] In short, while surrogacy itself may generally be more widespread than ever before, its commercial availability remains concentrated in a handful of countries with varying degrees of regulation.[39]

B. Contracting for Surrogacy

In almost every country permitting international commercial surrogacy, a surrogacy agency (sometimes a clinic) is the first point of contact for commissioning parents.[40] The agency then finds a

india [https://perma.cc/CB4M-D5CU]; Gargi Mishra & Brototi Dutta, *With the Surrogacy Act, the Judiciary Has the Chance to Expand Scope of Reproductive Rights,* INDIAN EXPRESS (Oct. 27, 2022), https://indianexpress.com/article/opinion/columns/with-the-surrogacy-act-the-judiciary-has-the-chance-to-expand-scope-of-reproductive-rights-8232007 [https://perma.cc/5CQT-QRW7]; *see also* Raksha Kumar, *India's Surrogacy Tourism Takes a Hit*, FOREIGN AFFS. (Dec. 11, 2015), https://www.foreignaffairs.com/articles/india/2015-12-11/indias-surrogacy-tourism-takes-hit (on file with the *Columbia Human Rights Law Review*) (discussing some of the controversies surrounding initial attempts to ban or regulate commercial surrogacy in India); Rebecca Lee, *Thailand Bans Surrogacy for Foreigners with New Law*, PBS NEWS (Feb 21, 2015), http://www.pbs.org/newshour/rundown/thailand-bans-surrogacy-foreigners-new-law [https://perma.cc/CHH7-SP26] (discussing Thailand's law banning foreign couples from seeking a surrogate and noting that the law was "spurred by a series of recent high-profile scandals that roiled the profitable but often controversial industry"); U.S. Embassy Kathmandu, *Surrogacy Services Are Banned in Nepal*, U.S. EMBASSY IN NEPAL (June 4, 2021), https://np.usembassy.gov/surrogacy-services-are-banned-in-nepal [https://perma.cc/PV3Q-L2UC] (announcing that Nepal formally banned surrogacy for single men or women, transgender couples, or foreign couples as of 2015).

38. *See* Elina Nilsson, *Travelling Thai Surrogate Mothers: Required and Restricted Mobility in Transnational Surrogacy*, 43 MED. ANTHROPOLOGY 734, 739 (2024) (discussing how Thai surrogates were forced to travel to neighboring countries to undergo necessary procedures after 2015 due to Thailand's ban on commercial surrogacy); *see also* Lee, *supra* note 37 (noting that Thailand had banned commercial surrogacy and imposed tighter restriction on Thai couples who seek surrogates); Oman Al Yahyai, *Cambodia Cracks Down on Illegal International Surrogacy as Demand Remains High*, EURONEWS (Oct. 24, 2024), https://www.euronews.com/2024/10/24/cambodia-cracks-down-on-illegal-international-surrogacy-as-demand-remains-high [https://perma.cc/AF8H-8PJP] (reporting that Cambodian authorities had decided to crack down on an recent increase in demand for surrogacy by enforcing preexisting a ban).

39. *See* Trimmings & Beaumont, *supra* note 30, at 443–64 (surveying countries that provide surrogacy).

40. Almost all searches of international surrogacy result in websites directing an intending parent or surrogate to an agency. *See, e.g.*, *What Is*

surrogate to provide the gestational service.[41] Agencies provide the contract, receive the payment from commissioning parents, pay the surrogate, perform or facilitate the medical procedures, and monitor and regulate the surrogate, in some cases requiring her to live in agency-provided accommodations.[42] In some developing countries, the process of recruiting surrogates requires additional steps. Surrogates may be identified by brokers who go to villages and seek candidates through word of mouth or by advertising.[43] Surrogacy clinics and agencies may also pay individual brokers for bringing in surrogate candidates.[44]

Once a candidate has been cleared to become a surrogate, she signs a contract prepared by the agency.[45] At this juncture, some countries where the industry is more mature require procedural safeguards to ensure that surrogates understand their rights and obligations.[46] For instance, in the United States, where compensated surrogacy is legal in an increasing number of states,[47] U.S. firms that specialize in surrogacy can be used to locate surrogates, coordinate the contract with the parents, provide legal representation for the surrogates, and coordinate with the IVF clinic that will provide the medical services.[48] These businesses act as intermediaries for both

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International Surrogacy?, SURROGATE.COM, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-international-surrogacy [https://perma.cc/8YUQ-Y27F] (describing cross-border surrogacy).

41. *International Surrogacy Arrangements*, AUSTL. GOV'T, DEP'T OF HOME AFFS., https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements [https://perma.cc/BHR9-NW86].

42. *See, e.g.*, AMRITA PANDE, WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA 65–72 (2014) (describing surrogacy arrangements in India); *see also* Boampong et al., *supra* note 36, at 95–97 (discussing the role of brokers in facilitating surrogacy in Ghana).

43. PANDE, *supra* note 42, at 66.

44. *See* Boampong et al., *supra* note 36, at 95–96 (explaining how agencies often "rely on . . . the services of brokers" who recruit surrogates on their behalf).

45. PANDE, *supra* note 42, at 68–69.

46. For a survey of U.S. state regulations requiring legal representation for surrogates, see Choudhury, *Political Economy and Legal Regulation*, *supra* note 22, at 42–46; Courtney Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 483–92 app. C (2021).

47. Joslin, *supra* note 46, at 452–53. Some states, like Michigan, continue to prohibit surrogacy entirely. *Id.* at 469 app. A.

48. Rachel Rebouché, *Bargaining About Birth: Surrogacy Contracts During a Pandemic*, 100 WASH. U.L. REV. 1265, 1267 n.4, 1284–86 (2023) (explaining the role of U.S. surrogacy agencies and their negotiating power throughout the surrogacy process).

commissioning parents and surrogates.[49] According to the information provided by some of these firms, the contract between surrogates and commissioning parents is negotiated individually with legal representation on both sides.[50] However, this level of diligence is not always guaranteed,[51] and there are often few safeguards in less developed countries where problems of social and economic inequality can create serious imbalances between contracting parties.[52] In Global South countries with less developed legal practices around surrogacy, lawyers for surrogates may have no involvement in the drafting process, relying rather on standard form contracts largely dictated by surrogacy agencies.[53]

Across jurisdictions, there are some surrogacy contract terms that are commonplace. The central aspect of all paid surrogacy

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49. *Id.* at 1293 ("This intermediary role . . . is the heart of the service that a surrogacy agency provides.").

50. *Id.* at 1284 ("[U.S.] laws mandate legal representation for surrogates that is independent from intended parents' representation . . . .").

51. *Id.* at 1287–93 (describing the difficulties that arose with negotiating surrogacy contracts during the COVID-19 pandemic); *see also* Kumar, *supra* note 37 (describing how the commercial surrogacy industry in India "remains unregulated" and that "Indian surrogates from poor and lower-middle-class households are exploited . . . by foreign couples").

52. Dalia Bhattacharjee, *Commercial Surrogacy in India: Bans, "Altruism" and the Women Involved*, 51 ECON. & POL. WKLY. 27, 29 (2016) (noting that the commercial surrogacy industry in India faces "[g]reater exploitation, the emergence of unregistered clinics, increased involvement of middlemen, decreased bargaining capacity and lower pay for . . . surrogacy mothers" because of recent legislation banning foreigners from having children through surrogate mothers in India).

53. Boampong et al., *supra* note 36, at 95–97 (describing the recruitment of surrogates through brokers). As Boampong notes:

> These clinics are privately owned by medical entrepreneurs who provide private health care in the lucrative market of childlessness, primarily for profit-making motives. The sector is privately driven with virtually no support from the government of Ghana. Gerrits characterises the liberal ART sector in this way: "Ghana may thus be described as neoliberal in its ART policy as it largely relies 'on self regulation and market forces' similar to the US which lacks a central ART policy or ART registry." An informant we interviewed indicated the growing demand for fertility treatment; the employer, being conscious of the money that could be made from the sector, ventured into the ART sector.

Id. at 95 (citations omitted) (quoting Trudie Gerrits, *Reproductive Travel to Ghana: Testimonies, Transnational Relationships, and Stratified Reproduction*, 37 MED. ANTHROPOLOGY 131, 134 (2018)).

contracts is that the surrogate has no parental rights to the child.[54] While these provisions have not always prevented assertions of parentage,[55] the contract is clear that the surrogate relinquishes all claim to the child. Other common terms include requiring the surrogate to agree to necessary medical examinations and procedures such as regular health checks; selective reductions in fetuses; termination upon the discovery of fetal anomalies; and a caesarian delivery.[56] Restrictions on activities and behavior that might jeopardize the pregnancy are also common across jurisdictions, as well as a waiver of health privacy so that the surrogate's condition can be monitored.[57]

Every country legally manages surrogacy in some way: some have laws directly regulating it while those that do not leave themselves open to becoming the next surrogacy-providing destination.[58] A total ban, like those found in many Muslim-majority and European countries,[59] results in the regulation of surrogacy by

54. *See, e.g.*, *Surrogacy Agreements – Contract Terms*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT'YS [hereinafter *Surrogacy Contract Terms*], https://adoptionart.org/assisted-reproduction/intended-parents/gestational-surrogacy/surrogacy-agreements-contract-terms [https://perma.cc/VQ3Z-7PUJ] ("The [surrogacy] contract very clearly should spell out how parentage will be addressed, including how the intended parents will be established as the legal parents, and how the gestational carrier and her spouse (if applicable) will be relieved of any and all possible rights and responsibilities regarding the child.").

55. *See, e.g.*, Morrissey, *supra* note 19, at 466–67 (discussing the famous *Baby M* case in which the surrogate decided to retain custody over the child and successfully sued to void to surrogacy contract).

56. *Surrogacy Contract Terms*, *supra* note 54.

57. For instance, in the United States, surrogates often waive their privacy rights. *See* Claire Horner & Paul Burcher, *A Surrogate's Secrets Are(n't) Safe with Me: Patient Confidentiality in the Care of a Gestational Surrogate*, 47 J. MED. ETHICS 213, 214 (2013) (noting that while surrogates often waive their confidentiality in surrogacy contracts, it remains "an open question as to whether a voluntary and knowing waiver of a Constitutional right, such as the right to privacy, is legally enforceable"). In countries like India, women are often required to live in a dormitory so that their progress and health can be monitored by the clinic. PANDE, *supra* note 42, at 75.

58. *See infra* Section III.A (discussing how surrogacy services have moved to unregulated countries in response to attempts to ban or regulate surrogacy in existing markets).

59. *See* Giada Zampano & Paolo Santalucia, *Italy Expands Its Ban on Surrogacy to Overseas as Critics Say It Targets Same-Sex Couples*, ASSOCIATED PRESS (Oct. 16, 2024), https://apnews.com/article/italy-surrogacy-pregnancy-overseas-ban-lgbtq-3f1181480a71a01166b38540e7c25103 [https://perma.cc/JZ8Q-EY3U] (discussing Italy's extension of their surrogacy ban); Sekarsari Sugihartono, *Why Surrogacy Remains Banned in Some Countries: Political and*

the state through criminal prosecutions, fines, and denial of family status and citizenship.[60] In states that permit surrogacy, the main difference in regulatory schemes is a normative one between altruistic surrogacy states and paid surrogacy states.[61] In both types of state, the regulation of surrogacy agreements, the rights and responsibilities of the surrogate and the commissioning family, and the regulation of medical processes and providers may be very similar.[62] There may be rigorous regulation in which the government takes an active interest from the contracting stage onwards[63] or there may be very little interest on the part of the state in regulating the process.[64] Regardless of where a country may fall on the regulatory spectrum, there are sure to be myriad domestic laws that define the boundaries of the surrogacy business, such as the legal regimes responsible for regulating corporations, the practice of medicine, family law, constitutional law, and commercial law.[65]

Ethical Considerations, MOD. DIPL. (Oct. 30, 2024), https://moderndiplomacy.eu/2024/10/30/why-surrogacy-remains-banned-in-some-countries-policies-and-ethical-considerations/ [https://perma.cc/M7K8-D9QY] (describing the ethical, legal, political, and social concerns underlying surrogacy bans across European and Muslim-majority countries); Anna Arvidsson, et al., *Views of Swedish Commissioning Parents Relating to the Exploitation Discourse in Using Transnational Surrogacy*, 10 PLOS ONE (2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4425515/ [https://perma.cc/LED3-2MS3] (study which found that Swedish commissioning parents' views on surrogacy are "influenced by competing discourses on surrogacy represented by media and surrogacy agencies").

60. *See, e.g.*, Patricia Orejudo Prieto de Los Mozos, *Spain*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 347, 347–49 (summarizing the legislative ban on surrogacy in Spain).

61. *See* Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6 ("[V]ery few countries permit commercial surrogacy while more permit altruistic surrogacy . . . . [W]hile surrogacy itself may be more widespread than ever before, [its] commercial form is not.").

62. *See* Anleu, *supra* note 18, at 33–38 (describing the differences in commercial and altruistic surrogacy and arguing that, apart from the monetary transaction, they may be largely the same).

63. *See, e.g.*, *Surrogacy in Israel*, MINISTRY OF HEALTH [hereinafter *Surrogacy in Israel*] (ISR.), https://www.gov.il/en/service/embryo-carrying [https://perma.cc/KJS4-EK8M] (describing Israel's rigorous regulatory scheme).

64. *See, e.g.*, Kateryna Moskalenko, *The Legal Framework on Surrogacy in Ukraine: Quo Vadis,* 9 INT'L COMPAR. JURIS. 209, 222 (2023) (describing the fragmentary legal framework regulating surrogacy in Ukraine and noting that there is no specific law on human reproduction).

65. *See* Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6 (describing the different forms of domestic regulation of surrogacy).

C. Bargaining in the Shadow of Civil Rights and Liberties

Popular assumptions that surrogacy friendly states in the Global South take a "free for all" approach to the practice do not reflect legal reality. Even in relatively unregulated states, legal surrogacy requires a formal agreement or contract.[66] Consequently, all states have some minimal kind of quasi-regulation of surrogacy through contract law.[67] Moreover, parties to surrogacy agreements do not contract in a legal vacuum[68]—other legal regimes intersect and overlap with any existing surrogacy-related regulations to delineate how the contract will be interpreted and what rights can and will be enforced.[69]

Every state purports to guarantee its citizens basic rights and liberties,[70] which form the background rules or shadow of the law in

66. *See, e.g.*, Boampong et al., *supra* note 36, at 102 (noting that the surrogacy market in Ghana is unregulated by the state and that surrogate mothers, baby agents, and intending parents enter into agreements or contracts).

67. *Id.*; *see* PANDE, *supra* note 42, at 68–70 (describing how surrogacy contracts reiterate the transient role of the surrogate mother, who is "expected to be a disciplined contract worker [that] will give the baby away immediately after delivery without creating a fuss").

68. *See, e.g.*, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228–29 (1982) (arguing that parties to a legal dispute will often "bargain[] in the shadow of the law" by attempting to reach a negotiated settled that is necessarily shaped by external legal regimes); Robert Mnookin & Louis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950, 968, 997 (1979) (asserting that parties negotiating legal agreements "do not bargain . . . in a vacuum; they bargain in the shadow of the law").

69. *See, e.g.*, Joslin, *supra* note 46, at 405 (noting that surrogacy contracts vary across different states depending upon specific state laws); Strasser, *supra* note 26, at 87–101 (discussing traditional judicial approaches to enforcing surrogacy contracts); *see also* Mnookin & Kornhauser, *supra* note 68, at 984 (describing how to the legal system is meant to provide an "effective mechanism for redress if a promise is broken" in the context of contracts negotiated by parties to a divorce).

70. All but five countries have written constitutions that purport to define and protect citizens' rights. Elliott Abrams, *Constitutions Thick and Thin*, COUNCIL ON FOREIGN RELS. (May 23, 2024), https://www.cfr.org/article/constitutions-thick-and-thin [https://perma.cc/A75R-DTC7]. The remaining five—Canada, Israel, New Zealand, Saudi Arabia, and the United Kingdom—are governed by laws, "basic laws," and their own legal traditions. *Id.* This is also one of the motivations underlying modern international human rights law. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) ("Proclaim[ing] this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the

which surrogacy agreements are negotiated.[71] Some of these rights, like parental rights, can be voluntarily relinquished, but others may not be abrogated;[72] for instance, one cannot sell oneself into slavery.[73] In the past thirty years, many states have reformed their laws to encompass greater levels of gender equality, broader conceptions of family, and more robust protections for reproductive rights.[74] International articulations of human rights—such as frameworks around women's and children's rights—also include protections that can serve as the bases for challenging interventions by the state and demanding redress when violations occur.[75] While these background rules are not typically discussed explicitly by contracting parties to surrogacy agreements,[76] they may have important effects on such

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end that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms . . . .").

71. *See* Mnookin & Kornhauser, *supra* note 68, at 997 (arguing that "[i]ndividuals in a wide variety of contexts bargain in the shadow of the law" and concluding that "the entitlements created by law, transactions costs, attitudes towards risk, and strategic behavior will substantially affect the negotiated outcomes").

72. *See* Strasser, *supra* note 26, at 112–13 (noting the complex implications of ongoing legal debates among U.S. courts concerning whether parental rights may be terminated by contract).

73. *See* Mark Strasser, *Mill on Voluntary Self-Enslavement*, 17 PHIL. PAPERS, 171, 171–83 (1988) (discussing John Stuart Mill's thoughts on voluntary slavery and arguing that Mill was interested in both prohibiting the enforcement of "slave contracts" and in allowing the state to intervene to prohibit such contracts).

74. *See generally* GAYATRI PATEL, WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: UNIVERSAL PERIODIC REVIEW IN PRACTICE (2019) (presenting the range of state attitudes and approaches to women's rights issues through the Universal Periodic Review process); WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL, AND NATIONAL LAW (Anne Hellum & Henriette Sinding Aasen eds., 2013) [hereinafter WOMEN'S HUMAN RIGHTS] (describing the implementation of women's rights in CEDAW around the world through international, regional, and national laws).

75. *See*, *e.g.*, Cecilia M. Bailliet, *From the CEDAW to the American Convention*, *in* WOMEN'S HUMAN RIGHTS, *supra* note 74, at 158, 180 (describing how within the Inter-American human rights system "women's rights are addressed via reference to substantive and procedural guarantees relating to a state's due diligence duty to prevent, investigate, punish and redress cases in which women have been subjected to violations"); *see generally* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL HUMAN RIGHTS INTO LOCAL JUSTICE (2006) (examining how international human rights are used at the local level to fight human rights violations).

76. *See, e.g.*, *Sample Traditional Surrogacy Contract*, SURROGACY MOTHERS ONLINE, https://www.surromomsonline.com/articles/ts_contract.htm

agreements when controversies arise, and may provide or remove protections for surrogates as well as commissioning families.

Take, for instance, legally imposed gender roles and the legal rights women possess to make decisions about their wellbeing and future. These have a profound bearing on surrogacy agreements.[77] Historically, many women could not enter into contracts for themselves, were often considered the responsibility of a male guardian, and could not participate in most professions.[78] While some states continue to deny women rights and opportunities or subject their rights to the approval of a father or husband,[79] many other states have progressed.[80] For instance, in the United States, courts enforce agreements regardless of the gender of the contracting party; women may enter into surrogacy agreements regardless of their

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[https://perma.cc/66FW-LXED] (discussing parental rights and rights to privacy but not explicitly address other core human rights); *cf.* Mnookin & Kornhauser, *supra* note 68, at 968–71 (discussing how legal rules can influence negotiations between parties to a divorce and noting that often the parties engage in private order against a backdrop of uncertainty due to ambiguous in legal regimes).

77. *See* ELIZABETH S.F. ROBERTS, EXAMINING SURROGACY DISCOURSES: BETWEEN FEMININE POWER AND EXPLOITATION IN SMALL WARS: THE CULTURAL POLITICS OF CHILDHOOD 103–04 (1999) (reporting that surrogates defended their practice from critics by employing feminine "strategies of strength" despite the fact that many surrogates were also focused on "contradicting feminists"); Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2378 n.2 (1995) (applying a "maternalistic" approach—which represents the "mother's viewpoint" and considers what is "deemed best for the child or children"—to understand the enforcement of surrogacy agreements).

78. Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6.

79. *See* Jan Michiel Otto, *Introduction*, *in* SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 31–32 (Jan Michiel Otto ed., 2010) [hereinafter SHARIA INCORPORATED] (describing issues relating to women's legal status and human rights under sharia law which informed the comparative study of the family law systems across twelve majority Muslim countries); Jan Michiel Otto, *Towards Comparative Conclusions on the Role of Sharia in National Law*, *in* SHARIA INCORPORATED, *supra*, at 615, 631 (concluding that "[o]f all areas of law, family and inheritance law are most influenced by classical sharia" and noting that "[s]haria-based family law discriminates against women on a number of issues" based on the preceding survey).

80. *See generally* Anne Hellum & Henriette Sinding Aasen, *Conclusions*, *in* WOMEN'S HUMAN RIGHTS, *supra* note 74, at 625, 641–53 (summarizing other works on the intersection between international human rights law and national law in advancing women's rights).

marital status;[81] women may pass on citizenship to their child regardless of the citizenship of the father;[82] single women's children are generally afforded the same rights as those of married women;[83] and women can exercise their right to reproductive choice to become a parent,[84] to terminate a pregnancy in many U.S. states,[85] or to not parent at all.[86] More recently, same-sex families have been given the

81. *See, e.g.*, *FAQ: What Disqualifies a Surrogate Mother?*, CONCEIVEABILITIES (Nov. 11, 2021), https://www.conceiveabilities.com/about/blog/faq-what-disqualifies-a-surrogate-mother [https://perma.cc/C3WB-7X2D] (noting that a woman need not be married to be a surrogate); *see also* Michael J. Dale, *The Evolving Constitutional Rights of Nonmarital Children: Mixed Blessings*, 5 GA. ST. U.L. REV. 523, 525–26 (2012) (analyzing the Supreme Court's substantive due process jurisprudence with regard to nonmarital children and noting that "the Court has held that discrimination on the basis of illegitimacy is impermissible if the governmental purpose is to punish the child for the parents' failure to conduct themselves in accordance with society's laws and moral rules").

82. *See* Immigration and Naturalization Act § 30(c), 8 U.S.C. § 1409(c) (providing that a person born outside the United States and out of wedlock to a U.S. mother "shall be held to have acquired at birth the nationality status of his mother").

83. The issue of differential treatment for children born out of wedlock has often arisen in the context of state laws governing intestate succession rights. Camille M. Davidson, *Mother's Baby, Father's Maybe—Intestate Succession: When Should a Child Born Out of Wedlock Have a Right to Inherit from or Through His or Her Father?*, 22 COLUM. J. GENDER & L. 531, 558–66 (2011). The U.S. Supreme Court has found that classifications based on "illegitimacy" are subject to what has come to be known as "intermediate scrutiny." *Id.* at 567. Under this standard, distinctions between how the law treats children born in and out of wedlock "must bear some substantial relationship to a legitimate state interest." *Id.* at 567–68. The Court has used this standard to invalidate state intestate statutes under the Equal Protection Clause of the Fourteenth Amendment. *See* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (holding that § 12 of the Illinois Probate Law violates the Equal Protection Clause after applying intermediate scrutiny).

84. *See, e.g.*, Brigitte Alicea, *Your Step-by-Step Guide to Becoming a Single Mother by Choice (SMBC)*, ILLUME FERTILITY (Feb. 13, 2025), https://www.illumefertility.com/fertility-blog/step-by-step-guide-to-becoming-a-single-mother-by-choice [https://perma.cc/9X5B-GZN6] (providing fertility guidance to single women who wish to become mothers).

85. *See, e.g.*, *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/59C2-GQJA] (providing a summary of laws governing access to abortion in each state). *But see* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (holding that there is no privacy right to terminate pregnancy in the United States).

86. See Christina Caron, *Kids? A Growing Number of Americans Say, 'No, Thanks.'*, N.Y. TIMES (July 25, 2024), https://www.nytimes.com/2024/07/25/well/mind/child-free-adults-pew-study.html (on file with the *Columbia Human Rights Law Review*) (reporting that more U.S.

same protections and status as heterosexual families through the recognition of same-sex marriage.[87] Their right to parent has been recognized through adoption in some states[88] and, where legal, via surrogacy.[89] It can be inferred that women may enter surrogacy contracts with less fear of exploitation with these guarantees in place.

In other countries, differing levels of protection and rights can constrain the surrogacy industry even if it is not directly regulated or prohibited. For example, in countries that restrict or prohibit abortion, like many Latin American countries, women who enter surrogacy agreements may not be able to terminate their surrogacies in progress regardless of the wishes of any of the parties.[90] On the

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adults say they are unlikely to ever have children and that women are more likely to respond this way than men).

87. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

88. DAVID M. BRODZINSKY, EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 12 (2011), https://www.researchgate.net/publication/271909962_Expanding_Resources_for_Children_III_Research-based_best_practices_in_adoption_for_gays_and_lesbians [https://perma.cc/YSC8-UMLC].

89. For example, as of 2012 at least 20 states and the District of Columbia allowed same-sex couples to adopt children through joint adoption or second parent adoption. *Map of States Where Same-Sex Couples Are Able to Get Joint or Second Parent Adoption*, ACLU (June 12, 2012), https://www.aclu.org/documents/map-states-where-same-sex-couples-are-able-get-joint-or-second-parent-adoption [https://perma.cc/A2DD-A9XS]. Second parent adoptions allow a partner who is not biologically related to a child to adopt their partner's biological or adoptive child without terminating the first parent's rights. NAT'L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES 2 (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/87UP-KC4L]. Joslin notes that surrogacy laws impact the scope and meaning of the right to form families of choice. Joslin, *supra* note 46, at 404–05. For example, she notes that Louisiana's surrogacy laws have the effect of excluding unmarried couples and same-sex married couples. *Id.* at 422 & n.149. Nevertheless, Joslin concludes that "the strong trend [in state surrogacy laws] is towards inclusiveness and the elimination of discriminatory criteria." *Id.* at 434.

90. *See Fact Sheet: Abortion in Latin America and the Caribbean*, GUTTMACHER INST. (Mar. 2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-latin-america.pdf [https://perma.cc/4D2D-RTMA] (reporting that "[m]ore than 97% of women of reproductive age in Latin America and the Caribbean live in countries with restrictive abortion laws" and recommending that these countries broaden the ground for legal abortion); Tetiana Narok, *Abortions in Ukraine: What Does the State Guarantee*, JURAFEM (July 22, 2022), https://jurfem.com.ua/en/abortions-in-ukraine-what-does-the-state-guarantee

other hand, in countries where abortion is a constitutional right, commissioning parents cannot force specific performance even if by the terms of the contract the surrogate has abrogated her right to terminate.[91] Similarly, countries that have strong health privacy protections, like the Health Insurance Portability and Accountability Act (commonly known as HIPAA) in the United States, may prevent commissioning parents and clinics from enforcing terms that require a surrogate to submit to particular forms of testing or invasive medical procedures.[92]

Additionally, states that do not allow a parent to pass on citizenship except to genetic children may dissuade intending parents from engaging in surrogacy.[93] Family laws that do not recognize same-sex marriages or prohibit same-sex adoption may prevent one partner from becoming a parent to a surrogate born child.[94] Other less obvious legal regimes might also be relevant, such as the regulation of medical providers, the regulation of health insurance,

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[https://perma.cc/N8U9-WJDQ] (discussing restrictions on access to abortion in Ukraine).

91. *See, e.g.*, Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2372–73 (1995) ("If a court, under traditional contract principles, is not going to grant specific performance to force an opera singer to sing, it seems highly unlikely that a court would enforce the abortion, cesarean section, or medical provisions of the surrogacy contract.").

92. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 4–11 (2003), https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html [https://perma.cc/3ULF-S52G] (discussing the substantive requirements of HIPAA's privacy rule and noting that covered entities are only required to disclose information when the individual has requested access to their own information or when the Department of Health and Human Services requests it during a compliance investigation, review, or enforcement action). For a survey of countries that have laws on international or transnational surrogacy arrangements, see INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30. To date, this is the most comprehensive survey of countries on the issues of surrogacy.

93. *See, e.g.*, Trimmings & Beaumont, *supra* note 30, at 454–55 (asserting that certain jurisdictions which allow altruistic surrogacy nevertheless impose myriad restrictions in order to limit the number of surrogacy arrangements and noting that some such jurisdictions place conditions on the transfer of legal parenthood to intended parents).

94. *See, e.g.*, Mary Boyte, *Staying the Course: Hattiesburg LGBTQ+ Couple Has Fought for Change for Decades*, CLARION LEDGER (Dec. 5, 2023), https://www.clarionledger.com/story/news/local/2023/12/05/hattiesburg-lgtbq-couple-encourages-queer-youth-fights-for-gay-rights/71718683007 [https://perma.cc/J2QF-LEFC] (interviewing a same-sex couple that fought to overturn Mississippi's ban on same-sex adoptions in 2016).

and the regulation of surrogacy's medical procedures.[95] Thus, even in a state with very little enacted law specifically on surrogacy and in which the courts are involved only when there is a disagreement or claim of breach, there are layers of ancillary laws at work.

As noted above, the rights afforded to surrogates in areas such as abortion, privacy, and autonomy in medical decision-making may affect the interpretation of contract terms and limit their enforceability. Also, while such background rules may not result in fair contracts, they do provide limits to what parties can be obligated to do. In assessing or proposing the regulation of commercial surrogacy, therefore, it is important to consider these frameworks that make up the broader legal context.

II. THE PROBLEMS WITH INTERNATIONAL SURROGACY CONTRACTS

Although most surrogacy agreements are completed without resorting to litigation, there are some difficult cases that often dominate the conversation about international surrogacy. Those who are concerned about the commodification of reproduction and the exploitation of children and surrogates cite these exceptional cases in advocacy for stringent regulation or even bans on surrogacy.[96] In contrast, scholars and activists on the other end of the spectrum argue that the international surrogacy market should be left to regulate itself through contract law and the free market.[97] Following

95. *See, e.g.*, The Surrogacy (Regulation) Act, 2021, §§ 3–4 (India) (regulating surrogacy clinics and surrogacy procedures in India); The Assisted Reproductive Technology (Regulation) Act, 2021, §§ 21–31 (India) (regulating assisted reproductive technology clinics, gamete banks and related medical procedures).

96. *See e.g.*, Yasmine Ergas, *Babies Without Border: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy,* 27 EMORY INT'L L. REV. 117, 139 (2013) (noting that concerns about commodification arise in surrogacy debates but asserting that filiation laws govern parent-child recognition and nationality attribution); *see also Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, ¶¶ 29–30, U.N. Doc. A/HRC/37/60 (Jan. 15, 2018) [hereinafter *SR 2018 Report*] (discussing concerns about surrogacy leading to the sale of children and calling for stronger regulation).

97. A.B.A., Resolution 112B with Report 11–12 (Feb. 8, 2016) [hereinafter A.B.A., Res. 112B], *reprinted in* A.B.A., RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES, 2016 MIDYEAR MEETING (2016); Margalit, *In Defense of Surrogacy*, *supra* note 9, at 444–50. Margalit's later work makes a case for more robust international regulation but relies heavily on Israel's example. Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy*

this approach, the American Bar Association's resolution on international surrogacy takes the position that human rights concerns should not be addressed in any international instrument.[98] It further argues that market-based mechanisms have allowed the industry to operate efficiently.[99] The resolution thus asserts that any regulation at the international level should confine itself to issues of parentage and advancing comity rather than attempting to include human rights protections.[100] The majority of scholars and advocates take a middle position between a total ban and leaving the practice to the free market.[101]

Agreements, 24 J.L. & POL'Y 41, 41–42 (2016) [hereinafter Margalit, *From Baby M to Baby M(anji)*]. While this is an important model, few Global South countries have the legal infrastructure to go through a pre-authorization process for surrogacy via courts. *See id.* at 51 (noting that "the acute problems of surrogacy" often fall on countries in the developing world which "lack the basic legal and medical infrastructure to address the medical, legal, and ethical concerns of the surrogates"). It is possible that the better way to do this is through coordination between the consular offices regulating visas for intending parents and a ministry for health or women's affairs. *See id.* at 80–81 (noting political and practical challenges to international surrogacy regulation). Early articles made the case that surrogacy contracts should be enforced, but did not necessarily argue that surrogacy should be regulated by contract alone. *See, e.g.*, Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 24–26 (1989) (arguing that there is "no persuasive evidence that contracts of surrogate motherhood are less likely to maximize value than the class of contracts that the law routinely enforces"); Epstein, *supra* note 10, at 2308 (arguing for enforcement of surrogacy contracts while downplaying the need for state regulation).

98. A.B.A. Res. 112B, *supra* note 97, at 7. The Resolution specifically argues that human rights abuses "are not necessarily inherent in or exclusive to" international surrogacy agreements. *Id.* Consequently, it concludes that any such human rights abuses should be addressed separately from any international legal mechanisms designed to regulate such agreements. *Id.*

99. *Id.* at 9–11.

100. *Id.* at 5.

101. *See, e.g.*, Trimmings & Beaumont, *supra* note 30, at 442 (advocating for a Convention imposing minimum international regulation on surrogacy agreements and arguing against a blanket ban); Ergas, *supra* note 96, at 121 (advocating for a bifurcated treaty regime to regulate the international surrogacy market); Margalit, *In Defense of Surrogacy*, *supra* note 9, at 440 (concluding that "surrogacy agreements should be seen as legitimate and enforceable, but premised upon a regulated, narrower notion of freedom of contract"); Margalit, *From Baby M to Baby M(anji)*, *supra* note 97, at 63–66 (rejecting calls for a ban and advocating for a bilateral or multilateral international agreement to protect against harmful, exploitive, or coercive arrangements); Joslin, *supra* note 46, at 455 (arguing that bans on surrogacy do not prevent compensation but merely reduce the bargaining power of surrogates).

Part III will take up the issue of a global ban—the most suppressive form of international regulation. This Part will challenge the claim that contract law is sufficient to regulate international surrogacy. This Article's argument in favor of domestic regulation and the inclusion of human rights obligations rests on two broad points. The first involves the validity of contract law's assumptions and remedies in the context of international surrogacy.[102] Many of the requirements of contract formation are already largely myths in the numerous one-sided contracts people enter into on a near daily basis.[103] This may not cause much concern when access to courts and a trustworthy legal system offers the possibility for parties to vindicate their rights, but these avenues of redress may be less reliable in international surrogacy agreements, which makes formation fundamentals more important.[104] In states where parties are in substantially unequal positions that facilitate coercive or unfair contract procedures, a lack of adequate legal means to contest these contracts necessitates other forms of regulation be in place to protect vulnerable parties.

Second, there are several types of surrogacy cases in which contract law is inadequate for resolving disputes or giving an adequate remedy.[105] These cases arise with alarming regularity, and their resolutions tend to come via diplomatic negotiations or the mediation of surrogacy agencies and lawyers effecting a compromise not contemplated by the contract.[106] This pattern suggests that some

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102. *See* Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 BALT. L. REV. 1, 4 (2011) (arguing that modern contract law institutionalizes unequal bargaining power and concluding that "[o]nce the inequities girding the modern contract law system are unmasked, it suggests we cannot continue to ignore them").

103. *See* Andrea J. Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights*, 110 IOWA L. REV. 497, 502–03 (2024) (analyzing the boilerplate from contracts to demonstrate the imposition on consumers of binding unfavorable terms); s*ee also*, Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (analyzing the enforcement of clickwrap licenses).

104. *See generally* Jayanth K. Krishnan & Marc Galanter, *Bread for the Poor: Access to Justice and Rights of the Needy in India*, 55 HASTINGS L. J. 789, 789–90 (2004) (noting the gridlock in Indian courts, the lack of access for poor people, and the rise of less formal peoples' courts).

105. *See infra* Section II.B.4 (demonstrating contract law's inadequacy in resolving cross-border surrogacy disputes and ensuring legal recognition of parentage).

106. *See infra* Section II.B (presenting four types of controversies surrounding international surrogacy agreement in which enforcing contract terms is rendered impossible or undesirable).

positive regulation is necessary to prevent the conflict, or to resolve it without having to take an ad hoc approach.

A. Questionable Assumptions in International Surrogacy Contract Formation

In order to bind parties, modern contract law rests on a number of legal fictions which are problematic in the context of international surrogacy. As such, this Section raises some questions about the formation of surrogacy contracts. The point here is not to offer a comparative examination of contract formation, but rather to underscore the assumptions that are made about how parties enter into these agreements. This Article utilizes common law concepts because of their familiarity to most U.S. lawyers, but the critiques can be translated to civil law concepts.

Writing about U.S. contract law, Danielle Kie Hart notes that "modern contract law . . . creates a 'presumption of contract validity' upon formation of a traditional contract via mutual assent and consideration."[107] In other words, once a contract is executed, the assumption is that the formation was procedurally fair even if it is substantively a bad bargain. If a party to that contract wishes to challenge its validity, it must argue either that there is some defect in formation or that there is some other basis like unconscionability for not enforcing it.[108] In the context of international surrogacy agreements, this legal fiction tends to maintain the power of economically and socially better situated intended parents and profit-making intermediaries at the expense of the surrogate.[109]

While it is beyond the scope of this Article to engage the vast literature on contract law and comparative contract law, this Section points to three closely related requirements or assumptions in structuring the obligations among surrogacy contracting parties that should be interrogated: mutual assent, bargaining power, and information asymmetries.

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107. Hart, *supra* note 102, at 11 (quoting Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 206 (2009)).

108. *Id.* at 12–13.

109. *See* Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6 (noting that surrogates retain medical decision-making rights and that this limits contract enforcement).

1. Mutual Assent

In general, mutual assent in a contract assumes that the parties agree upon the subject matter of the contract and the obligations that attach.[110] In order to assent to a contract, parties must understand the terms, their obligations, the consideration, and the penalties or remedies if there is a breach.[111] For the most part, the law expects parties to read the contract and do their due diligence, but in impoverished Global South countries these expectations may be unreasonable.[112] For instance, during the height of India's international surrogacy boom, studies of the domestic industry revealed that the contracts were in English, a language that most surrogates did not know, read, or adequately understand.[113] The clinics and brokers were required to translate the contract for the surrogates, who were not independently represented by lawyers.[114] While it is possible that the terms were faithfully translated and explained, without independent legal representation for the surrogate, it is questionable whether mutual assent should be assumed. To be clear, the argument is not that poor, illiterate women cannot form contracts. Rather, this Article merely notes the possibility that, in contexts where they can get away with it, a powerful intermediary might enter into contracts that it has drafted with an unrepresented and uneducated surrogate without necessarily being particular about informed mutual assent.

2. Relative Bargaining Power

For transnational agreements, the legal fiction that the contracting parties are in relatively equal bargaining positions is often not a reflection of reality.[115] International surrogacy agreements tend to be undertaken by affluent commissioning parents and financially struggling surrogates.[116] The ability to bargain against

110. Restatement (Second) of Contracts § 17(1) (Am. L. Inst. 1981).

111. *Id*. § 20.

112. *See* PANDE, *supra* note 42, at 68–74 (discussing the nature of surrogate contracts in India).

113. *Id*. at 66, 69.

114. *See id.* at 69 (indicating that brokers are responsible for translating salient elements of the contract to surrogates and describing the process as involving "inadequate counseling").

115. Daniel D. Barnhizer, *Inequality of Bargaining Power,* 76 U. COLO. L. REV. 139, 177 (2005).

116. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1265–79 (2013); Barbara Stark, *Transnational*

unfair terms that are presented as standard—and, indeed, to even be aware of their unfairness—and to have the opportunity to reject them is limited by the economic and social inequalities among the parties. One delegate to a conference on surrogacy from South Africa—where the industry is booming—said that many of the surrogates in South Africa were illiterate and could not even sign their names.[117] Along with the problem of assuming that an unrepresented, illiterate surrogate *understands and assents* to the terms of the contract, such a situation should challenge the assumption that the surrogate can *negotiate* different terms. In the context of surrogacy where one party is engaging in life-altering, physically dangerous, reproductive labor, the question of inequality in bargaining power goes directly to exploitation.

3. Information Asymmetries

While the parties to a contract do not have to have perfectly equal bargaining power for a contract to be legitimate, they should be able to bargain for their preferences adequately.[118] To that end, the information available to the parties should allow them to strike a bargain that achieves their expectations even if not all facts are known or knowable.[119] And yet, Hart asserts that in the United States:

> Studies show . . . that common-form contract language is understandable only by people with college degrees, a group that does not comprise many contracting parties, particularly consumers. In addition, basic microeconomics continue to confirm that market

Surrogacy and International Human Rights Law, 18 ILSA J. INT'L & COMPAR. L 369, 375 (2012); *see also* Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy,* 27 EMORY INT'L L. REV. 117, 184 (2013) (discussing consent and the potential for exploitation in surrogacy).

117. Tania Broughton, *Surrogacy Growing in Africa*, AFR. LEGAL (Apr. 10, 2019), https://www.africa-legal.com/news-detail/surrogacy-growing-in-africa [https://perma.cc/E4HD-74KT] (noting the lack of regulation in a number of African countries including Ghana and Nigeria).

118. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. L. INST. 1981).

119. S*ee* Hart, *supra* note 102, at 15–21 (discussing the role of statutory disclosure requirements in addressing information asymmetries and legitimating contract law's assumption that "the law should give [the parties'] bargain literal effect, that is, protect the parties' 'justified' expectations based on their contract, because it is the product of their voluntary and informed choice").

> failures in the form of information asymmetries remain fairly common, obtaining information imposes costs, and parties do not have equal access to information.[120]

Modern contract law assumes and is not overly concerned about information asymmetries because contract policing doctrines like fraud, duress, and unconscionability can be deployed to correct egregious faults.[121] But these protective doctrines rarely succeed in practice.[122] Hart's argument is directed at the United States, which has a relatively literate population.[123] It stands to reason that her point is even more relevant in Global South countries where surrogates may not be aware of even their basic civil and political rights.[124]

Problems like information asymmetries, unequal bargaining power, and questionable assent in contracting, in turn, can lead to distributions of risks and liabilities that are unacceptably one-sided. For intending parents, the risks are apparent: the surrogate may not be successful in the IVF process, she may breach the contract by aborting, she may jeopardize the health of the child by disregarding the health rules in the contract, and she may refuse to give up the child.[125] In addition to the significant and incalculable emotional burden of losing an opportunity to have a child, the intending parents therefore stand to lose materially should the surrogate breach. The surrogate, on the other hand, faces more serious physical and economic risks, including of short- and long-term health complications, disability, the possibility that the parents will refuse the child, and ultimately the loss of life to the pregnancy or other medical procedures.[126] Contracts that do not account for these risks

120. *Id*. at 36.

121. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST. 1981) (describing minority as a basis for finding that contractual duties are voidable); *id.* § 15 (describing conditions in which mental illness or defect render all contractual duties voidable); *id.* § 175 (providing that duress may render a contract voidable); *id.* § 177 (providing that undue influence by another party may render a contract voidable).

122. Hart, *supra* note 102, at 51.

123. *Id*. at 31, 51.

124. PANDE, *supra* note 42, at 69; Boampong et al., *supra* note 36, at 99.

125. *See* Deborah S. Mazer, Note, *Born Breach: The Challenge of Remedies in Surrogacy Contracts,* 28 YALE J.L. & FEMINISM 212, 213–14 (2017) (discussing possible scenarios in which a surrogate breaches the terms of a surrogacy contract).

126. *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 79–85 (2006)

shortchange the surrogate who must then internalize these costs.[127] In addition, if the surrogate is unaware of her rights—particularly to terminate the pregnancy—she may believe that she has no choice but to perform.[128]

Even if contracts are entered into perfectly with procedural and substantive fairness for all sides, certain types of problems have arisen repeatedly in surrogacy arrangements that cannot be resolved by contract law, suggesting that further regulation is needed. These cases are discussed below.

B. The Impossibility or Undesirability of Enforcing Contract Terms: Four Types of International Surrogacy Controversies

The commercial nature of surrogacy contracting raises ethical and normative questions about regulation. As mentioned above, while most surrogacy contracts are completed without fuss and drama, when the failures happen, they can be dramatic. Over the years, four types of cases have pointed to the limits of contract law in sufficiently regulating international surrogacy.

1. Civil Liberties and Unenforceable Terms

The following examples of surrogacy-agreements-gone-wrong highlight how contract terms might come into conflict with the constitutional and civil rights of the surrogate guaranteed by the state. In some of these cases, intending parents' demands that the pregnancy be terminated and the surrogate's refusal has led to the birth of a child that was genetically linked to the intended parent but whose parentage had to be established contra the contract because

(describing the development of surrogacy markets and noting that surrogates in typical gestational contracts "agreed to assume all the risks of pregnancy" as well as a litany of additional constraints); Choudhury, *Political Economy and Legal Regulation*, *supra* note 22, at 24 (discussing health complications and potential risks).

127. *See, e.g.*, Rebouché, *supra* note 48, at 1268 (discussing several cases in which surrogates were forced to provide extended child-care after countries imposed travel restrictions during the COVID-19 pandemic). For a more detailed discussion of cases in which surrogates have been forced to internalize unexpected costs (such as the cost of caring for surrogate-born children), see *supra* Sections II.B.1–2.

128. Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAM. L.Q. 29, 34 (2015) (analyzing the contract terms and remedies in surrogacy contracts containing abortion clauses).

both sides failed to honor the terms. In other cases, contract terms that were unenforceable to begin with came into conflict with the surrogate's bodily autonomy and had to give way.

In the case of Baby Gammy, an Australian couple—David and Wendy Farnell[129]—entered a surrogacy contract with a Thai surrogate, Ms. Pattaramon.[130] One of the twins Pattaramon was carrying was discovered through prenatal testing to have Down Syndrome.[131] According to Pattaramon, the Farnells demanded that she abort the fetus with the anomalies, which she refused to do.[132] The couple, in turn, refused to take custody of the child, Gammy, and left with his twin sister to return to Australia, abandoning him in Pattaramon's care in Thailand.[133] In sum, the Farnells could not compel the surrogate to abort the fetus and the surrogate could not, in the end, compel the intending parents to take the child even though David Farnell was the child's genetic father.[134]

In a similar domestic U.S. case, a commissioning father in the United States asked his surrogate to reduce the number of fetuses she was carrying because he was concerned about his financial ability to care for three children.[135] However, the surrogate, Melissa Cook,

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129. *Australian Parents of Thai Surrogate Twin Say They Feared Losing Both Babies,* REUTERS (Aug. 10, 2014) [hereinafter *Australian Parents Feared Losing Both Babies*], https://www.reuters.com/article/lifestyle/australian-parents-of-thai-surrogate-twin-say-they-feared-losing-both-babies-idUSKBN0GA0J2 [https://perma.cc/4P5W-UJFL].

130. Michael Sullivan, *Surrogacy Storm in Thailand: A Rejected Baby, A Busy Babymaker*, NAT'L PUB. RADIO (Oct. 22, 2014), http://www.npr.org/sections/goatsandsoda/2014/10/22/357870757/surrogacy-storm-in-thailand-a-rejected-baby-a-busy-babymaker [https://perma.cc/5A59-SC6Z].

131. *Id*.

132. *Id*.

133. *Id*. According to some reports, the Farnells also asked for a refund for the child they refused to accept. Rachel Browne, *David and Wendy Farnell Demanded a Refund for Gammy*, SYDNEY MORNING HERALD (Aug. 10, 2014), https://www.smh.com.au/world/david-and-wendy-farnell-demanded-refund-for-gammy-20140810-102kpn.html [https://perma.cc/K52V-QQSU].

134. *See* Sullivan, *supra* note 130 (reporting that Pattaramon was still caring for Baby Gammy nine months after his birth).

135. Katie O'Reilly, *When Parents and Surrogates Disagree on Abortion*, ATLANTIC (Feb. 18, 2016), http://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323 (on file with the *Columbia Human Rights Law Review*). As O'Reilly reports:

> A major problem with assisted reproductive technology contracts is that they so often butt up against the right to privacy defined in 1973 with Roe v. Wade. "But while a

refused because she claimed she was pro-life and did not want to abort a healthy fetus.[136] Because the father was a single man and the eggs came from an anonymous donor, the fetuses had no legal mother.[137] Cook sued to be legally recognized as the mother of the children, but the California Court of Appeals affirmed the trial court's ruling in favor of the intended father and enforcing the surrogacy contract's terms disclaiming the surrogate's parental rights.[138] The court held that the father alone had the power to decide the fate of the babies once they were born.[139] Cook appealed to the federal district court to challenge the unconstitutionality of surrogacy contracts under California family law, which foreclose parental rights for the surrogate.[140] The Ninth Circuit ultimately dismissed the appeal because the California Supreme Court had already ruled on the issue of constitutionality of the California family code at issue, thereby precluding further litigation of Cook's constitutional claim.[141] However, even if the surrogacy contract had been rendered void, parentage would have had to be determined under California law following *Johnson v. Calvert*, a precedent that allocates legal parentage of surrogate-born children to intended parents and not the birth mother.[142]

> surrogate has a constitutional right not to undergo the abortion—or to undergo one if she wants to—she has no such right to the payment stipulated in the contract," explains Cyra Akila Choudhury, a law professor at Florida International University. And if the contract is effectively rendered void, it's unclear if the surrogate would bear any responsibility for the children's care after birth: "The question extends to whether she would be liable for any further damages, should these children be born with birth defects or anything like that. Most surrogacy contracts at this point don't account for those hypotheticals."

Id.

136. *Id.*

137. *Id.*

138. C.M. v. M.C., 213 Cal. Rptr. 3d 351, 357, 367–68, 370 (Cal. Ct. App. 2017).

139. *See id*. at 357 (noting that the trial court had "entered a detailed judgment establishing that Father is the sole parent of the Children").

140. Cook v. Harding, 190 F. Supp. 3d 921, 925 (C.D. Cal. 2016). The district court did not opine on the merits and ultimately dismissed Cook's suit against C.M. (the intending father) and all other parties with prejudice based on its conclusion that it must abstain pursuant to *Younger v. Harris*. *Id.* at 925, 938.

141. Cook v. Harding, 879 F.3d 1035, 1043 (9th Cir. 2018).

142 *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("[A]lthough the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth

These cases demonstrate how a surrogate may refuse to abide by contract terms because of her right to reproductive choice. The consequences of the breach may result in the responsibility to care for an abandoned child, as in Pattaramon's case.[143] Or, as in Cook's case, a breach could result in the intended parent ending up with an additional child.[144]

The U.S. case of Jessica Allen similarly underscores the difficulty in enforcing terms that restrict bodily autonomy.[145] Through Omega Family Global, Inc., Allen entered into a surrogacy agreement for a Chinese couple.[146] She breached the contract by engaging in sex with her partner after the start of the surrogacy.[147] The result was that rather than carrying one surrogate child, she bore two children, who were assumed to be twins from the splitting of the implanted embryo and, therefore, the children of the intending parents.[148] Pursuant to the contract, the intended parents paid Allen an additional fee of $1000 per month after the 20th week of pregnancy for the extra fetus.[149] However, it turned out that one of the children was, through the rare condition of superfetation, Allen and her boyfriend's biological child.[150] The agency reimbursed the intended parents the extra fees and reunited Allen with her child two months after the birth.[151] Allen sued the agency for withholding her child, even though she had disclaimed responsibility by denying that she

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as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child . . . is the natural mother under California law.").

143. *Australian Parents Feared Losing Both Babies*, *supra* note 129.

144. Kelley Puente, *Woodland Hills Surrogate Mom Loses Custody Battle for Triplets*, SAN GABRIEL VALLEY TRIBUNE (Jan. 16, 2018), https://www.sgvtribune.com/2018/01/16/woodland-hills-surrogate-mom-loses-custody-battle-for-triplets [https://perma.cc/U7N7-A3BV]. While this is a breach of the contract terms, what is the appropriate remedy of three children being born rather than two? Should we allow for wrongful birth tort suits for these situations? Liquidated damages in contract? Neither seem normatively appealing.

145. Ellen Trachman, *She Signed a Contract Not to Have Sex, Then She Got Pregnant*, ABOVE THE LAW (Jan. 6, 2021), https://abovethelaw.com/2021/01/she-signed-a-contract-not-to-have-sex-then-she-got-pregnant [https://perma.cc/56UV-KK3H].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

had engaged in sex after the start of the surrogacy.[152] Omega countersued for breach and negligence.[153] The case took five years to resolve, but the jury found Allen to be negligent and awarded Omega $10,000 in damages.[154] While restitution was made to the commissioning parents for the extra payments and Omega was able to prevail in recovering its costs, contract law was unable to capture the intended parents' nonpecuniary emotional damage of losing a child who they assumed was theirs and who they had prepared to parent. The case raises the question of whether breaches resulting from the exercise of fundamental rights should give rise to damages.[155]

2. Contract Performance in Times of National and Global Instability

International surrogacy comes with risks and uncertainties at the best of times. But by shutting down borders and halting travel, the global Covid-19 pandemic had unprecedented effects. Surrogates carrying children during the height of the pandemic were subject to viral hazards in every interaction with healthcare professionals and facilities, but contract terms that mandated regular health checkups,

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152. Ellen Trachman, *Jury Returns Surprising Verdict in Surrogacy Superfetation Case*, ABOVE THE LAW (Oct. 19, 2022), https://abovethelaw.com/2022/10/jury-returns-surprising-verdict-in-surrogacy-superfetation-case [https://perma.cc/B5CG-RFG7]. Trachman reports:

> The agreed-upon summary of the case could not be more simple: "Plaintiff/Cross Defendant [Allen] agreed to work as a surrogate with Defendant/Cross-Plaintiff OFG [Omega]. [Allen] had sex with her then boyfriend, resulting in the birth of her own biological child. It is claimed by [Allen] that [Omega] breached its duty to [Allen] by not immediately granting physical custody of baby to [Allen]. [Omega] claims that Allen breached her contract by having sex with her boyfriend and producing her own biological child."

Id.

153. *Id.*

154. *Id.*

155. *See, e.g.*, Browne C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child*, 87 ST. JOHN'S L. REV. 899, 900–05 (2013) (discussing ethical and legal issues arising out of surrogacy contracts and "contend[ing] that contractual surrogacy obligations should be treated like any other contractual obligations"); see also Mazer, *supra* note 125, at 214–15 (arguing that surrogacy contracts should be enforced on the grounds that such contracts are "freedom enhancing").

monitoring, and hospital births required them to accept these risks.[156] In countries where Covid-19 vaccines were available, public health officials strongly recommended that pregnant women get inoculated.[157] Yet, per their contracts, surrogates were obligated to take the intended parents' vaccine preferences into consideration in their own medical decision-making.[158] Some parents were wary of vaccines and their effects on the fetus while others wanted the surrogate to be vaccinated.[159]

Writing about the United States, Rachel Rebouché notes that the pandemic resulted in a greater role for surrogacy lawyers and agencies in resolving conflicts arising from vaccine mandates, but she also notes that these intermediaries continued to rely on terms that were essentially unenforceable.[160] Rebouché quotes one surrogacy lawyer as saying:

> If a Gestational Carrier agreed in the contract to receive the vaccine and later refused, this again could not be forced upon her. However, to the extent that her breach of that term caused damage, she theoretically would be responsible. For this reason, it's recommended that if vaccination is important to a particular Intended Parent, they should be matched with a Gestational Carrier who is in fact already vaccinated.[161]

However, this advice fails to resolve all potential concerns. Theoretically, the likelihood of showing causation in such a breach would be slim.[162] Moreover, these strategies of matching are only

156. *See generally* Rebouché, *supra* note 48 (assessing the challenges of negotiating, drafting, and enforcing gestational surrogacy contracts during the pandemic).

157. *Id.* at 1287–88.

158. *Id.* at 1289–93.

159. *Id.* at 1290.

160. *Id.* at 1277–80.

161. *Id.* at 1290–91 (quoting Donor Concierge, *Should Surrogates Get the COVID Vaccine?*, DONOR CONCIERGE (Aug. 26, 2021), https://www.donorconcierge.com/blog/should-surrogates-get-the-covid-vaccine [https://perma.cc/W4KQ-QDWM]).

162. *See* Rachel S. Ruderman et al., *Association of COVID-19 Vaccination During Early Pregnancy with Risk of Congenital Fetal Anomalies*, 176 JAMA PEDIATRICS 717, 718–19 (2022), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2790805 [https://perma.cc/6277-PXG3] (finding no association between vaccination and congenital anomalies in women who received the vaccination between 30 days before conception and 14 weeks' gestation).

effective in contexts where the surrogacy has not already begun and where surrogates are able to assert their bodily autonomy with a degree of confidence. In international surrogacy, the latter condition is not always met.[163] And in the context of COVID-19, contracting parties had not contemplated these risks or the additional costs from delays, and contracts were largely silent on how to resolve the problems.[164]

The pandemic also created the problem of stranded children once the surrogate gave birth.[165] Commissioning families were prohibited from traveling due to pandemic border closures, leaving newborn children either in the care of surrogates or private agencies for months.[166] For Chinese intending parents with children in the United States, rigorous enforcement of the lockdown prevented anyone from leaving the country for nearly a year.[167] Surrogates and agencies were left to care for these children and incur substantial additional costs.[168] In countries where surrogates were designated as the legal parent until they could relinquish their rights, this also meant unwanted added liability for childcare beyond just the costs.[169]

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163. For a discussion of the risks of paternalistic regulations that deprive women of their rights in the context of surrogacy, see *infra* Section IV.C.

164. *See* Rebouché, *supra* note 48, at 1267–69 (discussing complications for surrogacy contracts resulting from the COVID-19 pandemic).

165. *See, e.g.*, Joelle Goldstein, *Surrogate Still Caring for Baby Nearly 1 Year Later*, PEOPLE (Mar. 23, 2021), https://people.com/human-interest/surrogate-mom-still-caring-for-baby-nearly-1-year-later-as-covid-19-prevents-parents-from-leaving-china/ [https://perma.cc/62M6-5RLT] (reporting on an Idaho woman who had agreed to serve as a surrogate for a couple in China and was still taking care of their baby a year after giving birth due to travel restrictions arising from Covid-19); Mary Ilyushina, *Dozens of Surrogacy Babies Stranded By Coronavirus Lockdown in Ukraine, Lawmaker Says*, CNN (May 16, 2020), https://www.cnn.com/2020/05/15/europe/ukraine-surrogacy-babies-lockdown-intl/index.html [https://perma.cc/2RJY-VBPC] (reporting that "[d]ozens of babies born to Ukrainian surrogate mothers [we]re trapped in lockdown and unable to join their adoptive parents abroad" because Ukraine's borders remained closed in response to the Covid-19 pandemic).

166. *See* Goldstein, *supra* note 165 (reporting on a surrogate who was still taking care of the baby a year after giving birth because the biological parents were subject to travel restrictions).

167. *Id.*

168. *Id.*

169. Sirin Kale, *Surrogates Left Holding the Baby as Coronavirus Rules Strand Parents*, GUARDIAN (May 14, 2020), https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy [https://perma.cc/L8Z3-KZYB].

And delays in the legal system meant that obtaining adjudications of parentage took longer, adding to all the other existing delays.[170]

In Ukraine, war with Russia affected the ability of parents to travel, the safety of the surrogates, and the operation of surrogacy agencies.[171] Surrogates unable or unwilling to take on additional responsibilities left children in the care of agencies.[172] Some intending parents made hazardous overland journeys into Ukraine or to the borders of neighboring countries to get their children.[173] Surrogates fled war torn areas and were asked by agencies and intending parents to evacuate to safer countries.[174] In cases where surrogates' husbands were of fighting age and thus prohibited from leaving, this meant splitting up their own families.[175] The following example demonstrates the grave risks and calculations surrogates faced as a result of the conflict:

> A surrogate named Nadia lived in a village in Russia-occupied territory that was not at risk of artillery shelling. But she decided to evacuate to Ukrainian-controlled territory to deliver the baby, lest the biological parents be deprived of custody, and she lose the fee. She spent two days with her husband and 11-year-old daughter sleeping in a car on a roadside that is sometimes shelled, waiting to cross the front line.[176]

While surrogacy agencies and surrogates have survived and the business continues to thrive in Ukraine,[177] the exigencies of war, like

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170. Anna Nelson, *International Surrogacy During the COVID-19 Pandemic*, BMJ SEXUAL & REPROD. HEALTH (Mar. 26, 2020), https://blogs.bmj.com/bmjsrh/2020/03/26/covid19-surrogacy/ [https://perma.cc/3HAE-ZR5E].

171. Stephanie Hegarty & Eleanor Layhe, *Ukraine: Impossible Choices for Surrogate Mothers and Parents*, BBC (Mar. 21, 2022), https://www.bbc.com/news/world-europe-60824936 [https://perma.cc/FJ3U-GVGC].

172. *See id.* (noting that one agency in Kyiv was taking care of 41 babies because their intended parents had been prevented from collecting them by the war).

173. *Id.*

174. *Id.*

175. *Id.*

176. Maria Varenikova & Andrew E. Kramer, *How Ukraine's Surrogate Mothers Have Survived the War,* N.Y. TIMES (Oct. 16, 2022), https://www.nytimes.com/2022/10/16/world/europe/ukraine-surrogacy-war.html (on file with the *Columbia Human Rights Law Review*).

177. *See* Mariia Prus, *Despite War, Surrogacy in Ukraine Keeps Flourishing*, VOICE OF AM. (June 12, 2024), https://www.voanews.com/a/despite-war-surrogacy-in-ukraine-keeps-flourishing/7652783.html [https://perma.cc/QBD6-HZ4U]

the pandemic, require parties to work outside the terms of the contract to resolve issues that arise.

War and the pandemic are not the only forms of unanticipated instability that can disrupt cross-border surrogacy agreements; sudden about-faces by surrogates' governments can upend contracts. For instance, in 2022, the *New York Times* reported that Cambodia's government had banned surrogacy entirely.[178] The consequences were dire. Cambodian surrogates were prosecuted, but their jail sentences were suspended on the agreement that they would care for the surrogate-born children.[179] They were also warned that any attempt to reunite children with intended parents would result in a custodial sentence.[180] This threat was not limited to the surrogates—Cambodian authorities prosecuted one Chinese intending father for human trafficking and sentenced him to fifteen years in jail for attempting to retrieve his surrogate-born child.[181] The result was that surrogates who had entered the agreement hoping to improve their financial situations were left caring for another child in addition to their own.[182]

3. Breaches Against Intending Parents

While stories about exploitation of surrogates and abandoned babies routinely make the news, the cases of intending parents being defrauded, or their expectations thwarted, are rarely the stuff of scintillating headlines. However, several such cases have been reported periodically. From the late 1990s to the present, intending parents have lost their ova, sperm, or embryos to either negligent or criminal intermediary surrogacy agencies, and, in at least one instance, even an academic clinic.[183]

(reporting that many foreigners have continued to go to Ukraine for surrogacy despite Russia's invasion).

178. Hannah Beech, *They Were Surrogates. Now They Must Raise the Children*, N.Y. TIMES (Nov. 26, 2022), https://www.nytimes.com/2022/11/26/world/asia/surrogacy-cambodia.html (on file with the *Columbia Human Rights Law Review*).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Hector Becerra, *Lawsuit Claims Defunct Clinic Stole Embryo*, L.A. TIMES (May 13, 2000), https://www.latimes.com/archives/la-xpm-2000-may-13-me-29639-story.html (on file with the *Columbia Human Rights Law Review*) (reporting on the UC Irvine clinic that stole embryos).

One of the earliest cases of theft of genetic materials occurred in the early 1990s when a woman's eggs were used to impregnate others.[184] In 2000, the *Los Angeles Times* reported that the clinic in question, the UC Irvine Center for Reproductive Health, was sued by the woman whose embryos (created from her ova and the sperm of her then-husband) had been used to impregnate other infertile women for profit.[185] It was revealed that the clinic routinely took people's genetic material without their consent.[186] The Center settled suits with 107 parents, and the chief culprits of the scheme fled the country to avoid prosecution.[187]

In 2011, an Italian couple was denied parentage when it was discovered that their surrogate-born child was not genetically related to either parent.[188] The surrogacy was undertaken in Russia, and the surrogate had signed a document averring that the child was the genetic offspring of the intending couple.[189] This tragic error resulted in a decision by the European Court of Human Rights finding no family formation, not even de facto, and upholding the removal of the child to a foster facility and her adoption by another couple.[190]

More recently, BioTexCom, the largest surrogacy company in Ukraine, has been mired in scandal about its treatment of embryos.[191] One American couple reported that the company claimed that the transfer of their embryos to a surrogate was unsuccessful.[192] When they inquired about the details their surrogacy arrangement, the couple were surprised to learn that the agency had used their embryos for another couple (something they had not intended).[193] A

184. Alice M. Noble-Allgire, *Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born from Stolen or Misdelivered Genetic Material*, 64 MISS. L. REV. 517, 517–19 (1999).

185. Becerra, *supra* note 183.

186. *Id.*

187. *Id.*

188. Melanie Levy, *Surrogacy and Parenthood: A European Saga of Genetic Essentialism and Gender Discrimination*, 29 MICH. J. GENDER & L. 121, 154–55 (2022).

189. *Id.* at 154.

190. *Id.* at 155.

191. Ilya Gridneff, Emily Schultheis, & Dmytro Drabyk, *Inside a Ukrainian Baby Factory*, POLITICO (July 23, 2023), https://www.politico.com/news/2023/07/23/ukraine-surrogates-fertility-00104913 [https://perma.cc/L55W-8YRN].

192. *Id.*

193. *Id.* The mother was initially told that the embryo transfer was unsuccessful. *Id.* Only later did she discover that the embryos had been used in another surrogacy. *Id.* According to the article in *Politico*:

German woman who had canceled her plans for surrogacy with the same company never received all her embryos back.[194] Another German couple reported that "BioTexCom mixed up their surrogate twins with another couple's pair, forcing them to exchange the babies at a secret rendezvous."[195] While it may be subject to other domestic and international laws, BioTexCom operates with little to no direct regulation of its surrogacy activities by Ukraine.[196]

4. State Conflicts over Parentage and Citizenship in Family Formation

In many countries, parentage is determined by law (based on biological descent, adoption, or common law presumptions like the marital presumption),[197] by a legal act (e.g., acknowledgment of parentage),[198] or through judicial decision.[199] As noted above, these

> Her husband was in Kyiv for work a few weeks later and decided to stop by the clinic to see if he could get some answers. He introduced himself to a clinic staffer, who immediately thanked him for donating their embryos to another couple. He was floored: Was this what had happened when the firm told them the process was unsuccessful?

Id.

194. *Id.*

195. *Id.*

196. *See id.* ("The requirements to use a surrogate in Ukraine are simple: A heterosexual couple must to be [sic] married, show they are medically unable to have children and provide at least half of the child's genetic link, via sperm or embryo.").

197. *See* HCEG Final Report, *supra* note 5, ¶ 16 (identifying four methods by which legal parents can be established: (1) "by operation of law"; (2) "following an act of a (putative) parent"; (3) by decision of an authority (usually judicial)"; and (4) "by adoption"); SHAZIA CHOUDHRY & JONATHAN HERRING, INTRODUCTION TO THE CAMBRIDGE COMPANION TO COMPARATIVE FAMILY LAW 17–18 (Shazia Choudhry & Jonathan Herring eds., 2019) (noting traditional models of parenthood and discussing how the default presumptions of parenthood are being challenged by the decline of marriage, the possibility of genetic testing, and the shift to conceptions of a parent's role as designed to promote the interests of the child); *see also* Levy, *supra* note 188, at 133–38 (discussing problems arising from the "restrictive family laws" in the European context).

198. *See, e.g.*, Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 82–85 (2017) (discussing the "voluntary acknowledge of paternity" and identifying it as "the most common avenue through which unmarried fathers establish legal paternity of their children").

199. *See, e.g.*, HCEG Final Report, *supra* note 5, ¶ 17 (noting that "[t]he establishment of legal parentage by judicial decision is less common" than other

laws create the backdrop upon which surrogacy contracts are negotiated and performed.[200] But if the rules do not account for advances in reproductive technology and states have conflicting laws, this may result in uncertainty about parentage—such as cases of "limping legal parentage" where different jurisdictions recognize different people as legal parents[201]—or in the failure to recognize any legal parent.[202] Because citizenship is tied to parentage, uncertainty about the legal parent may also result in difficulties settling citizenship.[203]

The famous Indian case of Baby Manji is an example of how international surrogacy agreements between parties in jurisdictions with conflicting rules about legal parentage can result in, at least temporarily, stateless babies.[204] Before India's international and commercial surrogacy ban, the Yamadas—a Japanese couple—entered into a contract for surrogacy in India.[205] Per the standard contract provided by the clinic at the time, the surrogate relinquished all her legal rights to the child.[206] The Yamadas received an egg donation from an anonymous Indian donor.[207] The child was therefore the genetic offspring of Mr. Yamada but had no biological connection to Mrs. Yamada.[208]

The Yamadas divorced eight months into the surrogacy, with the now ex-Mrs. Yamada no longer willing to parent the child.[209] The anonymous egg donor had no responsibilities to the child, nor did the surrogate who had relinquished her rights by contract.[210] The contract terms vested Mrs. Yamada with parental rights, but those

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basis for recognition but that "the use of judicial decisions in disputed cases or in some more difficult cases may be more frequent").

200. *See supra* Section I.C (discussing how contracting parties bargain "in the shadow of the law" and describing how this impacts surrogacy arrangements).

201. HCEG Final Report, *supra* note 5, ¶ 15.

202. *See* Levy, *supra* note 188, at 129 (noting that several European supreme courts have refused to recognize legal parenthood in cases where neither of the intended parents have a genetic link with the child).

203. *Id.* at 137.

204. KARI POINTS, KENAN INST. FOR ETHICS, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 5 (2009), https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/Case-Study-Surrogacy.pdf [https://perma.cc/X3GV-K8SR].

205. *Id.* at 4.

206. *Id.*

207. *Id.*

208. *Id.* at 5.

209. *Id.*

210. *Id.*

terms were not legally enforceable as parentage was determined by India's parentage laws, which required biological parents to adopt children born through surrogacy in order to obtain rights.[211] The result was that the surrogate-born daughter, Manji Yamada, had a legal and genetic father but was left with no legal mother.[212] To complicate matters, when Mr. Yamada attempted to obtain papers for Manji's travel to Japan, the consulate refused to issue the requisite documents because Japanese law only recognized the woman who gave birth to the baby as the mother.[213] The Japanese Civil Code did not recognize children born of surrogacy, so Japan did not consider Mr. Yamada a legal parent either.[214] In the eyes of the Japanese government, Manji's only legal parent was Indian, and so Manji was not entitled to a Japanese passport.[215] The natural alternative seemed to be an application for an Indian passport; however, the Indian authorities required a birth certificate which reflects both the mother and father.[216] Given that Manji's mother was legally indeterminate, they initially refused to issue Manji a birth certificate.[217]

Some three months later the matter was resolved through diplomatic negotiation after the Indian government gave Manji Yamada the requisite documentation to obtain a visa for Japan.[218] Japan gave Manji a one-year visa on humanitarian grounds—Mr. Yamada would then have had to establish his paternity in Japan which would have made Manji Yamada eligible for Japanese citizenship.[219] To reiterate the problem: designating the intended mother as the legal mother under Indian law, in conflict with Japanese law designating of the birth mother as the legal mother, created a lacuna preventing Manji from having a defined legal mother and from being recognized as either an Indian citizen or a

211. *See id.* at 4–5 (discussing the original contract between the Yamadas and the surrogate mother and reporting that "the contract was not legally binding with regard to parental responsibilities" because Indian laws required that the genetic parents to adopt babies born via surrogacy).

212. *Id.* at 5–6.

213. *Id.* at 5.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*; *see also* Baby Manji Yamada v. Union of India, AIR 2009 SC 84, ¶ 2 (2008) (India) (noting that Indian authorities had eventually issued a birth certificate indicating only the name of the genetic father).

218. POINTS, *supra* note 204, at 5–7.

219. *Id.* at 6–7.

Japanese citizen at birth.[220] The contract terms regarding parentage made no difference whatsoever in resolving the underlying legal problem—necessitating creativity on the part of the Japanese diplomatic service to return Manji to Japan with her father.[221]

Jan Balaz v. Anand Municipality is another case where the intending parent's domicile (in this instance, Germany) refused to recognize Balaz's parental status, thereby rendering the child stateless.[222] Germany explicitly bans all forms of surrogacy[223] and does not acknowledge children born abroad through the process even if there is a genetic link to the commissioning parent(s).[224] In the Balaz twins' case, the commissioning couple also faced problems obtaining travel documents from Indian authorities for their children.[225] Susan Lohle, the intended mother, had no genetic ties to the twins, who were born in India.[226] Hospital records listed the surrogate mother as the birth mother, not Mrs. Lohle.[227] The German consulate rejected the twins' birth certificates as evidence of the intending parents' legal parentage on the basis that Germany does not recognize surrogacy,[228] recognizing instead the surrogate and her husband as the legal parents.[229] According to Germany, the children were therefore only eligible for Indian citizenship; Jan Balaz, the

220. *Id*. at 5–7.

221. *Id*. at 5.

222. Jan Balaz v. Anand Municipality, AIR 2010 Gul 21, ¶ 7 (2009) (India).

223. *Id*. ¶ 13; Embryonenschutzgesetz [ESchG] [Embryo Protection Act] Dec. 13, 1990, BUNDESGEETZBLATT, TEIL I [BGBL I] at 2746, §§ 1–2 (Ger.); *see also* Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 196 n.43 (2012) (noting that Germany is one of several countries that has banned all forms of surrogacy); Jenny Gesley, *Germany: Expert Commission Recommends Reform of Laws on Abortion, Egg Donation and Surrogacy*, GLOB. LEGAL MONITOR (May 9, 2024), https://www.loc.gov/item/global-legal-monitor/2024-05-09/germany-expert-commission-recommends-reform-of-laws-on-abortion-egg-donation-and-surrogacy [https://perma.cc/QL22-7Y85] (noting that "[s]urrogacy is illegal in Germany" and reporting that an expert commission convened to study the matter "recommended that the legislature either continue to prohibit altruistic surrogacy or allow it only under strict protections").

224. *See Jan Balaz*, AIR 2010 Gul 21, ¶ 7 (recording petitioner's assertion that "as the children are not born in Germany, they would not get German citizenship").

225. *Id*. ¶ 5.

226. *Id*. ¶ 2.

227. *Id*. ¶ 3.

228. *Id*. ¶ 4.

229. *Id*. ¶ 17.

genetic and intended father, was unable to pass on his German citizenship.[230]

India, on the other hand, recognized the intending parents as the legal parents.[231] Because both intending parents were German, the children had no Indian parent according to Indian law, rendering them ineligible for Indian citizenship.[232] The result was stateless children. Through judicial action by the High Court of Gujrat, the children's birth certificates were amended to name the surrogate as the legal mother, which allowed for the possibility of Indian citizenship and passports.[233] However, the central government of India intervened, questioning the validity of the children's parentage.[234]

The dispute between Germany and India was resolved through the creative use of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (the Adoption Convention), which provides certain guarantees relating to the right to respect for one's private and family life.[235] But the use of the Adoption Convention in this case required transgressing a number of the Convention's prohibitions. For instance, the Adoption Convention requires the birth mother to have no contact with adopting parents before the adoption;[236] for the child to have no prospects for adoption in the state of habitual residence;[237] and for the child to be an orphan, abandoned, or surrendered.238 Furthermore,

230. *Id.* ¶ 7.
231. *Id.* ¶ 6.
232. *Id.*
233. *Id.* ¶ 18.
234. *Id.* ¶ 20.
235. *See id.* ¶¶ 14–22 (discussing the legal complexities underlying the case before holding that "the babies born in India to the gestational surrogate are citizens of [India]" and were thus entitled to receive Indian passports); Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 16, ¶ 2, *adopted and opened for signature* May 29, 1993, T.I.A.S. No. 08-401 [hereinafter Adoption Convention] (providing that state authorities shall not reveal the identity of the mother or father when coordinating adoptions with authorities in other states).
236. Adoption Convention art. 29, *supra* note 235.
237. *See id.* art. 4(b) ("An adoption within the scope of the Convention shall take place only if the competent authorities . . . (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interest . . . .").
238. *See id.* art. 4(a) (requiring competent authorities to establish that "the child is adoptable"); U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL vol. 5,

Jan Balaz was the genetic father of the children,[239] and the Adoption Convention was not crafted to address a scenario in which a genetically related parent was required to adopt their child after that genetic link had been proven.[240]

In addition to diplomatic conflicts over parentage between states, citizens of European states have had to sue in order for their parentage to be recognized. In recent cases before the European Court of Human Rights (ECtHR), the Court's jurisprudence has been increasingly concerned with the rights of the child and their best interest and less so about the rights of parents and the right of family. This line of decisions reflects and does not question many E.U. Member States' strident disapproval of surrogacy,[241] even while

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pt. D, ch. 4 (Apr. 2, 2025), https://www.uscis.gov/book/export/html/68600 [https://perma.cc/PF8L-7QW5] (describing the requirements for a finding of adoptability under the Hague Convention).

239. *Jan Balaz*, AIR 2010 Gul 21, ¶ 2.

240. *See* Adoption Convention art. 16, *supra* note 235 (requiring authorities to prepare a report including information about a child's "identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child"). After two years and mounting public pressure, the Indian government issued the twins identity documents and the German government issued them visas. Dhananjay Mahapatra, *German Surrogate Twins to go Home*, TIMES OF INDIA (May 27, 2010), https://timesofindia.indiatimes.com/india/german-surrogate-twins-to-go-home/articleshow/5978925.cms [https://perma.cc/R547-E83X].

241. *See, e.g.*, Gerd Verschelden & Jinske Verhellen, *Belgium*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 49, 59 (noting that Belgium lacked any formal legal regulation and that a majority of scholars had concluded that surrogacy contracts were therefore absolutely unenforceable); Monika Pauknerová, *Czech Republic*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 105, 105–06 (discussing how surrogacy was the subject of "sharp political disputes" in the Czech Republic with many opposing regulating surrogacy on the grounds that it would encourage the industry); Louis Perreau-Saussine & Nicolas Sauvage, *France*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 119, 119–21 (discussing surrogacy under French law and noting that surrogacy contracts are void under civil law while the practice of surrogacy is subject to criminal penalties); Susanne L. Gössl, *Germany*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 131, 133–37 (summarizing the criminal and civil law prohibitions against surrogacy in Germany); Csonger István Nagy, *Hungary*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 175, 177 (noting that surrogacy is not lawful in Hungary though it does not appear to be subject to any criminal prohibitions); Maebh Harding, *Ireland*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 30, at 219, 219–221 (noting that Ireland had no explicit prohibition against surrogacy but that it nevertheless refused to enforce surrogacy contracts on the grounds that they were "against public policy"); Ian Currey-Sumner & Machteld Vonk, *The Netherlands*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra*

having to protect surrogate-born children. There has been a curious refusal by some European countries' courts to recognize the value of legal parentage and family for surrogate born children, particularly of same-sex partners.[242] But this dual approach of protecting the child while punishing the parent is not ideal either. It continues to affirm denials of parental status to intending parents who have no genetic ties to surrogate-born children.[243]

In *D v. France*, the ECtHR found no violation of Article 8 of the European Convention on Human Rights—which guarantees the right of privacy in family[244]—in France's refusal to record the

note 30, at 273 ("The Dutch Government operates a very restrictive policy with respect to commercial surrogacy.").

242. *See, e.g.*, D. v. France, App. No. 11288/18, ¶¶ 70–72, 88–89 (July 16, 2020), https://hudoc.echr.coe.int/eng?i=001-203565 (finding no violation of the right to respect for private life or the prohibition against discrimination based on French laws which precluded same-sex parents from registering their surrogate born child with French authorities); Paradiso and Campanelli v. Italy, App. No. 25358/12, ¶¶ 215–16 (Jan. 24, 2017), https://hudoc.echr.coe.int/eng?i=001-170359 (finding no violation of the right to private life based on Italian officials' decision to separate a surrogate born child from the applicants); K.K. and Others v. Denmark, App. No. 25212/21, ¶¶ 50–51, 74–77 (Dec. 6, 2022), https://hudoc.echr.coe.int/eng?i=001-221261 (finding no violation of the right to respect for family life but finding a violation of the right to respect for private rights with respect to two surrogate born children based on Danish authorities' refusal to permit their intended mother to formally adopt them); *see also*, Lenka Krickova, *Same-Sex Families' Rights and the European Union: Incompatible or Promising Relationship?* 37 INT'L J.L. POL'Y & FAMILY 1, 7–10 (2023) (discussing the European Union's role in protecting and enhancing the rights of same-sex couples and their children including children born through surrogacy).

243. For example, the facts submitted to the Court in *Paradiso and Campanelli* made clear that due to an error on the part of the Russian surrogacy agency, there was no genetic link between the child and either intending parent. App. No. 25358/12, ¶ 30. The ECtHR found that there was no family life between the child and parents. *Id.* ¶¶ 157–58. Nevertheless, it found that Article 8 did apply to the applicants' private life, as they "had a genuine intention to become parents" and had spent "[a] major part of their lives" focusing on realizing those intentions. *Id.* ¶¶ 162–63. However, the Court ultimately found no violation of Article 8, in part because of the lack of a genetic relationship between the applicant and the surrogate born child. *Id.* ¶¶ 195, 216.

244. Article 8 of the European Convention on Human Rights provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

intended mother as the legal mother, following the parentage rules of Ukraine where the child was born to a surrogate.[245] In *K.K. and Others v. Denmark*, the Court again found no violation of K.K.'s (the intended mother) Article 8 rights in Denmark's refusal to allow her to adopt the children born to a compensated surrogate in Ukraine.[246] The Danish law at issue in that case forbids adoption in situations where the birth mother is paid.[247] The Court opined that K.K. lived with the children and their biological father unproblematically.[248] However, it did find a violation of the children's rights under Article 8 because Denmark had failed to strike "a fair balance between, on the one hand, the specific children's interests in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement."[249]

Similarly, in *D.B. and Others v. Switzerland*, the intending parents had their child via a surrogate in California; however, the Swiss government only recognized the legal parentage of the genetic father.[250] D.B. sued Switzerland alleging inter alia that it violated Article 8.[251] The ECtHR held that there was no violation of family life under Article 8.[252] Nevertheless, it held that there was a violation of the child's rights because Swiss authorities had provided no means by which the parent-child relationship between the intended father and the child could be established.[253] According to the Court, "[t]he general and absolute impossibility, for a significant period of time, of obtaining recognition of the relationship between the child and the [intended father] had amounted to a disproportionate interference

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> crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights art. 8, *adopted* Apr. 3, 1954, 231 U.N.T.S. 221, 230.

245. *D.*, App. No. 11288/18, ¶¶ 70–72.

246. *K.K. and Others*, App. No. 25212/21, ¶¶ 50–51; *see also id.* ¶¶ 71–77 (finding a violation of the right to private life in respect to the two children but not vis-à-vis the intended mother).

247. *Id.* ¶ 18 (discussing relevant provisions of the Adoption Act).

248. *Id.* ¶ 49.

249. *Id.* ¶ 76.

250. D.B. and Others v. Switzerland, App. Nos. 58817/15 & 58252/15, ¶¶ 4–14 (Nov. 22, 2022), https://hudoc.echr.coe.int/?i=001-220955.

251. *Id.* ¶ 1.

252. *Id.* ¶¶ 91–94.

253. *Id.* ¶¶ 87–90.

with the [child's] right to respect for private life [under Article 8]."[254] Of note here is the Court's continued unwillingness to find for parents who engage in surrogacy in contravention of their country's law yet a solicitude towards children's rights and in their best interest.

Parentage issues have also begun to arise in the United States, which has become a destination of choice for wealthy Chinese commissioning parents.[255] These parents choose the United States not only because it has good health care and is a relatively safe destination, but also because children born in the United States obtain citizenship at birth, providing an escape route out of China.[256] Perhaps the most famous surrogacy-agreement-gone-wrong involving Chinese intended parents is that of Chinese actress Zheng Shuang.[257] Zheng and her partner Zhang Heng entered into two surrogacy agreements with U.S. surrogates, but, seven months into the pregnancy, Zheng changed her mind.[258] However, Zhang, still committed to the agreements, traveled to the United States to care for the two children, who were born in Colorado and Nevada.[259] In both of these states, Zheng and Zhang are recorded as the parents.[260]

Zheng received intense negative attention in China after posting on the social media platform, Weibo, about no longer desiring the children.[261] While not formally illegal, the Chinese Communist Party has made clear that it considers surrogacy to be prohibited.[262] Party leaders accused Zheng of seeking to evade Chinese

254. *Id.* ¶ 89, *translated in* D.B. and Others v. Switzerland, App. Nos. 58252/15 & 58817/15, Legal Summary (Nov. 22, 2022), https://hudoc.echr.coe.int/eng?i=002-13896.

255. Nectar Gan, *Accused of Abandoning Two Babies in the US, This Chinese Celebrity Has Sparked a National Debate About Surrogacy*, CNN (Jan. 22, 2021), https://www.cnn.com/2021/01/22/china/china-celebrity-surrogacy-scandal-dst-intl-hnk/index.html [https://perma.cc/G5L8-SKL7].

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*; Ellen Trachman, *Colorado Court Rules in Chinese Celebrity Surrogacy Case*, ABOVE THE LAW (June 30, 2021) [hereinafter Trachman, *Chinese Celebrity Surrogacy Case*], https://abovethelaw.com/2021/06/colorado-court-rules-in-chinese-celebrity-surrogacy-case [https://perma.cc/G6PR-P4Z4].

260. Ellen Trachman, *Can a Chinese Celebrity Really Just Abandon Surrogate-Born Babies?*, ABOVE THE LAW (Jan. 27, 2021), https://abovethelaw.com/2021/01/can-a-chinese-celebrity-really-just-abandon-her-surrogate-born-babies [https://perma.cc/VV67-PT5D].

261. Gan, *supra* note 255.

262. *Id.*; Yue Zhao, *Protection of Rights and Legal Remedies for Surrogate Mothers in China*, 10 HUMANS. & SOC. SCI. COMMC'NS 1, 2 (2023).

proscriptions by entering into an agreement in the United States.[263] Chinese law recognizes the surrogate as the biological or "natural" mother,[264] though it permits an intended mother to be a "constructive mother" if she is the functional mother.[265] But here, Zheng made clear that she had no intention of being the constructive mother, nor any other kind of parent.[266] As such, the children's mothers are different according to the two different countries involved; in China, they are the two different American surrogates,[267] while in the United States, Zheng is the legal mother.[268] Thankfully, there is agreement that Zhang is the children's father,[269] but this diverging recognition of the mother could in theory pose legal obstacles.

A case in Ukraine also could not be resolved by enforcing the contract, but with more dire consequences. In this terrible case—similar to that of Baby Gammy in Thailand—an American couple entered into a surrogacy agreement with a Ukrainian surrogate.[270]

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263. Gan, *supra* note 255.

264. Chunyan Ding, *Chinese Legal Response to the Share Motherhood Model in Lesbians' Family-Making*, 10 J.L. & BIOSCIS. 1, 8 (2023).

265. *See id*. (discussing two types of "constructive parenthood" recognized by Chinese law).

266. *See* Gan, *supra* note 255 (reporting that Zheng allegedly expressed frustration that abortion was not a viable option because the surrogate mothers were seven months' pregnant at the time that she and Zhang separated); Trachman, *Chinese Celebrity Surrogacy Case*, *supra* note 259 (reporting that Zheng contacted the surrogacy agencies and asked them whether it would be possible to terminate the pregnancies or give the children up for adoption).

267. *See, e.g.*, Ding, *supra* note 264, at 8 (noting that Chinese law presumes motherhood "by the fact of childbirth regardless of the existence of a marriage between the biological parents").

268. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that the person who "intended to bring about the birth of a child" is the natural mother under California law). This has become the majority position in surrogacy-providing U.S. jurisdictions. *See generally* Joslin, *supra* note 46, at 483–92 app. C (surveying legal protections for persons who act as surrogates in permissive U.S. jurisdictions).

269. *See* Trachman, *Chinese Celebrity Surrogacy Case*, *supra* note 259 (reporting that a Colorado court ultimately designated Zhang as the "primary residential parent").

270. Rosemary Ferreira, Abandonment via International Surrogacy 1 (2022) (unpublished note), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2324&context=student_scholarship [https://perma.cc/4XQP-JJ58]; *see also*, Emma Lamberton, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, J. PUB. & INT'L AFFS. (May 1, 2020), https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children [https://perma.cc/8G7A-JCF6] (noting that there have been a series of human

Baby Bridget was born with cerebral palsy and a club foot at twenty-five weeks and, because of these disabilities, her American genetic parents rejected her.[271] Ukraine recognized the intended parents as the legal parents, but because they had not filed for citizenship, Bridget was not an American citizen.[272] Her surrogate, who was not a legal parent, could not pass on her Ukrainian citizenship, leaving Bridget stateless and parentless.[273] She was left in an orphanage and eventually, Ukraine conferred citizenship so she could be adopted.[274] Luckily for Bridget, after five years and in the midst of a war, an American family adopted her, and she is now in the United States.[275]

Legal parentage and citizenship are matters that only states can settle[276]—they cannot be contracted for by the parties in a surrogacy arrangement.[277] Without adequate understanding of the

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rights violations in Ukraine due to surrogacy including the abandonment and trafficking of children).

271. *See* Ferreira, *supra* note 270, at 1 (noting that Bridget was "left stateless and unadoptable once the American parents who 'commissioned' her decided not to take her to the United States after learning she has an 'incurable' mental and physical illnesses [sic] that left her gravely ill at birth"); Annalisa Teggi, *American Family Adopts Surrogate-Born Baby with Disability in Ukraine*, ALETEIA (May 14, 2022), https://aleteia.org/2022/05/14/american-family-adopts-surrogate-born-baby-with-disability-in-ukraine [https://perma.cc/4ULB-ZDW6] (reporting that Baby Bridget's formal diagnosis included spastic paraplegia, an "unspecified mental affliction," club foot, a congenital malformation of the papilla, and undernourishment).

272. Ferreira, *supra* note 270, at 1–2; *see also* Lamberton, *supra* note 270 (arguing that "[c]hildren should be granted citizenship" by the state in which they are born if they are not claimed by their biological parents within 30 days of birth in order to protect against exploitation).

273. Timofey Neshitov, *The Perils of Wartime Adoption: "We Promised Bridget We Would Come Get Her"*, SPEIGEL INT'L (Apr. 6, 2022), https://www.spiegel.de/international/world/the-perils-of-wartime-adoption-we-promised-bridget-we-would-come-get-her-a-abf4ad88-9c62-48b6-8b9b-f57bc3afeeba [https://perma.cc/7GYX-2NAY].

274. Ferreira, *supra* note 270, at 2.

275. Teggi, *supra* note 271.

276. *See generally* GREGG STRAUSS, RECONSTRUCTING PARENTAGE 18–61 (2025) (arguing that parenthood is a legal and political structure); *About the Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy [https://perma.cc/L2MM-FW8R] (explaining how states varied approaches to establishing parentage has resulted in legal issues that "implicate children's fundamental human rights").

277. Trachman notes when discussing the case of Zheng Shuang that certain U.S. states allow intended parents to file affidavits confirming that they are the parents of surrogate children, at which point judges are authorized, at their discretion, to issue an order naming the intended parents as the child's official

conflicts that may arise from cross-border agreements and without clear rules at the international level to settle these conflicts, the parents, the clinics, and the surrogates face uncertainty as to their rights and obligations, and the states are left to cobble together inelegant solutions to conflicts of law arising from differing views on surrogacy and parentage across states.[278] Both national and regional reactions to these extreme cases arising from international surrogacy suggest that a convention that addresses the rights of parents, children, and surrogates is needed.[279]

C. Mind the Gap: Inadequate Contract Remedies for Breaches and Failures and Ad Hoc Solutions

The cases described above in Sections II.B.2 to II.B.4 demonstrate that contract remedies cannot adequately compensate for the losses from a breach in surrogacy arrangements. After all, what is the remedy for one's genetic child being born to another set of parents? How does one calculate the loss of embryos and the opportunity to have biological children? In other words, contract remedies are difficult to ascertain when the loss is the loss of a

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parents. Trachman, *Chinese Celebrity Surrogacy Case*, *supra* note 259. However, no court adjudicating parentage is bound by private agreements between possible parents, meaning the state still retains final authority to dictate the conditions necessary to establish legal parentage.

278. *See About the Parentage/Surrogacy Project*, *supra* note 276 (discussing some of the challenges surrounding the "burning issue" of international surrogacy arrangements).

279. At the regional level, the ECtHR has had occasion to rule on E.U. Member States' cases that deny parentage for children born of surrogacy. In a pair of cases, *Labassee v. France* and *Mennesson v. France*, the ECtHR held that the total denial of recognition of a parent-child relationship violated the children's rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly when one of the parents was genetically related to the child. Mennesson v. France, App. No. 65192/11, ¶¶ 96–101 (June 26, 2014), https://hudoc.echr.coe.int/eng?i=001-145389; Lebassee v. France, App. No. 65941/11, ¶¶ 75–80 (June 26, 2014), https://hudoc.echr.coe.int/eng?i=001-145180. In *Mennesson*, a pair of twins who had been born to through surrogacy in the United States were deemed the legal children of the commissioning parents by the United States. *Mennesson*, App. No. 65192/11, ¶ 13. However, France does not recognize children born of surrogacy, and consequently the children were not deemed the legal children of the Mennessons. *Id.* ¶¶ 24, 27. The ECtHR held this denial of recognition to be a violation in part because of the uncertainty it created in the lives of the children. *Id.* ¶¶ 96–101. It stressed that, even with a biological French father, it was unclear that the children would be able to obtain citizenship, thereby also jeopardizing their ability to inherit from their de facto parents. *Id.* ¶¶ 98, 100.

chance at parenthood. Post facto remedies are not, then, a substitute for the proper regulation of the industry. And consequently, when the culprits are unethical agencies like BioTexCom, it becomes clear that something more than contract law is needed to regulate those intermediaries before harm occurs.[280] In the absence of such regulations aimed at enforcing ethical guidelines and contractual obligations, and without a check on the unrestrained profiteering of intermediaries, intending parents and surrogates are left to accept high levels of risk and fend for themselves, resulting in companies benefitting from their depredations with impunity.

Further, contract law's limits become apparent when there is a breach for which the remedy is normatively inappropriate. Surrogacy contracts are unique insofar as at the end of the day what the intending parents want and expect is a child, even if they are fashioned as service contracts. And for the surrogate to perform, she must willingly forgo many rights, like that of privacy or the right to terminate where it exists. While the contract may not be able to prohibit or force abortion depending on the jurisdiction, what it can do is attach consequences to these decisions that result in breach.[281]

As scholars like Rebouché have noted, when problems arise in surrogacy arrangements in the United States, parties often come to a resolution in an ad hoc fashion that facilitates resolution through reliance on the contract relationship.[282] These resolutions do not necessarily involve adherence to the contract.[283] Because of this less formal approach, parties do not immediately move towards litigation in cases of breach.[284] During the pandemic, for instance, agencies and lawyers mediated between parties to make sure that children were

280. *See* Margalit, *From Baby M to Baby M(anji)*, *supra* note 97, at 78–80 (discussing how an international convention can regulate international surrogacy agreements); *see also* Kalantry, *supra* note 6, at 685–87 (discussing how jurisdictions that have no regulations result in parties negotiating based on their relative bargaining power).

281. *See, e.g.* Elizabeth Cohen, *Surrogate Offered $10,000 to Abort Baby*, CNN (Mar. 6, 2013), http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle [https://perma.cc/B9VB-JZ2T] (reporting on a case in which the intended parents offered $10,000 to the surrogate to have an abortion and threatened to both stop paying the monthly surrogacy fee and sue to collect the fees they have already paid in order to coerce the surrogate into terminating the pregnancy).

282. *See* Rebouché, *supra* note 48, at 1277–83 (noting how attorneys draft difficult-to-enforce provisions not for their legal enforceability but to shape parties' relationships and expectations and that this fosters a sense of obligation that helps maintain the arrangement).

283. *Id.* at 1281.

284. *Id.* at 1283–84.

cared for and that surrogates were compensated when the surrogacy agreement should have technically been completed.[285] The cases illustrating the consequences of conflicting rules on parentage between countries thus further reinforce the argument that international regulation is needed because contract law cannot address matters that are the proper and exclusive concern of a country's family law. And when conflicting rules exist across borders, what parties have contracted for is simply irrelevant.

III. PROSPECTS FOR INTERNATIONAL LAW: ASSESSING THE PROPOSALS FOR A BAN AND THE HCEG'S FINAL REPORT ON A CONVENTION AND PROTOCOL ON PARENTAGE

As discussed above, the ways in which states have resolved their conflicts over surrogate born children have been patched together by surrogacy agencies and lawyers, through diplomatic negotiations, or through court intervention. In the wake of the more spectacular cases of surrogacy-gone-wrong, some scholars have called for a global ban on international surrogacy.[286] They argue that a blanket ban is the best way to protect women from exploitation and prevent children from becoming commodified.[287] There are also those in direct opposition to the ban who argue that the free market provides sufficient and efficient regulation, despite widespread concerns about abuse.[288] Many advocates and scholars take a middle position calling for greater domestic and international regulation of

285. *Id.* at 1296–97.

286. *See, e.g.*, Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 15–16 (2008) (calling for the abolition of international surrogacy); Dorothy E. Roberts*, Why Baby Markets Aren't Free,* 7 U.C. IRVINE L. REV. 611, 611–12 (2017) (noting how the story of Amy Kehoe exemplifies the apparent freedom offered by reproductive markets but arguing that such markets are shaped by economic barriers, systemic oppression, and coercion, thereby undermining claims of universal liberation).

287. *See* Smerdon, *supra* note 286, at 85 (noting how, unlike international adoption, international surrogacy in India lacks the countervailing concern for existing children's welfare and concluding that abolition is the only acceptable solution).

288. *See* Epstein, *supra* note 10, at 2315 (explaining that when both parties benefit from a transaction it often creates more good than harm overall and arguing that regulation should only follow a clear showing of significant negative effects); *see also* Margalit, *In Defense of Surrogacy*, *supra* note 9, at 440 (noting that "some scholars from the school of the economic analysis of law strongly assert that it is very economically efficient to enable a free market regime and to fully legalize surrogacy agreements").

the market and its participants.[289] This Part concurs with the middle-ground approach, recognizing that a regulated industry with proper protections is better than either a ban that would drive practices underground or a free license to surrogacy firms to structure the industry's practices in potentially exploitative ways.[290]

A. Against Bans: The Impossibility of Enforcement, Disempowerment of Surrogates, and Negative Impacts on Family Formation

To reiterate, the lack of laws addressing surrogacy specifically (rather than a reliance on other laws or courts to fill in the gaps) results in greater uncertainty about the parties' rights, their legal status, and the obligations of intermediaries.[291] Furthermore, when scandals come to light, they remind the public of the ethical and human rights implications of surrogacy and the inadequacy of private contract law in the absence of protections for both child and surrogate.[292] Because of a few highly publicized scandals and the consequent moral concern about exploitation and commodification, some advocates have called for the outright banning of paid surrogacy.[293] However, a global ban is not only unlikely to

289. *See* Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6 (arguing for better regulation of surrogacy at both the domestic and international levels); Choudhury, *Political Economy and Legal Regulation*, *supra* note 22, at 14 (observing that some critics call for banning commercial surrogacy while others advocate for more comprehensive regulation and noting that some states have responded with transnational bans that address citizenship issues but leave domestic exploitation concerns unresolved).

290. For examples of papers advocating for such reforms to the surrogacy market, see KIRSTY HORSEY ET AL., U.K. WORKING GRP. ON SURROGACY L. REFORM, SURROGACY IN THE UK: MYTH BUSTING AND REFORM 35–37 (2015), https://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf [https://perma.cc/G4H3-N86S]; Amanda M. Herman, *The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts*, 18 CHAP. L. REV. 553, 571–74 (2015).

291. *See* Herman, *supra* note 290, at 558–74 (comparing state laws governing surrogacy in California and Connecticut and concluding that states should seek to emulate California's laws because they provide clearer guidance to contracting parties).

292. For a discussion of some of these implications, see *supra* Sections II.B.2–4.

293 For recent attempts to impose a ban on surrogacy, see Solène Tadié, *International Group Launches Proposal to Ban Surrogacy Worldwide*, CATHOLIC NEWS AGENCY (Mar. 6, 2023), https://www.catholicnewsagency.com/news/253798/international-group-launches-

materialize, but also unable to yield the outcomes that its proponents seek.

A global ban is unlikely because there is no international consensus on the practice.[294] It is not proscribed by customary international law nor is it a per se violation of current human rights laws and norms.[295] Therefore, significant work would have to be done to craft a formal instrument that would attract enough signatory states to make it legally binding.[296] Surrogacy-providing states would have no incentive to accede to such a ban, and the growth of the industry globally indicates the very opposite of an emerging agreement on the illegality of commercial surrogacy.[297] Given that a blanket global ban is extremely unlikely, the regulatory system will likely continue to exist as it does now: a spectrum of approaches that ranges from bans to encouragement of the industry. For advocates of bans, then, the only way to change the landscape is not through a

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proposal-to-ban-surrogacy-worldwide [https://perma.cc/2AW8-GA7X]; *Casablanca Declaration*, *supra* note 12. For examples of arguments supporting a ban, see David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Market of Children*, 43 PEPP. L. REV. 265, 337–41 (2016); David M. Smolin, *The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export*, 49 CUMB. L. REV. 1, 50–54 (2019) [hereinafter Smolin, *One Hundred Thousand Dollar Baby*]; Smerdon, *supra* note 286, at 81–85.

294. *See generally* Koch, *supra* note 8 (summarizing four arguments surrounding the use of advanced reproductive technologies).

295. *See* GLOB. HUM. RTS. CLINIC, UNIV. OF CHICAGO L. SCH., HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY 16–19 (2019) [hereinafter HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY], https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1009&context=ihrc [https://perma.cc/9NGG-FEN4] (concluding that surrogacy is not a per se violation of international human rights law and arguing that it could even "enhance the rights of all stakeholders" if implemented under the auspices of proper protective mechanisms).

296. *See id.* at 36–60 (discussing the risks and opportunities associated with surrogacy that must be considered when crafting any regulatory regime at the domestic or international level).

297. Countries in Europe that ban surrogacy continue to face issues with their citizens traveling to surrogacy-providing countries, demonstrating that the demand for international surrogacy remains high. *See id.* at 39–40 (noting that demand for surrogacy is likely to grow and arguing that "it is unlikely that prohibitions on surrogacy can be implemented effectively," which in turn suggests that country-specific prohibitions might undermine global efforts to protect women). Recall that the industry is projected to boom in the next decade. *See* Gilchrist, *supra* note 33 (reporting that the global surrogacy market was projected to rise from $14 billion in 2022 to $129 billion in 2032).

one-shot international treaty, but through state-by-state advocacy and change.[298]

However, even countries that ban paid surrogacy continue to fuel the industry because their citizens then turn to the global market, propelling the demand for cross-border services and thereby incentivizing others to meet that demand.[299] Some countries in the Global South that have experienced abuse of their surrogates have banned the industry in the wake of scandals, but they have also encountered the growth of gray and black markets in surrogacy.[300] One report describes how, after Thailand banned international surrogacy, a Thai surrogate traveled to neighboring Laos for her IVF procedures and then to China to give birth to the child for the intended parents.[301] Clearly, the availability of the procedure and the ease of travel make a ban difficult to enforce.

In addition to these problems, a partial ban that permits paid surrogacy domestically for a country's citizen or diaspora would be underinclusive if the goal is to protect women and children from exploitation. It would protect women from foreign elites who seek surrogacy but not domestic elites, which results in nothing more than a change in the national identity of the exploiters.[302] Moreover, it may

298. *See* Smerdon, *supra* note 286, at 82 (accepting that "an international law against surrogacy is not likely to become a reality" and proposing that "[t]he alternative would be for nations to independently ban international surrogacy").

299. *See* Roeloffs, *supra* note 29 (showing that surrogacy is expected to grow to a $129 billion global industry by 2032 and attributing this to "growing infertility cases, more same-sex couples looking to have children and heightened awareness about reproductive options").

300. *See, e.g.*, Simon Bowers et al., *The Baby Broker Project: Inside the World's Leading Low-Cost Surrogacy Agency*, PULITZER CTR. (Dec. 22, 2022), https://pulitzercenter.org/stories/baby-broker-project-inside-worlds-leading-low-cost-surrogacy-agency [https://perma.cc/6A7G-7W33] (reporting the findings of a journalistic investigation into a surrogacy agency which repeatedly exploited "grey" markets in response to bans imposed by countries in the Global South); Yuri Hibono, *Ongoing Commercialization of Gestational Surrogacy Due To Globalization Of The Reproductive Market Before And After The Pandemic*, 14 ASIAN BIOETHICS REV. 349, 352–53 (2022) (noting that the bans in countries in Asia has driven surrogacy underground and to neighboring countries).

301. Jutharat Attawet, *Ban Won't Stop Transnational Surrogacy*, 360 INFO (July 19, 2023), https://360info.org/ban-wont-stop-transnational-surrogacy [https://perma.cc/E7YU-9F78].

302. *See* Nadimpally Sarojini et al., *Globalisation of Birth Markets: A Case Study of Assisted Reproductive Technologies in India*, 7 GLOBALIZATION & HEALTH 1, 1–2 (2011) (discussing the political economics underlying assisted reproductive technologies in India and asserting that "[t]his unequal power

drive down the cost of surrogacy, meaning surrogates would be undertaking the same risky work for their compatriots at a lower cost.[303] Rather than abolishing the market, a partial ban would just change the actors and the prices that intermediaries can charge.[304]

Finally, the current situation in which some countries ban surrogacy while others permit it decreases the number of countries in which safe surrogacy is available.[305] It may force intending parents to seek the service in riskier jurisdictions where the possibility of exploitation and fraud is higher.[306] This shift has disproportionate effects on disabled or LGBTQ+ couples for whom surrogacy is the only means of having a genetically-related child.[307] While fetishizing

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equation is present not just in cases of foreign clients but also when the recipient individual or couple is from the third world country in question").

303. *See, e.g.*, Yuri Hibino, *The Advantages and Disadvantages of Altruistic and Commercial Surrogacy in India*, 18 PHIL., ETHICS & HUMANS. MED. 1, 6 (2023) [hereinafter Hibino, *Advantages and Disadvantages*] (discussing opposition to India's ban on commercial surrogacy and quoting one broker as stating that "poorer women . . . could never make such a large amount of money from ordinary work" as they could through commercial surrogacy in India and that "foreigners are more welcome because they pay more and can give additional money as tips").

304. *See* HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, *supra* note 295, at 39–40 (arguing that "it is unlikely that prohibitions on surrogacy can be implemented effectively" in light of the transnationality of surrogacy).

305. *See id.* at 40 (arguing that "prohibitions could lead to a race-to-the-bottom phenomenon where countries capable of enforcing prohibitions push the industry into countries with the least capacity for regulation" and where "the risks associated with poor regulation are likely highest").

306. *Id.*

307. *See, e.g.*, Jenny Kleeman, *'We Are Expected to Be OK with Not Having Children': How Gay Parenthood Through Surrogacy Became a Battleground*, GUARDIAN (Oct. 1, 2022), https://www.theguardian.com/lifeandstyle/2022/oct/01/how-gay-parenthood-through-surrogacy-became-a-battleground [https://perma.cc/J2LG-8JEZ] (reporting the story of one gay couple who sought a surrogate child and noting that "since same-sex marriage has been legalised across the western world, demand for surrogacy has soared"). It is important to acknowledge that the theoretical arguments from those who oppose surrogacy as a normative matter—such as framing surrogacy as the sale of children—tend to disregard or downplay the desires of LGBTQ+ and disabled families. *See, e.g.*, Smolin, *One Hundred Thousand Dollar Baby*, *supra* note 293, at 13–14, 50–54 (identifying the liberal critique of "the traditional family as essentially sexist and heterosexist, exploiting women and LGBTQ persons" as part of the roots of pro-surrogacy ideologies but advocating for a prohibition of all surrogacy). When willing surrogates, science, and technology can fulfill the affective desire for genetic children, preventing LGBTQ+ and people with disabilities from realizing their dreams of building families is unjustifiable. *See generally* Olga Khazan, *The New Question Haunting Adoption*, ATLANTIC (Oct. 19, 2021),

kinship based on biology may be problematic, most would-be parents desire genetic offspring and society does not, generally, denigrate heterosexual couples for choosing to procreate rather than adopt.[308] Furthermore, adoption—commonly suggested as the more ethical process for those wanting children—is not always available or possible.[309]

In sum, from a practical standpoint, it is very unlikely that a universal global ban will ever be enacted when countries like the United States permit surrogacy.[310] As such, the material effect of more countries banning surrogacy is that intending parents will either have to pay more or take more risks in unregulated markets.[311] With this in mind, international bodies and states should explore ways in which regulation can improve the conditions in which surrogacy is undertaken, facilitate family formation, and protect the human rights of all parties. That has been the work of the HCEG, as discussed below.

B. Towards an International Convention and Optional Protocol: A Critical Assessment of the Hague Conference Experts' Group on the Parentage/Surrogacy Project's Final Report of 2022

In 2010, the Hague Conference on Private International Law began exploring the issue of international surrogacy and established the HCEG in 2015 to examine the feasibility of an instrument to address the cross-border issues arising from parentage and

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https://www.theatlantic.com/politics/archive/2021/10/adopt-baby-cost-process-hard/620258 [https://perma.cc/F7F5-RLN9] (discussing the steep decline in the number of adoptable children).

308. *See, e.g.*, Seppe Segers et al., *Getting What You Desire: The Normative Significance of Genetic Relatedness in Parent-Child Relationships,* 22 MED., HEALTH CARE & PHIL. 487, 494 (2019) ("[T]here may be *pro tanto* obligation to help people conceive a genetically related child (if this is what they prefer), but this can be outweighed by other moral considerations (like safety and justice concerns).").

309. *See* Khazan, *supra* note 307 ("Though the statistics are unreliable, some estimates suggest that dozens of couples are now waiting to adopt each available baby [in the United States].").

310. Kirsty Horsey, *The Future of Surrogacy: A Review of the Current Global Trends and National Landscapes*, 48 REPROD. BIOMED. ONLINE 1, 11–12 (2024), https://www.sciencedirect.com/science/article/pii/S1472648323008635 [https://perma.cc/6GF8-AU89].

311. *Id*. at 11.

citizenship.[312] In November 2022, the HCEG issued its final report on a Private International Law (PIL) Convention on parentage.[313] Although the Expert Group's main purpose was to explore issues arising from international surrogacy agreements, it framed its approach to parentage broadly throughout its work and in the final report.[314] That is to say, the report recognized that parental status and citizenship conflicts may arise outside of the surrogacy context in areas such as birth registration,[315] adjudication of parentage,[316] or common law presumptions.[317]

The various intercountry conflicts in parentage laws have resulted in diplomatic maneuvering and ad hoc judicial decisions, and will continue to require legal improvisation unless an international agreement can be crafted.[318] As a result, the final report proposed a Convention that addresses legal parentage in general with an Optional Protocol dealing with international surrogacy agreements specifically.[319] This differentiated approach, the report argued, is likely to be more attractive to states than an undifferentiated one, as it allows states that currently prohibit surrogacy to accede to a Convention that establishes some international laws on parentage while allowing surrogacy-permitting states to join the Optional Protocol.[320] The focus in the discussion below is on the Optional Protocol rather than the Convention, which does not pertain to international surrogacy.

The HCEG approached the problem of parentage in international surrogacy agreements with the following understanding:

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312. HCEG Final Report, *supra* note 5, ¶¶ 7, 9.

313. *Id.* at 1.

314. *See id.* ¶ 5 ("The Group worked with the understanding that the aim of any new instrument would be to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned . . . .").

315. *Id.* ¶¶ 62–63.

316. *Id.* ¶ 37.

317. *Id.* ¶ 16.

318. *Id.* ¶ 8; *see also* Hague Conf. on Priv. Int'l L., *Background Note for the Meeting of the Experts Group on the Parentage/Surrogacy Project*, annex 1 (Jan. 16, 2016) [hereinafter Background Note], https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf [https://perma.cc/YU9C-FEF3] (providing examples illustrating cross-border problems in legal parentage).

319. HCEG Final Report, *supra* note 5, ¶ 10.

320. *Id.* ¶¶ 78–81. It also contemplates the possibility of a separate chapter in the Convention with an opt-in/opt-out mechanism that allows surrogacy-prohibiting states the ability to opt-out of it. *Id.* ¶ 79.

> [T]he aim of any new instrument would be to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the [United Nations Convention on the Rights of the Child (CRC)] and in particular their right that their best interests be a primary consideration in all actions taken concerning them.[321]

Members of the Experts' Group differed on how to achieve this goal. Most argued that addressing human rights specifically would be attractive to states.[322] Many experts concluded that the primacy of human rights should preclude any instrument from legitimizing the recognition of legal parentage when there has been a breach of those rights.[323] Others suggested that the Optional Protocol would not legitimize a breach of those rights by providing "continuity of validly established legal parentage" and would make the Optional Protocol more attractive to a greater number of states.[324] Throughout the report, the experts evinced a tension between the need to include strong and explicit requirements for the protection of human rights and more uniform and positive PIL rules on the one hand, and the need for greater flexibility and autonomy for states to choose how they adhere to their human rights obligations (with more reliance on domestic law) on the other.[325]

In their work leading to HCEG's final report, the Hague Conference on Private International Law's Council on General Affairs and Policy (CGAP) noted that the parentage issues that arise from international surrogacy agreements are particularly complex.[326]

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321. *Id.* ¶ 82.

322. *Id.* ¶ 83.

323. *Id.*

324. *Id.* That group also noted that states might have "different ways of meeting international obligations and providing protection against abuses rather than denial of recognition of legal parentage," meaning the Optional Protocol need not necessarily impose one specific strategy to avoid legitimizing human rights violations. *Id.*

325. *Id.* ¶¶ 82–86.

326. *See id.* ¶ 7 (quoting the Council on General Affairs and Policy as acknowledging "the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements") (quoting Council on Gen. Affs. & Pol'y, Hague Conf. on Priv. Int'l L., *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project*, ¶ 1, Prel. Doc. No. 3 B (Mar. 2014) [hereinafter CGAP, *Desirability and Feasibility*

States have not addressed parentage in this context at the international level, and the result has necessarily been a resort to domestic parentage laws, which has led to unpredictable outcomes.[327] The CGAP recognized that the Expert Group's work was best focused on an area in which scholars and activists had previously suggested private international lawmaking could contribute: resolving the problem of stateless or parentless children and the limping status that sometimes arises from international surrogacy.[328]

The CGAP noted that strict application of the receiving country's national law may disestablish parentage established by the surrogacy-providing country.[329] This is particularly true for parentage that is established statutorily by legal fact (registration of birth), or by tradition or presumption (acknowledgement of paternity/marital

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Report], https://assets.hcch.net/upload/wop/gap2015pd03b_en.pdf [https://perma.cc/7NLC-VEV7]).

327. *Id.* ¶¶ 15, 78; *see also* Background Note, *supra* note 318, ¶¶ 8–10 (discussing the need to establish an international convention governing the establishment of parent-child relationships and the resolution of disputes over legal parentage arising in international contexts).

328. Background Note, *supra* note 318, ¶¶ 9, 32. The CGAP also states:

> 56. In most States, national law does not recognise a parental status established through surrogacy in other jurisdictions, whether in the context of a foreign public document (such as a birth certificate), a foreign voluntary acknowledgment or a foreign judicial decision (pre-birth or post-birth). This is usually because surrogacy is prohibited. Where there is a permissive surrogacy framework, surrogacy arrangements for profit are usually excluded from specifically enacted domestic surrogacy laws that enable transfer of legal parentage in certain circumstances. Despite such positions, national authorities and courts have had to grapple with the claims of intending parents trying to return with a foreign-born child with whom one of the intending parents usually has a genetic link and both intending parents have a primary caregiving role, but no legal relationship.
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> 57. Recognition has occurred through *ad hoc* liberalisation of interpretations of "parent" and "child" in particular pieces of legislation as well as an assessment of the best interests of the surrogate-born child. Where recognition has been refused, this has resulted in "limping" legal parentage, and often an asymmetry in the parental statuses between, on the one hand, an intending (genetic) father and, on the other, an intending mother (whether or not genetically related) or second parent.

Id. ¶¶ 56–57.

329. *Id.* ¶ 60.

presumption).[330] Even where a judicial decision has established parentage in a surrogacy-providing country, strong public policy exceptions in the country receiving the child may prevent it from giving such decisions comity.[331] As such, ordinary conflicts of law methods may not provide predictable resolutions of parentage.[332]

In their discussion on the scope of the Optional Protocol, the HCEG recognized the establishment of parentage by different means, including by operation of law (by birth or marital presumption), through an act (official acknowledgment), or judicial process.[333] However, most agreed that limiting the Optional Protocol's method for establishing parentage to solely judicial decisions was the most likely to promote states' accession.[334]

The HCEG also proposed an *a posteriori* approach to the Optional Protocol and set forth some basic essential elements.[335] First, there would have to be some rule of recognition of parentage, although the Protocol would likely have to also include grounds for refusal of recognition.[336] Experts disagreed on whether to propose an approach that required certain conditions to be met before recognition was granted.[337] Here, again, there was tension between a group who preferred recognition to be conditioned on compliance with uniform standards, safeguards, and human rights and a group who preferred more flexibility, allowing recognition even if there were violations of human rights or noncompliance with standards and safeguards.[338]

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330. *Id.* ¶¶ 37–40.

331. *See id.* ¶ 29 ("The use of the public policy exception, while rare in private international law generally, appears more frequently in the field of [international surrogacy agreements] (and, to some degree, parentage in the context of ART)."); *id.* ¶ 53 (noting that many states refuse to recognize foreign judicial decisions that are "manifestly contrary to [the recognizing state's] public policy").

332. *See, e.g.*, *id.* annex 1, at ix–x (presenting two possible issues arising from an international surrogacy arrangement where two states have conflicting laws).

333. HCEG Final Report, *supra* note 5, ¶¶ 84–86.

334. *Id.* ¶ 86.

335. *Id.* ¶¶ 90–91. The HCEG also discussed an *a priori* approach that would require regulations before the surrogacy has begun and the child has been born, which many experts argued would be most protective of human rights. *Id.* ¶¶ 87–88. However, most experts concluded it would be unfeasible because it would require drastic changes to most countries' parentage laws. *Id.* ¶ 89.

336. *Id.* ¶ 94.

337. *Id.*

338. *Id.* Specifically, some experts argued that "a Protocol would only be attractive to certain States if it would improve the status quo by making recognition of legal parentage conditional upon compliance with some uniform

In the HCEG's most explicit attempt to address human rights concerns, the report laid out some of the safeguards to be included in the Optional Protocol.[339] It adopted recommendations from several

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safeguards/standards . . . ." *Id.* Other experts reasoned that states would prefer to retain some flexibility over the decision to recognize legal parentage. *Id.*

339. *Id.* ¶¶ 99–112. The final report identified the following possible safeguards and standards:

1. Require consent of the surrogate mother and her partner (if the partner would be considered a legal parent at birth under applicable law). *Id.* ¶ 102.
2. Require consent of the intended parents. *Id.* ¶ 103.
3. Establish criteria for eligibility and suitability of the surrogate. *Id.* ¶ 104.
4. Establish criteria for eligibility and suitability of the intended parents. *Id.* ¶ 105.
5. Require an existing genetic connection between a surrogate-born child and the intended parent(s) and/or prohibit a genetic connection with the surrogate. *Id.* ¶ 106.
6. Require conception of the pregnancy only through assisted reproduction technologies. *Id.* ¶ 107.
7. The surrogacy arrangement must:
    a. Be subject to and governed by the laws of the state of origin;
    b. Be expressly permitted under the laws of the state where the agreement takes place at the time of the agreement;
    c. Be memorialized in writing;
    d. Not restrict the surrogate's full and free determination;
    e. Not impose penalties against the surrogate for revoking consent;
    f. Be unenforceable as to the terms that transfer legal parentage;
    g. Indicate that intended parents will take financial responsibility of child upon birth;
    h. Identify all intermediaries; and
    i. Outline all costs and fees. *Id.* ¶ 108.
8. Require valid establishment of legal parentage pursuant to the state of origin's applicable law. *Id.* ¶ 109.
9. Establish regulation of financial aspects of surrogacy agreements to prevent trafficking or sale of children by:
    a. Disclosing the payment to surrogate in addition to reimbursements;
    b. Disclosing the timing of payments to a surrogate;
    c. Prohibiting "improper financial gain" derived from international surrogacy agreements; and
    d. Ensuring that payments to intermediaries and the surrogate are reasonable and proportionate. *Id.* ¶ 110.

sources, including the 2018 report by the U.N. Special Rapporteur (SR) on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuses;[340] the Verona Principles;[341] and the U.N. International Children's Emergency Fund (UNICEF) report on surrogacy from 2022.[342] The HCEG's recommendations also broadly reflect these other reports' attempts to preserve the rights of all the parties in an international surrogacy agreement while concentrating on the rights of the child.[343] Regarding safeguards, the HCEG recognized the conflict between achieving continuity in legal parentage and the human rights of the parties in an international surrogacy agreement.[344] Further questions remain about which safeguards should be included in an Optional Protocol, whether they should be uniform and directly included in the Protocol or indirectly through domestic law, and how they should be framed (as conditions to recognition versus grounds for refusal).[345]

The Optional Protocol as it is currently contemplated would not go far enough by itself because much is left to private contracting and domestic laws and enforcement. And, to be clear, a PIL instrument dealing with parentage is, by design, limited in what it can achieve to protect human rights and liberties because of the

10. Establish regulation of intermediaries by the state of origin. *Id.* ¶ 111.
11. Collect and preserve records regarding the child's origin (i.e., information on the surrogate mother, the donor, the intended parents, the child's gestational history, and the medical history of the child's genetic parents). *Id.* ¶ 112.

340. *Id.* ¶ 110 n.64.

341. *Compare id.* ¶¶ 102–12 (recommending a variety of safeguards to be included in an Optional Protocol governing international surrogacy agreements), *with* Int'l Soc. Serv., *Principles for the Protection of the Rights of the Child Born Through Surrogacy (Verona Principles)*, 16–25 princs.7–16 (Feb. 25, 2021) [hereinafter *Verona Principles*], https://www.iss-ssi.org/wp-content/uploads/2023/03/VeronaPrinciples_25February2021-1.pdf [https://perma.cc/49VX-9A66] (establishing legal principles applicable to international surrogacy agreements including the need to acquire the consent of surrogate mothers, intending parents, and donors; the establishment of legal parentage and parental responsibility; protection of information about a child's identity and origins; the protection of a child's right to a nationality; the prevention and prohibition of selling, exploiting, and trafficking in children; and the guarantee of transparency concerning financial issues and intermediaries).

342. HCEG Final Report, *supra* note 5, ¶ 110 n.63.

343. For a discussion of these reports' contributions, see *infra* notes 392–393 and accompanying text.

344. HCEG Final Report, *supra* note 5, ¶ 99.

345. *Id.* ¶¶ 94, 99.

general scope of PIL.[346] Nevertheless, the HCEG, by incorporating human rights bodies' concerns, made some attempt to address issues beyond its direct remit.

The HCEG's proposed safeguards are broad strokes, expressed in generalities, and leave a lot of room for signatories to water them down.[347] For instance, by requiring *consent* but neither legal representation for surrogates nor procedural fairness in contracting, the Optional Protocol would not really depart from contract law, in which agreement is a basic requirement.[348] Moreover, people consent to bad bargains regularly because they have no choice or because they are unaware of the import of the terms to which they have agreed.[349] A South African surrogate who cannot sign her name and is illiterate[350] would not be protected by the Optional Protocol safeguards if there is proof that she consented to a contract written by the surrogacy firm and explained to her by its agents.[351] The duty

346. For example, Watt argues that PIL has been "domesticated" and thereby confined "to a purely ancillary function beyond (or beneath) the international political sphere," rendering it unable to effectively constrain private interests. Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347, 355–56 (2011); *see also id.* at 356–74 (discussing the genesis of the schism between public and private international law).

347. *See* HCEG Final Report, *supra* note 5, ¶¶ 101–12 (introducing the proposed safeguards as standards that states "*might* wish to see in a Protocol" and noting that states "might have different views on the relevance of these [safeguards] to recognition of legal parents, and on their precise content") (emphasis added).

348. *See id.* ¶¶ 102–03, 108 (proposing that an international surrogacy arrangement should be subject to the laws of a state which expressly permit such arrangements and should require the consent of all parties without requiring legal representation for the parties or defining conditions to ensure procedural fairness).

349. *See* Caleb N. Griffin, *Contracting as a Class*, 48 BYU L. REV. 1185, 1193–94 (2023) (describing captive contracts where there is no real bargaining between parties); *see also* Mark Lemley, *Benefit of the Bargain*, 2023 WIS. L. REV. 237, 281–82 (2023) (suggesting that American courts could enforce the common law of contracts to negate the risk of unfair contractual terms or alternatives that "the Federal Trade Commission or state regulators could impose restrictions on contractual terms as unfair trade practices").

350. *See* Broughton *supra* note 117 (quoting one delegate at the family law conference in South Africa as saying that surrogates are poor and illiterate "and I have yet to come across one who could sign her name").

351. The proposed Optional Protocol has some circularity: if contract law is not enough then, surely, we need much more than evidence of consent, which is a foundational requirement of contract. *See, e.g.*, Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 616 (2017) ("The concept of consent lies at the heart of contract law.").

to read[352] might be more reasonable in developed countries with more robust literacy rates; it is less so in developing countries where large portions of the population do not have enough education to understand legal contracts.[353]

The safeguards in the Optional Protocol also call for establishing eligibility criteria for both surrogates and intended parents,[354] but without reference to equality principles these criteria can be sexist and ageist, as well as reify gender stereotypes.[355] India is a case in point. Following the government's decision to exclude foreigners from its surrogacy market in 2015, the lower house of the Parliament of India passed a law that would have required surrogates to be married and to have already borne children.[356] The HCEG's proposed safeguards further require surrogacy-providing states to identify and regulate intermediaries and restrict payment to "reasonable and proportionate" sums so that there is no financial gain from surrogacy.[357] This requirement is meant to prevent the sale of children.[358] But without an understanding of how fees are distributed in a profit-making enterprise, it allows intermediaries to capture most of the fee while shortchanging the surrogate, even if the fees are reasonable.[359]

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352. Note that enforcement of many modern "form contracts" is predicated on an "affirmative duty to read the contract" from which courts may imply the parties' consent. *Id.* at 621.

353. *See Literacy Rate by Country 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/literacy-rate-by-country [https://perma.cc/S5GZ-QG4C] ("[M]assive country-to-country differences exist. Developed nations almost always have an adult literacy rate of 96% or better. In contrast, the least developed nations manage an average literacy rate of only 65%."); *see also* Hart, *supra* note 102, at 36 (noting that a college education is required to understand most contracts); Broughton *supra* note 117 (discussing the issues posed by illiteracy for surrogate contracts in South Africa).

354. HCEG Final Report, *supra* note 5, ¶¶ 104–05.

355. *See infra* Sections IV.B–C (advocating for a more inclusive human rights-based approach to regulating international surrogacy agreements but cautioning against paternalistic regulations that ignore principles of equality enshrined in prominent international human rights instruments).

356. Hibino*, Advantages and Disadvantages*, *supra* note 303, at 2. The final bill loosened the eligibility criteria for being a surrogate mother to include single women, among other changes. *Id.* at 2–3.

357. HCEG Final Report, *supra* note 5, ¶¶ 110–11.

358. *Id.* ¶ 110.

359. *See id.* (proposing safeguards that would require states to ensure that parties do not derive any "improper financial gain" from international surrogacy without providing any protections to ensure fair distribution of such proper financial gains or defining what type of gain might be "proper").

The HCEG's safeguards also call for the regulation of surrogacy intermediaries, ostensibly to prevent unfettered profits incentivizing the sale of children, in terms that parallel the Adoption Convention.[360] This regulation would hopefully incorporate other requirements laid out in the Adoption Convention, such as those requiring states to license agencies,[361] regulate agreements,[362] and limit the share of the fee the intermediary can keep.[363] But the proposed Optional Protocol does not call for any specific forms of regulation,[364] meaning that a duly registered intermediary conforming to business and corporation law might qualify as "regulated."

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360. *Compare id.* ¶¶ 110–11 (proposing that states should take steps to ensure that payments to intermediates are not "improper" but are "reasonable and proportionate" and to regulate and supervise intermediaries), *with* Adoption Convention art. 8, *supra* note 235 ("Central Authorities shall take . . . all appropriate measures to prevent *improper* financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.") (emphasis added).

361. *See* Adoption Convention art. 10, *supra* note 235 ("Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted."). Article 9 of the Adoption Convention provides that accredited bodies have limited authority to assist states with their legal responsibilities under the Convention. *Id.* art. 9.

362. *See, e.g.*, *id.* arts. 4–5 (setting forth legal requirements for intercountry adoptions such as mutual and genuine consent of all relevant parties on minimum eligibility for adoptive parents).

363. *See id.* art. 32, ¶¶ 1–2 (providing that "[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption" and that "[o]nly costs and expenses, including reasonable professional fees of persons involved in the adoption, maybe charged or paid"). It has been noted that a surrogacy instrument cannot be based on the Adoption Convention because of the specific requirements that do not apply to surrogacies. *See, e.g.*, CGAP, *Desirability and Feasibility Report*, *supra* note 326, ¶ 45 (reporting that some states and other stakeholders "expressed their hesitation at drawing too heavily from [the Adoption Convention] when considering international legislation" governing international surrogacy agreements). Nevertheless, an Optional Protocol could replicate the licensing regime and other elements of the Adoption Convention to the extent that they would achieve the instruments underlying goals.

364. *See, e.g.*, HCEG Final Report, *supra* note 5, ¶¶ 111 (proposing only "regulation and supervision of the activities of intermediaries by competent authorities" without elucidating any specific regulations). The HCEG may have chosen not to include more specific regulatory requirements in its final report because it could not establish the necessary degree of consensus among its constituent experts. *See, e.g.*, *id.* ¶ 101 ("[A] range of views were expressed by different experts on the aspects that were discussed.").

An Optional Protocol structured without more specifics would leave the free-market regime that exists in place and promote a post hoc punishment of nonrecognition of parentage for violations of the instrument and human rights.[365] The result would be that states could withhold or deny recognition of parentage when or if these safeguards are violated.[366] It is unclear which violations would trigger nonrecognition and how many violations would be unacceptable.[367] Moreover, the punishment of nonrecognition for human rights violations would have at least two unintended and undesirable—yet foreseeable—consequences. First, nonrecognition would gravely affect both surrogate-born children by destabilizing their parentage and intending parents by potentially denying family formation through the withholding of parental rights, the custody of their children, and the ability to pass on citizenship.[368] But intermediaries—the biggest profit-makers in the business—would be unaffected except perhaps reputationally by nonrecognition of their clients' parentage.[369] Thus, the parties most likely to exploit both surrogates and intending parents would be largely unaffected by this approach.

Second, nonrecognition of intended parents as the legal parents obligated to provide child support may leave surrogate-born children parentless, either as additional children of surrogates or wards of the surrogacy-providing states.[370] The same result occurs when domestic laws require the establishment of parentage and citizenship after the child is born, allowing intended parents to disclaim their obligations as happened in the cases of Baby Gammy

365. *See id.* ¶¶ 90–91 (implicitly endorsing an *ex post facto* approach to enable the recognition of legal parentage for international surrogacy agreements by operation of law).

366. *See id.* ¶¶ 116–17 (summarizing the HCEG's diverse views on establishing conditions for recognition and noting that many experts advocated for construing compliance with at least some safeguards as conditions for recognition of international surrogacy agreements).

367. *Id.* ¶ 116.

368. *See id.* (reporting that some experts argued against conditioning recognition on compliance with the safeguards because doing so "could leave many more children rather than less with limping legal parentage").

369. *See* Bowers et al., *supra* note 300 (noting that one major surrogacy agency operates in multiple countries and boasts a "world known reputation" but finding that that agency had engaged in "ethical violations regarding the company's recruitment and treatment of surrogates" and had a history of issuing "worthless contracts").

370. *See supra* Section II.B.2 (discussing instances in which surrogates or agencies have been forced to provide care for surrogate-born children due to global instability or national emergencies).

and Baby Bridget.[371] Again, this result undermines one of the stated purposes of the Optional Protocol (namely, to protect the rights and interests of surrogate-born children[372]).

The focus on parentage and prevention of the sale of children leaves a great many other human rights issues unaddressed. The HCEG's proposed international regulation is a start, but it is very limited and maintains the status quo in most surrogacy-providing countries. As such, a more robust enforcement of human rights that gives substance to the Optional Protocol's safeguards is needed.

IV. CONTRACTS + PUBLIC AND PRIVATE INTERNATIONAL LAW + DOMESTIC LEGISLATION AND ENFORCEMENT: DEFAULT RULES, FILLING IN THE GAPS, AND PROTECTING PARENTS, CHILDREN, AND SURROGATES

Part I of this Article described the importance of domestic civil rights and liberties in shaping contracts.[373] International human rights obligations are also part of the backdrop in which these bargains are struck and enforcing these obligations explicitly may be one way to increase the protections afforded to surrogates and surrogate-born children. Given that the problem of exploitation of surrogates has been regularly reported in the press and the literature on gender, commodification of reproduction, and human rights abuses is as voluminous,[374] one would expect that the HCEG and human rights bodies would center the human rights of surrogates. But in general they have not done so.[375] Moreover, scholars that have

371. For a discussion of these two cases, see *supra* Sections II.B.1, B.4, respectively.

372. HCEG Final Report, *supra* note 5, ¶ 82.

373. *See supra* notes 19–95 and accompanying text.

374. A Google Scholar search using the terms "exploitation of surrogates" yields over ten pages of scholarly articles on the subject. Search Results for "Exploitation of Surrogates," GOOGLE SCHOLAR, https://scholar.google.com/scholar?q=exploitation+of+surrogates&hl=en&as_sdt=0&as_vis=1&oi=scholart [https://perma.cc/SG95-E46J].

375. For example, the HCEG explicitly emphasized that protecting the human rights of children was a major goal of the Optional Protocol but subsumed the rights of surrogates within the brought category of "all persons concerned." HCEG Final Report, *supra* note 5, ¶ 82. However, the CEDAW Committee has occasionally chastised countries for their treatment of surrogates. *See* Leonie Kijewski, *UN Reiterates Call to Abolish Criminalization of Surrogates*, VOA CAMBODIA (Nov. 15, 2019), https://khmer.voanews.com/a/UN-reiterates-call-to-abolish-criminalization-of-surrogates/5164651.html [https://perma.cc/P243-MA2J] (reporting that the CEDAW Committee had called on Cambodia to repeal its

emphasized the need for international lawmaking have not paid adequate attention to the fact that, by itself, international law can do little to protect vulnerable individuals within states.[376] Even well-established conventions like the Adoption Convention have been unable to stem abuse in the adoption context where domestic enforcement is lax.[377] Consequently, this Article argues that a broader approach involving legislation at the state level is required to protect all vulnerable parties in international surrogacy agreements. But for any such legislation to be effective in protecting such parties while still allowing the surrogacy industry to function, lawmakers and activists must revise their gendered assumptions and framings with regard to the proper role of women and surrogacy as work.

A. A Critique of the Prevalent Human Rights Framing of Surrogacy as the Sale of Children

To provide context for the argument for a more expansive human rights approach, it is important to understand the prevailing concerns of human rights groups and the positions they have taken. Of all the agencies and non-profits that have weighed in on surrogacy, the most consequential (at least in influencing the HCEG) has been the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other

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decision to criminalize surrogacy on the grounds that it imposed burdens on surrogate mothers).

376. *See* Council on Gen. Affs. & Pol'y, Hague Conf. on Priv. Int'l L., *A Preliminary Report on the Issues Arising from International Surrogacy Agreements*, ¶¶ 58–63, Prel. Doc. No. 10 (Mar. 2012), https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf [https://perma.cc/2F3S-FVE3] (suggesting that a surrogacy convention might use the Adoption Convention as a model for establishing a framework for cooperation but omitting any discussion of how this might provide additional protections in jurisdictions that provide insufficient protections for surrogates). Elsewhere, I have argued that these two contexts are not sufficiently comparable for this sort of borrowing. Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6, at 21–23.

377. *See Orphan Fever: The Dark Side of International Adoption*, UAB INST. FOR HUM. RTS. BLOG (Mar. 13, 2018), https://sites.uab.edu/humanrights/2018/03/13/orphan-fever-the-dark-side-of-international-adoption [https://perma.cc/LB9V-J6FE] (noting that nearly 25 years after the Adoption Convention first entered into force "[a]buses and deaths in intercountry adoptive families are common" while "[i]nternational policy on intercountry adoption is scarce, vague, and often unenforced").

child sexual abuse material.[378] The SR raised concerns about human rights abuses in the context of commercial surrogacy in her 2018 report to the U.N. Human Rights Council.[379] Because it is one of the only reports on commercial surrogacy authored by a U.N. agent,[380] it is particularly significant. Unfortunately, the SR's report reinforced the existing narrative in some nonprofit and scholarly human rights quarters that surrogacy is closely related to or involves the sale of children.[381] This framing is important to understand because it promotes some priorities at the expense of others.

The report began with a logical fallacy begging the question of "*when* surrogacy arrangements constitute the sale of children under international human rights law . . . ."[382] From that biased starting point, the report described the legal regulatory landscape and the concerns about human rights violations and exploitation of children in the industry.[383] The SR then suggested a "safe harbor" pending the promulgation of international regulation: "all States are obligated to prohibit, and to create safeguards to prevent, the sale of children."[384] As no state has taken the position that selling children is acceptable,[385] this is a peculiar suggestion which merely states the obvious. In other words, having first assumed that commercial surrogacy arrangements will at times constitute the sale of children, the SR then suggested that states prohibit child selling as a means of limiting what is permissible in commercial surrogacy contracts. She

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378. *See* HCEG Final Report, *supra* note 5, ¶ 110 n.64 (reporting that some experts had referred to the SR's recommendations to support their proposed safeguards and standards to govern financial aspects of international surrogacy agreements).

379. *See SR 2018 Report*, *supra* note 96, ¶¶ 29–30 (discussing concerns about surrogacy leading to the sale of children and calling for stronger regulation).

380. *See id.* ¶¶ 7–8 (acknowledging the existence of a "gap" due to inadequate attention given to issues "beyond the sexual exploitation of children" including surrogacy).

381. *See id.* ¶¶ 29–33 (discussing cases indicative of abusive practices in the context of surrogacy and concluding that "contract-based legal regimes lead to the sale of children").

382. *Id.* ¶ 9 (emphasis added). This is a form of circular reasoning or "begging the question," in that it assumes that some surrogacy arrangements will be sales without first showing that some *are* sales.

383. *Id.* ¶¶ 13–37.

384. *Id.* ¶ 22.

385. *See id.* ¶ 23 (stating that the report responds to the possibility that "States and the international community would attempt to legalize and normalize the sale of children and other human rights violations *when regulating surrogacy*") (emphasis added).

also distinguished commercial surrogacy as particularly exploitative and raised concerns about the exchange of payment for the child as opposed to payment for reproductive services.[386]

Relying on extraordinary cases of commercial surrogacy-gone-wrong as indicative of widespread exploitation and rights abuses, the SR contended that:

> [S]urrogacy regulations in some jurisdictions are designed to enforce contracts, obtain children for intending parents, maintain the industry's profits, and intentionally reject most protections for children or surrogate mothers. These kinds of *contract-based models lead to systemic abusive practices.* Indeed, these *contract-based legal regimes lead to the sale of children*, as they include the kinds of pre-birth contractual determinations of parentage that the Committee on the Rights of the Child has warned can lead to the sale of children.[387]

The key issue for the SR here was the pre-birth determination of parentage.[388] In arguing that such pre-birth determinations rendered the surrogacy a child sale contract, the SR suggested that, to protect the rights of the child, parentage should be adjudicated after birth with the best interest of the child as the applicable standard.[389] If adopted, this standard would require a post-birth judicial step to determine the best interest of the child and identify the parent(s) accordingly, thereby injecting uncertainty into the arrangement. Default rules that recognize the birth mother as the legal mother are problematic for the same reason. Both these approaches have the potential to saddle surrogates with parental obligations they have stated at the outset that they do not want.[390]

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386. *Id*. ¶¶ 24–26. But, as noted above, the difference between altruistic and commercial surrogacy is in *who* is paid. *See* discussion *supra* Section I.A. In altruistic surrogacy, it is only the surrogate who is not given a fee for her reproductive work. Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6, at 22. Altruistic surrogacies can arrange their "costs" in a way that is de facto a fee for the service. *Id.* at 4–5. Moreover, the essence of both agreements is the production of a child. *Id.* The distinction drawn by the SR and other critics overstates the difference. It is mostly one of form rather than substance.

387. *SR 2018 Report*, *supra* note 96, ¶ 33 (emphases added).

388. *Id*.

389. *Id*. ¶¶ 28, 73

390. Moreover, it is unclear who would have standing to raise the issue. In many cases, it is the surrogate who has claimed parental rights. *See, e.g.*, *id.* ¶¶ 31–32 (discussing the case of *Cook v. Harding*). However, there should also be an affirmative duty on the part of agencies and brokers to ensure fitness before

Without a showing that there are facts justifying concern about the intending parents' fitness, the SR's uniform, post-birth adjudication approach is overkill, and may protect some children but would not protect surrogates.[391]

Despite the problematic framing of surrogacy as the sale of children, the SR did make important national and international legal recommendations, which the HCEG clearly gave due consideration in their final report.[392] These recommendations were also reflected in the UNICEF Briefing Note on surrogacy and the Verona Principles of the International Social Service.[393] Rather than discussing all of these specifically, a brief overview of the SR's relevant recommendations will suffice as a summary of the dominant institutional human rights approaches.[394]

At the national level, the SR recommended that all intermediaries be regulated with regard to the financial aspects of their role.[395] This is an important recommendation, and greater

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allowing a surrogacy to go forward, which might further complicate the question of who has the right to bring a claim and who might be brought into court to defend against such a claim. This problem is unlikely to be solved at the international level but rather will likely be solved at the national level with states regulating the firms involved. Such regulation would have stopped the Japanese man who engaged eleven Thai surrogates to birth his children. *See id*. ¶ 29 (highlighting this surrogacy-gone-wrong case as emblematic of the abuses inherent in commercial surrogacy).

391. For instance, in the case of Baby Gammy, a post-birth adjudication that found the Farnells unfit would have left two children in the care of either the surrogate or the Thai state. *See id*. ¶ 29 & n.67 (discussing the Baby Gammy case and citing news coverage and court documents). Rather than waiting until the children's birth, a process that evaluates the fitness of intending parents before they enter into the surrogacy process is far more appropriate. *See, e.g.*, Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT'L L. 627, 642 (2011) (proposing that states establish conditions regarding the parental fitness of the intended parents).

392. *SR 2018 Report*, *supra* note 96, ¶¶ 77–78; *see also* HCEG Final Report, *supra* note 5, ¶ 110 n.64 (citing the SR report in its recommendations on the financial aspects of surrogacy arrangements).

393. *See* UNICEF, BRIEFING NOTE ON CHILDREN AND SURROGACY 1 (2022) https://www.unicef.org/media/115331/file (on file with the *Columbia Human Rights Law Review*) (noting that the SR report provided guidance on protecting the rights of children through surrogacy); *Verona Principles*, *supra* note 341, at 5 (citing the SR report as a significant influence on the development of the Verona Principles).

394. *See SR 2018 Report*, *supra* note 96, ¶¶ 77–78 (providing national and international level recommendations for surrogacy arrangements).

395. *Id*. ¶ 77(h).

oversight into firms brokering surrogacy is warranted. In addition, the report suggested that states should focus their criminal or civil penalties for illegal surrogacy contracts on intermediaries rather than on surrogates.[396] Given that it is often the intermediary engaging in fraudulent activities, stealing genetic material, or withholding compensation from surrogates, the focus on intermediaries is wholly justified.[397] At the international level, the SR recommended that any regulation aimed at recognition of parentage include a public policy exception that would bar recognition where the surrogacy-providing country does not protect the rights of the child or the surrogate and does not provide post-birth review of parentage to prevent the sale of children.[398] The SR also encouraged international cooperation among states to protect the rights of the child and prevent statelessness.[399]

For children's rights advocates, it is paramount that the gains made pursuant to the Convention on the Rights of the Child are not lost.[400] In their opinion, any international instrument on surrogacy should have the CRC at its heart to ensure that children are not being traded and that their rights are protected.[401] While, of course, the protection of children is perhaps the highest priority of surrogacy regulation, it is not the only priority. The HCEG's inclusion of some provisions that might result in better conditions for surrogates is a good step, but they are not strong enough to prevent the worst abuses of international surrogacy. As discussed below, advocates for regulation must find alternative approaches.

B. Protecting Parents, Surrogates, and Children Through a More Inclusive Human Rights Approach

This Article has argued that contract law alone is not enough to guarantee the rights of and protection for the most vulnerable

396. *Id*. ¶ 77(k). This oversight should include a review of any standard form contract, its terms, and the distribution of payments to ensure that the surrogate is properly compensated.

397. For a review of cases in which intermediaries have defrauded intending parents, see *supra* Section II.B.3.

398. *SR 2018 Report*, *supra* note 96, ¶ 78(c). I have already critiqued this second recommendation above. *See supra* notes 382–391 and accompanying text. Suffice it to say here, that there should be some regulation in place in which the presumption of fitness of intended parents can be challenged.

399. *SR 2018 Report*, *supra* note 96, ¶ 78(e).

400. Anika Keys Boyce, *Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements*, 36 SUFFOLK TRANSNAT'L L. REV. 649, 660 (2013).

401. *Id.* at 660–61.

parties in a surrogacy agreement: the child, the surrogates, and the intending parents. Indeed, contract law best protects the intermediaries who draft the agreement, coordinate the performance, and make the most profit. The HCEG's proposed Optional Protocol, if drafted and adopted, would improve upon the current regime. However, there would still be a substantial gap in protections. This Article suggests a middle-of-the-road position that expands protections for all parties: a more intentional and sustained enforcement of human rights obligations in states that permit surrogacy and the required enactment of domestic legislation to protect these rights. While contracts may still be the primary legal framework for surrogacy arrangements, demanding that states take steps to adhere to their human rights obligations would require some legislative intervention or the application of existing legislation to these contracts.[402]

To realize these protections at the international level, the Optional Protocol would have to incorporate more than just the CRC. It should also specifically reference and incorporate the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) to signal to signatories the importance of women's rights in the context of reproductive work.[403] Signatories that provide surrogacy should be held to account by human rights monitoring bodies through reporting requirements specifically on surrogacy and the protection of those engaging in surrogacy work.[404]

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402. Margalit argues that human rights instruments are inadequate and weak and suggests a specific convention on surrogacy. Margalit, *From Baby M to Baby M(anji)*, *supra* note 97, at 42, 59–62. At this point in time, such a convention has not been proposed. Moreover, human rights obligations become ineffective when unmoored from specific domestic contexts. *See generally* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2005) (arguing that despite new ideas of human rights being enthusiastically appropriated by social movements around the globe, those ideas need to be translated to local terms and contexts to be most effective). For any of these international conventions to have some teeth, it is imperative that states domesticate their guarantees through domestic legislation and enforcement. The usual processes of monitoring should take special note of surrogacy provision in signatory countries.

403. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force* Sept. 3, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW] (guaranteeing human rights and setting forth multiple protections for women).

404. For example, the Human Rights Council could start by appointing a Special Rapporteur on the rights and protections for surrogates who could examine how surrogates are treated in providing countries, the power of

At both the international and domestic levels, the framing of surrogacy as reproduction alone rather than as labor must change because it limits the protections that surrogates could otherwise access through the application of labor law and standards.[405] It also allows states like India to enact sexist and paternalistic "protections" that prevent adult women from choosing surrogacy as work.[406] When surrogacy is framed as reproduction alone, these sexist laws do not violate labor rights but become subsumed under family law, where they are justified by the need to protect families.[407] These forms of sexism are still a clear violation of several CEDAW provisions. For example, CEDAW requires states to take measures to eliminate prejudices and customary practices based on gender stereotypes.[408] Yet, if surrogacy is regulated as work, such restrictive laws violate the "right to free choice of profession and employment"[409] and the right to safe working conditions including "safeguarding the function of reproduction."[410]

Many of CEDAW's articles are directly implicated in the surrogacy context. Article 12 recognizes the right to equal health care and maternal care.[411] Article 15 requires signatories to afford women the right to contract, the same parental rights as men, and the right to freely decide the number and spacing of their children.[412] Taken together, these provisions afford women the right to choose to enter into surrogacy and to make autonomous decisions without consulting male members of their family in a country in which that work is legal.

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intermediaries, and the role of state regulation without the framing adopted by the Special Rapporteur on the sale and exploitation of children.

405. *See* Choudhury, *Political Economy and Legal Regulation*, *supra* note 22, at 28–29 ("Given that the state has long invested in trying to control reproduction through coercive means . . . feminist notions that the state will intervene positively on behalf of surrogates . . . is unrealistic.").

406. *See New Laws in India Regulate Surrogacy*, *supra* note 37 (arguing that India's Surrogacy Act "perpetuate[s] a paternalistic model which undermines women's autonomy and reproductive labor"). For a discussion on the labor framing of surrogacy, see Sarojini et al., *supra* note 302, at 8.

407. *See, e.g.*, Hibino, *Advantages and Disadvantages*, *supra* note 303, at 8 ("The form of surrogacy proposed in the most recent bill shows a clear lack of advocacy for the surrogate mothers it is intended to aid, which is striking given that protection of the rights of surrogate mothers and of the children has been considered of paramount importance.").

408. CEDAW art. 5, *supra* note 403.

409. *Id*. art. 11(c).

410. *Id*. art. 11(f).

411. *Id*. art. 12.

412. *Id*. art. 15.

As such, the patriarchal and paternalistic regulations that countries like India have enacted are violations of CEDAW.

Also, when surrogacy is framed as work it can be placed in juxtaposition with other exploitative work, making it less exceptional and even less grueling.[413] Thus, while the drafters of the Optional Protocol and activists should advocate for protections for women, they must keep in mind that surrogacy may provide better conditions than many other forms of labor. Poor women often choose surrogacy since it allows them to accumulate several years' worth of wages in a year.[414] Yet some protectionist critics find less moral discomfort in women undertaking grueling nonreproductive work like breaking bricks for twelve hours a day for minimum or no wage that traps them in poverty without escape.[415] Unlike other women working in dangerous conditions, surrogates are comparatively highly paid for reproductive labor outside the family.[416] The point here is not to deny exploitation but to recognize that *many forms of labor,* including surrogacy, may involve such exploitation. Even if we recognize that affective, reproductive labor is indeed special, surrogacy is not exceptionally exploitative per se.[417] To combat concerns about gender equality and children's rights, it would be more effective on the part

413. *See id*. (requiring states to provide equality before the law with men in civil matters, contracts and other private instruments, and freedom of movement and domicile).

414. *See* Choudhury, *Transnational Commercial Surrogacy*, *supra* note 6, at 4 ("Indian surrogates can earn several thousand dollars for a surrogacy . . . . This represents several years of wage earnings.").

415. Rinku Kumari, *Brick Kiln Labourers: Women Are Underpaid and Lack Decisive Power or Status,* FEMINISM IN INDIA (Nov. 3, 2021), https://feminisminindia.com/2021/11/03/brick-kiln-labourers-women-are-underpaid-and-lack-decisive-power-or-status [https://perma.cc/P8A4-VFNH] (describing how women brick workers are considered family workers meaning their labor does not require remuneration—much like when they perform reproductive labor within their family).

416. *See* PANDE, *supra* note 42, at 71 ("Payments made to the surrogate range from as low as $2,000 to as much as $8,000.").

417. *See* Joint Submission of Civil Society Organizations, Ctr. for Reprod. Rts. et al., Expression of Concern: With Regard to the Special Rapporteur on the Sale and Sexual Exploitation of Children's Call for Input on Her Intended Report on "Safeguards for the Protection of the Rights of Children Born from Surrogacy" 2–3 (June 17, 2019) [hereinafter Joint Submission], https://www.ohchr.org/sites/default/files/Documents/Issues/Children/SR/Surrogacy/CivilSociety/Joint_Submission_SR_on_the_sale_of_children.pdf [https://perma.cc/TZ8J-V39X] (arguing that it is "misinformed and misguided" to construe commercial surrogacy as "inherently exploitative" while maintaining that altruistic surrogacy is somehow less so).

of advocates to push for the enforcement of human rights obligations in international surrogacy arrangements with the goal of protecting surrogates' ability to choose this work, their working conditions, and their rights, as well as the rights of surrogate-born children. In short, to be effective in their advocacy for enforcement, some human rights bodies, domestic nongovernmental organizations, and activists will have to revise their views of surrogacy as *only ever exploitative*.[418]

Additionally, the framing of surrogacy as the sale of children reduces surrogates to "baby factories" and "rental wombs" at worst, and exploited victims at best.[419] These terms are not only sexist but also classist, denigrating poor women without offering them self-determination and agency. Furthermore, feminist critics of surrogacy (who seem to have no problems with heterosexual reproduction of genetic children) dismiss the affective desires for a genetic child that drive most surrogacies pursued by those who cannot reproduce for themselves.[420] They forget that, for centuries, feminist scholars have sought to decouple women's personhood from their biology, and that there is a vast and rich literature about the exploitative nature of family care work and reproduction.[421] The criticism and debate over

418. *Id*. at 1–2. Specifically, the Joint Submission concluded that "[w]hile there may be non-trivial concerns related to coercion, exploitation, dignity and autonomy, labelling consensual surrogacy arrangements, whether commercial or altruistic, as inherently exploitative, denies the rights of all parties involved, and ignores the complex, lived experiences of those who seek and those who provide reproductive services." *Id*. at 1.

419. *See, e.g.*, DONNA DICKERSON, PROPERTY IN THE BODY: FEMINIST PERSPECTIVES 65–66 (2017) (arguing that women who donate ova are "effectively being used merely as means to another's end . . . irrespective of whether consent has been obtained"); Gridneff, Schultheis, & Drabyk, *supra* note 191 (noting that critics have described surrogacy as the "rent-a-womb" industry); *Womb for Rent: A Tale of Two Mothers*, BBC (July 28, 2011), https://www.bbc.com/news/world-14138394 [https://perma.cc/4EKV-P8J4] (describing surrogacy as a "womb for rent").

420. *See, e.g.*, Kleeman, *supra* note 307 (quoting one prominent American anti-surrogacy advocate as arguing that gay men prefer surrogacy over adoption because of "genetic narcissism").

421. *See* DICKERSON, *supra* note 419, at 67–69 (discussing the historical philosophical bases for the notion that women have legitimate property interests in extracted reproductive tissue); *see generally* ANNE PHILLIPS, OUR BODY, WHOSE PROPERTY? (2013) (arguing that there are numerous harmful effects of framing women's bodily rights in terms of property rights); Cyra Akila Choudhury, *The Common Law as a Terrain of Feminist Struggle*, 114 NW. U.L. REV. ONLINE 160, 164–65 (2019) (critiquing property rights as an analogy to women's bodies).

whether heterosexual reproduction constitutes exploitative work[422] reinforces the prejudice against LGBTQ+ and disabled families. The desire for genetically related children ought to be seen in the same light whether it is in an "able" heterosexual family, a family in which disability makes reproduction impossible, or in an LGBTQ+ family where similar barriers exist. To wit, this treatment by some feminist scholars and activists is hardly in keeping with the demand for dignity and freedom enshrined in CEDAW and fought for by many for decades.

C. Domesticating Human Rights

For surrogacy-providing states, obligations arising from both the CRC and CEDAW require more regulatory involvement than simply leaving profit-making intermediaries to shape the industry.[423] The current HCEG proposal requires safeguards such as regulation of intermediaries and protection against the sale and exploitation of children, but much more can be done.[424] In the United States, some states require that the surrogate be independently represented, that she give informed consent to the terms of the contract, and that the contract have basic protections for health and safety.[425] Some Global South countries have recently moved toward requiring independent legal advice (or judicial pre-confirmation) for surrogates.[426] They are

422. *See* Joint Submission, *supra* note 417, at 1–2 (arguing that any regulation of surrogacy arrangements must consider the sexual and reproductive rights of surrogates, intending parents, and gamete providers and should be accompanied by "robust human rights principles" that *inter alia* "ensure the respect, recognition and prevention of discrimination against diverse families/intended parents").

423. *See generally New Laws in India Regulate Surrogacy*, *supra* note 37 (arguing that India's recent laws governing surrogacy and assisted reproductive technology fail to provide a sufficiently robust rights-based protections for surrogates).

424. *See* discussion *supra* Section III.B (discussing the scope and limitations of the latest HCEG proposal).

425. *See generally* Rebouché, *supra* note 48, at 1271–74 (discussing the different requirements and safeguards that state legislatures have enacted in the area of surrogacy contracts).

426. See e.g., Donrich Thaldar, *Performing IVF for Surrogacy Before Confirmation of the Surrogacy Agreement by the Court: A Critical Analysis of Recent Case Law in South Africa*, 10 HUMANS. & SOC. SCI. COMMC'NS 1, 1 (2023) (noting that South Africa's Children's Act creates "a system of judicial confirmation" for surrogacy agreements wherein courts must first confirm that the agreement is lawful before the agreement is considered enforceable).

slowly but surely recognizing that without these regulations, the contract's formation may be questionable.

But a note of caution is warranted. Human rights protections in the guise of rigid and paternalistic surrogacy regulations remove choice from women and reify gender stereotypes. For instance, the Indian government's justification for its ban on commercial surrogacy is steeped in outdated and clichéd beliefs about the proper role of women and the impropriety of reproducing for money.[427] The Surrogacy (Regulation) Act of 2021 limits surrogates to married women between the ages of twenty-five and thirty-five years who have already borne children.[428] Women are restricted to one surrogacy in their lifetime,[429] and they may either gestate or donate ova or oocytes, but not both.[430] Intending mothers are restricted to twenty-three to fifty years of age.[431] Intending mothers must also establish a medical necessity for surrogacy.[432] Moreover, they cannot already have had any children by surrogacy, by reproduction, or by adoption.[433] The Act also effectively requires any woman who wishes to act as a surrogate to first procure her husband's written consent.[434] It is unclear why a woman with one child who wishes to have more through surrogacy is barred. Additionally, it is unclear what undergirds the restriction of a surrogate's age to the eleven-year

427. *See* Hibino, *Advantages and Disadvantages*, *supra* note 303, at 7 ("The altruistic surrogacy model proposed in the Surrogacy (Regulation) Bill 2016 was clearly based on India's traditional social (patriarchal) system . . . ."); *see also New Laws in India Regulate Surrogacy*, *supra* note 37 (arguing that the laws ultimately adopted by the Indian Parliament "perpetuate a paternalistic model which undermines women's autonomy and reproductive labor").

428. The Surrogacy (Regulation) Act, 2021, § 4(iii)(b)(I) (India).

429. *Id*. § 4(iii)(b)(IV).

430. *Id*. § 4(iii)(b)(III).

431. *Id*. § 4(iii)(c)(I).

432. *Id*. § 4(ii)(a); *see also id*. § 2(1)(r) (defining an "intending couple" as "a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy").

433. *Id*. § 4(iii)(c)(II).

434. Specifically, section 42 provides that "courts shall presume, *unless the contrary is proved*, that the woman or surrogate mother was compelled by her husband, the intending couple or any other relative . . . to render surrogacy services, procedures or to donate gametes" in violation of the prohibitions contained in section 4. *Id.* § 42 (emphasis added). While this does not explicitly impose a consent requirement, it operates in such a way as to require a surrogate to get her husband's consent to avoid the possibility of criminal liability. *See id.* § 40 (providing that anyone who seeks unauthorized surrogacy shall be punishable by up to five years imprisonment and a fine of up to five lakh rupees for the first offense).

span. The requirement that the husband consent to the arrangement is clearly sexist and does not account for the many women abandoned in South Asia whose husbands cannot be located or whose husbands are abusive.[435] These restrictions codify sexist ideas about women's role in society, strip autonomy and reproductive rights, and limit women's choices. They do not advance the human, civil, and political rights of women.

More effective regulation that does protect women's autonomy and the ability of intending parents to form families can be legislated, with domestic government ministries taking an active role in oversight of the industry. Some best practices include pre-authorization of surrogacy contracts to ensure the suitability of both surrogates and intended families (as Israel has long required[436]); a requirement that there be a genetic relationship between one intended parent and the child or a showing of need for donations of both egg and sperm;[437] the provision of legal counsel to surrogates;[438]

435. For a discussion of the problems arising from abandoned brides in India, see Safina Nabi, *"Neither a Widow Nor a Wife": India's Abandoned Brides*, FULLER REP. (Nov. 7, 2022), https://fullerproject.org/story/abandoned-brides-india-nri-dowry-2 [https://perma.cc/L65N-GZ9K].

436. *See Surrogacy in Israel*, *supra* note 63 (detailing the surrogacy requirements in Israel, including the requirement that parties must sign the surrogacy contract in the presence of the Committee for Approval of Agreements for the Carriage of Fetuses before the Committee authorizes the commencement of the process).

437. For example, as a condition of recognizing a surrogacy agreement, the U.S. state of Virginia requires at least one intending parent to have a genetic link with any child resulting from such an agreement. VA. CODE ANN. § 20-160(B)(9) (2024). Alternatively, the statute provides that a court may deem such an agreement enforceable where "such intended parent has the legal or contractual custody of the embryo at issue." *Id.* Similarly, both the United Kingdom and Israel require that at least one intended parent have a genetic relationship to the surrogate-born child. Marianna Iliadou, *Examining the Genetic Link Requirement in Surrogacy Arrangements Through the ECHR Lens*, REFORMING SURROGACY L. (July 26, 20223), https://reformingsurrogacylaw.blog/2023/07/26/examining-the-genetic-link-requirement-in-surrogacy-arrangements-through-the-echr-lens [https://perma.cc/33YL-8F6C]; *Surrogacy in Israel*, *supra* note 63; *see also* Bar Peleg, *Israel's Top Court Rules No Recognition of Parental Status in Non-Genetic Surrogacy*, HAARETZ (Dec. 12, 2022), https://www.haaretz.com/israel-news/2022-12-12/ty-article/.premium/israels-top-court-rules-no-recognition-of-parental-status-in-non-genetic-surrogacy/00000185-07b9-daa8-a3df-07bbea5d0000 (on file with the *Columbia Human Rights Law Review*) (reporting that the Israeli Supreme Court ruled in 2022 "that parental status would not be recognized for parents of offspring through surrogacy without genetic or biological ties between the parents and the baby").

the escrow of fees for surrogates;[439] protections guaranteeing surrogates' right to free movement and choice in housing;[440] adequate laws regarding ownership and use of genetic materials;[441] and access to adequate remedies either judicially or through administrative law.[442] These would all be in keeping with the principles of CEDAW and human rights obligations generally.

Such legislation and oversight might slow the process and require all the parties to submit a great deal of information in order to access surrogacy, and may consequently reduce the number of surrogacies done in the country. But it would also potentially have the benefit of enhancing certainty in the contracts—making their protections more uniform rather than encouraging a race to the bottom—and would reduce human rights abuses and conflicts arising from the contracts.[443]

In sum, even though the HCEG's proposed Optional Protocol will not provide the kind of comprehensive regulation needed to resolve the challenges around international surrogacy, its more

438. *See, e.g.*, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, *supra* note 295, at 68 (recommending that states consider providing "free independent counsel or advisor throughout the process to the surrogate").

439. *See id.* at 59 (arguing that "if intended parent(s) must place money in escrow at the beginning of the surrogacy process, this money could be used to provide for the surrogate's expenses and compensation" even if the intended parents attempt to renege on the agreement).

440. *See id.* at 69 ("Contract terms must be reviewed to ensure they do not violate women's reproductive freedoms, freedom of movement or any other rights.").

441. *See, e.g.*, Thaldar, *supra* note 426, at 5 (discussing the need for regulations to determine ownership over unused genetic material).

442. *See, e.g.*, Mazer, *supra* note 125, at 214–15, 231–37 (arguing that "the realities of gestational surrogacy in the United States necessitate a predictable and clear legal approach" and advocating for courts to respect additional remedial provisions including liquidated damages clauses).

443. Israel, for instance, authorizes an average of around 80 surrogacies for approved parents a year. Ronny Linder, *Married, Educated, Not in It for the Money: The New Profile of Israeli Surrogate Mothers*, HAARETZ (July 13, 2024), https://www.haaretz.com/israel-news/2024-07-13/ty-article-magazine/.highlight/married-educated-not-in-it-for-the-money-the-new-profile-of-israeli-surrogate-mothers/00000190-a88c-d9bb-a3d5-e99e7fc80000 (on file with the *Columbia Human Rights Law Review*). In contrast, Ukraine completed approximately 2,500 surrogacies a year before the war with Russia. *The War Has Thrown Ukraine's Surrogacy Industry into Crisis*, ECONOMIST (Sept. 8, 2022), https://www.economist.com/europe/2022/09/08/the-war-has-thrown-ukraines-surrogacy-industry-into-crisis (on file with the *Columbia Human Rights Law Review*).

expansive incorporation of human rights is an important signal that these rights matter. Moreover, it is vital for human rights monitoring bodies to take up the issues raised by surrogacy under existing frameworks like the CRC and CEDAW and to require state parties to report on and ameliorate abuses. They could do more to push providing countries to regulate carefully in compliance with human rights obligations, which would help bridge the gap between a free market regime and the minimalism of the Optional Protocol. Finally, states have a stake in improving the domestic regulation of surrogacy so that their citizens are protected and so that they do not become a jurisdiction known for exploitative practices and violations of women's, children's, and familial rights.

While it is beyond the scope of this Article to fully examine private international agreements that might also affect the welfare of surrogate-born children, it is important to briefly mention these agreements, particularly given the focus of the HCEG's final report. In addition to public international law and human rights law, there are also PIL conventions—notably the Adoption Convention—that might provide additional protections if applied.[444] For instance, incorporating some of the PIL procedures for resolving international child abduction and child support may be useful.[445] Moreover, any Convention and Optional Protocol on parentage should require signatories to identify a central authority that can facilitate the settlement of parentage where cases slip through the cracks.[446] Also, even if the *consequences* of parentage determinations, like passing on citizenship, are left to individual states, at a minimum the right of

444. For example, the Adoption Convention requires states to establish Central Authorities to discharge the duties. Adoption Convention art. 6, *supra* note 235. This includes overseeing the requirements for intercountry adoption set forth in Articles 4 and 5. *Id.* arts. 4–5. For information about the U.S. Central Authority that handles international child support enforcement, see Off. of Child Support Servs., *Hague Child Support Convention Forms*, ADMIN. FOR CHILD. & FAMS., https://www.acf.hhs.gov/css/form/hague-child-support-convention-forms [https://perma.cc/7S9X-YTQA].

445. *See generally* Convention on the Civil Aspects of International Child Abduction, *entry into force* Dec. 1, 1983, 1343 U.N.T.S. 89 (providing a legal framework for addressing the civil law issues surrounding international child abduction); Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, *entry into force* Jan. 1, 2013, 2955 U.N.T.S. 81 [hereinafter Child Support Convention] (establishing an international legal framework to ensure the effective recovery of child support and other forms of family maintenance).

446. *See* Adoption Convention art. 6, *supra* note 235 (requiring states to establish a Central Authority to discharge their duties under the Convention).

the surrogate-born child to support from their intended parents should be recognized. This might require a very limited recognition of parental obligation for the purposes of support only. Surrogacy-providing states might even be incentivized to accede to the Child Support Convention[447] if they can recoup support from abandoning intended parents. This might mean that intended parents like the Farnells could not simply "cut their losses" by abandoning children without any consequences. They would still be required to pay support, providing much needed material means for abandoned children.[448] Given that most of the current signatories to the Child Support Convention are also the domiciles of most "Western" intended parents,[449] its adoption by more states that provide international surrogacy would further child protection and rights.

CONCLUSION

International surrogacy implicates multiple layers of regulation. States need to confront both the domestic and international legal issues raised by surrogacy. At the national level, states that permit surrogacy must consider the risk of exploitation that results from leaving regulation to private contracting among the intending parents, the intermediary agency or clinic, and the surrogate. Without some explicit parameters and strong background laws, the problem of unequal bargaining compounded by information asymmetries will reify gender and class hierarchies to the detriment of poor surrogates. These concerns about the procedural and substantive fairness of surrogacy contracts and the human rights and liberty of surrogates and children born of surrogacy have only grown as the global industry has grown.[450]

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447. Child Support Convention, *supra* note 445.

448. *See id.* art. 20 (providing conditions in which a decision made in one Contracting State shall be recognized and enforced in other Contracting States).

449. *See Status Table 38: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=131 [https://perma.cc/S4D4-K9WU] (as updated Feb. 6, 2025) (providing information on the current signatories to the Child Support Convention).

450. The negative characterizations of surrogacy are commonplace in the media, but beyond the amplified horror stories that are reported, there is scant evidence that women are trafficked for the surrogacy business. Moreover, as I have described elsewhere, the empirical evidence that has been gathered so far belies this account, with surrogates themselves supporting the practice. *See* Kumar, *supra* note 37 (highlighting positive stories from surrogates themselves

This Article has argued that contract law and the free market alone are insufficient to regulate international surrogacy. This inadequacy is evident in several types of disputes that arise in ISAs. Contract doctrines cannot resolve the conflicts between contract terms that limit individual rights and the exercise of those rights. Parties cannot contract for parentage and nationality when conflicts arise from competing national laws. Nor can contract law adequately address the difficulties in performing contractual obligations arising from international surrogacy agreements during periods of global or regional instability like a pandemic or war. In addition, these contracts have not provided adequate remedies for intending parents whose embryos and hopes for a family have been destroyed by intermediaries like BioTexCom.

High profile scandals involving surrogacy have resulted in some scholars demanding a global ban of commercial surrogacy. In their view, surrogacy commodifies reproduction, exploits women, creates a trade in children, and is morally unacceptable.[451] However, a global ban is unlikely to succeed. Even domestic bans in countries with the medical capacity to provide IVF do not work well; instead, they push surrogacy underground where it is even less regulated and more exploitative. Recognizing the reality of the endurance of cross-border surrogacy and its growth, international regulation of ISAs enjoys broad support.

The HCEG has been assessing the feasibility of a Convention on parentage for over a decade. In 2022, its final report suggested a differentiated approach with a general convention on parentage and an Optional Protocol on parentage and surrogacy. Yet this approach,

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and the need for thoughtful regulation instead of abolition); PANDE, *supra* note 42, at 74–83 (examining the life of surrogates within hostels and clinics and concluding that "[t]he resistive strategies of the surrogates . . . explicate the complex web of power relations" underlying the social contexts in which they operate); Choudhury, *Political Economy and Legal Regulation*, *supra* note 22, at 30–39 (describing the domestic economy of Indian surrogates and identifying long-term benefits of surrogate labor). Naturally, the choice to enter into such labor is constrained, but so are a host of other very dangerous and less remunerative choices like scavenging, brick-breaking, and factory work. Yet critics are less likely to demand paternalistic protections for these forms of work. It is insufficient to say that the choices are driven by economic pressure and to demand a ban of well-remunerated work without addressing these structural pressures themselves. To do so simply forecloses one form of morally disapproved of work while leaving other equally dangerous, underpaid, and undesirable work untouched simply because they are not morally repugnant.

451. *See generally* Smerdon, *supra* note 286 (arguing for the abolition of international surrogacy due to the ethical concerns involved).

which is undoubtedly more likely to find signatories, also leaves the current situation largely unchanged in terms of protections for surrogates. This Article has argued that this omission in the proposed optional protocol can be addressed in some measure by the enforcement of international human rights obligations in surrogacy-providing countries. Even if no laws on surrogacy are enacted directly, legislation aimed at protecting the working conditions of surrogates and guaranteeing their rights to reproductive decision-making and autonomy would be a step in the right direction. Moreover, if children's rights are of paramount importance, adopting mechanisms from other conventions and establishing a recognition of limited parental status for the purpose of support—preventing abandonment or at least allowing recoupment of child support from intending parents—are all important ways to improve the fairness of international surrogacy contracts. Adopting the HCEG's proposed option protocol would be a step in the direction of safer, more certain surrogacy, but if the purpose is to stop the exploitation of poor women and to protect the rights and interests of surrogate-born children, a great deal more needs to be done.