ART and the Constitution Part II: Pros and Cons of Surrogacy, An Academic Debate

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**Moderator:**
Simi Denson

**Speakers:**
Harold J. Cassidy
Judith Daar
John Weltman
Harold J. Cassidy, Esq.
Shrewsbury, NJ
Harold Cassidy has engaged in a broad variety of litigation, both trial and appellate, in his 43 years in the private practice of law. He is a past member of the Board of Governors of the Association of Trial Lawyers of America, New Jersey. The New Jersey Supreme Court designated him as a Certified Civil Trial Attorney. He was selected by the New Jersey Governor to serve as a member of the New Jersey Bioethics Commission, and was a Delegate to the American Bar Association Convention on Life, Death and the Law. In 2017 he was selected by Who's Who as one of the Top One Hundred Lawyers in North America and was invited to be a member of the prestigious, invitation only, “National Trial Lawyers: Top 100.”

Harold Cassidy is a leading and accomplished attorney in matters defending the rights of pregnant mothers. He was Chief Counsel in the Baby M case, the first case in the United States to strike down surrogate parenting contracts as illegal, unenforceable, against public policy and exploitive of women. In 2009, he successfully litigated the first contested “gestational” surrogacy case in New Jersey, obtaining a decision that the woman who carried the child was the legal mother, that the contract was unenforceable, violative of public policy, exploitive of women, and her consent for adoption, resulting from compulsion of the contract, was void. For his achievements on surrogacy, he was selected as Person of the Week by ABC World News with Peter Jennings.

Prof. Judith Daar, JD
Irvine, CA
Judith Daar is a Visiting Professor at the University of California, Irvine School of Law and a Clinical Professor at the University of California Irvine, School of Medicine. She is the former Interim Dean and Professor of Law at Whittier Law School in Costa Mesa, California. Beginning in November 2014, Professor Daar has served as Chair of the Ethics Committee of the American Society for Reproductive Medicine, where she has been a member of the committee since 2008. Since 2002, Professor Daar has been a member of the Medical Ethics Committee at UCI Medical Center. She was elected president of the American Society of Law, Medicine & Ethics from 2009-11, where she also sat on the Board of Directors from 2006-2012. She also served as the co-chair of the ABA Section on Real Property, Trust and Estate Law, Bioethics Committee. In 2012, Professor Daar was elected to the American Law Institute.


Professor Daar has spoken extensively on legal, medical and ethical issues in reproductive medicine, including giving testimony to the National Academies of Science and the California legislature. Her scholarly work includes over 100 book chapters, articles, white papers and editorials on a range of topics including prenatal genetic testing, human reproductive cloning, regulation of reproductive technologies and malfeasance in the provision of assisted conception services. She is the recipient of three outstanding teaching awards, including the Jay Healey Distinguished Health Law Teacher of the Year awarded in 2015. In October 2013, she was awarded the Suheil J. Muasher, M.D. Distinguished Service Award by the American Society for Reproductive Medicine. Professor Daar has taught as a visiting professor at UCLA School of Law, UCI School of Law, Loyola Law School and the University of Houston Law Center.

Simi Denson, Esq.
Austin, TX
Simi Denson is an attorney in Austin, Texas who exclusively practices assisted reproduction law. She
Prof. David M. Smolin, JD
Birmingham, AL

David Smolin is the Harwell G. Davis Professor of Constitutional Law, and Director, Center for Children, Law, and Ethics, at Cumberland Law School, Samford University. He serves as an independent expert for the Hague Conference on Private International Law (HCCH) on intercountry adoption issues, and serves as an external expert for the International Reference Centre for the rights of children deprived of their family, of the International Social Service (ISS/IRC), on issues related to children’s rights, adoption, and surrogacy. He is a member of the core expert group of the ISS surrogacy project. He also serves on the Ethics Committee at Children’s (Hospital) of Alabama. He teaches in the areas of constitutional law, bioethics and law, family and juvenile law, children’s rights, and criminal law and procedure. Many of his publications are available at http://works.bepress.com/david_smolin/. He received the Outstanding Scholar in Adoption Award from the St. John’s University Adoption Initiative in 2014. He has presented internationally at the Second International Symposium on Korean Adoption Studies in Seoul, South Korea; the 2010 and 2015 Hague Special Commissions on the Practical Operation of the Hague Adoption Convention; the 2014 International Forum on Intercountry Adoption and Global Surrogacy at the International Institute of Social Studies, the Hague, Netherlands; the State Supreme Court of Sao Paulo, Brazil; and the NALSAR University of Law, in Andhra Pradesh, India. He works together with his wife, Desiree Smolin, on analysis and reform of adoption systems and practices, and sometimes contributes to the adoption blog she co-founded: http://fleasbiting.blogspot.com/.

John Weltman, Esq.
Boston, MA

John Weltman is a father through surrogacy, a lawyer, and founder of Circle Surrogacy & Egg Donation; the nation's oldest, full-service surrogacy and egg donation agency. John is recognized worldwide as an expert in the field of reproductive law, including surrogacy and gay parenting. John and his husband were among the first gay couples to have children through surrogacy and were only the second to have two children, each man fathering a biological son. John has practiced law all over the world, and was the first to establish the right of couples to get insurance coverage for gestational surrogacy in Massachusetts, and has repeatedly obtained pre-birth orders, step-parent and second-parent adoptions for gay and straight couples and singles having children through surrogacy in the United States. John studied at Yale, Oxford and the University of Virginia and holds a Master’s Degree in History and a JD. He is licensed to practice law in MA, NY and CA.
ART and the Constitution: Pros and Cons of Surrogacy

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Judith Daar
Dean-Elect, Chase College of Law, Northern Kentucky University
Visiting Professor of Law, University of California, Irvine School of Law
Clinical Professor of Medicine, University of California, Irvine School of Medicine

I. Introduction

The United States Constitution is textually silent on the matter of assisted reproductive technologies (ART), not a surprise given the framers drafted this guiding tome at the end of the 18th century when methods of procreation other than male-female union were beyond contemplation. It would take nearly 140 years after the Constitution’s ratification in 1789 for the Supreme Court to confront a case linking an individual’s right to reproduce with the fundamental rights set out as protected against governmental violation. In the now repudiated case of Buck v. Bell, the Court refused to find invalid a Virginia law authorizing sexual sterilization of a reputedly “feeble minded white woman” named Carrie Bell.¹ Finding the law to not violate due process of law or the equal protection of the laws, Justice Oliver Wendell Holmes famously lauded the forced sterilization law for aiding “society [to] prevent those who are manifestly unfit from continuing their kind.” Never expressly overruled, Buck serves a cautionary tale against state-sponsored exuberance for controlling an individual’s right to reproduce; well-researched accounts reveal Carrie Buck to have been a woman of average intelligence whose case was pursued by eugenic enthusiasts holding now-discredited views about hereditability of human traits.²

Fifteen years would pass before the Court again considered the scope of constitutional protection for reproduction. This exploration yielded a pivotal U.S. Supreme Court decision that marked the beginning of the demise of the eugenics movement, and ushered in an era of

procreative protectionism. In *Skinner v. Oklahoma*, thrice-convicted armed robber Jack Skinner challenged the constitutionality of the Oklahoma Habitual Criminal Sterilization Act, a 1935 law passed in the heyday of the eugenics movement. Based on the scientifically unsupported proposition that criminality was a heritable trait, the law permitted state officials to sexually sterilize those convicted two or more times for felony crimes involving “moral turpitude.” Writing for a unanimous court in overturning the law, Justice William O. Douglas described the case as “touch[ing] a sensitive and important area of human rights...the right to have offspring.” In repudiating the law and protecting Mr. Skinner, and countless others, from forced sterilization, Justice Douglas declared: “Procreation involves one of the basic civil rights of man...fundamental to the very existence and survival of the race.”

At the time of this broad mid-century proclamation of reproduction as a fundamental right, procreation through means other than sexual intercourse were largely unknown. Justice Douglas’ world-view of human conception entailed a single scenario in which one man and one woman privately melded their gametes inside the woman’s body to produce a child. By the end of the twentieth century, this simplistic view had shifted dramatically with the birth of reproductive medicine, an amalgam of arrangements requiring collaborations unthinkable in the post-war era. Would Justice Douglas offer the same unfettered protection against state interference to today’s reproducers? The question of procreative freedom that engaged the Court nearly eight decades ago is far more complicated today, asking not simply whether a right exists, but to whom and for what it should be assigned.

Would Justice Douglas, for example, defend the right of a legally married same-sex male couple to have children with the aid of an egg donor and a gestational carrier, the latter who happens to be the nonbiological father’s sister? When the sister changes her mind about the

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4 *Id.* at 541. See also Lombardo, supra note 2, at 219-235.
5 A.G.R. v. D.R.H. and S.H., (Superior Ct. of NJ, Chancery Div., Dec. 23, 2009) (married male couple contracts with genetic father’s sister to act as gestational carrier; after twins are born, trial court awards sister/surrogate parental rights, finding the intent of the parties “of no significance”). In December 2011, Superior Court Judge Francis Schultz modified the previous order, awarding the biological father “sole legal custody” while granting the sister/surrogate substantial parenting time with the children.
limits of her role in this modern family formation, demanding parental rights to the twin girls born of her womb but not of her blood, to whom would Justice Douglas ascribe the basic civil right of procreation? How about the rights of Thomas Beatie, a female by birth and chromosomes but a transgender male by phenotype and law, and wife Nancy Beatie to become parents through donated sperm injected into Thomas’ still-functional reproductive tract? Rebuked at the time as a biological freak by some, Thomas gave birth to three healthy children but later became embroiled in a legal dispute over his identification as a man when the couple sought dissolution of their marriage. Does the “human right” of reproduction entitle Thomas to give birth and then list himself as “father” on the child’s birth certificate? What about the 2009 phenom Nadya Suleman, dubbed Octomom after giving birth to octuplets conceived in a Beverly Hills fertility clinic? Does this single mother of 14 children have an unfettered right to access the technology that makes such unnatural multiple pregnancies a clinical possibility?

Sorting through the rights and privileges of modern day procreation in a constitutional framework is highly challenging. Since the 1940s, reproductive medicine has introduced myriad advances in assisted conception and childbearing, yet Skinner remains the only U.S. Supreme Court precedent to consider the right to procreate as an affirmative, intentional act. Every other case to come before the Court in the reproductive realm has involved the right to avoid procreation, either through the use of contraception or abortion. The question of whether

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6 See Jacques Billeaud, “Pregnant Man” Thomas Beatie’s Divorce Stalled, Huffington Post, available at http://www.huffingtonpost.com/2013/01/02/pregnant-man-thomas-beati_n_2397360.html (describing Thomas and Nancy’s marriage in Hawaii and subsequent decision to divorce after moving to Arizona. In a state that bans same-sex marriage, Maricopa County family law judge struggled to recognize the marriage as valid, finding no legal authority defining a man as someone who can give birth).


8 The fundamental right to procreate established in Skinner has been reaffirmed by the Court on numerous occasions, typically as a starting point for discussing other conduct of an intimate and personal nature. See, e.g., Washington v. Glucksberg, 521 U.S. 702 (1997) (challenge to state assisted suicide laws which deprive terminally ill patients the right to physician aid in dying); Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) (upholding right of competent adults to refuse life-sustaining medical treatment); Michael H. v. Gerald D., 491 U.S. 110 (1989) (discussing right of biological father to establish paternity and right to visitation of child born to married woman living with her husband); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding constitutionality of Georgia sodomy statute as applied to homosexual conduct, later overturned in Lawrence v. Texas, 123 S. Ct. 2472 (2003)).

reproduction via ART would receive the identical constitutional treatment as natural reproduction has been much debated but remains unresolved. Resolution of the constitutional status of assisted conception has implications beyond academic interest. As the uptake of birth via ART continues to grow, disputes over gametes, embryos and the offspring born of various arrangements present and often invoke questions of constitutional import. The aim of this presentation is to briefly set out the constitutional underpinnings of assisted conception and then focus on the rights surrounding gestational carrier arrangements – often referred to as surrogacy. Constitutional analysis surrounding surrogacy calls upon us to consider which rights are at play and by whom they can be claimed when one woman agrees to gestate for others.

II. The Preeminence of Reproductive Liberty

The concept of procreative liberty first advanced in *Skinner v. Oklahoma* has long guided discussion, law and policy surrounding the regulation of reproductive medicine. Nearly a quarter century ago, Professor John Robertson described procreative liberty as “a negative right against state interference with choices to procreate or to avoid procreation.” He expounded on the import of this right by asserting, “reproductive experiences . . . are central to personal conceptions of meaning and identity. To deny procreative choice is to deny or impose a crucial
self-defining experience, thus denying persons respect and dignity at the most basic level.”12 The source of denial of reproductive liberty to which Professor Robertson refers is the government whose various enactments in the procreative realm have given rise to a robust jurisprudence. While grounded almost entirely in the right to avoid procreation through contraception and abortion, the reproductive rights legal landscape arguably holds sway over the right to access the means to reproduction through ART.

The judicial volley over validation and rejection of state and federal regulation of abortion continues, still anchored to principles set out in Planned Parenthood of Southeastern Pennsylvania v. Casey, the U.S. Supreme Court's 1992 abortion decision.13 The Court recognized procreative liberty as being at stake in the abortion context, but warned this liberty is not absolute and must be balanced against the State's legitimate interest in the life of the unborn. Thus, the Court formulated a legal standard for evaluating state regulation of abortion, weighing the woman's liberty interest against the government's interest in potential life. State abortion regulation, the Court declared, will be invalid if it poses an “undue burden” on the right of a woman to decide whether to terminate a pregnancy. An undue burden exists, “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”14 In 2016, the Court reaffirmed the basic parameters of Casey, applying the undue burden test to a Texas law requiring abortion providers obtain admitting privileges at nearby hospitals and facilities meet more onerous ambulatory surgical center standards. Finding these requirements posed an undue burden on women seeking abortion, the Court struck down the Texas law as unconstitutional.15

The import of this jurisprudence to decision-making over noncoital reproduction is derivative but nonetheless vital. In its broadest context, the centrality of reproductive autonomy to personal identity and meaning extends not just to decisions about whether or not to become a parent, but also to decisions about how to bring a child into the world or into a family. For better or worse, the deliberate decision-making inherent in ART broadens the choices prospective parents enjoy when invoking the procreative process. The ever-presence of physicians and, at

12 Id. at 4.
14 Id. at 878.
times, third party collaborators transforms a private two-party act into a group activity involving stakeholders of varying interests. Women and couples who conceive naturally can feel secure in the protections afforded procreation, as no competing rights or interests stand as to challenge to their resting within the birthing woman and her chosen sperm-supplying partner. But ART-conceiving patients and their partners are less secure that the rights surrounding procreation will apply to them. Much depends upon whether procreation is viewed purely in terms of gestation and childbirth, or whether it is more broadly interpreted to include the provision of gametes and the arranging for the gestation and birth of a child. If the physicality of pregnancy is required for a woman to enjoy procreative rights, and the provision of sperm necessary for a man to enjoy these same rights, then protections against liberty infringements are assured. This lack of certainty leaves ART reproducers and their offspring vulnerable to competing claims not known to the naturally conceiving world.

Acknowledgement of reproductive liberty as a protected right arises not just in law but in the policies that surround clinical practice. The American Society for Reproductive Medicine, the largest U.S.-based organization of reproductive medicine professionals, publishes guidelines and opinions to inform and assist ART stakeholders in the myriad scenarios that present in the field. In various published statements, the ASRM Ethics Committee has discussed the essential role that patient autonomy and reproductive liberty play in the practice of reproductive medicine, stating these principles “have long guided patient/physician relationships in the field.”\textsuperscript{16} In an opinion discussing the ethics and law surrounding sex selection of embryos for nonmedical reasons, the Ethics Committee averred that it would be permissive to give patients this choice based on notions of reproductive liberty. Specifically, the ASRM affiliate wrote, “[t]he preeminent ethical considerations that support patient choice of sex selection for nonmedical reasons are patient autonomy and reproductive liberty.”\textsuperscript{17} The Committee opinion then discusses the various reasons patients might have to preferring one sex over another – i.e., family balancing, an anticipated rearing experience – and concludes, “[i]n such cases, sex selection is a material aspect of that person’s reproductive decision making…Having access to technologies that enable individuals to shape the course of their pregnancy and child-rearing experience may

\textsuperscript{16} Ethics Committee of the American Society for Reproductive Medicine, *Transferring Embryos with Genetic Anomalies Detected in Preimplantation Testing*, 107 Fertility & Sterility 1130 (2017).

\textsuperscript{17} Ethics Committee of the American Society for Reproductive Medicine, *Use of Reproductive Technology for Sex Selection for Nonmedical Reasons*, 103 Fertility & Sterility 1418 (2015).
be embedded in the concept of constitutionally protected reproductive liberty and thus not amenable to infringement by the government or those who operate as state actors.”\(^{18}\) The power of these words and their transferability to all forms of ART cannot be denied.

### III. Constitutional Questions Surrounding Surrogacy

Questions about the constitutionality and enforceability of gestational carrier agreements have been posed in formal legal proceedings for over 30 years.\(^{19}\) Still other questions have arisen in surrogacy scenarios but not yet been answered in reported court decisions. What follows are a series of such questions and the author’s commentary as to suggested responses.

**What is the proper allocation of procreative liberty as between a gestational carrier and the intended parent(s)?**

It is possible to protect the procreative liberty interests of the surrogate and the intended parent(s) in the context of a gestational carrier arrangement. At its strongest point, procreative liberty would protect the surrogate in her private decision-making surrounding the use and treatment of her body. Less certain but highly arguable is the right of the intended parents to enter into a gestational carrier arrangement in order to exercise their procreative liberty in this fashion.

At the heart of a vast majority of gestational carrier arrangements lies a detailed contract, setting out the parties’ duties, rights and responsibilities. Typically these agreements allocate most aspects of medical decision-making to the intended parent(s), including decisions about the surrogate’s prenatal care, labor and delivery. Some agreements even purport to allocate decision-making about selective reduction in the case of multiple pregnancy and pregnancy termination in the case of fetal anomaly to the intended parent(s). To be clear, any decision-making that effects the pregnant woman’s body is reserved for her judgment alone. Decisions about pregnancy

\(^{18}\) *Id.* at 1419.  
\(^{19}\) *See, e.g.*, In re Baby M, 109 N.J. 396 (1988); Johnson v. Calvert, 5 Cal. 4\(^{th}\) 84 (1993); Culliton v. Beth Israel Deaconess Medical Center, 435 Mass. 285 (2001); In re Roberto d.B., 399 Md. 267 (2007).
management occupy the highest order in the realm of procreative liberty. As set out by the Committee on Ethics for the American College of Obstetricians and Gynecologists:

Regardless of the contractual details, however, the pregnant gestational carrier is the only one empowered and enabled to make independent decisions regarding any screening, testing, or procedure that may be indicated during her pregnancy. Such interventions include fetal chorionic villus sampling, amniocentesis, multifetal reduction, pregnancy termination, and invasive or fetal surgery. Similarly, the gestational carrier’s decisions regarding the continuation of pregnancy when her health is at risk should take priority over the well-being of the fetus and the desires of the intended parents. Decisions counter to the contract may have financial or legal consequences, and the gestational carrier should be made explicitly aware of this fact and of the specific consequences that may result after a contract breach.20

Procreative liberty may also attach to the intended parents to protect their decisions about whether to form their families via gestational surrogacy. Laws in several states that outlaw, restrict or nullify surrogacy contracts could be subject to attack as unconstitutional infringements on their citizens right to reproduce – especially for those who have no other alternative to biologic parenthood. Since the right to reproduce is seen as a fundamental right, per Skinner, any governmental infringement on this right must be narrowly tailored to meet a compelling state interest. Given the vast majority of surrogacy arrangements proceed without negative incident and the social science data on the well-being of gestational carriers and the offspring are reassuring, it may be difficult for the state to sustain these laws on the basis of any legitimate governmental interest.21

**Does the gestational carrier enjoy constitutional protection of a right to companionship or parenthood of the offspring to which she bears no genetic relationship?**

Courts have not been friendly to the argument that a gestational carrier who initially agrees to carry the child of another, signs an agreement to that effect, and then changes her mind at some point after the pregnancy has commenced, has a right to the companionship or parenthood of any child born as a result of this lawful arrangement. In *Johnson v. Calvert*, the California Supreme Court rejected similar constitutional claims made by a gestation carrier, finding that no “sufficiently strong policy reasons exist to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond enjoyed by [the genetic and intended parents].” In 2017, the California Court of Appeals, citing to the earlier *Johnson* decision, likewise rejected a gestational carrier’s claims for constitutional protection of her parental rights over triplets she gave birth to because the surrogacy agreement validly and legally assigned parentage to the intended parent. Without recognition as a legal parent, constitutional claims for rights of companionship and parenthood seem unavailing in the surrogacy context in states that recognize these arrangements as valid. In jurisdictions in which surrogacy agreements are either invalid or there is ambiguity in the law, courts may be more open to considering constitutional claims brought by the surrogate in her quest for custodianship, visitation or even parentage over offspring born via gestational carrier arrangements.

**Do children born via surrogacy have a constitutional right to the companionship or parenthood of the women who gave birth to them?**

In states in which surrogacy is legal – meaning that the intended parents are presumptively recognized as the offspring’s legal parents either before or upon birth – any disruption in that parent/child relationship would fall under the legislative scheme in place to protect the best interests of the child. That is, the child would not have a constitutional right (nor likely a statutory right either) to be in contact with or reared by his or her birth mother. In *C.M. v. M.C.*, 22

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while the court found that the gestational carrier had standing to raise constitutional claims on behalf of the children she gave birth to, these claims were unavailing in a state that recognized the enforceability of gestational carrier arrangements. Moreover, the court noted the state’s disparate treatment of surrogacy and adoption, and thus rejected the birth mother’s request for the court to adjudge parentage based on the best interest of the children. The court noted that such determinations “should be left to the dependency laws” which were not invoked in this case.24

24 Id.

Constitutional claims by gestational carriers brought on behalf of themselves or the children they give birth to are qualitatively and legally distinct from claims to rights brought by parents who are not voluntary parties to a surrogacy arrangement. Since gestational carrier agreements involve a preconception agreement that the gestational carrier will not be accorded the status of legal mother, her rights to be regarded as a legal parent never come into play. Lacking status as a legal parent, and without grounds to seek protection under a state’s dependency scheme, a gestational carrier is unlikely to prevail on constitutional claims linked to legal parenthood. A surrogate’s constitutional rights are strongest during her pregnancy and fall away rapidly after her procreative efforts are completed.

24 Id.
THE ONE HUNDRED THOUSAND DOLLAR BABY: THE IDEOLOGICAL ROOTS OF A NEW AMERICAN EXPORT

DAVID M. SMOLIN*

The thesis of this article is controversial: The United States of America, as represented by the United States government, some states, and leading legal institutions, is actively building worldwide markets in children. The ideological roots of these actions span left–right divides, making it more difficult—and even hazardous—to advocate against it. Another important force is simply that of capitalism run amuck, as the profits generated create industries with deep pockets and large-scale resources to politically, legally, and socially further their ends. This practice of allocating children in large part through market mechanisms has attracted significant support from powerful and mainstream legal institutions. The combination of broad-based ideological support and deep financial pockets makes any engagement between supporters and opponents of these new markets in children asymmetric.

A primary present manifestation of this worldwide market is surrogacy. Adoption, in the recent past, has served as another manifestation of efforts to construct demand-driven markets in children, as well as an arena for resistance to such markets. Most likely developing Assisted Reproductive Technologies (“ARTs”) will continue to offer new opportunities for the development of markets in children.

The topic deserves a book; this essay merely sketches out the elements that sustain this controversial thesis. The purposes of this sketch are to document this mainstreaming and advocacy of markets in children and to encourage research and resistance.

I. IDEOLOGICAL ROOTS

A. Law and Economics

i. Introduction

For forty years, since the publication of The Economics of the Baby Shortage¹ by Elizabeth Lands and Richard Posner, the law and economics

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* Professor of Law and Director of the Center for Children, Law, and Ethics, Cumberland Law School, Samford University. I wish to thank Emma Cummings, Alex Sidwell, and Sydney Willmann for their research assistance; Desiree Smolin for our joint work on many of these issues over many years; and Nigel Cantwell and Amanda Lowndes for their review of and comments on prior drafts of this essay.
movement has advocated for allowing the sale of parental rights. While the initial paper was exploratory of the concept, the proposals over time have become more insistent and even dogmatic, as in Donald Boudreaux’s article, A Modest Proposal to Deregulate Infant Adoptions:

In his famous satire, Jonathan Swift “modestly” proposed slaughtering babies and feeding them to hungry Irish folk. Thanks to Swift’s masterful lampoon, any proposal for modestly changing public policy affecting children risks being branded a satire. So I proclaim up front my sincerity in proposing that pregnant women, and women who have just given birth, be allowed to contract freely with adoptive parents at mutually agreeable prices for the sale of parental rights in their infants.

ii. A Summary of the Law and Economics Argument for Markets in Parental Rights

It seems particularly important to convey the strength of the law and economics argument in favor of a market in parental rights. Therefore, despite my complete disagreement with its conclusions, this subsection summarizes the arguments in this section primarily from the perspective of a proponent rather than opponent.

Adoption already involves black and gray markets in children, as the laws against baby-selling are circumvented or porous. Birth mothers already

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3 Boudreaux, supra note 2, at 117; see Montgomery & Powell, supra note 2, at 187.
can be paid expenses, and the line between expenses and compensation is not always clear, and hence not readily enforceable. Intermediaries already profit (even when labeled non-profits) from adoptions, generally at the expense of birth mothers, since it is payments to the natural parents which are primarily limited under current law. The laws against babyselling have distortive and destructive effects, by inducing the negative features of black and gray markets, by preventing the most worthy person (the natural mother) from benefitting financially while allowing others to do so, and by artificially reducing supply which makes it more difficult for adults who wish it to become parents.

In addition, these harms are not justified by any benefits of such restrictions. As to the children themselves, so long as prospective adoptive parents are required to pass some sort of fitness screening, the matching produced by market mechanisms would be as good as, or better, than that provided by social workers and agencies, particularly as to healthy babies. Hence, the risks of child abuse or neglect of the proposed system are no greater than the present system, as the primary protection of screening of prospective adoptive parents would also exist in the proposed system.

Further, selling parental rights is not the same thing as selling children, as children will not be slaves, nor literally property, but simply be transferred from one parent or household to another. Most of the perceived negative impacts of child selling relate to black or gray markets and hence would not apply to explicit, legalized markets in parental rights.

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6 See Freundlich, supra note 4; Boudreaux, supra note 2, at 125; Landes & Posner, supra note 1, at 326.
7 See, e.g., Montgomery & Powell, supra note 2, at 143–44; Boudreaux, supra note 3, at 119–120; Landes & Posner, supra note 1, at 346–47.
8 See Montgomery & Powell, supra note 2, at 143–44; Posner, Economic Analysis, supra note 2, 165–170; Posner, Sex and Reason, supra note 2, at 410–16; Landes & Posner, supra note 1, at 326.
10 Landes & Posner, supra note 1, at 342–43.
11 See id.
12 See Posner, Sex and Reason, supra note 2, at 410, 413; Boudreaux, supra note 2; Lawrence A. Alexander & Lyla H. O’Driscoll, Stork Markets: An Analysis of “Baby-Selling”, 4 J. Libertarian Stud. 173, 173–74 (1980). Alexander and O’Driscoll claim that their position differs from Posner’s but the purported distinction between selling babies and selling parental rights appears similar. See id.
the value of such prohibitions is largely irrational and symbolic. Rationally, permitting such markets in parental rights would enlarge the number of children available for adoption, allowing more adults to fulfill their desires to parent, potentially decrease the numbers of abortions, empower birth mothers by allowing them more options and to benefit financially, and alleviate the current negative features of the black and gray markets in adoption: particularly the lack of information and lack of remedies for misconduct characteristic of such markets. The primary losers of such legalization would be adoption professionals, agencies, and intermediaries, as empowered birth mothers could capture more of the financial benefit of the market and only use intermediaries when in their own interests. Since adoption is already intrinsically a market, it is better to legalize and regulate the market in rational ways rather than irrationally restrict and distort the market.

iii. ART’s Contribution to the Increasing Plausibility of the Law and Economics Argument for Markets in Parental Rights

Initially, the law and economics proposal for legalizing the sale of parental rights was met with a chilly reception. Politically, some suggest that Posner’s published work in this area cost him the chance to be nominated to the United States Supreme Court, with Posner known as “the guy who wants to sell babies.” Posner himself noted that critics of the law and economics movement used the 1978 Landes and Posner article as “an example of [the] excesses” of the law and economics movement. Academic responses were often quite negative. Professor Margaret Radin’s famous 1987 article, Market-Inalienability, analyzed markets in the contexts of sex work, adoption, and surrogacy; Professor Radin noted concerns with commodification and the conceptions of children, sexuality, sexuality, and identity.

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14 See POSNER, SEX AND REASON, supra note 2, at 413.
15 See MONTGOMERY & POWELL, supra note 2, at 143–44; POSNER, ECONOMIC ANALYSIS (4th ed.), supra note 5, at 150–54; POSNER, SEX AND REASON, supra note 2, at 409–17; Alexander & Driscoll, supra note 12, at 173, 177–78; Boudreaux, supra note 2, at 117–22; Landes & Posner, supra note 1, at 324, 339.
16 See MONTGOMERY & POWELL, supra note 2, at 143–44; POSNER, SEX AND REASON, supra note 2, at 410–16; Landes & Posner, supra note 1, at 346–47.
17 See MONTGOMERY & POWELL, supra note 2, at xv; POSNER, ECONOMIC ANALYSIS (4th ed.), supra note 5, at 150–54; POSNER, SEX & REASON, supra note 2, at 409–16; Boudreaux, supra note 2, at 117–18; Landes & Posner, supra note 1, at 324.
20 See id. at 59 n.1 (quoting Mark Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. Cal. L. Rev. 669, 688 n.51 (1979)).
and persons that could develop with such markets. Professor Michael Sandel objected to some claims of the law and economics movement, basing his objections on the need for limits to markets, and the idea that “certain things should not be bought and sold.” While acknowledging that there often were economic contexts or aspects of children, parent-child relationships, personal intimate relationships, sexuality, and procreation, these authors were signaling the need to retain a primarily non-economic viewpoint and valuation of these aspects of human life. Limitations on markets in areas like sex work, surrogacy, and adoption were necessary in order to prevent a tilting to primarily economic perspectives of sexual intimacy, procreation, children, women, men, and family relationships. Such a primarily economic view, it was thought, would change human self-understanding and practice in ways contrary to human flourishing, human dignity, or our understanding of personhood.

Over time, however, some of the predictions and descriptions of the law and economics advocates of markets became increasingly plausible. The rise of Assisted Reproductive Technologies (“ART”) and a large-scale and ubiquitous market-based ART market made market-based understandings of human procreation increasingly plausible, both internationally, and especially in the United States, where the ART services industry was primarily privatized, paid for out of pocket by consumers. The proponents of adoption markets have often been perceptive enough to reference the market-based elements of present and possibly future forms of ART. Hence, Posner in 1987 noted that surrogacy already involved the sale of children, and Lawrence Alexander and Lyla O’Driscoll in 1980 looked ahead to markets in children that could develop in the future with a combination of IVF and an artificial womb. More recently, Kimberly

23 See Radin, supra note 21, at 1849; Sandel, supra note 22, at 100.
24 See Radin, supra note 21, at 1851; Sandel, supra note 22, at 100.
25 See Radin, supra note 21, at 1851.
27 See, e.g., Posner, supra note 19, at 72 (“In the first case the close family relative ‘buys’ the baby, in the second the father (and his wife) ‘buys out’ the natural mother’s ‘share’ in their joint product.”).
28 Id.
29 Alexander & O’Driscoll, supra note 12, at 173.
Krawiec discussed adoption in tandem with ART-related markets. The present and future development of ART as a primarily private market in human gametes, surrogacy services, and medical services, often with the involvement of for-profit intermediaries—a self-described industry—thus has become a comparison point by which to justify increased market mechanisms for adoption.

Thus, authors such as Kimberly Krawiec, Michele Goodwin, and Deborah Spar verified that, even without legalizing explicit markets in parental rights, adoption and ART in the United States nonetheless did primarily function as markets—and essentially markets in children. Features like differential “prices” for children based on race, age, and gender, highly-paid intermediaries, costly adoptions, payments for gametes and surrogacy services, and the tendency to stretch the concept of “reimbursement” for birth parent expenses, made the claim that adoption and ART comprised segments in a competitive baby market increasingly plausible.

The lines between permissible markets in adoption, ART, and surrogacy services, and theoretically impermissible markets in parental rights, and children, seemed increasingly arbitrary and implausible. Hence, the claim that since adoption was already a market, it should be made into a more efficient and beneficial market, were harder to dismiss as extreme. Indeed, when Professor Dorothy Roberts in 2017 published Why Baby Markets Aren’t Free, the tone of her argument suggested that she knew that her cautions about the baby market went against predominant views and trends.

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31 See SPAR, supra note 26, at 32–33; Alexander & O’Driscoll, supra note 12, at 173–74; Posner, supra note 19, at 72.
32 See Krawiec, supra note 30, at 42–43.
34 See SPAR, supra note 26, at 31, 33–35.
35 See, e.g., id. at 32; Goodwin, supra note 33, at 63.
The rise of gestational commercial surrogacy, and its explicit legalization in California and then other jurisdictions in the United States, made even the law and economics radicals cautious. Generally, the law and economics advocates for adoption markets had suggested that after-placement protections against abuse and neglect were insufficient protections for children in an adoption market, and thus had accepted the need for suitability screening for prospective adoptive parents. As to commercial gestational surrogacy, this limitation was lifted by commercial surrogacy regimes in California and other jurisdictions. Indeed, the American Bar Association specifically rejected suitability review of “intended” parents for surrogacy, whether or not they were genetically related, and the Uniform Commissioners 2017 revision of the Uniform Parentage Act (RUPA of 2017), also rejected such review. Washington State quickly replaced their anti-commercial law with a version of the RUPA of 2017, as a model of gestational commercial surrogacy rejecting suitability screening became legally and politically mainstream in the United States. Hence, in the new marketplace of commercial surrogacy, the rejection of suitability

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41 CAL. FAM. CODE § 7962; cf. Beiner, supra note 39, at 295–97 (explaining how the suitability screening requirement has been lifted in California); Bradley, supra note 40, at 8 n.27 (“Screening of prospective adoptive parents is generally required as part of the adoption process.”). *See generally* Andrew Botterell & Carolyn McLeod, *Licensing Parents in International Contract Pregnancies*, 33 J. APP. PHIL. 178, 179 (2016) (arguing that a licensing requirement be included in any future Hague Convention governing international surrogacy contracts).
42 AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 112B, at 4 (2016) [hereinafter ABA REPORT].
43 UNIF. PARENTAGE ACT § 813 (UNIF. LAW COMM’N 2017) (“Section 813 eliminates the prior requirement of a home study of the intended parents . . . .”).
review, and criminal or child abuse background checks, means that there was nothing legally to prevent a genetically unrelated pedophile or child murderer from obtaining a child through commercial surrogacy. The only protections in place were the possibility that an over-burdened child protective services system, which already struggles to process some four million child abuse reports annually, would take pre-emptive action, or the possibility that financially interested actors like agencies and so-called “gestational surrogates” might within the marketplace impose some kind of non-legal limitation. As to non-legal limitations, there are questions about how agencies and intermediaries would even learn reliably about the backgrounds of intending parents without legally enforced background checks. This task is made even more difficult by segments in the surrogacy market where foreign intending parents comprise as much as half of the clients of the industry.

iv. American Favoritism of Deregulated, Market-Based Approaches to Intercountry Adoption

Many in the American adoption community have come to favor a deregulated approach to intercountry adoption that allows market forces a larger


role. This approach has several roots. On the one hand, the private domestic adoption system in the United States is much more reliant on private actors, such as attorneys and private adoption agencies, than is typical in most countries. This unusual American acceptance of relatively unregulated, private, market-driven approaches to adoption has long been in tension with developing international norms. Second, Americans commonly blame the now almost 80% drop in international adoptions to the United States on over-regulation and international organizations such as UNICEF and the Hague Conference on Private International Law. Hence, the American preference for less-regulated, more market-driven adoption systems has been reinforced.

The international community, particularly starting in the 1980s, has been actively creating international standards governing adoption and the situation of children out of parental care. These international norms are particularly hostile to private and for-profit actors playing significant roles in the placement of children. The foundational document, the Convention on the Rights of the Child (1987) (CRC), has been ratified by every member state of the United Nations except for the United States—meaning that there are 196 State Parties to the CRC with the United States the sole exception. The United States prominently participated in the

50 See Smolin, Vulnerable Adoption System, supra note 48, at 1089–92.
53 See generally CRC, supra note 4; G.A. Res. 64/142, Guidelines for the Alternative Care of Children (Feb. 24, 2010); HCIA 1993, supra note 4.
creation of the 1993 Hague Convention on Intercountry Adoption, and negotiated successfully to create an exception, used only by the United States, to permit the use of private, for-profit actors in the intercountry adoption system. Nonetheless, the United States did not effectively ratify the HCIA for fifteen years, until 2008, and even then did not apply HCIA standards to the majority of intercountry adoptions until 2014, pursuant to the later passage of the Intercountry Adoption Universal Accreditation Act of 2012.

Intercountry adoption to the United States tripled from the early 1990’s until peaking at 22,989 adoptions in FY 2004 in a non-Hague system which relied on private, specialist, intercountry adoptions agencies which were usually nonprofit and financially dependent on intercountry adoption fees, and allowed agency personnel to sometimes earn very high compensation. For example, two sisters, according to the United States government, managed to pocket some eight million dollars over about five years of intercountry adoptions from a single country, Cambodia. As is well known, there are no effective limitations on what individuals working in


the “non-profit” sector can earn in the United States. At the same time, for-profit attorneys continued to work in both the domestic and intercountry adoption sectors, again potentially earning significant amounts.

The intercountry adoption boom in the United States, however, came crashing down after 2004, with intercountry adoptions to the United States declining by almost 80% since then, from 22,884 in 2004 to 4,714 in 2017. In response, it became commonplace in the United States to bemoan the decline as harmful to both children and prospective adoptive families, and to blame the decline on onerous regulations. Criticism was particularly leveled against the 1993 HCIA, UNICEF, the Convention on the Rights of the Child, and the United States Department of State. While a competing narrative, as articulated by this author, argued that it

was under-regulation and resulting abuses and scandals, along with independent developments in countries of origin, that was primarily responsible for the decline,67 this has not been the dominant view in the United States.68 The lesson taken, however wrong, was that to flourish, intercountry adoption required a largely market-driven, laissez faire context.69 Indeed, some directly applied the claims of Posner to intercountry adoption, explicitly arguing that birth families in developing nations should be able to negotiate their adoptions directly with adoptive parents, including allowing payments to birth families.70 While most were not that explicit, the implication was that intercountry adoption was a win-win for all involved and hence should be deregulated, which in practice would defer to market forces.

Hence, as predicted by some law and economics proponents, what was once perceived as radical has become increasingly plausible.71 The contexts for evaluating markets for children, particularly within the United States, have altered in favor of permitting markets in children, although usually in ways that allow some level of deniability and subterfuge. Decades of systems that place and/or create children through private actors with large-scale payments which are highly differential based on the characteristics of the child embody the characteristics of a consumer market, with the child as the product—even if officially it is merely a market in “services” and “gametes.”72 Even many who oppose explicit markets in children acknowledge that such markets are to a large degree already existing in current adoption, ART, and surrogacy systems, hence making plausible one of the pillars of the law and economics market in favor of explicit legalization—that it is better to acknowledge the realities of current practice and base any regulation on what maximizes benefit and efficiency within a market structure.73

In the meantime, what was initially seen as a provocative, almost satiric thought experiment put forward primarily by law and economics propo-


68 See Bartholet, supra note 52, at 114–17; Bartholet, supra note 65; Get to Know Our Partners, SAVE ADOPTIONS, http://saveadoptions.org/partners/ (last visited Oct. 29, 2018); Gwilliam et al., supra note 65; Letter from Concerned U.S. Intercountry Adoption Agencies, supra note 66.

69 See, e.g., Montgomery & Powell, supra note 2, at 159–60.

70 Montgomery & Powell, supra note 2, at 169–71, 192.

71 Cf. id. at 187.

72 See Spar, supra note 26, at x; Goodwin, supra note 33, at 63; Krawiec, supra note 30, at 1.

73 Krawiec, supra note 30, at 9–10.
ents has come to be seen increasingly, within the United States, as a matter of common sense.\textsuperscript{74} The fact that most of the academics and others involved in initially furthering this proposal on adoption markets were generally not particularly active in family law practice or family law scholarship became irrelevant.\textsuperscript{75} In part, this is because changing contexts provide increasing plausibility.\textsuperscript{76} In addition, as will be discussed next, these law and economics concepts, generally viewed as coming from the political right, were soon supported by some rather different perspectives coming from the center and left.

**B. Right to Procreate: Liberal Roots of the One Hundred Thousand Dollar Baby\textsuperscript{77}**

The political, legal, and cultural left in the United States has long critiqued the “traditional patriarchal family” bound together by heterosexual marriage and biological relationship. The critique has been based on both autonomy and equality concerns. As to autonomy, the goal has been to assert and make practical individual choice relating to sexuality, procreation, and “family.”\textsuperscript{78} These have been conceived of as personal zones of identity that are quasi-religious in their importance to the individual, and therefore about which each individual must have personal choice.\textsuperscript{79} As to

\begin{itemize}
\item \textsuperscript{74} See \textsc{Posner, Sex and Reason}, supra note 2, at 409; \textsc{Boudreaux, supra note 2}, at 117–18; \textsc{Landes & Posner, supra note 1}, at 324.
\item \textsuperscript{75} See \textsc{Posner, Sex and Reason}, supra note 2, at 409; \textsc{Alexander & O'Driscoll, supra note 12}, at 173; \textsc{Boudreaux, supra note 2}, at 117; \textsc{Landes & Posner, supra note 1}, at 323.
\item \textsuperscript{76} See \textsc{Spar, supra note 26}, at 206–07; \textsc{Goodwin, supra note 33}, at 62–63; \textsc{Krawiec, supra note 30}, at 1–2.
\item \textsuperscript{77} A portion of this subsection (text accompanying notes 77–101), is adapted by permission of Desiree Smolin and David Smolin, from a portion of David Smolin & Desiree Smolin, \textit{The Liberal Roots of the Modern Adoption Movement}, FLEAS BITING (Sept. 6, 2013), http://fleasbiting.blogspot.com/2013/09/the-liberal-roots-of-modern-adoption.html., originally published in the online magazine Gazillion Voices, but apparently not currently available there.
\item \textsuperscript{78} See, e.g., \textsc{Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (abortion as a fundamental right); \textsc{Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)} (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).
\item \textsuperscript{79} Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”); \textsc{Bowers v. Hardwick, 478 U.S. 186, 205 (1986)} (Blackmun, J., dissenting) (“The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will
equality, the critique has viewed the traditional family as essentially sexist and heterosexist, exploiting women and LGBTQ persons. The power structures within the family favoring male, heterosexual, and cisgender persons and practices therefore are critiqued in order to further both autonomy and equality. While not all heterosexual families are necessarily “patriarchal” in the historical sense, nonetheless, just as many perceive extensive racism and white privilege in the post-civil rights era, the left also remains concerned that most forms of “traditionalism” in family life contain implicit forms of patriarchy and male privilege.

Within this project of critiquing the traditional family, a fundamental part involves freeing reproduction from biological constraints through technological solutions. In this respect, there has been a critique of natural law arguments that found women’s “role” or “destiny” to be found in the female biological role in procreation and role as a wife and mother. The roles of “wife and mother” as constructed in human society were seen as placing women under and at the mercy of—men, creating a fundamental and practical inequality between the genders. The biologically distinctive roles of women in procreation became suspect as pathways into female subjugation. Unless women could gain autonomy over their reproductive functions, wresting control of their sexuality from men (whether husbands, fathers, brothers, cousins, uncles, or the male-dominated state), they were doomed to a limited realm of existence, disqualified from full come from the freedom an individual has to choose the form and nature of these intensely personal bonds.


See Gamal, supra note 80, at 232 (discussing the influence of the patriarchal structure of the family and gender stereotypes on Girls Court).


See Law, supra note 83, at 958–59; see also sources cited supra note 80.

See Law, supra note 83, at 957.
participation in vocations, professions, business, culture, and politics. The emancipation of women seemed to require that women not be defined by their biological roles in sexuality and procreation. The pathway of subjugation for women seemed to stem from sexuality, leading to procreation, leading to full-time motherhood. The children’s saying that “first comes love, then comes marriage, then comes the baby in the baby carriage” could carry an ominous ring, for it meant that a women’s sexuality inevitably led to her bondage to both a husband and to full-time motherhood. Thus, the liberal project has looked for ways of de-coupling each of these connections: de-coupling sexual activity from pregnancy, pregnancy from birth, and biological procreation from social and legal parenthood.

The standard ways of accomplishing these goals are contraception, abortion, the equal acceptance of inherently non-procreative sexual practices, ART, surrogacy, and adoption. The goal is to make procreation a choice.

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[86] See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); Kenneth L. Karst, The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 53–59 (1977); Law, supra note 83, at 960.


unbounded by biology. Thus, contraception minimizes the risk of heterosexual intercourse producing a pregnancy, while abortion serves as a backup for when contraception fails or is not used. Adoption serves as an alternative to abortion for those who cannot accept the killing of the fetus intrinsic to abortion. Further, the full, “as if” form of adoption predominates in the United States, under which it is “as if” the child had been born to the adoptive parents, made it legally as though the biological mother had never been a mother and had never given birth. Contraception, abortion, and adoption thus all emphasize (at least theoretically although not necessarily in practice) the choice of the woman, allowing her to de-couple sex from procreation and especially from legal and social motherhood.

The concept of choice also operates positively as well as negatively: just as biology should not dictate that a woman become a mother merely because she is sexually active or becomes pregnant, choice dictates that any adult may choose to become a parent even when biology does not cooperate. Decoupling procreation from biological capacities further extends choice over one’s life course, as infertility often occurs because of choices to defer parenting until long after the peak of biological fertility has passed, typically in favor of career or personal exploration. Indeed, choice dictates the capacity to “outsource” reproductive functions by purchasing gametes and surrogacy services. Choice also dictates that a single person, or a same gender couple, be able to parent a child. The principle is that regardless of age, partner-status (single, married, living together, etc.),

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90 See Joslin, supra note 88; Nel Jaime, supra note 82; Peter Nicolas, Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy, 89 WASH. L. REV. 1235, 1280–81 (2014).
91 See Casey, 505 U.S. at 833–34.
93 The baby-scoop era of adoption, discussed elsewhere in this paper, see infra note 116 and accompanying text, as well as the extreme power and economic differentials found in some forms of international surrogacy in particular, and the Chinese government’s population control policies, which give women little choice regarding the use of contraception and sometimes abortion, indicate that these technologies and practices do not intrinsically maximize individual choice. See David M. Smolin, The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective, 41 CUMB. L. REV. 1, 3–6 (2011).
94 See JOHN ROBERTSON, CHILDREN OF CHOICE (1994).
95 See id.; see also IFLG, supra note 47.
sexual practices, or sexual orientation, one ought to be able to have a child when one wants to have a child.  

Hence, two primary tools of reproductive choice are assisted reproductive technologies ("ART") and adoption. Thus, under the banner of an asserted "right to procreate," and equal protection, the individual or couple or family group can decide to have a child un-tethered by the constraints of biology.

Adoption, ART, and surrogacy hence fit very neatly into the broader "left" projects of making family relationships a matter of choice unbounded from any biological limitations: a repudiation of the preferred position of the "natural" through a higher preference for what is chosen. Sex without unwanted children and wanted children at will either with or without sex accentuates choice over biology; the right to ART and adoption becomes the neat corollary of the right to contraception and abortion. The concept of a right to procreate is thus conceptualized as a right to a child, or at least the means of obtaining a child. The right to the means of obtaining a child necessitates permitting whatever technological, medical, social, or legal means will facilitate the capacity of any adult to obtain a child to parent. Concretely, this suggests that the law should accommodate such arrangements.

As to surrogacy, this viewpoint has suggested that the following rules should apply to surrogacy:

1. Commercial surrogacy should be legal, allowing for paying "gestational carriers" or "gestational surrogates" for the service of gestating and giving birth to the child. The rationale is that payments beyond "expenses" to surrogate mothers are necessary to induce sufficient numbers of women to participate as surrogate mothers, in order to make this form of ART accessible to as many as possible; in addition, women should

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97 See ROBERTSON, supra note 94; Joslin, supra note 88; NeJaime, The Nature of Parenthood, supra note 82; NeJaime, The Family’s Constitution, supra note 96.
98 See, e.g., ROBERTSON, supra note 94.
99 See Snyder, supra note 96, at 276–77 (“Thus, according to the US perspective of the Constitutional right to procreate and its intersection with surrogacy, it can be persuasively argued that every individual does, indeed, have the fundamental right to have a child.”)
100 See id.
101 See UNIF. PARENTAGE ACT § 813 (UNIF. LAW COMM’N 2017); Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993); Snyder, supra note 96, at 276–77.
have a right to use their reproductive capacities for profit if they wish and to view gestational services as a potential kind of labor for pay. ¹⁰²

2. There should not be any screening for surrogacy or ART services parallel to the criminal background checks, child abuse registries, or social worker suitability reviews found in adoption. ¹⁰³ The rationale is that the right to procreate should include both un-assisted procreation and ART, in order to provide an equal right to procreate to all; therefore un-assisted procreation and ART should be provided as much as possible on the same terms. ¹⁰⁴ Hence, since un-assisted procreation is not subject to fitness or suitability reviews, ART and surrogacy assisted procreation also should not. In this sphere, a sharp break with adoption procedures is envisioned, as adoption procedures require suitability review and screening, including criminal background checks and child abuse registry searches for prospective adoptive parents. ¹⁰⁵ Hence, in some contemporary surrogacy legal systems there is nothing legally to prevent a genetically unrelated pedophile or child murderer from obtaining a child through commercial surrogacy - except the possibility that financially interested actors like agencies and so-called “gestational surrogates” might within the marketplace impose some kind of non-legal limitation. Instead, legal protection of the child is left, as it is for un-assisted procreation, to the after-the-fact work of the child protection systems, which even the law and economics proponents of markets in parental rights believed inadequate. ¹⁰⁶

3. As a corollary to the above break with adoption procedures, the right to procreate approach seeks systems whereby children born to a surrogate mother are, whether genetically related or not to intending parents,


¹⁰³ See UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62 (West 2018); ABA REPORT, supra note 42, at 2–4.

¹⁰⁴ See ABA REPORT, supra note 42, at 9–11.

¹⁰⁵ See UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62; ABA REPORT, supra note 42.

¹⁰⁶ See supra notes 9–10 and accompanying text; see also CAL. FAM. CODE §§ 7960–62.
only the children of the intending parents at birth.\textsuperscript{107} Hence, the surrogate mother, renamed a gestational carrier or gestational surrogate, is never a mother, and has no ability either during pregnancy or after birth to make an effective claim to parental rights. This requires elimination of another centerpiece of adoption procedure, which is a post-birth best interests of the child review. The right to procreate rejects use of the best-interests standard at any stage, since such does not normally apply to non-assisted procreation.

4. The right to procreate approach, in order to achieve its goals, has needed to create a new theory of legal parentage. Traditionally motherhood was established by birth—\textit{mater semper certa est}—the mother of a child is the one who gives birth.\textsuperscript{108} Fatherhood was decided traditionally primarily through marriage, and more recently as well through genetics.\textsuperscript{109} ART and surrogacy proponents have sought a theory of parentage instead based on contractual intention.\textsuperscript{110} Genetics are not determinative, as gamete donors are never parents and genetically unrelated individuals and couples may become parents through ART and surrogacy. The one exception is that surrogacy advocates seek to count a lack of genetic relationship as a part of the justification for stripping "gestational carriers" from parentage, even while making genetic connection unnecessary for intending parents. In any event, here politically left theories of the family have joined forces with politically right law and economics approaches in order to create contractual intention as the overriding theory of parentage.\textsuperscript{111} While sometimes called the theory of intention, in the statutes and case law the only intention that matters is that at the time of contracting - for gestational surrogacy, in the pre-embryo transfer contract. This combines the law and economics, and libertarian goal of governance by private contract with the liberal goal of autonomy trumping biology and tradition in the sphere of procreation. Indeed, there are also sometimes hints of a combination of

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\item \textsuperscript{107} See, e.g., UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62; Calvert, 851 P.2d at 782.
\item \textsuperscript{109} See, e.g., NeJaime, supra note 82, at 2276–77.
\item \textsuperscript{110} See UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62; Calvert, 851 P.2d at 782; Smolin, Surrogacy as Sale of Children, supra note 38, at 325–36; infra notes 140–53 and accompanying text.
\item \textsuperscript{111} See, e.g., Snyder, supra note 96, at 276 (“The individual liberties . . . include . . . the deeply ingrained concepts of economic liberty and freedom of contract. Each citizen’s personal awareness of . . . individual and collective liberties colors the sense of entitlement to make personal choices, particularly when it comes to the private arena of each individual family unit.”).
\end{itemize}
governance by both property rights and contract here, as the human embryo and fetus are viewed as belonging to the intended parent who “intended” to bring it into being, while the “gestational carrier” becomes a contracted temporary caregiver taking care of someone else’s property - since the fetus is not a person until birth. Another corollary of this ideological marriage of right and left in the form of parentage by contractual intention is potentially the elimination of father and mother as legal categories, with the substitution of the gender-neutral term “parent.” This accommodates both the liberal goal of making parenthood available to all regardless of sexual orientation or gender identity, and the conservative goal of moving family law from status to contract and viewing family law primarily through the lens of libertarian and economic perspectives.

5. To be clear, the surrogacy market has been built largely around heterosexual couples with fertility issues, as well as single parents. However, the recognition of a right to same gender marriage, which appears to have in view a corollary right to establish legal parentage ties to children equivalent to those enjoyed by heterosexual couples, also provides an additional impetus for the legalization of commercial surrogacy.\(^{112}\) If two men wish to have a child that is genetically related to at least one of them, they require an egg and a womb. Hence, some proponents of a right to procreate by male couples believe that the law should effectuate markets in gametes and surrogacy services.\(^{113}\) This assumes that the market and payment for such services are the best means toward meeting the need and demand for children - and especially genetically-related children - by same gender male couples. Arguably, altruistic surrogacy alone is unlikely to meet the demand for such services, since altruistic surrogacy usually involves friends or family, and most people likely do not have friends or family willing to act as a surrogate mother for them. In some political contexts this has made it more difficult to oppose commercial surrogacy, since we are in a period when the LBGTQ movement is achieving substantial legal, political, and social success, and commercial surrogacy is put forth as a need of a subset of such persons.

6. Although surrogacy proponents have insisted that adoption rules are generally inapplicable to surrogacy,\(^{114}\) in one respect the surrogacy movement has seemed to replicate what are generally seen today by many adoption experts as the errors of the traditional American approach to adoption. The key concept here is “as if” adoption, under which the adopted child is seen as only the child of their adoptive parents and as having been completely removed from any familial relationship with their

\(^{112}\) See, e.g., NeJaime, The Nature of Parenthood, supra note 82, at 2265; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, supra note 102, at 20.

\(^{113}\) See, e.g., NeJaime, The Nature of Parenthood, supra note 82, at 2330; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, supra note 102, at 32.

\(^{114}\) See, e.g., ABA REPORT, supra note 42.
family of origin. Hence, their original parents, siblings, grandparents, cousins, etc., are all legal strangers. This led as well to closed record adoption under which even adopted persons were denied, throughout life, information as to their origins—and especially the identity of their birth family. The legal fictions of “as if” adoption were created largely in the twentieth century.\textsuperscript{115} The contexts included the baby-scoop era in which single mothers were often coerced or socially pressured to give up their babies, a carry-over of the predominate eugenics viewpoints of the pre-World War II era which stigmatized the offspring of “illegitimate” children.\textsuperscript{116} In more recent years, the increasing practices of birth searches and open adoption have undermined the “as if” theory of adoption, as the vast majority of infant relinquishment adoptions are open to some degree, even as adoption statutes in many respects continue to reflect the older concept of closed adoption.\textsuperscript{117} Many adoption professionals consider the “as if” theory of adoption to be both unrealistic and destructive, as it fails to account for the continuing significance of birth family relationships despite the legal fiction of a lack of relationship. It turns out that, from the point of view of many adopted persons, that genetic relationships matter, even if they are raised in a loving adoptive home. Genetic and gestational origins are a part of our identities and hence adoptees argue—and international law increasingly agrees—access to information about origins and identity is a right.\textsuperscript{118}

Yet, at the same time the ART and surrogacy movements have moved beyond what was ever attempted in “as if” adoption. Hence, in “as if” adoption the original birth certificate reflected the woman who actually gave birth, and sometimes also included information on the birth father; this original birth certificate was sealed and a new one issued showing the adoptive parent(s) as the mother and father of the child. Hence, in recent


\textsuperscript{118}See CLAIRE ACHMAD, CHILDREN’S RIGHTS IN INTERNATIONAL COMMERCIAL SURROGACY 58–62 (2018); see also CRC, supra note 4, at arts. 7–9.
decades an adoptee rights movement has, often successfully, advocated for states to open up access to these original birth certificates to adult adoptees. Regardless of records, many have used genetic relation information contained, for example, in databases like 23andMe, to find original family members. Yet, in the face of these developments in adoption, the ART and surrogacy movements have sought systems in which there is no original birth certificate with accurate information as to who gave birth, with the only “birth” certificate showing the intending parents as the only parents. The very meaning of a “birth certificate” has been subverted in a system which no longer shows who gave birth to a child. Hence, in a context where “as if” adoption is perceived as unrealistic and regressive, the ART and surrogacy movements have successfully advocated for “never was” “as if” legal regimes—what one might call “as if” on steroids.

II. FROM IDEOLOGY TO LAW: THE LEGAL MAINSTREAMING OF THE ONE HUNDRED THOUSAND DOLLAR BABY

In the United States a left-right consensus against commercial surrogacy has been largely supplanted by a left-right predominate pro-commercial surrogacy consensus. The consensus against commercial surrogacy was crystallized in the Baby M case, decided in 1988 by the New Jersey Supreme Court. The New Jersey Supreme Court’s analysis contained several key elements:

(1) Commercial surrogacy contracts are unenforceable as against public policy.

(2) Commercial surrogacy contracts violate state laws against baby-selling, or at least would if the contracts were viewed as enforceable. The fact that the contract was entered into prior to artificial insemination points toward, rather than against, the conclusion that the sale of a child is involved. Under surrogacy contracts, the surrogate mother is being paid not only for personal services but also for transferring custody of the child, and hence the contracts violate the laws against baby-selling.

(3) Adoption principles apply to surrogacy arrangements, including the norms against baby-selling, the prohibition of payments to birth mothers beyond expenses, the norm against binding pre-birth relinquishments by birth mothers, and the treatment of surrogate mothers as mothers at birth equivalent to the position of the birth mother in adoption.

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120 Id. at 1240.
121 Id. at 1240–41.
122 Id. at 1235.
123 Id. at 1242 (“Baby-selling potentially results in the exploitation of all parties involved.”).
124 Id. at 1241.
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(4) Where surrogacy arrangements break down due to the surrogate mother wishing to keep the child, the matter should be treated as a child custody dispute between the surrogate mother, who has the status of the mother of the child, and a genetically-related intending father, who has the status of the father.125 Within this child custody dispute, courts may use visitation, primary custody and other approaches typical of child custody disputes between parents who do not live together can be used.126 Significantly, during the 1980s, the predominant feminist viewpoints in the United States seemed rather troubled by surrogacy and to view it primarily as exploitative of women. Margaret Atwood’s dystopian novel, The Handmaid’s Tale, was published in 1985, and provided a sharply negative portrayal of surrogacy within a future totalitarian hyper-patriarchal theocracy.127 Harvard Professor Martha Field’s 1988 book, Surrogate Motherhood, reissued in 1990, generally supported the Baby M viewpoint that surrogate mothers should not be held to pre-birth agreements to relinquish their children.128 Professor Field relied on then-common concerns with the commodification of children and commodification and exploitation of women.129 Interestingly, in 2014, Professor Field maintained many of the same concerns and positions, noting that

[surrogacy] raises serious issues of commodification—of sex, of childbirth, of birthmothers, and of children—by allowing contracts, sales, and money to govern these once noncommercialized areas of life. Such commercialization of childbirth could profoundly affect the kind of society in which we live. Surrogacy also arguably exploits women instead of liberating them.130

Professor Field also pointed out in 2014 that her viewpoint was not anti-surrogacy, but rather put the state in a neutral position.131 Under her proposal, surrogacy could still be conducted, and it was only in instances of a change of mind by the surrogate mother that the non-enforcement of promises to relinquish would come into play.132

125 In re Baby M, 537 A.2d 1227, 1256 (N.J. 1988).
126 Id. at 1256–64.
128 MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 97–98 (1988) (“[T]here are . . . occasions in contract law on which voidable or option contracts are recognized, and the developed case law with respect to such contracts could appropriately apply to surrogacy contracts.”).
129 Id. at 25–32.
131 Id. at 1157.
132 Id.
However, by 2014, the anti-commercial surrogacy and “neutral” theories of Baby M and Professor Field had become minority viewpoints among women’s rights proponents in the United States. Changes in technology and ideology led to the legal mainstreaming of commercial surrogacy and large-scale, globalized markets in commercial surrogacy.\(^ {133}\) The burgeoning ART and commercial surrogacy industries in the United States became a multi-billion-dollar self-described “industry,” with the accompanying political power that comes with representing such a lucrative practice.\(^ {134}\) The technological change was the transition from “traditional” surrogacy using AI, where the “surrogate mother” is genetically related to the child, to “gestational” surrogacy employing IVF, where typically the “gestational carrier” (as denominated under California law)\(^ {135}\) is genetically unrelated to the child.\(^ {136}\) The use of IVF also connected surrogacy more fully to the technological and market capacities of a legal, commercial market in gametes, which also more fully connects the surrogacy industry to the ART industry.\(^ {137}\) While the genetic link between surrogate mother and child are broken in gestational surrogacy, the opportunities expand for breaking the genetic link of intending parents to the child, as intending parents have available to them a global marketplace in gametes from which to select.\(^ {138}\) Opportunities for using PGD to test and select embryos


\(^ {135}\) CAL. FAM. CODE § 7960(f)(2) (West 2018) (“‘Gestational carrier’ means a woman who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement.”).


\(^ {138}\) *Id.* at 317; see Richard Vaughn, *30 Years After Baby M, Task Force Says Lift New York Surrogacy Ban*, INT’L FERTILITY L. GRP. (Jan. 31, 2018, 4:06 PM), https://www.iflg.net/ny-task-force/ (“Today, thanks to the evolution of new technologies and best practices, nearly all surrogate births occur via ‘gestational surrogacy,’ in which both egg and sperm are provided either by an intended parent or a (usually anonymous) donor; in other words, the surrogate is not biologically related to the child.”).
arise with surrogacy, and combined with the alleged births of the first genetically edited CRISPR babies, surrogacy may become a part of a new era of designer babies.\textsuperscript{139}

The 1993 California Supreme Court case of \textit{Johnson v. Calvert} was the legal milestone by which the contractual-intention theory of parentage became mainstreamed into American law.\textsuperscript{140} The contractual-intention theory combines the conservative law and economics and libertarian love of contracts with the liberal right to procreate agenda to make parenthood available to all without regard to biological limitations.\textsuperscript{141} \textit{Johnson v. Calvert} was a complete victory for this approach. Under the approach of contractual intention, the surrogate mother gets reduced to a “never mother” who effectively loses parental status when she signs the contract.\textsuperscript{142} Commercial surrogacy is explicitly approved as a legitimate form of fee for “gestational services.”\textsuperscript{143} The California Supreme Court accepted the viewpoint that no sale of the child or of parental rights was involved, despite noting the contractual provision by which the surrogate mother agreed to relinquish all parental rights, and despite referencing the “gestator” “voluntarily contracting away any rights to the child . . . .”\textsuperscript{144} \textit{Johnson v. Calvert} and its theory of parentage by intention has become the foundation of a large-scale surrogacy industry in California.\textsuperscript{145} California became a global center for commercial surrogacy, with perhaps half of the intended parents coming from outside of the United States.\textsuperscript{146} California surrogacy agencies explicitly marketed to Chinese nationals, even

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\textsuperscript{140} Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

\textsuperscript{141} See id. at 782–83; Hill, supra note 102, at 415; Stumpf, supra note 102, at 196.

\textsuperscript{142} See Calvert, 851 P.2d at 782.

\textsuperscript{143} Id. at 784 (“The payments to [the surrogate mother] under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up ‘parental’ rights to the child.”).

\textsuperscript{144} Id. at 782 n.10 (“Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.”).

\textsuperscript{145} See CAL. FAM. CODE §§ 7960, 7962 (West 2018).

\textsuperscript{146} Maud de Boer-Buquicchio (Special Rapporteur on the sale and sexual exploitation of children), Report of the Special Rapporteur on the sale and sexual exploitation of
creating parallel Chinese language web sites.\textsuperscript{147} When California codified \textit{Johnson v. Calvert}’s doctrine of parentage through contractual intention into the California Code,\textsuperscript{148} prominent industry proponents indicated that they had gotten essentially everything they wanted from the California legislature.\textsuperscript{149}

Under the 2013 California surrogacy code, parentage for all practical purposes was determined in the surrogacy contract.\textsuperscript{150} There was no suitability review of intended parents, no criminal background checks, no child abuse registry checks, and no best interests of the child review at any time.\textsuperscript{151} Basically, so long as the money was there and properly escrowed and the parties represented, the contract governed, with the court lacking either the information or even jurisdiction to do anything other than grant parentage based on the contract.\textsuperscript{152} The “gestational carrier” was a never mother who could be denied the opportunity to even see the child in the hospital once she had given birth, since she was a legal stranger to the child in the eyes of the law.\textsuperscript{153} Indeed, although the Supreme Court’s abortion and health care case law probably forbids it, California surrogacy contracts further purport to delegate abortion decisions to the intended parents.\textsuperscript{154} Hence, “gestational carriers” who refuse to undergo reduction abortions or abortions of fetuses with disabilities are threatened by the attorneys of intending parents with


\textsuperscript{147} Special Rapporteur, \textit{Sale of Children}, supra note 146; Harney, \textit{infra} note 163.

\textsuperscript{148} CAL. FAM. CODE §§ 7960–62 (West 2018).


\textsuperscript{150} CAL. FAM. CODE §§ 7960–62.

\textsuperscript{151} Id.; see also Cook v. Harding, 190 F. Supp. 3d 921, 927 (C.D. Cal. 2016).

\textsuperscript{152} CAL. FAM. CODE § 7962 (f)(2).


monetary damages unless they change their mind. The “gestational carrier” is truly treated as a mere means to the ends, purposes and desires of the intending parents, as the body and reproductive capacities of the “gestational carrier” are placed at the service of the intending parents. In exchange for such subjugation, however, California gestational carriers are one of the highest paid in the world, with only Chinese surrogate mothers in China’s grey/underground market context perhaps receiving comparable or even greater compensation. The expression “one hundred thousand dollar baby” aptly describes the California surrogacy industry, and indeed the industry where practiced throughout the United States. Cost estimates of a California surrogacy are in the range of $90,000 to $145,000, and so the expression may be conservative. Of that amount, perhaps around $50,000 to $60,000 might typically go to the “gestational carrier” in combined fees and expenses, with the rest going to intermediaries such as surrogacy agencies and attorneys, the extensive medical costs of ART and childbirth, as well as travel and other expenses. California, along with other locations in the United States, is generally understood to be the high end of a global market in commercial surrogacy. In exchange for the higher costs, California provides not only presumably high quality medical services but also legal certainty of result and legal stability. In California there is no doubt that the surrogate mother lacks parental status and any ability to contest parentage. An additional bonus for some foreign intended parents is that, since the United States is one of only a small number of nations in the world with birthplace citizenship, the child born in the U.S. is a U.S. citizen.

155 Special Rapporteur, Sale of Children, supra note 146, ¶ 32; Cummings, supra note 154, at X.
156 Field, Compensated Surrogacy, supra note 130, at 1175–76.
157 Id. at 1166, 1182; Ian Johnson & Cao Li, China Experiences a Booming Underground Market in Child Surrogacy, N.Y. TIMES, Aug. 3, 2014, at A4.
159 Surrogacy Costs, supra note 158.
160 Field, Compensated Surrogacy, supra note 130, at 1161 (“The state that currently is the most friendly to surrogacy is California . . . .”); Snyder, supra note 96, at 284 (“The United States is, perhaps, the most expensive surrogacy destination . . . .”).
161 Field, Compensated Surrogacy, supra note 130, at 1166; Snyder, supra note 96, at 284.
162 Field, Compensated Surrogacy, supra note 130, at 1163, 1166; Snyder, supra note 96, at 284 (discussing the stability of surrogacy procedures in US generally).
163 U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”); Alexandra Harney, Rich Chinese hire American surrogate
For many years, Johnson v. Calvert and the California approach were minority approaches within the United States. However, over time, the backing of mainstream legal institutions and the predominant voices of academia have created the impression that the California approach is becoming dominant.\textsuperscript{164} A growing number of states, either by statute or court decision, have explicitly adopted California-like approaches to surrogacy.\textsuperscript{165} The American Bar Association, domestically through model statutes and internationally through the ABA resolution discussed above, have advocated for the contractual parentage approach.\textsuperscript{166} More recently, the Uniform Law Commissioners in the Revised Uniform Parentage Act of 2017 followed the California model although the RUPA of 2017 did refuse to accept the delegation of health care and abortion decisions to the intending parent(s).\textsuperscript{167} Nonetheless, the RUPA of 2017 model of contractual parentage in other significant ways strongly followed the California approach, including: the lack of suitability screening or review of intended parents, the lack of criminal background checks or child abuse registry checks of intended parents, the lack of any best interests of the child review, and the allocation of parentage based on the contract such that only the intending parent(s) would be named on the original birth certificate.\textsuperscript{168} Significantly, Washington State, which had been one of the states with a


\textsuperscript{166} ABA REPORT, supra note 42, at 6, 22.

\textsuperscript{167} UNIF. PARENTAGE ACT § 807 (UNIF. LAW COMM’N 2017). See Memorandum to Drafting Comm., supra note 164.

\textsuperscript{168} UNIF. PARENTAGE ACT § 807 cmt.; Memorandum to Drafting Comm., supra note 164.
prohibitionist approach to surrogacy, almost immediately enacted a version of the 2017 RUPA, and efforts are being made in New York State, another prohibitionist state, to follow suit.169 Hence, although the legal frameworks for surrogacy in the United States remain quite diverse and inconsistent, prestigious legal institutions and the weight of academic opinion are strongly supportive of the commercial surrogacy industry.170 Of course, the ability of intending parents living in prohibitionist states to contract surrogacies in permissive states, and the fact that surrogacy is also conducted fairly freely in many states that lack statutory or precedential rules, means that the industry is firmly established throughout the United States.171 The end result is that if you have the money, the law is no barrier to participating in the commercial surrogacy market.

III. AMERICA’S ONE HUNDRED THOUSAND DOLLAR BABY AS THE HIGH END OF A GLOBAL SURROGACY MARKET

The United States’ one hundred thousand dollar baby represents the high end of the global surrogacy market.172 Despite the high price, the United States is attractive to foreign intended parents because it is one of the few nations that offers stable legal systems explicitly supportive of commercial surrogacy.173 Apart from the United States, cross-border surrogacies involve travel to developing nations that lack a regulatory framework for surrogacy, and which shift in and out of the global market amidst scandals and shutdowns, but which offer lower prices, or else a few Eastern European states that host international commercial surrogacy and are mid-priced.174 Other Western nations either prohibit commercial surrogacy or lack laws facilitating it.175

The United Nations Special Rapporteur on the sale and sexual exploitation of Children (Special Rapporteur), in her Study on Surrogacy and the

169 S.B. 6037, 65th Leg., Reg. Sess. (Wash. 2018); see N.Y. ST. TASK FORCE, supra note 102; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, supra note 102, at 12
170 See Gestational Surrogacy Law Across the United States, CREATIVE FAMILY CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (last visited Nov. 17, 2018) (listing different state policies on surrogacy in the United States); see also FINKELSTEIN ET AL., SURROGACY LAW AND POLICY, supra note 136; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, supra note 102; ABA REPORT, supra note 42; Memorandum to Drafting Comm., supra note 164.
171 See INTERNATIONAL SURROGACY ARRANGEMENTS 392 (Katarina Trimmings & Paul Beaumont eds., 2013).
172 See Snyder, supra note 96, at 284.
173 See id.; Lewin, supra note 146.
174 Special Rapporteur, Sale of Children, supra note 146, ¶ 14–16.
175 Id.
Sale of Children, accurately summarized the global situation regarding commercial surrogacy as follows:

The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries, including Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have engaged in commercial international surrogacy arrangements with surrogate mothers in developing countries, such as Cambodia, India, the Lao People’s Democratic Republic, Nepal and Thailand. However, California and other jurisdictions in the United States are centers for commercial international surrogacy arrangements, as are Georgia, the Russian Federation and Ukraine, creating a different set of cross-border relationships. In addition, intending parents from China frequently engage in commercial surrogacy in South-East Asia and the United States.176

National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law (i.e. in Australia, Mexico and the United States). The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational. Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit “commercial”, “for profit” or “compensated” surrogacy, while explicitly or implicitly permitting “altruistic” surrogacy. Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy. Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive

176 Id. ¶ 14 (footnotes omitted).
practices. However, Georgia, the Russian Federation, Ukraine, and some states in the United States, have fora sustained period of time chosen to remain centers for international surrogacy arrangements.177

Indeed, as the Special Rapporteur noted, the predominant viewpoints on surrogacy in Europe are divided between a large plurality that oppose all surrogacy, and a large plurality that advocate for legalizing altruistic surrogacy and prohibiting commercial surrogacy.178 This division was so contentious that it prevented the Council of Europe from approving a statement on surrogacy, as the group that opposes all surrogacy was unwilling to accede to a policy of prohibiting only commercial forms of surrogacy.179

In addition, in the European context, many feminists and women’s groups vocally oppose all forms of surrogacy, viewing it as inherently exploitative of women.180 Thus, feminist groups are arguing, with possible success, that Sweden should move toward a total ban on surrogacy.181 While the American-style pro-commercial surrogacy viewpoint is expressed by some feminists in Europe, it does not predominate among feminists as it currently appears to in the United States.182

The extensive travel to developing nations by comparatively wealthy and privileged intending parents from Europe, Australia, Israel, Japan, China, and the United States has cast surrogacy in a negative light for some, as the stark power and wealth imbalances involved accentuate the risks of exploitation of the surrogate mothers.183 The level of control and manipulation of surrogate mothers in developing nations by intermediaries has

177 Id. ¶ 15 (footnotes omitted).
178 Id. ¶¶ 15–17.
182 See supra notes 180–81.
suggested the view that some surrogate mothers are trafficked. For example, in India, typically surrogate mothers, who generally already have children and families, live apart from their families in groups housed by the agencies or clinics, and thus have their day-to-day lives totally controlled by the intermediaries. The practice of intermediaries moving poor, developing nation surrogate mothers across national boundaries to avoid domestic prohibitions, as has been documented in South-East Asia amidst changing legal contexts in Cambodia, Thailand, and Laos, further suggests exploitation and trafficking. In general, surrogate mothers in developing country contexts are relatively poorly paid, not well-informed as to the medical procedures and risks, and may not receive adequate medical after-care, while intermediaries appear able to become wealthy through the practice.

The negative implications of this kind of cross-border surrogacy may be used by American surrogacy intermediaries as further marketing for the high-end American system, where surrogate mothers are comparatively well-paid, remain at home with their families during the pregnancy, and are not so easily controlled and manipulated as in developing nation contexts.

Despite the marketing of California, as well as other jurisdictions in the United States, as a high-end, well-regulated, trouble-free surrogacy zone, the facts are somewhat to the contrary. This was even noted in the Special Rapporteur’s Report, which described two instances of troubling practices related to California’s surrogacy industry:

For example, two prominent surrogacy attorneys were criminally convicted in a baby-selling ring in California, a centre for international surrogacy arrangements. According to governmental authorities, a prominent surrogacy attorney admitted that “she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over $100,000 each”. The convicted attorney told the local media that, as to abusive practices, she was the “tip of the iceberg” of a “corrupt” “billion-dollar industry”.

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184 See id.
Another case from California, *Cook v. Harding*, reveals the intentional regulatory omissions in a regulated commercial surrogacy jurisdiction: “The statute places no conditions on who can serve as a surrogate (beyond requiring that she not be genetically related to the fetuses) or who may solicit the services of a gestational carrier . . . . No minimum levels of income, intelligence, age or ability are required for either the surrogate or the intended parent(s).”

In *Cook*, the surrogacy agency matched a 47-year-old surrogate mother with a 50-year-old single intending father. Three embryos were transferred, leading to a triplet pregnancy. Conflicts arose when the intending father balked at paying the costs of the high-risk triplet pregnancy, and also demanded a reduction abortion. The surrogacy contract contained a common provision that reduction abortion decisions would be made by the intending parent. The surrogate mother refused the reduction abortion. Hence, “C.M.’s attorney informed Cook in writing that, by refusing to reduce, she was in breach of the contract and liable for money damages thereunder”. It is also argued that surrogate mothers who refuse to submit to reduction abortions are liable for monetary damages, including “the cost of medical treatment (for) . . . a resulting child.”

Nonetheless, what the Special Rapporteur viewed as substantive flaws in the California system are, from a marketing perspective, strengths. The “intentional regulatory omissions” brought to light by *Cook v. Harding* empower intending parents at the expense of surrogate mothers, and thus heighten the attractiveness of the California system to the paying customers, the intending parents. Even the apparent medical risks of implanting three embryos into a forty-seven-year-old woman, which would seem to defy the idea of a well-regulated surrogacy system, illustrates the market-friendly approach of California. If you are a fifty-year-old single, deaf man of relatively moderate means living with elderly parents, as was

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189 Id. ¶ 32 (footnotes omitted).
190 See ABA REPORT, supra note 42, at 10.
191 Id.
the intended father in *Cook*,¹⁹³ you might find it helpful that California does not place age or suitability limits on intending parents. Similarly, allowing forty-seven-year-old women to participate as a surrogate mothers—as occurred in *Cook*¹⁹⁴—widens options, as a lack of women willing to serve as surrogate mothers, even for pay, is one of the primary limitations on the numbers. Allowing three embryos to be implanted at once creates the risk of a dangerous multiple pregnancy with attendant risks to the “gestational carrier” and surrogate-born children, but offers a greater chance of achieving pregnancy at lower costs to the intending parents.¹⁹⁵ The California approach, thus, for marketing purposes, is quite willing to allow practices that risk the life and health of surrogate mothers, and even the resulting children, if it serves the interests of the customer, the intending parents, and the intermediaries who profit from surrogacy.¹⁹⁶ Further, the California approach is quite willing to place women’s bodies under the dominion of intending parents and the industry.¹⁹⁷ While it is understandable why this model is attractive to the industry, the support of women’s rights advocates for these features of the California approach illustrates the powers of the ideological forces favoring surrogacy in the American context. Women’s rights groups, in fact, give the industry a virtual free pass as to the industry’s apparent exploitation of women, apparently because of the ideological commitments of many American women’s rights advocates to a particular model of procreative freedom.

IV. EXPORTING THE ONE HUNDRED THOUSAND DOLLAR BABY: AMERICA ADVOCATES GLOBALLY FOR MARKETS IN CHILDREN

The American surrogacy industry is not content to advocate only for the legalization of surrogacy within the United States, but instead advocates globally for the protection of surrogacy markets.¹⁹⁸ The apparent reason is economic self-interest. A very substantial proportion of the clients of the American surrogacy industry comes from outside of the United States.¹⁹⁹ Many of these intending parents come from countries where commercial surrogacy is either illegal or else lacking any legal framework.²⁰⁰ The American surrogacy industry, including especially the lawyers and agencies that serve as intermediaries, particularly assists citizens of other nations in evading their own laws.²⁰¹ Because of the sympathies and children’s rights concerns that arise once the child already exists, and

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¹⁹³ *Id.*
¹⁹⁴ *See id.*
¹⁹⁵ *See Special Rapporteur, Sale of Children, supra note 146, ¶ 32–33.*
¹⁹⁶ *See id.*
¹⁹⁷ *Id.*
¹⁹⁸ *See ABA REPORT, supra note 42.*
¹⁹⁹ *Lewin, supra note 146.*
²⁰⁰ *See Special Rapporteur, Sale of Children, supra note 146, ¶ 17.*
²⁰¹ *See id. ¶¶ 15–17.*
a lack of enforcement, many intending parents are successful in bringing back to their home countries children born from United States surrogacy arrangements that would be illegal in their own countries.\textsuperscript{202} The success of these evasions of domestic law then further fuel and legitimate the systematic practice of traveling from prohibitionist jurisdictions to permissive jurisdictions for surrogacy.

Therefore, the American surrogacy industry became particularly concerned when The Hague Conference on Private International Law (HCCH) indicated it was considering creation of an international instrument on parentage and surrogacy arrangements. The HCCH created the pre-eminent treaty in the field of intercountry adoption, the 1993 HCIA.\textsuperscript{203} The industry presumably is concerned that any treaty containing substantive restrictions or required regulations for cross-border surrogacy would lead nations to take a tougher stance toward American surrogacies, in ways that might ultimately reduce the flow of customers to the United States. The California approach to surrogacy is contrary to typical global, and especially Western European, approaches in numerous ways, including the explicit acceptance of commercial surrogacy;\textsuperscript{204} the lack of access to information on origins and identity for surrogate-born children;\textsuperscript{205} the lack of any best interests of the child review;\textsuperscript{206} the lack of any kind of suitability review or screening of intending parents;\textsuperscript{207} the lack of a requirement of genetic connection for at least one of the intending parents;\textsuperscript{208} the lack of upper age limits for surrogate mothers;\textsuperscript{209} and the reduced status of “gestational carriers” to “never mothers” lacking parentage at birth.\textsuperscript{210} Hence, if a Hague instrument addressing surrogacy had any substantive standards at all, as does the 1993 Hague Adoption Convention,\textsuperscript{211} the result would be to characterize California-type surrogacies as deficient and to suggest that such surrogacies should not be recognized in other nations.

\textsuperscript{202} \textit{Id.} ¶ 17.
\textsuperscript{204} See \textit{CAL. FAM. CODE} § 7962 (West 2018).
\textsuperscript{205} \textit{Id.} § 7962(g).
\textsuperscript{206} See \textit{id.} §§ 7960–7962.
\textsuperscript{207} See \textit{id.}
\textsuperscript{208} See \textit{id.}
\textsuperscript{209} See \textit{id.}
\textsuperscript{210} \textit{CAL. FAM. CODE} § 7962(f)(2) (West 2018).
On the other hand, while the risks for the industry of a Hague instrument exist, there are also possible rewards. Another kind of approach to cross-border surrogacy could be imagined, in which each country was free to organize their domestic laws on surrogacies in any way they wished, but nations then promised to recognize and enforce parentage orders for surrogacies from other states. In such a regime, prohibitionist states in essence would promise to accept surrogacies conducted in permissive states, even when conducted for their own citizens traveling to evade domestic prohibitions. Such a system would, of course, further protect the capacity of California and other permissive commercial surrogacy regimes to market the $100,000 baby around the world and to gain wealthy clients particularly from states that prohibit commercial surrogacy. Indeed, a promise to mutually recognize parentage orders would legally legitimize the American role as the high end of a global surrogacy market.

In February 2016, the American Bar Association (“ABA”) adopted a resolution intended to influence the United States Department of State in international negotiations concerning a possible Hague Convention on international surrogacy arrangements.212 The ABA statement was an explicit endorsement of markets in children. Indeed, the ABA explicitly argued for an approach to surrogacy that would protect the international market, stating:

a. That any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, will be certain; and

b. That any such collective international approach allows individual member countries to regulate surrogacy within their own borders as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements; and

c. That a Central Authority model to regulate surrogacy arrangements is not an appropriate model for any collective international approach regarding surrogacy; and

212ABA REPORT, supra note 42, at 1.
d. That any Convention should recognize the clear distinctions between adoption and surrogacy; and

e. That the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy; and

f. That rather than requiring a genetic link, an intent-based parentage analysis is the most appropriate parentage doctrine for surrogacy; and

g. That human rights abuses are not necessarily inherent in or exclusive to surrogacy arrangement; and, therefore should be addressed separately. 213

Hence, the ABA was arguing for an approach precisely in line with the economic motivations of the American surrogacy industry. Of course, the argument that children need “certainty” implicitly claims to protect children, but it has the opposite effect. What it would mean in practice is that surrogacies conducted in jurisdictions that lack children’s rights protections, like the United States, would have to be automatically granted recognition everywhere. Hence, under this regime, all countries would have to accept surrogacies conducted in ways that are dangerous for children and surrogate mothers214 without being able to conduct independent reviews of such surrogacies.

The United Nations Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur), in her Study on Surrogacy and the Sale of Children, summarized the Report at some length:

The American Bar Association notes that “it is undeniable that the commissioning of children through surrogacy—for money—represents a market”. The American Bar Association praises this “market”, noting that “market-based mechanisms have allowed international surrogacy to operate efficiently”. The American Bar Association rejects application of the best interests of the child standard to

213 Id.
214 See Special Rapporteur, Sale of Children, supra note 146, ¶¶ 29–33; Christopher Coble, Can a Surrogate Mother Be Forced to Have an Abortion?, FINDLAW (Jan. 12, 2016, 10:10 AM), blogs.findlaw.com/law_and_life/2016/01/can-a-surrogate-mother-be-forced-to-have-an-abortion.html; see also Cummings, supra note 154, at 113 (discussing the major medical issue regarding the surrogate mother's informed consent for health care decisions such as abortion).
surrogacy, rejects most forms of suitability review and evaluation of parental fitness of intending parents, rejects caps for compensation for surrogate mothers and gamete donors, rejects licensing requirements for surrogacy agencies, rejects rights to birth records or origins information, rejects the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, as a “model for a surrogacy convention”, and rejects bilateral treaties on surrogacy. The American Bar Association states that “any focus on regulating the international surrogacy market itself is misguided”. Indeed, the American Bar Association urges that any international instrument on surrogacy not address human rights concerns; hence, it rejects “regulation of the surrogacy industry for the purpose of reducing human rights violations”.215

The Special Rapporteur perceived the ABA not as a proponent of justice or rights, but rather, as advocating for intermediaries who profit from global markets in children.216 From that perspective, the ABA’s perspective was viewed as a threat to children’s rights globally. For if the ABA position was “endorsed, the gains in developing children’s rights norms and standards in relation to adoption will be erased, and a new generation of human rights violations will emerge.”217 While recognizing that “not all rules applicable to adoption apply to surrogacy[,]” the Special Rapporteur, in contradiction of the ABA report, maintained that “certain human rights principles are applicable to both, including the prohibition of the sale of children, the best interests of the child as a paramount consideration, the lack of a right to a child, strict regulations and limitations regarding financial transactions, rights to identity and access to origins, and protections against exploitation.”218

The response of the United States government to the Special Rapporteur’s study on surrogacy and the sale of children fulfilled the hopes of the ABA that the United States government would defend markets in children in the context of surrogacy. Thus, when the Special Rapporteur’s Report was presented to the Human Rights Council in Geneva, on March 6, 2018, Mr. Jan McKay stated for the United States government:

On the issue of surrogacy that is raised in the Report, we must reiterate our long-standing view that surrogacy ar-

215 See Special Rapporteur, Sale of Children, supra note 146, ¶ 27 (footnotes omitted).
216 Id.
217 Id.
218 Id. ¶ 28 (footnotes omitted).
rangements fall outside of the scope of the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, because they do not involve any of the forms of exploitation identified in Article 3.219

It is important to remember that this statement by the United States is not a matter of some politician misspeaking or tweeting nonsense, but rather represents the carefully considered opinion of representatives of the United States government charged with representing the view of the United States on human rights matters to the U.N. Human Rights Council. These statements are carefully written and scripted in advance, as the Special Rapporteur’s report was available well in advance of the event, and each country has only a very short time to present their official reaction to a Special Rapporteur Report. Seemingly, this is America’s professional human rights bureaucracy at work and cannot be blamed on the mere passing views of a particular administration. Thus, this March 2018 statement by the United States at the Human Rights Council continues the pattern of the United States government, present also under the Clinton State Department and Obama Administration, of undermining international legal norms against markets in children.220 For many years, when faced with reports of financially-motivated illicit conduct in intercountry adoption, the United States government has maintained that buying and selling children for adoption could not constitute child trafficking.221 The government’s view has been that stealing children from parents and selling them to intermediaries was not child trafficking, so long as the children were ultimately placed with adoptive parents who did not themselves exploit the child sexually or through forced labor.222

222 Id.
While it is true that the legal elements of child trafficking under the Palermo Protocol require exploitation, the definition is intentionally open-ended, and is not limited to sex or labor trafficking. Arguably, being stolen away from a loving family of origin is inherently exploitative, no matter how good the replacement family. In cases of older child adoption, children often express immediate pain and trauma, but, for all human beings, being sold and having your family unnecessarily replaced with another family are serious harms that go the core of human dignity and human identity. Further, the language and work of preparation of the Hague Adoption Convention indicated a view that buying and selling children for adoption is a form of trafficking. Yet, in the face of all of this, the United States government insisted that buying and selling children for adoption is not trafficking. This has the practical impact of reducing remedies and interventions available to victims and also of minimizing the seriousness of the harms involved in such illicit adoption practices. The United States government did concede that buying and selling children for adoption could be the sale of children under the OPSC. This seems necessary, given the explicit language in the OPSC on adoption as a form of sale of children and the broad, open-ended definition of sale of children in the OPSC. Even here, however, the United States government took a highly restrictive view of the norm, maintaining that the OPSC only forbade buying and selling children for adoption when both countries had ratified the Hague Adoption Convention. This interpretation meant that, from the view of the United States government, the OPSC did not apply to any intercountry adoptions involving the United States until the United States had ratified the Hague Adoption Convention effective in

224 See Smolin, Child Laundering as Exploitation, supra note 45, at 15, 45.
225 See id. at 37–44.
226 See id. at 13–18, 45.
228 2005 TIP Report, supra note 221, at 21.
229 See id.
230 Optional Protocol, supra note 4, at arts. 1, 3.
2008.\textsuperscript{232} Even then, since most adoptions at that time to the United States were from countries that had not ratified the Hague Convention,\textsuperscript{233} the United States still viewed the OPSC as inapplicable to most intercountry adoptions.\textsuperscript{234} In effect, the United States government effectively reduced taking children illicit from their families and selling them to be only a kind of technical violation, never amounting to human trafficking and only rarely meeting the requisites of sale of children.

The stance of the United States government toward surrogacy is even worse because it proposes that buying and selling children for purposes of surrogacy does not violate any international norms binding upon the United States. Particularly, the United States claims that the sale of children in the context of surrogacy in principle does not violate the OPSC.

The government’s interpretation is particularly odd because it is so clearly a complete misinterpretation of the OPSC. Article 2(a) of the OPSC contains the complete definition of sale of children: “For the purpose of the present Protocol: (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”\textsuperscript{235}

As is evident from the text of the OPSC, there is no requirement of exploitation in the definition of sale of children. The work of preparation indicates that the omission of an exploitation requirement was intentional.\textsuperscript{236} In addition, the OPSC Preamble indicates that it is intended to “achieve the purposes” of the CRC and “the implementation of its provisions,” specifically including Article 35, which states: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”\textsuperscript{237}

While the United States, as the only nation on earth not to have ratified the CRC,\textsuperscript{238} is not bound by Article 35 of the CRC, the United States has ratified the OPSC and is bound by the OPSC’s intention of implementing

\textsuperscript{233} Smolin, Vulnerable Adoption System, supra note 48, at 1108–09.
\textsuperscript{234} See id.
\textsuperscript{235} Optional Protocol, supra note 4, at art. 2.
\textsuperscript{237} Optional Protocol, supra note 4, at 247.
\textsuperscript{238} Id. at art. 35 (emphasis added).
Article 35 of the CRC. The language of Article 2 and the Preamble of the OPSC, and the work of preparation, make clear that the OPSC is designed to reach all forms of the sale of children. Hence, the United States’ claim that the OPSC does not reach surrogacy at all is completely out of bounds.

The reliance by the United States government on Article 3 of the OPSC is clearly misplaced. Article 1 of the OPSC is the core undertaking of State Parties to the Convention, and states that “States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.” Article 2, as noted, provides the protocol’s definition of sale of children. The United States, as a State Party to the OPSC, is thus required to prohibit all forms of sale of children that meet the Article 2 definition. That definition does not include an exploitation element, and its definition is inclusive of all situations that meet its broad and inclusive designation.

Article 3 involves those forms of sale of children which State Parties must cover in their “criminal or penal law.” This goes beyond the general undertaking of a prohibition in Art. 1, and requires a more specific form of prohibition, in the form of criminal or penal law, for particular forms of the sale of children, child prostitution, and child pornography. Technically, even Article 3 lacks an exploitation requirement, but rather is specific as to which forms of the three practices of sale of children, child prostitution, and child pornography require criminal, rather than merely civil, sanction. For example, the provision in Article 3 regarding adoption lacks a specific requirement of exploitation of the child. More fundamentally, Article 3 of the OPSC in no way displaces the broader mandates of Articles 1 and 2 for State Parties to prohibit all forms of sale of children, even when not encompassed in Article 3.

While the above might sound technical, it is obvious to those who have worked in the field of children’s rights. The only explanations for the United States getting this wrong are either incompetence or result-driven misinterpretation. Even incompetence would not be a complete explanation, as one would have to explain why such incompetence produced this

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241 See Tobin, supra note 236, at 20.
242 Optional Protocol, supra note 4, at art. 1.
243 Id. at art. 2.
244 Id. at art. 3.
245 See id. at art. 3.
particular result. Thus, it seems that the United States government is effectively in the corner of the industries that create and profit from the baby market. The United States government interprets international norms against the traffic and sale of children in an idiosyncratic manner that protects adoption, surrogacy, and ART markets in children. The United States government appears to have a longstanding policy of working most actively against markets in sexual exploitation of children, and to a much lesser degree labor exploitation of children, while promoting markets in children for purposes of family formation.

V. RATIONALIZING BABY SELLING

The modern American discourse on child selling has been a form of rationalization, intended to disguise from both speaker and audience the advocacy and reality of child selling. America is in the business of both creating markets in children and also in pretending that we are not doing so. Here is a sampling:

A. Markets in babies v. Markets in parental rights

Law and economics advocates for legal markets in parental rights have long argued that such markets are ethically and legally legitimate because only parental rights to the child, rather than the child itself, is being sold. A further twist on the argument is to note that the child who is sold is intended to be a beloved son or daughter, not a slave.

Legally, this argument in formal terms was contrary to modern law. The baby-selling prohibitions, often created in the wake of the Georgia Tann baby-selling scandal of the early-to-mid-twentieth century, are clearly designed to criminalize precisely the selling of parental rights, whether by birth parents or by intermediaries. Of course, it was this kind of prohibition of baby-selling that the New Jersey Supreme Court relied on in the Baby M case to determine that the sale of parental rights in the context of surrogacy would also violate laws against baby-selling.

Moreover, if you follow the logic of this argument, an open market in selling babies would be perfectly legitimate so long as in the end the children were treated as family members rather than slaves. Wal-Mart or Target or Amazon could sell babies and it would be fine so long as the buyers intended to create a parent-child relationship with the child. One can easily imagine what the Amazon listings would look like, with its listing of

246 See Posner, Sex and Reason, supra note 2, at 413; Landes & Posner, supra note 1, at 344; Brennan, supra note 22.
247 Cf. Brennan, supra note 22.
248 See generally Barbara Bisantz Raymond, The Baby Thief: The Untold Story of Georgia Tann, the Baby Seller Who Corrupted Adoption (2008).
independent sellers; children divided by race, gender, and age; and various shipping options. Surely the intent of the law is to prevent a market in babies even for the purpose of obtaining children to parent?

B. Markets in services v. Markets in babies

It is common to argue, in the context of both adoption and surrogacy, that there is a market in services, not in babies. This can appear plausible because it is accurate that markets in services are involved. Legal, social work, and general “adoption” services are provided in adoptions. Medical, legal, and general intermediary services are provided in surrogacy. The surrogate mother may be considered to be providing “gestational services.” Clearly, there can be competitive markets in these services, as providers compete in local, national, and global marketplaces for such services. However, the fact that there are markets in services related to adoption and surrogacy does not determine whether or not there are also markets in parental rights, and hence, in children.

As noted by the United Nations Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur): “Commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law.” Indeed, one viewpoint is that “the transfer of the child is of the essence of the commercial surrogacy arrangement and therefore is a part of the consideration for the payment to the surrogate mother.” From that perspective, commercial surrogacy necessarily constitutes the sale of children, and any other conclusion is a legal fiction. The intending parents are not paying the surrogate mother to gestate, give birth, and then retain parentage and custody of the child. Hence, generally speaking, in commercial surrogacy markets the surrogate mother attempting to retain parentage or parental responsibility/custody of the child would be considered a breach of the arrangements and accompanying agreements. Indeed, in the foundational Johnson v. Calvert decision, the California Supreme Court referred to the surrogate mother as “voluntarily contracting away any rights to the child” and recited the contract.

250 See, e.g., Catherine London, Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts, 18 CARDOZO J.L. & GENDER 391, 410–11 (2012); Special Rapporteur, Sale of Children, supra note 146, ¶ 60; Spar, supra note 26, at 207; Snyder, Reproductive Surrogacy in the United States of America, supra note 96, at 278.

251 See London, supra note 250, at 415; Special Rapporteur, Sale of Children, supra note 146, ¶ 60–61; Freundlich, supra note 4, at 11; INTERNATIONAL FERTILITY LAW GROUP, HTTPS://WWW.IFLG.NET. (LAST VISITED OCT. 30, 2018).


253 See id. ¶ 41.

254 Id. ¶ 75.

provision whereby the surrogate mother “agreed that she would relinquish ‘all parental rights’ to the child in favor of” the intending parents.\textsuperscript{256} In effect, the Court enforced a surrogacy contract in which Johnson was paid, in part, for contracting away and relinquishing her parental rights.\textsuperscript{257} However, the Special Rapporteur was willing to contemplate that some regulated systems could be put in place that would be sufficient to separate the sale of gestational and other services from a following gratuitous transfer of the child. In order to do so, according to the Special Rapporteur:

First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. Hence, the surrogate mother would be viewed as having satisfied any contractual or legal obligations through the acts of gestation and childbirth, even if she maintains parentage and parental responsibility. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract.\textsuperscript{258}

Hence, the Special Rapporteur recommends that “States should prohibit commercial surrogacy until and unless a proper regulatory system, which includes a clear and comprehensive legal framework, is put in place . . .”\textsuperscript{259} The transfer of funds and children in an unregulated context makes it impossible practically to separate the transfer of services from the illicit transfer of the child for “remuneration or other consideration.”\textsuperscript{260} Further, under the analysis of the Special Rapporteur, the sale of children is systematically practiced in regulated commercial surrogacy systems implementing the contractual intention model of parentage.\textsuperscript{261} The contractual intention theory of parentage is the system found in California;\textsuperscript{262} the

\begin{itemize}
\item \textsuperscript{256} Id. at 778.
\item \textsuperscript{257} See id. at 778, 782 n.10.
\item \textsuperscript{258} Special Rapporteur, \textit{Sale of Children}, \textit{supra} note 146, ¶ 72.
\item \textsuperscript{259} Id. ¶ 75.
\item \textsuperscript{260} Id. ¶ 42–43, 67.
\item \textsuperscript{261} See id. ¶¶ 33, 51, 54–63, 68.
\item \textsuperscript{262} See CAL. FAM. CODE § 7960 (West 2018); \textit{Calvert}, 851 P.2d at 782.
\end{itemize}
RUPA, New Hampshire, Washington State, and other American jurisdictions. This is the system preferred by the industry’s advocates and most defended in the pro-commercial surrogacy academic literature. In such systems, the “gestational carrier” or “gestational surrogate” contracts away her parentage rights prior to embryo transfer. The contracts generally contain clauses by which the gestational carrier agrees to participate in the legal and physical transfer of the child, and it is clear that such transfer is of the essence of the agreement, and therefore, a part of the consideration for which the gestational carrier is compensated. The Special Rapporteur takes care to rebut the various legal fictions used by proponents of such systems to avoid the norm of sale of children, such as the time of contracting. Some of these are dealt with herein.

As to adoption services, in formal terms adoption systems which protect the rights of birth mothers, consider the birth mother the mother at birth, only permit relinquishments within a reasonable time after birth, prohibit the sale of children, and regulate the financial aspects of adoption, may appear to avoid the sale of children. However, some aspects of the adoption market do appear to stray beyond a market in services into the zone of transferring a child or rights to a child for “remuneration of other consideration.” These include the many adoption arrangements in which intermediaries are paid according to the number of children placed, the very high intermediary fees in many adoption markets which are far beyond comparable pay for similar social services work in the same community, and the extremely high differential in adoption fees according to the

263 See UNIF. PARENTAGE ACT § 809(a) (UNIF. LAW COMM’N 2017).
264 N.H. REV. STAT. ANN. §§ 168-B:2 (2018) (effective July 21, 2014) (“A person is the parent of a child to whom she has given birth, except as otherwise provided in this chapter and if the pregnancy was established pursuant to a gestational carrier agreement.”).
266 Beiner, supra note 39, at 295–97.
269 Special Rapporteur, Sale of Children, supra note 146, ¶¶ 41–63.
270 See Optional Protocol, supra note 4, at art. 2(a).
relative “demand” for the kind of child involved, as classified by age, gender, race, health, and other characteristics. Payments to birth mothers for private domestic adoptions of the more “desirable” categories of children reportedly blur the line between legal reimbursement of “expenses” and illegal payments to induce transfer of the child. Payments to intermediaries are very difficult to regulate, as almost anything can be characterized as a form of “counseling services, legal advice, or any other innocuous service that is difficult to define as illegal.” Overall, it is very hard to account for the ways in which money changes hands in many adoption systems without viewing those systems as markets in children, rather than merely markets in services. To put it another way, the service involved is the provision of a child, and payment is based on success in providing a child. At that point, however, what is the real difference between a market in providing children and a market in children? After all, a car dealer provides many services and could view even the sale of a car as the service of providing a car. When the service in question is that of providing a concrete thing (or person), the line between a market in services and a market in things or people collapses.

C. Markets in Children and the Rhetorical Provocation

Another common form of rationalization is the rhetorical provocation that seeks attention through acknowledging the prevalence and advantages of markets in children, while simultaneously making a specious distinction to somehow avoid the broadly held ethical objection to child-selling. Debora Spar’s 2006 book, The Baby Business, is a classic example. The title itself proclaims that the ART, surrogacy, and adoption markets

\[271\text{ See Goodwin, supra note 33, at 65–70;}\text{ ; FREUNDLICH, supra note 4, at 11;}\text{ ; SPAR, supra note 26, at 159–60.}\]
\[272\text{ SPAR, supra note 26, at 186–87. See also Goodwin, supra note 33, at 61–65 (discussing the types of “exorbitant fees” that result from a “largely unregulated[ ] adoption free market”);}\text{ ; FREUNDLICH, supra note 4, at 9–13 (exploring the issues raised by fee charging and the lack of regulation surrounding adoptive expenses).}\]
\[273\text{ SPAR, supra at note 26, at 188.}\]
\[274\text{ Contra SPAR, supra note 26, at 206–07 (arguing that labeling adoption as a service allows definition of “the boundaries between legitimate and illegitimate trade”).}\]
\[275\text{ See SPAR, supra note 26, for a discussion of the “baby trade” as an inevitable market that must be acknowledged and regulated.}\]
covered in the book are all a part of “the baby business.” Spar, a professor at Harvard Business School, repeatedly uses the terms “baby market(s)” and “baby trade.” The preface states that “[t]he central argument of this book, therefore, is that despite popular protests to the contrary, and despite the heartfelt sentiments of parents and providers, there is a flourishing market for both children and their component parts.” “We are selling children,” Spar proclaims, even if we would rather not admit it. Spar boldly stakes out an amoral position, refusing to “insist that this market is either good or evil.” Indeed, Spar takes a position of economic determinism in which “resistance is futile” to baby markets, stating that governments should neither “control the industry, [n]or ban it[,]” because “[m]arkets . . . will dominate the baby business. Private enterprises will profit . . . . If there is demand for babies, there will be supply. . . . In the end, of course, the market will still win. We will continue to buy, sell, and modify our children, generating substantial profits in the process.” Indeed, Spar closes the book urging that “we . . . plunge into the market that desire has created.”

Yet, Spar seeks somehow to pull back, denying that she is actually advocating the buying and selling of children. Hence, she acknowledges that “[m]ost people agree that it is inherently wrong to sell a child, that we can never treat babies or the parents who produced them as marketplace commodities.” Further, “[m]ost people are repulsed by the very idea of exchanging children for money or of putting a financial price on human heads.” These protestations are feeble given Spar’s declaration at the outset of her book that “[w]e are selling children. The Baby Business describes how.” Ironically, Spar, in a footnote, distances herself from the

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276 Id.
278 Spar, supra note 26, at 199, 208, 233.
279 Id. at 206–32.
280 Id. at xv.
281 Id. at xix.
282 Id. at xv.
283 Spar uses the phrase “prohibition . . . is futile,” rather than “resistance is futile,” but the phrase well summarizes her approach to markets in children. See id. at 224. The phrase has various origins but in popular culture is particularly associated with the Star Trek Next Generation television series, where the “Borg” constantly warn those whom they attack that “resistance is futile.” Borg, WIKIPEDIA, https://en.wikipedia.org/wiki/Borg (last visited Oct. 29, 2018).
284 Spar, supra note 26, at xviii–xix. See also id. at 223–24 (proposing regulation of the “baby business” as the only viable option for society).
285 Id. at 233.
286 Id. at 189.
287 Id. at 206.
288 Id. at xix.
famous Landes and Posner article on adoption, declaring it a “rare and extremely controversial argument in favor of the marketplace.”* Here is the classic rationalization: On the one hand, we are selling children and we better get used to it as resistance to markets is futile. On the other hand, of course, selling children is wrong and almost nobody advocates for it—certainly not this author.

In 233 pages of text, Spar makes only a weak attempt to reconcile her contradictory endorsement and rejection of baby-markets. She introduces two of the classic distinctions. First, Spar, like other baby-market proponents, points to a purported lack of exploitation, noting that there is no connection to “slavery, organ theft, or child prostitution.” For Spar, it is a sufficient distinction that one is providing a child for family formation purposes. To the contrary, and as noted by the United Nations Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur), sale of children as a legal concept does not require proof of any other form of exploitation. Rather, buying and selling human beings is considered a sufficient harm of itself, against both the individual sold and society generally, to merit prohibition. Indeed, the OPSC specifically names the buying of children for purposes of adoption as an illicit form of sale of children requiring criminal or penal sanction. Selling children so people can parent is selling children!

Second, Spar, like other baby market proponents, attempts to distinguish between a market in services rather than a market in “the child itself.” She suggests that the “baby trade” is a market in “the provision of a child rather than the child itself.” As noted above, however, there is no substantive difference between a market in things or persons, on the one hand, and a market in the service of providing things or persons, on the other hand. Honda or Ford could characterize themselves as service providers and they are in significant part; Honda and Ford certainly are in the business of the “provision of cars” to drivers. Nonetheless, Honda and Ford are also in the business of selling cars. As to the baby business Spar has spent a book describing, the distinction between the business of “the provision of a child” and the business of selling a child is merely semantic. This is self-delusion and rationalization in action, a distinction without a

289 Landes and Posner, supra note 1.
290 Spar, supra note 26, at 271 n.111.
291 Id. at 207.
292 Id.
293 Special Rapporteur, Sale of Children, supra note 146, ¶35; Optional Protocol, supra note 4, at art. 2(a); Tobin, supra note 236, at 28.
294 Special Rapporteur, Sale of Children, supra note 146, ¶35.
295 Optional Protocol, supra note 4, at art. 3.
296 Spar, supra note 26, at 207.
297 Id.
298 See discussion supra Sections V(A)–(B).
difference, except to avoid admitting that Spar is advocating for what she admits is abhorrent, which are markets in children.

This rationalization is made worse by Spar’s refusal to advocate for any particular public policy or legal stance toward markets in ART, surrogacy, and adoption. Unlike the Special Rapporteur, who describes the rules under which a commercial surrogacy context would not necessarily violate the prohibition on the sale of children, Spar specifically refuses to supply proposals or criteria for avoiding the sale of children. Even worse, the primary public policy argument she is willing to make is against prohibitions: “[W]e could . . . choose to ban the baby business, deciding that its risks and inherent inequalities are simply too great. Yet, as this book has demonstrated, prohibition at this point seems futile: demand in the baby business is simply too high and the technologies too good.”

In the end, Spar lands in the typical zone of self-contradiction endemic to so many writings regarding markets in children. She concedes that the critics of baby-markets, such as Radin and Sandel, are correct:

Michael Sandel . . . states that “treating children as commodities degrades them as instruments of profit rather than cherishing them as persons worthy of love and care,” and legal scholar Margaret Jane Radin has famously claimed that “conceiving of any child in market rhetoric wrongs personhood.” Sandel and Radin are almost certainly right.

Yet, according to Spar, the baby market is inevitable and can be ethical, so long as we simply re-conceptualize it as a market in “the provision of a child,” rather than a market in children.

VI. CONCLUSION: RESISTANCE IS NOT FUTILE

Contrary to Professor Spar’s view that “prohibition” of the “baby-business” “seems futile,” there is much that can be done. Indeed, the first step would be for the United States government, American Bar Association, Commissioners of Uniform State Laws, and advocates for intercountry adoption and international surrogacy to stop promoting global markets in children. The United States government could acknowledge that the OPSC applies to the sale of children in any context, including surrogacy.

299 Special Rapporteur, Sale of Children, supra note 146, ¶ 72.
300 Spar, supra note 26, at 224.
301 Id. at 223–24.
302 Id. at 199–200 (footnote omitted).
304 See supra notes 212–19 and accompanying text.
305 See supra note 219 and accompanying text.
The United States government could acknowledge that buying and selling children for adoption is sufficiently exploitative to constitute a form of human trafficking. The United States government, in its interventions at the Hague Conference on Private International law, could assist, rather than resist, the development and implementation of international norms to reign in markets in children. The American Bar Association could retract its resolution urging the United States Department of State to, in effect, promote a global market in commercial surrogacy. The Commissioners of Uniform State Laws could retract or re-write the surrogacy sections of the RUPA. States, which currently prohibit commercial surrogacy, such as New York, could resist the voices of those urging them to legalize forms of commercial surrogacy that would normalize markets in children. State legislatures could take seriously the viewpoint of the United Nations Special Rapporteur on the sale and sexual exploitation of children, indicating that the contractual intention theory of parentage represents the sale of children.

Indeed, the constant activism by governmental and non-governmental actors to create and facilitate markets in children belies the concept that markets in children are inevitable. Proponents of markets in children are continuously active precisely because the creation and facilitation of legalized markets in children requires governmental and non-governmental action and advocacy. Legal markets are not a product of the laws of nature, but are human artifacts created by governmental and non-governmental actors. Hence, we have a choice whether to create any particular legal market, a choice which should not be obscured by claims of inevitability. Similarly, the dreaded black market is not an inevitable feature of human life in all areas, and the level of black market activity produced by a prohibition varies based on the context. For example, the almost eighty percent drop in the numbers of intercountry adoptions to the United States has not been accompanied, so far as one can tell, by any increase in “black market” illegal transfer of children to the United States for purposes of family formation. Indeed, in this case, since most illicit intercountry adoption practice actually employed the channels and mechanisms of the legal intercountry adoption system, the drop in intercountry adoptions has apparently simultaneously also reduced the incidences of gray market and black market intercountry adoptions to the United States.

306 See supra notes 220–34 and accompanying text.
307 See generally ABA REPORT, supra note 42.
308 See UNIF. PARENTAGE ACT art. 8 (UNIF. LAW COMM’N 2017).
309 See supra note 169 and accompanying text.
310 See generally Special Rapporteur, Sale of Children, supra note 146.
311 See supra note 64 and accompanying text.
312 See Smolin, supra note 60, at 115.
Indeed, as to family formation, the risks of legal prohibitions leading to black markets are lessened because family formation requires explicit legal and social approval for a lifetime. The requirement of such permanent and public social sanction means that those who wish to obtain a child for family formation in a clearly illegal manner may be deterred both by the risks of exposure and also by an unwillingness to form their family in a clearly illegal manner. By contrast, the necessary and obviously justified prohibitions of markets in children for sexual exploitation more readily lead to black markets because the conduct involved requires only short-term control of a child and is conducted in secret. Further, the persons involved already understand that what they are doing is viewed by society as wrong.

Additionally, the growth of interest in ART and surrogacy is not primarily a consequence of the increased difficulties in adopting internationally or domestically, nor on limitations on adoption markets. There is, in fact, no shortage of children eligible for adoption in the United States, given that for many years there have been more than one hundred thousand children eligible for and waiting for adoption in the context of the child protection system.\(^{313}\) Most people who want children, however, do not want those children, who are generally much older and often have experienced multiple forms of trauma, neglect, and abuse with accompanying behavioral, cognitive, educational, emotional, relational, mental health and medical issues.\(^{314}\) ART and surrogacy offer what adoption generally does not, which is the possibility of a genetically-related healthy infant who has been genetically screened and selected. Hence, limitations on adoption “markets” cannot be blamed for demand for surrogacy and ART. The complex regulatory issues regarding ART and surrogacy are an inevitable development based on the development of new technologies, including IVF, PGD, and in the future applications of CRISPR.

Thus, the concept that “resistance is futile” to markets in children is analytically false, both as to the inevitability of legal markets in children and also as to the degree of black market responses to prohibitions. In each instance, we have to take responsibility to decide whether we are willing to permit such markets.

Resistance to markets in children should be both conceptual and legal. Conceptually, we should insist on the primacy of non-economic ways of understanding the “value” of human persons and of personal, procreative, and parental human relationships and processes. Here, Posner describes


\(^{314}\) See id. at 2.; Erin P. Hambrick et al., Mental Health Interventions for Children in Foster Care: A Systematic Review, 70 CHILD. & YOUTH SERVS. REV. 65, 65 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5421550/.
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well what is at stake. Specifically responding to Radin’s objection to commodification of human beings, and specifically in the context of discussing his proposal for legalizing a market in parental rights as an approach to adoption, Posner says: “some of us believe that this and most societies could use more, not less commodification and a more complete diffusion of the market-orientated ethical values that it promotes.”

To the contrary, this essay is based on the premise that Radin, Sandel, O’Donovan and others are correct in maintaining the importance of limiting “commodification and … diffusion of … market-orientated ethical values.” Radin’s “market-inalienability” in its origins is ethical in challenging us to think about when markets in practice and perspective debase and diminish human life.

Put another way: were markets made for humanity, or was humanity made for markets? Are markets simply one possible societal construct for serving human beings, or are human beings primarily defined by their value in the marketplace? If markets are human artifacts intended to serve human flourishing, then market mechanisms and understandings should be limited and put aside when contrary to human flourishing. Jesus is famously quoted making a similar point: “The Sabbath was made for man, not man for the Sabbath.” Hence, even as to divine law, the law should be interpreted so as to serve the good of humanity.

Hence, it is not enough for law and economics proponents to argue there are elements of markets involved in parent-child relationships, or that it is possible to view all aspects of human life from an economic perspective. The point is one of primacy of perspective. Should human society and law be built around a primarily economic view of the value and significance of human persons and personal, procreative, and parental relationships? Or should society and law, while acknowledging unavoidable economic aspects, insist on primarily non-economic perspectives as to certain aspects of human life?

Resistance to the primacy of the market as to parentage, adoption, surrogacy, and ART would be futile if human beings inevitably understood family formation in primarily market terms. If such were true, Posner and his disciples would not need to tirelessly advocate as they do for, in Posner’s terms, “a more complete diffusion of the market-oriented ethical values . . . .” Resistance is not futile because there is something in human

315 POSNER, SEX AND REASON, supra note 2, at 413.
316 See Radin, supra note 21, at 1921.
317 See generally Sandel, supra note 22; see also supra text accompanying note 22.
319 Mark 2:27 (New International Version).
320 See POSNER, SEX AND REASON, supra note 2, at 413; see also text accompanying note 2.
beings that wishes to perceive values beyond self-interest, market-valuation, and economic benefit in themselves, others, and their most personal relationships. Indeed, resistance is not futile because most human beings are repulsed by primarily market understandings of family formation and parent child relationships—as admitted, for example, by Spar.\textsuperscript{321}

Legally, since markets are indeed human constructs put in place in part by law, resistance to markets in children is not futile. If resistance were futile, the surrogacy industry would not invest in advocating for market-friendly commercial surrogacy laws. If resistance were futile, advocates for market-based surrogacy laws would not have to create dubious denials that their preferred laws meet legal definitions of the sale of children.\textsuperscript{322} If resistance were futile, jurisdictions that once were global centers for commercial surrogacy, such as Cambodia, India, Nepal, Thailand, and the Mexican state of Tabasco would not have chosen to limit foreign commercial surrogacies conducted within their territories.\textsuperscript{323} If resistance were futile, Sweden would not be actively considering a ban on surrogacy.\textsuperscript{324} If resistance were futile, there would not be a long list of countries that prohibit either surrogacy or commercial surrogacy.\textsuperscript{325} If resistance were futile, the numbers of intercountry adoption to the United States would not be down by almost 80%, despite the American adoption community over decades seeking to use its money and market power to obtain children across the globe.\textsuperscript{326}

Conceptually, the concept of a right to a child also must and can be resisted. Here, account must be taken of the understandable sympathetic reaction to well-intended adults who face impediments in fulfilling their natural human desire to parent. Sympathy for ends is not the same thing, however, as sympathy for means. The means of establishing markets in children for family formation are not acceptable. As a point of comparison, we might feel sympathy for those who face impediments in forming intimate partnerships, but still resist the means of establishing markets in persons for such purposes. The concept of a right to a child undermines the very foundation of human rights itself, which is the inherent and equal human dignity of all human beings.

\textsuperscript{321} See Spar, supra note 26, at 195–96.
\textsuperscript{322} See Special Rapporteur, Sale of Children, supra note 146, ¶ 52–61; see also supra text accompanying notes 246–274 (rebutting arguments that certain forms of commercial surrogacy do not meet the definition of sale of children); Smolin, Surrogacy as the Sale of Children, supra note 38.
\textsuperscript{323} See Special Rapporteur, Sale of Children, supra note 146, ¶ 15.
\textsuperscript{324} See supra note 181 and accompanying text.
\textsuperscript{325} See Trimmings, supra note 171, at 463–64; see also Should Compensated Surrogacy Be Permitted or Prohibited?, supra note 102, at 23–25.
\textsuperscript{326} See supra note 64 and accompanying text.
The effectuation of a right to a child through a doctrine of parentage by contractual intention marries liberty of contract to the right to procreate in a disastrous combination of the worst of rights claims from the right and left. From the right, this combination takes the willingness to create markets in human beings and to conceptualize familial and personal relationships in primarily market and economic terms. From the left, this combination takes the willingness to effectuate certain favored rights and equality claims through the subjugation of a class of human beings, and of less favored rights, in a manner that treats one human being as no more than a means of fulfilling the rights and wishes of another.

Resistance to markets in children will require exposing inappropriate rights and equality claims for what they are, which is the reduction of the conception and value and dignity of the human person. Resistance to markets in children will require courage precisely because there are good reasons for such markets, but of course, *not good enough reasons* to justify such a fundamental violation of human dignity. Resistance to markets in children will require the clarity to perceive what proponents obscure, and to protect what can be denigrated but not ultimately denied.
Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children

David M. Smolin
Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children

David M. Smolin*

Abstract

This Article argues that most surrogacy arrangements, as currently practiced, constitute the “sale of children” under international law and hence should not be legally legitimated. Therefore, maintaining the core legal norm against the sale of children requires rejecting claims that there is a right to procreate through surrogacy. Since a fundamental purpose of law in the modern era of human rights is to protect the inherent dignity of the human person, a claimed legal right that is built upon the sale of human beings must be rejected.

This Article refutes common arguments claiming that commercial surrogacy does not constitute the sale of children and should be legally legitimated. Upon analysis, those arguments, and the corollary legal regimens legitimizing a commercial surrogacy industry, are thinly veiled rationalizations for accepting commercial arrangements involving the de jure and de facto transfer of infants in exchange for monetary compensation.

This Article describes the minimum regulatory approach under which the practice of surrogacy would not constitute the sale of children. This Article argues that legal principles applicable to adoption, which are

* Harwell G. Davis Professor of Constitutional Law and Director, Center for Children, Law, and Ethics, Cumberland Law School, Samford University. I wish to acknowledge and thank Samantha Page, S. Katy Reed, Marley Davis, Ariel Jebeles, Anna Reilly, and Kayla Currie for their research assistance. I want to thank Herve Boechat, Nigel Cantwell, Lajuana Davis, Brannon Denning, Wendy Greene, David Langum, and Fouzia Rossier for their responses to prior drafts and presentations of this paper. The positions taken in this Article and any errors or omissions remain solely the responsibility of the author.
designed to protect vulnerable birth parents and children and to prevent human trafficking and the sale of children, should be adapted and applied to surrogacy.

Comparison to adoption is also useful in revealing the hidden hypocrisy of the surrogacy industry. Surrogacy industry proponents claim to reflect a progressive acceptance of new means of family formation, but in fact advocate for a retrograde and pseudo-traditionalist set of legal rules that cut off significant rights of surrogates and surrogate-born persons to information, autonomy, and relationship. In a context where birth parents and adoptees are gaining new rights in the context of adoption, surrogacy proponents seek to build an industry which empowers intended contractual parents and profit-seeking intermediaries at the expense of the rights of surrogates and surrogate-born persons.

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I. INTRODUCTION

When does surrogacy constitute the “sale of children,” particularly as that term is defined in international law? This legal question is directly relevant to currently debated questions as to whether the law should facilitate, prohibit, or regulate surrogacy under both national and international law.

This Article describes the undermining of a core legal norm in the name of an emerging and controversial rights claim. The core legal norm being undermined is the prohibition of child-selling, which itself follows from the modern abolition of slavery. Both norms are closely related to the contemporary norm against human trafficking. These norms can be conceptualized as rights—most directly the rights not to be sold, enslaved, or trafficked. These legal norms and rights protect the “inherent dignity of the human person” and the “equal and inalienable rights of all members of the human family” against the powerful tendencies toward extreme commodification and devaluation of human beings recurrent throughout history and inherent in a globalized market economy.


4. See, e.g., Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”).


6. Id.

7. See African Charter on Human and Peoples’ Rights, art. 5, Oct. 21, 1986, 21 I.L.M. 59 [hereinafter African Charter] (“Every individual shall have the right to the respect of the dignity
A claimed right to procreate through surrogacy is undermining the norm against child-selling. This claimed right seeks legitimation through association with a set of more established rights, which are variously termed the rights to procreation, family life, marriage, and privacy. These more established rights began with a more traditional protection of heterosexual marriage and procreation through sexual intimacy within such marriages and then, more controversially, have evolved in many societies (although not universally) toward protecting a broader range of relationships, whether marital or not, and inclusive of same-gender relationships. As currently constructed, these more established rights protect the family as a fundamental unit of society with its own zone of self-governance, while to various degrees also protecting individuals against inappropriate state interference in multiple kinds of “personal relationships” and associated activities, including consensual sexual intimacy, contraception, and procreation. Despite the controversies over the extent of such rights, they...
are grounded, like other human rights claims, in the protection of human dignity. Human dignity is expressed in part through familial, sexual, procreative, and parent-child relationships that, although various in forms, have occurred in every society. The controversial question here is whether the claimed right to procreate through surrogacy should be included within the sphere of the more established (and yet still developing) rights of procreation, family life, and privacy.

This Article will argue that most surrogacy arrangements as currently practiced do constitute the “sale of children” under international law and hence should not be legally legitimated. Consequently, maintaining the core legal norm against the sale of children requires rejecting claims of a right to procreate through surrogacy. Given the underlying purpose of all human rights law in maintaining the inherent human dignity of all human beings, a claimed legal right built upon the sale of human beings must be rejected.

The Hague Conference on Private International Law (HCCH) has publicly released significant documents on international surrogacy and the status of children as a part of its consideration whether to engage in further work in the field. The work completed by the Permanent Bureau to date has been very useful in elucidating the issues. The HCCH documents raise the question of whether multilateral international instruments—presumably one or more Conventions—should be created to address international surrogacy or the parentage issues that sometimes arise from international surrogacy arrangements. This Article will argue that any such Conventions or multilateral instruments must carefully avoid legitimating any forms of surrogacy that constitute the sale of children.

678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner, 316 U.S. at 535. I am putting aside for present purposes the question of abortion, sometimes included within this group of issues, because of controversy regarding the status of the human embryo or fetus, which can in some nations lead to a somewhat different treatment of this issue. See generally Roe v. Wade, 410 U.S. 113 (1973).


17. See supra note 15.
understandable goal of strengthening the legal position and protecting the best interests of children produced by international surrogacy should not come through legitimating the systematic selling of children. In the long term, the best interests of children as a group are not served by creating a legally legitimate pathway to the systemic sale of children, regardless of whether, in a specific individual case, an argument could be made for ex post facto adjustment of the legal status of a child who is a product of such a sale.  

Thus, this Article will describe the minimum regulatory approach under which the practice of surrogacy would not constitute the sale of children. Nations that wish to accommodate the practice of surrogacy, domestic or international, are bound under international law to prohibit the sale of children and hence must regulate surrogacy practice to the degree necessary to avoid the illicit sale of children. This Article will argue that international and domestic principles related to adoption, designed to protect vulnerable birth parents and children and to prevent the trafficking and sale of children in the context of adoption, should be adapted and applied to surrogacy.

Comparison to adoption is also helpful in revealing the hidden hypocrisy of the surrogacy industry. On the one hand, the surrogacy industry claims to reflect a new and progressive wave of an increasing variety of family forms and means of family formation, made possible by both advances in technology and increasing societal acceptance of varied family structures. The movement’s rhetoric suggests it is merely asking the law to catch up with society’s practices and acceptance of non-traditional family formation. On the other hand, it is apparent that the surrogacy

18. See, e.g., MARTHA FIELD, SURROGATE MOTHERHOOD 27–28 (1990) (arguing that it is in the interests of children and families in general to prohibit child selling regardless of the interests of particular children in individual cases).
19. See infra Parts II–V.
20. See, e.g., Optional Protocol, supra note 1.
industry is lobbying for laws that place these new family forms and means of family formation into the legal form of the traditionalist nuclear family composed of a marital couple and their naturally conceived children where the marital parents have exclusivist claims to parental status. While this nuclear family form, focused on exclusive control of children by a married male-female set of parents, is regarded as traditional in some Western nations, it is in fact not necessarily congruent with non-exclusivist and more fluid extended family forms that are traditional in many cultures and nations.

In order to accomplish this retrograde pseudo-traditionalism, the surrogacy industry seeks legal rules that cut off significant rights of the surrogates and surrogate-born persons to information, autonomy, and relationship in favor of empowering intended contractual parents and profit-seeking intermediaries.

By contrast, adoption law and practice increasingly recognizes that adoptive families should not be forced into the legal form of the traditional exclusivist family because doing so requires destruction of the legitimate interests and rights of both original (birth) family members and adoptees. Bans on binding pre-birth adoption contracts, bans on the sale of parental rights and on baby-selling, and regulations of the financial aspects of adoption—in combination with the movements toward open adoption,
adoptees maintaining some inheritance rights from their original birth family members, and adoptee rights to their information and birth certificates — reflect the necessity of legally acknowledging the distinctive nature of adoptive family relationships and recognizing the human rights of all adoption triad members.

The problem of baby-selling, which is the centerpiece of this Article, is deeply interconnected to this retrograde pseudo-traditionalism of the surrogacy industry because the surrogacy industry employs the same legal fictions both to bypass legal prohibitions of child-selling and to force the surrogate-formed family into the legal form of the traditional exclusivist family. Hence, the solution for surrogacy is to learn from, rather than seek to escape, the lessons learned from adoption.

Ultimately, a movement and industry that seeks to legitimize practices that systemically constitute the sale of children cannot be viewed as contributing to progress, particularly in human rights terms. This Article uses the mirror of the distant past through analysis of surrogacy in the scriptural book of Genesis and the ancient Babylonian Code of Hammurabi in order to remind us that there is in fact little truly new in the contemporary ethical and legal debates over surrogacy. Upon examination, the contemporary surrogacy movement and industry seek a retrograde exploitation of the vulnerable and an explicit market in children that would make those in the ancient world, awash in slavery and extreme patriarchy,


32. See UNIF. PROBATE CODE § 2-119(b)–(d) (UNIF. LAW COMM’N 2010) (stating adoptee inherits from or through genetic family in regard to stepparent adoption, adoption by relatives, and adoption after death of both parents).


34. See infra Part IV.

35. See infra Part IV.

36. See infra Part IV.A.

37. See infra Part III.E.
The question of the exploitation of the so-called surrogate is deeply intertwined with the question of surrogacy as the sale of children. Thus, some of the same rules that would protect children from being sold would also further the rights and interests of surrogates. However, this Article’s primary focus on the sale of children precludes a full, independent examination of all of the issues and contexts relevant to whether and when surrogacy constitutes an illicit exploitation of the surrogate. Moreover, even if surrogacy is not deemed exploitative for the surrogate, it can still be the illicit sale of children. Hence, this Article leaves a more complete exploration of protecting surrogates from exploitation to future work.

II. WHAT IS “SALE OF CHILDREN”?

The term sale of children has established roots in significant international legal instruments. The 1989 Convention on the Rights of the Child (CRC), the fundamental and foundational legal instrument on children’s rights, states in Article 35: “State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

The 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) echoes Article 35 of the CRC. Article 1 states in relevant part: “The objects of the present Convention are . . . to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”

The preparatory materials for the Hague Adoption Convention indicate that the term “child trafficking” included obtaining children illicitly for purposes of adoption, as well as obtaining children illicitly for other illegal purposes. This is clearest in the foundational 1990 Report on Intercountry Adoption

38. See infra Part III.E.
39. See infra Part IV.
40. See infra Part IV.A.
41. See infra Part IV.A.
42. See, e.g., CRC, supra note 4, at art. 35.
43. Id.
44. Hague Adoption Convention, supra note 21, at art. 1.
45. See David M. Smolin, Child Laundering and the Hague Convention on Intercountry
Adoption prepared by J.H.A. (Hans) van Loon (van Loon Report).46 Section E of the van Loon Report is titled: “Abuses of Intercountry Adoption: International Child Trafficking.”47 The van Loon Report discussed “practices of international child trafficking either for purposes of adoption abroad, or under the cloak of adoption, for other—usually illegal—purposes.”48 The van Loon Report described three principle methods of obtaining children illicitly: “[T]he sale of children, consent obtained through fraud or duress[,] and child abduction. Combinations are possible.”49 The van Loon Report noted the use of the legal system, through provision of falsified documents and legal travel documents, to “‘wash’ the ‘commodity’”—referring to the children.50 Hence, the van Loon Report uses the term child trafficking to encompass situations which this author has described as “child laundering”: obtaining children illicitly through force, fraud, or funds, providing the children with the status of adoptable orphans through the creation of falsified documents, and then processing these children for adoption through the official, legal channels of the intercountry adoption system.51

Although the CRC named child trafficking, the sale of children, and the abduction of children as three interrelated but distinct phenomena,52 at that point in time there was not an overriding and clear international definition of child trafficking.53 This is reflected in the way that the van Loon Report uses the term child trafficking as the overarching term to encompass child trafficking, the sale of children, and the abduction of children.54

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in

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47. Id. at 51.
48. Id.
49. Id.
50. Id. at 53.
52. See CRC, supra note 4, at art. 35.
54. van Loon, supra note 46, at 51–55.
Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Palermo Protocol) has provided a more detailed and specific legal definition of “trafficking in persons.”55 This definition of trafficking in persons implicitly provides a definition of child trafficking by specifying which elements of trafficking in persons are unnecessary when a child—defined as “any person under eighteen years of age”56—is the trafficking victim.57 The essence of the definition of child trafficking under the Palermo Protocol is: “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons.’”58 The definition of “exploitation” under the Palermo Protocol “shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”59

The definition of exploitation, therefore, explicitly includes sexual exploitation, forced labor, and the removal of organs but allows for the inclusion of other forms of exploitation. This has created much debate over other possible forms of exploitation.60

The debate in respect to intercountry adoption has been whether obtaining children illicitly for purposes of an adoption could be exploitative, particularly where the adoptive parents did not knowingly arrange or participate in an illicit adoption.61 This author has argued that exploitation nonetheless would exist because the child’s capacity and need to love and bond is exploited as a part of an illicit process whereby the child is made to emotionally attach to strangers in the place of the child’s original parents and family.62 To make this clearer, it may be helpful for the reader to imagine a kind of science-fiction scenario in which someone, without your

55. See Palermo Protocol, supra note 3, at art. 3.
56. Id. at art. 3(d).
57. Id. at art. 3(c).
58. Id.
59. Id. at art. 3(a).
61. See id.
consent, kidnapped you, altered your memories, and then provided you with a substitute set of intimate and family relationships. Would you feel exploited if you became aware of this ruse? Would it make it non-exploitative if the substitutes were better than the originals by some measures—more attractive, wealthier, smarter, and more attentive? In an analogous manner, victims of child laundering lose the memories that should have been created with their original family because they never have the experiences that would have created those memories.\(^\text{63}\) When victims of child laundering are wrongfully taken from their original family and given at a very young age to a substitute family, they are made to love the wrong people at an age when they almost cannot help but love whoever cares for them.\(^\text{64}\) This seems a profound exploitation of the inherent character, vulnerability, and developmental needs of young children. It may be that the intermediaries who wrongfully take the children from their original families, rather than the unknowing adoptive families, are the exploiters, but nonetheless it is exploitation.\(^\text{65}\) Of course, in cases of child laundering of older children who have already attached to their original families, the exploitation involved is even clearer, for such children undergo the completely unnecessary and extremely painful loss of the family they love while being expected to bond to a new family.\(^\text{66}\) In addition, older children involved in child laundering generally lose their first language and are asked to adjust to an entirely new culture and nationality under conditions that are extremely traumatic.\(^\text{67}\)

By contrast, some have argued that being placed in an adoptive home does not constitute exploitation and hence children obtained illicitly for adoption are not trafficking victims.\(^\text{68}\) From this point of view, the enumerated forms of exploitation under the Palermo Protocol, such as sexual exploitation and forced labor, are so unlike the situation of a child in a loving adoptive home that the term exploitation is necessarily inapplicable to an adopted child.\(^\text{69}\)

\(^{63}\) Id.
\(^{64}\) Id.
\(^{65}\) See id.
\(^{66}\) See id.
\(^{67}\) See id.
\(^{68}\) See, e.g., OFFICE OF THE UNDER SECRETARY FOR GLOB. AFFAIRS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2005) [hereinafter TRAFFICKING REPORT].
\(^{69}\) See id.
Further, some argue that even if the children have not been exploited where children are obtained illicitly for adoption, *their original parents* have been exploited, at least in many typical child laundering scenarios.\textsuperscript{70} Thus, Jini Roby and Taylor Brown apply the Palermo Protocol to the experiences of original parents in documented instances of child laundering and conclude that such scenarios would indeed involve exploitation and human trafficking of those parents.\textsuperscript{71}

However one resolves these debates, the very fact of the debate has brought attention to the distinctions between child trafficking and the sale of children. Thus, there is general agreement that a child sold for purposes of adoption is a victim of the sale of children, whether or not he or she is a trafficked child.\textsuperscript{72}

This point is underscored by the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sale of Children Protocol).\textsuperscript{73} This Convention, created in 2000—the same year as the Palermo Protocol\textsuperscript{74}—contains a specific definition of the sale of children: “Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”\textsuperscript{75}

The Sale of Children Protocol requires State parties to fully cover in their “criminal or penal law,” “[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”\textsuperscript{76} It is generally understood that the Hague Adoption Convention is the reference point for the term “applicable international instruments on adoption” in the Sale of Children Protocol.\textsuperscript{77} Hence, the Sale of Children Protocol specifically includes the sale of children in the context of intercountry adoption within the Protocol’s definition of the sale of children.\textsuperscript{78}

\textsuperscript{70} See Smolin, *supra* note 51, at 4–18, 33.
\textsuperscript{72} See, e.g., *TRAFFICKING REPORT, supra* note 68, at 21.
\textsuperscript{73} See Optional Protocol, *supra* note 1, at art. 3.
\textsuperscript{74} See generally Palermo Protocol, *supra* note 3.
\textsuperscript{75} See Optional Protocol, *supra* note 1, at art. 2(a).
\textsuperscript{76} See *id.* at art. 3.
\textsuperscript{78} See Optional Protocol, *supra* note 1, at arts. 2–3.
Therefore, it is clear that there is not a complete overlap between child trafficking and the sale of children. The most specific difference is that the sale of children does not require exploitation; hence, some instances of the sale of children would not constitute child trafficking. The reverse is also true. In some instances, child trafficking would not constitute the sale of children. Thus, UNICEF’s Handbook on the Sale of Children Protocol notes that the definition of human trafficking does not require that a sale of children exist, as the elements of human trafficking do not require any commercial transaction, remuneration, or consideration. Thus, while it is common, and perhaps typical, for children to be sold during various stages of human trafficking, it is neither inevitable nor required. This difference between trafficking and the sale of children points out the key role that “remuneration or any other consideration” plays in the definition of sale of children. As suggested by the very word “sale,” the essence of the sale of children is some kind of transfer of the child in exchange for some kind of financial benefit or consideration: a quid pro quo contractual sale of a child. By contrast, the essence of the legal concept of child trafficking is some kind of transfer, broadly construed as “recruitment, transportation, transfer, harbouring or receipt of persons . . . for purposes of exploitation.”

Most of the time, these distinctions between child trafficking and sale of children are irrelevant, as most instances of sale of children are exploitative of the children and most instances of child trafficking involve a profit or financial motive. Nonetheless, the distinction matters in some instances, including adoption and (as shall be seen) commercial surrogacy. Thus, it is helpful to remember that child trafficking is transfer of a child for purposes of exploitation, while sale of children is transfer of a child for remuneration.

79. See id.; TRAFFICKING REPORT, supra note 68, at 10–11.
80. Cf. Palermo Protocol, supra note 3, at art. 3; Optional Protocol, supra note 1, at arts. 2–3.
82. See id.
83. See Optional Protocol, supra note 1, at art. 2.
84. See id.
85. See Palermo Protocol, supra note 3, at art. 3.
86. See HANDBOOK ON OPTIONAL PROTOCOL, supra note 81, at 9–11.
87. See infra Part IV.
or any other consideration.88

III. WHAT IS “SURROGACY”?

A. Surrogate as “Substitute”

The underlying word “surrogate” has several meanings, but the core relevant concept appears to be that of a “substitute,” or one who acts in the place of another.89 This concept of a substitute therefore implicitly involves a comparison of two persons in respect to a particular role, where one party is the normal or expected person for that role, but another instead fulfills the role as a kind of replacement.

Before the recent era of Assisted Reproductive Technology (ART), the term “surrogate mother” would have been commonly understood as one who informally “mothers” a child in place of the biological mother.90 For example, someone might refer to an unrelated person, stepmother, sister, aunt, or grandmother as a surrogate mother if she performed mothering functions in the temporary or permanent absence of the biological mother.91 Similarly, the term surrogate might be used when an orphaned baby animal is put in the care of an unrelated mother, sometimes in the hope of establishing a nursing relationship or joining a litter.92

The concept of a substitute as the basis of surrogacy indicates why the term appears to be such a misnomer.93 In traditional surrogacy, achieved through artificial insemination (AI), the so-called surrogate is in fact the genetic and gestational mother—the natural mother.94 Calling her a

92. See generally LISA ROGAOK, ONE BIG HAPPY FAMILY: HEARTWARMING STORIES OF ANIMALS CARING FOR ONE ANOTHER (2013).
93. See FIELD, supra note 18, at 4–5.
94. JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 426–27 (LexisNexis ed., 2nd ed. 2006); FIELD, supra note 18, at 4–5; John A. Robertson, Surrogate Mothers: Not So Novel After All, 13 HASTINGS CTR. REP. 28, 28 (1983) (stating that the term “surrogate mother” is a misnomer as an adoptive mother is a substitute and the surrogate is the “natural mother”).
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substitute seems odd, when it is in fact the intended parent who is seeking to substitute herself, legally and in terms of child custody, for the natural mother.95 It would seem more accurate in traditional surrogacy for the intended mother, particularly where genetically unrelated, to be called the surrogate.96

B. Sexuality, Surrogacy, and the “Surrogate Wife”

Professor Martha Field suggested that the surrogate could be labeled a “surrogate wife.”97 This terminology is reminiscent of the historical antecedents of surrogacy in scriptural Genesis narratives and the ancient world, which are described below.98 The surrogate performs wifely roles or functions for a man in securing him a child and heir in an instance where the actual wife, for some reason, is unable to perform this procreative role.99

However, the terminology of surrogate wife has not been popular, presumably because it suggests a sexual intimacy between the surrogate and the genetic or intended father, which modern practice strives to deny.100 Modern surrogacy is based upon the viewpoint that an intended father and surrogate are not connected in a sexual way, even when they are jointly involved in the fundamental procreative processes necessary to bring a child to birth.101 Hence, in modern traditional surrogacy there is a presumption that a man whose sperm is artificially inseminated into a woman is not involved sexually with that woman, even if he intends to father the resulting child.102 Similarly, in gestational surrogacy, whereby an embryo is created through in-vitro fertilization (IVF) and pregnancy is achieved through

95. Robertson, supra note 94, at 28.
96. See id. (“It is the adoptive mother who is the surrogate mother for the child, since she parents a child borne by another.”); see also Barbara L. Atwell, Surrogacy and Adoption: A Case of Incompatibility, 20 COLUM. HUM. RTS. L. REV. 1, 1 (1988).
97. FIELD, supra note 18, at 5; see also Robertson, supra note 94, at 28 (suggesting “surrogate spouse”).
98. See infra notes 150–241 and accompanying text.
99. See infra notes 150–241 and accompanying text.
100. See, e.g., CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIOEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 46 (2d ed. 2006).
101. Cyril C. Means, Jr., Surrogacy v. the Thirteenth Amendment, 4 N.Y. L. SCH. HUM. RTS. ANN. 445, 468 (1987) (“The procreation occurs between the surrogate and the father, not between the father and his wife.”).
embryo transfer into the woman’s uterus,103 there is a presumption that the man seeking to become a father through the surrogate gestating and birthing his child is not sexually involved with the surrogate, even when he is the genetic father.104 This contemporary perspective truncates the biological meanings of sexuality by removing the sexuality from procreative processes. Thus, just as contraception and abortion rights are designed to permit one to engage in sexual intimacy while avoiding the conception or birth of a child, traditional and gestational surrogacy are designed to provide procreation without sexual intimacy.

Removing the sexuality from procreation may be more of a legal fiction, as, biologically speaking, any form of procreation that involves the genetic contributions of two individuals is inherently and by definition sexual. Thus, procreation is typically divided into asexual procreation and sexual procreation. Asexual procreation, used by bacteria, algae, and yeast,105 is achieved by cell division or cloning and produces offspring genetically identical to the single parent. Sexual reproduction involves the genetic contributions of two individuals and then a fusion and genetic recombination that produces offspring genetically distinct from either of the two parents.106 The distinction between sexual and asexual modes of reproduction is legally significant in regard to intellectual property rules regarding plants, with separate legal regimes for plants produced asexually (through grafting) and plants produced sexually (through seeds).107 From a biological perspective, surrogacy as currently practiced—whether through AI or IVF combined with embryo transfer—is inherently part of a sexual process of procreation.

Beyond the terminology, the sexual nature of procreative processes is intimately linked to human rights and human dignity questions associated with surrogacy.108 Does it comport with human dignity to de-couple

103. See Kindredan et MCBrien, supra note 100, at 132–35.
104. See Posner, supra note 102, at 428.
106. See id.
108. Pamela Laufer-Ukeles, Mothering for Money: Regulating Commercial Intimacy, 88 Ind. L.J.
commercialize the procreative aspects of human sexuality? Is creating children through such instrumental, commercialized “procreative relationships” an advance or regression of human dignity? 109

Controversially, the possibly sexual nature of commercial surrogacy to many is analogous to prostitution or sex work. 110 Is the sale of procreative processes, such as pregnancy, gestation, and childbirth as a service similar to the sale of sexual intercourse or other sexual acts as a service? 111 Given the diversity of viewpoints and legal approaches on prostitution and sex work the analogy, even if apt in some ways, does not dictate one clearly dominant approach to surrogacy. Some perceive sex work with consenting adults as a matter of personal autonomy for both the sex worker and the customer and seek only to regulate for the purposes of preventing the involvement of children and coercion (and hence trafficking) and providing safety precautions and improved working conditions. 112 Others perceive sex work as inherently exploitative for the sex worker and seek to prohibit the sale and purchase of sexual services. 113 Among those seeking to prohibit or discourage sex work, some seek to prohibit only the purchase of sex and offer of sexual services by third parties, in order to avoid further stigmatizing the sex worker, who is to be treated as an exploited victim rather than as a criminal. 114


110. See, e.g., FIELD, supra note 18, at 28–30.

111. See id.


113. See EKMAN, supra note 109, at 3–121.

114. See Prostitution, supra note 112; 100 Countries and Their Prostitution Policies, supra note 112.
Whatever position one takes regarding prostitution or sex work, surrogacy is fundamentally different to the extent that it is intended to produce a child who certainly can neither consent nor bargain. Thus, even if one views commercial surrogacy for the surrogate and intended parents as a legitimate marketplace in procreative services in which autonomous actors should be permitted to bargain within certain regulatory limits, such a view cannot itself provide an ultimate answer to the legitimacy of surrogacy. The question is whether a child is being sold along with such procreative services. If and when surrogacy includes the sale of a child, it becomes completely illegitimate under international standards, even if it also involves an allegedly permissible sale of procreative services.

The analogy between surrogacy and the sale of sex acts alludes to the question of whether a child is being sold in surrogacy. It is a common truism of prostitution that the payment is made not just for the sex but also for the prostitute to leave after the sex. It is not just sex that is being purchased, but sex with no strings of continuing relationship or personal obligation. Modern surrogacy is similar, since most intended parents would not pay for the procreative services of gestating and giving birth to a child if they knew the surrogate intended to keep the child or co-parent the child with the intended parents. Viewed from a realistic perspective, typically the surrogate is being paid to turn over the child and walk away from both the child and the intended parents. Even in the exceptional cases in which there is a continuing relationship between the surrogate and the intended parents, co-parenting by the surrogate is not permitted or intended and a continuing relationship is at the discretion of the intended parents. Hence, in the modern world, the surrogate, like the sex worker, is being paid not only for services, but also for walking away. Further, the surrogate is being paid not only for walking away from the client, but for walking away from the child by physically and legally handing over the child. This was made eminently clear in the contracts underlying the famous Baby M. case,

115. See Optional Protocol, supra note 1, at arts. 2–3.
118. See, e.g., In re the Paternity of F.T.R., 833 N.W.2d 634, 638, 653 (Wis. 2013).
which defined a “surrogate mother” as going through the necessary procedures “for the purpose of becoming pregnant and giving birth to a child and surrendering the child.”119 Hence, the analogy of surrogacy to sex work suggests the practical reality that surrogacy includes both the sale of a procreative service and also the sale of custodial rights and physical custody of a child.120

C. Alternative Terminologies for Surrogacy

This Article conforms to the current conventional terminology of surrogate and intended parent as a matter of convenience and communication. However, it is helpful to explore alternative terminology, as the debate over language illustrates underlying legal and ethical tensions. In addition, over time there may be a space created for serious consideration of alternative terminology.

Fundamentally, as the discussion above indicates, the term surrogate mother appears to be misleading and ambiguous.121 One can wonder about the purpose of using such problematic terminology. Unfortunately, it appears that the terms surrogate mother or surrogate initially were used to denigrate the status of the natural mother in traditional surrogacy and to elevate the status of legal strangers who wish, essentially through pre-conception contracts for adoption of a child, to become the sole legal parents of a child.122 My own recommended terminology for traditional surrogacy would be natural mother—or just mother—for the surrogate, and “prospective adoptive parent” for the intended, non-genetically related mother. Where the genetic father is the intended father, it would be simpler to label him as the father of the child.

Even in gestational surrogacy, the so-called surrogate mother who is not genetically related to the child has gestated and given birth to the child and the intended mother is not necessarily genetically related to the child. Here, “gestational and birth mother,” or gestational mother for short, would be a

120. Id. at 1240 (“[W]e have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead.”).
121. See supra notes 89–109 and accompanying text.
122. See Baby M., 537 A.2d at 1265–69 (“Surrogate Parenting Agreement” labeling Mary Beth Whitehead as “surrogate” in contract designed to eliminate Whitehead’s custodial and parental rights.).
better term for the so-called surrogate. The terms “contractual parent” or “intended contractual parent” would fit for what is now termed the intended parent. It would be useful to identify the genetic parents in such arrangements as well, whether they are intended parents or not. For example, it would be helpful to use terminology such as the “genetic contractual parent” or “unrelated contractual parent.” Once again, if the genetic father is the intended father, one could simply call him the father, although for clarity the term “genetic contractual parent” would also work.

The term “intended parent” is convenient, but also ideological and misleading. The term intended parent seems designed to imply that intention is, or should be, the fundamental determining factor in parentage issues, which is controversial at best and demonstrably inaccurate in most instances outside of the context of surrogacy. Normally, no matter how much one person might intend to be the father or mother of someone else’s biological child, this intention is totally irrelevant to parentage. Taking custody of another’s child based purely on the “intention” of one party would be kidnapping. This is why I prefer the term contractual parent, or perhaps intended contractual parent, to describe the view that surrogacy is fundamentally one of parentage by contractual agreement. Contemporary surrogacy is based on a legal theory of contractual parentage, with the relevant intentions memorialized in a contract. Of course, this is why so many core legal issues related to surrogacy are contract issues, such as the enforceability of the contractual terms, what happens when parties change their minds or circumstances change, whether the contractual terms are against public policy, and whether the contractual terms explicitly or implicitly constitute the illicit sale of children.

It is important to note that gestational surrogacy, arising in the field of ART, generally rejects the premise that genetics determines parentage

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125. See Margalit, supra note 124, at 456.
126. See id.
because it often involves the “donation” (more realistically purchase)\(^\text{127}\) of gametes from individuals who have been promised protection from the status of parenthood.\(^\text{128}\) In regard to ARTs, it is common to speak of gamete donors.\(^\text{129}\) This terminology is designed to distance these genetic progenitors of children from the term parent and from the commercial nature of the transaction, which frequently involves payments to the donors and extensive profit-making by intermediaries in what has become an extensive market in human sperm and eggs.\(^\text{130}\) Hence, it would be inconsistent to strip the gestational mother of the status of parenthood due to a lack of genetic link when many contractual intended parents also lack a genetic link and when one or two genetic parents are deemed “gamete donors” and not regarded as parents.\(^\text{131}\) The use of the term “gestational carrier” in instances of gestational surrogacy seems designed particularly to deny use of the term mother and to emphasize gestational surrogacy as a service.\(^\text{132}\) The legal principle that one who gives birth to a child is not, even ab initio, a mother of that child is at this point an experimental and misunderstood principle.\(^\text{133}\) Even where it is followed, it is based not merely on the status of a genetically unrelated gestational mother, but rather primarily on the theory of contractual parentage.\(^\text{134}\) The term gestational carrier is mistakenly viewed as based on the legal theory that an unrelated gestational mother inherently is never a mother and, hence, is contracting solely for procreative services and not for the transfer or sale of the child.\(^\text{135}\) As we will see, this theory is erroneous, for even in jurisdictions applying the rule that a gestational surrogate is, ab initio, not a mother, a woman who gestates and gives birth to a child to

\(^\text{127}\) See DAAR, supra note 94, at 201 (“[D]onors’ . . . [is] a clear misnomer given that men and women who supply their gametes to the infertile are typically paid for said contribution.”).


\(^\text{129}\) See, e.g., UNIF. PARENTAGE ACT § 102(8) (UNIF. LAW COMM’N 2002).


\(^\text{132}\) See, e.g., CAL. FAM. CODE § 7960 (f)(2) (West 2013).

\(^\text{133}\) See Johnson v. Calvert, 851 P.2d 776, 783–84 (Cal. 1993).

\(^\text{134}\) See infra note 261 and accompanying text.

\(^\text{135}\) See Johnson, 851 P.2d at 783–84.
whom she is genetically unrelated remains the mother absent a valid, pre-embryo transfer surrogacy contract. Thus, it is the surrogacy agreement that renders the woman not a mother, rather than the mere status of being an unrelated gestational mother. Therefore, the gestational surrogacy contract implicitly or explicitly includes the woman’s agreement to give up her parental rights and status.136 Under these circumstances, it is unwise to use the term gestational carrier because the term implicitly includes the very sale of children it seeks to avoid and inconsistently and wrongfully diminishes the motherhood of such women.

D. Technology and Surrogacy

One of the difficulties in evaluating surrogacy is its purported newness.137 There is an implicit narrative in which surrogacy is a product of developing technologies and, as something “new,” it cannot be evaluated by the laws, ethics, and practices of the past.138 However, there is also a contrasting narrative in which surrogacy is viewed as the “least technological of reproductive technologies,” as well as “the oldest” with forms of surrogacy in the ancient world involving “normal coitus.”139 Further, even with the more scientific forms of surrogacy, many of the technologies involved are not that new.140 The technology of artificial insemination (AI)—basic to traditional surrogacy—is not particularly new, with successful animal births through AI extending back to the eighteenth century.141 While newer technologies related to storage and other matters may have improved the capacity to commercialize AI for human births, the basic ethical dilemmas of traditional surrogacy as a form of human procreation remain unchanged. Human procreation through IVF and

136. See infra Part IV.B, E.
138. See, e.g., Laufer-Ukeles, supra note 108, at 1224–25 (citing multiple sources representative of the viewpoint that rejecting benefits of surrogacy is “reactive and anti-technological”).
embryo transfer, the basic technologies underlying gestational surrogacy, are much newer. The first IVF human baby, Louise Brown, was born in 1978. Even there, however, there have been almost four decades of experience with the basic technologies of IVF-related births. What is, in fact, newest in gestational surrogacy is the large-scale transfer of embryos into women who are not the contractually intended parents in the contexts of commercialization and medical tourism.

Technological advancement is a double-edged sword, capable of being used for positive or negative purposes, potentially furthering human dignity, or diminishing and degrading human dignity. The claim that scientific and technological advancement creates its own ethical imperative, which renders traditional ethical concerns irrelevant, is by now an old siren song with a sad history of abuse.

Science and technology provide for new possibilities, but the human capacities for exploiting others remain ever-present, with inequality of all kinds seemingly expanding rather than contracting in the contemporary world. In a global context of extreme inequality, both within and between nations, the expansion of technologies cannot be deemed to establish a kind of technological exemption from ethics and law.

New technological capacities, especially for human procreation, need to be evaluated within ethical and legal norms that are deeply rooted in societies and nations and should be subject to the principles of international law.


144. See generally ALDOUS HUXLEY, BRAVE NEW WORLD (1932).


147. See supra note 146 and accompanying text.

148. Lisa Ikemoto, The Role of International Law for Surrogacy Must be Expanded, N.Y. TIMES
Thus, faced with claims of newness, it may be particularly helpful to use what is ancient as a reference and comparison point, a distant but still relevant mirror. Hence, the next section examines some commonly cited precedents or precursors of so-called surrogacy in the ancient world.

E. Historical Antecedents Viewed Through Multiple Perspectives

A significant historical antecedent of surrogacy occurs in the Book of Genesis, the first book in the Hebrew Bible and in both the Jewish and Christian scriptures. The Book of Genesis also has a special but complex status for Muslims as a corrupted form of scripture. Hence, these stories of Abraham, Sarah, Hagar, Jacob (Israel), Rachel, Leah, Bilhah, and Zilpah have special significance for a majority of humankind, since there are approximately 3.8 billion people in the world today who identify with one of the Abrahamic religions.

The existence of these stories in scriptural texts describing the family life of the foundational figure of the three major monotheistic religions makes them significant not only as a mirror of the ancient past, but also as a culture-forming set of stories that have been repeatedly told, read, and studied in diverse cultures for more than two thousand years. Thus, even for those who take a highly skeptical and purely academic approach to these


149. See infra Part III.E.


152. See id. at 26.


154. See infra note 156.
Genesis narratives and doubt whether Abraham, Sarah, Hagar, and the others described in the narratives ever existed, it is necessary to see the stories as mirrors of beliefs and attitudes that have had significance in both the ancient world and the millennia since.

The stories of Abraham and his extended family are set in the ancient Middle East and Mesopotamia approximately four thousand years ago. Even from an academic, historical-critical approach to these texts, there can be no doubt that Genesis is a very old book, compiled at least 2300 years ago from pre-existing sources reflecting much earlier times. Hence, whether viewed from a secular or religious perspective, the Genesis narratives concerning surrogacy are a very significant mirror and vantage point from which to view our current ethical and legal dilemmas regarding surrogacy. Indeed, secular sources on surrogacy commonly cite the Genesis accounts as examples or antecedents of surrogacy practice.

Usha Smerdon, in her significant article on global surrogacy between India and the United States, cites both the Genesis surrogacy narratives and the surrogacy narratives in the Bhagvata Purana, a significant Hindu text. This is a useful reminder that in the global context of surrogacy, it can be useful to examine a variety of religiously and culturally significant texts to provide a broader context for evaluating contemporary practices.

1. Hagar, Bilhah, and Zilpah: Scriptural and Religious Narratives

A 1994 study of surrogacy published by the American Bar Association (ABA) and authored by attorney Julia J. Tate is titled Surrogacy: What Progress Since Hagar, Bilhah, and Zilpah! The use of the exclamation mark, rather than the question mark, suggests the author’s viewpoint that

157. See, e.g., Field, supra note 18, at 5; Furrow, Greaney, Johnson, Jost & Schwartz, supra note 139, at 133.
159. See id.
160. See generally Julia Tate, Surrogacy: What Progress Since Hagar, Bilhah, and Zilpah! (1994).
great progress has been made. The stories of Hagar, Bilhah, and Zilpah, and their roles in reproductive practices commonly cited as ancient or Biblical forms of surrogacy, are, of course, drawn from the scriptural book of Genesis. Unfortunately, much legal scholarship provides erroneous or misleading portraits of these ancient practices. For example, Tate’s study says:

In [b]iblical times, three little-known women, Hagar, Bilhah, and Zilpah, all served as involuntary surrogates, bearing a total of four [sic] sons, after their mistresses, Sarai, Rachel, and Leah, had given them over to their husbands, Abram and Jacob. No doubt these involuntary surrogates had very different experiences than those of today’s surrogates. They had no choice about the matter, being slaves. They certainly were not paid the equivalent of today’s $10,000.00 fee! Their sons were taken from them and their mistresses named them. No court intervened on their behalves when their mistresses’ husbands raped them or when their children were taken from them.

This ABA published study follows a strategy of distancing: by denigrating the ancient practices of surrogacy as particularly brutal, the author means to establish a contrast that will establish the ethical legitimacy of contemporary surrogacy practices. As we shall see, however, in significant ways the practice of surrogacy in Genesis was more humane, particularly in the context of their time, than the comparative practices today. This is particularly true when one considers the developments—since Tate’s study—of large-scale commercial international surrogacy.

First, Tate is simply wrong when she assumes that “their sons were taken from them.” The Hagar Genesis narrative make it clear that Hagar is the primary mother raising Ishmael. Indeed, after Sarah gives birth to

161. See id. at 1 (“No doubt these involuntary surrogates had very different experiences than those of today’s surrogates.”).  
163. Tate, supra note 160, at 1.  
165. See id. at 22.  
166. Tate, supra note 160, at 1.
Isaac, Sarah demands that Abraham cast out Hagar and Ishmael together as mother and son. The story of God’s repeated provision and intervention for Hagar and her son Ishmael is a significant part of the *Genesis* narrative. Indeed, the *Genesis* narrative has an angel of the Lord promising Hagar that God would greatly multiply Hagar’s descendants. This is a promise that in the narrative is clearly to be fulfilled through Hagar’s status as Ishmael’s mother—a status that no one in the narratives denies. Thus, in the *Genesis* narrative, God considers Hagar to be Ishmael’s mother. Of course, in Islamic tradition Hagar (Hajar) is especially revered as a matriarchal figure who, through Ishmael, is a progenitor of the Prophet Mohammed and a devout and brave woman. Indeed, Muslims remember Hagar’s travails, bravery, faith, and special role as the mother of Ishmael as a part of the hajj, or pilgrimage, to Mecca.

While Hagar is a particularly significant figure in *Genesis* and in Islamic tradition, the acknowledgement of her as the mother of her child would have been typical in this kind of arrangement. At a time when there was no substitute for nursing, one would assume that surrogates nursed and cared for their children. As maidservants of the intended mothers, surrogate mothers likely helped raise even their mistresses’ natural children, and nursed and raised the children the surrogates themselves carried and birthed. The assignment of the children to the intended mothers was symbolic, while practically speaking the children were raised primarily by the surrogate mothers.

The *Genesis* narratives involving Bilhah and Zilpah, the maidservants of

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174. *See Steinberg, supra* note 162, at 65.
176. *See Steinberg, supra* note 162, at 62; Rothman, *supra* note 175, at 485.

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Rachel and Leah, are the other major examples of so-called surrogate motherhood in *Genesis*.\(^{177}\) Again, Tate’s characterization of the arrangements as ones in which the children are simply taken from the surrogate mothers is erroneous.\(^{178}\) Thus, in the *Genesis* genealogies, the sons of Jacob (Israel) who comprise the roots of the twelve tribes of Israel are grouped according to the four mothers (Rachel, Leah, Bilhah, and Zilpah) who bore sons to Jacob, with the four sons born to Bilhah and Zilpah assigned as their sons, rather than their mistresses Rachel and Leah.\(^{179}\) Hence, *Genesis* reads: “[T]he sons of Bilhah, Rachel’s handmaid; Dan, and Naphtali: and the sons of Zilpah, Leah’s handmaid; Gad, and Asher.”\(^{180}\) The very structure of the twelve tribes of Israel, which comprise the family roots and structure of the nation of Israel in the Hebrew Bible,\(^{181}\) are based on acknowledging the motherhood of Bilhah and Zilpah.

Tate accuses Abraham, the father of the faith for Jews, Muslims, and Christians alike, as well as Jacob, the namesake (when he is re-named Israel)\(^{182}\) of the Jewish nation, as rapists of the surrogates.\(^{183}\) She clearly misunderstands the nature of the relationship between the fathers and the so-called surrogates (the Bible never uses this term). The *Genesis* narrative states that Sarah gave Hagar to Abraham to be his wife.\(^{184}\) The arrangement, in which a first wife gives her husband her maidservant as a wife for the sake of providing children and heirs, would have substantially raised the status and position of the maidservant—particularly if she succeeded in bearing children.\(^{185}\) These wives were sometimes called concubines because they were secondary wives, lesser in position than the first wife, but wives nonetheless.\(^{186}\) To their mistresses they remained servants or slaves, but in relationship to their husbands they were wives and in relationship to their

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180. *Id.*
184. *See Genesis* 16:3. At this point in the text, Sarah is still named “Sarai” and Abraham is still named “Abram.” *Id.*
186. *See Marsman*, supra note 185, at 485; *Steinberg*, supra note 162, at 79.
children they were mothers.\textsuperscript{187} The surrogates, as we call them, were not women to be used and then discarded, but rather were wives and mothers to whom other family members owed continuing and significant duties.\textsuperscript{188}

Tate’s accusation that the women were involuntary surrogates who were raped misses the point. While it is true that the text does not record whether or not the women’s consent was gained, since this was consent to a form of marriage, this would have been typical in this cultural context.\textsuperscript{189} In a world in which marriage was generally arranged by parents—and for servants or slaves by their masters—the consent of the spouses was secondary and perhaps assumed or viewed as gratuitous.\textsuperscript{190} For example, the Genesis text never tells us if Abraham’s son Isaac ever “consents” to the marriage his father (and father’s servant) arranges for him. Isaac’s bride Rebekah is brought home to him without him ever having met her.\textsuperscript{191} Rebekah appears to be given somewhat of a choice, although she must make her decision before ever meeting her groom.\textsuperscript{192} Jacob contracts with Laban, Rachel’s father, to marry Rachel in exchange for seven years of labor, but the text never indicates whether Rachel herself (presumably a child at the time) was consulted prior to the agreement.\textsuperscript{193} Thus, Hagar, Bilhah, and Zilpah, as servants and slaves, were involved in an arranged marriage where their consent was assumed or secondary.\textsuperscript{194} In this respect, they were no different from innumerable women—and also men—in the ancient world, both free and slave, who could really only avoid an arranged marriage by running away. However, in this particular instance, the marriages, as grotesque as they may be by some modern sensibilities, would have been seen as a profound and permanent benefit to these women and, culturally speaking, completely different from a rape.\textsuperscript{195}

While it is possible to view them as rapes according to some modern sensibilities, such a view would condemn most marital sexual acts in the ancient world as rapes. Taking the

\textsuperscript{187} See Marsman, supra note 185, at 485; Steinberg, supra note 162, at 65.
\textsuperscript{188} See Marsman, supra note 185, at 485.
\textsuperscript{189} See id. at 452–53.
\textsuperscript{191} See Genesis 24:1–66.
\textsuperscript{192} Id.
\textsuperscript{193} See id. at 29:15–20.
\textsuperscript{194} See id. at 16:3, 30:4, 30:9.
\textsuperscript{195} See Marsman, supra note 185, at 143–44.
ideological position that in a patriarchal society, or a society with arranged marriages—whether in the past or present—marriage is always rape hardly helps us evaluate the situation of Hagar, Bilhah, and Zilpah within its cultural context.

Tate perhaps believes that Hagar, Bilhah, and Zilpah were raped and impregnated against their will with the children then taken from them, presumably because she views surrogacy through the lens of modern practice, where the primary goal is to use and then discard the surrogate while taking the child from her. The customs of the Genesis narratives, however, were different. God intervenes to help Hagar and Ishmael, when Abraham (at Sarah’s instigation) abandons them in the desert, and Abraham drives Hagar and Ishmael away after God promises to care for them. The men and women who use surrogates in the Bible become obligated and connected to the surrogates in a way that is virtually unthinkable today.

Professor Field’s insight that surrogate wife is a better label for surrogacy in some ways fits the Biblical narrative, except that the Genesis surrogates were real, albeit secondary, wives rather than merely surrogate wives. In a polygamous context, this custom of elevating the wife’s maid to secondary wife created a need to balance the primacy and status of the first rank wife (or wives in the instance of Rachel and Leah) against the need to provide status and protection to the secondary wife who was bearing children and heirs for the husband and father of the family.

The “realness” of the marital status of the surrogates is made clear when Reuban, the first-born son of Jacob with his wife Leah, had sexual relations with Bilhah, Rachel’s maidservant and the mother of Dan and Naphtali. In today’s terminology, we would say that Reuban is having sex with a surrogate his father used in the procreation of two of his half-brothers. In the terminology of Genesis, however, Reuban is having sex with his father’s

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197. See Tate, supra note 160, at 1.
199. See id. at 16:1–16, 17:17–26, 21:8–21.
200. See Genesis 16:3; MARSMAN, supra note 185, at 143–44, 437–54; STEINBERG, supra note 162, at 61–65.
concubine (secondary wife), although of course Bilhah is not Reuban’s mother. Since Reuban is old enough to have intercourse with Bilhah, the event is occurring many years after the births of the children Bilhah bore for Jacob. Yet, the Biblical narrative clearly considers Bilhah to be the secondary wife and concubine of Jacob, such that Reuban’s act constitutes a kind of incest, which permanently mars Reuban’s reputation and strips him of the benefits of his status as firstborn.

Interestingly, the kind of slavery involved in these narratives, while repugnant in a post-abolitionist world, was in certain ways less brutal than the kinds of slavery that existed in the United States and other places in more recent history. For example, the presumed or probable children of President Thomas Jefferson and his slave Sally Hemings—and any other children conceived by a master with his slave at that time—would have been born slaves. This policy of slavery passing through the mother seems to have been based on the racist perspective that black persons—including those of mixed race—were presumed to be, and best suited to be, slaves, and hence viewed as property (like livestock) rather than persons. Therefore, the child’s racial identity as even partially black doomed the child to the status of presumed enslavement (absent emancipation by the master), even if he or she was the master’s child. By contrast, Ishmael initially was presumed to be an heir of Abraham and was sent away precisely because he was a competitive threat to the status and inheritance of Sarah’s son, Isaac. The sons of Bilhah and Zilpah—the slaves and maidservants of Rachel and Leah—are considered descendants of Jacob, along with the children Jacob

203. See id. at 29:32, 35:22.
204. Id. at 35:22, 49:4; Leviticus 18:8; 1 Chronicles 5:1; MARSMAN, supra note 185, at 379 & n.44; STEINBERG, supra note 162, at 112–14, 121–22.
207. See Genesis 16:1–16, 17:17–26, 21:8–21; MARSMAN, supra note 185, at 451–52; STEINBERG, supra note 162, at 61–81.
had with the sister-wives Rachel and Leah. The very twelve-tribe structure of the nation of Israel is predicated on the children of the maidservants being descendants of their father. Presumably, the practice of slavery in the patriarchal narratives is not built upon any kind of viewpoint of racial superiority, and hence the practice is cabined by an understanding of the common humanity of master and slave. Slavery was an inhumane practice of the time and culture of the patriarchs, but ironically it was less brutal and inhumane than the kinds of slavery that predominate the modern world thousands of years later.

The scriptural and religious contexts of the patriarchal narratives raise particular religious questions for the estimated 3.8 billion people worldwide of either Jewish, Christian, or Islamic faith who look to Abraham as a preeminent founder of their faith. While detailed analysis of such religious questions is beyond the scope of this Article, it seems appropriate to at least acknowledge the issues, given the large proportion of humankind involved. The problem is this: scriptural narratives and religious tradition describe customs and practices of extreme patriarchy, slavery, concubinage, and the use of maidservants as secondary wives to provide children for a family. Do scriptural descriptions of the very founders of the faith being engaged in such practices make them normative for religious believers today? It may be surprising to secular people to understand that for many—and perhaps most—religio us believers, the answer is a clear “no.” For many religious believers of the large monotheistic faiths, Abraham is a father of the faith because of his “faith,” trust, belief, and obedience in relationship to God, but nonetheless is simply a man of his time in many aspects of his family life and cultural practice. Calling Abraham a rapist is jarring for religious believers but considering all aspects of his lifestyle normative for today would be equally jarring.

There are several lessons that could be drawn from examining the narratives and traditions concerning Hagar, Bilhah, and Zilpah. First, the

209. See id. at 35:23–26, 49:1–28; Derek Kidner, Genesis, An Introduction and Commentary 126 (1967) (noting that sons born of Bilhah and Zilpah “were to count in Jacob’s family as full members and heads of tribes”).
211. See supra notes 160–209 and accompanying text.
212. See, e.g., Hebrews 12:8–19 (praising the faith of Abraham).
passage of time does not automatically bring progress. Some practices later in time are more brutal and degrading to human dignity than some practices earlier in time. Dr. Martin Luther King, Jr. may have been correct when he famously said that the “moral arc of the universe is long, but it bends toward justice,”\(^\text{213}\) but in the interim, sometimes things get worse instead of better. Of course this is undeniable in certain ways:\(^\text{214}\) the genocides, wars, and brutality of the twentieth century were in some ways worse than those in the past, as new technologies and capacities for war and killing were unleashed upon the world.\(^\text{215}\) Thus, it is clear that advances in technology can be used for better or worse.\(^\text{216}\) Hence, the mere passage of time and technological advancements do not inevitably bring progress in ethics and human rights and indeed may bring new threats to human dignity and new ethical dilemmas.

A related point is that each society has groups that are particularly vulnerable and thus each society is responsible to self-consciously protect those vulnerable groups against exploitation in a manner that realistically takes account of the inequalities of that society. While the extreme patriarchy, slavery, and concubinage depicted in Genesis and common in that cultural milieu were brutal and inhumane in many respects, the narratives of Hagar, Bilhah, and Zilpah reveal that the customs and morals of the time worked to some degree within those negative contexts to ameliorate some of the harms.\(^\text{217}\) In our times and diverse cultural contexts, we need to be realistic regarding who is most vulnerable to exploitation and vigilantly protect them without pretending that we have created societies in which no one is vulnerable. Equality before the law is a guiding ideal and legal principle in our time\(^\text{218}\) but should not be used as a pretense to ignore


\(^{215}\) See generally id.

\(^{216}\) See id. at 305–08.

\(^{217}\) See MARSMAN, supra note 185, at 143–44.

\(^{218}\) See African Charter, supra note 7, at pmbl., arts. 2–3; American Convention on Human Rights, art. 1, Nov. 21, 1969, 1144 U.N.T.S. 143; ICCPR, supra note 5, at pmbl., arts. 2–3; ECHR, supra note 9, at art. 14; ICESCR, supra note 14, at pmbl., arts. 2–3; Universal Declaration, supra note 9, at pmbl., arts. 1–2, 6–7.
the very real inequalities in our societies and the accompanying vulnerability of certain segments of society. Otherwise the ideal of equality will ironically facilitate exploitation and the expansion of inequality.

2. Code of Hammurabi

The famous Code of Hammurabi (the Code), the Babylonian law code that dates approximately to the patriarchal era described in *Genesis* \(^ {219} \) provides a comparative lens from which to view the Hagar, Bilhah, and Zilpah narratives and traditions, as well as providing another distant mirror and point of comparison for our own time. In the context of a patriarchal society with slavery and polygamy, the Code sought to protect the vulnerable position of women. \(^ {220} \) The Code assumed that many marriages are contracted or arranged between families and include a financial arrangement such as a dowry, which operated as a kind of financial asset and protection of the wife. \(^ {221} \) Similarly, the bride price, which could be seen from our perspective as an indication of women being sold as property, was used along with a dowry as a financial protection of women. \(^ {222} \)

Hence, the law provided that if a man wished to separate from a woman who had borne him children, the wife received custody of the children, as well as her dowry and an interest in property, so that she could support herself and the children. \(^ {223} \) After the children were grown, the wife received a permanent portion of the inheritance—in other words, a fee simple or complete ownership, rather than merely a life estate or temporary ownership. \(^ {224} \) Obviously, the law was structured to protect these wives against abandonment; while husbands could separate from their wives, they lost child custody and property. \(^ {225} \) On the other hand, a wife who had not borne the husband children received a lesser degree of financial compensation upon the end of the marriage, which included the dowry and


\(^ {220} \) See generally id.

\(^ {221} \) See id. § 138.

\(^ {222} \) See, e.g., id. §§ 137–40, 160–64, 172.

\(^ {223} \) See id. § 137.

\(^ {224} \) See id.

\(^ {225} \) Id.
bride price or a designated gift of release.\textsuperscript{226}

The Code protects first wives who become ill by requiring the husband to support the sick wife within his own household, even if he takes a second wife.\textsuperscript{227} Yet, if the husband takes a second wife, the sick wife is permitted to leave and take her dowry if she wishes.\textsuperscript{228}

It is in these contexts of patriarchy, slavery, and polygamy—wherein the law nonetheless attempted to protect wives and mothers—that the Code of Hammurabi discusses the practice, found in the \textit{Genesis} narratives, of wives giving their husbands their maidservants as a means to produce children.\textsuperscript{229}

Consider §§ 144 to 147 of the Code of Hammurabi:

144. If a man take a wife and this woman give her husband a maid-servant, and she bear him children, but this man wishes to take another wife, this shall not be permitted to him; he shall not take a second wife.

145. If a man take a wife, and she bear him no children, and he intend to take another wife: if he take this second wife, and bring her into the house, this second wife shall not be allowed equality with his wife.

146. If a man take a wife and she give this man a maid-servant as wife and she bear him children, and then this maid assume equality with the wife: because she has borne him children her master shall not sell her for money, but he may keep her as a slave, reckoning her among the maid-servants.

147. If she have not borne him children, then her mistress may sell her for money.\textsuperscript{230}

Sections 144 and 146 seem to envision the kind of custom practiced in the \textit{Genesis} narratives, in which a wife provides her husband with her maidservant for purposes of childbearing.\textsuperscript{231} In § 144, the maidservant or

\textsuperscript{226} See id. §§ 138–40.
\textsuperscript{227} See id. § 148.
\textsuperscript{228} See id. § 149.
\textsuperscript{229} Compare id., with \textit{Genesis} 16:1–16, 17:17–26, 21:8–21, 30:1–13.
\textsuperscript{230} See Code, supra note 219, §§ 144–47.
\textsuperscript{231} Compare id. §§ 144–46, with \textit{Genesis}16: 1–16, 17:17–26, 21:8–21, 30:1–13.
surrogate does not appear to attain the status of a wife, but her existence becomes the grounds for denying the husband a second wife.\textsuperscript{232} Section 146 is most similar to the Genesis narratives: the wife gives her husband a “maidservant as a wife and she bear[s] him children.”\textsuperscript{233} As in the Hagar-Sarah narrative, once the maidservant or second wife bears children, competition emerges between her and the first wife.\textsuperscript{234} The Code protects the second wife or surrogate by declaring she cannot be sold, while at the same time reasserting her status as a slave, seemingly in part to preserve the status of the first wife from competition.\textsuperscript{235}

The Code provides a broader context for the *Genesis* narratives because it discusses or presumes the same practices of extreme patriarchy, slavery, polygamy, concubinage, and the use of maidservants to provide children for the family.\textsuperscript{236} The Code also represents a similar set of concerns with protecting women against exploitation and abandonment—as those were understood at the time—as well as balancing between protecting the status and position of first wives and protecting others, whether maidservants or maidservants elevated to second wife, who bear children for the husband and father.\textsuperscript{237} The existence of similar—even if not identical—customs between the patriarchs of the *Genesis* narratives and the Babylonian society represented by the Code indicates that many of the practices in *Genesis* were common in those regions of the world at that time.\textsuperscript{238} From this perspective, there is no reason to particularly associate these practices with monotheistic religion because the Code indicates that many aspects of the family life and customs of Abraham and his extended family were common to the time and region, in a cultural context where most people were not monotheists.

Of course, there is a grim irony in our quick propensity to condemn the practices of that distant era, when the present topic indicates that we struggle, in different forms, with the same issues. To the degree that surrogacy and related practices represent the sale of children—as well as the degree that surrogacy sometimes represents the exploitation of poor and vulnerable women by those who are more powerful or wealthy—it would

\begin{itemize}
\item[232.] See Code, supra note 219, § 144.
\item[233.] See id. § 146.
\item[234.] Compare Genesis 16, with Code, supra note 219, § 146.
\item[235.] See Code, supra note 219, § 146.
\item[236.] See id. §§ 15–20, 118, 144–47, 159–96.
\item[237.] See MARSMAN, supra note 185, at 441–42, 451–52; Code, supra note 219, §§ 144–47.
\item[238.] See Code, supra note 219, §§ 144–47.
\end{itemize}
appear that we are struggling in our own time with the same destructive
tendencies. Indeed, the modern world has been subject to recurrent scandals
involving the illicit procurement and sale of children for purposes of
exploit people in the context of reproductive processes did not cease in the
ancient world. Our contemporary concerns with human trafficking\footnote{See, e.g., Palermo Protocol, supra note 3; MARY C. BURKE, HUMAN TRAFFICKING: INTERDISCIPLINARY PERSPECTIVES (2013); E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY (2008).} and
the sale of children\footnote{See, e.g., Optional Protocol, supra note 1; SKINNER, supra note 240.} indicate that we must be ever-vigilant against the same
tendencies to commodify and exploit, and should not fool ourselves into
believing we have become invulnerable to these sins or crimes.

IV. SURROGACY AS THE SALE OF CHILDREN

A. The Committee on the Rights of the Child on Surrogacy and the Sale of
Children

The Committee on the Rights of the Child (Committee) is a body of
eighteen independent experts that monitors implementation of the CRC and
the two optional protocols, including the Sale of Children Protocol.\footnote{See CRC, supra note 4, at art. 43; Committee on the Rights of the Child, UNITED NATIONS HUM. RTS., http://www.ohchr.org/en/HRBodies/CRC/Pages/CRCIndex.aspx (last visited Oct. 15, 2015).} While
the Committee is not a court and cannot issue binding interpretations of the
CRC and accompanying protocols, its views are obviously highly
significant.\footnote{See Introduction, UNITED NATIONS HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx (last visited Oct. 15, 2015).} State parties under these Conventions are required to submit
initial and periodic reports.\footnote{See CRC, supra note 4, at art. 43.} The Committee responds to these state reports
with “concerns and recommendations” in its “concluding observations.”

Significantly, the Committee’s concluding observations for India and the United States has raised the concern that surrogacy as practiced in these nations leads to the deprivation of the rights of children and the sale of children. India and the United States are two of the most active nations in the field of commercial surrogacy; hence, the Committee’s concerns seem particularly apt. It is also particularly significant that the Committee addresses these concerns with surrogacy in the context of the Committee’s discussions of adoption. Typically, when surrogacy is viewed through the legal lens of adoption, its commercial aspects are interpreted as a kind of illicit sale of children.

1. The Committee on the Rights of the Child on Adoption, Surrogacy and the Sale of Children in India

On June 13, 2014, the Committee issued its concluding observations in response to India’s initial report on the Sale of Children Protocol. In its observations, the Committee first addressed in some detail its concern with “unlawful adoption” and “the sale of children for adoption purposes.” It is within this context of the sale of children for adoption that the Committee addressed surrogacy. It is helpful to see the full context of the Committee’s statement on surrogacy:

Adoption

23. The Committee notes the measures taken to protect children

245. See, e.g., India Report, supra note 1, at art. 12.
248. India Report, supra note 246, ¶ 23.
250. See generally India Report, supra note 246.
251. Id. ¶ 23.
252. Id. ¶¶ 23–24.
from unlawful adoption, including the adoption of Guidelines Governing the Adoption of Children in 2011, which strengthen the prevention of illegal adoption. However, the Committee is concerned that children are still insufficiently protected from unlawful adoption, a situation which may give rise to the sale of children for adoption purposes. The Committee is particularly concerned at:

(a) The practice of unregulated informal adoption as recognized by the State party in its report;

(b) The stealing of babies from hospital and the lack of information on the whereabouts of children found at the Baby Cradle Reception Centers and on measures the State has taken to prevent the stealing and abandonment of babies, as well as the recognition of the root causes and any applicable sanctions for stealing and possible sale of the children;

(c) The extent of use of fraudulent birth registration in the State party and the lack of adequate efforts made to prevent it;

(d) Insufficient legal or policy measures taken to prevent intermediaries from attempting to persuade biological families to give children for adoption;

(e) The lack of information on prohibition of illegal adoption or regulating licensing of agencies and limiting the fees; and

(f) Widespread commercial use of surrogacy, including international surrogacy, which is violating various rights of children and can lead to the sale of children.\(^{253}\)

The Committee’s recommendations correspond to each of the concerns as follows:

24. The Committee urges the State party to:

(a) Develop and implement policies and legal provisions to
guarantee that all cases of adoption are in full conformity with the Optional Protocol and with the principles and the provisions of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993;

(b) Take all necessary measures, including the establishment of an effective monitoring system, to prevent the stealing of babies from hospitals and their abandonment in the cradle centers, fraudulent birth registration, and intermediaries from attempting to persuade mother to give children in adoption, as well as ensure that such practices are adequately sanctioned

(c) Explicitly prohibit illegal adoption and develop a programme to prevent illegal intercountry and international adoptions;

(d) Effectively regulate the licensing and monitoring of agencies, as well as the fees they charge for their various services;

(e) Follow up the adoptions, as appropriate, in order to prevent children from being exploited; and

(f) Ensure that the Assisted Reproductive Technology Bill or other legislation to be developed contain provisions which define, regulate and monitor the extent of surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption.\(^{254}\)

The Committee’s extensive concern with the sale of children for adoption is appropriate, since India has a notoriously difficult history with abusive adoption practices, including in its intercountry adoption program.\(^{255}\) It is significant that the Committee is concerned with more than formal conformance to international legal standards.\(^{256}\) India had ratified the Hague Convention on Intercountry Adoption in 2003, some eleven years before the

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254. Id. ¶ 24 (emphasis added).
256. India Report, supra note 246, ¶¶ 9–12.
issuance of this report.\textsuperscript{257} The Committee evidences its awareness that mere ratification of international agreements is not enough; indeed, the Committee’s role in monitoring the CRC and accompanying protocols presupposes the difficulties and importance of the implementation process, which occurs after ratification.\textsuperscript{258} Hence, the Committee did not give India a free pass on adoption, even though India had ratified the Hague Convention on Intercountry Adoption approximately eleven years before the issuance of this report.\textsuperscript{259} Ratification of relevant international conventions is an important first step, but it is just the beginning.

The Committee noted the need, in regard to adoption, to regulate and monitor the fees charged by agencies and to “prevent intermediaries from attempting to persuade [a mother] to give children for adoption.”\textsuperscript{260} Preventing the sale of children requires paying attention to the real world inequalities of money and power, and, in response, regulating the critical interactions between the parties and intermediaries in adoption and surrogacy.

It is highly significant that the Committee expressed concern, in the context of adoption, regarding “[w]idespread commercial use of surrogacy, including international surrogacy, which is violating various rights of children and can lead to the sale of children.”\textsuperscript{261} The Committee’s comment is realistic in responding to the widespread practice of commercial surrogacy in India, conducted in part in the context of international medical tourism.\textsuperscript{262} In regard to this concern, the Committee recommended legislation that would “define, regulate and monitor the extent of surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption.”\textsuperscript{263} It is also significant that the Committee, in the context of the contemporary practice of commercial surrogacy, referred to criminalizing “the sale of children for the purpose of illegal adoption.”\textsuperscript{264} This reiterates

\textsuperscript{258} See generally Hague Adoption Convention, supra note 21.
\textsuperscript{259} India Report, supra note 246, ¶ 24; HCCH, supra note 15.
\textsuperscript{260} India Report, supra note 246, ¶ 23(d).
\textsuperscript{261} Id., ¶ 23(f).
\textsuperscript{262} Darnovsky & Beeson, supra note 247, at 10–15.
\textsuperscript{263} India Report, supra note 246, ¶ 23(f).
\textsuperscript{264} Id.
that the Committee views the rules governing adoption, especially the prohibition of the sale of children for purposes of adoption, to be applicable to the contemporary practice of commercial surrogacy.265

Laws governing adoption, both international and domestic, have sought to prohibit the transfer of official custodial rights or the physical transfer of the child in exchange for financial remuneration, compensation, or consideration.266 When traditional surrogacy became prominent, a common legal response was to insist that the so-called surrogate mother was in the same legal position as a “birth mother” in adoption.267 This approach rendered the typical surrogacy arrangement in which the mother agreed to both gestate the child and relinquish the child for financial consideration as an illicit form of child selling under laws originally devised to cover adoption.268 Hence, such contracts were void and unenforceable as against public policy, even when one of the intended contractual parents was a genetic parent.269 Significantly, in a context where the widespread practice of commercial surrogacy in India consists primarily of gestational surrogacy, the Committee evidences the same approach as previously applied to traditional surrogacy. If adoption principles govern both traditional and gestational surrogacy, as implied by the Committee, this will render much of contemporary surrogacy practice as the illicit sale of children.270

2. The Committee on the Rights of the Child on Adoption, Surrogacy, and the Sale of Children in the United States

On July 2, 2013, the Committee issued its concluding observations on the second periodic report of the United States on the Sale of Children Protocol.271 The Committee, as it would subsequently do in regard to India,

265. See id. ¶¶ 23–24.
266. See, e.g., In re Baby M., 537 A.2d 1227, 1244 (N.J. 1988); Hague Adoption Convention, supra note 21, at arts. 4(c)(3), 8, 32; Optional Protocol, supra note 1, at art. 3(1)(a)(ii).
268. Id. at 1248.
269. See generally id. at 1227.
270. See India Report, supra note 246, ¶ 23(f).
covered the topic of surrogacy within a section titled “Adoption.” The concerns and recommendations stated in relevant part:

**Adoption**

29. The Committee appreciates the adoption of the Intercountry Adoption Universal Accreditation Act of 2012, S. 3331 (UAA), expanding the accreditation standards in the Intercountry Adoption Act (IAA) of 2000 to cover all intercountry adoptions. . . . [T]he Committee is particularly concerned that:

(a) Ambiguous definitions and legal loopholes persist despite the new accreditation act, such as for example the fact that payments before birth and other expenses to birth mothers, including surrogate mothers, continue to be allowed, thus impeding effective elimination of the sale of children for adoption;

(b) *The absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children . . .*

30. The Committee strongly recommends that the State party:

(b) Define, regulate, monitor and criminalize the sale of children at federal level and in all states in accordance with the Optional Protocol, and in particular the sale of children for the purpose of illegal adoption, in conformity with article 3, paragraphs 1 (a) (ii) and 5, of the Protocol; *including issues such as, surrogacy and payments before birth and the definition of what amounts to “reasonable costs . . .”*

The cited portions of the Sale of Children Protocol require State parties to cover under “criminal or penal law”: “Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption,” as well as requiring “all appropriate legal and administrative measures to ensure that all persons

272. *Id.* ¶¶ 29–30.
273. *Id.* ¶ 29 (emphasis added).
274. *Id.* ¶ 30 (emphasis added).
involved in the adoption of a child act in conformity with applicable legal instruments.”

The Committee’s strongly worded statement that surrogacy “amounts to sale of children,” “if not clearly regulated,” obviously leads to the question of what kinds of regulations are necessary to avoid this negative conclusion. This question is unfortunately not answered directly by the Committee, but the Committee’s presumption that surrogacy involves an adoption is highly suggestive of the answer. The presumption that surrogacy involves an adoption presupposes that surrogate mothers have status under international law as birth mothers and hence that rules limiting the role of money in inducing consent for adoption also apply to surrogacy. Indeed, the Committee states explicitly that birth mothers include surrogate mothers.

In the United States, surrogate mothers in traditional surrogacy arrangements usually are legally classified as birth mothers with original custodial rights to their children, as indicated in the foundational Baby M. case. In Baby M., the surrogacy contract was void as against public policy, in part because the quid pro quo embodied within the contract constituted baby selling. Although the Baby M. decision is precedent in only one jurisdiction within the United States, its reasoning has generally been accepted as persuasive in traditional surrogacy cases in the United States. Hence, the same rules govern payments to birth mothers regarding adoption and birth mothers in a traditional surrogacy arrangement in the United States precisely because a post-birth adoption proceeding is required in order to recognize the intended mother as the legal mother of the child. As the Committee notes, there is ambiguity in the United States about the amount and type of expenses that birth mothers can receive in either

276. Id. at art. 3(5).
278. See generally id.
279. See generally id.
280. Id.
283. See id. at 1234.
284. Peng, supra note 281, at 578.
285. See KINDREGAN & McBRIEN, supra note 100, at 130–32.
adoptive or surrogacy situations; nonetheless, the underlying premise is clear that these mothers cannot be paid to relinquish their custodial rights, consent to adoption, or transfer their custodial rights.\textsuperscript{286} In the United States, mothers generally cannot be bound to pre-birth agreements to relinquish custodial rights, consent to adoption, or transfer custodial rights.\textsuperscript{287} Hence, those who pay expenses in the hopes of receiving a child do so with the risk that, despite those payments, the mother may elect to keep her child.\textsuperscript{288}

The Committee does not explicitly address the current claim that gestational surrogacy—where the mother is not genetically related to the child she carries and births—should be governed by different rules than either adoption or traditional surrogacy.\textsuperscript{289} Proponents of gestational surrogacy argue that a gestational surrogate has no claim to the child and hence any funds she receives should not be considered as payment to relinquish or transfer custodial rights.\textsuperscript{290} As indicated below, these proponents are, in fact, wrong about the current law of gestational surrogacy. For example, in California, it is the pre-embryo transfer surrogacy contract, rather than the mere status of being genetically unrelated, that strips gestational surrogates of parental rights under California law.\textsuperscript{291} Hence, even in California, a gestational surrogate who has not signed such a contract has the status of a mother at the birth of the child.\textsuperscript{292} Nonetheless, whatever any jurisdiction or State might claim about gestational mothers or gestational surrogacy, the Committee’s comments indicate its opinion that, under the Sale of Children Protocol, gestational surrogates are mothers of the children they carry and birth.\textsuperscript{293} Hence, the Committee should be understood as stating that the same fundamental rules about the status of the mother who gives birth, and the same fundamental prohibitions of the sale of children, apply to adoption, traditional surrogacy, and gestational surrogacy. If the Committee had commented on surrogacy in the United States decades earlier, it might have been possible to interpret its comments as addressing only traditional surrogacy. However, the factual context of the Committee’s

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{286} See Observations on U.S., supra note 271, \textsuperscript{\textbullet\textsuperscript{\textbullet}\textsuperscript{\textbullet}} 29–30.
\item\textsuperscript{287} See KATZ \& KATZ, supra note 28, at 40–51.
\item\textsuperscript{288} Id.
\item\textsuperscript{289} See generally Observations on U.S., supra note 271.
\item\textsuperscript{290} See infra notes 296–97, 335 and accompanying text.
\item\textsuperscript{291} See infra notes 377–463 and accompanying text.
\item\textsuperscript{292} See infra notes 434–41 and accompanying text.
\item\textsuperscript{293} See generally Optional Protocol, supra note 1.
\end{enumerate}
\end{footnotesize}
2013 Concluding Observations about the United States was that gestational surrogacy is the only kind of surrogacy widely practiced in the United States, and certainly is the dominant form of commercial surrogacy in the United States. From that perspective, the Committee’s comments on surrogacy in the United States have to be understood as addressing gestational surrogacy.

B. *Never a Mother and Other Points of Contention*

One of the primary arguments by proponents of commercial surrogacy is that in gestational surrogacy, the woman who gives birth is never the mother of the child. Hence, whatever she is paid cannot be viewed as compensation for relinquishing the child, consenting to adoption, or transferring custody. Instead, the gestational surrogate is labeled as a mere “gestational carrier” who is paid only for the service of gestating a child. As seen above, the expressed concerns and recommendations of the Committee suggest a contrary view. Surrogate mothers, whether gestational or traditional, should be viewed in the same way as birth mothers in adoption contexts and payments may constitute the illicit sale of children.

Presumably, proponents of surrogacy would reply that, in at least jurisdictions where surrogacy is widely practiced, domestic law agrees with the pro-surrogacy viewpoint that gestational surrogates are never mothers. This reliance on the law of the jurisdiction has numerous flaws.

First, if gestational surrogates have the legal status of mothers under the Sale of Children Protocol, and hence under international law, that would

294. Indeed, gestational surrogacy has been dominant in the United States for more than a decade. See, e.g., DAAR, supra note 94, at 426 n.4 (citing David P. Hamilton, *She’s Having Our Baby: Surrogacy Is on the Rise as In Vitro Improves*, WALL STREET J., Feb. 4, 2003, at D1 (indicating that by February 2003, gestational surrogacies already accounted for 95% of all surrogacy pregnancies)).
295. See supra notes 272–74 and accompanying text.
299. See supra notes 242–295 and accompanying text.
300. See supra notes 242–295 and accompanying text.
trump the law of any jurisdiction bound by the relevant international law. Further, if particular practices under the Sale of Children Protocol constitute the illicit sale of children, State parties to the Sale of Children Protocol cannot escape their obligations by simply decreeing under their domestic law that they do not regard those practices as constituting the sale of children. Legally speaking, State parties to international conventions cannot escape their international legal obligations by redefining essential terms under their domestic law contrary to how those terms are defined under binding international law.\(^\text{301}\) Under the fundamental principle of \textit{pacta sunt servanda} (agreements must be kept), States that ratify treaties have the obligation to carry out their responsibilities under international agreements and cannot escape those obligations by making references to their domestic laws.\(^\text{302}\)

Second, under international law, the concept of sale of children includes instances where individuals without lawful custody sell children. For example, intermediaries who obtain children illicitly and then sell those children to adoptive parents for purpose of adoption, or to other intermediaries for purposes of sexual or labor exploitation, would still be involved in the illicit sale of children. Thus, the Sale of Children Protocol defines “sale of children” as “any act or transaction whereby a child is transferred . . . to another for remuneration or any consideration.”\(^\text{303}\) There is no requirement that the transferor possesses legal rights to the child to violate the Sale of Children Protocol.\(^\text{304}\) Hence, someone who literally kidnaps a child could be liable for child selling under the Sale of Children Protocol. The Sale of Children Protocol specifically requires State parties to criminalize the “offering, delivering, or accepting, by whatever means, a child” for purposes of sexual exploitation, transfer of organs for profit, or


\(^{303}\text{Optional Protocol, \textit{supra} note 1, at art. 2(a).}\)

\(^{304}\text{Id.}\)
In addition, the Sale of Children Protocol specifically requires State parties to prohibit, as a form of sale of a child, an “intermediary” from “improperly inducing consent” for adoption, thereby addressing instances where intermediaries either never obtain legal custody or only do so through illicit means. Similarly, the definition of child trafficking in the Palermo Protocol only requires the “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation” and clearly includes individuals without legal custody exercising various forms of de facto control over children. Certainly it would be perverse for the law not to address the sale of children or child trafficking by those without proper legal custody of children. Hence, even if States could redefine surrogates as never being mothers and as never having legal custody of the children they gestate and birth, that would not escape the conclusion that commercial surrogacy arrangements constitute the illicit sale of children.

Thus, the argument that gestational surrogacy cannot be the illicit sale of children because the surrogates are “never mothers” is misdirected and completely misunderstands the concept of sale of children under international law. Even if gestational surrogates were viewed as never having legal custody of the children they birth, they could still be paid for transferring de facto control and custody of the child. Gestational surrogate mothers clearly have, at least, de facto control over the child or fetus during pregnancy, and unless they are enslaved or kidnapped, they have the freedom to determine where they give birth. Gestational surrogates can arrange to give birth under circumstances in which their de facto control and custody of the child or fetus continues after birth. Hence, whether stated or not, a key provision of surrogacy contracts is the surrogate’s agreement to notify the intended parents of the place of birth and to physically hand over physical custody and de facto control of the child, usually immediately or shortly after childbirth.

In addition, even if gestational surrogates lack legal custody ab initio, legal systems usually still require specific judicial or administrative
procedures for declaring the surrogate’s lack of rights and cementing the legal rights of the intended contractual parents. Hence, surrogates are explicitly or implicitly paid for not contesting legal custody and facilitating the legal acknowledgement of intended parents in court or administrative procedures.

Third, given the central role played by intermediaries in commercial surrogacy arrangements, intermediaries are primary or secondary sellers of children. Those who do not properly have legal custody of children may nonetheless be guilty of selling children over whom they exercise significant de facto control. Thus, as to adoption, the Sale of Children Protocol focuses explicitly on the sale of children by intermediaries rather than the birth parents. If surrogacy agencies and other intermediaries are realistically selling children over whom they exercise significant de facto control, surrogacy would still constitute the sale of children regardless of whether the surrogates were participating in such sales.

Fourth, proponents are incorrect when they view pro-surrogacy jurisdictions as defining genetically unrelated gestational mothers as inherently never the mothers of the children they birth. Practically speaking, in the absence of intended contractual parents committed to becoming the legal parents of the child, stating that gestational mothers are never mothers would make the children they birth into children who never had a mother. Thus, genetically unrelated gestational mothers who are not in competition with contractual parents are presumably viewed as mothers, even in pro-surrogacy jurisdictions.

Putting it another way, under present practice, there is presumably no jurisdiction in the world where women who give birth must, as a routine practice, establish their parentage through DNA testing. Even pro-surrogacy jurisdictions still habitually rely on the traditional presumption that the woman who gives birth to a child is, ab initio, the mother of that child.

309. See e.g., CAL. FAM. CODE §§ 7960–62 (West 2013).
310. See e.g., id. § 7960(d)–(e) (defining “nonattorney surrogacy facilitator” and “surrogacy facilitator”).
311. See supra notes 303–06 and accompanying text.
312. Optional Protocol, supra note 1, at art. 3(1)(a)(ii).
314. Gamete donors who are not intended parents are typically shielded from parentage status.
315. See Ergas, supra note 297, at 170; supra note 293 and accompanying text.
316. See Ergas, supra note 297, at 170. See generally William M. Lopez, Note, Artificial
Even in pro-surrogacy jurisdictions, such as California, the presence of intended parents and a valid surrogacy agreement is required to rebut this traditional presumption that the woman who gives birth is the mother of the child.317

Hence, even in pro-surrogacy jurisdictions with laws defining gestational surrogates as not being mothers, something more than the fact of being genetically unrelated to the child is required to make birth mothers into “never mothers.” That something more is not merely a matter of “intention,” whether it be the intention of the gestational surrogate not to be a parent or the intention of the intended parents to be the parents. Mothers who give birth and intend not to parent those children remain, throughout the world, at birth, the mothers of those children.318 Hence, the significance of the acts of relinquishment and abandonment, which are governed by various legal principles, ensure that the acts are voluntary and not part of an illicit sale of a child.319 Similarly, merely “intending” to be someone’s parent is not enough to make one a parent. Rather, these intentions of the surrogate mother and intended parents are relevant because they are a part of a contract. Thus, even in jurisdictions that legally consider some gestational surrogate mothers not to be the mother of the children they birth, a surrogacy contract entered into voluntarily by the surrogate is necessary to the legal conclusion that she is not, at birth, the mother.320 Hence, by definition, whether explicitly or implicitly, the surrogate in surrogacy contracts is agreeing to give up rights to the child and the status of mother that she would otherwise have absent the contract. Realistically, to the degree that the surrogate is being paid or compensated for her services, such services de facto include her voluntarily agreeing to sign the contract in which she gives up her parental rights and agrees to facilitate the legal recognition of the contractual intended parents as the legal parents.321

318. See In re Baby M., 537 A.2d 1227, 1240 (N.J. 1988) (noting that the surrogate is the “natural mother”).
319. See, e.g., id. at 1240–44.
320. See infra notes 377–463 and accompanying text (discussing California law).
321. See infra notes 377–463 and accompanying text (discussing California law).
C. Pre-Transfer Contracts and the Sale of Children

Proponents of surrogacy also argue that the timing of contract execution can prevent surrogacy contracts from constituting the sale of children. Hence, surrogacy proponents maintain that signing surrogacy contracts, either before the transfer of the embryo into the woman or before the creation of the embryo, prevents the contracts from being for the sale of children.\textsuperscript{322} To the degree that this reasoning is based on the idea that you cannot sell a human being who does not exist yet, or over whom you do not yet have physical custody, the argument is clearly ludicrous.\textsuperscript{323} Would we allow a slave trade in human beings so long as the contracts of purchase dooming children to the status of slaves were made before the children were conceived or born or before the slave traders took physical custody?\textsuperscript{324} Should we allow baby farms for purposes of adoption, whereby women become pregnant for pay for purposes of placing children for adoption—or are coerced into doing so—so long as intended parents contracted for their children with the intermediaries or birth mother prior to conception?\textsuperscript{325} Anti-slavery and anti-trafficking legal norms, as well as prohibitions for the sale of children for adoption, cannot be evaded simply by making contracts pre-conception or prior to attaining physical custody because there is no such exception for “pre-conception” or “pre-transfer” contracts in those norms.\textsuperscript{326} Thus, the same must be true for surrogacy.\textsuperscript{327}

Indeed, in the foundational Baby M. case regarding traditional surrogacy, the Supreme Court of New Jersey viewed the creation of the contract prior to conception as a factor indicating a contract for the illicit sale of a child.\textsuperscript{328} The court relied specifically on adoption statutes and policies that do not permit binding contracts to relinquish prior to birth and viewed such contracts as improperly creating the “coercion of contract”

\textsuperscript{322} See Johnson, 851 P.2d at 783–84; see also CAL. FAM. CODE §§ 7960–62 (West 2013).
\textsuperscript{323} See e.g., Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 214 (Ky. 1986) (Vance, J., dissenting).
\textsuperscript{325} See Roby & Brown, supra note 60, at 313–14 & n.40.
\textsuperscript{326} See Palermo Protocol, supra note 3; Slavery Convention, supra note 2; Optional Protocol, supra note 1; see also U.S. CONST. amend. XIII.
\textsuperscript{327} Kerian, supra note 296, at 154–55.
\textsuperscript{328} See In re Baby M., 537 A.2d 1227, 1240 (N.J. 1988).
coupled with “the inducement of money.” Thus, pre-conception contracts for child custody point toward, rather than against, a conclusion that the child is being sold.

Indeed, the pre-production sale of goods is commonplace in the commercial world and done as a matter of course with goods that are individualized or special ordered. Special ordering human beings “pre-production” could become a particularly egregious commodification of human beings. As technologies develop in the era of ARTs—with the practices of purchasing gametes, IVF, pre-implantation genetic diagnosis, and gene therapy or genetic enhancement—it will be particularly important to guard against the sale of “pre-ordered” designer babies produced and sold according to the buyer’s specifications.

Thus, a rule that the pre-conception or pre-embryo transfer contract cannot be considered the illicit sale of children would create a highly dangerous rule that could facilitate the large-scale production and sale of human beings.

Proponents of surrogacy attempt to combine the never a mother argument—rebutted in Part IV.B above—with arguments based on the time of contracting, rebutted herein. The apparent argument is that gestational surrogates can be viewed as “never mothers” when they sign surrogacy agreements before embryo transfer because prior to such transfer they have no legal claim to the embryos or to the child at birth. By the time the transfer has occurred, the surrogate has voluntarily contracted away any such parental rights. Presumably, the surrogate’s contractually binding promise to release any custodial claims that might develop after embryo transfer is a contractual term that is essential to the willingness of other parties (intermediaries and intended parents) to proceed with the embryo transfer. However, this argument merely underscores that the gestational surrogate is being paid to contract away her future custodial

329. Id.
330. Id.
333. See supra Part IV.B.
335. See Kerian, supra note 296, at 137.
336. See id.
337. See Johnson, 851 P.2d at 782.
rights because this release of her custodial rights is essential to the contract—and therefore part of what she is being paid to do.338

Therefore, in regard to surrogacy contracts constituting the sale of children, gestational surrogacy is not fundamentally different from traditional surrogacy. Hence, in the Baby M. case, the intended genetic father, Mr. Stern, would never have agreed to allow the surrogate, Mary Beth Whitehead, to be artificially inseminated with his sperm unless she had signed the contract in which she promised to “surrender custody . . . immediately upon birth of the child; and terminate all parental rights to said child pursuant to [the] Agreement.”339 Nonetheless—and indeed because of such terms—the New Jersey Supreme Court properly considered the surrogacy agreement void as against public policy because it concluded that “the money is being paid” not merely for “personal services” but also to obtain custody of the child.340

Thus, as a matter of logic, reliance on the time of contracting to avoid the prohibition on the sale of children, even when combined with other pro-surrogacy arguments, is erroneous. Allowing distinctions as to the time of contracting to avoid laws concerning slavery, human trafficking, and the sale of children would create exceptions that would largely swallow these fundamental policies against human commodification. It would effectively invite attorneys to design clever and legally legitimated contracts for the sale of human beings. Allowing the time of contracting to avoid prohibitions on slavery, human trafficking, and the sale of children would invite development of large-scale, legally shielded markets in human beings. The fundamental policies and values protected by the prohibitions against slavery, human trafficking, and the sale of children should not be subjected to destruction by such lawyers’ tricks and strategies.

D. The Sale of Children Includes the Sale of De Jure or De Facto Custody of Children

Proponents of commercial markets in adoption and surrogacy have argued for the legitimacy of the commercial and contractual aspects of those practices.341 In order to do so, they have attempted to avoid the difficulties

338. See infra notes 377–463 and accompanying text (discussing California law).
340. Id. at 1240.
posed by laws against baby selling, which under both domestic and international law have plainly prohibited the sale of children for adoption and have been viewed as applicable to surrogacy.\textsuperscript{342} One argument used to justify the commercial and contractual aspects of adoption and surrogacy has been an attempted distinction between the purportedly legitimate buying and selling of custodial rights in children versus illegitimately selling children or property rights in children. Judge Richard Posner, a foundational figure in the law and economics movement, as well as other law and economics scholars, famously has argued for the establishment of a regulated and legal adoption market whereby custodial rights in children could be sold by birth mothers to the highest bidder, so long as the bidders could pass a home study as adequate parents.\textsuperscript{343} Posner argued that such a market in adoption did not violate statutes prohibiting baby selling because only the custodial rights regarding children, and not literally the children themselves, were being sold.\textsuperscript{344} Refining Posner’s arguments, Martha Ertman argued for permitting some markets in parental rights based on weighing the positive versus negative effects, leading her to argue for “enthusiastically embracing the benefits of commodification.”\textsuperscript{345} Similarly, commercial surrogacy can be defended based on the notion that children in the modern world are not legally a form of property but are persons and, hence, it is legally impossible to sell them.\textsuperscript{346}

Of course, the foundation of the contemporary movement against human trafficking and the sale of children is the recognition that human beings may be impossibly commodified and treated as de facto articles of commerce through various practices, even when the law does not explicitly permit property rights in human beings.\textsuperscript{347} It is no accident that the primary international instrument defining human and child trafficking, the Palermo
Protocol, is a supplement to the U.N. Convention Against Transnational Organized Crime. If contemporary prohibitions of human trafficking and the sale of children laws applied only to situations where de jure, governmentally established property rights in human beings were granted, the laws would have little application. Legally established de jure slavery and slave markets in human beings were abolished during the nineteenth and early twentieth century. Nonetheless, powerful forces in the marketplace and human society can treat people de facto as mere things or articles of commerce in a manner fundamentally contrary to human dignity and human rights. Individuals, private companies, and criminal organizations, sometimes facilitated by government officials, can seek profit from the de facto sale or enslavement of human beings. This is one of the key insights of the modern human rights and anti-trafficking movement. Hence, permitting markets in adoption and surrogacy based on the lack of a de jure ownership right in human beings would undermine the legal and ethical predicates of the entire contemporary anti-trafficking movement.

Even though it is true that the de jure slavery of the past and the de facto trafficking of the present are different in significant ways, both implicate similar values and concerns. De jure or de facto markets in children, even if for comparatively positive and benign purposes such as assisting family formation, nonetheless implicate some of the same values as de jure slavery. It is a mere lawyer’s trick to argue that selling de facto custody or legal custodial rights in children is legitimate because the law does not officially recognize property rights in children. Such an argument would basically legitimize kidnapping children for adoption so long as the law did not officially grant kidnappers property rights in children.

Similarly, it is wrong to argue for markets in the sale of parental rights merely because of the role that money already plays in adoption. So long as private actors, such as lawyers and social workers, are involved as professionals and intermediaries in adoption, there will be some degree of payment. There will be some role for money in adoption so long as the law permits original family members to receive some degree of reimbursement.

348. See Palermo Protocol, supra note 3, at pmbl.
350. See generally Anita L. Allen, Surrogacy, Slavery, and the Ownership of Life, 13 HARV. J.L. & PUB. POL’Y 139 (1990) (discussing how slaves were perceived as “de facto surrogates,” similar to the surrogacy discussed in this Article).
or payment for certain expenses, such as the medical costs of pregnancy and childbirth. Nonetheless, there have been clear efforts to prevent these financial aspects of adoption from creating a market in either children or de facto or de jure custody of children under international law and most domestic systems. The legal and ethical necessity of preventing markets in human beings requires maintaining the prohibitions of the sale of parental rights that pervade adoption law and also requires enforcing similar prohibitions as to both traditional and gestational surrogacy.

Under the CRC, children “shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” Similarly, children have a right to preserve their identity and a right not to be “separated from [their] parents against their will.” Creating market mechanisms to transfer parentage status, custodial rights, and de facto custody of children subjects these children’s rights to a bidding war that operates completely independently of any consideration of the best interests of children. It also treats children’s ties to those intimately involved in their creation, whether through gestation and childbirth or genetically, as meaningless and insignificant. To the contrary, the CRC recognizes that children are human beings who will normally, over their life course, find great significance in knowing the people who are, in these fundamental ways, parents and family to them. Hence, depriving children of these connections is a deprivation of rights that can only be justified by the overriding need to protect the children from even greater harms. Market mechanisms are adult centered and focus on which adults have greater bargaining power, based largely on wealth and social position; market mechanisms thereby cannot and do not properly account for the rights and

351. See, e.g., Hague Adoption Convention, supra note 21, at arts. 4(c)(3), 8, 32; Optional Protocol, supra note 1; Expert Group on the Financial Aspects of Intercountry Adoption, supra note 30.
352. CRC, supra note 4, at art. 7(1).
353. Id. at art. 8(1).
354. Id. at art. 9(1).
356. See CRC, supra note 4, at arts. 7–9.
best interests of children.

The law—including international law as represented by the CRC, the Sale of Children Protocol, and the Hague Adoption Convention—has generally rejected the law and economics argument for an explicit market in children for adoption. Nonetheless, the fundamental principles of law protected by the legal norms against slavery, human trafficking, and the sale of children are currently threatened by jurisdictions that are facilitating or tolerating the large-scale practice of commercial surrogacy. While the practice of large-scale commercial surrogacy is fairly new, the arguments in favor of it are disturbingly familiar and should be rejected, as they have been in other contexts. Indeed, it may be helpful to remember that some proponents of nineteenth century de jure slavery argued that they, too, were not actually buying and selling human beings, but only buying and selling the labor of human beings. The human and lawyer’s capacities to invent legal fictions and rationalizations cannot be allowed to triumph on a question of such fundamental importance.

E. Can You Buy What Is Yours?

Surrogacy proponents could argue that intended contractual parents who are also the genetic parents cannot be buying the children, since such children already belong to them. The argument, in short, is that you cannot buy what is already yours. This argument in its purest form applies to the subset of surrogacy cases in which there are two intended parents who are also the genetic parents of the child. In these circumstances, it is claimed that the intended parents are the only parents of the child and hence are only receiving gestational services, and not custodial rights, from the surrogate.

Even in its purest form, however, where the intended parents are the genetic parents, the principle that you cannot buy what is yours is both
incorrect and misapplied. With property, you can buy what is already yours if ownership is shared or if there are possible conflicting claims on the property. For example, it is commonplace in property law that where property is held in some kind of joint tenancy or is shared between present and future interests, one owner can buy out the interests of others. Similarly, in the law of wills, one can buy out another’s interest in a possible but uncertain property interest— as in contracts not to contest wills— whereby the testator contracts with potential contestants. Under such contracts, the potential contestants accept financial consideration in exchange for relinquishing their right to contest the will or otherwise claim inheritance rights. Similarly, custodial arrangements for children are commonly plural in nature, not only between parents, but sometimes also involving other persons, such as grandparents. Hence, third party visitation statutes are commonplace in the United States, and courts can enter orders that create visitation rights for third parties. Thus, buying out another’s custodial interests in a child would still be a form of illicit sale of children, even if the purchaser prior to the sale had a custodial right or interest in the child. Hence, the law generally does not enforce contracts in which custodial interests are relinquished for financial consideration by one parent to another parent. Similarly, custodial interests are often uncertain in relationship to children, but courts do not enforce contracts for financial consideration in which individuals agree not to litigate custody as we do for inheritance— because doing so would constitute a kind of sale of custodial interests in children. Hence, when intended parents who are also genetic parents pay surrogates, they are still buying the surrogate’s de facto and de jure custodial rights and interests in the child. The intended parents are buying, in short, exclusivity—that they would be the only persons with recognized legal and de facto custodial control of the child.

It might be contested that a child cannot have two mothers, and hence,

where an intended parent is a genetic parent, the gestational parent is automatically ruled out. This argument, however, fails on several fronts. First, the law in many jurisdictions is increasingly structured to permit two persons of the same gender to both be legal parents of a child. California’s recent surrogacy bill was specifically designed to permit two people of the same gender to be legal parents, a rule directed at same gender, contractually intended parents. In addition, California law now permits a child to have more than two legal parents, recognizing that children sometimes benefit from having more than two legal adult parents. The ban on two mothers is thus not absolute. Hence, the decision to not permit it in instances where one woman has gestated and birthed the child and another has provided the egg is arbitrary.

Second, it is an aberration that proponents and practitioners of surrogacy and assisted reproduction technologies intentionally create instances where the numbers of people involved in procreating an infant are multiplied beyond the traditional father and mother and yet seek to arbitrarily maintain exclusivist legal models where a child may only have one mother or two legally acknowledged parents. This is particularly arbitrary because it is already commonplace that not every parent of a child necessarily has full custodial rights; hence, acknowledging parentage and some degree of custodial interest in a third parent would not necessarily undercut the existence of primary custody in the parents with whom the child primarily resides.

Thus, the argument that you cannot buy what is already yours ultimately returns to the question of whether the genetically unrelated gestational surrogate has any custodial or parental rights to the child she gestates and

369. CAL. FAM. CODE §§ 7960–62 (West 2013); see also Vorzimer & Randall, supra note 22.
371. See Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993) (rejecting ACLU argument that the court should recognize both gestational mother and genetic mother as legal mothers).
372. See Laufer-Ukeles, supra note 108, at 1254 (“[M]ultiple parental-child relationships may be securely and safely established to the benefit of all involved. While some would object that this violates the exclusivity and privacy of parenthood where procreating and raising children involves third parties, such exclusivity may not be appropriate.”).
373. See FAM. § 7802.
births. As indicated below in the review of California law, it is clear that she does, absent an approved form of surrogacy contract.\textsuperscript{374} Hence, it is still the surrogacy contract that makes her a non-parent, and it is the surrogacy contract that, whether explicitly or implicitly, includes the purchase of her parental and custodial interests, both de facto and de jure and actual and potential.

The argument that you cannot buy what is already yours is obviously misapplied in the common instances where one or both intended parents are not genetic parents of the child in question.\textsuperscript{375} Thus, in the Baby M. case, wherein the intended father was also the genetic father but the intended mother was not genetically related to the child, the court correctly surmised that the surrogacy contract was an attempt to sell the maternal rights of the child from the surrogate to the “adoptive” mother.\textsuperscript{376} This same logic should apply in gestational surrogacy arrangements where there are two intended parents but only one is genetically related. In instances where there is only one intended parent and a gamete is purchased or obtained from someone who is not an intended parent, it is clear that the intended parent is seeking to purchase an exclusive parentage status from the surrogate, in a situation where otherwise the intended parent would have only a shared custodial interest in the child.

F. California, Gestational Surrogate Mothers, and the Sale of Children

California is the preeminent pro-surrogacy jurisdiction in the United States and is also a significant destination for international commercial surrogacy.\textsuperscript{377} California has carefully crafted its laws to facilitate the practice of commercial gestational surrogacy, drafting its laws with significant input from attorneys and others active in California’s “burgeoning surrogacy industry.”\textsuperscript{378} Yet ironically, upon examination, California’s legal regime for gestational surrogacy has structured surrogacy arrangements such that they will generally constitute, under international standards, the illicit sale of children.

California also illustrates the thesis that even explicitly pro-surrogacy

\textsuperscript{374} See infra notes 377–463 and accompanying text.
\textsuperscript{375} See, e.g., In re Baby M., 537 A.2d 1227 (N.J. 1988).
\textsuperscript{376} See generally id.
\textsuperscript{377} Spar, supra note 130, at 84–85; Laufer-Ukeles, supra note 108, at 1265.
\textsuperscript{378} See Fam. §§ 7960–62; Vorzimer & Randall, supra note 22.
jurisdictions do not regard gestational surrogates as inherently, ab initio, never the mother of the children they birth.\textsuperscript{379} Instead, California strips gestational surrogates of parentage status based on surrogacy agreements with intended parents.\textsuperscript{380} Hence, as theorized above, gestational surrogates—like traditional surrogates—bargain away their parental rights in surrogacy agreements, indicating that commercial surrogacy arrangements constitute the illicit sale of children.\textsuperscript{381} In order to make this point, a survey of California’s case law and statutory approach to surrogacy is necessary.

In \textit{Johnson v. Calvert}, the foundational pro-surrogacy decision from the California Supreme Court, the court explicitly approved commercial gestational surrogacy contracts.\textsuperscript{382} \textit{Johnson} concerned a dispute between the two intended parents—a married couple, Mark and Crispina Calvert, who were the genetic parents of the child—and the genetically unrelated surrogate, Anna Johnson.\textsuperscript{383} Prior to embryo transfer, the parties signed a contract providing that “the child born would be taken into [the Calvert’s] home ‘as their child.’”\textsuperscript{384} As the court noted, Johnson “agreed she would relinquish ‘all parental rights’” to the child in favor of the Calverts.\textsuperscript{385} Under the contract, the Calverts would pay Johnson $10,000 in several installments, with the last installment paid six weeks after birth, and pay for a $200,000 life insurance policy for Johnson.\textsuperscript{386} Conflicts developed during pregnancy and the Calverts and Johnson claimed parentage in conflicting lawsuits.\textsuperscript{387} At trial and on appeal, a key issue was whether “the surrogacy contract was legal and enforceable against [Johnson’s] claims.”\textsuperscript{388}

The California Supreme Court held that both genetic and birth mothers had presumptions of parentage under California law.\textsuperscript{389} Under those circumstances, the court did not view genetics as inherently trumping birth mother status.\textsuperscript{390} Thus, the court noted that in an egg donation situation, the

\begin{itemize}
\item \textsuperscript{379} See infra notes 386–451 and accompanying text.
\item \textsuperscript{380} See infra notes 386–451 and accompanying text.
\item \textsuperscript{381} See supra Part IV.B, .C.
\item \textsuperscript{382} See generally \textit{Johnson v. Calvert}, 851 P.2d 776 (Cal. 1993).
\item \textsuperscript{383} Id. at 778.
\item \textsuperscript{384} Id.
\item \textsuperscript{385} Id.
\item \textsuperscript{386} Id.
\item \textsuperscript{387} Id.
\item \textsuperscript{388} Id.
\item \textsuperscript{389} See id. at 782.
\item \textsuperscript{390} Id.
\end{itemize}
genetically unrelated birth mother who intends to parent the child would be “the natural mother under California law” rather than the genetically related egg donor. The court held that when a conflict developed between the birth and genetic mothers, that intention was the deciding factor. Hence, where “genetic consanguinity and giving birth” did not “coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.” Thus, the court explicitly followed legal commentators who argued that intention, rather than genetics, should govern parentage in regard to reproductive technologies.

However, in Johnson, the only intention that mattered was the intention in the surrogacy contract that was entered into prior to embryo transfer and pregnancy. Johnson, the gestational surrogate and birth mother, asserted in court her intention to raise the child as her own during the pregnancy. Thus, by the time the birth occurred—the time when the child became a constitutional person under U.S. Supreme Court case law—Johnson had clearly and legally asserted her intention to exercise her parental rights to custody of the child. However, the court completely discounted Johnson’s intentions to raise the child in the court’s intention-based theory. Thus, where both Johnson and Crispina Calvert had “presented acceptable proof of maternity,” the court decided it was necessary to inquire “into the parties’ intentions as manifested in the surrogacy agreement.” Further, the court referred to “the gestator . . . voluntarily contracting away any rights to the child” and noted that the contract provisions included Johnson agreeing to

391. See id. at 782 n.10.
392. Id. at 782.
393. Id.
395. Id. at 782.
396. Id. at 778.
399. Id. at 782.
400. Id. (emphasis added).
401. Id. at 782 n.10.
“relinquish ‘all parental rights’ to the child in favor of [the Calverts].” 402 Hence, the court’s intention-based theory was, in practice, a theory of contractual parentage—the only intentions that mattered were those embodied in the pre-embryo transfer contract.

Thus, even after Johnson, California law presumes that the woman who gives birth is the natural and legal mother of the child. 403 California law still states that a parent and child relationship may be established “by proof of having given birth to a child.” 404 Thus, the term natural mother is not restricted to genetic mothers but can include a non-related gestational surrogate mother. 405 Indeed, under California law, a non-related intended parent can also be listed on the child’s original birth certificate as the child’s mother or father. 406 Thus, women who give birth in California generally have a presumption in favor of them being legal mothers, regardless of whether or not they are genetic parents. 407 It is the surrogacy contract and the corollary existence of intended parents, not the mere fact of being genetically unrelated to the child, that strips the gestational surrogate of her parentage status. 408

This conclusion is underscored by the significant federal criminal prosecution and scandal in California concerning prominent ART attorneys in what the federal authorities described as a “baby-selling ring.” 409 The federal prosecution indicated that surrogacy arrangements and contracts entered into after embryo transfer, but before birth, constituted baby-selling under California law. 410 In 2011, the Federal Bureau of Investigation (FBI)
issued the following press release about the guilty plea of Theresa Erickson, a prominent California attorney “specializing in reproduction law.”

Titled “Baby-Selling Ring Busted,” the press release stated in relevant part:

United States Attorney Laura E. Duffy announced today that Theresa Erickson entered a guilty plea . . . in which she admitted to being part of a baby-selling ring that deceived the Superior Court of California and prospective parents for unborn babies. According to court records, Erickson (an internationally renowned California attorney specializing in reproductive law) fraudulently submitted false declarations and pleadings to the California Superior Court . . . in order to obtain pre-birth judgments establishing parental rights for Intended Parents (“IPs”). California law forbids the sale of parental rights to babies and children but permits surrogacy arrangements if the women expecting to carry the babies, Gestational Carriers (“GCs”), and the IPs enter into an agreement prior to an embryonic transfer. If the GC and IPs do not reach an agreement before the GC receives the embryonic transfer, the GC cannot transfer parental rights except through a formal adoption procedure.

In her guilty plea, Erickson admitted that she and her conspirators used GCs to create an inventory of unborn babies that they would sell for over $100,000 each. They accomplished this by paying women to become implanted with embryos in overseas clinics. If the women . . . sustained their pregnancies into the second trimester, the conspirators offered the babies to prospective parents by falsely representing that the unborn babies were the result of legitimate surrogacy arrangements, but that the original IPs had backed out. Erickson also admitted that she prepared and filed with the Superior Court . . . declarations and pleadings that falsely represented that the unborn babies were the products of legitimate surrogacy agreements, that is, ones that involved agreements between the IPs and the GCs prior to embryonic transfer. With these fraudulently


412.  Baby-Selling, supra note 409.
obtained pre-birth orders, the IPs’ names would be placed on the babies’ birth certificates and the conspirators would be able to profit from their sale of parental rights.\footnote{413}

Erickson was joined in this “baby-selling ring” by Hillary Neiman, another prominent surrogacy attorney, and Carla Chambers, a six-time surrogate, both of whom also pled guilty to federal charges.\footnote{414} The ring arranged for American and Canadian surrogates to travel to Ukraine where they were implanted with embryos created with donor sperm and donor eggs.\footnote{415} At least a dozen babies were placed with prospective parents, who paid between $100,000 and $150,000 for each child.\footnote{416} The surrogates were promised $38,000 to $45,000, which was significantly higher than normal for surrogates in the United States.\footnote{417} These illicit baby-selling activities were conducted from 2005 to 2011 by the nationally recognized Erickson, with Neiman reportedly joining the conspiracy in 2008.\footnote{418}

This baby-selling ring was designed to exploit interactions between the permissive nature of California and Ukrainian law and practice on surrogacy.\footnote{419} Clinics in Ukraine were willing to transfer embryos to surrogates without proof of a surrogacy contract.\footnote{420} California was—and is—willing to place the names of genetically unrelated intended parents on the original birth certificate of the child without any kind of adoption procedure based on proof of a pre-embryo transfer surrogacy contract.\footnote{421}

For the uninitiated, the difficulty presented by the prosecution of this baby-selling conspiracy is differentiating between what California law deems illicit baby-selling and what California law deems a lawful commercial surrogacy arrangement.\footnote{422} A commercial surrogacy contract entered into after embryo transfer—but still during pregnancy—is considered baby-selling or human trafficking with the rules limiting baby-

\footnotesize
\begin{itemize}
\item \footnote{413}{Id.}
\item \footnote{414}{See Mohapatra, supra note 411, at 415–17; Baby-Selling, supra note 409.}
\item \footnote{415}{See id. supra note 411, at 415.}
\item \footnote{416}{See id. at 416–17.}
\item \footnote{417}{See id.}
\item \footnote{418}{See id. & nn.16–17.}
\item \footnote{419}{See id. at 417.}
\item \footnote{420}{Id. at 416.}
\item \footnote{421}{See id. at 417.}
\item \footnote{422}{CAL. FAM. CODE §§ 7960–62 (West 2013).}
\end{itemize}
sells in adoption considered applicable. However, a commercial surrogacy agreement entered into prior to embryo transfer in California is considered proper and is exempted from California’s criminal laws against baby-selling and from the limitations of California’s adoption code. While the time differential between whether the contract is made pre- or post-embryo transfer is clear enough, the rationale of the difference in legal result remains obscure. Do not both situations involve payment for both the gestational services and the contractual relinquishment of parental rights?

The California Supreme Court in Johnson v. Calvert tried to explain the difference this way:

Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when [Johnson] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. Anna was not the genetic mother of the child. The payments made to [Johnson] under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up “parental” rights to the child. Payments were due both during the pregnancy and after the child’s birth.

Each of the court’s proffered explanations is either analytically flawed or false. First, the court notes that payments were made both before and after birth in support of the conclusion that Johnson was paid for gestation, rather than relinquishment. This is illogical, since she could be paid for both gestation and relinquishment—in which case the contract still includes the illicit sale of a child. The timing of the payments, with some part paid after birth, points toward at least partial payment for relinquishment. Further, it is possible to sell rights to a child with any timed sequence of payments,

423. See Mohapatra, supra note 411, at 415–17.
425. FAM. § 7960.
426. Johnson, 851 P.2d at 782.
427. See supra notes 428–47 and accompanying text.
particularly since the transfer of Johnson’s legal rights to the child would apparently occur at signing of the contract, rather than at birth. This is indicated by the court’s dismissal of Johnson’s “change of heart” during pregnancy as too late. 428

Second, the Johnson court appears to engage in “doublethink” by simultaneously claiming that Johnson was not paid for relinquishing her child, while also chiding her for “voluntarily contracting away any rights to the child” and reciting the contract provision whereby Johnson “agreed she would relinquish ‘all parental rights’ to the child in favor of [the Calverts].” In the quid pro quo of the Calvert-Johnson surrogacy contract the Calvert’s quid was financial in nature; hence, Johnson’s responding consideration, including contracting away her parental rights, was clearly in exchange for financial consideration.

Third, the court’s statement that Anna was not subject to financial inducement to relinquishment because the contract was made prior to conception (or before embryo transfer) is obviously false, since in fact Anna was financially induced to sign the contract. It is certainly possible for someone to bargain away their not-yet-conceived children. Consider, for example, the children’s story Rumpelstiltskin where a desperate woman is induced to bargain away her not-yet-conceived first-born child in exchange for life-saving assistance from a mysterious man.

Fourth, the court seems to rely on the concept that Johnson cannot be selling the child since the child is, ab initio, the Calverts’ child. Of course, the court relied on its own power to arbitrarily declare that the child was never Johnson’s: the child was never Johnson’s because the court says it was never Johnson’s. Even so, the court mischaracterized its own analysis. The court, in fact, never declared that genetically unrelated birth mothers are inherently never mothers. To the contrary, it declared that under the right circumstances—and absent a surrogacy agreement—genetically unrelated

428. Id. at 782.
430. Johnson, 851 P.2d at 782.
431. Id. at 778.
432. Financial compensation was really the only inducement for Johnson to sign the contract. Id. at 784.
433. See, e.g., PAUL O. ZELINSKY, RUMPELSTILTSKIN (1986).
434. Johnson, 851 P.2d at 782.
435. Id.
birth mothers are legal and natural mothers. According to the court’s own reasoning, it is the pre-embryo transfer contract that rendered Johnson not the mother of the child, not merely the lack of genetic relationship. Hence, by definition, Johnson was “contracting away” her parental rights. Further, the court’s reliance on the concept that you cannot sell what is not yours is misplaced. Even if Johnson has no legal claim on the child by judicial fiat, she still is being paid to willingly hand over the child after birth and not to assert or claim any such rights. Indeed, intermediaries who lack any legal custodial or parental right regarding children are nonetheless prosecuted for their roles in trafficking and the sale of children. In the 2005–2011 surrogacy baby-selling ring in California, the FBI characterized the conspirators, including prominent surrogacy attorney Theresa Erickson, as profiting from “their sale of parental rights.” Hence, one does not need to have lawful custody of a child to be paid to hand over a child. Obviously, Johnson as a birth mother had the capacity to control the place of birth, had de facto physical control of the child, and was paid in part to physically facilitate the handing over of the child to the Calverts under the contract.

Fifth, the court’s reasoning that Johnson was genetically unrelated to the child as a justification for their conclusion that there was not a sale of a child contradicts other parts of the court’s opinion that holds that genetics are not determinative of parentage claims in ART cases. The Johnson court stated specifically that a genetically unrelated birth mother in a “true ‘egg donation’ situation” would be deemed the legal and “natural mother under California law.” Further, the court acknowledged that Johnson, despite her lack of genetic relationship, had “adduced evidence of a mother and child relationship as contemplated” by California law and had “presented acceptable proof of maternity.” Under the court’s analysis, where both Johnson—as birth mother—and Crispina Calvert—as genetic mother—had

436. Id.
437. Id.
438. See supra notes 303–06 and accompanying text.
439. Baby-Selling, supra note 409.
440. See supra notes 303–06 and accompanying text.
441. See Johnson, 851 P.2d at 782.
442. Id.
443. Id.
444. Id.
presented equally valid evidence of maternity, and when the court declined the ACLU’s contention that both should be legally acknowledged as mothers, it was only the intention embodied in a surrogacy contract that tipped the balance against Johnson. Hence, it was the surrogacy contract, rather than her status as genetically unrelated, that was decisive in causing Johnson to lose her parentage claim. Once again, the court engaged in a kind of doublethink, asserting one thing in one part of the opinion and then discarding it later to prove an opposite point.

In summary, the California Supreme Court in Johnson took a surrogacy contract, which, by its own terms and the court’s own legal analysis, involved an exchange of payments for Johnson both gestating the child and “contracting away” her parental rights, and arbitrarily interpreted it as a payment for gestational services in order to avoid California’s laws against child selling.

The court’s arguments against the application of child-selling prohibitions to surrogacy are so transparently based on legal fictions, arbitrary dictates, and doublethink that the question must be asked: Should legal systems be permitted to evade fundamental policies against child selling, human trafficking, and related wrongs through such dubious legal analysis? If so, the law becomes a means by which human beings are bartered and sold, rather than a remedy against such evils. The California Supreme Court, like the United States Supreme Court in its approval of separate but equal in Plessy v. Ferguson, has used the raw power of judging to distort both law and reality in service to the goal of facilitating practices that violate fundamental human rights.

The use of legal fictions and raw power to legalize the sale of children under California law became even clearer with California’s enactment of a new surrogacy statute, which became effective on January 1, 2013. The law was created with the explicit involvement of attorneys and others prominent in what an advocate describes as “California’s burgeoning surrogacy industry.” The law was a response, in part, to the scandal of the federal convictions of prominent surrogacy attorneys Theresa Erickson and

445. Id. at 781–82.
446. Id. at 781 n.8.
447. Id. at 782–83.
449. See CAL. FAM. CODE §§ 7960–62 (West 2013); Vorzimer & Randall, supra note 22.
450. See Vorzimer & Randall, supra note 22.
Hilary Neiman in the “baby-selling ring.”

Unfortunately, California’s statute, by operationalizing the methods and rationale of Johnson and subsequent practice in California, makes the quid pro quo of financial inducement for a combination of gestational services and transfer of a child even more explicit.

Under California’s new statute, a “gestational carrier” is defined as a woman “who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement.”

An “intended parent” is defined as “an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction.”

Thus, intended parents do not need to be genetically related to the child. The statute requires the assisted reproduction agreements for gestational carriers to be “fully executed” prior to embryo transfer. An action to establish parentage may be filed pre-birth and requires providing a copy of the “assisted reproduction agreement for gestational carriers.”

A notarized assisted reproduction agreement for gestational carriers signed by all parties, accompanied by declarations of independent legal representation, rebuts the various statutory presumptions of parentage otherwise available under California law “as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.”

“Upon petition of any party to a properly executed assisted reproduction agreement for gestational carriers,” the court issues an order that:

Shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or

451. See id. (noting that the law was “in reaction to recent incendiary industry scandals”); Baby-Selling, supra note 409.
452. FAM. § 7960(f)(2).
453. Id. § 7960(c).
454. See id.
455. Id. § 7962(d).
456. Id. § 7662(e).
457. Id. § 7662(f).
evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.\textsuperscript{458}

Ironically then, California’s new surrogacy statute makes it clear that, as was the case in \textit{Johnson}, it is precisely the pre-embryo transfer surrogacy agreement that causes the gestational surrogate to lose her parental rights. Therefore, regardless of whether or not it is explicitly stated in the contract, by implication every such surrogacy agreement in California includes a provision by which the surrogate, in the words of \textit{Johnson}, is “contracting away” her parental rights.\textsuperscript{459}

The commercial nature of these arrangements is also presumed in the statute, particularly in the way the law provides for payments to intermediaries, including the “surrogacy facilitator” and the “nonattorney surrogacy facilitator.”\textsuperscript{460} These persons or organizations are involved in “advertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement,”\textsuperscript{461} and “charging a fee or other valuable consideration for services rendered related to an assisted reproduction agreement.”\textsuperscript{462} The law presumes that both attorneys and non-attorneys will play these paid intermediary roles and provides for regulation of the handling of client funds in both instances. Similarly, the statute regulates the use of escrow, providing structure for the practice by which payments from the intended parents are held and then distributed at agreed-upon points of time to the surrogates themselves.\textsuperscript{463} California’s statutory legitimation of commercial surrogacy, upon analysis, is a thinly veiled legitimation of the sale of children. It therefore should not be viewed as a model for other jurisdictions.

\begin{footnotes}
\item 458. \textit{Id.}
\item 460. FAM. § 7960(d)–(e).
\item 461. \textit{Id.} § 7960(e)(1).
\item 462. \textit{Id.} § 7960(e)(2).
\item 463. \textit{Id.} §§ 7960(c), 7961.
\end{footnotes}
V. CONCLUSION: REGULATING SURROGACY

This Article is primarily focused on the question of when surrogacy constitutes the sale of children, particularly under international law standards. From that perspective, the question of appropriate legal regimes for surrogacy arises.

Certainly, it is not permissible under international law standards for nations to legitimize the systemic practice of surrogacy under circumstances when it constitutes the sale of children. Nonetheless, there is clearly pressure upon states, legislatures, and courts to do so. The large and growing global ART and surrogacy industry, related to the lucrative phenomenon of medical tourism, creates a powerful industry lobby. The appeals of those who simply want to parent a child and grow a family produce sympathetic responses. The dilemma of stateless children caught between permissive and prohibitory legal regimes creates an apparent imperative to provide a legal regime, or at least a legal solution, that will provide for the best interests of such children.

The argument that surrogacy constitutes a “win-win-win” scenario—opposed only due to irrational traditionalism—has a surface plausibility.

In addition to the core understanding that commercial surrogacy, as currently practiced in many states and jurisdictions, does constitute the sale of children, there are several other factors that rebut these pro-surrogacy arguments. First, it should be understood precisely what the surrogacy industry is seeking. The industry does not merely seek toleration or acceptance of an alternative family form or reproductive practice. Rather, the industry seeks a legal regime that protects the more powerful and wealthier participants in the practice—the intermediaries and intended contractual parents—at the expense of the rights and interests of the more vulnerable participants, the so-called surrogates and children. Thus, while the industry may claim to speak for the interests of surrogates, they advocate for laws that strip surrogates of any parentage claims they may wish to assert.

464. See generally SPAR, supra note 130; Vorzimer & Randall, supra note 22 (noting how a surrogacy advocate refers to California’s “burgeoning surrogacy industry”).
466. See generally Mohapatra, supra note 411 (describing cases involving the dilemmas caused by possible statelessness).
in the children they gestate and birth. Thus, the industry advocates for laws that strip birth mothers in surrogacy situations from the rights and protections that are typically accorded to birth mothers in adoption contexts. 468 Similarly, the surrogacy industry advocates for laws that deny children the information and reliable legal documents by which they might, even as adults, construct their personal history and identity. 469 Hence, the surrogacy industry seeks to reverse recent gains by adoptees in securing rights to their own information in some jurisdictions 470 by creating a legal regimen that distorts the very concept of a birth certificate. Thus, the industry seeks to create a situation where even the original birth certificate does not contain the name of the woman who gave birth to the child but instead contains only the names of the intended parents, even when they are genetically unrelated. 471

Ironically, while the surrogacy industry may put itself forward as representing a break with the traditional family forms of the past, the industry is seeking to provide an “as if” exclusivist two-parent family to its clients, the intended parents. Hence, the surrogacy industry imposes a distorted legal form of the traditionalist nuclear family upon family constellations which are far more complex. The surrogacy industry is using legal fictions to squeeze non-traditional families into the nuclear family form traditionally predominant in some, but not all, nations and cultures. In order to do so, the surrogacy industry is seeking legal rules from governments and legal systems that cut off the legitimate rights and protections of less powerful persons impacted by surrogacy: children and surrogates.

The commercialization and commodification of babies is central to these special privileges sought by the surrogacy industry. It is clear that the surrogacy industry is selling not just services, but babies. 472 Yet the law is asked to pretend that contracts transferring parental and custodial rights and de facto custody of children are merely contracts for services. 473 The

468. See supra notes 377–463 and accompanying text.
469. See supra notes 377–463 and accompanying text.
471. See supra notes 394, 421 and accompanying text.
472. See, e.g., SPAR, supra note 130.
473. See supra notes 377–463 and accompanying text.
surrogacy industry is not seeking any kind of equal treatment under neutral principles of law, but is seeking exemptions from one of the most basic legal principles of the modern age—the prohibition of the sale of human beings.\textsuperscript{474}

Under these circumstances, it becomes relatively easy to summarize the kinds of regulations that should be applied to surrogacy. In essence, legal systems should apply the same rules to gestational and traditional surrogacy that already apply to adoption. One model for this kind of approach is the \textit{Baby M.} decision, which correctly applied adoption law principles to traditional surrogacy.\textsuperscript{475} Hence, the financial aspects of both gestational and traditional surrogacy should be regulated in the same manner as adoption.\textsuperscript{476} Payments for gestational services should be prohibited as such implicitly and necessarily include relinquishment and hence the transfer of de facto and de jure custodial rights. While “reasonable expenses” are sometimes permissible in adoption and in surrogacy, in surrogacy this must include only medical and other expenses directed related to surrogacy. Permissible “reasonable expenses” should not include the financial support or living expenses of the surrogate during pregnancy, lest such expenses become a backdoor means of selling parental rights.

In addition, all birth mothers—whether genetically related or not—should be accorded the status of birth mothers, ab initio, as the mothers of their children. Surrogacy should be subject to the rule, developed for adoption, that birth mothers cannot be held to any kind of pre-birth contractual relinquishment of parental rights.\textsuperscript{477} Thus, an important protection against surrogacy contracts improperly transferring de facto or de jure parental or custodial rights is to declare any such provisions in pre-birth contracts unenforceable.

Similarly, as adoptees increasingly win the right to information about their parental and family heritage, these rights should apply to children born through surrogacy and ART. The increased capacities to create children in more complex and artificial ways should be accompanied by the increased rights of those children to learn, at least by adulthood, the facts about their

\textsuperscript{474} See, e.g., U.S. CONST. amend. XIII; CRC, \textit{supra} note 4, at art. 35; Slavery Convention, \textit{supra} note 2; Optional Protocol, \textit{supra} note 1.

\textsuperscript{475} See generally \textit{In re Baby M.}, 537 A.2d 1227 (N.J. 1988).

\textsuperscript{476} See, e.g., Hague Adoption Convention, \textit{supra} note 21, at art. 4(c)(3) (requiring that “consents [...] not be [...] induced by payment or compensation of any kind”).

\textsuperscript{477} See, e.g., \textit{id.} at art. 4(c)(4) (stating that consent of the mother can be “given only after the birth of the child”).
It is understandable if States wish to permit new means of family formation in order to promote procreative liberty, a right to family life, privacy, toleration, or the public good. However, legal recognition of these new family forms should reflect the complexities of those families rather than trying to inappropriately squeeze them into the legal forms of the exclusivist nuclear family. Thus, the proper answer to the surrogacy industry’s claim to represent new, useful, and emerging forms of family formation is that it is impermissible to legally force these new practices into the patterns of the exclusivist two-parent family at the expense of the basic rights of children, including their right not be commodified. Hence, all procreative practices, whether old or new, must be subject to basic policies against the sale of human beings, policies that cannot be bargained away through legal fictions or pretenses.

While it is important to apply relevant adoption law principles to surrogacy, some legal procedures and systems created for adoption may not be suitable for processing surrogacy cases. Thus, the question has arisen whether the Hague Adoption Convention can be used to process international surrogacy cases. The 2010 Special Commission on the Practical Operation of the Hague Adoption Convention “viewed as inappropriate the use of the Convention in cases of international surrogacy.”

The reasoning for such viewpoint is provided in a letter by William Duncan, then Deputy Secretary General of the HCCH, written on behalf of the Permanent Bureau of HCCH, which was distributed by HCCH to participants of the 2010 Special Commission. Deputy Secretary General Duncan noted “very serious concerns,” as “it would seem at the very least ironic that the 1993 Hague Convention, which clearly opposes the idea of intercountry adoption as a commercial transaction, should be used to help to complete a commercial surrogacy arrangement.”

Duncan also noted a number of specific violations of the Hague Adoption Convention that would be likely in a typical surrogacy arrangement, including the Article 4 rule requiring that the consent be “given only after the birth of the

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479. On file with the author.
480. Id.
child” and “not induced by payment or compensation of any kind,” Article 17 requiring various procedures before entrustment of the child to prospective adopters, and the subsidiarity principle requiring consideration of placement in the country of origin. Duncan did not rule out the possibility of applying Convention procedures to a non-commercial surrogacy case. Duncan’s analysis is compelling and underscores the differences between legitimate intercountry adoptions and the current practice of commercial international surrogacy.

Upon examination, commercial surrogacy in the forms sought and practiced by the surrogacy industry usually constitutes the sale of children under international law. Thus, the legal legitimation of commercial surrogacy in some jurisdictions is a profound step backwards in the legal progress against the interrelated practices of human trafficking and the sale of children. The justifications of commercial surrogacy reflect the strong desire for certain kinds of babies in the world today; such justifications fail to explain how or why such practices are not the sale of children. As in past eras, our own era is also faced with a temptation to justify the sale of human beings in the name of some good or interest to which we are strongly attached. Hopefully, that temptation can, over time, be resisted.

481. See id. (quoting Hague Adoption Convention, supra note 21).
482. See id.
Human Rights Council
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Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report of the Special Rapporteur on the sale and sexual
exploitation of children, including child prostitution, child
pornography and other child sexual abuse material

Note by the Secretariat

In her report, prepared pursuant to Human Rights Council resolutions 7/13 and 34/16, the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material provides an overview of her activities since her previous report, presented to the Council in March 2017. The report also contains a thematic study on surrogacy and sale of children, and recommendations on how to uphold the prohibition of, and how to prevent, the sale of children.
I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolutions 7/13 and 34/16. It contains information on the activities of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material since her previous report, which was presented to the Human Rights Council in March 2017. It also contains a thematic study on surrogacy and sale of children.

II. Activities

A. Country visits

2. The Special Rapporteur undertook a visit to the Dominican Republic from 8 to 15 May 2017. She also conducted a visit to the Lao People’s Democratic Republic, from 8 to 16 November 2017. The report of the visit to the Lao People’s Democratic Republic will be presented to the Human Rights Council at its fortieth session. The Special Rapporteur thanks both Governments for their cooperation before and during the visit.

3. The Government of Ireland has agreed to a visit of the Special Rapporteur from 14 to 21 May 2018, and the Government of Malaysia has accepted a visit from 24 September to 1 October 2018. The Special Rapporteur thanks both Governments for accepting the visits and looks forward to a constructive dialogue in the preparation for both missions. She also invites the Government of India to propose dates for a visit in 2019.

B. Other activities

1. Conferences and engagement with stakeholders

4. On 4 October 2017, the Special Rapporteur chaired a session on child sexual abuse online, at the World Congress on Child Dignity in the Digital World, organized by the Centre for Child Protection of the Pontifical Gregorian University in Rome.

5. On 10 October 2017, the Special Rapporteur and the Special Rapporteur on trafficking in persons, especially women and children, presented their joint report on vulnerabilities of children to sale, trafficking, and other forms of exploitation in situations of conflict and humanitarian crisis, to the General Assembly at its seventy-second session. On 11 October 2017, she participated in a panel discussion on preventing violence against children and helping to focus efforts and track progress on the implementation of target 16.2 of the 2030 Agenda for Sustainable Development, which was organized by the United Nations Children’s Fund (UNICEF), and by the Delegation of the European Union to the United Nations and the Permanent Mission of Uruguay to the United Nations, in New York.

2. Communications

6. Summaries of six communications sent by the Special Rapporteur during the reporting period appear in the communications reports of special procedures.

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1 See A/HRC/37/60/Add.1.
3 For activities of the Special Rapporteur between February and July 2017, see A/72/164.
4 See A/72/164.
III. Study on surrogacy and sale of children

A. Objective, scope and methodology

7. The mandate of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material includes “matters relating to the sale of children”.5 The Special Rapporteur’s last two reports have addressed a “gap” that arose when inadequate attention had been given to issues beyond “the sexual exploitation of children”.6 Hence, the Special Rapporteur’s report to the General Assembly at its seventy-first session focused on the sale of children for the purpose of forced labour7 and her report to the Human Rights Council at its thirty-fourth session focused on illegal adoptions.8

8. The present study addresses a further such “gap”, regarding the sale of children in the context of surrogacy. It is a logical follow-up to the study on illegal adoptions, wherein the Special Rapporteur already noted that “the international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children”.9 The Committee on the Rights of the Child has consistently expressed similar concerns that surrogacy could lead or amount to the sale of children.10

9. The present study therefore examines when surrogacy arrangements constitute the sale of children under international human rights law and as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. It reviews the wide spectrum of policies on surrogacy, in a context where explicit and specific international norms are currently lacking. The study notes the presence of abusive practices in both unregulated and regulated contexts. In order to strengthen the legitimacy and viability of the fundamental norm prohibiting the sale of children, the study provides analysis and recommendations on implementing this prohibition as it relates to surrogacy.

10. “Surrogacy” refers to a form of “third party” reproductive practice in which the intending parent(s) and the surrogate mother agree that the surrogate mother will become pregnant, gestate, and give birth to a child. Surrogacy arrangements generally include an expectation or agreement that the surrogate mother will legally and physically transfer the child to the intending parent(s) without retaining parentage or parental responsibility.11 Surrogacy generally occurs in the context of assisted reproductive technologies — such as in vitro fertilization and embryo transfer for gestational (or full) surrogacy (where the surrogate mother is genetically unrelated to the child) and artificial insemination for traditional (or partial) surrogacy (where the surrogate mother is genetically related to the child). Gametes can also be obtained, by purchase or “donation”, from additional parties who are neither the intending parent(s) nor the surrogate mother, and hence the intending parent(s) may or may not be genetically related to the child.12

11. The analysis of sale of children that is contained in the present study is applicable to both international and national surrogacy, traditional and gestational surrogacy, and commercial and altruistic surrogacy. The study concentrates on the prohibition of sale of

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6 See A/71/261, para. 15.
7 Ibid., para. 16.
8 See A/HRC/34/55.
9 Ibid., para. 52.
10 See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.
12 Ibid. It would also be traditional surrogacy if in vitro fertilization and embryo transfer were used employing the surrogate mother’s eggs.
children and child rights as per international standards and protection issues that arise under contemporary surrogacy practice. The implications of surrogacy for women’s rights is beyond the scope of the present study, except as regards issues that affect both children’s rights and women’s rights, or certain clear rights violations that illuminate regulatory or enforcement issues. The Special Rapporteur echoes the position of other human rights experts who have stated that discrimination against women, through the instrumentalization of their bodies for cultural, political, economic and other purposes, including when rooted in patriarchal conservatism, cannot be accepted.13 The Special Rapporteur encourages other human rights mechanisms and United Nations entities to contribute with further research to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations. Nothing in the present report should be interpreted as a restriction of women’s autonomy in decision-making or of their rights to sexual and reproductive health.

12. The study benefited from contributions by international experts and relevant international organizations. The Special Rapporteur organized an expert meeting on surrogacy in Geneva on 1 November 2017. The Special Rapporteur also participated in an expert meeting on surrogacy convened by the International Social Service in May 2017 at the Department of Law of the University of Verona, Italy. The Special Rapporteur particularly wants to thank members of the core expert group of the International Social Service surrogacy project for contributions in developing the study. The Special Rapporteur has benefited from reviewing the work of the Committee on the Rights of the Child, the Council of Europe and the Hague Conference on Private International Law. The Special Rapporteur has also gained insight from her missions to various countries.

B. Urgent concerns

13. Surrogacy as a reproductive practice is on the rise. Indeed, as intercountry adoptions have fallen in number and increasingly become subject to international standards, the numbers of international surrogacy arrangements have rapidly increased in the absence of international standards.14 Therefore, surrogacy, like intercountry adoption in the 1980s and 1990s, has emerged as an area of concern where a demand-driven system may endanger the rights of children.15 There is also “unease” and concern that “the practice of engaging surrogates in States with emerging economies to bear children for more wealthy intending parents from other States has dimensions similar to those discussed in the preparatory reports on intercountry adoption”16.

14. The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries, including Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have engaged in commercial international surrogacy arrangements with surrogate mothers in developing countries, such as Cambodia, India, the Lao People’s Democratic Republic, Nepal and Thailand.17 However, California and other jurisdictions in the United States are centres for commercial international surrogacy arrangements, as are Georgia, the Russian Federation and Ukraine, creating a different set of

13 See A/HRC/32/44, para. 106 (a).
16 See HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”, para. 5 as well as footnote 28.
17 See Trimmings and Beaumont, p. 472.
cross-border relationships. In addition, intending parents from China frequently engage in commercial surrogacy in South-East Asia and the United States. All of these patterns pose human rights concerns.

15. National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law (i.e. in Australia, Mexico and the United States). The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational. Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit “commercial”, “for-profit” or “compensated” surrogacy, while explicitly or implicitly permitting “altruistic” surrogacy. Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy. Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive practices. However, Georgia, the Russian Federation and Ukraine, and some states in the United States, have for a sustained period of time chosen to remain centres for international surrogacy arrangements.

16. Laws governing surrogacy also vary across a spectrum from extensive to non-existent. Although there are historical antecedents to surrogacy, modern practices are related to the rise of assisted reproductive technologies, which not only offer new reproductive opportunities but also introduce new legal and ethical dilemmas. Hence, it is often said that the law is having difficulty keeping up with developing technologies and practices. Many countries, for example Argentina, Belgium, Guatemala, Ireland and Japan,

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18 Ibid., pp. 311–324, 357–366 and 464–469. See also HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”, footnote 94; and HCCH, “A study of legal parentage and the issues arising from international surrogacy arrangements” (March 2014), para. 130, available at https://assets.hcch.net/docs/bb90cfd2-a66a-46e4-a05b-55f33b309cfc.pdf; and Re D (A Child) (Surrogacy) [2014] EWHC 2121(Fam) (Georgia).

19 See footnotes 22–24 below.


26 See Trimmings and Beaumont, pp. 443–454.


28 See, for example, Chief Federal Magistrate Pascoe, “The rise of surrogate parenting”, twenty-fourth Law Asia Conference, Seoul, Republic of Korea, 10 October 2011, at sect. 6 (quoting Justice
and many jurisdictions in the United States, have thus far failed to enact legislation concerning surrogacy, whether prohibitionist or permissive, leaving courts and competent authorities to develop their own responses to the developing practice of surrogacy. In the absence of surrogacy-specific laws, surrogacy arrangements are often completed using pre-existing laws governing parentage, termination of parental rights and adoption. Those jurisdictions which have legislated more explicitly as to surrogacy vary in the degree of comprehensiveness and clarity. The absence of clear and comprehensive laws addressing surrogacy can lead to unregulated commercial surrogacy developing, with accompanying exploitative practices.

17. Intending parents often travel from jurisdictions prohibiting commercial surrogacy, such as Australia, France or Italy, to jurisdictions permitting commercial surrogacy, and then seek to return with surrogate-born children to their home jurisdiction. Such travel intentionally evades prohibitionist laws and creates dilemmas for the jurisdictions involved. Competent authorities and courts are often placed in the situation of being asked to validate, after the fact, international surrogacy arrangements that are illegal in one or both jurisdictions. The imperative to protect the rights of these surrogate-born children adds to the dilemma. Sympathy for intending parents and their wish to engage in family formation further complicates the issues. Concern for surrogate mothers, especially those who are exercising agency in contexts that often are particularly vulnerable to exploitation due to poverty, powerlessness, a lack of education, and multiple forms of discrimination, sharpens the dilemmas faced by States.

18. International commercial surrogacy networks swiftly move from jurisdiction to jurisdiction as laws change. Indeed, sometimes in vitro fertilization and embryo transfer are conducted in one State, and then the surrogate mother is moved to a second State for the birth, with the intending parent(s) coming from a third State. Hence, the need for the development and implementation of international standards is clear.

19. These unresolved dilemmas have created urgent concerns both for States and for the international community. Some are primarily concerned with the dilemmas and impact on human rights produced when international surrogacy is conducted to evade national prohibitions. Others are primarily concerned with abusive practices that can occur due to the lack of governing international and/or national law. From this perspective, the required solution is international and national legal frameworks that clearly regulate surrogacy.

20. Some recommend legalizing and regulating both altruistic and commercial surrogacy. The hope is that legalization combined with a regulatory framework would protect the rights, dignity and interests of all parties, while avoiding the harms and violations of underground


30 Ibid.

31 See sources cited in footnote 10 above; as well as Trimmings and Beaumont, p. 442; and HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”.


34 See Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam), para. 22, per Justice Hedley.

35 See HCCH — “A study of legal parentage and the issues arising from international surrogacy arrangements”.

36 See Audrey Wilson, “How Asia’s surrogate mothers became a cross-border business”.

37 See HCCH — “A preliminary report on the issues arising from international surrogacy arrangements” and “A study of legal parentage and the issues arising from international surrogacy arrangements”.
or unregulated surrogacy practice. Others argue for prohibiting all forms of surrogacy, based on human dignity concerns, or on the view that surrogacy is inherently exploitative or that in current contexts of power imbalance it is usually exploitative. The most frequently preferred answer, as indicated by State legislation and practice, has been to prohibit commercial surrogacy while permitting altruistic surrogacy, based on the viewpoint that commercial surrogacy commonly commodifies children and exploits surrogate mothers. The inability of the Council of Europe to adopt a position exemplifies the depth of the conflict, as an overwhelming majority favoured either prohibiting commercial surrogacy or prohibiting all surrogacy, and yet ultimately no position was adopted due to the split between those positions.

21. Even if agreement could be reached among the various options regarding prohibition, the issue of “appropriate” regulation is equally divisive. Thus, there are fundamental disagreements on basic regulatory issues — such as determinations of parentage, whether to conduct best interests determinations, regulation of the financial aspects of surrogacy, the status of “surrogate mothers” and even the terminology, implementation of the rights of identity and access to origins, suitability reviews of intending parents, the significance of genetic connections, and the role of contracts and the courts. Thus, even those who argue for legalizing and regulating surrogacy may completely disagree about the appropriate forms of regulation.

22. Amidst this controversy, the present study identifies a safe harbour, in a simple premise: all States are obligated to prohibit, and to create safeguards to prevent, the sale of children. While the imperative to prohibit and prevent the sale of children does not provide answers to all policy debates over surrogacy, it does narrow the scope of permissible approaches.

23. This focus on the prohibition of sale of children responds to the risk that States and the international community would attempt to legalize and normalize the sale of children and other human rights violations when regulating surrogacy. Amidst the demand for governing law, the demand for children, and the influence of a wealthy and growing surrogacy industry, there is a risk that the governing law that is adopted will undermine fundamental human rights. The demand that domestic parentage orders be recognized globally without appropriate restrictions and without consideration of human rights concerns raises the related risk that a minority of jurisdictions with permissive approaches to commercial surrogacy, and with regulations that fail to protect the rights of vulnerable parties against exploitation, could normalize practices globally that violate human rights.

24. Surrogacy, in particular commercial surrogacy, often involves abusive practices. Furthermore, it involves direct challenges to the legitimacy of human rights norms, as some of the existing legal regimes for surrogacy purport to legalize practices that violate the international prohibition on sale of children, as well as other human rights norms. Moreover, many of the arguments provided in support of these legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit. Thus, if this type of governing legal regime becomes accepted, whether as international or national law, or through recognition principles, it would undermine established human rights norms and standards.

25. The international community cannot relinquish gains made in the development of child rights norms and standards, including those developed in the context of adoption. In prior decades, the international community confronted adoption systems which were based on satisfying adult demands for children and were driven by commercial interests and

38 See HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”, para. 18; see also Judge Pascoe 2014 as per footnote 22 above.
financial incentives, and which in practice exploited the vulnerability of birth parents. In response, the international community has insisted that the best interests of the child be the “paramount consideration” in regard to adoption, created standards requiring strict regulation of the financial aspects of intercountry adoption, sought to protect vulnerable birth families, and denied that prospective adoptive parents have a right to a child. Implementation of these norms in relation to adoption has been difficult, but significant progress has been made in terms of standard-setting, monitoring and compliance.

26. Yet, the commercial surrogacy industry and its advocates have insisted that the kinds of systems rejected by the international community in regard to adoption be accepted in regard to surrogacy systems. Hence, the commercial surrogacy industry and its advocates insist that commercial surrogacy be accepted worldwide as a market-based system designed to respond primarily to adult demands for children, whereby parentage is determined primarily by contract. For example, the American Bar Association, which represents over 400,000 attorneys, advocates for commercial surrogacy nationally and internationally. The stance of the American Bar Association is of international significance because it advocates for commercial international surrogacy arrangements and for intermediaries who practise globally.

27. The American Bar Association notes that “it is undeniable that the commissioning of children through surrogacy — for money — represents a market”. The American Bar Association praises this “market”, noting that “market-based mechanisms have allowed international surrogacy to operate efficiently”. The American Bar Association rejects application of the best interests of the child standard to surrogacy, rejects most forms of suitability review and evaluation of parental fitness of intending parents, rejects caps for compensation for surrogate mothers and gamete donors, rejects licensing requirements for surrogacy agencies, rejects rights to birth records or origins information, rejects the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, as a “model for a surrogacy convention”, and rejects bilateral treaties on surrogacy. The American Bar Association states that “any focus on regulating the international surrogacy market itself is misguided”. Indeed, the American Bar Association urges that any international instrument on surrogacy not address human rights concerns; hence, it rejects “regulation of the surrogacy industry for the purpose of reducing human rights violations”. If this position is endorsed, the gains in developing child rights norms

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42 See, for example, Saclier, “Children and adoption”, pp. 12–13; and van Loon, “Report on intercountry adoption”.
43 See the Convention on the Rights of the Child, art. 21.
44 Ibid., art. 21 (d); 1993 Hague Convention, arts. 4 (c) (3), 8 and 32; and HCCH, “Note on the financial aspects of intercountry adoption (2014), available from https://www.hcch.net/en/publications-and-studies/details4/?pid=6310.
45 See the 1993 Hague Convention, art. 4; and Saclier, “Children and adoption”, pp. 12–13.
46 See the Convention on the Rights of the Child, arts. 20–21; the 1993 Hague Convention; and A/HRC/34/55.
47 See https://www.americanbar.org/about_the_aba.html.
48 See American Bar Association report and resolution. It should be noted that the Association does not represent the Government of the United States and that there are both permissive and prohibitionist jurisdictions in the United States. See Joslin, footnote 7.
49 American Bar Association report, p. 9.
50 Ibid., p. 11.
51 Ibid., pp. 15–16.
52 Ibid., pp. 4, 17–18.
53 Ibid., pp. 20–21.
54 Ibid., p. 20.
55 Ibid., pp. 21–22.
56 Ibid., p. 15.
57 Ibid., pp. 4–5.
59 Ibid., p. 1.
60 Ibid., p. 7.
and standards in relation to adoption will be erased, and a new generation of human rights violations will emerge.

28. There are significant differences between adoption and surrogacy, and not all rules applicable to adoption apply to surrogacy. Nonetheless, certain human rights principles are applicable to both, including the prohibition of the sale of children, the best interests of the child as a paramount consideration, the lack of a right to a child, strict regulations and limitations regarding financial transactions, rights to identity and access to origins, and protections against exploitation. The present report focuses on the necessity of maintaining these human rights standards against the pressures created by the large-scale practice of a market- and contract-based form of commercial surrogacy.

C. Abusive practices in surrogacy systems

29. Abusive practices in the context of surrogacy are well documented. Examples include convicted sex offenders from Australia and Israel employing surrogate mothers from India and Thailand, a wealthy Japanese man employing 11 surrogate mothers, leading to the births of 16 infants in Thailand and India, the abandonment of a surrogacy-born infant with disability in Thailand, and the abandonment or sale of “excess” surrogacy-born infants in twin births in India. Commercial surrogacy networks transfer surrogate mothers, sometimes while pregnant, across national borders in order to evade domestic laws; in one case, 15 Vietnamese women were found and freed by Thai authorities, leading to human trafficking charges in the context of a baby-farming scheme.

30. Many of these abuses occur in unregulated contexts, often in cases involving intending parents from Western countries employing for-profit intermediaries to contract with vulnerable surrogate mothers in developing countries. However, abusive practices also occur in purportedly well-regulated commercial surrogacy jurisdictions. For example, two prominent surrogacy attorneys were criminally convicted in a baby-selling ring in California, a centre for international surrogacy arrangements. According to governmental authorities, a prominent surrogacy attorney admitted that “she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over $100,000

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61 See the Convention on the Rights of the Child, art. 35; and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.
62 See the Convention on the Rights of the Child, arts. 3 and 21.
64 See the Convention on the Rights of the Child, art. 21 (d); the 1993 Hague Convention, arts. 4 (c) (3), 8 and 32; and HCCH, “Note on the financial aspects of intercountry adoption”.
65 See the Convention on the Rights of the Child, arts. 7, 8 and 9.
66 Ibid., art. 35; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and the Trafficking in Persons Protocol, of 2000.
69 See [2016] FCWA 17 as per footnote 67 above.
72 See sources cited in footnotes 67–71 above.
The convicted attorney told the local media that, as to abusive practices, she was the “tip of the iceberg” of a “corrupt” “billion-dollar industry”.

Another case from California, *Cook v. Harding*, reveals the intentional regulatory omissions in a regulated commercial surrogacy jurisdiction: “The statute places no conditions on who can serve as a surrogate (beyond requiring that she not be genetically related to the foetuses) or who may solicit the services of a gestational carrier … No minimum levels of income, intelligence, age or ability are required for either the surrogate or the intended parent(s).”

In *Cook*, the surrogacy agency matched a 47-year-old surrogate mother with a 50-year-old single intending father. Three embryos were transferred, leading to a triplet pregnancy. Conflicts arose when the intending father balked at paying the costs of the high-risk triplet pregnancy, and also demanded a reduction abortion. The surrogacy contract contained a common provision that reduction abortion decisions would be made by the intending parent. The surrogate mother refused the reduction abortion. Hence, “C.M.’s attorney informed Cook in writing that, by refusing to reduce, she was in breach of the contract and liable for money damages thereunder”. It is also argued that surrogate mothers who refuse to submit to reduction abortions are liable for monetary damages, including “the cost of medical treatment (for) … a resulting child”.

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

**D. International legal framework**

It is stated in article 35 of the Convention on the Rights of the Child that: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” The phrase “for any purpose or in any form” is significant, and surrogacy is no exception to the article’s prohibitions. Family formation should not be accomplished through “the abduction of, the sale of or traffic in children”.

The prohibition of sale of children is clearly stated in article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Article 2 (a) of that Optional Protocol defines sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. The premise of the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child is that the sale of children is a serious

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77 Ibid., p. 6.


80 Dov Fox, “Surrogacy contracts, abortion conditions, and parenting licenses”.

81 See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.
harm and human rights violation in and of itself, without having to prove any other rights violation under the Convention such as sexual or labour exploitation.\textsuperscript{82}

36. The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, confirms that the prohibitions of article 35 of the Convention on the Rights of the Child and article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography apply to methods of family formation (such as intercountry adoption), stating in its article 1: “The objects of the present Convention are … to establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”

37. The Convention on the Rights of the Child assumes a permissible diversity of State policies on both domestic and intercountry adoption. Hence, some States view both domestic and intercountry adoption as positive methods of family formation, while other States do not provide in their national law for one or both.\textsuperscript{83} The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, makes it clear that regardless of those policy differences, States must create safeguards to prevent the abduction of, the sale of or traffic in children from being used as a means of family formation. This principle also applies to surrogacy. In that respect, the Committee on the Rights of the Child has been consistent in its review of States that are affected by surrogacy, stating that if not properly regulated, surrogacy can constitute sale of children.\textsuperscript{84} Thus, States, regardless of their perspectives on surrogacy, must prohibit, and create safeguards to prevent, the abduction of, the sale of or traffic in children in the context of surrogacy.

\section*{E. Defining commercial surrogacy}

38. One definition of commercial surrogacy, also known as “for-profit” or “compensated” surrogacy, focuses on the contractual and transactional — rather than gratuitous — relationship between the intending parent(s) and the surrogate mother. Hence, commercial surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration.

39. Commercial surrogacy also includes “reimbursement” that goes beyond reasonable and itemized expenses incurred as a direct result of the surrogacy arrangement.\textsuperscript{85} The inference is that payments for unreasonable or non-itemized “expenses” are disguised payment for gestational services and/or transfer of the child.

40. The involvement of for-profit intermediaries is another indication of commercial surrogacy. For the purpose of the present report, intermediaries are defined as parties (persons or organizations/institutions) that bring together intending parents and surrogate mothers, and/or mediate the ongoing surrogacy arrangement — including medical clinics, medical professionals, attorneys, surrogacy agencies or “brokers”. Medical professionals or clinics, and attorneys, receiving reasonable compensation for the professional services necessary to surrogacy, are not necessarily intermediaries, if they do not perform these functions of establishing and mediating the relationship between the intending parents and the surrogate mother. This supplementary definition of commercial surrogacy is necessary because intermediaries often receive the largest profits and create large-scale national and transnational surrogacy markets and networks.


\textsuperscript{84} See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

\textsuperscript{85} See HCCH, “A preliminary report on the issues arising from international surrogacy arrangements”.
F. Surrogacy and sale of children

41. Commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law. As will be described in section IV below, commercial surrogacy may not constitute sale of children if it is closely regulated in compliance with international human rights norms and standards, and in a manner contrary to what exists in many commercial surrogacy regimes. Altruistic surrogacy, too, must be appropriately regulated to avoid the sale of children (see section III (G) (8) below).

42. Under article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, surrogacy arrangements constitute sale of children whenever the surrogate mother or a third party receives “remuneration or any other consideration” in exchange for transferring the child. There are three elements in the definition of sale of children: (a) “remuneration or any other consideration” (payment); (b) transfer of a child (transfer); and (c) the exchange of “(a)” for “(b)” (payment for transfer).

1. First element: remuneration or any other consideration (payment)

43. The receipt or promise of “remuneration or any other consideration” (payment) occurs by definition in all commercial surrogacy arrangements. A promise of future payment would constitute “other consideration”, and hence the element is established even before payments are made. The question of payment in altruistic surrogacy is addressed in section III (G) (8) below.

2. Second element: the transfer of a child (transfer)

44. Transferring a child entails either a legal transfer of the child or physically transferring the child. Legal transfer of the child would include transfer of parentage or parental responsibility. Physical transfer of the child would include the act of one person or group of persons physically turning a child over to another person or group of persons. Physical transfer of the child does not require a legal transfer. The concept of sale of children does not require the transferor to have parentage or legal parental responsibility. A trafficker illicitly sells a child by physically transferring a child in exchange for “remuneration or any other consideration”, even though his or her control of the child is illegal.

45. Legal transfer of a child occurs or is promised in surrogacy arrangements. Women who give birth are generally accorded parentage and parental responsibility at birth under the national law of all States. Indeed, this is a requirement under the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, even in instances where an intercountry adoption is planned. The surrogate mother’s status as a parent at birth is generally recognized in traditional surrogacy arrangements, as the surrogate mother is both the genetic and the gestational mother. Hence, a transfer is necessary for the intending parents to attain parentage.

46. The situation is more complicated as regards gestational surrogacy. Since there is no jurisdiction which generally requires women who give birth to prove a genetic connection to establish parentage, the lack of a genetic connection is not an obstacle to parentage. Indeed, surrogacy advocates do not consider a lack of genetic connection to be a barrier to intending parents establishing parentage, and some surrogacy regimes do not require even one intending parent to be genetically related.

47. Nonetheless, some surrogacy jurisdictions have created legal rules by which gestational surrogate mothers, often relabelled “gestational carriers”, “surrogate carriers” or “gestational surrogates”, lose parentage prior to birth, based upon a contract made prior to

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86 The term “parental responsibility” is based on the Convention on the Rights of the Child (art. 18), and includes the term “custody” used in some jurisdictions.

87 See the 1993 Hague Convention, art. 4 (c) (4).

88 See the American Bar Association report; and the California Family Code, sects. 7960–7962.
embryo transfer.\textsuperscript{89} Under such laws, a valid surrogacy contract effectuates the transfer of the child either by operation of law, or else by pre- or post-birth action by a court or other competent authority, with the court or competent authority obligated to effectuate the transfer so long as the contract itself meets certain minimum standards.\textsuperscript{90} Hence, it is the surrogacy contract, rather than merely being genetically unrelated, that for these surrogacy jurisdictions renders the surrogate mother an unrelated “gestational carrier”.\textsuperscript{91} Under those circumstances, the surrogacy contract itself includes a legal transfer of parentage, or at least a pivotal and irreversible step toward such. The surrogate mother, in signing a surrogacy contract, is participating in a legal transfer of the child. Thus, in \textit{Johnson v. Calvert}, the Supreme Court of California specifically referred to the surrogate mother “contracting away any rights to the child”.\textsuperscript{92}

48. In addition, surrogacy contracts, explicitly or implicitly, include an undertaking by the surrogate mother to cooperate with legal proceedings which ensure that she and her spouse (if applicable) terminate parentage and parental responsibility, and that parentage and parental responsibility legally reside with the intending parents.\textsuperscript{93} In some jurisdictions, the transfer is done prior to the birth, based on the actions of courts or other competent authorities approving the surrogacy arrangement.\textsuperscript{94} Once again, the surrogate mother’s pre-birth actions facilitate the vesting of parentage in the intending parents. Therefore, surrogacy arrangements typically include a promised or actual legal transfer of a child. Legal systems which accomplish the transfer prior to birth do not alter the existence of a legal transfer.

49. Surrogacy arrangements also include a promised or actual physical transfer of the child from the surrogate mother to the intending parent(s). Indeed, some surrogacy contracts seek to contractually or physically restrict the surrogate mother’s freedom of movement in order to ensure control by the intending parent(s) over the child at birth.\textsuperscript{95} Explicitly or implicitly, the surrogate mother is promising in surrogacy arrangements to physically transfer the resulting child to the intending parent(s).

3. Third element: the exchange (payment for transfer)

50. The third and final required element in sale of children is the term “for”, which refers to an exchange: the “remuneration or any other consideration” (payment) must be made “for” the transfer of the child.

51. Commercial surrogacy arrangements typically include this element of an exchange between the payment and the transfer. In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised. If a surrogate mother underwent becoming pregnant, pregnancy, and giving birth, she would not be deemed to have fulfilled her promises and contractual obligations if she refused to participate in the legal and physical transfer of the child to the intending parent(s). While the surrogate mother is paid, in commercial or compensated surrogacy arrangements, for the services of gestating and giving birth to a child, she is also being paid for the transfer of the child. Commercial surrogacy legislation and practice which mandate the enforcement of the surrogacy contract, including specifically the transfer of parentage and parental responsibility,\textsuperscript{96} make it even clearer that the transfer is of the essence of the contract and is a part of the consideration for which the surrogate mother is paid. Thus, under current practice, the third element of an exchange is met in most commercial surrogacy arrangements.

\textsuperscript{89} See Joslin, pp. 3–6 (in the United States: California, Maine and New Hampshire).
\textsuperscript{90} Ibid.
\textsuperscript{91} Ibid.
\textsuperscript{93} Ibid., p. 778.
\textsuperscript{94} See Joslin.
\textsuperscript{96} See Joslin, pp. 3–4.
G. Sale of children in particular contexts

1. Sale of children and time of contracting

52. In California, commercial surrogacy contracts created during pregnancy are viewed as sale of children, but commercial surrogacy contracts signed before embryo transfer are not.97

53. If the distinction is based on the theory that a human being who does not exist, or over whom there is not yet custody, cannot be sold, under such a theory babies could legally be sold for adoption so long as the contract or relinquishment was signed before the pregnancy, leading to legalization of baby-farming schemes. In the commercial world, pre-production orders of goods are common; carrying such practices into the procurement of human beings is in clear breach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Indeed, in a renowned surrogacy case, the creation of the surrogacy contract prior to conception was viewed as indicating a violation of a local law prohibition of the sale of children.98

2. Sale of children and parentage at birth

54. In some jurisdictions, the law defines a genetically unrelated surrogate mother as a mere “gestational carrier”. If a valid pre-embryo transfer contract is entered into, the law regards the “gestational carrier” as not being the mother of the child at birth. Pre-birth procedures are implemented such that the contractual intending parent(s) are listed as the only parent(s) on the original birth document, regardless of whether or not the intending parent(s) are genetically related to the child. Proponents of this kind of approach contend that no sale of children occurs in this legal context, even where commercial surrogacy is concerned, because the “gestational carrier” cannot transfer a child that has never been hers.99 The prior claim, analysed in section III (G) (1) above, that the time of contracting avoids the prohibition of sale of children, is often used in tandem with this argument.

55. This perspective relies on the controversial premise that a woman who gestates and gives birth to a child is no more of a mother than a childcare worker is.100 Such perspectives also rely on the claim that the gestational surrogate mother is never a mother because she is genetically unrelated, which is contradictory to the practice of providing parentage to genetically unrelated intending parents.101

56. However, even if one were to accept such controversial premises and inconsistencies, in some commercial surrogacy jurisdictions it is the surrogacy contract that is primarily determinative as to parentage.102 Hence, the gestational surrogacy contract explicitly and implicitly includes a transfer of parentage, and that transfer is usually a central part of the legal consideration for which the gestational surrogate is paid. Furthermore, the surrogate mother is also paid to give birth in a place accessible to the intending parents, and to physically hand over the child after birth; as stated above, under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography a transfer can exist even if the transferor lacks parentage or parental responsibility.

57. The legal fiction of the “never-a-mother” gestational carrier is a legal concept which is used to justify denial of the surrogate mother’s rights. Once the surrogate mother is reduced, during pregnancy, to a never-a-mother gestational carrier acting for the benefit of intending parents, the door is open to enforcing contracts that purport to alienate her rights and freedoms (e.g. the right to health and the right to freedom of movement).103

97 See footnotes 74–76 above.
99 See Joslin; and Smolin, pp. 311–315.
101 American Bar Association report, pp. 1, 5, 15 and 17.
102 See Joslin; and Johnson v. Calvert.
103 See Joslin; and New Hampshire Revised Statutes Annotated, sects. 168-B:10, B:11 and B:12 (2014).
3. **Sale of children and exclusive parentage**

58. Some claim that intending parents cannot buy “their own” children. However, intending parent(s) at a minimum are paying for exclusivity, so that they will not have to share parentage and parental responsibility with the surrogate mother. In order to achieve this exclusivity, intending parent(s) pay the surrogate mother to release and transfer legal parentage and parental responsibility, as well as to physically transfer the child.

59. The premise that the child is automatically the child of the intending parent(s) is also flawed. It is often the contract or the arrangement that is the basis for parentage in commercial surrogacy jurisdictions, and the contract explicitly or implicitly includes a transfer, as noted in section III (F) above.

4. **Sale of children and the sale of services**

60. Some argue that commercial surrogacy is merely the sale of gestational “services” and not the sale of children. Even though commercial surrogacy includes the sale of gestational services, as the surrogate mother agrees to undergo artificial insemination or embryo transfer, to gestate and to give birth to the child, commercial surrogacy as it is usually practised also includes payment for the legal and physical transfer of the child. In general, the provisions relating to the transfer of the child are of the essence of the agreement, without which the intending parents would neither enter into the agreement nor pay the surrogate mother. Hence, although commercial surrogacy includes the sale of services, it also usually includes the sale of the child.

61. Some try to evade the prohibition on sale of children by inserting into surrogacy agreements a provision stating, in substance, that the parties agree that all payments are for services and none are for the transfer or sale of the child. However, the prohibition on sale of children cannot be avoided by contracts arbitrarily relabelling the sale of children as something else, when in substance the arrangement includes the sale of children.

5. **Sale of children and intermediaries**

62. Intermediaries are often responsible for creating and participating in surrogacy markets, and often receive the largest profits. Where the interactions between the intending parent(s) and the surrogate mother constitute sale of children, intermediaries would normally be complicit, and hence legally responsible, given their intermediary role in establishing and mediating the relationship between the intending parent(s) and the surrogate mother. Prosecutions for sale of children in the context of surrogacy should focus primarily on intermediaries, and, absent exceptional circumstances, they should not include surrogate mothers, who may often be regarded as exploited victims.

63. Intermediaries who physically or legally transfer the child to intending parents in exchange for “remuneration or any other consideration” are directly liable for the sale of the child. Some intermediaries exercise extraordinary physical or legal control over the surrogate mother, and exercise direct control over the surrogate-born child. In such instances, the intermediary may be primarily responsible for the transfer of the child, and thus may be directly liable in appropriate cases for the sale of the child.

6. **Sale of children and the rejection of a “right to a child”**

64. International and regional human rights instruments protect the right to “found a family” or the right to “respect for … private and family life.” The language of a “right to procreate” is used in some national legal systems, though this terminology is not found in international human rights instruments. On bases such as these, it is sometimes argued that all adults are entitled to create a family and raise children. However, it is recognized that there is no “right to a child” under international law. A child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing

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104 See, for example, the International Covenant on Civil and Political Rights, art. 23 (2); the European Convention on Human Rights, art. 8; and the American Convention on Human Rights, art. 17 (2).

105 See, for example, Saclier, “Children and adoption”, pp. 12–13; and Van Bueren, The International Law on the Rights of the Child.
a “right to a child” would be a fundamental denial of the equal human rights of the child. The “right to a child” approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights.

65. In general, advocates for commercial surrogacy are not asking the State to grant them “privacy” in the sense of leaving them alone to conduct their private and family life without State interference. On the contrary, commercial surrogacy advocates seek to enlist the State in enforcing surrogacy contracts in ways that strip children of rights to best interests protections, and rights to identity and access to origins, while simultaneously stripping surrogate mothers of parentage status and autonomy over health-care decisions. Commercial surrogacy advocates seek and sometimes obtain legislation that empowers intermediaries and intending parents at the expense of children and surrogate mothers. Furthermore, the complex networks of contracts and highly paid intermediaries and the financial transactions typically involved in commercial surrogacy arrangements are not the sorts of matters viewed as immune from regulation.

7. Sale of children and the role of regulation

66. Some may agree that unregulated surrogacy can lead to the sale of children, but argue that well-regulated commercial surrogacy systems will not. Similarly, some may suggest that purportedly well-regulated commercial surrogacy systems in developed countries avoid the sale of children, even if international commercial surrogacy systems operating in developing countries often do not.107

67. It is accurate that unregulated commercial surrogacy systems often involve the sale of children, and are subject to abusive practices and rights violations. Thus, the Committee on the Rights of the Child has specifically warned that surrogacy, “if not clearly regulated, amounts to sale of children”.108

68. However, it is not accurate that regulated commercial surrogacy systems avoid the sale of children. Thus, in 2017, the Committee on the Rights of the Child stated, in regard to the United States, that it was “nevertheless concerned that widespread commercial use of surrogacy in the State party may lead… to the sale of children. The Committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage.”109 The Committee’s concern is directly applicable to regulated commercial surrogacy jurisdictions in the United States, which generally have enacted legislation making commercial surrogacy contracts enforceable and determinative as to parentage.110

8. Sale of children and altruistic surrogacy

69. In theory, a truly “altruistic” surrogacy does not constitute sale of children, since altruistic surrogacy is understood as a gratuitous act, often between family members or friends with pre-existing relationships, and often without the involvement of intermediaries. Hence, in theory, altruistic surrogacy is not an exchange of payment for services and/or transfer of a child based on a contractual relationship. However, the development of organized surrogacy systems labelled “altruistic”, which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy. Therefore, labelling surrogacy arrangements or surrogacy systems as “altruistic” does not automatically avoid the reach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and it is necessary to appropriately regulate altruistic surrogacy to avoid the sale of children. Courts or other competent authorities must require all “reimbursements” to surrogate mothers to be reasonable and itemized, as otherwise “reimbursements” may be disguised payments for transfer of the child. Payments

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106 See footnotes 47–60 and 75–80 above.
107 See, for example, Snyder, p. 284.
108 See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.
109 Ibid.
110 See Joslin.
to intermediaries, whether for-profit or not-for-profit, may be considered an indication of commercial surrogacy, and should be reasonable and itemized. There is particular risk when significant reimbursements or payments are made using open-ended categories such as “pain and suffering” or “professional services”.

9. Sale of children and recognition of foreign surrogacies

70. States that prohibit all surrogacies, or commercial surrogacies, often face a situation where their nationals evade their laws by conducting a surrogacy abroad and then seek to bring the child home. Cross-border surrogacies are mostly commercial surrogacies mediated by for-profit intermediaries, and are usually conducted in jurisdictions that permit commercial surrogacy. The State of the intending parents should not assume that such surrogacies are altruistic. Given the risk of sale of children in both regulated and unregulated commercial surrogacies, States generally should not automatically recognize parentage orders or birth records from foreign States in respect of commercial surrogacies, but should review carefully the proceedings abroad. The State of the intending parents is responsible for conducting post-birth best interests determinations, protecting the child’s identity rights and access to origins, and making independent assessments as to parentage, and also for inquiring into the treatment and post-birth consent of the surrogate mother. The State of the intending parents should only grant parentage and parental responsibility to intending parents after such evaluations, based on the best interests of the child. The child must not be punished or discriminated against due to the circumstances of his or her birth, and the rights of surrogate-born children must be protected. The States concerned, namely the State(s) of the intending parents and the State in which the child is born, are responsible for ensuring that statelessness does not occur.

10. Sale of children and post-birth relinquishments

71. The requirement that the surrogate mother have non-exclusive parentage and parental responsibility at birth is necessitated by the norm against sale of children, and protects the rights of the surrogate mother. Nonetheless, where the surrogate mother, after the birth, does not wish to retain parentage or parental responsibility, the best interests of the child require that there be a legal mechanism for transfer of the child. All States are responsible for establishing such a mechanism in surrogacy arrangements, for the post-birth transfer of the child, even if they otherwise do not permit parents to relinquish children or transfer parentage.

IV. Conclusions and recommendations

A. Conclusions

72. Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. Hence, the surrogate mother would be viewed as having satisfied any contractual or legal obligations through the acts of gestation and childbirth, even if she maintains parentage and parental responsibility. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract. If the surrogate mother chose to maintain parentage and parental responsibility, she may be legally obligated to share parentage and parental responsibility with others, including the intending parent(s). However, the surrogate mother would not be obligated to relinquish her own status by the surrogacy arrangement. Any choice by the surrogate mother after the birth to legally and

111 See the cases cited in footnote 32 above.
physically transfer the child to the intending parent(s) must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation.

73. A properly regulated system of commercial surrogacy would also provide necessary protections for children, including post-birth individualized best interests of the child determinations, appropriate suitability reviews of intending parents, and protections of rights of origin and access to identity. For the protection of all parties, it is appropriate to conduct screenings and reviews of surrogacy arrangements prior to pregnancy, but pre-birth processes cannot be conclusive as to parentage and parental responsibility, which can only be determined upon appropriate review after the birth. Similarly, appropriate protections of surrogate mothers, consistent with retaining the status of mother at birth, would include retention of rights of informed consent in regard to all health-care decisions, and freedom of movement and travel — including the principle that such rights cannot be alienated by contract. Appropriate regulation of the financial and medical aspects of surrogacy, and strict regulation of intermediaries, would also be necessary.

74. Commercial surrogacy is currently practised in jurisdictions where even genetically unrelated surrogate mothers retain parentage at birth (e.g. the Russian Federation). In addition, surrogacy practitioners claim that in some jurisdictions lacking surrogacy laws they practise commercial surrogacy relying on pre-existing rules related to parentage, termination of parental rights, and adoption, resulting in post-birth voluntary transfers by the surrogate mother to the intending parent(s) and post-birth parentage orders. In addition, commercial surrogacy advocates claim that relatively few surrogate mothers change their mind and seek to retain parentage and parental responsibility after birth, making the risks to intending parents of surrogate mothers retaining parentage at birth rather limited. Indeed, a prominent commercial surrogacy attorney found that intending parents changed their minds significantly more often than surrogate mothers. Thus, current practice indicates that commercial surrogacy can be practised under legal regimes that retain the traditional rule that the woman who gives birth is the mother at birth, and which implement appropriate post-birth procedures for transfer. Certainly, practising commercial surrogacy in unregulated environments remains highly risky and is not recommended.

75. In order to fulfil their obligation to prohibit, and create safeguards to prevent, the sale of children in the context of surrogacy, States should prohibit commercial surrogacy until and unless a proper regulatory system, which includes a clear and comprehensive legal framework, is put in place as described above. Such an approach responds to the premise that the transfer of the child is of the essence of the commercial surrogacy arrangement and therefore is a part of the consideration for the payment to the surrogate mother. It is possible for States to strictly regulate and permit commercial surrogacy without involvement in the sale of children, if they clearly enact, and enforce effectively, regulations as indicated in the present conclusions and recommendations. States should not adopt commercial surrogacy regulations based on obligatory or automatic enforcement of surrogacy contracts and accompanying pre-birth parentage orders, for such would make the States complicit in authorizing practices that constitute the sale of children.

76. Similarly, as regards altruistic surrogacy, where permitted, States should appropriately regulate the practice to prevent the sale of children and respect the international prohibition in that regard, for example by requiring that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to review by courts or other competent authorities.

B. Recommendations

1. At the national level

77. The Special Rapporteur invites all States to:

(a) Ratify the Convention on the Rights of the Child and its three Optional Protocols;

(b) Adopt clear and comprehensive legislation that prohibits the sale of children, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in the context of surrogacy;

(c) Create safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;

(d) Create safeguards to prevent the sale of children in the context of altruistic surrogacy, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);

(e) Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination, which should be the paramount consideration;

(f) Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority conducts an appropriate and non-discriminatory suitability review of the intending parent(s), either prior to or after the birth or both;

(g) Closely regulate, monitor and limit the financial aspects of all surrogacy arrangements, with a requirement for full disclosure of the financial aspects of all surrogacy arrangements to the court or competent authority reviewing the surrogacy arrangement;

(h) Regulate all intermediaries involved in surrogacy arrangements, in regard to the financial aspects, relevant competencies, use of contractual arrangements, and ethical standards;

(i) Regulate the medical aspects of surrogacy arrangements to ensure the health and safety of the surrogate mother and child, including by placing appropriate limits on the number of embryos transferred to a woman at one time;

(j) Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;

(k) Focus any criminal or civil penalties for illegal surrogacy arrangements primarily upon the intermediaries;

(l) Collect, analyse and share comprehensive and reliable data, and conduct qualitative and quantitative research studies, on surrogacy arrangements and their impact on human rights, to ensure that accurate information is available, and facilitate
the monitoring and evaluation of surrogacy systems, services and outcomes in order to develop appropriate human rights-compliant measures.

2. At the international level

78. The Special Rapporteur invites the international community to:

(a) Support the work of the Hague Conference on Private International Law, in particular in relation to its study of private international law issues related to the legal parentage of children, including in the context of international surrogacy arrangements;

(b) Ensure that any international regulation developed in regard to surrogacy, or in regard to legal recognition of parentage in international surrogacy arrangements, focuses on both private international law and public international law, providing in particular for the protection of the rights of the child, of surrogate mothers and of intending parents, and recognizing that there is no “right to a child” in international law;

(c) Ensure that any international regulation addressing recognition of parentage in international surrogacy arrangements, or addressing recognition of foreign judicial decisions on parentage, or other foreign determinations on parentage, also includes appropriate public policy exceptions barring recognition where the foreign legal system does not adequately protect the rights of the child or the surrogate mother, and provide appropriate post-birth review in cross-border commercial surrogacies in order to prevent the sale of children;

(d) Support the work of the International Social Service in developing international principles and standards governing surrogacy arrangements that are in accordance with human rights norms and standards and particularly with the rights of the child;

(e) Work cooperatively to ensure the protection of the rights of surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, which should include protection of the best interests of the child and prevention of statelessness;

(f) Encourage other human rights mechanisms, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities to contribute, with further research, to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations.
THE CONSTITUTIONALITY AND ENFORCEABILITY OF CARRIER AGREEMENTS

INTRODUCTION

The Supreme Court of the United States has long held that there is a constitutional right to procreate. However, most courts have not addressed whether that includes a right to assisted reproduction technology (“ART”) if a couple has infertility issues or is in a same sex relationship. Some state courts have said that the constitutional right to procreate applies equally to assisted reproduction, but the only federal court to address the issue has claimed that ART is too new (at over 30 years old) to be included in the constitutional right to procreate. This must change. The fundamental right to parent is also well established. Courts have even asserted that gestational surrogacy agreements promote the fundamental right to have families by enabling infertile couples to raise their own children. This premise of a fundamental right to parent has led the highest European court, overseeing countries where surrogacy is banned, to insist that children born through surrogacy be given basic human rights, such as the right to have a parent and to be citizens of the country from which their genetic parent comes.

The courts of the United States support the right to contract and are loath to question that right unless there is a legal or other invalidity (such as fraud, duress or coercion). In fact, the state-wide support of surrogacy is so strong that, in validating the carrier agreement and certifying parentage, most states will not even consider the best interests of the children. It is my position that overlooking the child’s best interests is wrong. Any time agencies, lawyers, or courts look to place a child in a home, even a genetic child of one or both parents, they must consider the best interests of the child above all else. At least one court has so indicated and found an agency potentially liable for failing to screen an intended parent before allowing a surrogacy to proceed. It is also my belief that the more the legal system in this country mandates screening of intended parents, in the same way it is done in adoption, the more acceptable surrogacy will become worldwide.

DISCUSSION

A. The Constitutional Right to Procreate Should Apply to Assisted Reproduction

It has long been established that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes a number of fundamental rights. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967)(right to marry); Meyer v. Nebraska, 262 U.S. 390 (1923)(right to direct the education of one’s children); Griswold v. Connecticut, 381 U.S. 479 (1965)(right to marital privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972)(right to use contraception); Rochin v. California, 342 U.S. 165 (1952)(right to bodily integrity); Roe v. Wade, 410 U.S. 113 (1973)(constitutional right of privacy encompasses a woman’s decision whether or not to terminate her pregnancy.) Among these fundamental rights protected by the Constitution is the right to procreate. In 1942, the United States Supreme Court held that the “right to have offspring” is “one of the basic civil rights of man.” Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”). In Stanley v. Illinois, the Supreme Court reiterated that the rights “to conceive and to raise one's children have been deemed ‘essential.’” 405 U.S. 645, 651 (1972). State courts have held similarly. The Florida Supreme Court, for example, explained that the fundamental right to have children is a right “so basic as to be inseparable from the rights to ‘enjoy and defend life and liberty, (and) to pursue happiness.’” Grissom v. Dade Cnty., 293 So.2d 59, 62 ( Fla.1974) (quoting art. I, § 2, Fla. Const.).
The common law was developed before the scientific advancements in reproductive technology, but the fundamental right to procreate is the same. The Florida Supreme Court embraced scientific advances and easily extended the *Skinner* holding to modern infertility assistance:

Although the right to procreate has long been described as “one of the basic civil rights” individuals hold, *Skinner*, 316 U.S. at 541, 62 S.Ct. 1110, advances in science and technology now provide innumerable ways for traditional and non-traditional couples alike to conceive a child and, we conclude, in so doing to exercise their “inalienable rights ... to enjoy and defend life and liberty, [and] to pursue happiness.” Art. I, § 2, Fla. Const.; see *Grissom*, 293 So.2d at 62.

*D.M.T. v. T.M.H.*, 129 So.3d 320, 338 (Florida 2013) (emphasis supplied). The 1987 New Jersey Supreme Court reached the same conclusion: “The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination.” *In re Baby M*, 109 N.J.396, 537 A.2d 1227, 1253 (1988).

Surprisingly, the Eleventh Circuit Court of Appeals refused to extend *Skinner’s* constitutional right to procreate to an intended parent, holding that there is no fundamental right to “procreate via an IVF process that necessarily entails the participation of an unrelated third-party egg donor and a gestational surrogate.” *Morrissey v. United States*, 871 F.3d 1260, 1269 (11th Cir. 2017) (male taxpayer's asserted right to reproduction assisted by in vitro fertilization (IVF) and surrogacy was not a fundamental right, and thus strict scrutiny did not apply to taxpayer's claim that IRS violated his equal protection rights by denying income tax deduction for IVF-related expenses). The *Morrissey* decision raised surprisingly little chatter in the surrogacy arena and largely appears to be viewed as a tax court decision. In fact, the very first sentence in the decision says “This is a tax case.” *Id.* at 1262. To date, it has not been cited or followed for the proposition that an intended parent using assisted reproduction does not have a fundamental right to procreate.¹

The Eleventh Circuit correctly observed that “fundamental rights” are those “deeply rooted in this Nation’s history and tradition.” *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (describing a two-part fundamental rights analysis where to be considered a fundamental right a practice must “objectively, deeply rooted in this Nation’s history and tradition” and carefully refined)). The Eleventh Circuit veered off in its analysis, however, with its conclusion that procreation by Assisted Reproductive Technology is simply too new to qualify as a fundamental right:

History and tradition provide no firm footing—let alone “deep[ ] root[ing]”—for the right that underlies Mr. Morrissey’s claim. To the contrary, IVF, egg donation, and gestational surrogacy are decidedly modern phenomena. Indeed, not all that long ago, IVF was still (literally) the stuff of science fiction. *See* Aldous Huxley, *Brave New World* 1 (1932) (“‘And this,’ said the Director opening the door, ‘is the Fertilizing Room.’”). The first IVF-assisted human birth didn’t occur until 1978, and

¹ In 2018, the Iowa Supreme Court conducted a careful analysis of surrogacy agreements. The Iowa Supreme Court quoted *Morrissey v. United States*’ description of advances in fertility assistance, did not mention or refer to the *Morrissey* holding that an intended parent did not have a fundamental right to procreate, and went on to hold that “this gestational surrogacy contract is legally enforceable.” *P.M. v. T.B.*, 907 N.W.2d 522, 525 (Iowa 2018).
it wasn't until the mid to late 1980s that doctors began to use gestational surrogates in conjunction with IVF procedures.

Id. at 1269. Perhaps the Morrissey Court forgot that surrogacy is about as “deeply rooted” as you can get. See Genesis 16:2 (“And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.”); Genesis 30:3 (“And [Rachel] said, Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her.”) Or perhaps the Court wished to set the nonsensical precedent that advances in medical science should take away fundamental rights.

The Court of Appeals continued its attempt to justify its denial of Mr. Morrissey’s fundamental right to procreate by explaining that states have different laws and different approaches for surrogacy and if the court were to confer “fundamental” status on Mr. Morrissey’s right to procreate via IVF-and-surrogacy-assisted reproduction, it would effectively remove the issue from the state and legislative arenas. Morrissey v. United States, supra, 871 F.3d at 1270. But this is precisely what federal courts are supposed to do: protect individual constitutional rights from state infringement. At present, all but two of the United States have permitted some form of compensated surrogacy and bills are before the houses of these states to authorize this practice. Once the practice is authorized in all fifty states it will be impossible to deny people their inalienable right to procreate in this fashion. But the federal courts do not need to await a fifty state wide acceptance, any more than the Supreme Court required in Obergefell, when it authorized gay marriage when only thirty-six of the fifty states were supportive, and some of the states had even passed laws refusing to give full faith and credit to gay marriages performed in other states. See Obergefell v. Hodges, 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). The capacity to have children through gestational surrogacy is 30 years old. It is imperative that the constitutional right to procreate extend to persons who need surrogates in order to bear children. D.M.T. v. T.M.H., supra at 338.

B. Constitutional Right to Parent Supports Enforcement of Surrogacy Agreements and is in the Child’s Best Interest.

Separate and apart from the constitutional right to procreate, is the right to parent your child. Whether or not the Eleventh Circuit can support its decision that assisted reproduction technology is too recent to be “deeply rooted in this Nation’s history and tradition” and, therefore, does not support a right to procreate, there is no question that once the baby is born, the right to parent that child is fully supported by age-old Supreme Court precedent. The Supreme Court has expressed this right in various ways:

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.” Lehr v. Robertson, 463 U.S. 248, 256 (1983).

A “parent's desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’” Lassiter v. Dept of Soc. Servs.,452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651(1972)).

The 2018 Iowa Supreme Court relied upon this inherent right in holding a surrogacy agreement enforceable:
The United States Supreme Court has consistently recognized that a parent’s ‘care, custody, and control’ of a child is a fundamental liberty interest given the greatest possible protection.” *F.K. v. Iowa Dist. Ct.*, 630 N.W.2d 801, 808 (Iowa 2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 65–66, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000)).

*P.M. v. T.B.*, *supra*, 907 N.W.2d at 542.

State courts have consistently held that this fundamental right to parent belongs to the intended parents, not to the surrogate, as “but for” their acted-on intention, the child would not exist. *P.M. v. T.B.*, *supra*, 907 N.W.2d at 539; *In re Paternity of F.T.R.*, 349 Wis.2d 84, 833 N.W.2d 634, 647 (2013); *Johnson v. Calvert*, 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776, 782 (1993). State courts have recognized that this innate right to parent, is not simply for the benefit of the intended parents. It promotes the “sanctity and stability of the family.” *P.M. v. T.B.*, *supra*, at 539 (citing *Tyler v. Iowa Dep’t of Revenue*, 904 N.W.2d 162, 168 (Iowa 2017)). As a result, “gestational surrogacy agreements promote families by enabling infertile couples to raise their own children and help bring new life into this world through willing surrogate mothers.” *Id.* (emphasis original). Even in the case of traditional surrogacy, the Wisconsin Supreme Court held:

> [e]nforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child’s life.


Significantly, European courts have also recognized the fundamental rights of parenting and raising children born to surrogates. For instance, the UN Convention on the Rights of the Child (CRC) instructs that a child shall be registered immediately after birth and has the right from then on to a name, nationality, and to know and be cared for by his or her parents. *See* CRC, Art. 7(1). The European Convention on Human Rights (ECHR) likewise protects the right of each individual for private and family life. *See* ECHR, Art. 8.

Recent decisions by the ECHR recognize that it is in the best interest of children to be considered the legal children of their intended parents. In *Mennesson v. France*, the French authorities refused to acknowledge birth certificates according to The French Register of Births, Marriages and Deaths, despite judgments given in the US that the intended parents were the children’s legal parents. The ECHR Court found that the children’s rights to respect for their private life were violated. Because nationality and the right to inheritance are relevant elements of identity, the state’s action was irreconcilable with the best interests of the child principle. Consequently, the state was obliged to legally recognize a parent-child relationship established abroad and to grant those children French citizenship. *Mennesson v. France*, App. No. 65192/11 (Eur. Ct. H.R. June 26, 2014). Being a decision by the ECHR, this then meant that all 47 member countries had to give citizenship to children born through surrogacy. The Supreme Court of Germany also recently recognized the right to respect for private and family life and prioritized the best interests of a child born through a surrogate over the ban on the practice within the country. *See* Supreme Court of Germany Decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13). The right to parent your child and raise your child within your family, therefore is timeless, without boundaries, and is well supported by state constitutions, the U.S. Constitution, international treaties, and international legal precedent.
C. Fundamental Right to Contract Supports Enforceability of Surrogacy Agreements and Promotes Human Rights

The Ninth Circuit Court of Appeals recently rejected a constitutional challenge to surrogacy agreements, stating that “we do not believe that [the California Supreme Court] would have held that the surrogacy contract in Calvert was consistent with public policy if it believed that the surrogacy arrangement violated a constitutional right.” *Cook v. Harding*, 879 F.3d 1035 (9th Cir. 2018) (quoting *C.M. v. M.C.*, 7 Cal.App.5th 1188, 213 Cal.Rptr.3d 351, 370 (2017), cert denied, 139 S. Ct. 72 (2018)). In the vast majority of states that uphold surrogacy arrangements, the courts turn to principles of freedom of contract between consenting adults. The Iowa Supreme Court explained surrogacy as follows:

In general terms, surrogacy “is the process by which a woman makes a choice to become pregnant and then carry to full term and deliver a baby who, she intends, will be raised by someone else.” *In re Paternity of F.T.R.*, 349 Wis.2d 84, 833 N.W.2d 634, 643 (2013) (quoting Thomas J. Walsh, *Wisconsin’s Undeveloped Surrogacy Law*, 85-Mar. Wis. Law. 16, 16 (2012))... An “intended parent” is “an individual, married or unmarried, who manifests the intent... to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.” *Id.* (quoting Model Act Governing Assisted Reproductive Technology (ABA Model Act). § 102(19) (Feb. 2008)).

*P.M. v. T.B.*, 907 N.W.2d 522, 525 (Iowa Supreme Court 2018) (quoting *In re Paternity of F.T.R.*, 833 N.W.2d at 643 (emphasis supplied)).

It seems to me that the Iowa and Wisconsin Supreme Courts got it exactly right. Even though the Wisconsin court was looking at traditional surrogacy and the Iowa court was looking at gestational surrogacy, the analysis is the same. Attention to the very simple and fundamental elements of an agreement between a surrogate and the intended parents will prevent the issues that critics raise in opposition to surrogacy. When a “woman makes a choice” it necessarily means that she is not being taken advantage of and is not being exploited. When the intended parents manifest the intent “to be legally bound as the parent” of the child, it reinforces the goal of a family unit, of the best interests of the child, and defeats any argument that the child is being commodified.

1. Surrogacy Agreements Are Enforceable and Binding

When courts examine a surrogacy agreement, it starts with the premise that a “contractual agreement is binding on the parties.” *P.M. v. T.B.*, 907 N.W.2d at 537 (quoting *Water Dev. Co. v. Lankford*, 506 N.W.2d 763, 766 (Iowa 1993)). Although it is correct that the courts do have the power to invalidate a contract based upon public policy, this power “must be used cautiously and exercised only in cases free from doubt.” *Thomas v. Progressive Cas. Ins.*, 749 N.W.2d 678, 687 (Iowa 2008) (quoting *Grinnell Mut.Reins. v. Jungling*, 654 N.W.2d 530, 540 (Iowa 2002)). The party claiming the contract is contrary to public policy bears the burden of proof. *Walker v. Gribble*, 689 N.W.2d 104, 111 (Iowa 2004). In upholding the surrogacy agreement, the Iowa Supreme Court reiterated that “[t]o strike down a contract on public policy grounds, we must conclude that ‘the preservation of the general public welfare... outweigh[s] the weighty societal interest in the freedom of contract.’” *P.M. v. T.B.*, 907 N.W.2d at 538 (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003)).

Due to the fundamental rights discussed previously, courts addressing the issue almost uniformly hold that surrogacy agreements are not barred by public policy. See, e.g., *P.M. v. T.B.*, 907 N.W.2d at 525; *In re Baby S.*, 128 A.3d 296, 296 (PA 2015); *In re Paternity of F.T.R.*, 833 N.W.2d at 652 (2013);
Even the 1988 Baby M case was not particularly negative about the enforceability of surrogacy contracts. The New Jersey Supreme Court simply held that the courts would not enforce a traditional surrogacy contract in the absence of legislative authorization. In re Baby M, 109 N.J.396, 537 A.2d 1227, 1264 (1988). While concluding that New Jersey’s “present laws do not permit the surrogacy contract used in this case” the court held “the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional restraints.” Id. at 1264. As we know, the New Jersey legislature has now taken that step. New Jersey Gestational Carrier Agreement Act, N.J.S.A. 9:17-60, et seq., effective May 30, 2018.

Some states specify by statute what the carrier agreement needs to contain to be enforceable. California Section 7962 establishes a procedure for a summary determination of parental rights when specific requirements for an enforceable surrogacy agreement are met. The section requires that an “assisted reproduction agreement for gestational carriers” contain: (1) the date on which the agreement was executed; (2) the identity of the persons “from which the gametes originated, unless anonymously donated”; (3) the identity of the “intended parent or parents”; and (4) disclosure of how the “intended parents” will “cover the medical expenses of the gestational carrier and of the newborn or newborns.” (§ 7962, subd. (a)(1)–(4).) The section also requires that the surrogate and the intended parent be represented by separate counsel with respect to the agreement; that the agreement be executed and notarized; and that the parties begin embryo transfer procedures only after the agreement has been fully executed. (§ 7962, subds. (b)–(d).) Other states have no statutory guidelines. In either situation, the Courts will conduct a careful analysis of the Surrogacy Agreement and the circumstances of the parties. The Iowa Supreme Court spent four (4) pages describing the agreement between the parties and the events leading up to its execution. The Wisconsin Supreme Court did similarly.

The important point here is that the terms of the contract and the circumstances of the negotiation and execution are important. The contracting and negotiating process are what protect the surrogate from any kind of overreaching. With her own counsel, the court can be satisfied that entering the agreement is the surrogate’s choice. The negotiation, and contracting process will ensure that the surrogate is fully informed and will enable her to choose whether she wants a transfer of one or two embryos, how she feels about termination, selective reduction, and C-section. It will allow the carrier to manifest her choice that the child be raised by the intended parents.

2. Women Have the Capacity to Enter into Surrogacy Agreements

No one contends that women lack the constitutional right to become pregnant and to carry the pregnancy as gestational carriers. Choices “concerning contraception, family relationships, procreation, and childrearing” “are protected by the Constitution” and are “among the most intimate [decisions] that an individual can make.” Obergefell v. Hodges, 135 S.Ct. 2584, 2599 (2015). Non-compensated or altruistic surrogacy is permitted in most states, some foreign countries, and is endorsed by many critics of surrogacy. It is only when compensation is involved that critics suggest that women do not possess the agency, autonomy, or intellect to decide to enter into a surrogacy agreement. This is a colossal insult to women as the Calvert court explained:

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.
19 Cal.Rptr.2d 494, 851 P.2d at 785. Courts have continued to reject the view that surrogacy agreements unfairly exploit women. See, e.g., P.M. v. T.B., 907 N.W.2d 522, 525 (Iowa 2018); C.M. v. M.C., 7 Cal.App.5th 1188, 213 Cal.Rptr.3d 351, 370 (2017) (relying on Calvert, 19 Cal.Rptr.2d 494, 851 P.2d at 785).

As noted, the Baby M case was focused on the lack of legislative authority, rather than any large scale conclusion that women would be exploited. It was the Michigan Court that started the fear-based jurisprudence that “Women in the lower economic strata could well become ‘breeding machines’ for infertile couples of the upper economic brackets.” Doe v. Atty. Gen., 194 Mich.App. 432, 487 N.W.2d 484 (1992). Yet even the Doe Court agreed that not all “surrogate mothers will feel exploited.” The Court “can conceive of instances where the surrogate may derive a great deal of satisfaction from being able to assist an infertile couple in having a child.” Id. at 439-440. The Michigan court concluded:

The fact remains, however, that there is a danger of women being exploited by these surrogacy-for-profit arrangements and the protection of women from that danger warrant government intrusion.

Id. at 440. The Michigan court presented no authority for its conclusion (the Michigan presently has a bill before its legislature to make surrogacy legal); nor has any court since. The court in Calvert expressed that, “[a]lthough common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.” Calvert, supra, 5 Cal.4th at p. 97. 19 Cal.Rptr.2d 494, 851 P.2d 776. More generally, “[t]he limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.” Id.

Women in some states are being denied their constitutional right to enter into commercial surrogacy agreements because of unsupported conclusions that there is a potential that they will be exploited. They can do it in some of those states for free, though. The irony is overwhelming. Women can only prove that they are not being exploited when they do something for free, rather than for payment for their services. How absurd! Women’s constitutional rights are protected, not by eliminating their right to enter into surrogacy agreements and not by removing compensation for their services, but by taking the necessary steps to ensure that when a woman is a surrogate, she “makes a choice to become pregnant and then carry to full term and deliver a baby who, she intends, will be raised by someone else.”

3. Enforceable Surrogacy Agreements Do Not Commodify Children

Critics of surrogacy claim that the payment of compensation implies that the children being created thereby are being treated as mere commodities. To be sure, human rights violations exist in the

2 It is vital to emphasize that by contending that surrogacy agreements should be enforced, we are not suggesting that all surrogacy agreements will automatically be upheld. As the Iowa Supreme Court made clear:

We do not foreclose the possibility that a surrogacy agreement in a particular case could be subject to specific contract defenses, such as fraud, duress, or unconscionability.

P.M. v. T.B., 907 N.W.2d at 540. This will always be the case.
surrogacy industry, even in the United States. Attorney Theresa Erickson pled guilty to being part of a baby-selling ring that deceived the Superior Court of California and prospective parents. Attorney Erickson submitted false pleadings to obtain pre-birth orders, when in fact Erickson and her conspirators had used surrogates to create an inventory of unborn babies that they would sell for over $100,000 each. They accomplished this by paying women to become implanted with embryos in overseas clinics. Once in the second trimesters, Erickson and her conspirators offered the babies to prospective parents, falsely telling them that they were the result of legitimate surrogate arrangements, of which the original intended parents had backed out. https://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html. As horrible as this is, it proves that abusers of surrogacy are prosecuted and put in jail in the United States.

The federal indictment against Erickson is not an indictment of the industry. The entire point of surrogacy, that Erickson violated, is that the carrier agreement must be put in place before the embryonic transfer. When the “intended parent” is “an individual, married or unmarried, who manifests the intent ... to be legally bound as the parent” (P.M. v. T.B., supra, 907 N.W.2d at 525) the child’s rights are respected and the intended parents are accomplishing their fundamental rights to procreate and parent their children. Courts have rejected critics’ arguments that payment to the surrogate under such scenarios amounts to the purchase of a child. The terms of the Surrogacy Agreement can and should make clear that payments are intended to reimburse the surrogate for pregnancy related expenses. See, e.g., R.R. v. M.H., 426 Mass. 501, 689 N. E. 2d 790, 796 (1988). Other states have declared payment is to compensate her for her time and services in gestating the fetus. See, e.g., P.M. v. T.B., 907 N.W.2d at 536 (intended parents’ payment was for surrogate’s “gestational services rather than for her sale of a baby”); In re Baby, 447 S.W.3d 807, 819–20 (Tenn. 2014) (surrogate is paid to help create a child, not to ‘sell’ one she is already carrying); Calvert, 19 Cal.Rptr.2d 494, 851 P.2d at 784 (explaining that the payments to the surrogate mother “were meant to compensate her for her services in gestating the fetus and undergoing labor”).

D. Human Rights Concerns Can Be Addressed By Focusing on the Best Interests of the Children.

Much of the concerns we hear about human rights violations exist when surrogacy is addressed in international settings. The Permanent Bureau of the Hague Conference on Private International Law reported, for example, that the vast majority of concerns about human rights violations through, among other things, inadequate medical care for the surrogates and the children relate to India, Thailand, and Ukraine. See PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, A Study of Legal Parentage and Issues Arising From International Surrogacy Arrangements, Preliminary Document No. 3, March 2014, at 141. Surrogates in India have been severely disadvantaged, separated from their families during their pregnancy, with virtually no contact with the intended parents. They are coerced into surrogacy through payments that are many times the national average annual income. This is precisely the kind of surrogacy that we should discourage our clients and others from engaging in.

The Theresa Erickson case indicates that we need to police our own practices. But not just with respect to international baby selling enterprises. We need to do so with each set of intended parents to protect newborns. In 1994, bank analyst James Alan Austin, paid Noel Keane's Infertility Center of America in Indianapolis $39,000 to find him a surrogate mother to inseminate with his sperm. Five weeks after the baby was born and turned over to Austin, he beat the boy to death. Austin later pleaded guilty to third-degree murder and endangering the welfare of a child. He said he shook the baby and beat him with a plastic coat hanger when the baby would not stop crying. Phyllis Ann Huddleston, of Lafayette, Ind., who carried the baby for Austin, sued Austin and the Infertility Center over the death.
The court held that “a business operating for the sole purpose of organizing and supervising the very delicate process of creating a child, which reaps handsome profits from such endeavor, must be held accountable for the foreseeable risks of the surrogacy undertaking because a ‘special relationship’ exists between the surrogacy business, its client-participants, and, most especially, the child which the surrogacy undertaking creates.” 700 A.2d at 460. The court held that the criminal act was foreseeable and that, as a result, the surrogate stated a prima facie cause of action of negligence against the surrogacy agency. Id.; accord Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992) (surrogacy agency owes surrogate and child an affirmative duty of protection from foreseeable risks based upon the existence of a special relationship between them).

One step that we can take to promote the welfare of surrogacy in the United States is to have surrogacy track more the age old, long tested, and worldwide respected legal process of adoption. By so doing, it would require, among other things, proof that the parents are the right people to parent the child and that the legal recognition of their rights is in the child’s best interests. Some courts have already recognized that the best interests of the child should be considered (at least in the instance of traditional surrogacy). The Wisconsin Supreme Court, for example, held that a traditional surrogacy contract was enforceable without enabling legislation “unless enforcement is contrary to the best interests of the child.” In re Paternity of F.T.R., 833 N.W.2d at 638

Nevertheless, most gestational surrogacy has been treated by the courts as very different than adoption or custody proceedings. In re Paternity of F.T.R., 833 N.W.2d at 646 (“[A]doption is distinctly different than surrogacy. Adoption often occurs in circumstances where the parent cannot or will not care for the child. Substantial court oversight is necessary in a voluntary-[termination-of parental-rights]-and-adoption scenario to ensure that the biological parents have consented to the [termination of parental rights] after being informed of the consequences thereof. In contrast, surrogacies are planned, and the intended parents want the child and are willing and able to care for the child.”). According to these courts, surrogacy addresses the issue of parentage, which is separate from the question of custody. As a result, the courts addressing gestational surrogacy have been unwilling to look at the best interests of the child or permit a surrogate to deny intended parents the right to their children based on a newly formed decision that they are unfit.

The California appellate court explained:

Permitting a surrogate to change her mind about whether the intended parent would be a suitable parent—or requiring a court to rule on whether the intended parent’s conduct subsequent to executing an assisted reproduction agreement is appropriate for a prospective parent—would undermine the predictability of surrogacy arrangements. We agree with the observation of the federal court in Harding, supra that, were M.C.’s position to be accepted, we are “at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, ‘decide’ that the intended parent or parents are not up to snuff and challenge their parenting abilities in court.”

[W]hat a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver's licenses. What questions, one wonders, would appear on the written test?’

*Harding, supra,* 190 F.Supp. 3d at 932, fn. 9 (quoting *J.R. v. Utah,* 261 F.Supp. 2d 1268, 1298, fn. 29 (D. Utah 2002)).

But the US attitude toward surrogacy, where the predictability of contracts takes precedence over the best interests of the child, has largely been rejected by other countries and there has yet to be a universal acceptance of surrogate parenting arrangements through the Hague Convention or any other international body. This would dramatically change in many countries if surrogacy were subject to court approval in both the US and the home country as is the case with adoption. Adoption has universal acceptance. Why? Because in any instance in which third parties are involved in assisting parents to have children, determining the psychological and physical well-being of the intended parents and the home they offer is a critical job of psychologists and social workers before the transfer of legal rights is permitted. It helps to ensure that children are placed in a home that is physically safe, emotionally supportive and fiscally secure for them.

I know from practicing in this field for a quarter century that my attitude toward surrogacy has long been the subject of disdain by professionals who either consider their job to help infertile couples have children or to make the legal process for securing children born through surrogacy more simple. They do not feel it is their job to screen these people as they are simply effectuating their desires to have children that fertile couples could do without any screening. We have an obligation as social workers and lawyers and even as agency heads in a still unlicensed field to do something more than make money, or even protect intended parents from “crazy” surrogates or donors. We have to protect children from unfit parents. Making the best interests of the child paramount in this field will not only dramatically improve its acceptance worldwide, it will prevent endangerment to children.

We, as agencies, can be more proactive in the screening stage to conduct the appropriate background checks on intended parents. We should screen their support systems and evaluate their home life. A workable solution may be that we assume that all our intended parents will be matched with carriers in Utah. We can use the Utah statute as a model of what every intended parent needs to prepare before parentage is adjudicated. In Utah, in addition to background checks, the courts require a home study, a letter from a mental health profession, and letters of reference. Utah Code Ann. § 78B-15-801 (2008). If we, as surrogate agencies and professionals, agree to this type of heightened screening method for intended parents, it would promote confidence worldwide that all of the intended parents engaged in surrogacy in the United States have been fully screened in order to protect the best interests of the children.

**CONCLUSION**

Surrogacy is not a violation of human rights. If properly done, someone can give their knowing consent to this process as to any contractual process. Despite concerns expressed in some cases about taking advantage of lower income women and capitalizing on their financial impoverishment, there is no evidence that this is occurring in the United States and proper representation by independent counsel will ensure that a surrogate’s interests are protected. The child is well protected in the surrogacy situation, as

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3 Again, the absurdity of this statement is clear. What more important incidence could there be than the placement of a child to provide testing of the intended parents. This is done daily in adoption and the testing is well known, involving home studies by social workers among other things.
even the European Convention of Human Rights has found that it is a violation of human rights to deprive children born through this process of the rights of having parents or of being a citizen of their parents’ countries. Focusing on the best interests of the child should be a key element of surrogacy. Through this change in focus, surrogacy would more closely track adoption. We would thereby make sure only to help intended parents who had already been screened psychologically and their home deemed a good and safe home for the children before allowing them to begin a surrogacy journey. This would likely make US surrogacy more acceptable worldwide and more protective of the rights of children and surrogate mothers, who should be our principal concern.