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Adopting an International Convention on Surrogacy—A Lesson from Inter-country Adoption

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ADOPTING AN INTERNATIONAL CONVENTION ON SURROGACY – A LESSON FROM INTERCOUNTRY ADOPTION

Seema Mohapatra*

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Introduction

Stories of scandals, stranded babies and parents, and stateless babies are becoming more and more common in the world of international surrogacy.¹ Surrogacy is having an identity crisis at the moment. There appears to have been a shift in public opinion about commercial surrogacy in the United States, and much of the world was already skeptical about this concept. In the United States, the entire concept of international surrogacy came into greater public attention in 2007 on the Oprah Winfrey Show when the Indian surrogacy example was touted as a “win-win” for both intended parents and Indian surrogates.² Just a few years

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¹ In this article, I use the term surrogacy to describe the arrangement whereby an intended parents or parents use a paid surrogate to carry a child for them via in vitro fertilization of their own gametes or purchased gametes. Some have argued against the term “surrogacy,” arguing that the gestational carrier, or surrogate, is a true mother and not a surrogate at all. Bioethicist Francois Baylis uses the term transnational contract pregnancy, following early researchers who used that term. See Baylis, Françoise, *Transnational Commercial Contract Pregnancy in India*, INT’L INST. OF SOC. STUDIES IN THE HAGUE (Nov. 22, 2013, 7:04PM), http://www.iss.nl/fileadmin/ASSETS/iss/Guests/Adoption___surrogacy/Publications/Francoise_Baylis_Pub.pdf. (last visited Jan. 5, 2016). In this article and in previous works, I use the most commonly used phrasing “surrogacy” and thus I use it here. However, I have argued elsewhere for the need to improve conditions and rights of surrogates, and thus agree with the concern of those like Baylis who worry about the dignity of the surrogate. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412, 442 (2012).

² Ling, Lisa, *Journey to Parenthood: Wombs for Rent*, OPRAH (Sept. 15, 2015, 7:20 PM), <http://www.oprah.com/world/Wombs-for-Rent/2>.

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later, the realities of shady ethics, tabloid-worthy messes, and baby-selling, were exposed by countless newspaper articles, documentaries, and exposés such as the “Outsourcing Embryos” feature on HBO’s *Vice*.³ Although it is rarely a good idea to overreact with a legal solution or restriction to every sensational new story, a plethora of recent cases involving surrogacy demonstrate the need to protect the parties in surrogacy, particularly the child borne via surrogacy. Self regulation by surrogacy agencies is not realistic and not happening. Understandably, there is doubt about how effective an international convention on surrogacy would be, especially if many countries do not agree to be signatories. However, there is value in having a consensus about norms and standards in international surrogacy, especially if that comes from an esteemed organization such as the Hague Convention. Additionally, an international convention on surrogacy does not have to and should not have a normative position on surrogacy. Thus, countries that ban commercial surrogacy can still be part of such a convention. The convention could serve as notice to intended parents about which countries have a strong anti-surrogacy stance. I see a problem with countries that claim to be anti-surrogacy turning a blind eye to its residents leaving their border to seek international surrogacy arrangements. The tacit message seems to be “don’t exploit our own women, feel free to exploit poor surrogates elsewhere. . .” Countries that “ban” commercial surrogacy need to have a plan of action when (not if) residents ignore their ban and seek surrogacy arrangements abroad. Such plans could be delineated in an international convention. This article is attempting to broaden how regulation is defined. There are other international conventions that seek to exist to define international norms. I suggest that it is time to consider the same for surrogacy. Coming to international consensus is an arduous and time-consuming process full of conflict and disagreement; for example, the convention on intercountry adoption discussed later took over fifty years to negotiate. The fatalistic tone in much commentary I have read and heard that “surrogacy is too controversial” ignores the reality that many subjects of international conventions are similarly divisive. Calling for an international convention does not mean that domestic law is perfect as is—in fact, much domestic law on surrogacy should be strengthened and made clearer. However, it is not an either-or proposition.

This article attempts to compare the effort to come up with an international convention on surrogacy to similar efforts that took place decades ago with intercountry adoption. Part I of this Article summarizes some recent surrogacy cases and dilemmas to emphasize the need for international action and provides an overview of the different ways surrogacy is regulated throughout the world to show the need for regulation. Part II of this Article attempts to discuss the similarities and differences between adoption and surrogacy and summarizes the critiques of inter-country adoption in general. The main point of this section is to show that inter-country adoption is controversial as well, yet has been governed by an international convention. Thus, surrogacy could similarly be governed by an international convention. Finally, Part III proposes what elements an Interna-

³ *Vice: Lines in the Sand and Outsourcing Embryos* (HBO television broadcast March 27, 2015.)

tional Convention on ISAs should include. This Article proposes that surrogacy should be regulated similarly to adoption and outlines a potential surrogacy convention.

I. International Surrogacy: Definitions and Dilemmas

This section describes several recent scenarios that have arisen in international commercial surrogacy and defines the legal landscape in this arena. This background is helpful for understanding why it is imperative to have an international voice on commercial surrogacy.

A. Recent Controversies in International Surrogacy

Unfortunately, it seems that every month there is a new international surrogacy mess unfolding. In this section, I describe some recent cases that help demonstrate how domestic laws are not serving the needs of intended parents, surrogates, or the babies borne of a surrogacy arrangement.

Baby Gammy

In one of the most notorious surrogacy cases in recent years, an Australian couple was accused of abandoning their baby son, Baby Gammy, who has Down syndrome, with his Thai surrogate mother and returning home with his twin sister, who did not have Down syndrome. The conflict has resulted in a change in the surrogacy laws in Thailand and sparked an international debate about surrogacy. Pattaramon Chanbua is a Thai woman who was hired by an Australian couple, the Farnells, to be a surrogate for approximately \$16,000.⁴ Ms. Chanbua became pregnant with twins, and gave birth in December 2013.⁵ During her pregnancy, it was discovered that one of the twins has Down syndrome.⁶ The Farnells abandoned Gammy, their son that had Down syndrome, and took his healthy twin sister Pipah with them to Australia.⁷ Ms. Chanbua decided to raise Baby Gammy as her own, along with her other two children, even though she is not genetically related to Baby Gammy.⁸

⁴ *Thai Surrogate Mother of a Baby with Down Syndrome Abandoned by Australian Parents Says She Cannot Afford Baby Gammy's Medical Treatment*, ABC NEWS (Aug. 1, 2014 7:00 PM), <http://www.abc.net.au/news/2014-08-01/mother-of-thai-baby-abandoned-by-surrogate-parents-struggles-to/5642478>.

⁵ *Id.*

⁶ *Id.*

⁷ Samantha Hawley, *Baby Gammy, One-Year-Old at Centre of Thai Surrogacy Scandal, Granted Australian Citizenship*, ABC NEWS (Jan. 19, 2015 9:22 PM), <http://www.abc.net.au/news/2015-01-20/baby-gammy-granted-australian-citizenship/6026600>.

⁸ *Thai Surrogate Mother of a Baby with Down Syndrome Abandoned by Australian Parents Says She Cannot Afford Baby Gammy's Medical Treatment*, *supra* note 4. (Along with Down syndrome, Gammy has a hole in his heart, which will require expensive surgery that Ms. Chanbua and her family would not be able to afford.) In January of 2015, Gammy, who turned one year old on December 23, 2014, was granted Australian citizenship after Ms. Chanbua applied for it. Hawley, *supra* note 7.

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The Baby Gammy case has drawn attention to the lack of regulations in the international surrogacy process.⁹ The intended Australian parents have participated in television interviews and stated that they initially sought a refund for the surrogacy services when they were told one of the twins had Down syndrome.¹⁰ Statements like these are problematic and potentially dangerous. Assisted reproductive technologies (“ART”) have allowed people who cannot “naturally” have children to become parents through in vitro fertilization and the use of surrogates who are implanted with an embryo of the intended parents’ choosing. Some intended parents use the process of pre-implantation genetic diagnosis (“PGD”) to “screen” embryos and choose to implant those without genetic anomalies. Such a practice, although controversial, is routine in ART. In the Baby Gammy case, it is evident that PGD was not used, yet somehow, the parents had an expectation of a perfect child and refused parentage of their perceived “imperfect” child. The Farnells have stated in interviews that if they had learned earlier in the pregnancy about the child having the disability, they would have asked that the pregnancy be aborted.¹¹ Regardless of the moral questions involved, one issue I see is in protecting surrogates in international surrogacy relationships. Here, Chanbua was willing to raise Baby Gammy, but in many past surrogacy dilemmas such as the infamous Baby Manji case in India, surrogates often are not willing to raise a genetically unrelated child.¹² Chanbua took to the media to get attention to her plight.

In most cases, a surrogate has agreed to carry the child for financial reasons only. An additional child is more of a financial burden, especially one with special needs. Further, there is no biological relationship, and Chanbua never anticipated having to raise this child. The surrogate is in a vulnerable position, and faces not being paid and being burdened with an additional child, or facing the guilt of abandoning a child she carried for nine months. An international convention should make clear that a contract for surrogacy might not condition payment on the birth of a healthy child. Even if a surrogate agrees to an abortion, she should still receive full payment. In too many cases, surrogates are held responsible for outcomes that have nothing to do with them. Without international protection, they are often in a vulnerable position.

Further, after the initial scandal of abandoning Gammy, it came to light that Mr. Farnell had been previously convicted and served time in prison for over twenty child sex offenses against girls as young as five years old.¹³ This led to a

⁹ *Thai Surrogate Mother of a Baby with Down Syndrome Abandoned by Australian Parents Says She Cannot Afford Baby Gammy's Medical Treatment*, *supra* note 4.

¹⁰ Farrel, Paul, *Baby Gammy, Born into Thai Surrogacy Scandal, Granted Australian Citizenship*, THE GUARDIAN (Jan. 15, 2015 at 5:32 PM), <http://www.theguardian.com/australia-news/2015/jan/20/baby-gammy-born-into-thai-surrogacy-scandal-granted-australian-citizenship>.

¹¹ *Id.* (“It was late into the pregnancy that we learned the boy had Down [Syndrome],” David Farnell said. “They sent us the reports but they didn’t do the checks early enough. If it would have been safe for that embryo to be terminated, we probably would have terminated it, because he has a handicap and this is a sad thing. And it would be difficult – not impossible, but difficult.”).

¹² Mohapatra, *supra* note 1, at 419.

¹³ *Id.*

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public outcry that there should be some form of parental fitness requirement in surrogacy, similar to that in abortion. Yet, people who should not be parents for moral, financial, personal, and other reasons become parents every day. Just because someone is unable to have a child through traditional means does not mean they should be subject to policing. It is clear that Mr. Farnell's troubled history regarding child sex abuse is disturbing. However, it would be more harmful to discriminate against the hundreds and thousands of intended parents by setting forth a parental fitness test for surrogacy. This issue will be addressed in more detail in the proposed convention section of this Article. It is just one example of why every problem in international surrogacy does not need a regulatory fix. Countless examples exist of parents with predatory sexual behavior who gave birth to children "the natural way." The purpose of criminal law and family law is to protect children from unfit parents.

Thai Trafficking Concerns

Another disturbing Thai scandal that was publicized soon after the the Baby Gammy case was that of an alleged "baby factory" that has been created by a twenty-four year old Japanese businessman, who is the biological father of sixteen surrogate children and counting.¹⁴ In Bangkok, police raided a home to find nine babies, each fathered by Mitsutoki Shigeta.¹⁵ Though Shigeta claims his motives are benign, the babies were found in unfurnished rooms, which were not habitable for children.¹⁶ According to investigators, both human trafficking and child exploitation charges are being explored as of the end of 2015.¹⁷ Shigeta is said to have requested ten to fifteen babies per year from the fertility clinic, from now until the day he dies.¹⁸ Shigeta claims that he simply wants a large family and he has the means to support it.¹⁹ The Shigeta situation seems to be a case of a fertility clinic that is more interested in profit than the well being of the children borne via surrogacy. This type of situation seems to be one that could be avoided with the oversight of governmental entities in countries that allow commercial surrogacy.

¹⁴ Kevin Rawlinson, *Interpol Investigates 'Baby Factory' as Man Fathers 16 Surrogate Children*, THE GUARDIAN (Aug. 23, 2014), <http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (discussing a conversation with the founder of the New Life clinic, a multinational fertility clinic).

¹⁹ *Id.* (According to Shigeta's attorney, "These are legal babies, they all have birth certificates. There are assets purchased under these babies' names. There are savings accounts for these babies, and investments. If he were to sell these babies, why would he give them these benefits?").

Families in Transition

In light of these scandals, the Thai government outlawed commercial surrogacy in Thailand, and banned surrogacy for foreigners in its entirety.²⁰ The ban was supposed to exempt families who already had babies on the way via commercial surrogacy. Unfortunately, some families have been caught in the middle. Manuel Santos and Gordon Alan Lake, a couple from New Jersey, are fighting a legal surrogacy battle over their six-month old daughter, Carmen, who was born to a surrogate in Thailand.²¹ The couple also has a two-year old son, Alvaro, who was born to a surrogate in India.²² The legal issue concerning Carmen arose because the Thai surrogate backed out of her contract, and under current Thai law, Carmen belongs to the surrogate rather than to the couple.²³ The change in the Thai law exempts Lake and Santos, who were already in the midst of their surrogacy arrangement, but their legal issue exists because the surrogate changed her mind.²⁴ Under the parties' original agreement, the surrogate signed a consent form allowing Lake to put his name on the birth certificate, but the surrogate did not attend the last meeting at the U.S. Embassy to sign the proper paperwork.²⁵ Thus, even though Lake is the biological father and the parties' used a donor egg to facilitate the pregnancy, the family is still facing legal issues.²⁶ The couple's lawyers estimate that their chances of winning the legal battle against the surrogate are less than 10 percent.²⁷ This low estimate was given because Lake and Santos are a same-sex couple, which is not a legal union recognized under Thai law.²⁸ The United States State Department confirmed that the couple is subject to Thai law, and provided that "U.S. citizens in Thailand are subject to Thailand law. Pursuant to U.S. law, the Department cannot issue passports to minor children without the consent of the legal parent/s or guardian/s."²⁹ This again demonstrates the need for an international convention on surrogacy that addresses parentage and citizenship issues. The surrogate should not be named as a parent on the birth certificate when she is carrying the baby for the purposes of fulfilling

²⁰ Nelson Groom, "We're banning foreign couples from seeking surrogacy in our country': Thai parliament passes law banning 'rent-a-womb' tourism in wake of Baby Gammy saga," DAILYMAIL.COM (Feb. 20, 2015, 11:36 AM), <http://www.dailymail.co.uk/news/article-2961448/Thai-parliament-bans-surrogacy-wake-Aussie-baby-Gammy-saga.html>.

²¹ Michael Sullivan, *A Thai Surrogacy Case, with a 6-Month-Old Girl Caught in the Middle*, NAT'L. PUBLIC RADIO (July 15, 2015, 2:48 PM), <http://www.npr.org/sections/parallels/2015/07/15/423188769/a-thai-surrogacy-case-with-a-6-month-old-girl-caught-in-the-middle>.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (Through an interpreter, the surrogate outlined some of her reasoning for changing her mind: "First of all, they are not natural parents in Thai society. . . They are same-sex, not like male and female that can take care of babies. Second thing is, when I tried to contact them to visit the baby, they didn't want to talk to me. And the third thing is, I was begging them to see the baby but they didn't allow me to see her. They treated me very badly and said I have no right to see the baby.")

²⁵ *Id.*

²⁶ Sullivan, *supra* note 21.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

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a surrogacy arrangement. In countries that sanction commercial surrogacy, the intended parents should be the parents on the birth certificate, not the surrogate.

Mennesson Case

Another recent case that demonstrates the importance of citizenship and parentage was the 2014 European Court of Human Rights (ECHR) ruling that France cannot refuse to grant legal parent-child recognition for children born to surrogates.³⁰ Two French families, the Mennessons and the Labassees, had children born to surrogates in the United States, and not France, where surrogacy is illegal.³¹ The Mennessons' twins, Valentina and Fiorella were born via surrogacy in California in 2000, and Juliette Labassee was born in Minnesota in 2001.³² All three children are American citizens, but the appellate court in France originally refused to grant citizenship status to the children.³³ The families appealed, and the ECHR ruled that this infringed on the children's respect to privacy rights, while still recognizing that France has a right to make surrogacy illegal.³⁴ The ECHR found that it "undermined the children's identity within French society," and took issue that the children's inheritance rights were not the same as French citizens.³⁵ The lawyer in the case estimated that at least 2,000 other children are in the same situation.³⁶ This ruling has two effects on the French stance on surrogacy. First, it prevents France from denying citizenship to children borne of surrogacy to French parents. Second, it allows France take a moral stance against commercial surrogacy, while effectively ignoring when its citizens go abroad and utilize commercial surrogacy. An international convention would force France and other countries to be more forthright about their position on surrogacy and would alert French citizens to what the effects of circumventing the French law would be.

Swiss Ruling

Further evidence demonstrating the problem of competing domestic laws on surrogacy and the need for an international convention is a recent case of two men from Switzerland who travelled to California in 2010 to obtain surrogacy services. The surrogacy agreement resulted in a child who is now four years

³⁰ *European Human Rights Court Orders France to Recognise Surrogate-Mother Children*, RADIO FRANCE INTERNATIONALE (June 26, 2014), <http://www.english.rfi.fr/europe/20140626-european-human-rights-court-orders-france-recognise-surrogate-mother-children>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *European Human Rights Court Orders France to Recognise Surrogate-Mother Children*, *supra* note 30.

³⁵ *Id.*

³⁶ *Id.*

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old.³⁷ A California court ruled in 2011 that both of the men's names could be on the child's birth certificate. However, the Swiss Supreme Court recently ruled that the child may not have two fathers.³⁸ The Court held that since the couple had circumvented Switzerland's surrogacy ban by obtaining surrogacy services in the United States, the United States birth certificate was not valid.³⁹ If the men had been aware of this situation, they may have decided an alternate route to parenthood. If Switzerland, as an anti-surrogacy country, was party to a neutral, international surrogacy convention, these men would have been aware that the birth certificate obtained where surrogacy is legal may not be upheld in their home country.

Each of these scenarios highlight the need for international regulation of surrogacy. The Hague Conference has indicated its desire and willingness to propose an international convention about cross border surrogacy, similar to its convention on intercountry adoption. In this Article, I introduce ways that this can be accomplished without impinging on the morals of those countries that are staunchly anti-surrogacy.

B. Legal Landscape

This section will describe from a macro level the wide variety of approaches to regulating surrogacy, and is meant to serve as an introduction to the law of surrogacy. Obviously, each country's specific surrogacy situation can be the topic of an entire Article. However, that is not the purpose of this paper. This brief overview should inform the reader about what major stumbling blocks are present when negotiating an international document. The majority of this Article focuses on commercial gestational surrogacy, not altruistic surrogacy. In an altruistic surrogacy, a surrogate agrees to carry a child that may or may not be genetically related to her to "help" other individuals.⁴⁰ In such surrogacy arrangements, there is no payment given to the surrogate. In contrast, commercial gestational surrogacy, the most common method of surrogacy in the world today, is describing a contractual relationship between the surrogate and the intended parents, where the surrogate is paid to carry the child with whom she has no genetic relationship.⁴¹ In commercial gestational surrogacy arrangements, women are either employed through an agency or work independently. The majority of international surrogacy is transacted through agencies, and surrogates contract with these agencies. Given some of the questionable practices of certain agencies, as well as the low economic status of many surrogates involved, this surrogacy is the most controversial and is banned in most of Asia, Europe, and

³⁷ *Swiss Supreme Court Rules Boy Born to Surrogate Mother in US Can't Have 2 Legal Fathers*, ASSOCIATED PRESS (May 21, 2015, 12:38 PM), <http://www.dailyjournal.net/view/story/80168b3db1b24d84878b2428c0572eb3/EU—Switzerland-Two-Fathers/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ France Winddance Twine, *OUTSOURCING THE WOMB: RACE, CLASS, AND GESTATIONAL SURROGACY IN A GLOBAL MARKET* 13 (Routledge, 2d ed. 2015).

⁴¹ *Id.* at 13-14.

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the United States.⁴² With traditional surrogacy, in contrast to gestational surrogacy, the woman is genetically related to the child.⁴³ This type of surrogacy may exist with or without a commercial transaction, as it can involve a family member providing surrogacy services altruistically, or a third party donating her eggs and selling her services in return for a fee.⁴⁴

The legal confusion surrounding international surrogacy arises from the fact that there is no international regulation or agreement about either the surrogacy process itself, or about the national status of a child born to a surrogate in a different country than that of the intended parents.⁴⁵ There are many reasons why people seek international surrogacy arrangements.⁴⁶ First, domestic surrogacy may be prohibited by law or a surrogacy contract may not be enforceable in one's home country.⁴⁷ Second, the cost for domestic surrogacy could be much higher than a foreign surrogacy arrangement.⁴⁸ Third, a person or couple seeking to enter into a surrogacy arrangement could prefer the experience of a foreign surrogacy system, due to perceived better practices.⁴⁹

Globally, there is no consensus about international surrogacy. Some countries, including Switzerland, Germany, Spain, France, Greece, and Norway, ban commercial surrogacy.⁵⁰ Others, like India and Ukraine, have actively tried to be seen as a commercial surrogacy destination.⁵¹ Currently, sixteen countries ban all forms of surrogacy.⁵² Ten countries allow non-commercial altruistic surrogacy.⁵³ Eight countries explicitly allow for both types of surrogacy.⁵⁴

⁴² *Id.* at 14.

⁴³ *Id.*

⁴⁴ *Id.* (Under traditional surrogacy, the surrogate is the recognized legal mother of the child in most states in the United States until she relinquishes her rights by giving the child up for adoption. Under all three types of surrogacy, the person or couple that commissions the pregnancy is known as the intended parent(s), and usually is the party listed on the birth certificate).

⁴⁵ Charles P. Kindegran & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 532 (2013).

⁴⁶ Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1266 (2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 523 (2010).

⁵¹ Mohapatra, *supra* note 1, at 431-37, 441-48.

⁵² Twine, *supra* note 40, at 4. ("Austria, Belgium, Bulgaria, Canada (Quebec), France, Germany, Italy, Iceland, Norway, Sweden, Switzerland, Saudi Arabia, Turkey, Pakistan, China, Japan, and United States: Arizona, Indiana, Michigan, North Dakota").

⁵³ *Id.* at 5. ("Australia, Canada, Denmark, Greece, Hungary, Israel, the Netherlands, Spain, South Africa, United Kingdom, United States: New York, New Jersey, New Mexico, Nebraska, Virginia, Oregon, Washington").

⁵⁴ *Id.* ("Armenia, Belarus, Cyprus, Georgia, Mexico, Russian Federation, South Africa, Ukraine, United States: California, Florida, Illinois, Massachusetts, Texas, Vermont, Arkansas").

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“Unlike either of these approaches, the United States has no national stance on surrogacy.”⁵⁵ In fact, there are no federal laws or regulations related to surrogacy in the U.S.⁵⁶ Instead, each of the fifty states has its own approach to surrogacy—with some states embracing commercial surrogacy and others banning all types of surrogacy.⁵⁷ Currently, seventeen states permit surrogacy by law, but there are variations from state to state.⁵⁸ In twenty-one states, there are no laws applicable to surrogacy.⁵⁹ In five states, surrogacy contracts are void and cannot be enforced.⁶⁰ California currently has the most permissive law in the United States regarding surrogacy contracts.⁶¹ Because surrogacy remains a controversial issue, many states may seek to find a middle ground.⁶²

In both the United Kingdom and in Canada, commercial surrogacy is prohibited, and surrogacy agreements are unenforceable.⁶³ The rules about legal parenthood vary depending on the type of surrogacy involved.⁶⁴ Commercial surrogacy is also banned in Australia; however, some Australian states have lifted their ban on altruistic surrogacy.⁶⁵ Further, laws in Canada, France, Germany, and Japan make commercial surrogacy contracts illegal or unenforceable.⁶⁶ However other countries, such as India and Ukraine, have opened the door and become international centers for commercial surrogacy.⁶⁷

India, in particular, has become a hotspot for people looking for surrogates.⁶⁸ Although historically, the law in India has been largely unclear and mostly accepting of commercial surrogacy, in 2013 the Indian government began to update its surrogacy regulations.⁶⁹ These proposed regulations include restrictions such

⁵⁵ Seema Mohapatra, *States of Confusion: Regulation of Surrogacy in the United States* in COM-MODIFICATION OF THE HUMAN BODY: A CANNIBAL MARKET (Eds. J.D. Rainhorn & S. El Boudamoussi) Editions de la Fondation Maison des Sciences de l'Homme, Paris, 2015.

⁵⁶ Yehezkel Margalit, *In Defense Of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM & MARY J. WOMEN & L. 423, 424 (Winter 2014).

⁵⁷ Patton, *supra* note 50, at 513-17.

⁵⁸ Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, NEW YORK TIMES (Sept. 17, 2014), <http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.* (comparing the Illinois surrogacy law that requires “medical and psychological screenings for all parties before a contract is signed and stipulates that surrogates be at least 21, have given birth at least once before and be represented by an independent lawyer, paid for by the intended parents.”).

⁶³ Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240, 244 (2013).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Kindegren & White, *supra* note 45, at 527.

⁶⁷ *Id.*

⁶⁸ Trisha A. Wolf, *Why Japan Should Legalize Surrogacy*, 23 PAC. RIM L. & POL’Y J. 461, 478 (2014).

⁶⁹ *Id.* at 479-81.

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as a cap on the number of times a woman can act as a surrogate, the age requirements for the surrogate, and mandatory HIV testing.⁷⁰

C. Legal Condrum

There is no clear accord about or whether to regulate surrogacy. I join those who believe that international regulation of this “truly international problem[],” is needed.⁷¹ Although there are some that argue that this is really more of a family or citizenship law problem,⁷² the reality is that some form of international acknowledgement is needed. There is a warranted concern that an increase in the regulation in the surrogacy context will result in exclusion and discrimination against some people (whether LGBT, single, old, or a whole host of other perceived parental fitness exclusions). If international regulation was designed without protections against such discrimination, many who seek surrogacy arrangements look for an alternative outside of the regulatory scheme, which could lead to further international legal issues.⁷³

Domestic Law vs. International Law

The focus on international regulation does not mean domestic law should not be improved. Rather, I agree with scholars like Pamela Laufer-Ukeles, who has stated that jurisdictions should encourage domestic surrogacy, while still not outlawing international surrogacy arrangements.⁷⁴ Laufer-Ukeles argues that domestic surrogacy is preferable in many situations over an international arrangement, and therefore, jurisdictions should insure that domestic surrogacy is accessible. Although this is true, many countries will never legalize surrogacy arrangements. Individuals in such countries will seek out international arrangements as a last resort. While I agree with Laufer-Ukeles that criminalizing an international arrangement or refusing citizenship to the resulting child is harmful, I do not believe that staunchly anti-surrogacy countries will somehow allow surrogacy it is a realistic solution. Although criminalizing or refusing citizenship to the resulting child leads to stigmatization and often fails to protect the child’s civil rights,⁷⁵ many countries will not change their stance on the moral turpitude of commercial surrogacy. Such countries should then sign on to an international convention on surrogacy as countries where surrogacy is illegal. This provides a strong signal to intended parents that are citizens of these countries that they are in a legal no-man’s land should they seek international surrogacy services. One of the key problems in international surrogacy is that often agencies are assuring intended

⁷⁰ *Id.* at 480.

⁷¹ Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT’L L.J.* 665, 682 (2012).

⁷² Bruce Hale, *Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?*, 36 *SUFFOLK TRANSNAT’L L. REV.* 501, 510 (2013).

⁷³ *Id.* at 509–10. (“In addition, as regulation pushes people out of the market, the risk of exploitation in the grey and black markets will increase with the increased demand.”).

⁷⁴ Laufer-Ukeles, *supra* note 46, at 1277.

⁷⁵ *Id.* at 1276.

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parents that the visa and legal concerns will be easy to deal with. If countries really wish to discourage surrogacy, they should be part of an international convention to make their position even more clear to intended parents. Such an argument has not previously been made in literature, and I think it is key to theorizing an international convention that would have more participation. In such an international convention, signatories would note whether their laws allow either domestic surrogacy or international surrogacy. There is no need for an international convention to be pro-surrogacy, even if there are countries that are pro-surrogacy as signatories. Countries like India will likely be party to such a convention as it appears to be courting international fertility tourists. On the other hand, countries like France, which has a strong anti-surrogacy stance, could be part of such a convention to discourage French intended parents from seeking international surrogacy arrangements.

Even in regimes with permissive surrogacy laws, often people seek surrogacy services abroad due to financial concerns. However, they may not realize that they are embarking on a path that may cause their baby to be stateless and potentially parentless. An international convention on surrogacy could spell out that the domestic family and citizenship law of the intended parents' home country would control any international surrogacy arrangement. This may dissuade those from anti-surrogacy countries seeking international surrogacy arrangements.

The Council on General Affairs and Policy for the Permanent Bureau of the Hague Conference on Private International Law is currently researching how to address the issues raised by international surrogacy⁷⁶ including legal parentage, the child's citizenship status and vulnerability, and concerns that are raised regarding exploitation of surrogates.⁷⁷ This research was prompted by controversies and issues arising from intended parents of international commercial surrogacy arrangements attempting to return to their home countries that prohibit surrogacy, such as the Menneson case previously discussed.⁷⁸ Refusal of travel documents, refusal to recognize a parent-child relationship, and rejection of citizenship for the child are all too common problems in international surrogacy.⁷⁹ Governmental schemes that prohibit surrogacy arrangements may also deny issuance of a passport or visa to the child, or refuse to recognize the intended parents as the legal parents of the child.⁸⁰ Often, not surprisingly, there is an incompatibility between the family and citizenship legal infrastructure amongst various countries.⁸¹ There is also discrepancy among the penalties imposed in countries

⁷⁶ Hale, *supra* note 72, at 501.

⁷⁷ *Id.* at 501-02.

⁷⁸ Anika K. Boyce, *Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements*, 36 SUFFOLK TRANSNAT'L L. REV. 649, 663 (2013).

⁷⁹ Richard F. Storrow, "The Phantom Children of the Republic": *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 561, 598 (2012).

⁸⁰ *Id.*

⁸¹ *But see* Hale, *supra* note 72, at 509-10 (suggesting that "[s]urrogacy itself may not be the real issue. Rather, the uncertainty with these arrangements is a symptom of a more general problem of irreconcilable family and citizenship laws at the international level. It is important to note that these legal issues may arise in cases that do not involve surrogacy.").

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where commercial surrogacy is illegal.⁸² Some laws deny citizenship to the child born from a surrogate, thus stigmatizing the child.⁸³ This harms the child borne of surrogacy and fails to protect that child's human rights.⁸⁴ Further, some laws criminalize the behavior of the surrogate, which stigmatizes the woman, but does nothing to resolve the issues with the institution itself.⁸⁵ Some have argued that countries that disapprove of international surrogacy may not deny citizenship or deny legal parentage for children born of surrogacy.⁸⁶ Although I agree with the normative conclusion, I do not think that realistically, an anti-surrogacy country is going to make it easy for parents who circumvented domestic laws. The solution I propose is not the "ideal" solution, but rather what I see as a practical or workable solution. Although it may not prevent all of the "legal limbo" about the legality of surrogacy arrangements or the legal parenthood of the intended parents, it may serve to at least have international acknowledgement of this problem, define the issue, and inform intended parents about their options.⁸⁷ The lack of international regulation has led to money being a corrupting influence in the global surrogacy market, especially with agencies and middlemen who stand to gain the most in these transactions.⁸⁸ An international convention will serve to rein in these influences in cross border surrogacy arrangements.

II. Adoption as a Model for Surrogacy

Surrogacy advocates often try to separate cross border surrogacy from inter-country adoption. By focusing on the needs and rights of the intended parents and the surrogate herself, there is often not a discussion of the child borne of surrogacy. There has been a resistance to likening surrogacy to adoption in part because the restrictions on inter-country adoption often resulted in discrimination against LGBT parents, single parents, and parents that did not otherwise fit the mold of the ideal adoptive parents. Advocates have theorized gestational surrogacy as a private issue between the intended parents and the surrogates, without the state being involved in determining the fitness of the intended parents. The assisted reproductive technology ("ART") community has advocated an open approach to access to ART and surrogacy. The theory is based on the belief that just as those who conceive "naturally" do not have a parental fitness test, neither should those who need ART assistance. Part II compares and contrasts adoption and surrogacy. As mentioned previously, little regulation exists in the surrogacy

⁸² April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J. L. & SOC. CHANGE 257, 287 (2014).

⁸³ *Id.*

⁸⁴ *Id.*; see also Pamela Laufer-Ukeles, *The Lost Children: When the Right to Children Conflicts with the Rights of Children*, 8 LAW & ETHICS HUM. RTS. 219, 251 (2014) ("not identifying parenthood status can create legally orphaned children. Frameworks for such children need to be created and their problematic status recognized.").

⁸⁵ See Cherry, *supra* note 82, at 287.

⁸⁶ Laufer-Ukeles, *supra* note 84, at 251.

⁸⁷ Margalit, *supra* note 56, at 424–25.

⁸⁸ Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction and Child Welfare Policy*, 8 LAW & ETHICS HUM. RTS. 103, 127–28 (2014).

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context. However, adoption is highly regulated.⁸⁹ Just how much surrogacy regulation should reflect adoption regulations currently in place is a hotly contested issue.⁹⁰ Some who compare surrogacy to adoption embrace the view that the objectives of both adoption and surrogacy are substantially congruent, so adoption can be the appropriate “template” for surrogacy.⁹¹

A. Adoption versus Surrogacy

Similarities are found between the processes of both adoption and surrogacy for many reasons, including that both usually stem from infertility and offer an option for legal parentage absent biological relationships.⁹² Therefore, both adoption and surrogacy target the same market.⁹³ Further, both processes involve third-party participation in the reproductive process.⁹⁴ Additionally, both adoption and surrogacy raise social issues, such as the debate about commodification of children and exploitation of women.⁹⁵ Although the pregnant woman may share less intimacy with the unborn child in surrogacy than with a woman who places her child up for adoption, there remains a comparably “high degree of intimate contact” between the surrogate, the fetus, and the prospective parents. Thus, like in adoption, where the birth mother has significant rights in international adoption law, in surrogacy, the rights of the surrogate should be protected, especially given her vulnerable position. Looking to the simple facts at the moment of delivery, “two women with newborn children that they will relinquish,” some legislators look to apply existing adoption regulations to the surrogacy context.⁹⁶

However, there are also important differences between surrogacy and adoption. In many cases, surrogacy is not subject to adoption statutes because there are recognized, fundamental differences between the two processes.⁹⁷ Some scholars also find surrogacy vastly different from adoption, and thus reject that the adoption framework is applicable in the surrogacy context.⁹⁸ One difference is that surrogacy stems out of a contractual relationship that begins the reproductive process, while the adoption process begins after a woman has become preg-

⁸⁹ Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 332 (2006).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 333.

⁹³ Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 329 (1997).

⁹⁴ Storrow, *supra* note 89, at 333.

⁹⁵ *Id.*

⁹⁶ Terry J. Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 WASH. L. REV. 1311, 1334 (2014).

⁹⁷ See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 2014) (assessing the contractual nature of the surrogacy agreement in that case, and finding it not subject to adoption statutes because the nature of the transaction did not bring it within the public policy reasons behind adoption law).

⁹⁸ Storrow, *supra* note 92, at 332.

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nant.⁹⁹ With surrogacy, an intended parent may be biologically related to the child, while the same is not true in the adoption context with adoptive parents.¹⁰⁰ Adoption processes have also been in place longer than surrogacy, and thus have a more rigid structure.¹⁰¹ Moreover, even if adoption law does influence surrogacy, existing laws are not sufficient to govern “all of the new rights and responsibilities created in the three adults and the child involved in IVF surrogacy.”¹⁰² Additionally, in IVF surrogacy, both the surrogate and the biological or intended parent can play a role in the reproductive process.¹⁰³

Proponents of surrogacy agreements have attempted to distinguish adoption by highlighting that the child of a surrogate was never going to be her legal child.¹⁰⁴ The unborn child was always “to be the child of the intended parents, and legal parenthood would attach at birth.”¹⁰⁵ Thus, they argue there is no need for adoption-like regulations in the surrogacy context.¹⁰⁶ I disagree with this notion, and believe such regulations would help avoid many of the surrogacy conflicts that have arisen recently.

One of the major issues about the way adoption is regulated is the use of the parental fitness test. I will discuss how this works in the adoption context and explain why it does not similarly apply in the surrogacy context. Prospective adoptive parents are heavily vetted via a “parental fitness test”¹⁰⁷ to protect the interests and rights of the adoptive child.¹⁰⁸ In the United States, adoption procedures vary state-to-state, but the processes are similar.¹⁰⁹ Prospective parents must file a petition with the appropriate court, and then the court looks to the parental fitness factors determined by the state.¹¹⁰ Courts generally use one of

⁹⁹ *Id.* at 333.

¹⁰⁰ See *id.* at 333–34 (“The two are not equally valued by society, given the nearly overwhelming desire for and bias in favor of genetically-related children. . . . [T]he possibility of a genetic tie to a child born through assisted reproduction may make that choice appear more understandable and legitimate . . .”).

¹⁰¹ *Id.* at 334 (discussing the different parental fitness tests in place and contrasting that in surrogacy, post-birth assessments do not take place like they do in adoption).

¹⁰² Suzanne F. Seavello, *Are You My Mother? A Judge's Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211, 212–13 (1992).

¹⁰³ *Id.* at 212.

¹⁰⁴ Price, *supra* 96, at 1335.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J.L. & FAM. STUD. 59, 97 (2004).

¹⁰⁸ Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQUALITY 481, 491 (2009) (“[N]o would-be parent in the United States can legally adopt a child without some outside authority (a child welfare office, licensed adoption agency, or court) deeming that the parent is fit and that the proposed adoption is in the best interests of the child.”).

¹⁰⁹ Stella Lellos, *Litigation Strategies: The Rights of Homosexuals to Adopt Children*, 16 Touro L. REV. 161, 168 (1999).

¹¹⁰ *Id.*

three tests to determine parental fitness: (1) the best interests of the child test;¹¹¹ (2) the adverse impact test;¹¹² or (3) the nexus test.¹¹³ Although the best interests of the child is the predominant screening device for adoptive parents, it is not applied uniformly.¹¹⁴ Often there is a question about how the “best interests” test is balanced with “rights of individual adults to establish and maintain nurturing relationships with the child and to make decisions that promote their own goals for a happy and productive life.”¹¹⁵

Adoptive parents have a more substantial burden to meet to become parents than so called “natural” parents.¹¹⁶ Within the rigorous parental fitness test framework, there is a real possibility for discrimination against adoptive parents based on factors that have been employed by various jurisdictions. For example, courts have previously considered race,¹¹⁷ and some courts consider factors such as sexual orientation,¹¹⁸ weight,¹¹⁹ and disabilities¹²⁰ in making the determination of parental fitness. The vague and unclear definition of “best interests” can lead to discriminatory results.¹²¹

In the United States, a prospective adoptive parent has to petition the state court to grant an adoption, and present evidence that they satisfy the jurisdictional standards.¹²² Courts generally must make an official finding that a person

¹¹¹ *Id.* at 168–69 (This test “examines the individual circumstances of the child in order to determine what is in the ‘best interests of the person to be adopted.’”) (quoting *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982)).

¹¹² *Id.* at 169 (“The adverse impact test considers the possible effect of any purported conduct or abnormal circumstances on the child, which must be demonstrated through a ‘clear and convincing manner.’”).

¹¹³ *Id.* (“[T]he nexus test considers the possible effect of any purported conduct or abnormal circumstances on the child.”).

¹¹⁴ Eleanor Willemsen & Michael Willemson, *The Best Interest of the Child*, SANTA CLARA UNIV. <http://www.scu.edu/ethics/publications/iie/v11n1/custody.html>. (last visited Sept. 20, 2015).

¹¹⁵ *Id.*

¹¹⁶ Brenda K. DeVries, *Health Should not be a Determinative Factor of Whether One Will Be a Suitable Adoptive Parent*, 6 IND. HEALTH L. REV. 137, 148–49 (2009).

¹¹⁷ See Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149, 159 n.47 (2012).

¹¹⁸ *Id.*

¹¹⁹ DeVries, *supra* note 116, at 148.

¹²⁰ *Id.* at 147.

¹²¹ *Id.* at 143. One suggested solution specific to the sexual-orientation context is to change the legal definition of “parent.” Sheryl L. Sultan, *The Right of Homosexuals to Adopt: Changing Legal Interpretations of “Parent” and “Family,”* 10 J. SUFFOLK ACAD. L. 45, 88 (1995). Other suggestions include an expansion of the considerations that the courts find controlling, to include factors such as the support system available to the prospective parents. Kimberly A. Collier, *Love v. Love Handles: Should Obese People Be Precluded from Adopting a Child Based Solely upon Their Weight?* 15 TEX. WESLEYAN L. REV. 31, 55 (2008). Further commentary suggests that states should adopt the standards employed by the Child Welfare League of America. DeVries, *supra* note 116 at 169. This framework imposes standards against discrimination in the evaluation process. *Id.* (“According to the Child Welfare League of America, “[a]pplicants should be accepted on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child at the point of the adoption and in the future”).

¹²² *Adoption: An Overview*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/adoption> (last visited Mar. 14, 2015). Some states only permit one of the two types of adoption, others recognize both

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is “acceptable” as an adoptive parent, and after weighing a number of factors, must approve an investigation report submitted by the applicable state agency.¹²³ However, “the law has begun to incorporate greater concern for children, [and] ‘the law often seems to be lurching unwittingly in opposite directions.’”¹²⁴ Adoption carries stigma for many families, including labels such as being a family that is “not ‘real’ or ‘natural,’ solely because the legal, permanent, caretaking parents are not the adults who biologically produced the child.”¹²⁵ This labeling can be detrimental for both the child and the adoptive parents.¹²⁶ With the adoptive parents, it can lessen confidence in parental ability, diminish satisfaction with parenting, and produce a want of secrecy within the adoptive family context about the biological origins of the child.¹²⁷ “All parents need social support to carry out their responsibilities most effectively, and the stigmatizing of adoptive families as deviant can make adoptive parents feel they are doing something bad rather than something that is supremely commendable.”¹²⁸ Further, stigmatizing or discriminating in the adoption context can discourage participation, which can lead to less people engaging in raising children with whom they have no biological connection.¹²⁹

Scholars like Dara Purvis have critiqued the court proceedings that govern whether the adoption is in the best interests of the child because there is no judicial test that must be met for “natural” parenthood to be created.¹³⁰ Purvis argues that the best interests test “can be a rigorous hurdle,” due to the highly regulated nature of adoption proceedings and intense involvement on behalf of the state.¹³¹ She argues that best interests test can introduce extrinsic factors that

open and closed adoptions. *Id.* An open adoption allows for the biological mother to select the adoptive parents, while a closed adoption results in a state administrative agency conducting the process. *Id.* Whether the biological mother in an open adoption retains visitation rights varies by jurisdiction. *Id.* The adoption process can be conducted through either a public or private agency. Jared C. Leuck, *The Best Interests of the Child in Adoption: An Article Overview*, 11 J. CONTEMP. LEGAL ISSUES 607, 609 (2000). Through this process, prospective parents work with the agency to complete the adoption formalities. *Id.* Adoption can also be independent, where the adoption is arranged between the biological and prospective parents. *Id.* Whether through agency or independent adoption, the prospective parents must still go through court proceedings, and accordingly have their parental fitness assessed. *Id.*

¹²³ See *Adoption: An Overview*, *supra* note 122 (“These investigatory reports are tremendously detailed, including the petitioners’ religious backgrounds, social history, financial status, moral fitness, mental and physical fitness, and criminal background. After weighing the factors, the agency makes a recommendation, which the court can accept or reject, with the court basing its decision on serving the best interests and welfare of the child.”).

¹²⁴ Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 218 (2012).

¹²⁵ James G. Dwyer, *First Parents: Reconceptualizing Newborn Adoption*, 37 CAP. U. L. REV. 293, 296–97 (2008).

¹²⁶ See *Id.* at 297.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (“Though there is no shortage of adults in the United States today wanting to adopt newborns, there would likely be an even larger surplus of applicants if the role were treated and viewed as normal parenthood. This could have spillover benefits for older children awaiting adoption, as to whom there is a shortage of applicants in some communities.”).

¹³⁰ See Purvis, *supra* note 124, at 215.

¹³¹ *Id.* at 216.

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may disqualify a prospective parent from the adoption process.¹³² For example, factors such as sexual orientation may be considered, although this does not truly affect parental fitness.¹³³ Thus, she has argued that parentage should be defined by statute, instead of by a judicial determination.¹³⁴ Further, if legislative identification of legal parentage is defined by statute, a parent would become the “legal parent” when the child is born, and would not be subject to such state intrusion.¹³⁵ In the United States, there is currently no documented parental fitness test in surrogacy that is comparable to the test employed in adoption.¹³⁶ I believe this is a good thing. Surrogacy is often a last resort that individuals face after a long and arduous infertility battle. Adding a parental fitness test here seems to add insult to injury.

However, other protections exist within the adoption framework which would work well in the surrogacy context, particularly against greedy agencies.¹³⁷ In the ART context, there are some countries like Israel that have extensive regulations, but that is the exception.¹³⁸ Naomi Cahn and others have argued that the best practices of adoption can be translated into the field of ART,¹³⁹ and notes four common issues that are present in both the adoption and ART context: (1) a need for a focus toward greater transparency in the process; (2) defining which parties are to benefit from the service and the implications for the future child; (3) ethical implications of heightened awareness regarding both types of families; (4) the need for regulations that enhance accountability and set parameters for services.¹⁴⁰ Although these points were about ART in general, the goals noted here are relevant and important for surrogacy - particularly transparency regarding what the agencies are being paid and what the surrogacy is being paid, the roles of the parties in the process-including the physician, the agency, the surrogate, and the intended parents; and the need for regulations to set guidelines for the practice of surrogacy, particularly citizenship and parenthood. There is a need to deter unethical conduct and safeguard individuals’ right in the adoption context and the ART context.¹⁴¹ Cahn notes that because ART and adoption services are

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 217.

¹³⁵ Purvis, *supra* note 124, at 217.

¹³⁶ Although the parental fitness test in the adoption context is “far from perfect,” some scholars argue that the underlying principles could and should be applied to forms of assisted reproduction, including surrogacy. Spar, *supra* note 111, at 491. They argue that such principles could be used to monitor processes that carry risks to unborn children in the ART process. *Id.* Some countries that use the parental fitness test currently prohibit the use of assisted reproductive technology for parents who fail to meet the test’s criteria. Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction and Child Welfare Policy*, 8 LAW & ETHICS HUM. RTS. 103, 111 (2014).

¹³⁷ See Naomi Cahn & Evan B. Donaldson Adoption Institute, *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIM. LAWS. 1, 4 (2011).

¹³⁸ See *id.* (“for instance, there are no legal limits on how many times an individual can provide gametes, so that a single sperm donor may father hundreds of children.”).

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 6–7.

¹⁴¹ *Id.* at 17.

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very expensive, the people who access the service tend to have significant resources, while those providing the service are less likely to have such financial resources.¹⁴² Similarly, in surrogacy cases, intended parents are generally in a much more stable financial position than surrogates. Therefore, there is the risk of coercion and corrupting influence in a regulation free zone.

International adoption is regulated in participant countries by the Hague Convention, and a similar system can and should be developed for surrogacy agencies operating in countries that allow commercial surrogacy.¹⁴³ This would incentivize foreign jurisdictions to adhere to standards, and would “allow domestic jurisdictions to certify foreign surrogacy destinations.”¹⁴⁴

The comparison between adoption and ART/surrogacy has not been unchallenged.¹⁴⁵ The Hague Convention’s focus is adoption, which is traditionally seen as an acceptable method of building a family.¹⁴⁶ In contrast, surrogacy is illegal or discouraged in many countries. Due to individual national public policy stances, some scholars doubt that an acceptable international treaty regarding surrogacy could be effective.¹⁴⁷ I disagree. Most scholars who envision a surrogacy convention seem to be picturing a pro-surrogacy convention. In contrast, I believe there is a possibility of agreeing on a value-neutral description surrogacy convention that develops standards for those countries that engage in commercial surrogacy, but also notes the countries that are signatories that are staunchly anti-surrogacy. Such a document has real value in defining the positions of various countries and forcing them to articulate how they will deal with children borne of surrogacy. For example, France may be a signatory as an anti-surrogacy state, but would have to note that babies borne of surrogacy abroad to French parents would be able to gain French citizenship, as a result of the *Mennesson* decision. Obviously, the wrangling over the details of a convention will not be as simple. However, such effort has value because it protects individuals seeking surrogacy arrangements and the surrogates themselves. Although there are differences between ART and adoption, in many aspects ART, and surrogacy specifically, are similar to the state of adoption prior to international law in the adoption arena.¹⁴⁸ Additionally, there is a significant amount of research available regarding adop-

¹⁴² *Id.*

¹⁴³ Laufer-Ukeles, *supra* note 46, at 1277.

¹⁴⁴ *Id.* at 1278.

¹⁴⁵ See Kindregan & White, *supra* note 45, at 528.

¹⁴⁶ *Id.* at 623.

¹⁴⁷ *Id.* at 623–24.

¹⁴⁸ Cahn, *supra* note 137, at 28. Additionally, to model international surrogacy on the adoption framework, it presumes that the model is sound and that it can effectively be adapted for the issues in the surrogacy context. Tina Lin, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT’L & COMP. L. 545, 567 (2013). Further, based on the current functions of the Hague Convention, people seeking that the agency regulate surrogacy agreements should be cautioned that a separate agency may need to be formed to regulate the process. Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing Need For International Regulation*, 21 MINN. J. INT’L L. 120, 143 (2012).

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tion and how it is regulated, which would be a useful platform to begin analyzing how to regulate assisted reproduction.¹⁴⁹

B. Controversies in International Adoptions

This section responds to the critique by many scholars that an international convention in surrogacy is impossible because many countries oppose or ban commercial surrogacy. I want to highlight that there is a disparity of opinions about international adoption just as there is on surrogacy. This supports my position that a neutral convention on surrogacy is possible.

1. *Arguments in Support of International Adoption*

Nations that participate in the Hague Convention on Inter-Country Adoption agree that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,” and that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”¹⁵⁰ The Convention has two main objectives: promoting intercountry adoptions and preventing abusive practices in this context.¹⁵¹ In contrast, a surrogacy convention would not need to promote international surrogacy. Rather, it could simply serve to protect the parties that are involved in a surrogacy arrangement and put intended parents on notice about which countries may be better choices for them to seek surrogacy arrangements. If the convention has the effect of dampening the surrogacy industry, because intended parents will be nervous to seek surrogacy in a country that is on record as being anti-surrogacy, this will be a significant change to the current situation where third party brokers seem to assure intended parents that there will be no roadblocks in their path to parenthood. I believe surrogacy arrangements can be a win-win for all the parties involved, but that usually occurs when the regulations in the country or state are clear, the surrogates’ and intended parents’ interests are protected and represented by counsel, and there is not too much inequality in bargaining power between the parties. Following this test, the majority of international surrogacy arrangements would not pass. This is similar to the world of pre-Hague Convention Inter-country Adoption- where surrogacy was a corrupt business where stories of baby-selling scandals abounded. The Hague Convention, though decades in the making, curbed many of the evils in the Intercountry Adoption business.

Proponents of international adoption say that it plays an important role in protecting the parentless child,¹⁵² and “makes a huge difference to each of those

¹⁴⁹ See generally Cahn & Donaldson, *supra* note 137.

¹⁵⁰ Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 223 (2014).

¹⁵¹ *Id.*

¹⁵² *Id.* (“especially those in third-world countries”).

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children as well as future children.”¹⁵³ The best interests of the child argument is also employed in the context of intercountry adoption in certain circumstances.¹⁵⁴ Proponents support the idea that regardless of the child’s background, what should matter is that the adoptive parents will support the child unconditionally.¹⁵⁵ Further, supporters of international adoption argue that “research shows internationally adopted children do essentially as well as other adopted children.”¹⁵⁶

In the United States, restrictions can make domestic adoption “challenging” and thus make inter-country adoption attractive.¹⁵⁷ Foster adoption can be even more difficult because of the possibility the child may be reunited with the child’s biological family. Additionally, many children in foster care are older, and some families may not be able to provide the special support that these children need.¹⁵⁸ Compared to a life confined to an orphanage, advocates argue that international adoption is the better solution.¹⁵⁹ Limiting international adoption would have adverse effects, including more institutionalized children for longer periods of time. This would result in developmental harm, and reduce the prospect of these children becoming a part of a permanent family.¹⁶⁰

2. Arguments Against International Adoption

The opponents of the current processes involved in international adoption raise several concerns, including: human trafficking, coercion, lack of sufficient record-keeping, and the best interests of the child.¹⁶¹ Human trafficking is arguably

¹⁵³ *Id.*

¹⁵⁴ Joseph M. Isanga, *Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards*, 27 *BYU J. PUB. L.* 229, 249 (2012); *see id.* at 240 (this author argues that banning intercountry adoptions would only “negatively impact the best interests of otherwise adoptable children”).

¹⁵⁵ *Id.* at 251.

¹⁵⁶ *See id.* (“Supporters even maintain that there is no evidence that children are genetically predisposed to a particular cultural identity.”).

¹⁵⁷ Lisa Milbrand, *Why International Adoption Matters*, GOODYBLOG (Jan. 2, 2013 2:11 PM), <http://www.parents.com/blogs/goodyblog/2013/01/why-international-adoption-matters/> (discussing challenges such as the time frame involved, failed placements when the birthmother changes her mind, and the issues people may have with the “open adoption” which is prevalent in the United States).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (“Institutional care is always subpar . . . [t]here is no replacement for a loving family . . . Children in orphanages often have limited opportunities for education, and are sent out into the world as young as 14 years old, left to fend for themselves.”).

¹⁶⁰ Belinda Luscombe, *The Dark Side of Cleaning Up International Adoptions: Kids Are Left in Orphanages Longer*, *TIME* (Nov. 4, 2013), <http://healthland.time.com/2013/11/04/the-dark-side-of-cleaning-up-international-adoptions-kids-are-left-in-orphanages-longer/> (“While there has been some rethinking on orphanages, studies are pretty conclusive that institutionalization of very young children can contribute to a range of lifelong effects that are almost impossible to undo, including behavioral, psychological and basic health issues.”).

¹⁶¹ Elizabeth Long, *Where Are They Coming from, Where Are They Going: Demanding Accountability in International Adoption*, 18 *CARDOZO J.L. & GENDER* 827, 831–33 (2012); *see also* Isanga, *supra* note 154, at 239 (“Reports are rife of instances of ‘child-buying, coercion of vulnerable birth parents, weak regulatory structures, and profiteering,’ as well as a highly problematic fee structure. Humanitarianism can also mask abuse.”) (citing Trish Maskew & Johanna Oreskovic, *Red Thread or Slender Reed*:

the greatest concern by the opponents of international adoption.¹⁶² The demand for international adoption in the United States has led to couples paying up to \$30,000 for one child, creating an incentive for the exploitation of orphaned children.¹⁶³ Further, in some countries, receiving payment for children is not per se illegal, and such payment is labeled a private business transaction.¹⁶⁴ Coercion has been called a “subdivision of human trafficking.”¹⁶⁵ Sometimes poverty and social stigma are used to effectively coerce parents to give up their children.¹⁶⁶ Although the Hague Convention purportedly attempts to remedy this situation, such coercion is still present.¹⁶⁷ This is not to suggest that the Hague Convention is not doing anything. On the contrary, it is easy to imagine how much worse the situation would be without the benefit of an international convention.

Additionally, some critique the insufficient record-keeping and lack of an information sharing process¹⁶⁸ as leading to “often tragic failed attempts at finding homes for needy children.”¹⁶⁹ Often prospective parents are not informed that their potential adoptive child has special psychological or medical needs.¹⁷⁰ Again, an international convention may not solve all the problems, but it at least addresses some of the most important issues. Similarly, should there be an international convention on surrogacy, one cannot expect every scandal or problem in international surrogacy to disappear. Rather, the goal should be to make the situation for intended parents, surrogates, and children borne of surrogacy better than it currently is.

Several additional concerns involve whether adoptive parents interests align with the best interests of the child. For some, there is concern that an adopted child’s cultural identity will be lost by putting a child in a “non-traditional family structure.”¹⁷¹ This is often veiled discrimination against LGBT and single-led

Deconstructing Prof. Bartholet’s Mythology of International Adoption, 14 BUFF. HUM. RTS. L. REV. 71, 79 (2008)).

¹⁶² See, e.g., Long, *supra* note 161, at 831.

¹⁶³ *Id.* at 831–32.

¹⁶⁴ *Id.* at 832 (the author specifically refers to Guatemala).

¹⁶⁵ *Id.* See also Rahul Sinha & Akshara Gyan, *Making Families or Selling Babies*, ACADEMIA, http://www.academia.edu/5301254/THEME-SURROGACY_AND_INTERCOUNTRY_ADOPTION_IN_INDIA_TITLE-MAKING_FAMILIES_OR_SELLING_BABIES_Author-Rahul_Sinha (calling this process “child laundering” whereby there is “illegal acquisition of children through monetary transaction, deceit, and/or force.”).

¹⁶⁶ Long, *supra* note 161, at 832. (“A group of Romanian nuns profited by as much as \$15,000 per child by persuading single mothers to relinquish their parental rights, possibly out of cultural shame for having a child out of wedlock.”).

¹⁶⁷ See Sinha & Gyan, *supra* note 168.

¹⁶⁸ Long, *supra* note 161, at 832 (“between adoption agencies, potential parents, and sending and receiving countries.”).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (One of the main concerns in this arena is insufficient medical records for the children, specifically the lack of diagnosis for children suffering from psychological disorders requiring special care. *Id.* This is unforeseen to many adopting parents, leading to the need for extra time, money and attention that an adoptive parent may not be able to provide. *Id.* Further, there are no uniform requirements in place that would notify potential parents that these children could be “special needs adoptees.”).

¹⁷¹ See Isanga, *supra* note 154, at 240–41.

families. In adoption, the best interests analysis is used to protect an already living child. In surrogacy, the intended parents are choosing to go through the considerable time expense, financial overhead, and medical intervention to procure eggs and sperm in order to have a biologically related child. There are many people that have children “naturally” that are not subject to a best interests analysis. I believe that there is no need for a best interests analysis in the surrogacy context, and existing legal structures protect less-than-ideal family relationships that may result from a surrogacy arrangement.

Another common critique of inter-country adoption is that it puts the financial security of a transnationally adopted infant over other interests such as cultural heritage.¹⁷² This critique is not directly relevant to surrogacy, as the child borne of surrogacy would typically share the race and culture of the intended parents and not that of the surrogate.

III. Ideas for Reform: Lessons for Surrogacy and a Plea to the Hague

Although there are many critiques of the Hague Convention on Inter-Country Adoption, the most common proposed solution is more stringent international legislation, not laxer regulations.¹⁷³ In the case of surrogacy, there is no international body or document that can even be considered as a starting point for any resolution of international surrogacy disputes. Even a weak surrogacy convention is better than none at all. The Hague Convention seems to be in the best position to facilitate international regulation in the developing global market for surrogacy.¹⁷⁴ A Preliminary Report by the Hague “calls for such regulation, particularly for the sake of children . . . some of whom have been left ‘marooned, stateless and parentless’ because of conflicting legal approaches to Inter-Country Surrogacy in different countries.”¹⁷⁵ Similar to the Hague Convention on Inter-Country Adoption, a proposed Hague Convention on International Surrogacy would insure that surrogacy arrangements are recognized in the state where the child is born, as well as the state in which the child will live.¹⁷⁶ The Convention

¹⁷² *Id.* at 243-45 (“Opponents argue that intercountry adoption forces the adopted child to assimilate into western society in a manner that is reminiscent of colonial attempts to indoctrinate indigenous peoples into European values and learning . . . [such that] the adopted child loses an essential aspect of the child’s identity by being removed from his or her birth country.”).

¹⁷³ See e.g., Long *supra* note 161, at 831 (“The growing demand for foreign babies has led to dangerous results and the need for some form of multinational legislation to regulate the practice is clear.”).

¹⁷⁴ Carolyn McLeod & Andrew Botterell, *A Hague Convention on Contract Pregnancy (or ‘Surrogacy’): Avoiding Ethical Inconsistencies with the Convention on Adoption*, 7 INT’L J. OF FEMINIST APPROACHES TO BIOETHICS 219 (2014). International contract pregnancy is a term that the authors use as a substitute for “surrogacy” as a more morally neutral term. *Id.*; see also *id.* at 223-24 (“If a convention on contract pregnancy is to be neutral or unbiased with respect to what many call *surrogacy*, then it should adopt the term *contract pregnancy* instead. The latter is more neutral because it does not suggest that the woman who carries the child is merely a substitute for the real mother or real caregiver of the child.”).

¹⁷⁵ *Id.* at 220-21 (citing Hague Conference on Private Int’l Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prel. Doc. No. 10 (March 10, 2012), <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>).

¹⁷⁶ McLeod & Botterell, *supra* note 174, at 221 (In the case of countries like India, where no birth citizenship exists, either the rules must be amended for surrogacy or another acceptable solution must be sought).

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on Intercountry Adoption satisfies these objectives, while still remaining neutral about states actually accepting inter-country adoption.¹⁷⁷ It would be appropriate for a convention on Inter-Country Surrogacy to adopt this same approach of neutrality. Using this approach, the two states involved in an international surrogacy arrangement could agree to the process without necessarily supporting Inter-Country Surrogacy, though for some countries, even a document mentioning surrogacy legitimizes the practice.¹⁷⁸ Because a proposed Convention should not “favor the one way of forming a family with children over the other . . .”¹⁷⁹ and could actually explicitly have anti-surrogacy countries as signatories, some of the hesitation about such a document may dissipate.

Limited Scope

Because international surrogacy implicates ethical concerns that vary by viewpoint across countries, a regulation of all of the issues raised in international surrogacy is not currently feasible, especially as a first step.¹⁸⁰ Surrogacy involves numerous areas of law, both domestic and international, and it is therefore unlikely that a comprehensive, single instrument would gain enough political support to pass, especially if it takes a pro-surrogacy position.¹⁸¹ If the surrogacy convention is drafted to define surrogacy and propose best practices for those countries that allow surrogacy, there may be more likelihood of such a document being adopted by several countries. If the document tries to address too many issues, it is unlikely that enough countries could come to an agreement on all of the questions involved to make the uniform regulation of international surrogacy possible.¹⁸²

Although ideally an international convention would address all the different aspects of citizenship, parentage, and protection of surrogates I have discussed throughout the article, I acknowledge that this may be too ambitious a goal as a first step. Instead, an international document that agrees on the definition of commercial surrogacy may be the realistic first step, with the Palermo Protocol as an acceptable model. The main international instrument addressing issues with transnational organized crime is the United Nations Convention against Transnational Organized Crime, adopted by the UN in November 2000 in Pa-

¹⁷⁷ *Id.* (noting that the Convention on Adoption does not actually promote the practice or encourage any state to implement it, and further noting that “a Contracting State might never allow an adoption to proceed”).

¹⁷⁸ *Id.* at 221–22. (“To expect that member States would all accept international contract pregnancy, which tends to be commercial rather than altruistic, is unrealistic. There is simply too much global opposition to this practice.”).

¹⁷⁹ *Id.* at 222; see also *id.* at 5 (“It is still not obvious to us that the Hague Conference should support contract pregnancy—in particular by requiring that Contracting States accept it—while refusing to support adoption in the same way.”).

¹⁸⁰ Kristiana Brugger, *supra* note 71, at 679–80.

¹⁸¹ *Id.* at 680 (discussing the impact on family law, immigration law, adoption & citizenship law, abortion laws, labor laws, human rights laws, property laws, contract laws, and more).

¹⁸² *Id.* at 684.

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lermo, Italy.¹⁸³ The Convention is supplemented by three Protocols, commonly referred to as the “Palermo Protocols,”¹⁸⁴ including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which became effective in December 2003.¹⁸⁵ This Protocol became the first international, legally-binding document that defined trafficking in persons.¹⁸⁶ The definition provides that:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁸⁷

The stated intent behind the definition is “to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases.”¹⁸⁸ Additionally, the Protocol seeks to protect the victims’ of human trafficking basic human rights.¹⁸⁹

Although the goals may be modest, the mere agreement of a definition of surrogacy and the convergence in national approaches with regard to the establishment of domestic surrogacy regulation that would support efficient international cooperation in cases of stateless or parentless babies borne of surrogacy would be a vast improvement compared to the black hole of international law that exists today. Some critics of the Palermo Protocol on human trafficking state that it “primarily serve(s) law enforcement goals, without sufficient provision for long-term protection of the victims.”¹⁹⁰ This could be a concern for a value neutral surrogacy provision that includes anti-surrogacy countries. Advocates of a convention would want to ensure that it does more than criminalize surrogacy in anti-surrogacy countries and instead, actually helps prevent stateless and parentless babies. One issue to deal with in international surrogacy is that there may be conflict with existing international law. For example, the definition of trafficking has been interpreted differently by various jurisdictions, and few

¹⁸³ United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, art. 1, Dec. 12, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 183.

¹⁸⁸ *Id.* (The United Nations Office on Drugs and Crime is charged with its implementation.).

¹⁸⁹ *Id.* (The United Nations Office on Drugs and Crime is charged with its implementation.).

¹⁹⁰ Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 MICH. J. GENDER & L. 453, 490 (2010).

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have incorporated the Palermo Protocol's actual definition of "trafficking in persons" into legislation.¹⁹¹ Thus, jurisdictions that forbid surrogacy arrangements could seek to use existing international legislation such as the Palermo Protocols to criminalize surrogacy as a form of human trafficking.¹⁹² However, alternate routes are available for countries that disallow surrogacy, such as promoting agreements with states that do allow surrogacy by requiring the permissive states to actively prevent transactions by its citizens.¹⁹³

Legal Representation of the Surrogate

In addition to the definition of surrogacy, an international document on surrogacy should delineate the best practices for commercial surrogacy in countries in which it is legal. Commercial surrogacy raises concerns about the commodification of the pregnancy, the surrogate, and the resulting child.¹⁹⁴ Moreover, there is a real risk of abuse with coercive conduct, exploitation, and human trafficking.¹⁹⁵ A problematic example is India, where under most surrogacy contracts, the fetus' health explicitly comes before the health of the mother.¹⁹⁶ Further, in India, surrogates often live in group homes during their pregnancies to monitor their health and progress, which may not include medical concerns, but does raise ethical and legal questions.¹⁹⁷ The entire life of the surrogate becomes gestating the child to complete the contract with the intended parents.¹⁹⁸ An international convention on surrogacy should address surrogate health and decision making, and should require that countries that allow commercial surrogacy require legal representation of the surrogate paid for by the intended parents. Such legal representation would ensure that the surrogate was in a position of understanding about what she had agreed to and the terms of her arrangement. In many current international surrogacy situations, the surrogate is the victim of a fertility clinic and middlemen recruiters, or even her own family. There are many states in the United States that require that surrogates have legal representation and even a mental health evaluation prior to undertaking a surrogate pregnancy. It may be

¹⁹¹ Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 Alb. Gov't L. Rev. 111, 122 (2014). Moldova is an example of a country with a very broad definition, and it has established that trafficking includes women acting as surrogates for reproductive purposes. *Id.* at 123. Additionally, both Israel and Azerbaijan have also established that exploitation includes surrogacy. Lauren A. McCarthy, *Human Trafficking and the New Slavery*, Ann. Rev. L. & Soc. Sci. 221, 223 (2014). See Allain at 126.

¹⁹² Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 Emory Int'l L. Rev. 117, 172–73 (2013).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 176

¹⁹⁵ *Id.*

¹⁹⁶ See Laufer-Ukeles, *supra* note 46, at 1268 ("Apparently, under the terms of most surrogacy contracts in India, the surrogate mother and her partner agree that if the childbearing woman is injured or diagnosed with a life-threatening disease during advanced pregnancy, she is to be sustained with life support equipment to protect the fetus viability and insure a healthy birth on the genetic parents' behalf") (internal quotation marks omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

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difficult to require a mental health evaluation in countries where mental health services are often lacking. However, legal representation can help ensure that surrogates are cognizant of the arrangement they are entering into, and are willingly a part of it. Legal representation may ensure that the financial and physical health of surrogates is being protected. Surrogates are often more vulnerable than birth mothers in inter-country adoption, because surrogates are being paid to carry a child for another and are separated from their support system while pregnant in some countries like India.

Parentage

Another issue raised is the legal confusion caused by situations like those in India, in which there is no regulation establishing legal parenthood in the context of surrogacy.¹⁹⁹ India bases its citizenship rules on the biological parents' citizenship, not birth citizenship. Therefore, there have been many scenarios where a baby borne to an Indian surrogate and foreign intended parents through donor gametes has been left stateless. Without better domestic rules to regulate surrogacy and an umbrella international convention to ensure parentage and citizenship are established, a child can be left without responsible care; a stateless, parentless baby.²⁰⁰

Implementation of an international surrogacy regulation that could cause a conflict of an international law with current domestic laws, the unlikely reform of domestic conflicting laws, and the possibility of political backlash will be difficult.²⁰¹ However, this should be the paramount goal of an international surrogacy convention. Some scholars have suggested that existing international organizations such as the World Trade Organization (WTO) or the International Labor Organization (ILO), may be good vehicles for regulating surrogacy.²⁰² Under the WTO, surrogacy arrangements could be regulated as "trade," through which a "surrogacy service instrument" could be formed that would require the enactment of domestic laws regarding surrogacy.²⁰³ Alternatively, under the ILO, surrogacy could be regulated as "labor," because "legalized surrogacy is, indeed, paid labor (in the truest sense of the word)."²⁰⁴ Although such arrangements are theoretically workable, a separate convention on surrogacy seems the most comprehensive and appropriate answer. Much of the dilemmas in surrogacy arise due to conflicts of laws issues.²⁰⁵ International surrogacy has effects

¹⁹⁹ Kindregan & White, *supra* note 45, at 593.

²⁰⁰ *Id.* at 593–94.

²⁰¹ Brugger, *supra* note 71, at 684.

²⁰² *See id.* at 685. ("The challenges to these approaches include (1) a lack of political will to push the boundaries of instrument creation into the surrogacy arena, and (2) a high risk of an imbalance in the protection given to various parties to a surrogacy arrangement. Both challenges ultimately derive from these two organizations' limited scope.").

²⁰³ *Id.* at 691.

²⁰⁴ *Id.* at 693–94 ("Simply stated, '[t]he ILO is the international organization responsible for drawing up and overseeing international labour standards.'").

²⁰⁵ *See* Hale, *supra* note 72, at 511.

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on several fields of domestic law,²⁰⁶ and rather than change domestic law, an international convention could address the relevant issues.²⁰⁷ This could result in countries changing their surrogacy laws, or even cause intended parents to avoid the jurisdictions that would likely result in a struggle for citizenship or parentage.

Many doubt the feasibility of having an international uniform set of rules to regulate the commercial surrogacy industry. Although difficult, it may be possible for countries offering surrogacy services to adhere to guiding principles set forth via treaties.²⁰⁸ A multilateral agreement may be the only effective way to resolve the issues concerning international surrogacy, because it leaves the power with those who have authority to change the contractual relations—the states.²⁰⁹

It may be possible, although not ideal, to address surrogacy via existing international treaties. There are three current human rights treaties that could incorporate surrogacy—the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).²¹⁰ None of these currently address surrogacy, but each of these treaties incorporate some of the same protections that are needed in surrogacy.²¹¹ Although there is much doubt that there can be absolute agreement on all of the issues surrounding international surrogacy, such agreement is not necessary. For example, in the CRC, due to controversies between states about when life begins, “the drafters defined only an end-point of childhood (eighteen years), leaving the question of its beginning—whether at conception, birth, or some other stage—to each signatory’s discretion.”²¹² For a provision on surrogacy, an agreement on the key issues—such as citizenship, parentage, and protection of surrogates would be satisfactory.²¹³

Although some have suggested creating an agreement that delineates the relations between states and the acceptance of parentage documents, such a document would be even more difficult to negotiate.²¹⁴ This could be done through current international agreements, even though they are not specific to surrogacy.²¹⁵

Amending existing treaties may work, but a separate convention on surrogacy would likely be more able to address all of the key issues related to surrogacy.²¹⁶

²⁰⁶ See Nelson, *supra* note 63, at 248 (discussing “including family law, contract law, health law, and human rights law.”).

²⁰⁷ *Id.*

²⁰⁸ Boyce, *supra* note 78, at 662.

²⁰⁹ Ergas, *supra* note 192, at 163.

²¹⁰ Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT’L & COMP. L. 369, 371–72 (2012).

²¹¹ *Id.* at 372 (discussing “including the right to health, the right to support, the right to know one’s origins, and the right to a family.”).

²¹² Ergas, *supra* note 192, at 164.

²¹³ *Id.*

²¹⁴ Hale, *supra* note 72, at 502.

²¹⁵ *Id.*

²¹⁶ *Id.*

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Because I propose that the international convention on surrogacy be value-neutral, anti-surrogacy states would also be able to be party to the convention. Anti-surrogacy states can make clear their domestic law and position on citizens that circumvent their surrogacy laws and seek surrogacy abroad. This will serve two purposes; first, the convention would serve as notice to prospective intended parents and protect intended parents from false assurances by clinics or other middlemen. Second, such declarations would serve as a test for anti-surrogacy states which are forced to admit that the babies borne of surrogacy may gain citizenship of their state (as in the case of France). This may be a first step in motivating countries to change their domestic surrogacy laws to be more consistent. This will avoid issues of abandonment because the agreement about the birth is enforceable and determined prior to conception.²¹⁷ In countries where commercial surrogacy is legal, an international convention could deem that those countries will ensure that their domestic laws will allow intended parents to be given parental rights at the time of the written surrogacy contract.²¹⁸ This would help safeguard that before the birth of the child, the surrogate and intended parents have accounted for the child's citizenship or nationality to prevent statelessness.²¹⁹ Another issue that should be addressed by a convention on surrogacy is requiring countries that allow surrogacy arrangements to create a central agency that is designated to monitoring the surrogacy process.²²⁰ Such agencies would give security to intended parents, surrogates, and the country where the surrogacy arrangement takes place to ensure that stateless or parentless babies are not born.

Preventing Trafficking

As the Convention on Adoption expressly prohibits the sale and traffic of children,²²¹ the Convention on Inter-Country Surrogacy should contain similar language. Specifically, with regard to commercial surrogacy, a surrogate should be compensated regardless if her pregnancy results in a live child. Births begin to resemble a sale of children, instead of a contract pregnancy, "when [the surrogate] is paid only if there is a live child in the end."²²² This should be prohibited by a Hague Convention on International Surrogacy.²²³

²¹⁷ Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2290 (2012).

²¹⁸ See *id.*

²¹⁹ McLeod & Botterell, *supra* note 174, at 126.

²²⁰ *Id.*; but see Hale, *supra* note 72, at 518 ("Central regulatory agencies specific to surrogacy would add unnecessary cost to the system.").

²²¹ Hague Conference on Private International Law, Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51 [hereinafter Hague Convention], Preamble, Article 1 sub paragraph b, available at <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>.

²²² McLeod & Botterell, *supra* note 174, at 126.

²²³ *Id.*; See also *id.* (Katarina Trimmings & Paul Beaumont "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level," 7 J. Private Int'l L. 627, 627-47 (2011) (who advocate that "instead that to prevent the sale of children, the convention should specify a 'remuneration maximum' No commercial contract pregnancy arrangements should exceed this maximum, in their view. However, such a measure would not eliminate the sale of children.")).

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Compensation of Surrogates

The question of what level of compensation should be allowed in an international convention is controversial. In comparing the current Hague Convention on Adoption language,²²⁴ some scholars suggest that subsection (1) and (2) should be used in the Convention on International Surrogacy.²²⁵ They suggest that the language should be amended to prohibit payment offers that are coercive.²²⁶ In the context of International Surrogacy, subsection (4), and the second half of subsection (3), arguably present the most difficulty, as these sections involve withdrawal of consent.²²⁷ Although I do not disagree with scholars who advocate such language and issues, I think more modest goals would result in an actual international convention. I believe that the international convention should be silent as to the payment to surrogates and withdrawal of consent. However, it is worthwhile to have countries who allow commercial surrogacy change their domestic laws to ensure that women be paid for their services in all circumstances, whether the surrogate pregnancy results in a live birth or not.²²⁸

Additional Issues

Just because the Hague Convention on Intercountry Adoption has a parental vetting requirement,²²⁹ does not mean the proposed Convention on International Surrogacy should adopt the same position. Although some scholars disagree,²³⁰ there is sufficient concern that parental vetting will discriminate against non-biological parents, LGBTQ parents, economically diverse parents, or non-married or single parents, just as it has been used in adoption. Criminal law and international law adequately deal with concerns about child trafficking. Too many people who would otherwise be good parents will be left out of the oppor-

²²⁴ *Hague Convention*, *supra* note 221, at Article 4.

Article 4 sub-paragraph c) of the Convention on Adoption,

[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin . . . have ensured that,

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child.

²²⁵ McLeod & Botterell, *supra* note 174, at 126.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Hague Convention*, *supra* note 221, at Article 5. ("Article 5, sub-paragraph (a) states that "[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State have determined that the prospective adoptive parents are eligible and suited to adopt.").

²³⁰ McLeod & Botterell, *supra* note 174, at 126.

Adopting an International Convention on Surrogacy

tunity to choose a surrogacy arrangement if a parental vetting requirement exists in any proposed convention.

Many commentators have suggested that any surrogacy convention must deal with the issue of whether anonymous gamete donations are allowed. Controversially, in adoption, there is a movement towards open adoption, and in many parts of the world, a trend towards "open ART" is also emerging. I take the position that although open ART may be a laudable goal, it will hinder the availability of donor gametes for infertile families and other intended parents that need to seek donor gametes. Thus, I suggest that the convention remain silent on whether donors need to be known.

There are numerous other issues that any international convention has the potential to address. However, it is urgent to develop some sort of international convention that can attract the most countries as signatories in order to protect the parties in commercial surrogacy transactions. It is not beneficial to forego any international agreement just because not every issue is dealt with. Although my proposed model may not be overly ambitious, it is pragmatic and realistic, especially because I propose that anti-surrogacy countries can and should be parties to the convention.

IV. Conclusion

This Article makes a case for why international surrogacy can and should be regulated. I use adoption as a model, but note that there are many differences in international surrogacy that warrant a new approach. In this Article, I attempt to make an argument that surrogacy should be regulated on an international level, similar to inter-country adoption. What makes the feasibility of such a convention a question is that, unlike inter-country adoption, where most countries are open to some form, many countries outright ban commercial surrogacy and would not want to be involved in theorizing how to make it legal. However, as I note, the proposed convention does not have to deem surrogacy a right or even make any moral judgments for or against surrogacy. The reality is that many citizens of countries that ban surrogacy are seeking surrogacy arrangements elsewhere, and thus, even those countries banning the practice, should be party to a convention which attempts to address this issue. The convention should address how to deter the breaking of the law, without harming children borne of such illegal arrangements. It would be great progress if countries could agree on a definition of international surrogacy and work towards best practices. We should not wait for all the issues in international surrogacy to be solved by one document. Rather, a convention that has modest goals is currently the best solution in giving notice to intended parents and the rest of the world about a countries' stance on surrogacy.