

A BOOMING BABY BUSINESS: INTERNATIONAL SURROGACY ARRANGEMENTS AND
THE NEED FOR REGULATION

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INTRODUCTION

International surrogacy arrangements have become a prominent topic in academic literature in recent years, as a robust market for commercial surrogacy has emerged and the call for international regulation has been amplified. This Note argues that there is an urgent need for international regulation of surrogacy and discusses the potential benefits of the Hague Convention on Parentage / Surrogacy that is currently under development at the Permanent Bureau of the Hague Conference on Private International Law. Part I provides an overview of international surrogacy arrangements by defining terms, introducing the surrogacy market, discussing its scope, and identifying common areas of concern and normative frameworks that have been examined by scholars in the field. Part II discusses the United States' approach to surrogacy as a microcosm of the international variation in regulatory schemes. Part III turns to international surrogacy arrangements, and the relevant existing legal and regulatory framework. Finally, Part IV discusses the need for international solutions like the proposed Hague Convention and Protocol and the difficulties arising from their adoption.

I. KEY SURROGACY CONCEPTS

a. *Terms*

The word “surrogacy” has a number of different definitions in the legal debate surrounding surrogacy and assisted reproductive technology. There are two dichotomous distinctions in types of surrogacy discussed in the literature: traditional versus gestational surrogacy, and commercial versus altruistic surrogacy.

Traditional surrogacy (also called partial surrogacy)¹ is an arrangement in which the surrogate both carries the child and donates the ova, so that she is the genetic mother of the child.² Gestational surrogacy (also called full surrogacy)³ is an arrangement in which the surrogate does not provide the ova; it is instead obtained through assisted reproductive technology (“ART”) from either the intended mother or a donor.⁴ As ART has become more feasible due to advances in medical technology, gestational surrogacy has become more popular than traditional surrogacy in surrogacy arrangements⁵ because it allows the genetic donation of both the intending mother and intending father of the child. Gestational surrogacy has also become more desirable in the wake of well publicized cases in which the traditional surrogate decided to keep the baby and was permitted to do so because of her genetic tie to the child.⁶

¹ COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, SURROGACY LAW AND POLICY IN THE U.S. 5 (2016) [hereinafter *Columbia study*].

² Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 124 (2013). Note that, in keeping with the literature on surrogacy, this Note uses she/her pronouns to refer to surrogates.

³ *Columbia study*, *supra* note 1, at 5.

⁴ Ergas, *supra* note 2, at 124.

⁵ Seema Mohapatra, *Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 413 (2012).

⁶ *Id.* at 412.

Recent estimates show that 95% of all surrogacies undertaken in the United States are gestational surrogacies.⁷

Commercial surrogacy is an arrangement in which the surrogate is financially compensated for her services, over and above the cost of “reasonable expenses.”⁸ Altruistic surrogacy is an arrangement in which the surrogate is either not financially compensated at all, or is compensated only for certain permitted expenses under applicable law.⁹ It should be noted, however, that there is an “unfortunate lack of uniformity” in statutory usage of words such as compensation, reimbursement, and payment with regard to surrogacy arrangements.¹⁰ By far the most common type of surrogacy arrangement is one that is both gestational and commercial, and most often uses a donor egg rather than the egg of the intending mother.¹¹

b. *Scope of the Surrogacy Industry*

i. *Economic Scope*

Though surrogacy has been around for centuries, technological advances, softening of cultural attitudes toward surrogacy, and the trend towards having children later in life have all fueled a recent surge in surrogacy arrangements.¹² The surrogacy industry today is a booming, global business, estimated to be worth up to \$6 billion per year.¹³ According to the Permanent Bureau of the Hague Conference on Private International Law (“HCCH”), the number of international surrogacy cases jumped 1,162% over the span of five years, and is continuing to grow.¹⁴ Based on data collected by the HCCH, it is likely that several thousand children are being born each year as a result of international surrogacy arrangements worldwide.¹⁵ However, it should be noted that official information about numbers of international surrogacy arrangements in recent years is not available, and data gathered unofficially is likely to be under-representative.¹⁶

The costs associated with surrogacy in different countries vary widely, and may include medical, legal, and agency fees, health insurance, and payments to surrogates and donors.¹⁷ In the United States, the average cost—as reported by intending parents—

⁷ Richard F. Storrow, *Surrogacy American Style*, in SURROGACY, LAW, AND HUMAN RIGHTS 191, 193 (Paula Gerber & Katie O’Byrne, eds., 2015).

⁸ Columbia study, *supra* note 1, at 5.

⁹ *Id.*

¹⁰ Storrow, *supra* note 7, at 206.

¹¹ Permanent Bureau, Hague Conference on Private Int’l Law, *Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, Prel. Doc. No. 3C of March 2014, 62-63. <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf> [hereinafter *HCCH Study 2014*].

¹² Claire Fenton-Glynn, *Surrogacy: Why the World Needs Rules for Selling Babies*, BBC NEWS (Apr. 26, 2019), <https://www.bbc.com/news/health-47826356>.

¹³ Mohapatra, *supra* note 5, at 413.

¹⁴ HCCH Study 2014, *supra* note 11, at 60.

¹⁵ *Id.* at 61.

¹⁶ *Id.* at 59.

¹⁷ *Id.* at 64.

was approximately \$122,000, whereas in India it was \$71,841.¹⁸ These costs may vary within states as well, depending on the facts of the individual case.¹⁹

ii. *Geographical Scope*

Popular destinations for “states of birth” include the United States, India, Thailand, Ukraine, and Russia.²⁰ Other countries used less frequently include Canada, Georgia, Armenia, Australia, Belgium, Brazil, Cambodia, China, Cyprus, Czech Republic, Greece, Israel, Italy, Indonesia, Kazakhstan, Kenya, Philippines, Poland, South Africa, Malaysia, Mexico, and Nepal.²¹ Intending parents travel from all regions of the world to engage in international surrogacy arrangements, and often more than two countries are implicated in such arrangements.²² One study found responses demonstrating that parents from nearly 70 different countries had reported using international surrogacy arrangements, which is likely to be under-representative because many countries do not have formal reporting mechanisms for international surrogacy arrangements.²³

II. AREAS OF CONCERN

As discussed below, some scholars argue that regulation of surrogacy arrangements will legitimize them, thus perpetuating certain legal and ethical concerns. However, because surrogacy arrangements clearly persist under the radar of countries that prohibit them, this Note argues that regulation can actually mitigate the effects of these concerns while recognizing that bad actors may attempt to exploit permissive attitudes. Three common legal and ethical concerns raised are the commodification of children, the potential for stateless children, and the exploitation of surrogates (also known as gestational carriers).

a. *Commodification of Children*

A common concern surrounding surrogacy arrangements is the idea that surrogacy amounts to “sale of children” and analogizes surrogacy to slavery in that it creates a marketplace for children to be purchased.²⁴ These concerns are exemplified in the worry that “babies, like automobiles, stock, and pedigreed dogs, will be viewed quantitatively, as merchandise that can be acquired, at market or discount rates.”²⁵ The concern that surrogacy constitutes sale of children and thus violates international law is based on Article 35 of the 1989 Convention on the Rights of the Child (“CRC”), which states: “State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose

¹⁸ *Id.* at 65.

¹⁹ *Id.* at 64.

²⁰ Helier Cheung, *Surrogate babies: Where can you have them, and is it legal?*, BBC NEWS (Aug. 6, 2014), <http://www.bbc.com/news/world-28679020>.

²¹ HCCH Study 2014, *supra* note 11, at 58.

²² *Id.* at 58–59.

²³ *Id.*; Cheung, *supra* note 20.

²⁴ Christine L. Kerian, *Surrogacy: A Last Resort Alternative or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L. J. 113, 164–165 (1997).

²⁵ Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 143–144 (1986).

or in any form.”²⁶ Some argue that commercial surrogacy should be considered illegal (for signatories) under the Optional Protocol to the CRC, which has a definition of “sale of children” that includes “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”²⁷ The UN Special Rapporteur on the sale and sexual exploitation of children warned in 2018 that children face becoming commodities as surrogacy arrangements become more prevalent, and declared that urgent action is needed to protect their rights.²⁸ The Rapporteur went on to explain that if a surrogate mother or third party receives remuneration or any other consideration for the transfer of the child, it should be considered a sale as defined under international human rights law.²⁹

This concern is grounded in legal norms against commodification of persons and makes sense if commercial surrogacy is conceptualized as paying for a child. In that regard, it could be difficult to disentangle surrogacy from adoption, which is permitted under international law and often involves considerable expenses paid by the adoptive parents.³⁰ If surrogacy were to be instead conceptualized as paying for a service by the surrogate mother, these concerns would not be implicated, though commodification of surrogates could be, as is discussed below. Because payment tends to involve covering expenses like medical bills and agency or legal fees, it makes more sense to think of surrogacy as providing a service to which infertile couples, same sex couples, and single individuals may not otherwise have access. Studies indicate that the most frequent clients for international surrogacy arrangements continue to be married, heterosexual couples with a medical need for surrogacy who desperately want to have genetic children.³¹ Advances in ART and the use of surrogacy permit these families to have children when they otherwise could not conceive.

Of course, bad actors can exploit permissive regulation on surrogacy in order to sell children in violation of international law. One example of this is a baby-selling ring that was established in California, in which a California lawyer and a former surrogate recruited women to be surrogates before parents were matched, in violation of California law. The women were sent to Ukraine for insemination and were unaware that there were no intending parents. The leaders of the scam then attempted to sell the children to prospective parents for \$100,000 to \$150,000.³² While illegal under California law, these types of scams are perpetuated in part because of lax regulation surrounding surrogacy. However, the potential for bad actors does not justify the conclusion that surrogacy should be banned. Bad actors exist in all varieties of

²⁶ Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, TIAS 13095 (entered into force Jan. 18, 2002). See David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265 (2016).

²⁸ Maud de Boer-Buquicchio (Special Rapporteur on the Sale and Sexual Exploitation of Children), *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, U.N. Doc. A/HRC/37/60 (Jan. 15, 2018).

²⁹ *Id.*

³⁰ See, e.g., Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167, (entered into force May 1, 1995), http://www.hcch.net/index_en.php? [hereinafter *Hague Adoption Convention*].

³¹ HCCH Study 2014, *supra* note 11, at 62.

³² See Lily Johnson, *Commercial Surrogacy Is the Sale of Children?: An Argument That Commercial Surrogacy Does Not Violate International Treaties*, 28 WASH. INT'L L. J. 701, 706 (2019).

regulated industries, including adoption,³³ which is recognized and regulated at an international level, as evidenced by the ongoing HCCH Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption.

Many scholars argue against the conceptualization of surrogacy as sale of children and claim that such a characterization undermines the goal of standardizing its regulation.³⁴ If surrogacy itself is illegal as the sale of children under the CRC and other international regulations, international and domestic law would not be able to regulate it, and surrogacy would likely continue under the radar and on the black market, which would lead to even more exploitation of women and children.³⁵ While the definition of “sale of children” in the Optional Protocol to the CRC is very broad, legislative history indicates that surrogacy was not considered or even referenced by the working group that prepared the Protocol. Rather, the definition was meant to focus on forms of child trafficking and sexual exploitation.³⁶

b. *Stateless Children*

Because many countries’ laws have not yet caught up with technology like ART and the increased use of surrogacy arrangements, a common concern involves the potential for “stateless children,” or children who are born having no nationality due to conflicting laws operating to assign them citizenship nowhere.³⁷ As a consequence of differing legal regimes on citizenship, the legal status of children born via surrogacy may be uncertain. The HCCH also identifies the problem of “limping legal status,” a situation in which different legal parentage is established according to the laws of different countries, as leading to the possibility of statelessness.³⁸ Many countries’ family or citizenship laws assume that the genetic and legal parents of a child will be the same individuals, and problems can arise with the scope of such laws when that is not the case.³⁹ Countries have invoked the “best interests of the child” principle from the CRC to both recognize and deny filiation under national laws.⁴⁰

Statelessness was a major concern in the 2008 “Baby Manji” case, in which a baby was born in India through commercial surrogacy to a Japanese couple who divorced shortly before the child was born.⁴¹ Under Indian law, a single father could not adopt a female child, and neither the surrogate mother nor the intending mother wanted custody of the child.⁴² Under Indian law, Baby Manji could not acquire Indian citizenship because her father, as her only recognized legal parent, did not have Indian

³³ The HCCH has recognized the potential for exploitation of the inter-country adoption system and is in the process of creating a Toolkit to address illicit practices related to inter-country adoption. See Hague Conference on Private International Law, Report of the Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption, July 10, 2020, <https://assets.hcch.net/docs/24f5a339-2ae1-44fd-bbbc-2ba84fb80cf0.pdf>.

³⁴ See *id.* at 703. See also Kerian, *supra* note 24, at 165.

³⁵ Katarina Trimmings & Paul Reid Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT’L L. 622, 647 (2011).

³⁶ Johnson, *supra* note 32, at 715.

³⁷ HCCH Study 2014, *supra* note 11, at 24.

³⁸ *Id.* at 64.

³⁹ *Id.*

⁴⁰ Ergas, *supra* note 2, at 179–180.

⁴¹ Fenton-Glynn, *supra* note 12.

⁴² *Id.*

citizenship. Japan also refused to recognize her as a Japanese national because it had no laws regulating surrogacy and restricted its recognition of motherhood to the genetic mother, who was the Indian surrogate.⁴³ Due to her statelessness, Baby Manji was unable to obtain paperwork to leave India to live with her intended father.⁴⁴ While the Baby Manji case was ultimately resolved using an *ad hoc* solution,⁴⁵ it exposes the potential for conflicting laws to render a child stateless, and potentially stuck in a country with no legal guardian.

Statelessness can have wide ranging deleterious effects. Stateless individuals face deprivation of both domestic and international rights. Nationality is the link between the individual and his or her rights under international law; thus, stateless individuals lack “the essential condition for securing to the individual the protection of his rights in the international sphere.”⁴⁶ Domestically, stateless individuals may be denied rights to education, health care, employment, and political participation.⁴⁷ Problems may also arise later on if the child’s nationality is not regularized in the receiving state, for example in a custody battle.⁴⁸ Additionally, if the legal parentage of other parties, like the surrogate mother, is still recognized, their consent may be required for certain decisions while the child is a minor.⁴⁹ Multiple international instruments have recognized the right to nationality and citizenship, indicating its fundamental nature and that it is a necessary predicate to many other fundamental rights.⁵⁰

Legitimization of surrogacy through national or international regulation could solve this problem by permitting recognition of intending parents as legal parents and avoiding the potential for conflicting laws that leave no applicable nationality. For example, if Japan were to have recognized surrogacy for the purposes of parentage and citizenship laws, there would have been no statelessness issue in the Baby Manji case, as the child would have been recognized as a Japanese citizen. Even so, the child might not have been able to leave the country if India did not recognize her parentage and refused to give her paperwork to leave. Alternatively, if there had been a standard international regulation, both countries would have had the mechanisms to recognize the surrogacy arrangement and the legal parentage it conferred. This concern seems to be the most readily handled by international regulation of the three concerns surrounding surrogacy.

⁴³ Tina Lin, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT’L & COMP. L. 545, 557.

⁴⁴ *Id.*

⁴⁵ India ultimately issued Baby Manji a certificate of identity, a legal document given to those who are stateless, which allowed her father to obtain a Japanese visa and bring her home to Japan. Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J. L. & POL’Y 41, 48–49 (2015).

⁴⁶ *Id.* at 559 (quoting PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 3–7 at 152 (1956)).

⁴⁷ Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT’L & COMP. L. 75, 92 (2011).

⁴⁸ HCCH Study 2014, *supra* note 11, at 78.

⁴⁹ *Id.*

⁵⁰ These instruments include Article 15 of the Universal Declaration of Human Rights, ratified in 1948 by the UN, the 1959 UN Declaration of the Rights of the Child, and Article 7 of the 1989 Convention on the Rights of the Child. *See* Lin, *supra* note 43, at 559.

c. *Exploitation of Surrogates*

A third concern is the exploitation of surrogates. Due to the large sums of money involved, some worry that surrogacy can be economically coercive to surrogates in poor countries around the world, when intending parents from wealthier countries engage in reproductive tourism and international surrogacy arrangements. For example, a surrogate in Ukraine can earn up to \$20,000, which is more than eight times the average yearly income.⁵¹ Because there is an international market for surrogacy, it risks a “race to the bottom” of highly permissive regulations and cheaper fees for surrogates, although intending parents seem willing to shell out for close monitoring of carriers to ensure the health of the child. Such attentive monitoring is a practice often offered in India.⁵² One study by the Centre for Social Research (“CSR”) in India found that over 85% of surrogate mothers interviewed reported that poverty had driven them to make the decision to become surrogate mothers.⁵³ Because of the economic pressures and possibility for duress, there are also concerns about whether surrogates have given informed consent, especially in cases where the surrogate mother is illiterate.⁵⁴ The CSR study found that over 50% of women interviewed were illiterate and could not answer questions about the terms of the surrogacy contracts they signed.⁵⁵ The study also noted that women were often emotionally pressured by their husbands to engage in surrogacy agreements due to the financial benefits.⁵⁶

International regulation could address this concern by helping to establish domestic regulatory frameworks, increasing monitoring, and emphasizing the importance of autonomy and informed consent of surrogates. An international instrument could also establish a network of oversight bodies, as the HCCH has previously done for adoption.⁵⁷

d. *Normative Approaches to Surrogacy*

i. *Contractual Autonomy and Communitarianism*

Though once maligned, surrogacy as a practice has now been largely accepted across the political and feminist spectrum.⁵⁸ Two normative and legal models put forth by Yasmine Ergas deal with the feasibility of private solutions to filiation issues,⁵⁹ and

⁵¹ Fenton-Glynn, *supra* note 12.

⁵² John Weltman, the President of Circle Surrogacy (a surrogacy broker that matches intending parents from countries around the world to surrogates in the United States) has been quoted stating, “Surrogate mothers in India are ‘milk-fed veal, kept apart from their families and communities’ while being kept under close monitoring. They’re saying, ‘I want my woman in a closet,’ but wait a minute, that’s slavery.” Mohapatra, *supra* note 5, at 445 (quoting Surrogacy Abroad Inc., *More Seek Surrogacy in India as an Available Destiny for International Surrogate Mothers*, SURROGACY ABROAD BLOG, May 9, 2011, <http://egg-donors.blogspot.com>).

⁵³ This report is based on interviews with 100 surrogate mothers and 50 sets of intending parents. CTR. FOR SOC. RSCH., SURROGATE MOTHERHOOD: ETHICAL OR COMMERCIAL 38 (2010).

⁵⁴ HCCH Study 2014, *supra* note 11, at 82.

⁵⁵ CTR. FOR SOC. RSCH., *supra* note 53, at 42.

⁵⁶ *Id.* at 39.

⁵⁷ In the adoption context, these include Central Authorities and accredited bodies. *See* Hague Adoption Convention, *supra* note 30, at ch. III.

⁵⁸ *See, e.g.*, Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 137-44 (2009).

⁵⁹ Ergas, *supra* note 2, at 139.

have their roots in feminist theories about the regulation of female sexual autonomy. The first is contractual autonomy, which focuses on the rights of self-determination and freedom of contract.⁶⁰ This approach characterizes surrogacy as a market for the rights a person has to her body and labor, rather than as a market for children.⁶¹ The contractual autonomy approach also frames the transaction as one between parties capable of consent, and one that takes place entirely before conception, so that all of the constitutive parts of the future child are already the property of the commissioning parties.⁶² This transforms the surrogate's property rights into "immovable" ones, as though her uterus were a form of real estate.⁶³ In doing so, the surrogate is considered to be selling her labor, rather than her body, which also avoids some of the concerns surrounding commodification and exploitation of surrogates. Some feminist scholars have used this approach to embrace surrogacy as a method of permitting parentage arrangements outside the constraints of gender stereotypes and biases, as it allows for same-sex couples and single individuals to have genetic offspring.⁶⁴

Though freedom of contract is no longer recognized as a constitutional right,⁶⁵ it is still relevant to American legal thought, and connects to the idea of human dignity. By allowing a woman to work in whatever form she pleases, distinguishing her capacity to labor from her property in her own person, and recognizing her capacity to consent, the contractual autonomy theory of surrogacy allows her to retain her dignity by avoiding the perception that she is an object to be bought and sold. Feminists have both lauded and rejected this theory, and whether it is accepted may turn on whether one is willing to disaggregate a woman's right to her body from her right to use her body to labor, particularly when it is used in ways that certain individuals may find undesirable or immoral. Similar arguments have been put forth concerning a woman's right to engage in sex work.⁶⁶

One benefit of this theory in the context of surrogacy arrangements is that considering surrogacy to be simply a contract allows the arrangement to be customized to the commissioning parties' individual needs and specifications. On the other hand, this means that similarly situated parties can engage in surrogacy arrangements on vastly different terms, and that parentage may be fractionalized or pluralized, which can cause problems for recognition.⁶⁷ Under the contractual autonomy model, the role of private international law would simply be to facilitate recognition and enforcement of these voluntary agreements.⁶⁸

In contrast to the contractual autonomy theory, the communitarian theory takes the position that filiation, maternity, and paternity are legitimate objects of both national and international regulation.⁶⁹ This theory also focuses on human dignity, but

⁶⁰ *Id.*

⁶¹ *Id.* at 140.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Marjorie Maquire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 315, 344–45 (1990).

⁶⁵ *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Lochner v. New York*, 198 U.S. 45 (1905), which created an individual right to contract from due process principles).

⁶⁶ *See generally* Jeffrey Gauthier, *Prostitution, Sexual Autonomy, and Discrimination*, 26 HYPATIA 166 (2011) (discussing feminist theories supporting prostitution as an exercise of sexual autonomy).

⁶⁷ Ergas, *supra* note 2, at 143–144.

⁶⁸ *Id.* at 145.

⁶⁹ *Id.* at 162.

does so through the lens of institutions regulating for the “general good” rather than through possessive individualism.⁷⁰ While individualism resonates deep within the American ethos, European countries more readily embrace communitarianism.⁷¹ The Human Rights Committee expounds this view of human dignity, holding that certain transactions are not allowable because they do not comport with a normative vision of public order or public morals, within which freedom of choice is necessarily constrained.⁷² The communitarian theory eschews the individual contracting approach, and holds that certain behaviors, including selling of certain goods and services (like surrogacy), may inherently violate the human dignity that countries are meant to uphold through regulations.⁷³ Some feminist scholars use this approach to argue that surrogacy is “reproductive prostitution” and serves as another example of the historical cooptation of women’s reproductive power by men.⁷⁴

This approach lacks the customization and individualization of the contractual autonomy approach, and in turn gives more legal uniformity, although that uniformity may lead to a complete ban on surrogacy. Countries that embrace communitarian theories, like France and Germany, tend to prohibit or heavily regulate surrogacy through national legislation. On the other hand, this theory identifies a flaw in the contractual autonomy approach to surrogacy: surrogacy cannot function without state sanction because ultimately, filiation and citizenship are determined by the state and cannot be created through individual agreements.⁷⁵

While both theories focus on human dignity, contractual autonomy promotes it through an individual’s right to choose what to do with her own body, while communitarianism focuses on regulation of individual rights for the greater good. Contractual autonomy seems to be more receptive to the allowance of surrogacy, and communitarianism to its prohibition, but both theories can comport with some level of national and international regulation. As the communitarian theory identifies, some form of regulation recognizing the existence of surrogacy arrangements will be required in order to confer citizenship and resolve filiation issues that cannot be resolved by individual agreement.

ii. *Commercial Intimacy*

Another theory proffered to understand the ethical, legal, and normative impact of surrogacy regulation is “commercial intimacy.” This theory, outlined by Pamela Laufer-Ukeles, highlights the need for a more nuanced understanding that transcends both abstract fears of surrogacy and uninformed enthusiasm in favor of

⁷⁰ *Id.* at 147.

⁷¹ *See id.* at 149–151 (discussing the employment of communitarian ideals in French and German court cases).

⁷² *Id.* at 151. (quoting *Wackenheim v. France*, No. 854/1999, para. 4.5, in Hum. Rts. Comm., Selected Decisions of the Human Rights Committee Under the Optional Protocol, No. 8, at 110, 111, U.N. Doc. CCPR/C/OP/8, U.N. Sales No. E.07.XIV.11 (2007)).

⁷³ *Id.* at 162.

⁷⁴ Storrow, *supra* note 7, at 213 (citing GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 221, 223 (Harper & Row ed., 1985); JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN’S FREEDOM* 31, 99 (Harper Collins ed., 1993)).

⁷⁵ *See id.* at 159 (noting that even in the United States, states that allow surrogacy arrangements still regulate the attribution of parental status).

it.⁷⁶ The commercial intimacy theory again focuses on human dignity as the basis for domestic regulation, but argues that regulation should respect both the benefits of the commercial transaction and the relational intimacy of surrogacy arrangements, in order to properly empower and protect surrogates from exploitation.⁷⁷ In this context, regulation must provide for the surrogate's fully informed consent, confirm a lack of emotional or economic duress, and promote surrogates' expectations in order to protect their dignity.⁷⁸ Most notably, the commercial intimacy theory suggests that regulation should provide for post-birth contact between the child and the surrogate in order to protect the surrogate and appropriately reflect both the commercial and intimate aspects of surrogacy arrangements.⁷⁹ This theory blends aspects of the contractual autonomy and communitarianism theories by advocating for regulation that both promotes autonomy and protects surrogates from exploitation and other concerns.

However, Laufer-Ukeles asserts that this framework is appropriate only in the domestic context, because international surrogacy arrangements magnify the concerns discussed above due to the cultural and geographic distance between parties as well as the emphasis on the commercial rather than intimate aspects of surrogacy.⁸⁰ While domestic surrogacy may be preferable for the commercial intimacy theory's focus, there is no reason why international regulation cannot encourage domestic surrogacy while still setting parameters to protect surrogates in international arrangements. Although the post-birth contact element may be more difficult to fulfill, most domestic surrogacy regulations already eschew that idea and few, if any, existing legislative schemes require it.⁸¹ Though there may be a higher risk of exploitation in the international context, domestic regulations that are unified and directed by underlying principles of international law can serve to increase protections for surrogates and children. Domestic regulation alone risks a lack of uniformity, leading to conflicting legal regimes that actually increase the use of international arrangements that may be detrimental to women and children, according to Laufer-Ukeles. As noted above, when there is only domestic regulation, more permissive countries attract couples for their surrogacy services when such services are prohibited by their state of origin. Under Laufer-Ukeles's view, international regulation could simply prohibit international surrogacy arrangements, but that may not stop them from happening given the existing black market in surrogacy.⁸² Rather, international regulation should seek to encourage intending parents to use domestic surrogacy while setting up standards to protect women and children involved in surrogacy arrangements abroad.

III. SURROGACY IN THE UNITED STATES

⁷⁶ Storrow, *supra* note 7, at 214 (citing Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L. J. 1223 (2013)).

⁷⁷ Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L. J. 1223, 1228 (2013).

⁷⁸ Storrow, *supra* note 7, at 215 (citing *id.* at 1238–39, 1253–55, 1259, 1262–63).

⁷⁹ Laufer-Ukeles, *supra* note 77, at 1228.

⁸⁰ *Id.* at 1267.

⁸¹ Storrow, *supra* note 7, at 215.

⁸² See Johnson, *supra* note 32, at 703. See also Kerian, *supra* note 24, at 165.

a. *Legislative Regulation of Surrogacy*
 i. *State Legislation*

The United States is a useful model for international surrogacy regulation, as the federal system serves as “a microcosm of the rest of the world, with the whole range of global attitudes towards surrogacy subsumed within its borders.”⁸³ In the United States, surrogacy comes under the umbrella of family law, which is traditionally relegated to state rather than federal regulation.⁸⁴ The United States has the full range of legal possibilities, from full allowance of commercial surrogacy in California,⁸⁵ to full prohibition in Michigan.⁸⁶ Some states have only case law addressing the legality of surrogacy.⁸⁷ Nearly half of U.S. states have some legislation addressing surrogacy, and the general trend is towards permissive rather than prohibitive regulation.⁸⁸ The types of regulation among U.S. states fall generally into three categories: surrogacy is legalized and regulated by statute or case law; the legality of surrogacy is not addressed by statute or is ambiguous; or surrogacy is fully banned by statute.⁸⁹

1. *States Expressly Permitting Surrogacy*

Forty-one states and Washington, D.C. regulate and permit some form of surrogacy.⁹⁰ However, these states vary widely in their approaches to regulation. For example, some states allow compensation while others prohibit it, and some states restrict who can be an intending parent or a surrogate while others do not.⁹¹ States also differ on whether they allow same-sex couples to engage in surrogacy arrangements. Some commonalities include that many of the statutes regulating surrogacy do so via regulation of the surrogacy contract. Many also allow or require judicial recognition of parentage, likely for the purposes of the Full Faith and Credit Clause⁹² (discussed below).

California, which is the most permissive of states and often attracts reproductive tourism from other countries,⁹³ most recently updated its surrogacy laws in 2019.⁹⁴ California strictly regulates surrogacy contracts and requires disclosure of certain information, including how the intending parents will cover medical expenses, as well representation by attorneys for both the intending parents and the surrogate.⁹⁵ It also requires that the agreement be fully executed prior to beginning the ART

⁸³ Storrow, *supra* note 7, at 193.

⁸⁴ *Id.*

⁸⁵ CAL. FAM. CODE §§ 7960-7962 (2019).

⁸⁶ MICH. COMP. LAWS § 722.855 (1988).

⁸⁷ For example, Massachusetts permits surrogacy through case law. *See Hodas v. Morin*, 442 Mass. 544 (2004), *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 435 Mass. 285 (2001).

⁸⁸ Storrow, *supra* note 7, at 198.

⁸⁹ Columbia study, *supra* note 1, at 55.

⁹⁰ *The United States Surrogacy Law Map*, CREATIVE FAMILY CONNECTIONS (2020), <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> [hereinafter *Surrogacy Map*].

⁹¹ Columbia study, *supra* note 1, at 9.

⁹² U.S. CONST. art. IV, § 1.

⁹³ For example, Sir Elton John had his first child through a surrogate in California in 2010. *See Sir Elton John becomes father via surrogate*, BBC NEWS (Dec. 28, 2010), <https://www.bbc.com/news/entertainment-arts-12084650>.

⁹⁴ *See* CAL. FAM. CODE §§ 7960-7962 (West 2019).

⁹⁵ *Id.* § 7962.

process of embryo transfer.⁹⁶ California also allows full compensation, and the statute does not expressly put a reasonableness limitation on the amount of money to be paid.⁹⁷ The California statute permits judgments or orders establishing a child's parentage, which may be issued before or after birth, and establishes a presumption of validity for surrogacy contracts.⁹⁸ However, the pre-birth order does not become effective until the moment of birth.⁹⁹ This statute, like many in the United States, focuses on recognition and enforcement of the surrogacy contract.

Texas, which has adopted the 2002 Uniform Parentage Act (discussed below), also permits surrogacy but with different requirements for intending parents. Gestational surrogacy is permitted for married couples, provided that they follow the procedure specified in the statute, which includes having the surrogacy agreement authorized by a court before birth and filing a notice of birth no later than the 300th day after the ART process occurs.¹⁰⁰ The statute requires an adjudication to establish parentage by the intending parents, rather than automatically conferring parentage upon them.¹⁰¹

Florida has a statute expressly regulating gestational surrogacy contracts. This statute permits gestational surrogacy only when there is verified medical reason that the intending mother cannot conceive the child herself.¹⁰² The statute also requires a court determination of parentage within three days after the birth of the child through a parental status hearing.¹⁰³ Unlike the California statute, Florida only permits determination of parentage after the child's birth, though there is an expedited process for doing so. Under the surrogacy agreement, the surrogate agrees to relinquish parental rights only upon the birth of the child,¹⁰⁴ which leaves open the possibility that the surrogate could change her mind and retain parental rights over the child.

2. *States with Silent or Ambiguous Legislation*

Six states have either no legislation regulating surrogacy, legislation that relates to surrogacy but does not fully address it, or legislation that allows surrogacy but makes it difficult for intending parents.¹⁰⁵ In these states, whether and how surrogacy agreements operate varies widely and is often unclear. For example, in Idaho, there are no statutes or case law expressly addressing surrogacy, but there appears to be an operational surrogacy industry,¹⁰⁶ and only post-birth parentage orders are permissible.¹⁰⁷ In Arizona, surrogacy contracts are prohibited by statute.¹⁰⁸ However, gestational surrogacy continues to be practiced, and some courts will issue pre-birth

⁹⁶ *Id.*

⁹⁷ Columbia study, *supra* note 1, at 9.

⁹⁸ CAL. FAM. CODE § 7962 (West 2019).

⁹⁹ *Id.* § 7633.

¹⁰⁰ TEX. FAM. CODE ANN. §§ 160.754-160.760 (West 2015).

¹⁰¹ *Id.* § 160.760.

¹⁰² FLA. STAT. § 742.15(2) (2020).

¹⁰³ *Id.* § 742.16(1).

¹⁰⁴ *Id.* § 742.15(3)(c).

¹⁰⁵ Surrogacy Map, *supra* note 90.

¹⁰⁶ *See Doe v. Doe (In re Declaration of Parentage & Termination of Parental Rights)*, 372 P.3d 1106 (Idaho 2016).

¹⁰⁷ Surrogacy Map, *supra* note 90.

¹⁰⁸ Ariz. Rev. Stat. Ann. § 25-218 (2018).

parentage orders.¹⁰⁹ Under Virginia law, gestational surrogacy is permitted, but only to intending parents who do not violate the enumerated restrictions, which include prohibitions on compensation in excess of “reasonable medical and ancillary costs.”¹¹⁰ Also, the surrogate cannot give her consent until four days after the birth of the child.¹¹¹ In order to seek court approval of the surrogacy agreement prior to the ART process, intending parents must undergo a lengthy procedure involving home studies for all parties, the appointment of a guardian ad litem for the unborn child, and a full court hearing.¹¹²

In these jurisdictions, intending parents could be discouraged from engaging in surrogacy arrangements, even if they are permissible, because the outcome and parentage status may be unclear under existing legislation. Intending parents in these jurisdictions may instead seek surrogacy arrangements in states where legislation gives more predictable outcomes, but the contract’s enforceability when returning home may be in question.

3. *States Expressly Prohibiting Surrogacy*

In the last group of states, surrogacy arrangements are expressly prohibited. These states include only Louisiana, Michigan, and Nebraska. In Louisiana, commercial surrogacy is prohibited, with the possibility of civil and criminal sanctions.¹¹³ Gestational surrogacy is allowable, with strict requirements, as long as there is no compensation paid to the surrogate.¹¹⁴ Compensation is defined to include any payment of anything with monetary value, but does not include reimbursement of actual expenses to the surrogate or payment for expenses that are incurred by the intending parents which wouldn’t have been incurred but for the pregnancy.¹¹⁵ In Michigan, the Surrogate Parenting Act makes all surrogacy contracts void and unenforceable as against public policy.¹¹⁶ Michigan’s statute carries harsh criminal penalties for anyone entering into a surrogacy contract that involves compensation to the surrogate, making intending parents guilty of a felony punishable by a fine of up to \$50,000 or imprisonment for up to five years.¹¹⁷ Nebraska’s statute makes surrogacy contracts void and unenforceable and also declares that the biological father is the sole legal parent of any child born via a surrogacy arrangement.¹¹⁸ New York only recently passed the Child-Parent Security Act of 2020, overturning its ban on surrogacy, which went into effect on February 15, 2021.¹¹⁹

¹⁰⁹ *See* Soos v. Super. Ct. of Maricopa Cty., 897 P.2d 1356 (Ariz. Ct. App. 1994).

¹¹⁰ VA. CODE ANN. § 20-160 (2019).

¹¹¹ Surrogacy Map, *supra* note 90.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ LA. STAT. ANN. § 9:2720 (2016).

¹¹⁵ *Id.* § 9:2718.1.

¹¹⁶ MICH. COMP. LAWS § 722.855 (1988).

¹¹⁷ *Id.* § 722.859.

¹¹⁸ NEB. REV. STAT. § 25-21 (2007).

¹¹⁹ Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020, 8:02 PM), <https://www.nbcnews.com/news/us-news/new-york-state-long-holdout-against-legalizing-surrogacy-overturns-ban-n1176071>.

ii. *Uniform Acts*

1. *Uniform Parentage Act*

There have been two major attempts at nationalizing legislation on surrogacy through uniform acts to be adopted by states. The first of these is the Uniform Parentage Act (“UPA”), although—despite its name—the UPA is not necessarily uniform and can be amended and customized by adopting states. Its first iteration was promulgated in 1973, and was adopted by North Dakota, Montana, Washington, Hawaii, California, Colorado, Minnesota, Rhode Island, Ohio, New Jersey, Illinois, Alabama, Kansas, and Texas.¹²⁰ The first version of the UPA made no reference to surrogacy arrangements or contracts. The second iteration came in 2002, in which Article 8 explicitly addressed and recognized “Gestational Agreements” as valid.¹²¹ This version of the UPA had a judicial pre-approval requirement, did not require that at least one parent be a genetic parent, and was not limited only to married couples.¹²² The 2002 UPA was adopted by Texas, Washington, Wyoming, Delaware, Utah, North Dakota, Oklahoma, Alabama, New Mexico, Maine, and Illinois.¹²³ The 2017 version of the UPA has been enacted only in Washington, Vermont, California, and Rhode Island. However, as of April 2021, it has also been introduced in Massachusetts, Maine, Connecticut, Pennsylvania, and Nevada.¹²⁴ The impetus behind the 2017 revision was to account for the Supreme Court decision in *Obergefell v. Hodges* legalizing same-sex marriage and to ensure that the UPA would apply equally to children of same-sex couples.¹²⁵ There were seven major changes added in the 2017 revision: removing gender distinctions, adding new methods for establishing parentage of nonbiological parents, adding a multi-factor assessment to resolve competing parentage claims, adding optional recognition of more than two parents, addressing the parentage of children born as the result of sexual assault, updating the surrogacy provisions, and addressing the rights of children born through ART to information about the gamete providers.¹²⁶ In its article on surrogacy, the 2017 UPA adds distinctions between gestational and genetic surrogacy arrangements, and liberalizes some of the rules surrounding gestational surrogacy arrangements.¹²⁷

While uniformity is desirable, uniform acts may not be the best way to achieve it, because they are still editable when enacted by the states. This is especially likely in the context of family law, which is traditionally the purview of the states. Further, since there are multiple versions, some states are still using previous versions and have not

¹²⁰ *Parentage Act (1973)*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=10720858-ebc1-4e85-a275-40210e3f3f87>.

¹²¹ UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM’N 2002).

¹²² *Id.*

¹²³ See generally *Parentage Act (2002)*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315>.

¹²⁴ *Id.*

¹²⁵ Courtney G. Joslin, *Uniform Parentage Act 2017: What You Need to Know*, AMERICAN BAR ASSOCIATION: SECTION OF FAMILY LAW, 1 (May 11, 2018) (discussing *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

¹²⁶ *Id.* at 1–2.

¹²⁷ *Id.* at 8.

yet introduced the most recent one.¹²⁸ Because states are able to customize the provisions and use different versions of the act, and are under no requirement to enact the uniform act at all, legislation like the UPA does not lead to true uniformity.

2. *American Bar Association (“ABA”) Model Act*

The ABA has also promulgated a Model Act on ART, most recently updated in 2019. Article 7 of the Model Act authorizes commercial gestational and genetic surrogacy.¹²⁹ The Model Act gives detailed requirements for eligibility of both the surrogate and the intending parents and for what must be included in the surrogacy arrangement in order for it to be enforceable.¹³⁰ Requirements include mental health evaluations, legal representation for both parties, payment of reasonable legal, medical, and ancillary expenses, and provisions for the informed consent of both parties.¹³¹ A genetic surrogacy arrangement has the additional requirement that it must be judicially validated prior to the ART process in order to be enforceable.¹³² The Model Act also has a provision conferring jurisdiction over surrogacy arrangements on any state where at least one party is a resident, at least one of the medical procedures under the agreement occurs, the birth occurs or is anticipated to occur, or if none of those apply, confers jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.¹³³

The Model Act is an excellent resource for states designing ART and surrogacy legislation, as it gives a detailed menu of regulatory options. If fully adopted, it would make both commercial gestational and genetic surrogacy arrangements that comply with the detailed procedures laid out in the Act enforceable. However, it runs into the same problem as the UPA in that states are not required to adopt uniform or model acts; thus far, no states have adopted the ABA Model Act.

b. *Enforcement of Surrogacy Contracts and Potential Need for Judgments*

i. *Full Faith and Credit*

Unlike other countries, the United States is a federal system with a constitutional overlay on states’ prescriptive jurisdiction. Most importantly for the surrogacy context, the Full Faith and Credit Clause requires recognition of judgments between sister states.¹³⁴ Perhaps uniquely, the United States does not allow public policy exceptions to judgments; however, the Full Faith and Credit Clause applies *only* to judgments rather than the contracts themselves. This helps explain why so many regulations permitting surrogacy require some sort of judgment on parentage, which triggers other states to give full faith and credit. For example, if intending parents go from their home state, which prohibits or has unclear legislation on surrogacy

¹²⁸ For example, Texas still uses the 2002 UPA. *See* TEX. FAM. CODE ANN. §§ 160.754-160.760 (West 2015).

¹²⁹ MODEL ACT GOVERNING ASSISTED REPRODUCTION § 701 (AM. BAR ASS’N 2019).

¹³⁰ *Id.* §§ 702-703.

¹³¹ *Id.*

¹³² *Id.* § 701.

¹³³ *Id.* § 703(4).

¹³⁴ U.S. CONST. art. IV, §1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

arrangements, and receive a judgment declaring their parentage of a child born via surrogacy in another state where it is permitted, their home state must recognize that judgment, regardless of whether it has a public policy against surrogacy.¹³⁵

There are several examples of cases dealing with these issues. In a recent case in New York, a family court magistrate validated a California paternity judgment for same-sex male parents of a child born via a surrogacy arrangement, even though New York public policy (prior to the new Child-Parent Security Act) explicitly rendered surrogacy contracts unenforceable.¹³⁶ Another case in Texas addressed full faith and credit recognition of surrogacy arrangements when a court held that full faith and credit required recognition of a California judgment on same-sex parentage of a child born through surrogacy.¹³⁷

The most expeditious way to gain recognition of a surrogacy agreement is to obtain a pre-birth judgment validating the agreement,¹³⁸ because amendment of the birth certificate and post-birth adoption by the intending parents are not necessary, and other states will have to give full faith and credit to the judgment establishing parentage.¹³⁹ However, some states that permit surrogacy do not permit pre-birth judgments establishing parentage.¹⁴⁰ Intending parents who enter into surrogacy contracts in permissive states which do not require or permit pre-birth judgments on parentage may not be able to enforce those agreements later in other states in which surrogacy is prohibited or has different requirements. Although many states that allow surrogacy have provisions requiring local law to apply to surrogacy arrangements,¹⁴¹ states will apply their own choice of law rules when adjudicating claims related to surrogacy arrangements. If such an action is brought in a different state, the forum's choice of law rules could point to a state where surrogacy is not allowed or has different requirements that may not be met by the contract.

In order to take advantage of the Full Faith and Credit Clause, intending parents should attempt to seek a judgment on the validity of their surrogacy agreement or of their legal parentage of the commissioned child wherever they can get jurisdiction, so that they will not face issues with recognition and enforcement of the agreement as a contract if a problem should arise down the line. Intending parents should also put choice of law and choice of court provisions for a governing law and forum that permit both surrogacy and pre-birth judgments in the surrogacy agreement in order to ensure a judgment can be attained if necessary or desired. Under the Second Restatement of Conflict of Laws, choice of forum will be respected as long as the

¹³⁵ See generally *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (declaring that there are no public policy exceptions to full faith and credit recognition of sister state judgments).

¹³⁶ Mark Fass, *Despite N.Y. Policy, Magistrate Backs Calif. Surrogacy Contract*, N.Y. L. J. (Oct. 28, 2010, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202474027048/>.

¹³⁷ *Berwick v. Wagner*, 509 S.W.3d 411, 419 (Tex. App. 2014).

¹³⁸ There could be a question as to whether this type of judgment would get full faith and credit, but courts have not yet addressed this issue. This was an issue in same sex marriage cases, which the Defense of Marriage Act tried to address by freeing states of their constitutional obligation of judgment recognition. The Defense of Marriage Act was eventually held to be unconstitutional. See Linda Silberman, *Same Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PENN. L. REV. 2195, 2210 (2005). See generally *Obergefell*, 576 U.S.

¹³⁹ See Storrow, *supra* note 7, at 211.

¹⁴⁰ See *id.* at 212.

¹⁴¹ See, e.g., VA. CODE. ANN. § 20-157 (2019).

choice is not unreasonable or unfair.¹⁴² Choosing a forum doesn't necessarily mean application of the forum's law, only its choice of law rules,¹⁴³ so choice of law should still be included. Under the Second Restatement, choice of law that permits surrogacy arrangements should be respected in a surrogacy contract unless the chosen state has no substantial relationship to the parties or transaction and there is no other reasonable basis for the choice, or if application of the chosen law would violate a fundamental policy of a state with materially greater interest.¹⁴⁴ While this could be a litigable issue in cross-border cases within the United States, choosing the law and forum in which the surrogate lives (if the child is commissioned there and the intending parents live in a less permissive jurisdiction) could be a sufficient connection to create a substantial relationship to the parties. However, there could still be a potential violation of a fundamental policy of the intending parents' home state if such state prohibits surrogacy.¹⁴⁵ Violation of a fundamental policy will cause a court to strike down choice of law and apply the otherwise applicable law.¹⁴⁶

ii. *Surrogacy Contracts in Domestic Cases*

In the United States, case law dealing with surrogacy revolves heavily around enforcement of surrogacy arrangements via contract. The first major case to deal with a surrogacy arrangement was the case of "Baby M" in New Jersey.¹⁴⁷ The case dealt with a surrogate mother who refused to relinquish the child pursuant to the surrogacy contract after the child's birth.¹⁴⁸ At the trial court, the court found the surrogacy contract to be a valid exercise of procreative liberty, grounding the decision in a constitutional right to contract for surrogacy under the Fourteenth Amendment.¹⁴⁹ The New Jersey Supreme Court reversed the decision, rendering the surrogacy contract invalid under New Jersey law and unenforceable on grounds of public policy, based on surrogacy constituting "sale of a child, or, at the very least, the sale of a mother's right to her child."¹⁵⁰ Though ostensibly a custody trial, *Baby M* sparked a moral panic surrounding surrogacy, and led to three federal bills and expansive state

¹⁴² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (AM. L. INST. 1977).

¹⁴³ *See id.* at § 122 ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case"). In England, choice of forum implies choice of law, but that is not necessarily the case in the United States. *See e.g., Vita Food Prods v. Unus Shipping Co. Ltd.* [1939] UKPC 7.

¹⁴⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

¹⁴⁵ U.S. courts have drawn a distinction between "fundamental policy" and the traditional public policy exception, which results in dismissal of the case. The "fundamental policy" of the Second Restatement § 187 does not have to rise to the level of the traditional public policy exception. *See Loucks v. Standard Oil Co.*, 224 N.Y. 99 (1918) (defining the traditional public policy exception as applying when a statute violates "some fundamental principle of justice, some prevalent conception of morals, some deep-rooted tradition of the common weal"); *S. Int'l Sales Co. v. Potter & Brumfield Div. of AMF Inc.*, 410 F. Supp. 1339 (S.D.N.Y. 1976) (noting that a fundamental policy does not have to rise to the level of the *Loucks* public policy exception).

¹⁴⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

¹⁴⁷ *See In re Baby M*, 537 A.2d 1227 (N.J. 1988).

¹⁴⁸ *Id.* at 415.

¹⁴⁹ *In re Baby M*, 525 A.2d 1128, 1139 (N.J. Super. Ct. Ch. Div. 1987); *see also* U.S. CONST. amend. XIV.

¹⁵⁰ *In re Baby M*, 537 A.2d at 1248.

regulations restricting surrogacy arrangements.¹⁵¹ This case shaped the discourse and attitudes surrounding surrogacy for many years, though surrogacy has become more acceptable in recent years as statutes enacted following *Baby M* have been challenged and invalidated.¹⁵² However, *Baby M* remains controlling law in New Jersey, and has been extended to cover gestational as well as traditional surrogacy arrangements.¹⁵³ The court has reiterated the importance of its reliance on public policy and the best interests of the child in determining custody.¹⁵⁴

On the other end of the spectrum is California, whose case law and statutes expressly permit and validate surrogacy arrangements. The second most well-known surrogacy case after *Baby M* is *Johnson v. Calvert*, which took place five years later in California. There, the court used a paradigm of intent to validate a surrogacy contract and held that such contracts do not violate public policy.¹⁵⁵ In its key holding, the California Supreme Court found that although the Uniform Parentage Act recognized both genetic consanguinity and giving birth as establishing maternity. When the two did not coincide in a single individual, the one who intended to bring about the birth of the child that she intended to raise was the natural mother under California law.¹⁵⁶ *Johnson* was reinforced in a later case, *In re Marriage of Buzzanca*, in which the Court of Appeals found that in gestational surrogacy arrangements where neither parent had any genetic contribution, the intending mother's intentional act determined her legal motherhood.¹⁵⁷ The Court of Appeals also extended the intent paradigm to any situation in which the child would not have been born but for the efforts of the intending parents.¹⁵⁸ The California Court of Appeals most recently affirmed both *Johnson* and *Buzzanca* in 2017, holding that surrogacy contracts are both constitutional and enforceable under California statutes and case law.¹⁵⁹

c. *Surrogacy Contracts in Cross-Border Cases*

Many states permitting surrogacy have choice of law provisions for their own law,¹⁶⁰ and statutory directives will generally act as controlling law.¹⁶¹ However, when there is no statutory directive, conflict of law issues may arise. In cross-border cases, the results can vary widely and may be unpredictable, even when a surrogacy contract is entered into in a state where it is enforceable. In one case, a child was commissioned by a surrogacy contract in Connecticut, where state law rendered the genetic parents

¹⁵¹ Storrow, *supra* note 7, at 196. See *Surrogacy Arrangements Act of 1987*, HR 2433, 100th Congress (1987); *Anti-Surrogate Mother Act of 1987*, HR 3264, 100th Congress (1987); *Anti-Surrogate Mother Act of 1989*, HR 576, 101st Congress (1989).

¹⁵² Storrow, *supra* note 7, at 197.

¹⁵³ *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

¹⁵⁴ See *Emma v. Evans*, 71 A.3d 862, 875 (N.J. 2013) (citing *In re Baby M*).

¹⁵⁵ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

¹⁵⁶ *Id.* at 783.

¹⁵⁷ 72 Cal. Rptr. 2d 280, 282-83 (Cal. Dist. Ct. App., 1998).

¹⁵⁸ *Id.*

¹⁵⁹ *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351 (2017).

¹⁶⁰ See, e.g., VA. CODE. ANN. § 20-157 (2019).

¹⁶¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law”).

to be the legal parents in a gestational surrogacy arrangement.¹⁶² When the intending parents learned that the child had significant birth defects, they offered the surrogate \$10,000 to abort the pregnancy.¹⁶³ In response to their insistence, the surrogate went to Michigan to have the baby, where she would be recognized as the legal mother.¹⁶⁴ There, she found a couple to adopt the child, but the intending parents filed in the Connecticut Supreme Court for parental rights.¹⁶⁵ Though the case ultimately settled without trial, giving the intending parents visitation rights and allowing the child to be adopted, the legal issues in the case would have been extremely complex had it gone to trial. Since the case was filed in the Connecticut Supreme Court, Connecticut's choice of law rules would have been used to determine whether its law or Michigan's would apply to determine legal parentage. While one can only speculate about what would have occurred, in choice of law cases dealing with family law, choice rules often point to the domicile; in this case, the domicile would be Connecticut.¹⁶⁶ In this case, that would render the intending parents who wished to abort the child the legal parents, which could lead to complex moral and ethical concerns.

d. *Public Policy and Surrogacy Contracts*

As discussed above, there can be no public policy exception to the recognition of a judgment on parentage once it has been made in a sister state, nor can courts deny a forum for enforcement of a judgment. However, because surrogacy arrangements are usually contracts, they may be unenforceable as against public policy in a state's substantive contract law.¹⁶⁷ This could allow states to refuse to enforce surrogacy contracts, even if they are permissible in another state, because the contracts violate their own public policy.

Public policy in contract law is somewhat nebulous, and has been defined as, "community common sense and common conscience ... applied ... to matters of public morals, public health, public safety, public welfare, and the like."¹⁶⁸ In the *Baby M* case, the court invalidated the surrogacy contract under New Jersey law, but went on to declare all surrogacy contracts invalid as a matter of public policy as well.¹⁶⁹ In *Rosecky v. Schissel*, the concurrence notes that public policy considerations are at the forefront of cases involving surrogacy, and that there is no legal consensus on surrogacy and public policy.¹⁷⁰ It goes on to list some of the public policy concerns that are implicated in surrogacy contracts, including public policy against baby-buying; public policy against the exploitation of women; statutes and case law relating to

¹⁶² Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN (Mar. 6, 2013, 2:58 PM), <https://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html#:~:text=Crystal%20Kelley%20was%20offered%20%2410%2C000,wrenching%20s%20urrogacy%20story%20played%20out>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See generally *Haumschild v. Cont'l Casualty Co.*, 7 Wis. 2d 130 (1959) (holding that the law of the domicile governs for spousal immunity as a family law issue).

¹⁶⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 178. See also 1-6 Murray on Contracts § 99 (2011).

¹⁶⁸ 1-6 Murray on Contracts § 99 (2011) (quoting *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, 1 K.B. 331 (1881) (McCardie, J.)).

¹⁶⁹ *In re Baby M*, 537 A.2d at 1248.

¹⁷⁰ *Rosecky v. Schissel*, 833 N.W.2d 634, 655 (Wis. 2013).

adoption, including provisions on consent, termination of parental rights, and payment; and statutes and case law governing legal custody and placement focusing on the best interests of the child.¹⁷¹

The potential for a contract to be invalidated on grounds of public policy is a major issue facing enforcement of surrogacy contracts within the United States. In addressing surrogacy cases, courts often speak in terms of the best interests of the child,¹⁷² a deep-rooted value embedded in much of state family law. This moral valence, along with the lack of uniform regulation regarding surrogacy, makes it all the more likely that courts will employ public policy to invalidate surrogacy contracts.

e. *Choice of Law and Surrogacy Contracts*

When two or more states are implicated in or connected to a surrogacy contract, there may also be a conflicts issue. In domestic cases, it is clear which state's policy or interest is relevant, but in interstate issues, courts must determine which state's policy or interest is relevant. If the law of one state enforces surrogacy contracts, and the law of another does not, either because of statutory prohibitions or on grounds of public policy, a court would then have to decide which state's law applies. For example, In *R.R. v. M.H.*, a Massachusetts court declined to enforce a surrogacy arrangement between Rhode Island intending parents and a Massachusetts surrogate, in which the child was born in Massachusetts, on public policy grounds.¹⁷³ Although the contract contained a choice of law clause for Rhode Island law, the Massachusetts court held that because the child was conceived and born in Massachusetts, and because the mother was a Massachusetts resident, Massachusetts law applied to invalidate the agreement.¹⁷⁴

If there is no choice of law clause in the contract, general choice of law principles will operate to determine which law applies. Those general principles will depend on the forum's choice of law rules, but the Second Restatement of Conflicts of Law, to which many states adhere, can give some guidance. In absence of an effective choice of law by the parties in the contract, a court would look to section 188 of the Second Restatement, under which the issues are to be determined by the local law of the state with the most significant relationship to the transaction and parties with respect to the particular issue.¹⁷⁵ Section 188 also lists the following contacts to be evaluated according to their relative importance with respect to the particular issue in the case: the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.¹⁷⁶

If there is a choice of law clause, section 187 of the second Restatement says it will be respected unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice", or "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the

¹⁷¹ *Id.* at 133–34.

¹⁷² *See id.* at 511; *In re Baby "M"*, 537 A.2d at 1248.

¹⁷³ 426 Mass. 501, 513 (1998).

¹⁷⁴ *Id.* at 508.

¹⁷⁵ *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1).

¹⁷⁶ *See id.* at § 188(2).

determination of the particular issue and which ... would be the state of the applicable law in the absence of an effective choice of law by the parties"¹⁷⁷ by reference to section 188. This essentially requires a comparison and weighing of state interests or purposes, given the facts of the case and the particular issue at hand. To determine whether a fundamental policy of the otherwise applicable law is violated, one must know what the otherwise applicable law is, which requires a determination under section 188.¹⁷⁸

Examining the problems of surrogacy in the United States can help to inform the disputes over international surrogacy. The United States provides a useful case study because it is a federal nation that relegates family law to the states. The diversity of legal approaches within the United States is echoed in the international variation in legal regimes addressing surrogacy, which fall generally into the same three categories of express permission, silence or ambiguity, and express prohibition. Thus, the United States can serve as a microcosm in which to examine the legal and ethical issues that arise in cross-border surrogacy arrangements that implicate different regulatory regimes, without taking into account the full spectrum of diversity in international regimes.

IV. INTERNATIONAL SURROGACY ARRANGEMENTS

a. *Existing Legal Framework*

i. *International Instruments*

A number of international instruments touch on issues related to surrogacy, though none specifically regulate it as of yet. Notably, European Union regulations that could be relevant specifically exclude issues related to family law and surrogacy. The Rome I Regulation, dealing with contractual obligations, excludes from its scope any obligations arising out of family relationships, which would logically include surrogacy.¹⁷⁹ The Brussels Regulation Recast, dealing with jurisdiction and the enforcement of judgments, does not deal with the status or legal capacity of persons or family relationships.¹⁸⁰ The Rome III Regulation, dealing with divorce and legal separation, excludes from its scope the legal capacity of natural persons and parental responsibility.¹⁸¹ Lastly, the Brussels II bis Regulation, dealing with jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which would seem most relevant, does not apply to the

¹⁷⁷ *See id.* at § 187(2).

¹⁷⁸ Note that in family law contexts, domicile tends to be a more important connection than place of contracting and other listed connections. *See id.* § 188.

¹⁷⁹ Regulation No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 1, 2008 O.J. (L 177), 6, 10 (EC).

¹⁸⁰ Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), art. 1, 2012 O.J. (L 351), 1, 6 (EC).

¹⁸¹ Regulation No. 159/2010, of the European Parliament and of the Council of 20 December 2010 on Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separations (Rome III), art. 1, 2010 O.J. (L 343), 10, 13 (EC).

establishment or contesting of a parent-child relationship or decisions related to adoption.¹⁸²

Because surrogacy is often framed as a human rights issue, conventions and international agreements on human rights are relevant in international surrogacy cases, including the CRC and the European Convention on Human Rights (“ECHR”). Both of these conventions require decisions to be made in the “best interests of the child.”¹⁸³ This “best interests of the child” framework appears in many international agreements dealing with family law issues, including the 1993 Hague Adoption Convention.¹⁸⁴ However, in the context of surrogacy, the meaning of this phrase has been interpreted by different countries to reach different conclusions on legal parentage. Some countries have invoked the “best interests of the child” to place limitations on the contestation of legal parentage, finding that it is in the child’s best interest for legal certainty to prevail over the biological reality.¹⁸⁵ Others have invoked the “best interests of the child” to hold that parentage is a question of fact which can be challenged, and that it is in the child’s best interest to know the truth of his or her parentage.¹⁸⁶ This ideological divide on what the “best interests of the child” means in the context of surrogacy illustrates the lack of guidance given in existing international agreements. While respecting the “best interests of the child” is important for making decisions or framing legislation, it does not give any meaningful direction as to whether and how surrogacy should be regulated. This lack of guidance indicates a gap that must be filled by international instruments specifically targeting international surrogacy arrangements.

The human rights framework laid out in the CRC has three major implications for surrogacy cases. First, according to Article 2, Article 3, and statements by the Committee, all decisions related to surrogacy with implications for children should respect all rights of the child laid out in the Convention and should not discriminate against children based on the fact of their birth being facilitated through surrogacy or other ART methods.¹⁸⁷ Second, under Article 18, a regulatory framework for surrogacy should support parents’ fulfillment of their duties to protect their children’s rights, including the right to know their parents under Article 7.¹⁸⁸ Third, Article 12 requires that a regulatory framework for surrogacy respect and allow for the contribution of the child’s opinion and views, to be given due weight in accordance with his or her age and maturity.¹⁸⁹

Article 8 of the ECHR also has some implications for surrogacy cases and regulation. Article 8 lays out the right to respect for privacy and family life, which requires that individuals should be able to establish the details of their identity,

¹⁸² Regulation No. 2201/2003, of the European Parliament and of the Council of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, art. 1, 2003 O.J. (L 338), 1, 4 (EC).

¹⁸³ See Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; European Convention on Human Rights, art. 8, Nov. 4, 1950, E.T.S. No. 5.

¹⁸⁴ Hague Adoption Convention, *supra* note 30.

¹⁸⁵ Germany has taken this approach. See HCCH Study 2014, *supra* note 11, at 19.

¹⁸⁶ *Id.*

¹⁸⁷ Katherine Wade, *The Regulation of Surrogacy: A Children’s Rights Perspective*, 29 CHILD & FAM. L. Q. 113 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

including a legal parentage relationship.¹⁹⁰ In application to surrogacy, Article 8 protects children born via surrogacy outside the Member State in question, whose legal parentage under foreign law could not be registered as such under domestic law.¹⁹¹ However, Article 8 does not require countries to legalize surrogacy.¹⁹² Furthermore, countries may demand proof of parentage before issuing identity documents.¹⁹³ Because Article 8 does not require countries to legalize surrogacy, the refusal to recognize legal parentage in a surrogacy arrangement does not violate the right to privacy and family life as long as it does not prevent the intending parents and the child from enjoying their family life together.¹⁹⁴ For example, if they are able to settle in the parents' country of origin without any issues, that state may not be required to recognize the legal relationship between the parents and the child. If the child is not recognized as a citizen of the state in which he or she resides with the parents, this can cause issues for the child down the road related to health care, education, and other public benefits.

ii. *International Court Decisions*

The European Court of Human Rights ("ECtHR") has recently decided three cases under Article 8 of the ECHR which are related to international surrogacy arrangements, and which give some guidance as to where international surrogacy regulation is headed in the future. These cases are *Mennesson v. France*,¹⁹⁵ *Labassee v. France*,¹⁹⁶ and *Paradiso and Campanelli v. Italy*.¹⁹⁷

The *Mennesson* and *Labassee* cases were lodged with the ECtHR jointly in 2014 after the French government refused to grant recognition of the legal parentage of two French couples to children born through surrogacy in the United States.¹⁹⁸ In each case, there was a judgment in the United States establishing the legal parentage of the intending parents which the French government refused to acknowledge by entering the birth certificates into the French register.¹⁹⁹ The French Court of Cassation held that surrogacy arrangements were null and void under French public policy, and dismissed the case.²⁰⁰ When brought to the ECtHR, the court found that there was no violation of Article 8's requirement of respect for the intending parents' family life because the families had been able to settle in France with their children relatively

¹⁹⁰ *Mennesson v. France*, App. No. 65192/11, Eur. Ct. H.R. ¶ 96 (2014), <http://hudoc.echr.coe.int/eng?i=001-145389>.

¹⁹¹ EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 57 (2020), https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

¹⁹² *Id.* at 69.

¹⁹³ *Id.* at 57.

¹⁹⁴ *Id.* at 69.

¹⁹⁵ *Mennesson v. France*, App. No. 65192/11, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-145389>.

¹⁹⁶ *Labassee v. France*, App. No. 65941/11, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-145180>.

¹⁹⁷ *Paradiso v. Italy*, App. No. 25358/12, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-170359>.

¹⁹⁸ Paul Beaumont & Katarina Trimmings, *Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?* 1 (Univ. of Aberdeen Ctr. for Private Int'l Law, Working Paper No. 4, 2016).

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.*

easily following the birth and to live there together.²⁰¹ However, the court found that the French government *did* violate the children’s right to respect for their private life by denying recognition to the U.S. judgments and leaving their legal parentage status uncertain.²⁰² The court noted that the children’s inheritance rights under French law would be affected, which is a component of their identity of which they would be deprived as a direct result of their having been born via surrogacy.²⁰³ The concerns for the children’s private life was heightened in these cases, as the intending father of each child was also the biological father. Even so, the French government refused to recognize that genetic link by registering the births. The court also noted that while it will not require France to legalize surrogacy, France’s regulations cannot affect the child’s right to respect for his or her private life in their attempt to deter intending parents from seeking surrogacy elsewhere.²⁰⁴

Adding nuance to the framework set out in the *Menesson* and *Labassee* cases in 2014, the ECtHR held in the *Paradiso* case that the Italian government did not violate the right to respect for private life by removing a child born through international surrogacy, which violated Italian law, when the couple was found to have no biological tie to the child. The court concluded that the right to respect for family life was inapplicable to the case, due to the absence of a biological tie between the child and the intending parents, the short duration of the relationship to the child of approximately eight months, and the legal uncertainty of the intending parents’ ties to the child.²⁰⁵ The court found that the right to respect for private life was implicated, but not violated in this case, because the Italian government had complied with paragraph two of Article 8 in that they had interfered with the intending parents’ private life in accordance with the law and to pursue the goals of preventing disorder and protecting the rights and freedoms of others.²⁰⁶

The major difference between the two cases appears to be whether there was a biological tie between the intending parents and the child, which indicates a focus on genetic linkage as a trigger for the rights under Article 8 of respect for family and private life. All three cases also indicate that the principle of the “best interests of the child” should prevail over considerations of national public policy on surrogacy.²⁰⁷ A third major implication of the three cases is that the ECtHR’s approach allows countries the freedom to prohibit surrogacy, while also requiring them to recognize legal parentage in certain instances of cross-border surrogacy.

The *Menesson* and *Labassee* cases give countries a guideline for situations in which they must recognize legal parentage despite national legislation prohibiting surrogacy, with a particular focus on the biological link to at least one parent. The

²⁰¹ *Menesson*, Eur. Ct. H.R. at ¶ 92.

²⁰² *Id.* at ¶ 97.

²⁰³ *Id.* at ¶ 98.

²⁰⁴ *Id.* at ¶ 99.

²⁰⁵ *Paradiso*, Eur. Ct. H.R. at ¶ 157..

²⁰⁶ *Id.* at ¶ 185–214. *See* European Convention on Human Rights, *supra* note 181, at art. 8 (“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 crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

²⁰⁷ *Beaumont & Trimmings*, *supra* note 199, at 15. *See* *Menesson*, Eur. Ct. H.R. at ¶ 99; *Paradiso*, Eur. Ct. H.R. at ¶ 80.

conditions under which legal parentage must be recognized are as follows: the recognition concerns the legal parentage of a genetically related intending parent (at least when that parent is the biological father), legal parentage is properly established in the country of birth, and there is no alternative way for legal parentage to be established in the intending parents' country of origin.²⁰⁸ *Paradiso* gives governments an idea of how they can regulate surrogacy without impinging on the intending parents' or child's Article 8 rights under the ECHR. However, these cases may not provide guidance for situations that they do not address, for example, if there is no biological link but the parents have been able to settle in their country of origin without issue. The ECtHR recently issued an advisory opinion upon request by the French Court of Cassation intending to clear up some of this confusion, which gave two conclusions. First, the court concluded that the child's rights under Article 8 of the ECHR require that domestic law provide a possibility of recognition of a legal parentage relationship with the intending mother, designated in the birth certificate legally established abroad as the legal mother.²⁰⁹ Second, the court held that the child's rights under Article 8 do not require recognition to take the form of entry in the birth register. Rather, other means can be used, such as adoption by the intending mother, provided that the procedure laid out by domestic law can be implemented quickly and effectively in accordance with the best interests of the child.²¹⁰

While these decisions give some guidelines to governments considering regulation, they are not particularly effective in unifying the standards for surrogacy regulation and eliminating the problems of statelessness and limping legal parentage. The ECtHR approach is only an *ex post* solution to the parentage issues involved in international surrogacy arrangements and is based solely on recognition of parentage judgments issued elsewhere.²¹¹ Because of the limited ability of the ECtHR approach to solve these problems, there is still a gap to be filled by international regulation, which is recognized by the court in its reference to the ongoing work by the HCCH on international regulation of surrogacy arrangements.²¹²

b. *Recognition of Legal Parentage*

As demonstrated in the ECtHR cases, the underlying problem in many international surrogacy cases brought before the relevant courts is conflicting state approaches to legal parentage and nationality, in contrast to the problem of recognition and enforcement of contracts within the U.S. federal system. International surrogacy arrangements necessarily involve the parentage laws of at least two countries, and often, the laws of more than two countries are implicated.²¹³

²⁰⁸ Beaumont & Trimmings, *supra* note 199, at 17. See Mennesson, Eur. Ct. H.R. at ¶ 67..

²⁰⁹ Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Eur. Ct. H. R. (2019), <http://hudoc.echr.coe.int/eng?i=003-6380464-8364383>.

²¹⁰ *Id.*

²¹¹ Beaumont & Trimmings, *supra* note 199, at 17.

²¹² Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Eur. Ct. H. R. (2019), <http://hudoc.echr.coe.int/eng?i=003-6380464-8364383>.

²¹³ HCCH Study 2014, *supra* note 11, at 59.

Because legal parentage is traditionally a family law issue left to national law, there is wide variation in the methods and processes of attribution of legal parentage among different countries. These variations include, but are not limited to, who can bring an action to contest legal parentage,²¹⁴ the ways in which children can acquire nationality by birth,²¹⁵ and whether the internal *lex fori* determines legal parentage or if conflicts principles are implicated as well.²¹⁶ This variation becomes all the more difficult in the context of surrogacy, as countries have varying laws for surrogacy on top of the varying laws governing attribution of legal parentage. A 2019 comparative law analysis by the ECtHR found that of forty-three State Parties to the ECHR, surrogacy arrangements were permitted in nine States, tolerated in ten more, and explicitly prohibited in the remaining twenty-four States.²¹⁷ It also found that in thirty-one of those States, including twelve States where surrogacy is prohibited, it is possible for the biological father to establish legal parentage of a child born through surrogacy, and in nineteen of those States, including seven in which surrogacy is prohibited, it is possible for the intending mother to establish maternity to a child born through surrogacy to whom she is not genetically related.²¹⁸ The opinion further notes that there are several different procedures by which parentage may be established or contested, and that multiple procedures may be available within the same State. While this is only a subset of the global variation in legal regimes, it illustrates the variety of, and sometimes-unexpected interaction between, domestic parentage and surrogacy laws.

c. *Public Policy*

Public policy has been invoked to deny recognition and enforcement to surrogacy contracts made in other countries, as well as to deny recognition and enforcement to judgments on parentage made in other countries. Countries can deny recognition to contracts that are manifestly incompatible with their public policy, for example under Rome I for the European Union.²¹⁹ However, unlike the United States Constitution, which has the Full Faith and Credit clause, the EU rules on jurisdiction and judgments²²⁰ allow for courts to invoke public policy to deny recognition of judgments. This version of public policy was used by the French Court of Cassation in refusing to recognize the California judgment on legal parentage in the *Mennesson*

²¹⁴ *Id.* at 19.

²¹⁵ *Id.* at 22 (discussing the difference between the *ius soli* principle, by which children gain nationality automatically by birth within the territory of a State, and the *ius sanguinis* principle, by which children gain nationality by descent automatically through their parents).

²¹⁶ *Id.* at 23.

²¹⁷ Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Eur. Ct. H. R. ¶ 23 (2019), <http://hudoc.echr.coe.int/eng?i=003-6380464-8364383>.

²¹⁸ *Id.*

²¹⁹ See Regulation No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 21, 2008 O.J. (L 177), 6, 15 (EC).

²²⁰ See Regulation No. 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), art. 45, 2012 O.J. (L 351), 1, 15 (EU).

case.²²¹ Countries have also invoked public policy to refuse recognition of certain public documents issued in other countries, such as birth certificates.²²²

This broad use of public policy has the potential to undermine international regulation of parentage and surrogacy arrangements. The traditional language of public policy provisions provides that applicable law can only be refused if its application would be manifestly incompatible with the public policy of the forum.²²³ If this formulation is used, courts could continue to refuse recognition to parentage judgments in surrogacy cases if they find that surrogacy is manifestly incompatible with the public policy of their country. Like any exception to the rules on applicable law or recognition of judgments, this could lead to a lack of the uniformity that international regulation seeks to achieve. However, this language is repeated in many different conventions and international instruments, thus it is likely to appear in any international regulation on parentage and surrogacy, especially since the issues surrounding surrogacy and other family law issues go to the heart of many countries' conceptions of public policy.

V. INTERNATIONAL SOLUTIONS

a. *Need for International Regulation*

There is a desperate need for uniformity in legislation and case law dealing with international surrogacy arrangements, in order to prevent problems such as the commodification of children, exploitation of surrogates, statelessness, and human rights and dignity concerns. Due to the wide variation in national legislation and approaches to surrogacy, an international regulation has the potential to create more uniformity and remedy some of these concerns. For example, if countries expressly regulate how and where intending parents can seek surrogacy arrangements, there will be fewer opportunities for illegal practices to go on under the noses of governments prohibiting surrogacy. Additionally, governments can implement safeguards to ensure that women and children are treated ethically while engaged in surrogacy arrangements. This may reduce the instances of reproductive tourism to countries like India and Ukraine, which allow surrogacy and have been accused of allowing unethical practices to fester within the surrogacy industry.

States have attempted to craft ad hoc solutions to fit specific cases that arise,²²⁴ but such an approach is not useful for setting precedent to be used in other cases. It is clear from cases like *Baby Manji*²²⁵ that ad hoc solutions are not effective in solving the legal problems created by international surrogacy arrangements. In *Baby Manji*, and other cases like it, a solution was created through court orders and emergency

²²¹ Mennesson, Eur. Ct. H.R. at ¶ 27.

²²² For example, the Polish Supreme Administrative Court recently adopted a resolution stating that it is not possible to transcribe a foreign birth certificate with two same-sex parents into the birth register, on grounds of public policy. II OPS 1/19 of December 2, 2019, <http://orzeczenia.nsa.gov.pl/doc/0CB4DBF3D4>.

²²³ See Regulation No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 21, 2008 O.J. (L 177), 6, 15 (EC).

²²⁴ For example, by issuing emergency entry documents for children, compelling administrative authorities to recognize birth certificates from other countries that are against public policy, and judicial solutions to solve problems specific to the facts of the case at hand. Ergas, *supra* note 2, at 118.

²²⁵ *Baby Manji Yamada v. Union of India* (2008) 13 SCC 518 (India).

authorization, which would be of no use as precedent for similar cases arising later. In response to the inadequacy of ad hoc solutions, states have turned to national legislation, but the wide variation in approaches has led to problems in cross-border surrogacy cases. Because of the failures of the current system based on ad hoc and national solutions, international coordination is the only viable resolution to the “individual dramas and diplomatic crises” that have plagued international surrogacy arrangements.²²⁶

Although currently there is no international regulation dealing with surrogacy, the HCCH is currently working to develop an instrument to regularize the private international law rules on parentage and international surrogacy arrangements.²²⁷

b. *Drafting an International Regulation*

i. *Non-Normative Approach*

The first step in establishing a set of private international law rules governing surrogacy is to take a non-normative approach so that any instrument can maximize its coverage, given the wide variety of domestic regulatory approaches to surrogacy arrangements. While there is clearly a value in having a consensus about norms and standards when it comes to international surrogacy, especially if that consensus is handed down by a reputable international organization, such as the HCCH, an international regulation should not take a normative approach to regulating international surrogacy arrangements just to allow countries that ban surrogacy to be a part of the regulation scheme.²²⁸

ii. *Current Drafts: Convention and Protocol*

The HCCH Parentage / Surrogacy project aims to unify private international law rules surrounding parentage, with a special focus on problems arising from surrogacy, and to create a cooperation framework so that legal matters can be resolved *ex ante* (i.e., before conception).²²⁹ Thus far, the Experts’ Group on the Parentage / Surrogacy project have discussed a bipartite framework involving both a general private international law instrument on legal parentage (“the Convention”) and a separate protocol with private international law rules on legal parentage established as a result of an international surrogacy arrangement (“the Protocol”).²³⁰ This would

²²⁶ Ergas, *supra* note 2, at 118.

²²⁷ See Hague Conference on Private International Law, *Report of the Experts’ Group on the Parentage/Surrogacy Project*, Prel. Doc. No. 2 of October 2020, <https://assets.hcch.net/docs/a6aa2fd2-5acf-44fa-8088-514e93ac251d.pdf>.

²²⁸ Seema Mohapatra, *Adopting an International Convention on Surrogacy – A Lesson from Intercountry Adoption*, 13 LOY. U. CHI. INT’L L REV. 25, 26 (2015). France, for example, is unwilling to change its domestic prohibition on surrogacy, or be party to an instrument that would require it to accept and normalize surrogacy. See Hague Conference on Private International Law, *The Parentage / Surrogacy Project: an Updating Note*, Prel. Doc. No. 3A of February 2015, Annex I, <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>.

²²⁹ Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project*, Prel. Doc. No. 3B of March 2014, 20, <https://assets.hcch.net/docs/6403eddb-3b47-4680-ba4a-3fe3e11c0557.pdf>.

²³⁰ Hague Conference on Private International Law, *Report of the Experts’ Group on the Parentage / Surrogacy*

allow for the general problems surrounding parentage to be addressed, with the more specific instance of parentage issues relating to international surrogacy arrangements to be addressed in a separate instrument. Although both instruments would likely be non-normative, this would allow states that do not choose to recognize surrogacy arrangements to cooperate in the recognition of parentage and filiation by signing on to the Convention only.²³¹ While both instruments are still in the early stages, the Experts' Group has considered applicable law rules for the establishment of legal parentage²³² and provisions on legal parentage established by public document²³³ for the Convention and has also discussed possible safeguards or minimum standards to be included in the Protocol, and whether they would be conditions for recognition or general obligations.²³⁴ As of 2021, the Experts' Group is still considering the feasibility of this bipartite framework.²³⁵

iii. *Using the Adoption Convention as a Model*

Some scholars have urged the HCCH to use the Adoption Convention as a model for a convention on parentage and international surrogacy arrangements.²³⁶ However, while parts of the approach the HCCH has taken thus far seem to be somewhat similar, given the focus on cooperation and discussion of minimum standards, the Adoption Convention is useful only as a reference point due to key differences between adoption and surrogacy. Notably, states involved in the HCCH Parentage / Surrogacy project have cautioned against drawing too heavily from the Adoption Convention.²³⁷

Project, Prel. Doc. No. 2A of October 2020, Annex I, <https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf>.

²³¹ In the past, the Group has favored an approach that would allow states to choose to become a party to both instruments or only one of them. *See* Hague Conference on Private International Law, *Report of the Experts' Group on the Parentage / Surrogacy Project*, Prel. Doc. No. 2 of November 2019, 6, <https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf>.

²³² In particular, the Group has discussed the following mechanisms: "the same applicable law rule regardless of the method and timing of establishment of legal parentage; the use of the State of birth as the main objective connecting factor; in cases where neither of the parents are habitually resident in the State of birth, an alternative connecting factor which would lead to the application of the law of the habitual residence of the person who gave birth; and by way of an exception, the application of the law of the State of habitual residence of the child, if legal parentage is established by an act or by a judgment after the child's birth, and if it would benefit the child." *Id.*

²³³ Discussions included "how such a Chapter would complement uniform applicable law rules and a rule of recognition of judgments on legal parentage provided for in the Convention and whether the compliance with such rules would need to be verified in every case or only in case of doubt; whether the legal parentage recorded in a public document issued in the State of origin should be given the same effect cross-border or whether, for the purpose of the Convention, the legal parentage should be presumed to have been validly established until the contrary is established; and how an optional certificate on legal parentage could facilitate the acceptance of the legal parentage recorded in a public document." *Id.*

²³⁴ *Id.*

²³⁵ Hague Conference on Private International Law, *Report of the Experts' Group on the Parentage / Surrogacy Project*, Prel. Doc. No. 2B of February 2021, <https://assets.hcch.net/docs/ffa7be80-a3a7-49ca-b6c5-b2abb04c863f.pdf>.

²³⁶ Mohapatra, *supra* note 229, at 27.

²³⁷ Prel. Doc. No. 3B of March 2014, *supra* note 230 at 20 ("As Canada expressed in relation to intercountry adoption and international surrogacy, whilst there are undoubtedly some lessons which can be drawn from the 1993 Convention, 'the two situations [...] present important differences that

There are several reasons these states have cautioned against this approach. First, surrogacy is a contractual arrangement that begins before the birth of the child.²³⁸ This characteristic of surrogacy makes it difficult to fit surrogacy arrangements within the adoption framework, because a crucial requirement of the Adoption Convention is subsidiarity.²³⁹ Subsidiarity requires adoption authorities to ensure that there is no suitable placement for the child within the country of origin after birth, before allowing inter-country adoption to take place. Because this subsidiarity requirement cannot be fulfilled, inter-country adoption is not a solution to parentage issues that arise due to international surrogacy arrangements.

Second, the possibility and often existence of a biological link between intending parents and the child born via surrogacy triggers additional rights, such as those enumerated in the ECHR. Because of the lack of biological link between adoptive parents and children, there are also additional requirements for parental fitness that are not imposed on biological or natural parents.²⁴⁰ These requirements of parental fitness are a major way that adoption is regulated in both national and international regulation.²⁴¹

However, as a broad framework, the Adoption Convention can be useful as a guideline for subjects that a convention on international surrogacy arrangements should address. For example, the organization in the Adoption Convention of central authorities and accredited bodies to oversee the adoption process within each member state could be useful in application to international surrogacy arrangements.²⁴² Also, the Adoption Convention focuses on cooperation between states, which will be a focus of the potential Convention on parentage and the potential Protocol on international surrogacy arrangements. The future Convention could also include the formulation of public policy in Article 24 of the Adoption Convention, which qualifies the traditional language by requiring consideration of the best interests of the child.²⁴³ Additionally, the Protocol can deal with illicit practices in surrogacy, as the toolkit under development does for illicit practices in inter-country adoption, and could be a valuable tool for countries seeking to regularize the surrogacy process and can help to ensure that certain standards are uniformly met.²⁴⁴

c. *Difficulties of Adopting an International Regulation*

Many scholars doubt the feasibility of an international regulation on cross-border surrogacy arrangements.²⁴⁵ A major challenge to the acceptance of an

may make the transfer of the framework provided by the 1993 Convention [...] to international surrogacy undesirable and / or not feasible without further review and necessary adaptation.”).

²³⁸ *Id.* at 38.

²³⁹ Hague Adoption Convention, *supra* note 30, at art. 4(b).

²⁴⁰ Mohapatra, *supra* note 229, at 40, 54 (Noting that the parental vetting requirement that applies to the adoption context should not apply in the surrogacy context).

²⁴¹ *Id.* at 39.

²⁴² See Hague Adoption Convention, *supra* note 30 at arts. 6-13.

²⁴³ *Id.* at art. 24 (“The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.”).

²⁴⁴ See Report of the Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption, *supra* note 33.

²⁴⁵ See Mohapatra, *supra* note 229, at 52; Martin Engel, *Cross-Border Surrogacy: Time for a Convention?*, Fifth Conference of the Commission on European Family Law, 15 (2013).

international regulation is the lack of consensus on both legal and ethical issues surrounding surrogacy,²⁴⁶ and the wide variety of legal approaches to regulate, permit, and prohibit it. Especially for those jurisdictions in which surrogacy is prohibited as against public policy, it seems unlikely that countries would be willing to sacrifice such fundamental principles of family law to international regulation for the sake of legal certainty.²⁴⁷ However, simply because a subject is controversial does not mean that it cannot be regulated by an international instrument. For example, intercountry adoption was similarly controversial when the Adoption Convention was passed. The terms of the Convention took many decades to negotiate, but it has now been widely and successfully adopted.²⁴⁸

The HCCH noted that surrogacy raises difficult questions of public policy and that it will be challenging to strike an appropriate balance.²⁴⁹ Parentage and filiation are key elements of a country's regulation of its family law and citizenship, and a convention would necessarily require recognition of foreign judgments and/or public documents on parentage. Some countries may be unwilling to cede such important public policy considerations to international regulation.

These feasibility concerns may be heightened in federal nations like the United States, in which laws on parentage and surrogacy are state regulations, rather than national ones. The impact of the United States entering into such a convention on the states is yet to be seen, but the United States is a party to the Adoption Convention. This indicates that the United States is not unwilling to enter into conventions that may bind the states on matters of family law, even though family law is traditionally reserved to the states.²⁵⁰

Many of the HCCH preliminary documents on the parentage/surrogacy project recognize the need to consider the feasibility of such a convention.²⁵¹ Even so, the project continues going forward, indicating that the Permanent Bureau thinks that such an instrument is feasible despite the difficulties of unifying national regulations. The HCCH has also noted that although this area is fraught with challenges, the effort to establish uniform private international law rules governing parentage and surrogacy should be seen against "the imperative of protecting the vulnerable persons concerned," especially the children whose fundamental rights and interests are implicated.²⁵²

The current legal landscape surrounding international surrogacy arrangements demonstrates a dire need for international regulation to lend legal certainty to such agreements, which deeply and personally affect the families involved. While there are hurdles to adoption of an international regulation, a non-normative approach to

²⁴⁶ Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L. J.* 665, 686 (2012).

²⁴⁷ Engel, *supra* note 246, at 16.

²⁴⁸ Mohapatra, *supra* note 229, at 26.

²⁴⁹ Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, Prel. Doc. No. 11 of March 2011, 24, <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf>.

²⁵⁰ See discussion *supra* Section II.A.i.

²⁵¹ See, e.g., Prel. Doc. No. 2 of October 2020, *supra* note 228; Prel. Doc. No. 3A of February 2015, *supra* note 229; Hague Conference on Private International Law, Report of the Experts' Group on the Parentage / Surrogacy Project, Prel. Doc. 2 of November 2019, <https://assets.hcch.net/docs/d435cffe-65ce-4047-b603-ff63ed20591c.pdf>.

²⁵² Prel. Doc. No. 11 of March 2011, *supra* note 250 at 25.

surrogacy that combines a Convention on parentage and a Protocol on international surrogacy arrangements has the potential to minimize, if not eliminate, many of the current legal and ethical concerns surrounding international surrogacy arrangements. The HCCH Parentage / Surrogacy project presents a viable option for unifying disparate national regulation schemes and providing the uniformity that is necessary in this area of law.