

SURROGACY, AUTONOMY, AND EQUALITY

DISCUSSION LEADERS

DOUGLAS NEJAIME, REVA SIEGEL, AND DAPHNE BARAK-EREZ

IV. SURROGACY, AUTONOMY, AND EQUALITY

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Surrogacy has become a relatively common practice around the world, with an increasing number of couples and individuals turning to surrogacy to have children. The vast majority undertake gestational surrogacy, in which the woman serving as the surrogate bears a child to whom she is not genetically related. Instead, donor eggs or the eggs of the intended mother are used in the *in vitro* fertilization (IVF) process. The

sperm usually comes from the intended father, though donor sperm may be used in some cases.

For some different-sex couples, gestational surrogacy provides an opportunity to have a child genetically related to both the intended mother and father. A woman who has viable eggs, but cannot carry a pregnancy, can create an embryo with her own eggs and her partner's sperm—and then have the embryo transferred to a woman serving as a surrogate. Even when different-sex couples use donor eggs, surrogacy usually offers the opportunity to have a child genetically related to the intended father.

Surrogacy also affords a path to parenthood for same-sex couples and single people. When male same-sex couples have children through surrogacy, they usually use sperm from one of the men. Some couples create multiple embryos, some with the sperm of one of the men and some with the sperm of the other, so that each has a genetic child. Some couples combine their sperm so that they do not know to which man the child is genetically related. Procedures such as these reveal some of the tensions that surrogacy, as it is practiced today, presents. Surrogacy offers the opportunity to have a genetic child. Yet it regularly involves donor gametes. The practice seems at once to solidify and destabilize the priority of genetic ties.

Laws that prohibit or regulate surrogacy present a variety of constitutional questions. Do courts enforcing contracts for surrogacy violate women's rights, or do women have liberty or equality rights to engage in surrogacy? Are women's interests protected by banning surrogacy, or by allowing and carefully regulating the practice? (Is there one answer to that question, or might it vary over time, or by class, or culture?) What are the autonomy and privacy interests of those seeking to have children through surrogacy? Does a government that permits surrogacy have a constitutional obligation to provide equal access—so that unmarried people and same-sex couples as well as married couples can have children through surrogacy? When people travel across borders to enter into surrogacy arrangements, whose law determines the status of the parties involved?

Surrogacy is like and unlike other forms of assisted reproduction. It uniquely involves another woman gestating the child for nine months. For this reason, it has garnered more controversy than practices of gamete donation and IVF. The fact that a woman deliberately gestates a child she does not intend to raise creates unease, as it so fundamentally violates the role-expectations for pregnant women, who are understood to have duties as mothers. That a woman may choose to carry a child for another *for money* creates special concern, including urgent questions of human rights. Is reproductive labor a commodity which a woman can sell like most other forms of labor—or is it more akin to sex, which most still believe should not be commodified? Is compensation for surrogacy for the surrogate's services or instead for the child, and if so, might the transaction amount to baby-selling? (For some, restricting *commercial*, or compensated, surrogacy, and allowing only *altruistic* surrogacy mitigates concerns

about the appearance of women profiting from care work and the legitimacy of financial transactions involving parentage or children.)

Others see women as capable of making their own personal and economic choices under appropriate background conditions, and surrogacy as potentially empowering, because it enables women to enter into altruistic and remunerative relationships that may enrich their lives and their families' lives. Others may wish to give women some measure of control over the compromises they make in the struggle to support themselves and their families. Even for those who see surrogacy as degrading, why should women be prohibited from serving as surrogates yet allowed to engage in various forms of degrading, low-wage work? With appropriate regulation, should women be given the choice to serve as surrogates?

These questions raise competing views of women's status and autonomy, and thus present concerns of constitutional dimension. Should we allow women to decide whether and when to bear a child, including whether and when to enter into surrogacy agreements, just as we might with respect to contraception and abortion? Is the decision to enter such agreements, against traditional role-expectations for women, an expression of a woman's privacy, role-autonomy, and equality? Or, does surrogacy degrade women by taking advantage of poor women's destitution and treating them as "reproductive vessels"? Is the woman's consent to serve as a surrogate, in all cases, uninformed and coerced? Or is the prohibition of surrogacy an expression of paternalism that reinscribes traditional views about women's roles and decisional competence, symbolically and practically entrenches women's subordination, and threatens their emancipation in other contexts?

Can the woman who acts as a surrogate truly appreciate the experience of surrendering the child such that her consent to the arrangement is informed and voluntary? How could a woman acting as a surrogate not form an attachment with the child that is parental in nature? Are these concerns mitigated by the practice of gestational surrogacy, which unlike traditional (or "genetic") surrogacy does not involve the egg of the surrogate? Is the child a gestational surrogate carries not "her child" because she has no genetic connection? Can a surrogacy agreement be regulated in ways that take account of these concerns—or do they count as reasons, on balance, to ban the practice? In weighing the case for and against different forms of surrogacy, note how many of the underlying social judgments rest on norms and beliefs that are in flux. In what ways are social judgments about peoples' reasons for entering into the arrangements evolving, and why?

Consider this dynamic from another vantage point. Can jurisdictions with young children in need of adoption ban the practice of surrogacy? Or should these jurisdictions nonetheless allow the practice because they respect a potential parent's wish to have a child genetically related to themselves or their partner?

What kinds of families does surrogacy make possible? In what ways does surrogacy reproduce the “natural family,” and in what ways does surrogacy disturb the “natural family”? Does the practice affirm the importance of men’s bloodlines, or does it present new, emancipatory opportunities for “families we choose”? Or might it do both?

Will the practice of surrogacy persist even if banned—with women laboring and families formed outside the shadow of the law—and if so what bearing does that have on the question of regulation?

Which way do children’s interests point? Are children harmed by surrogacy? Do they suffer psychological harm, and if so, why? Because their existence arose from a commercial transaction? Because they have been separated from their “birth mother”? Do the interests of children justify banning the practice? If would-be parents evade such bans to have children through surrogacy in other jurisdictions, how should the resulting child’s interests be weighed? Does the child now have independent interests in citizenship, family recognition, and parental relationships that outweigh the government’s interest in restricting surrogacy?

Concerns about autonomy, equality, child welfare, commodification, and coercion will depend on how surrogacy is structured and regulated, and thus shape the social meanings of the practice.

Courts, legislatures, and human rights tribunals have faced these concerns in disputes over surrogacy. Judges have considered whether bans on surrogacy safeguard or undermine constitutional and human rights; whether forms of regulation that governments have undertaken comply with constitutional requirements and human rights principles; and how the practice of surrogacy across borders implicates state sovereignty, constitutional principles, and human rights norms.

Across legislative enactments and judicial decisions, we see that jurisdictions across the globe have responded to surrogacy in various ways. Some criminalize the practice. Criminalization may entail punishing third-party brokers, punishing those commissioning surrogates to have children, or punishing the women acting as surrogates. What are the practical effects of banning the practice? How do individuals determined to have children respond to such bans?

Other jurisdictions prohibit surrogacy not as a criminal but as a civil matter, thus refusing to recognize such arrangements in their family law systems or to treat surrogacy contracts as enforceable. In some of these jurisdictions, if all parties abide by the arrangement, they may be able to achieve their ends by having the woman who gives birth to the child relinquish her rights and allow the intended parent(s) to adopt the child. But if the woman who serves as the surrogate changes her mind, the law may offer the intended parents no recourse.

Many countries have retreated from such restrictive approaches. Today, many jurisdictions, including a growing number of states in the United States, allow and regulate surrogacy (namely, gestational surrogacy). They provide clear guidance on who may enter a surrogacy arrangement, what the arrangement must entail, and what parentage determinations follow from a compliant surrogacy arrangement.

Regulation varies along the following dimensions, raising questions of autonomy and equality for the women who act as surrogates and the individuals who seek to have children through surrogacy:

- whether surrogacy can be compensated or only altruistic;
- the role of genetics—including the forms of surrogacy permitted (must the surrogate be genetically unrelated to the child?), as well as the requirements imposed on would-be parents (must one of the intended parents contribute genetic material?);
- the status-based criteria that govern those who can have children through surrogacy—for example, whether the practice is limited to only married different-sex couples or also includes same-sex couples and single people;
- the healthcare decision-making authority of the woman serving as surrogate, including the right to terminate the pregnancy;
- the parentage determinations that follow from surrogacy—whether the woman who serves as the surrogate is the legal mother or whether the intended parents are the legal parents by operation of law; and
- the degree to which the state is willing to subsidize this process or related IVF procedures.

The forms of regulation are relevant to considering whether and how surrogacy promotes or undermines autonomy, privacy, and equality.

While many countries have acted either expressly to restrict or expressly to allow and regulate surrogacy, many other countries have done very little. They maintain neither criminal or civil prohibition, nor a permissive system of regulation. In some of these countries, surrogacy thrives as an industry.

Many who live in countries where surrogacy is banned or severely restricted evade the law. Those seeking to have children engage surrogates in more permissive jurisdictions—either where the practice is heavily regulated or scarcely regulated at all. The movement across borders for surrogacy (what some term “reproductive tourism”) has raised important questions of law and policy. How should courts and legislatures assign citizenship and family statuses to persons in surrogacy relationships formed

outside the country to evade domestic law? Does the child's citizenship run with the woman who acted as a surrogate or with the intended parents? Who are the legal parents—the woman who gave birth or the intended parents? Which jurisdiction's law matters in making such determinations—the jurisdiction where the child was born or the jurisdiction to which the intended parents return with the child? To what degree should the state take into consideration the ability or inability of citizens to have access to surrogacy in other countries? Recognizing, and denying, these parental relationships present multifaceted constitutional questions. They also squarely present the rights and interests of the children born through surrogacy. And they implicate critical questions of sovereignty for jurisdictions that continue to prohibit the practice.

We begin with perspectives on surrogacy across borders, and we return to these questions at the end of the chapter. The intervening sections focus on the shifting social meaning and legal status of surrogacy and the forms of regulation that have developed to address the practice—regulation that implicates constitutional guarantees and human rights.

SURROGACY AS A TRANSNATIONAL PHENOMENON

Many jurisdictions ban surrogacy—or allow some individuals (e.g., married, different-sex couples) but not others (e.g., same-sex couples, unmarried couples, and single people) to form families through surrogacy. Individuals and couples seeking to have children through the banned practice then travel to jurisdictions where it is allowed to evade the constraints of law. Others may travel across borders for financial, rather than legal, reasons. Even when the home country permits surrogacy, costs of the practice may be far lower abroad. This dynamic presents questions of exploitation, inequality, and geopolitics. The following excerpts provide various perspectives on surrogacy across borders. The excerpts illustrate how a once rare practice has become increasingly widespread and may call for new forms of judicial response.

The Baby Business Booms

Carolyn Schurr (2018)*

For 50,000 US\$, you can either go through four cycles of *in vitro* fertilization (IVF) in a U.S.-American fertility clinic or 10 IVF cycles in an Ukrainian clinic catering to reproductive tourists, buy yourself the oocytes of an Ivy-League egg donor, or travel to Mexico for a surrogate baby gestated by a Mexican surrogate laborer. . . . [E]conomic *geographies* underwrite the global fertility market. The consumption of the same reproductive technologies and services has not only a different cost in different places. Some technologies and services are only legal at certain places; other places restrict the

* Excerpted from Carolyn Schurr, *The Baby Business Booms: Economic Geographies of Assisted Reproduction*, 12 GEOGRAPHY COMPASS e12395 (2018).

access to certain reproductive technologies to particular populations, denying, for example, single or homosexual people access to IVF treatment, oocyte donation, or surrogacy. Access to assisted reproductive technologies is highly unequal both within and between nation states. In general, wealthier, urban, heterosexual, married, and White(r) people living in the Global North have better access to assisted reproductive technologies than poorer, rural, homo- and transsexual, single, and non-White people in the Global South and the Global East and ethnic minorities in the Global North. . . .

. . . The more recent history of the global surrogacy market is characterized by fast changes: In the last 5 years, the major global surrogacy hotspots such as India, Thailand, Nepal, Mexico, and Cambodia have all faced comprehensive legislative changes to contract a surrogate, resulting in either a total ban of commercial surrogacy (Thailand, Nepal, and Cambodia) or severe restrictions limiting the legal options to married and heterosexual national citizens (India and Mexico). . . .

Discussions about whether to conceptualize surrogate mothers' and oocyte donors' reproductive service as an altruistic act or a form of labor . . . intermingle in complex ways . . . according to the context in which the surrogacy arrangement takes place. [Empirical studies of surrogacy in various locations highlight this complexity.] In the . . . United States, . . . financial and altruist motivations to donate oocytes or gestate a baby are co-constitutive. Unlike U.S. surrogates, who can be rejected from surrogacy programs if they are not financially secure, . . . surrogates in Israel state unapologetically that money is their primary goal in pursuing surrogacy in order to supplement their income to pay off huge debts and provide for their children's basic needs. Nevertheless, they often transform their contractual relationship into a gift relationship during the surrogacy process. Surrogate workers in Mexico have deeply incorporated the industry's rhetoric of altruism and gift while openly admitting that economic needs are the main driver to engage in surrogacy. . . . Russian surrogates consider any affective involvement . . . as dangerous and hence prefer to "do it business style." . . . [M]etaphors of gift giving are absent from the narratives of Indian surrogates as the surrogates emphasize surrogacy as "majboori" (something we have to do to survive). . . . [H]owever, . . . affective ties and exchanges of gifts of food, medication, and money characterize the relationship between the Indian surrogates, the recruiting agent who is usually known to the women, and the hospital staff. . . . Framing surrogacy either as an altruistic act or as a new form of labor has important implications not just for the way it is perceived socially but also with regard to the women's rights to reclaim their wage . . . as well as their capacities to fight for their labor rights and working conditions including health and social securities. . . .

The racialized geographies of clinical labor are . . . more complex than often suggested by media when it comes to the gestational surrogates. . . . [I]n the United States . . . , for example, . . . despite early warnings that surrogacy could result in the exploitation of women of color, this appears not to be the case . . . , as surrogacy is "largely the terrain of white women." . . .

In the last decade, mostly non-White women have catered to the international and national clients consuming in South Asia's surrogacy hotspots in India, Nepal, Thailand, Cambodia, and Laos. Since the increasing regulation and closure of many of the South Asian hotspots after 2015, however, it is mainly White Caucasian women in Ukraine, Georgia, and Russia who carry the global babies to term. Experts estimate that demand for surrogacy alone in Ukraine has increased by 1,000% in the last 2 years. My own research in Ukraine has revealed that many women are drawn into surrogacy as a result of the rapid fall in living standards in consequence of the deep recession resulting from the ongoing conflict in Eastern Ukraine with Russia. This last example highlights once more that there is a particular geography to the global surrogacy market in which surrogacy hotspots do not emerge randomly but as a result of wider geopolitical constellations. . . .

100 Babies Stranded in Ukraine After Surrogate Births

Andrew E. Kramer (2020)*

The babies lie in cribs, sleeping, crying or smiling at nurses, swaddled in clean linens and apparently well cared for, but separated from their parents as an unintended consequence of coronavirus travel bans. Dozens of babies born into Ukraine's booming surrogate motherhood business have become marooned in the country as their biological parents in the United States and other countries cannot travel to retrieve them after birth. For now, the agencies that arranged the surrogate births care for the babies.

Authorities say that at least 100 babies are stranded already and that as many as 1,000 may be born before Ukraine's travel ban for foreigners is lifted. "We will do all we can to unite the children with their parents," Albert Tochilovsky, director of BioTexCom, the largest provider of surrogacy services in Ukraine, said in a telephone interview. . . . Ukraine does not tally statistics on surrogacy, but it may lead the world in the number of surrogate births for foreign biological parents, Mr. Tochilovsky said. His company alone is awaiting about 500 births. Fourteen companies offer the service in Ukraine.

Ukraine is an outlier among nations, though not alone, in allowing foreigners to tap a broad range of reproductive health services, including buying eggs and arranging for surrogate mothers to bear children for a fee. The business has thrived largely because of poverty. "The cheapest surrogacy in Europe is in Ukraine, the poorest country in Europe," BioTexCom's website explains. Surrogate mothers in Ukraine typically earn about \$15,000. . . . The business has depended on the careful choreography of births and travel, disrupted now by the virus. For a time at least, the babies in their cribs are citizens of no country. Under Ukrainian law, the newborns share the citizenship of their

* Excerpted from Andrew E. Kramer, *100 Babies Stranded in Ukraine After Surrogate Births*, NEW YORK TIMES (May 16, 2020).

biological parents, but the parents must be present for foreign embassies to confirm that status. . . .

Mr. Tochilovsky said doctors and caregivers now live at a company-owned hotel in Kyiv together with the babies, feeding them formula, taking them for walks and showing them to parents in video calls, all while in quarantine to protect against infection. As of Saturday, 60 babies were at the hotel. The parents of 16 of them were also present, having arrived before the lockdowns or having found a way in afterward. . . . “We know a lot of you are sitting at home with the same anxiety and worries that we had,” Maria Tangros, a Swedish mother who managed to get to Kyiv on a private plane, said in another video published on BioTexCom’s website. Parents, she said, are “panicking how to get here.” The babies’ parents are now in the United States, Italy, Spain, the United Kingdom, China, France, Romania, Austria, Mexico and Portugal, the company said.

Lyudmila Denisova, a human rights ombudsman for Ukraine’s Parliament, said the stranded babies underscore a pressing need for the country to bar foreigners from hiring Ukrainian women as surrogate mothers. . . . Olha Pysana, an official with one company, World Center of Baby, said that surrogacy is safe and provides an irreplaceable service to infertile couples. “We believe people are searching for a scandal out of nowhere,” Ms. Pysana said. “All the children are genetically linked to the parents. Unfortunately, because of Covid, the parents are just not here in Ukraine.”

* * *

After failing to have a child through assisted reproduction and foreign adoption, Italian nationals Donatina Paradiso and Giovanni Campanelli pursued gestational surrogacy. Because surrogacy is banned in Italy, Paradiso traveled to Russia with Campanelli’s semen. According to Paradiso, a gestational surrogate gave birth to a child conceived with a donor egg and her husband’s sperm. Back in Italy with the child, Paradiso and Campanelli applied to their municipal authority to register the birth. The authorities refused after the intended mother conceded the child was born through a surrogacy agreement, and a DNA test showed that the intended father was not actually the genetic father of the child—presumably because of the Russian clinic’s error. The Italian authorities removed the child and placed him with a foster family.

In 2015, the Second Section of the European Court of Human Rights (ECtHR) determined that the Italian authorities had violated Paradiso and Campanelli’s right to family life protected by Article 8* of the European Convention on Human Rights

* Article 8 of the European Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

(ECHR). But in 2017, in the decision excerpted below, the Grand Chamber overruled the decision of the Second Section.

Paradiso and Campanelli v. Italy
European Court of Human Rights (Grand Chamber)
No. 25358/12 (2017)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Luis López Guerra, *President*, Guido Raimondi, Mirjana Lazarova Trajkovska, Angelika Nußberger, Vincent A. De Gaetano, Khanlar Hajiyev, Ledi Bianku, Julia Laffranque, Paulo Pinto de Albuquerque, André Potocki, Paul Lemmens, Helena Jäderblom, Krzysztof Wojtyczek, Valeriu Griţco, Dmitry Dedov, Yonko Grozev, Síofra O’Leary, *judges*[:]

. . . 141. The provisions of Article 8 do not guarantee either the right to found a family or the right to adopt. The right to respect for “family life” does not safeguard the mere desire to found a family; it presupposes the existence of a family, or at the very least the potential relationship

148. . . . The Court accepts, in certain situations, the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties. . . .

151. It is therefore necessary . . . to consider the quality of the ties, the role played by the applicants *vis-à-vis* the child and the duration of the cohabitation between them and the child. . . . [T]he applicants had developed a parental project and had assumed their role as parents *vis-à-vis* the child. They had forged close emotional bonds with him in the first stages of his life, the strength of which was . . . clear from the report drawn up by the team of social workers following a request by the Minors Court.

152. . . . [T]he applicants and the child lived together for six months in Italy, preceded by a period of about two months’ shared life between the first applicant and the child in Russia. . . .

156. Although the termination of their relationship with the child is not directly imputable to the applicants . . . , it is nonetheless the consequence of the legal uncertainty that they themselves created . . . by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child. The Italian authorities reacted rapidly to this situation by requesting the suspension of parental authority and opening proceedings to make the child available for adoption

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

157. Having regard to the above factors, namely the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considers that the conditions enabling it to conclude that there existed a *de facto* family life have not been met. . . .

161. . . . [T]here is no valid reason to understand the concept of “private life” as excluding the emotional bonds created and developed between an adult and a child in situations other than the classic situations of kinship. This type of bond also pertains to individuals’ life and social identity. In certain cases involving a relationship between adults and a child where there are no biological or legal ties the facts may nonetheless fall within the scope of “private life.” . . .

163. . . . [T]he applicants had a genuine intention to become parents, initially by attempts to conceive via *in vitro* fertilisation, then by applying for and obtaining formal approval to adopt, and, lastly, by turning to ova donation and the use of a surrogate mother. A major part of their lives was focused on realising their plan to become parents, in order to love and bring up a child. . . . [W]hat is at issue is the right to respect for the applicants’ decision to become parents, and the applicants’ personal development through the role of parents that they wished to assume *vis-à-vis* the child. . . .

177. . . . The Court regards as legitimate under Article 8 § 2 the Italian authorities’ wish to reaffirm the State’s exclusive competence to recognise a legal parent-child relationship—and this solely in the case of a biological tie or lawful adoption—with a view to protecting children. . . .

194. . . . [T]he facts of the case touch on ethically sensitive issues—adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood—in which member States enjoy a wide margin of appreciation

202. . . . [I]n Italian law descent may be established either through the existence of a biological relationship or through an adoption respecting the rules set out in the law. [The Italian government] argued that . . . the Italian legislature was seeking to protect the best interests of the child as required by Article 3* of the Convention on the Rights of the Child. . . . [B]y prohibiting private adoption based on a contractual

* Article 3 of the UN Convention on the Rights of the Child provides:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. . . .

relationship between individuals and restricting the right of adoptive parents to introduce foreign minors into Italy to cases in which the rules on international adoption have been respected, the Italian legislature is seeking to protect children against illicit practices, some of which may amount to human trafficking.

203. . . . [Surrogacy] raises sensitive ethical questions on which no consensus exists among the Contracting States. By prohibiting surrogacy arrangements, Italy has taken the view that it is pursuing the public interest of protecting the women and children potentially affected by practices which it regards as highly problematic from an ethical point of view. This policy is considered very important . . . where . . . commercial surrogacy arrangements are involved. That underlying public interest is also of relevance in respect of measures taken by a State to discourage its nationals from having recourse abroad to such practices which are forbidden on its own territory. . . .

208. . . . [T]he child is not an applicant in the present case. In addition, the child was not a member of the applicants' family within the meaning of Article 8 of the Convention. This does not mean however, that the child's best interests and the way in which these were addressed by the domestic courts are of no relevance. . . . Article 3 of the Convention on the Rights of the Child requires that "in all actions concerning children . . . the best interests of the child shall be a primary consideration," but does not however define the notion of the "best interests of the child."

209. . . . [T]he domestic courts . . . had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption. . . .

215. . . . Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case.

216. It follows that there has been no violation of Article 8 of the Convention. . . .

Joint Concurring Opinion of Judges de Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov[:]

. . . 3. . . . [T]he links between the applicants and the child were established in violation of Italian law. . . . The applicants concluded a contract commissioning the conception of a child and his gestation by a surrogate mother. . . . It is not acceptable to

invoke detrimental effects resulting from one's own illegal actions as a shield against State interference. . . .

7. . . . According to the Committee on the Rights of the Child, surrogacy without regulation amounts to the sale of the child.

. . . [R]emuneration gestational surrogacy, whether regulated or not, amounts to a situation covered by Article 1* of the Optional Protocol to the Convention on the Rights of the Child and is therefore illegal under international law. We would like to stress . . . that almost all European States currently ban commercial surrogacy.

More generally, . . . gestational surrogacy . . . is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother. Modern medicine provides increasing evidence of the determinative impact of the prenatal period of human life for that human being's subsequent development. Pregnancy, with its worries, constraints and joys, as well as the trials and stress of childbirth, create a unique link between the biological mother and the child. From the outset, surrogacy is focused on drastically severing this link. The surrogate mother must renounce developing a life-long relationship of love and care. The unborn child is not only forcibly placed in an alien biological environment, but is also deprived of what should have been the mother's limitless love in the prenatal stage. Gestational surrogacy also prevents development of the particularly strong bond which forms between the child and a father who accompanies the mother and child throughout a pregnancy. Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the [European] Convention [on Human Rights]. Gestational surrogacy is particularly unacceptable if the surrogate mother is remunerated. We regret that the Court did not take a clear stance against such practices.

Concurring Opinion of Judge Dedov[:]

. . . There could be many arguments in favour of surrogacy, based, for example, on the concepts of a market economy, diversity and solidarity. Not everyone is capable of using their intellect, as this requires considerable intellectual efforts and life-long learning It is much easier to earn money using the body, especially if one takes into account that strong demand exists for bodies for the purpose of surrogacy This could help to resolve unemployment problems and to reduce social tensions. . . .

However, we face a millennial dilemma here: human beings will survive through natural adaptation, requiring compromise with human dignity and integrity, or they will

* Article 1 of the Optional Protocol to the Convention on the Rights of Child on the Sale of Children, Child Prostitution, and Pornography provides:

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

try to achieve a new quality of social life for all, which would overcome the need for such compromise. The concept of fundamental rights and freedoms requires implementing the second option. . . .

. . . Surrogacy would not be a problem at all if it were used on rare occasions, but we know that it has become a big and lucrative business for the “third world.”

. . . I do not believe in surrogate motherhood as a voluntary and freely-provided form of assistance for those who cannot have children

The statistics and the facts of the surrogacy cases examined by this Court demonstrate that surrogacy is carried out by poor people or in poor countries. The recipients are usually rich and glamorous. Moreover, the recipients usually participate in or decisively influence the national parliament. Moreover, it is extremely hypocritical to prohibit surrogacy in one’s own country in order to protect local women, but simultaneously to permit the use of surrogacy abroad.

Again, this is another contemporary challenge for the concept of human rights: either we create a society which is divided between insiders and outsiders, or we create a basis for worldwide solidarity; we create a society which is divided between developed and undeveloped nations, or we create a basis for the inclusive development and self-realisation for all; we create a basis for equality or we do not. The answer is clear. . . .

Joint Dissenting Opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev[:]

. . . 11. . . . We do not intend to express any opinion on the prohibition of surrogacy arrangements under Italian law. It is for the Italian legislature to state the Italian policy on this matter. However, Italian law does not have extraterritorial effects. . . . [W]e have some difficulty with the majority’s view that the legislature’s reasons for prohibiting surrogacy arrangements are of relevance in respect of measures taken to discourage Italian citizens from having recourse abroad to practices which are forbidden on Italian territory. . . . [T]he relevance of these reasons becomes less clear when a situation has been created abroad which, as such, cannot have violated Italian law. . . . [I]t is also important . . . that the situation created by the applicants in Russia was initially recognised and formalised by the Italian authorities through the consulate in Moscow. . . .

12. . . . [T]oo much weight has been attached to the need to put an end to an illegal situation (in view of the laws on inter-country child adoption and on the use of assisted reproductive technology) and the need to discourage Italian citizens from having recourse abroad to practices which are forbidden in Italy. These interests were simply not those that the [Italian] Court of Appeal sought to pursue.

Transnational surrogacy arrangements often involve an agreement between intended parents from the Global North and surrogates from the Global South. In response to issues raised by surrogacy across borders, a number of countries, such as India, Nepal, and Mexico, have taken measures to ban commercial surrogacy and restrict the practice to their nationals.

In 2014, controversies over the practice of surrogacy in Thailand emerged. An Australian couple contracted with a surrogate in Thailand to carry and deliver children. During the course of the pregnancy, the parties involved learned that one of the twin babies (Baby Gammy) would be born with Down syndrome. Although the Australian parents brought Baby Gammy's twin sister home to Australia, they left Baby Gammy in Thailand. This caused immense hardship for the surrogate and the child, and resulted in international outcry. Partially in response to this controversy, Thailand passed the Protection of a Child Born by Medically Assisted Reproductive Technology Act.

**Protection of a Child Born by Medically Assisted
Reproductive Technology Act
Thailand (2015)**

... CHAPTER III SURROGACY

Section 21[:] . . . [A]n operation of surrogacy shall at least comply with the following conditions;

(1) lawful husband and wife, when a wife is unable to carry [a] pregnancy, intending to have a child by surrogacy, shall hold Thai nationality. In the case where a husband or a wife does not hold Thai nationality, the registration of their marriage shall not be less than three years; . . .

(3) a surrogate mother shall be [a] blood relative of the lawful husband or wife under (1), in the case where there [is] no blood relative of the lawful husband or wife, other woman may undergo the surrogacy

Section 22[:] An operation of surrogacy under this Act may proceed with [the] two following methods;

(1) to use an embryo formed from sperm of [the] lawful husband and an oocyte of [the] lawful wife intending to undertake the surrogacy;

(2) to use an embryo formed from [the] sperm of [the] lawful husband or an oocyte of [the] lawful wife intending to undertake the surrogacy and [a donor's] oocyte or sperm; provided that an oocyte of a surrogate mother shall not be used. . . .

Section 24[:] No person shall operate the surrogacy for commercial benefits. . . .

Section 27[:] No person shall act as an intermediary or an agent and demand, accept or agree to accept any property or benefit as a remuneration for arranging or suggesting to undertake the surrogacy. . . .

CHAPTER VI PENALTIES . . .

Section 48[:] Any person who violates section 24 shall be liable to imprisonment for a term not exceeding ten years and to a fine not exceeding two hundred thousand baht [(about 6150 USD)].

Section 49[:] Any person who violates section 27 . . . shall be liable to imprisonment for a term not exceeding five years and to a fine not exceeding one hundred thousand baht [(about 3075 USD)] or to both. . . .

EARLY CONCEPTIONS OF SURROGACY

Conflict over surrogacy in the United States erupted in the late 1980s when a surrogacy dispute from New Jersey, *In re Baby M*, 537 A.2d 1227 (N.J. 1988), captured the nation's attention. A married couple, William and Elizabeth Stern, had arranged to have Mary Beth Whitehead be inseminated with William's sperm and deliver a baby that the Sterns would raise. (Elizabeth Stern had been diagnosed with multiple sclerosis, and William Stern, a Holocaust survivor, felt compelled to have a biological child.) When Whitehead changed her mind and refused to surrender the child, the courts got involved. While the trial court found the surrogacy agreement valid, the New Jersey Supreme Court disagreed and ruled that such agreements were unenforceable as against public policy. Accordingly, William Stern was the legal father and Mary Beth Whitehead was the legal mother, so each would have claims to custody and visitation. Elizabeth Stern, without a biological connection to the child, would remain a legal stranger, even though she would essentially be parenting the child with the legal father, as the child's stepmother. While the court found that Whitehead was the legal mother, it gave primary custody of the child to the Sterns. The court explained its conclusion:

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child.

As *Baby M* demonstrates, at this early time, the paradigmatic scene of surrogacy involved a married heterosexual couple in which the wife was infertile. The woman serving as a surrogate would be inseminated with the husband's sperm. She would thus give birth to her own genetic child—an arrangement called *genetic* or *traditional* surrogacy. The agreement contemplated that she would relinquish her parental rights and cooperate in the biological father establishing his parentage and the wife engaging in a stepparent adoption.

Focusing on this paradigmatic scene, some feminists argued against surrogacy. They found common cause with social and religious conservatives opposed to the practice—an alliance that worried some feminist supporters of surrogacy. Of course, feminists and conservatives could oppose surrogacy for very different reasons. Some feminists criticized surrogacy for fetishizing “natural” family relations—by attaching undue significance to the perpetuation of men's bloodlines. But some religious conservatives criticized surrogacy for defying “natural” relations—separating sex from procreation and detaching the social role of motherhood from the biological fact of maternity.

Still, feminists and conservatives shared some arguments in common. Both worried about the commodification of women's reproductive labor, the sale of children, and the exploitation and coercion of vulnerable women. For some, surrogacy was inherently coercive. Harold Cassidy, an attorney representing the surrogate in *Baby M*, argued that women's “nature” prevents them from agreeing to carry and give up a child:

A woman's sense of personhood is grounded in the motivation to make and enhance relatedness to others. Women tend to find satisfaction, pleasure, effectiveness and a sense of worth if they experience their life activities as arising from and leading back into a sense of connection with others. . . .

As a woman's sense of self comes from her relationships and attachments to others, a death or surrender of a child for adoption shatters a woman's sense of identity. The mother will never be able to recon[s]titute herself as the individual she was before and will never regain her original identity.*

According to Cassidy, validating a surrogacy contract would result in “grave psychological and social damage to the surrogate mother.”

Cassidy has long opposed not only surrogacy but abortion. As Reva Siegel describes in *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument* (2008) and in *Dignity and the Politics of Protection* (2008), Cassidy is a pioneer of the argument that abortion harms women. In the 1990s,

* Excerpted from Brief for Defendants, *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (No. FM25314-86E).

shortly after *Baby M*, Cassidy played a role in recruiting Norma McCorvey, the original plaintiff in *Roe*, to sue to reopen her case, with affidavits gathered from 1,000 women attesting to abortion regret—affidavits so widely disseminated in state legislative testimony and in amicus filings that Justice Anthony Kennedy cited them in *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

In developing woman-protective antiabortion arguments, Cassidy helped forge modern ways to talk about the right to life and the role morality of motherhood in the idiom of late twentieth-century America. In Cassidy's own words:

It took the experimentation with abortion to disprove the central fundamental question or fundamental assumption of *Roe*, and the fundamental assumption that there can be a known, there can be a voluntary, there can be an informed waiver of the mother's interest. It took the experience of millions of women, who now have come forward, and said, "I didn't know what I was doing. I wasn't told the truth."

Walk away from it, and live with it, and forget about it. She can't forget, she can't live with it, and it's not just an unnatural act, it is an unnatural, evil act. And for the men of this nation, and the seven male judges who created this, who think that women can deny that they are women, they can deny that they are mothers, without consequence, is not only ignorant, it's cruel.*

Is coercion in a surrogacy relationship fact-dependent or role-dependent? Does the coerciveness of a surrogacy agreement depend on the context and terms of the agreement, or is coercion intrinsic in the relationships? Does the question of women's coercion depend on the way in which surrogacy is practiced and regulated? For example, if concern focuses on the ways surrogacy is embedded in a highly class, race, and gender-stratified market, can regulation address these concerns? Or is the concern that surrogacy is inherently coercive because relinquishing a child she has carried is contrary to a woman's instincts such that no court could enforce such an agreement, in any part, over a woman's objections?

The following excerpts sample feminist perspectives at the time of *Baby M*.

* Excerpted from Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE LAW JOURNAL 1694, 1781 (2008). For Cassidy's role in recruiting McCorvey and the role of the abortion-harms-women affidavits in state legislatures and in federal courts, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE LAW JOURNAL 1641 (2008). Just before her death, Norma McCorvey gave an interview in which she disclaimed her prolife conversion and affirmed women's autonomy—leaving a legacy that will be debated for years.

Is Women's Labor a Commodity?

Elizabeth S. Anderson (1990)*

. . . Proponents of commercial surrogacy have denied that the surrogate industry engages in the sale of children. . . . The payment to the surrogate mother is not for her child, but for her services in carrying it to term. The claim that the parties to the surrogate contract treat children as commodities, however, is based on the way they treat the *mother's* rights over her child. . . . [T]he natural father . . . would not pay her for the "service" of carrying the child to term if she refused to relinquish her parental rights to it. . . .

The primary distortions which arise from treating women's labor as a commodity—the surrogate mother's alienation from loved ones, her degradation, and her exploitation—stem from a common source. This is the failure to acknowledge and treat appropriately the surrogate mother's emotional engagement with her labor. Her labor is alienated, because she must suppress her emotional ties with her own child, and may be manipulated into reinterpreting these ties in a trivializing way. She is degraded, because her independent ethical perspective is denied, or demoted to the status of a cash sum. She is exploited, because her emotional needs and vulnerabilities are not treated as characteristics which call for consideration, but as factors which may be manipulated to encourage her to make a grave self-sacrifice to the broker's and adoptive couple's advantage. These considerations provide strong grounds for sustaining the claims of women's labor to its "product," the child. The attempt to redefine parenthood so as to strip women of parental claims to the children they bear does violence to their emotional engagement with the project of bringing children into the world. . . .

. . . [W]hat position should the law take on the practice? At the very least, surrogate contracts should not be enforceable. Surrogate mothers should not be forced to relinquish their children if they have formed emotional bonds with them. Any other treatment of women's ties to the children they bear is degrading.

But I think these arguments support the stronger conclusion that commercial surrogate contracts should be illegal, and that surrogate agencies who arrange such contracts should be subject to criminal penalties. . . .

* Excerpted from Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHILOSOPHY & PUBLIC AFFAIRS 71 (1990).

Privacy, Surrogacy, and the *Baby M* Case

Anita L. Allen (1988)*

. . . [C]onstitutional privacy prohibits the validation and enforcement of irrevocable surrogacy agreements. My conviction is two-fold: 1) childless men and couples do not have privacy rights that entitle them to state enforcement of surrogacy agreements; and 2) by contrast, would-be surrogate mothers have constitutional privacy rights so strong as to limit their own capacities for alienating their procreative and traditional parental prerogatives. . . .

A woman's security may be tied to the fate of her offspring in at least two distinct and evident ways. First, her security can be undermined by the feeling that she has lost control of a vulnerable being whom she has helped create and set loose into the world. A woman may come to regard her voluntary loss of control as a failure of responsibility and as deeply regrettable. . . . Second, women often identify strongly with their children. This sense of identity can stem from awareness of the physical connection that characterizes the latter stages of pregnancy. It also can stem from knowledge of a genetic link. . . .

Because women's security can be so tied to the fate of their offspring, there is at least one good reason to treat parental privacy rights as commercially inalienable. A more permissive rule, one that allowed parental rights to be commercially alienated but subject to revocation as a matter of law, would have an analogous justification. This more permissive rule would preserve surrogacy as an option, at least nominally. . . .

Surrogate Motherhood

Lori B. Andrews (1988)**

. . . In the past two decades, feminist policy arguments have refashioned legal policies on reproduction and the family. A cornerstone of this development has been the idea that women have a right to reproductive choice—to be able to contracept, abort, or get pregnant. . . . Another hallmark of feminism has been that biology should not be destiny. The equal treatment of the sexes requires that decisions about men and women be made on other than biological grounds. . . .

The legal doctrine upon which feminists have pinned much of their policy has been the constitutional protection of autonomy in decisions to bear and rear one's biological children. Once this protection of the biologically related family was acknowledged, feminists and others could argue for the protection of non-traditional,

* Excerpted from Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEORGETOWN LAW JOURNAL 1759 (1988).

** Excerpted from Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 JOURNAL OF LAW, MEDICINE & HEALTH CARE 72 (1988).

non-biological families on the grounds that they provide many of the same emotional, physical, and financial benefits that biological families do.

. . . [T]he very existence of surrogacy is a predictable outgrowth of the feminist movement. Feminist gains allowed women to pursue educational and career opportunities once reserved for men But this also meant that more women were postponing childbearing, and suffering the natural decline in fertility that occurs with age. Women who exercised their right to contraception, such as by using the Dalkon Shield, sometimes found that their fertility was permanently compromised. Some women found that the chance for a child had slipped by them entirely and decided to turn to a surrogate mother.

Feminism also made it more likely for other women to feel comfortable being surrogates. Feminism taught that not all women relate to all pregnancies in the same way. . . . Reproduction was a condition of her body over which she, and no one else, should have control. . . . [But some feminists oppose] surrogacy because of the potential psychological and physical risks that it presents for women. Many aspects of this argument, however, seem ill founded and potentially demeaning to women. They focus on protecting women against their own decisions because those decisions might later cause them regret, be unduly influenced by others, or be forced by financial motivations.

Reproductive choices are tough choices, and any decision about reproduction—such as abortion, sterilization, sperm donation, or surrogacy—might later be regretted. The potential for later regrets, however, is usually not thought to be a valid reason to ban the right to choose the procedure in the first place. With surrogacy, the potential for regret is thought by some to be enormously high. This is because it is argued (in biology-is-destiny terms) that it is unnatural for a mother to give up a child. . . .

Perhaps recognizing the dangers of giving the government widespread powers to “protect” women, some feminists do acknowledge the validity of a general consent to assume risks. They argue, however, that the consent model is not appropriate to surrogacy since the surrogate’s consent is neither informed nor voluntary. It strikes me as odd to assume that the surrogate’s consent is not informed. The surrogacy contracts contain lengthy riders detailing the myriad risks of pregnancy

. . . [A] strong element of the feminist argument against surrogacy is that women cannot give an informed consent until they have had the experience of giving birth. Robert Arenstein, an attorney for Mary Beth Whitehead, argued in congressional testimony that a “pre-birth or at-birth termination, is a termination without informed consent. I use the words informed consent to mean full understanding of the personal psychological consequences at the time of surrender of the child.” The feminist amicus brief in *Baby M* made a similar argument. . . .

The consent given by surrogates is also challenged as not being voluntary. Feminist Gena Corea . . . asks, “What is the real meaning of a woman’s ‘consent’ . . . in

a society in which men as a social group control not just the choices open to women but also women's motivation to choose?" Such an argument is a dangerous one for feminists to make. It would seem to be a step backward for women to argue that they are incapable of making decisions. That, after all, was the rationale for so many legal principles oppressing women for so long, such as the rationale behind the laws not allowing women to hold property. . . .

Feminists are taking great pride that they have mobilized public debate against surrogacy. But the precedent they are setting in their alliance with . . . groups like the Catholic church is one whose policy is "protect women, even against their own decisions" and "protect children at all costs" (presumably, in latter applications, even against the needs and desires of women). . . .

Market-Inalienability

Margaret Jane Radin (1987)*

. . . [I]s women's personhood injured by allowing or by disallowing commodification of sex and reproduction? The argument that commodification empowers women is that recognition of these alienable entitlements will enable a needy group—poor women—to improve their relatively powerless, oppressed condition, an improvement that would be beneficial to personhood. If the law denies women the opportunity to be comfortable sex workers and baby producers instead of subsistence domestics, assemblers, clerks, and waitresses—or pariahs (welfare recipients) and criminals (prostitutes)—it keeps them out of the economic mainstream and hence the mainstream of American life.

The rejoinder is that . . . commodification will harm personhood by powerfully symbolizing, legitimating, and enforcing class division and gender oppression. . . . But the surrejoinder is that noncommodification of women's capabilities under current circumstances represents not a brave new world of human flourishing, but rather a perpetuation of the old order that submerges women in oppressive status relationships, in which personal identity as market-traders is the prerogative of males. We cannot make progress toward the noncommodification that might exist under ideal conditions of equality and freedom by trying to maintain noncommodification now under historically determined conditions of inequality and bondage.

. . . If we now permit commodification, we may exacerbate the oppression of women—the suppliers. If we now disallow commodification—without . . . large-scale redistribution of social wealth and power—we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers. Thus, the alternatives seem subsumed by a need for social progress, yet we must choose

* Excerpted from Margaret Jane Radin, *Market-Inalienability*, 100 HARVARD LAW REVIEW 1849 (1987).

some regime now in order to make progress. This dilemma of transition is the double bind.

The double bind has two main consequences. First, if we cannot respect personhood either by permitting sales or by banning sales, justice requires that we consider changing the circumstances that create the dilemma. We must consider wealth and power redistribution. Second, we still must choose a regime for the meantime, the transition, in nonideal circumstances. To resolve the double bind, we have to investigate particular problems separately; decisions must be made (and remade) for each thing that some people desire to sell. . . .

Perhaps the best way to characterize the present situation is to say that women's sexuality is incompletely commodified. Many sexual relationships may have both market and nonmarket aspects: relationships may be entered into and sustained partly for economic reasons and partly for the interpersonal sharing that is part of our ideal of human flourishing. . . . The issue thus becomes how to structure an incomplete commodification that takes account of our nonideal world, yet does not foreclose progress to a better world of more equal power I think we should now decriminalize the sale of sexual services in order to protect poor women from the degradation and danger either of the black market or of other occupations that seem to them less desirable. At the same time, . . . we should prohibit the capitalist entrepreneurship that would operate to create an organized market in sexual services even though this step would pose enforcement difficulties. . . .

The question of surrogate mothering seems more difficult. . . . Paid surrogacy involves a potential double bind. The availability of the surrogacy option could create hard choices for poor women. In the worst case, rich women, even those who are not infertile, might employ poor women to bear children for them. It might be degrading for the surrogate to commodify her gestational services or her baby, but she might find this preferable to her other choices in life. But although surrogates have not tended to be rich women, nor middle-class career women, neither have they (so far) seemed to be the poorest women, the ones most caught in the double bind.

Whether surrogacy is paid or unpaid, there may be a transition problem: an ironic self-deception. Acting in ways that current gender ideology characterizes as empowering might actually be disempowering. Surrogates may feel they are fulfilling their womanhood by producing a baby for someone else, although they may actually be reinforcing oppressive gender roles. It is also possible to view would-be fathers as (perhaps unknowing) oppressors of their own partners. Infertile mothers, believing it to be their duty to raise their partners' genetic children, could be caught in the same kind of false consciousness and relative powerlessness as surrogates who feel called upon to produce children for others. Some women might have conflicts with their partners that they cannot acknowledge, either about raising children under these circumstances instead of adopting unrelated children, or about having children at all. These

considerations suggest that to avoid reinforcing gender ideology, both paid and unpaid surrogacy must be prohibited. . . .

Perhaps a more visionary reason to consider prohibiting all surrogacy is that the demand for it expresses a limited view of parent-child bonding [I]t is unclear why we should assume that the ideal of bonding depends especially on genetic connection. Many people who adopt children feel no less bonded to their children than responsible genetic parents; they understand that relational bonds are created in shared life more than in genetic codes. We might make better progress toward ideals of interpersonal sharing—toward a better view of contextual personhood—by breaking down the notion that children are fathers’—or parents’—genetic property.

In spite of these concerns, attempting to prohibit surrogacy now seems too utopian, because it ignores a transition problem. At present, people seem to believe that they need genetic offspring in order to fulfill themselves; at present, some surrogates believe their actions to be altruistic. To try to create an ideal world all at once would do violence to things people make central to themselves. This problem suggests that surrogacy should not be altogether prohibited.

Concerns about commodification of women and children, however, might counsel permitting only unpaid surrogacy (market-inalienability). . . . [I]f we wish to avoid the dangers of commodification and . . . recognize that there are some situations in which a surrogate can be understood to be proceeding out of love or altruism and not out of economic necessity or desire for monetary gain, we could prohibit sales but allow surrogates to give their services. We might allow them to accept payment of their reasonable out-of-pocket expenses—a form of market-inalienability similar to that governing ordinary adoption.

Fear of a domino effect* might also counsel market-inalienability. At the moment, it does not seem that women’s reproductive capabilities are as commodified as their sexuality. Of course, we cannot tell whether this means that reproductive capabilities are more resistant to commodification or whether the trend toward commodification is still at an early stage. Reproductive capacity, however, is not the only thing in danger of commodification. We must also consider the commodification of children. The risk is serious indeed, because, if there is a significant domino effect, commodification of some children means commodification of everyone. Yet, as long as fathers do have an unmonetized attachment to their genes (and as long as their partners tend to share it), even though the attachment may be nonideal, we need not see children born in a paid surrogacy arrangement—and they need not see themselves—as fully commodified. Hence, there may be less reason to fear the domino effect with paid surrogacy than with baby-selling. . . .

* The domino theory assumes that anytime market and nonmarket understandings coexist, it is inevitable that the market understanding will prevail. For more on the domino theory, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

The other possible choice is to create an incomplete commodification similar to the one suggested for sale of sexual services. The problem of surrogacy is more difficult, however, primarily because the interaction produces a new person whose interests must be respected. In such an incomplete commodification, performance of surrogacy agreements by willing parties should be permitted, but women who change their minds should not be forced to perform. The surrogate who changes her mind before birth can choose abortion; at birth, she can decide to keep the baby. . . .

We should be aware that the case for incomplete commodification is much more uneasy for surrogacy than for prostitution. The potential for commodification of women is deeper, because, as with commissioned adoption, we risk conceiving of all of women's personal attributes in market rhetoric, and because paid surrogacy within the current gender structure may symbolize that women are fungible baby-makers for men whose seed must be carried on. Moreover, as with commissioned adoption, the interaction brings forth a new person who did not choose commodification and whose potential personal identity and contextuality must be respected even if the parties to the interaction fail to do so. . . .

. . . If, on balance, incomplete commodification rather than market-inalienability comes to seem right for now, it will appear so for these reasons: because we judge the double bind to suggest that we should not completely foreclose women's choice of paid surrogacy, even though we foreclose commissioned adoptions; because we judge that people's (including women's) strong commitment to maintaining men's genetic lineage will ward off commodification and the domino effect, distinguishing paid surrogacy adequately from commissioned adoptions; and because we judge that that commitment cannot be overridden without harm to central aspects of people's self-conception. . . . In my view, a form of market-inalienability similar to our regime for ordinary adoption will probably be the better nonideal solution. . . .

* * *

Notice that Radin articulated her position in 1987, a time when surrogacy as a practice was still in its infancy in the United States. Radin's position is heavily fact-dependent—requiring what she describes as “pragmatic judgments” in “our nonideal world.” Facts on the ground contribute to the distinction she draws between prostitution and surrogacy. Given dramatic shifts in the prevalence and meanings of surrogacy, would Radin now support some form of commodification—a system of regulation rather than prohibition?

CHANGING CONCEPTIONS OF SURROGACY

At the time of *Baby M* and the feminist perspectives above, a woman serving as a surrogate would be genetically related to the resulting child. The vast majority of

surrogacies today, however, involve *gestational surrogacy*, in which the woman who serves as the surrogate bears a child to whom she is not genetically related. Through IVF, an embryo is created with sperm (either donor sperm or sperm of the intended father) and egg (either a donor egg or the egg of the intended mother) and transferred to the woman serving as the surrogate.*

Five years after *Baby M*, the California Supreme Court addressed a surrogacy conflict in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). But unlike *Baby M*, the situation involved gestational surrogacy, and the intended mother was also the genetic mother. The court recognized the intended mother as the legal mother over the objection of the woman who served as the surrogate:

We conclude that although the [California Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—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. . . .

In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.

Gestational surrogacy—and its separation of gestation from genetics—contributed to dramatic changes in popular and legal perspectives on surrogacy in the United States, as the following excerpt explores.

Surrogacy and the Politics of Commodification Elizabeth S. Scott (2009)**

. . . Political philosophers offer two objections to the commodification of certain transactions. The first focuses on coercion; exchanges that are driven by severe inequality, ignorance, or dire economic necessity are problematic. The second objection focuses on corruption and holds that the market has a degrading effect on certain goods

* Reliable data on the prevalence of gestational and genetic surrogacy do not exist. Still, anecdotal evidence suggests that all but a small percentage of surrogacy arrangements today involve gestational, rather than genetic, surrogacy. The limited data that do exist show that the number of children born through gestational surrogacy arrangements has increased dramatically over the course of the twenty-first century. See, e.g., Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435 (2016); S. A. Grover et al., *Analysis of a Cohort of Gay Men Seeking Help with Third-Party Reproduction*, 98 FERTILITY & STERILITY (Supplement) S48 (2012).

** Excerpted from Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMPORARY PROBLEMS 109 (2009).

and practices. As the *Baby M* case unfolded, both objections were aimed at surrogacy, effectively framing the transactions as illicit commodification. . . .

. . . Today [surrogacy] is seldom framed as baby selling and exploitation; instead, the discourse emphasizes the service provided by surrogates to couples who otherwise could not have genetically related children. Moreover, the legislative goal of discouraging and punishing a pernicious practice largely has been replaced by the pragmatic objective of providing certainty about parental status and protecting all participants, especially children. . . . In the absence of statutory authority, numerous courts have directed that intended parents, and not the surrogate, be named on the birth certificate in gestational arrangements. Moreover, the new Uniform Parentage Act* and most of the surrogacy statutes enacted since 2000 deal exclusively with requirements for enforcement of gestational-surrogacy agreements

. . . As couples eager to have children have increasingly shown themselves ready to turn to surrogates, even when the agreements are of uncertain legality, lawmakers have recognized the potential harms posed by the lack of regulation. In a legal vacuum, and even when surrogacy contracts are prohibited, a host of legal problems can arise regarding the rights and obligations of the participants toward the child. Along with the risk of acrimonious custody litigation between the surrogate and the intended parents, costly uncertainty can result when the intended parents divorce or decline to accept the child, perhaps because the baby is born with a medical condition or disability. . . .

. . . [F]amiliarity with surrogacy arrangements alleviated public fears because many predictions of harmful consequences made by opponents in the midst of the *Baby M* controversy proved to be exaggerated or wrong, undermining the characterization of commercial-surrogacy contracts as exploitative, baby-selling transactions. . . . Most American surrogates are not as wealthy as the intended parents, but few are poor. Many report using the money they receive to enhance their families' welfare in conventional ways, often indicating that they value the ability to earn money while staying home with their children. Further, few surrogates report reluctance to relinquish the child, and a very small percentage express regret about having served in the role. Contrary to the claim that surrogacy degrades motherhood and pregnancy, the available evidence suggests that surrogates view themselves as performing a service of great social value for the benefit of others. Further, little evidence indicates that children born of surrogacy arrangements suffer psychological or physical harm because of the circumstances of their birth, or that surrogates' other children fear that they too will be relinquished. . . .

* Uniform Acts are model state laws written and proposed by the non-profit Uniform Law Commission for consideration and adoption by U.S. states. The Uniform Parentage Act provides a legal framework aiming to standardize the rules for establishing parentage across all U.S. states. Article 8 of the more recent Uniform Parentage Act, promulgated in 2017, allows and regulates both genetic and gestational surrogacy, safeguards surrogate's decision-making during the pregnancy, and ensures access for intended parents without respect to gender, sexual orientation, marital status, or genetic connection.

The prevalence of gestational surrogacy in recent years has been a very important factor in dismantling the commodification frame and in changing the way many people, including lawmakers and lobbyists, view these arrangements. Today, ninety-five percent of surrogacy contracts involve IVF, so most surrogates are not the genetic mothers of the children they bear. . . . [S]everal contemporary laws limit access to procedures for efficiently establishing intended parent's rights to gestational-surrogacy contracts, and courts typically give intended parents' claims more weight when the surrogate is not the child's genetic parent. . . .

The move to gestational surrogacy has facilitated the change in the social meaning of surrogacy from a mother's sale of her baby to a transaction involving the provision of gestational services. It is telling that gestational surrogates are often described as "carriers," rather than as "mothers." . . . The relatively positive response to gestational surrogacy suggests that gestational motherhood is devalued when it is separated from genetic parenthood—and perhaps that surrogates who are not also genetic mothers, unlike traditional surrogates, might be expected not to form a maternal bond with a child who "belongs" to others. This widespread reaction goes some distance toward explaining the reframing of surrogacy, but it has some troubling implications. . . . [I]t raises questions about the value of pregnancy relative to other dimensions of motherhood and the extent to which the mother-child bond formed during this period is assumed to be a product of the genetic tie rather than of the nurturing relationship. It also recalls a long-rejected notion that parents have a property-like interest in their children based on biology. Nonetheless, it seems clear that the supplanting of traditional surrogacy by gestational contracts has contributed to public acceptance of surrogacy arrangements. . . .

Among the most notable changes in the political landscape of surrogacy in recent years has been the absence of feminist voices, women's groups, and civil-liberties organizations. Although it is difficult to find direct evidence of a change of heart on this issue or an explanation of why it happened, it seems likely that changes in the politics of abortion may have played an important role. . . . [A]rguments against surrogacy based on the threat of coercion and regret have become untenable for most feminists because anti-abortion advocates have invoked similar arguments. Recognizing that many people were offended by their standard "baby killing" argument, abortion opponents began to shift to what Reva Siegel calls a "women-protective" rationale for banning abortion. . . .

The women-protective argument includes two distinct but related claims: First, abortion opponents argue that boyfriends, family, and clinic staff coerce and mislead women to obtain abortions that they would never voluntarily obtain Second, and for the same reason, opponents argue that many women deeply regret their abortions, suffering from psychological trauma which puts them at risk for severe depression and "post-abortion syndrome," a form of post-traumatic stress disorder. . . .

After feminist interest in surrogacy waned, opposition was limited to religious and social conservatives, and even for this group, surrogacy likely was a minor issue

compared to abortion, gay marriage, or divorce reform. This may explain the relative lack of controversy in the recent law-reform initiatives. . . .

This is not to say that concern about commodification in this context is altogether assuaged or that any normative consensus exists about surrogacy. The growing number of individuals who satisfy powerful urges to form families and have children through commercial transactions continues to be a source of concern for ethicists, particularly given the recent trend to “outsource” the contracts to India and other countries where surrogates may indeed be poor women who have few other income options. Moreover, some scholars are concerned that the expense of gestational surrogacy effectively limits this family-formation option to high-income couples and individuals. However, the goal of assisted reproduction is relatively benign, and the emerging view among lawmakers seems to be that regulation is a better means of minimizing the costs than a legal vacuum. . . .

. . . The contemporary pragmatic approach to regulating surrogacy, in my view, is superior to the crusade-like urgency of early reformers. . . . [W]ell-designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.

* * *

The social meaning and legal status of surrogacy has shifted not only in the U.S. but in other jurisdictions across the globe.

In the United Kingdom, the 1985 Surrogacy Arrangements Act prohibits commercial surrogacy and bans advertisements indicating that anyone might be willing to enter into a surrogacy arrangement or be looking for a surrogate. The 1990 Human Fertilisation and Embryology Act amended the Surrogacy Arrangements Act and stipulates that “[n]o surrogacy arrangement is enforceable by or against any of the persons making it,” which enables surrogates in the United Kingdom to cancel their contractual obligations. Despite the restrictiveness of the U.K. regime, laws, regulations, and norms have shifted over time. In 2008, the U.K. Parliament passed another Human Fertilisation and Embryology Act that permits non-profit organizations to advertise and initiate surrogacy negotiations. Government and public attitudes towards surrogacy have also grown more permissive over time.

In 2020, the Supreme Court of the United Kingdom determined that a plaintiff could be awarded tort damages to be used towards a commercial surrogacy arrangement abroad. Responding to arguments that this would be contrary to U.K. public policy, the Court described how understandings of surrogacy have changed dramatically over time.

Whittington Hospital NHS Trust v XX
United Kingdom Supreme Court
[2020] UKSC 14

[Before Lady Hale, Lord Reed, Lord Kerr, Lord Wilson, and Lord Carnwath]

LADY HALE: (with whom Lord Kerr and Wilson agree)

[Between 2008 and 2012, the claimant had multiple cervical smears and biopsies performed at Whittington Hospital. The hospital negligently mis-reported the results of these tests, and the claimant was diagnosed with advanced cervical cancer in 2013. The claimant then underwent surgery and chemotherapy that damaged her womb such that she could not bear children herself. The claimant and her partner would like to have four children, preferably through the use of commercial gestational surrogacy arrangements in California.]

6. . . . In relation to surrogacy [trial judge Sir Robert Nelson] held that he was bound by the decision of the Court of Appeal in *Briody v St Helen's and Knowsley Area Health Authority*, first, to reject the claim for commercial surrogacy in California as contrary to public policy, and second, to hold that surrogacy using donor eggs was not restorative of the claimant's fertility. Non-commercial surrogacy using the claimant's own eggs, however, could be considered restorative of the claimant's fertility. . . .

7. The claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. . . . The Court of Appeal . . . allowed the claimant's appeal on both points Public policy was not fixed in time Attitudes to commercial surrogacy had changed since *Briody*; perceptions of the family had also changed and using donor eggs could now be regarded as restorative.

8. The hospital now appeals to this court. . . .

9. UK law on surrogacy is fragmented and in some ways obscure. In essence, the arrangement is completely unenforceable. The surrogate mother is always the child's legal parent unless and until a court order is made in favour of the commissioning parents. Making surrogacy arrangements on a commercial basis is banned. The details are more complicated. . . .

[The Court explained the process for commissioning parents seeking a parental order. UK courts balance a number of factors, such as whether the surrogate mother has a partner, how old the child is, who the child is living with at the time, the conscionability of the contract, and the types of compensation involved. The Court also described the complex web of restrictions placed on UK surrogacy agencies with regards to arranging and advertising surrogacy services.]

23. [In *Briody*], the claimant underwent a sub-total hysterectomy when aged around 19 Her ovaries were left intact. Many years later, she brought proceedings claiming damages for, among other things, the cost of a Californian surrogacy. . . .

24. By the time the case reached the Court of Appeal, . . . [t]he claimant was now proposing two cycles using her own embryos and if that failed up to four more cycles using the surrogate's eggs and if successful three more to have a second child. All of this would be arranged, not commercially abroad, but here [in the UK]

26. On the Californian proposals . . . , I had no difficulty in agreeing . . . that they were "contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it." As to the new proposals, I also agreed with the judge that it would not be reasonable to expect the defendant to pay for the implantation of the claimant's embryos when this had [a 1%] chance of success. As to a surrogacy using donor eggs, . . . this was "not in any sense restorative of Ms Briody's position before she was so grievously injured. It is seeking to make up for some of what she has lost by giving her something different. Neither the child nor the pregnancy would be hers." . . .

28. This Court is not . . . bound by the ratio of *Briody*. But the persuasiveness of that ratio is inevitably affected by the developments in law and social attitudes which have taken place since then. . . .

30. . . . Traditionally, families were limited to those related by consanguinity (blood) or affinity (marriage). Hence at first only opposite sex married couples could apply for parental orders. Now they have been joined by same sex married couples, by same sex and opposite sex civil partners, and by couples, whether of the same or opposite sexes, who are neither married nor civil partners, but are living together in an enduring family relationship. They have also been joined by single applicants. All of these would be regarded as family relationships within the meaning of article 8 of the [European Convention on Human Rights]. . . .

35. Another change which has taken place . . . since the Surrogacy Arrangements Act was passed in 1985 is the progress of the medicine and science of assisted reproduction . . . and increasing public familiarity with and acceptance of such methods of founding a family. . . . [N]ew techniques have been developed, success rates have improved, and people who are experiencing problems in conceiving or bearing children, or who are in same sex relationships, increasingly turn to assisted reproduction rather than to adoption in order to fulfil their desire to have a family. . . .

37. As to changes in the attitudes of society in general to surrogacy arrangements, the Law Commissions say this:

"Whilst we acknowledge that there is a lack of public attitudinal research in this area, the research that exists suggests that public attitudes to surrogacy also now stand in stark contrast to the prevailing hostile

attitudes at the time of the [Surrogacy Arrangements Act] 1985. The available research reflects the fact that the legislation is now out of step with attitudes towards surrogacy.” . . .

39. . . . [T]here is a spectrum of surrogacy arrangements. At one end of the scale there are desperately poor women who are induced to sell one of the few things they have for sale, their wombs, and are often grossly exploited At the other end . . . are altruistic women who enjoy being pregnant and are happy to make a gift of their child-bearing capacity to people who need it. It is no longer thought that women should not have the right to choose to use their bodies in this way. But it is thought that both they and the commissioning parents should be protected from exploitation and abuse. It is also thought that surrogacy arrangements, whether altruistic or commercial, should guard against any possibility that children are being bought and sold. . . .

44. The first question [in this case] . . . is whether it is ever possible to claim damages for the cost of surrogacy arrangements, even where these are made on a lawful basis in this country and using the claimant’s own eggs. It might once have been possible to argue that the law should not facilitate the bringing into the world of children who would otherwise never have been born. But the acceptance and widespread use of assisted reproduction techniques, for which damages are payable, means that this is no longer possible. . . .

45. The next question is whether it is possible to claim damages for UK surrogacy arrangements using donor eggs. In *Briody*, I expressed the view that this was not truly restorative of what the claimant had lost. . . . [I]t was probably wrong then and is certainly wrong now. . . .

48. This view is reinforced by the dramatic changes in the idea of what constitutes a family which have taken place in recent decades I would therefore hold that, subject to reasonable prospects of success, damages can be claimed for the reasonable costs of UK surrogacy using donor eggs.

49. That leaves only the most difficult question: what about the costs of foreign commercial surrogacy? Surrogacy contracts are unenforceable here. . . . UK courts will not enforce a foreign contract which would be contrary to public policy in the UK. Why then should the UK courts facilitate the payment of fees under such contracts by making an award of damages to reflect them? . . .

51. . . . It has never been the object of the [Surrogacy Arrangements Act 1985] to criminalise the surrogate or commissioning parents. The only deterrent is the risk that the court hearing an application for a parental order might refuse retrospectively to authorise the payments. . . . [T]here is no evidence that that has ever been done. . . .

52. . . . [Since *Briody*,] courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy. The government now supports surrogacy as a valid way of creating family relationships,

although there are no plans to allow commercial surrogacy agencies to operate here. The use of assisted reproduction techniques is now widespread and socially acceptable. The Law Commissions have provisionally proposed a new pathway for surrogacy which, if accepted, would enable the child to be recognised as the child of the commissioning parents from birth, thus bringing the law closer to the Californian model, but with greater safeguards. While the risks of exploitation and commodification are heightened in commercial surrogacy, they are not thought an insuperable ethical barrier to properly regulated arrangements.

53. . . . I conclude that it is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy. . . . There are some important limiting factors. First, the proposed programme of treatments must be reasonable. . . . Second, it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. This is unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded. Unregulated systems where both surrogate and commissioning parents are at the mercy of unscrupulous agents and providers and children may be bought and sold should not be funded by awards of damages in the UK. . . . Third, the costs involved must be reasonable. . . .

54. With those caveats, therefore, I would dismiss this appeal.

LORD CARNWATH: (dissenting) (with whom Lord Reed agrees)

. . . 56. . . . I differ only on the last issue: damages to fund the cost of commercial surrogacy arrangements in a country . . . where this is not unlawful. . . .

63. It seems clear . . . that the issue is seen as one of “legal policy,” to be determined by the courts. . . . In the present context I find most helpful Lord Millett’s emphasis on maintaining “the coherence of the law.” . . .

66. . . . [T]he objective is consistency or coherence between the civil and criminal law within a particular system of law. The fact that the laws of other jurisdictions and other systems may reflect different policy choices seems . . . beside the point. It would . . . be contrary to that principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law.

67. It is true that there have been striking developments in society’s approach to many issues affecting family life, including surrogacy, as the Law Commission’s comprehensive report demonstrates. There has however been no change to the critical laws affecting commercial surrogacy Nor does the Law Commission propose any material change in that respect. It is also apparent from recent studies that public attitudes remain deeply divided. So long as that remains the state of the law on commercial surrogacy in this court, it would not in my view be consistent with legal coherence for the courts to allow damages to be awarded on a different basis. . . .

* * *

The number of surrogate births in the United Kingdom continues to grow, and efforts are being made to update the United Kingdom's laws to match evolving societal attitudes on surrogacy. Noting that the current laws governing surrogacy date back to the mid-1980s, the Law Commission of England and Wales and the Scottish Law Commission have assembled a series of recommendations for legal reforms to address the practical issues that have arisen in modern surrogacy.* These reforms would make the intended parents of children born through surrogacy the legal parents at birth by operation of law. The recommendations also include creating regulated surrogacy organizations to oversee surrogacy agreements and developing a register for children born of surrogacy to access their genetic information. The Law Commissions are awaiting stakeholder input before establishing specific recommendations to regulate commercial surrogacy; still, the drafted recommendations indicate a desire to establish a legal structure for the co-existence of both altruistic and commercial surrogacy.

* * *

While Scott noted in 2009 that feminists largely were absent from contemporary debates over surrogacy in the United States, more recently feminist activists and organizations have become important voices in surrogacy reform. In the U.S. state of Washington, feminists joined legislative efforts to repeal the state's ban on commercial surrogacy. In 2018, Washington passed legislation allowing and regulating compensated gestational surrogacy. In the following excerpt, Sara Ainsworth, an attorney with the leading women's rights group in the state, explains why her organization became a leader in the surrogacy reform effort. Ainsworth observes how the practice of surrogacy can, and does, harm women who serve as surrogates. But she views the need for regulation—against the backdrop of the fact that surrogacy arrangements are happening—as a feminist imperative. She echoes many of the concerns with surrogacy voiced in the excerpts in the preceding section before developing a justice-centered framework that respects the interests of women serving as surrogates as well as intended parents.

Bearing Children, Bearing Risks

Sara L. Ainsworth (2014)**

. . . Legal Voice, founded in 1978 as the Northwest Women's Law Center and a leading voice on women's issues in Washington State's courts and legislature, was missing from the debate during the state's first legislative response to surrogacy. In

* LAW COMMISSION OF ENGLAND & SCOTTISH LAW COMMISSION, BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW, SUMMARY OF CONSULTATION PAPER (2019).

** Excerpted from Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASHINGTON LAW REVIEW 1077 (2014).

1989, the year after the notorious *Baby M* decision in New Jersey, Washington State banned compensated surrogacy. The Washington Legislature did not reconsider the issue—and women’s rights advocates never raised it—until a gay legislator lawyer, the father of children born to a woman acting as surrogate, proposed lifting the ban in 2010.

Just as the practice of compensated surrogacy had evolved, so had Legal Voice’s willingness to engage with the issue. In 2010, the organization recognized the imperative of bringing a progressive, feminist voice to the legislative arena—a voice informed as much as possible by the experience of women acting as surrogates. . . .

. . . What I seek to add to the discussion is a call to feminist law reform projects to develop a shared agenda for ensuring reproductive justice in the context of assisted reproductive technologies, and, most importantly, to take leadership in the field of surrogacy regulation. The risks of compensated surrogacy arrangements are primarily borne by the women acting as surrogates, who typically hold less power than other parties to these arrangements and are more likely to be subject to economic exploitation. Progressive feminists thus must meet the challenge of addressing surrogacy’s complexity in the legislatures and the courts. This work should focus on ensuring the humanity and dignity of the women whose interests are most at stake in the surrogacy debate. . . .

Women acting as surrogates in the United States tend to be white, of varying income, and define themselves as Christian. Media in the United States have reported that a significant number of women acting as surrogates were married to men who are enlisted in the military, and act as surrogates while their husbands are deployed overseas. Women acting as surrogates are frequently motivated by altruism; they have consistently explained that they want to help someone who desperately wants to have children, and that they view surrogacy as an opportunity to do something meaningful with their lives. Some women act as surrogates for a close friend or relative, and in states like Washington, where compensated surrogacy is banned, women nonetheless decide to act as surrogates out of this sense of altruism.

In both United States and British studies, women acting as surrogates indicate that they appreciated the emotional bond with the intended parents—or were unhappy if that was lacking—and that they were comfortable, even happy, giving the baby to the intended parents after the birth. They describe feeling like this pregnancy is akin to caring for someone else’s child, unlike the bonding they experienced with pregnancies with children they intended to keep. This was true even when they were genetically related to the children they carried This is not a surprising finding given that the vast majority of women who have had abortions describe feelings of relief, rather than sorrow, after the termination of their pregnancies. These studies demonstrate that women experience a pregnancy differently depending on their intentions in relation to it. . . .

. . . Legal Voice reached out to individual women acting as surrogates in other states, sought the guidance of reproductive justice organizations, and evaluated the available empirical evidence regarding women's experiences of surrogacy—including the experiences of women from other countries acting as surrogates for United States couples. . . . [W]hatever the feminist debate over surrogacy, the practice is currently happening and its unregulated state is what is harmful right now. And additional potential harm will be borne by those with the least economic resources and the least power—including women in other countries, where legal protections for women acting as surrogates may be insufficient to ensure their health, dignity, and safety. . . .

. . . Legal Voice determined that it is preferable to regulate surrogacy in Washington State, encouraging people to engage in these transactions locally, under a robust regulatory scheme. . . . Legal Voice determined that local regulation should be informed by a set of principles, based in pragmatic and anti-essentialist feminism. The principles guiding such regulation are humanity, equality of power, reproductive autonomy and health, non-discrimination, clarity, and justice. . . .

A primary feminist objection to commercial surrogacy is that by commodifying reproduction, such transactions reduce women's bodies to mere vessels. Surrogacy regulation should ensure, within the context of the compensated transaction, the human dignity of all its participants. The challenge is moving this principle from semantics, in a world that remains highly stratified by race, class, and yes, gender, to a meaningful legislative principle. Moreover, claiming such humanity does not necessarily address the arguments of feminists who would ban or discourage surrogacy. . . . [T]he point is not to answer the critiques and resolve them, but as pragmatists, to recognize that surrogacy arrangements are a reality with which we must engage if we are to ensure the humanity of the people who bring children into the world through surrogacy.

The commodification concern is echoed in the exploitation concern: that women, especially women of color, who still earn lower wages than men for comparable work in the United States, and whose earning power has been increasingly depressed by, among other things, this pay gap and wealth inequality, are more vulnerable to economic pressures. . . . One way to address this through a regulatory framework is to attempt . . . to craft provisions that elevate the power of the woman acting as surrogate, so that she and the intended parents approach each other on equal footing. The hope is that this equality of power in such agreements will help avert the risks of coercion once the agreement is entered into. . . .

The principle that the woman acting as surrogate retains her constitutional and human rights to medical decision-making, reproductive decisions, and control over her daily life regardless of whether she is pregnant serves the first two principles. . . .

. . . In some jurisdictions, despite the significant legal gains of recent years, lesbian and gay parents are still denied the right to adopt children or to engage in otherwise legally recognized surrogacy contracts. . . . A feminist principle of anti-

discrimination in this setting would look carefully at any exclusions from participation in surrogacy and consider whether the exclusion either serves or undermines equality and anti-subordination. Those that undermine or further serve to subordinate groups of people should be eliminated from a regulatory scheme. . . .

Legal Voice determined . . . supporting surrogacy legislation that unequivocally recognizes the parental rights of the intended parent immediately upon the birth of the child, with no revocation period for the woman acting as surrogate. . . .

. . . [T]he rights of all parties, including the child, are better protected when the law is unequivocal about parental rights and responsibilities upon the child's birth. The child is never left parentless; the intended parents are both assured of and required to assume their parental obligations; and the woman acting as surrogate knows in advance exactly what will happen when she agrees to act as a surrogate, and is never left with parental responsibility for a child she did not intend to raise. . . .

Arguably, regulating surrogacy in the states will also help increase justice for women in other countries, by encouraging surrogacy to take place locally. . . . But it is not surrogacy that is at the root of Global North exploitation of Global South countries, people, and women's bodies. Reproductive tourism is but a highly visible symptom of a much greater problem—a problem that is also a feminist and progressive imperative to address.

Finally, there is a local injustice that local surrogacy regulation can readily address: the problem of third party brokers, who, with few exceptions, are entirely unregulated. . . . [T]his has led to situations in which brokers have stolen from or made false assurances to people, putting women's health at risk. Progressive legislation should require government regulation of third party brokers in order to decrease their economic incentives and limit their ability to exploit the parties to these arrangements. There are several ways to accomplish this: prohibiting payment to third parties, licensing them in the manner of adoption agencies, or regulating their conduct short of licensing. . . .

REGULATING SURROGACY

As governments move to allow surrogacy in some form, questions of how to regulate become critical. As U.S. law professor Courtney Joslin observes:

By continuing to focus on the permit/ban issue, the existing discourse hides and in turn *discourages* consideration of other questions, including *the ways in which* states permit and regulate surrogacy, as well as the implications of those variations. . . . [T]hese details hold profound consequences, both from the perspective of the individual and from the

collective.*

According to Joslin, the details of regulation “implicate the scope and meaning of fundamental liberty interests, including the right to form families of choice and reproductive autonomy.” Jurisdictions may regulate surrogacy in ways that “challenge family law rules that long have excluded families that departed from gender- and biology-based norms about the nature of motherhood and fatherhood.”

The materials in this section probe whether “principles of equality and liberty are furthered” in surrogacy legislation by considering a few key dimensions: (1) whether the woman serving as surrogate can be compensated?; (2) who has access to surrogacy for family formation?; and (3) what authority the woman serving as surrogate possesses over decisions about her pregnancy?

Compensated or Altruistic?

As we have seen, attitudes toward surrogacy have been evolving over the last several decades, and a number of jurisdictions have begun to legalize the practice, at least in part. Some jurisdictions have begun to allow certain forms of fee exchange associated with surrogacy.

Questions abound. Can surrogacy be compensated? Does the regulatory regime allow both commercial and altruistic surrogacy? May only family members or friends be allowed to act as surrogates for intended parents? May women serving as surrogates be reimbursed only for reasonable expenses (e.g., healthcare costs, employment loss)? Or may they receive compensation beyond that? Are third parties allowed to coordinate the transaction?

The Parliament of Canada passed the Assisted Human Reproduction Act in 2004 to provide a comprehensive regulatory framework for assisted human reproduction and related research. As part of the regulations, the Act criminalized a range of reproductive activities, including commercial surrogacy (Section 6), and reimbursements for sperm or egg donation, or for expenditures incurred by a surrogate (Section 12). The Attorney General of Quebec challenged the Act as an unconstitutional overreach of the federal criminal power. In a 4-4-1 decision, the Supreme Court of Canada upheld some of the challenged provisions but not all.

* Excerpted from a 2020 draft of Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

Reference re Assisted Human Reproduction Act
Supreme Court of Canada
3 S.C.R. 457 (2010)

[The Reasons of McLachlin C.J. and Binnie, Fish, and Charron JJ. were delivered by The Chief Justice:]

[1] . . . [H]istorically, every generation has turned to the criminal law to address [unique moral issues]. Among the most important moral issues faced by this generation are questions arising from technologically assisted reproduction—the artificial creation of human life. Parliament has passed a law dealing with these issues under its criminal law power. The question on appeal is whether this law represents a proper exercise of Parliament’s criminal law power. I conclude that it does.

[2] Since time immemorial, human beings have been conceived naturally. . . .

[3] This changed in the latter part of the 20th century, with the development of technology that allowed ova and sperm to be captured and united to form a zygote outside the human body. . . .

[21] The issue is as follows: Is the *Assisted Human Reproduction Act* properly characterized as legislation to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk, as the Attorney General of Canada contends? Or should it be characterized as legislation to promote positive medical practices associated with assisted reproduction, as the Attorney General of Quebec contends? . . .

[110] Section 12* prohibits reimbursing donors for expenditures incurred in the course of donating sperm or ova, for the maintenance or transport of an *in vitro* embryo, or for expenditures incurred by a surrogate mother—except in accordance with the regulations and a licence. The section also prohibits reimbursement for expenditures without receipts, and the reimbursement of surrogate mothers for the loss of work-

* Section 12 of Canada’s Assisted Human Reproduction Act provides:

(1) No person shall, except in accordance with the regulations, (a) reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum; (b) reimburse any person for an expenditure incurred in the maintenance or transport of an *in vitro* embryo; or (c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

(2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

(3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless (a) a qualified medical practitioner certifies . . . that continuing to work may pose a risk to her health or that of the embryo

related income without medical certification that work may pose a risk to her health or that of the embryo. . . .

[111] The question is whether s. 12 has a criminal law purpose. Section 12 is complementary to ss. 6* and 7**, which are conceded to be valid criminal law. Sections 6 and 7 prohibit the commercialization of reproduction. These prohibitions are based on the Baird Report, which stated: “To allow commercial exchanges of this type . . . would undermine respect for human life and dignity and lead to the commodification of women and children.” Section 12 addresses the related issue of permitted expenses. It seeks to ensure that credited expenses are confined to actual outlays, and do not cross the line into commercialized reproductive activities. This is the line that prohibits that which is considered inappropriate commodification and permits that which is considered acceptable reimbursement. The act of drawing this line raises fundamental moral questions. Though there are differing views on where the line should be drawn, it is difficult to argue that the criminal law power does not permit Parliament to prohibit that which falls on the wrong side of it.

[112] I conclude that s. 12 is rooted in the same concerns as ss. 6 and 7 and is valid criminal law. . . .

[The reasons of LeBel, Deschamps, Abella and Rothstein JJ. delivered by LeBel and Deschamps JJ.:]

[157] In 2001, Health Canada estimated that every 100th baby in the industrialized world was being conceived through the application of some kind of assisted human reproduction technology. The popularity of assisted human reproduction was bound to increase, as it corresponded to a need. The same department reported in 2009 that one in eight Canadian couples experienced problems related to infertility. This appeal does not concern the appropriateness or wisdom of the decision to regulate

* Section 6 of Canada’s Assisted Human Reproduction Act provides:

- (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid. . . .
- (2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.
- (3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it. . . .

** Section 7 of Canada’s Assisted Human Reproduction Act provides:

- (1) No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.
- (2) No person shall (a) purchase, offer to purchase or advertise for the purchase of an *in vitro* embryo; or (b) sell, offer for sale or advertise for sale an *in vitro* embryo.

assisted human reproduction, or even the validity of the *Assisted Human Reproduction Act (AHR Act)* as a whole. Rather, the dispute relates to the connection between certain provisions of the *AHR Act* and the federal criminal law power. . . .

[238] . . . In establishing the basis for Parliament's action, the Chief Justice relies heavily on the purpose of upholding public morality. In her view, to justify having recourse to the criminal law by relying on morality, Parliament need only have a reasonable basis to expect that its legislation will address a concern of fundamental importance. . . . This approach in effect totally excludes the substantive component that serves to delimit the criminal law. Not only does it go far beyond morality, which as a result serves only as a formal component, but it inevitably encompasses innumerable aspects of very diverse matters or conduct, such as participation in a religious service, the cohabitation of unmarried persons or even international assistance, which, although they involve moral concerns in respect of which there is a consensus that they are important, cannot all be considered to fall within the criminal law sphere. . . .

* * *

In June 2020, Health Canada issued regulations on Reimbursement Related to Assisted Human Reproduction. The regulations permit reimbursement for groceries and telecommunication costs. The reimbursement must be directly related to the assisted reproduction, such as the food costs attributable to the increased calories consumed by the pregnant woman. Meanwhile, Members of Parliament continue to introduce proposed revisions to the 2004 law in order to allow compensated surrogacy.

Report on the Sale and Sexual Exploitation of Children

United Nations Special Rapporteur (January 15, 2018)*

. . . 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. . . .

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. . . .

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

68. . . . [I]t is not accurate that regulated commercial surrogacy systems avoid the sale of children. . . . [T]he Committee on the Rights of the Child stated . . . that it was “. . . particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage.” 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.

69. In theory, a truly “altruistic” surrogacy does not constitute sale of children 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. . . .

Who Has Access?

Genetic Ties

What role do genetics play in the regulation of surrogacy? Genetic ties are relevant both to the status of the woman serving as the surrogate and to the status of the intended parents. Does regulation reach only gestational surrogacy? Or does it also include genetic surrogacy, in which the surrogate’s own eggs are used? If only gestational surrogacy is permitted, can the intended parents use donor egg or sperm? Must at least one of the intended parents have a genetic connection to the child? These questions raise concerns regarding the normative force of genetics in parent-child relationships and thereby implicate the status of families—such as those formed by same-sex couples—that necessarily depart from this norm.

Most jurisdictions that have allowed surrogacy limit the practice to gestational surrogacy, in which the woman serving as the surrogate is not genetically related to the child. Courtney Joslin offers this description of U.S. law:

Intuitions about the importance (or not) of genetic connections also animate statutes that limit enforceable agreements to gestational surrogacy. . . . The majority of permissive states only allow gestational surrogacy arrangements. Only five of the 22 jurisdictions . . . expressly permit genetic surrogacy. And even among this group, all except Arkansas treat gestational and genetic surrogacy differently in some

respects.*

While the lack of genetic connection between the woman serving as the surrogate and the child has mattered to many authorities' assessment of surrogacy, others reject the distinction as meaningful. According to the 2018 U.N. Special Rapporteur's Report, excerpted above:

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. . . . 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. . . .

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. Such perspectives also rely on the claim that the gestational surrogate mother is never a mother because she is genetically unrelated.

The intended parents' genetic connections to the child also matter to assessments of surrogacy. With IVF, an intended mother can use her own eggs and thus be the genetic mother. In U.S. states that ban surrogacy, courts have found that such laws cannot be constitutionally applied so as to preclude the parental recognition of the intended mother. As a U.S. federal district court reasoned in *J.R. v. Utah*, 261 F. Supp. 2d 1286 (D. Utah 2002):

Resort to the adoption process to gain legal recognition of . . . parental rights, effective though it might be, still fails to account for the parent-child relationship that already exists in fact between [the intended mother and father] and the twin children they conceived, and thus continues to burden [their] fundamental parental rights.

For many different-sex couples who engage in gestational surrogacy to have a child, the intended mother is not the genetic mother and instead a donor egg is used. What if the couple also uses donor sperm? Is it permissible for neither to have a genetic connection? What about a single person who relies on donor gametes?

* Excerpted from a 2020 draft of Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

AB v. Minister of Social Development
Constitutional Court of South Africa
CCT 155/15 (2016)

[Justice Nkabinde, delivered the judgment of the court, joined by Justices Mogoeng, Moseneke, Bosielo, Jafta, Mhlantla, and Zondo.]

[The majority concluded that South Africa’s law prohibiting individuals to enter into surrogacy agreements unless at least one of the intended parents had a genetic connection to the child was constitutionally permissible. The Court held that: “The requirement [of a genetic link] . . . serves a rational purpose . . . of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s).” The Court emphasized that “clarity regarding the origin of a child is important to the self-identity and self-respect of the child.” The Court concluded that:

[The Constitution] does not give anyone the right to bodily integrity in respect of someone else’s body. If this were so, that begs the question, how then does [the law] impair the right to bodily integrity of someone who is unable to produce gamete? In my view, while the donor gamete decision is an important exercise of a prospective parent’s autonomy, it does not entail a decision regarding the commissioning parent’s bodily integrity. It entails the body of a surrogate “host” mother.]

[Justice Khampepe, joined by Justices Cameron, Froneman, and Madlanga dissented.]

8. . . . AB has admirably persevered in distressing circumstances. Between 2001 and 2011, she underwent 18 *in vitro* fertilisation (IVF) cycles which were all unsuccessful in helping her fall pregnant. . . .

9. [A doctor] recommended that AB look into surrogacy as a means to have a child. Through the surrogacy programme . . . she was put in touch with a potential surrogate mother, who agreed to act for her. As a single woman unable to donate her own ova, the only way for AB to proceed was to use both donor ova and donor sperm, as she had done over the course of the last 14 of the total of 18 IVF cycles she had undergone.

10. [An attorney informed AB] that she could not enter into a surrogacy agreement without contributing a gamete to the surrogacy process. Specifically, AB was made aware that she, as a single woman incapable of donating a gamete, could not legally enter into a surrogacy agreement [under South African law]

65. . . . [T]he lessons of our past have taught us that freedom means more than just physical liberty. Section 12(2)* [of the Constitution] thus protects “the right to bodily and psychological integrity.” There is a close connection between the freedoms protected by our Constitution and “integrity.” The Constitution enjoins us to actively turn away from indifference and move towards respect, empathy and compassion. The protection section 12(2) provides is grounded in these ideals. When interpreting the provisions of the Constitution, it is therefore incumbent on us to enhance the integrity of those who seek to rely on it. . . .

73. [The law] forbids a court from sanctioning a surrogate agreement unless the gamete of at least one commissioning parent is used in the conception of the child. An implication of this is that a prospective parent who is both conception and pregnancy infertile, and who does not have a relationship partner who is able to donate a gamete of their own or carry a pregnancy to term, is precluded from considering surrogacy as an option in order to have a child. . . .

86. . . . [I]nfertility is an unenviable and psychologically harmful condition. It is harmful both because it prevents people from having children of their own, and because it results in serious social exclusion and stigma. Where possible, our state should therefore look to alleviate these harmful effects. . . . This responsibility includes the negative obligation to avoid placing additional hurdles in the way of an infertile person’s attempts to temper the consequences of infertility. Infertility is as much a social as a physical condition. The state should avoid standing in the way of decisions that people take to mitigate the socio-psychological harm of this condition, including reproductive decisions on how to have a child using modern reproductive technologies.

87. Because infertility is experienced differently by women and men, and because social stigma plays a role in determining the psychological effects it has, infertility may be a phenomenon independent of bearing children. . . . Stripping a person of this choice has far-reaching personal and social ramifications. Infertility is thus harmful partly because it removes the ability to elect to have a child; a decision almost universally considered important. . . .

89. . . . [M]uch of the harm infertility brings has to do with the forced deprivation of choice in an area of life that humans consider particularly significant. Infertility cruelly dispossesses a person of the capacity to decide whether or not to have a child; where making this decision has extensive social implications. . . .

108. The Constitution’s understanding of dignity . . . is rooted in a recognition that indifference to the concerns of other members of society leads to “a culture of retaliation and vengeance.” Thus, our Constitution acknowledges that protecting and

* Section 12(2) of the South Africa Constitution of 1996 provides:

Everyone has the right to bodily and psychological integrity, which includes the right . . . a. to make decisions concerning reproduction; b. to security in and control over their body

promoting diversity of thought and action is a requirement for human flourishing, and for community building. . . .

110. [The law] strips Classes of persons, including those who are both conception and pregnancy infertile, of the power to choose to have a child using available reproductive technology. . . .

117. The Constitution values alternative forms of family life for good reason. Because of the diversity that characterises our society, there is no one correct version of the family against which others can be assessed. Therefore, it would be presumptuous and arbitrary to define what an acceptable family entails. In a legal culture based on justification, capricious restrictions on something as important to human beings as the family cannot be countenanced. This will harm the dignity of those directly affected, as well as our society in general.

118. Moreover, by requiring the existence of a “genetic link” between parent and child, [the law] is problematically disparaging of forms of family life that have already been constitutionally sanctioned, including adoption. . . .

180. There are important psychological differences between becoming a parent through adoption, and having a child through surrogacy. While the end result of both processes is that a person becomes the parent of a child genetically unrelated to them, the nature of the relationship between parent and child is substantially different. In the case of double-donor surrogacy, an emotional link develops between commissioning parent and child through the choices that the commissioning parent makes before conception, at conception, and during pregnancy. While an emotional link no doubt develops between parent and adoptive child, it is of an entirely different nature. We must show equal respect to these different mechanisms of forming a family. . . .

* * *

In 2017, in *Paradiso*, excerpted in the first part of this chapter, the European Court of Human Rights concluded that no violation of the European Convention on Human Rights occurred when Italian authorities removed a child from the home of intended parents who engaged in gestational surrogacy abroad. The fact that neither intended parent was genetically related to the child was critical to the Court’s decision. In the wake of the decision, the Italian Constitutional Court reviewed the ban on parental recognition for intended parents who had engaged in surrogacy and bore no genetic relationship to the child.

Judgment no. 272 of 2017

Constitutional Court of Italy (November 22, 2017)

[The Constitutional Court of Italy, composed of: President Paolo Grossi and Justices Giorgio Lattanzi, Aldo Carosi, Marta Cartabia, Mario Rosario Morelli, Giancarlo

Coraggio, Giuliano Amato, Silvana Sciarra, Daria de Pretis, Nicolò Zanon, Augusto Antonio Barbera, Giulio Prosperetti, and Giovanni Amoroso, delivered the following judgment:]

1. . . . [T]he constitutionality of Article 263* of the Civil Code . . . has been contested insofar as it does not provide that a challenge to the [parental] recognition of an underage child on the grounds that he was not in actual fact the biological child may only be accepted where this reflects the child's best interests. . . .

2. . . . [T]he remedy sought by the referring court seeks an acknowledgement of the ability to assess the child's best interest, when deciding on the challenge to recognition. Were that possibility to be denied, the acceptance of the claim would be conditional only upon a finding that the fact of recognition did not reflect the actual parentage. . . . [T]he question objects that the automatic mechanism within the decision-making process that precludes a consideration of the interests in play is unreasonable. The constitutional review referred to this Court is thus limited to a verification of the constitutional basis for the contested decision-making mechanism, without making any inference concerning the discretionary choices reserved to the legislator.

3. . . . [T]he proceedings before the referring court concern an application seeking a ruling that there is no parent-child relationship with regard to a child born abroad through recourse to a surrogate mother. However, the proceedings do not concern the legitimacy of the prohibition on [surrogacy] pursuant to Article 12(6)** of Law no. 40 of 19 February 2004

4.1. Whilst it is necessary to acknowledge a marked preference expressed by the legal order that the status of an individual should reflect the actual circumstances of his or her procreation, it cannot be asserted that the establishment of the biological and genetic parentage of an individual is a value of absolute constitutional significance, as such immune to any balancing operation.

Indeed, the current legislative and systemic framework, under both internal and international law, does not require within actions seeking de-recognition of filiative status, that such a finding should have absolute priority over all other interests at stake. In all cases in which genetic identity may differ from legal identity, the requirement to

* Article 263 of Italy's Civil Code provides:

The acknowledgment [of parentage] may be attacked on grounds of mendacity by the person who made the acknowledgement, by the person who has been acknowledged, or by any other interested party. The acknowledgment may be attacked even after the legitimation. . . .

** Article 12(6) of Italy Law no. 40 of 19 February 2004 provides:

Anyone who in any form realizes, organizes, or advertises the marketing of gametes or embryos or the substitution of maternity is punished with imprisonment from three months to two years and a fine of 600,000 to one million euros.

strike a balance between the need to establish the truth and the best interests of the child is apparent from the evolution of the law over time. This requirement also applies with regard to the interpretation of the provisions that must be applied in the case under examination. . . .

4.1.2. . . . Article 9* of Law no. 40 of 2004 provided that a spouse or cohabitee who had consented to the recourse to heterologous medically assisted reproduction techniques could not bring an action for de-recognition or challenge recognition pursuant to Article 263 of the Civil Code.

. . . [T]his Court held that it was possible “to confirm both that any action seeking de-recognition of paternity [. . .] and any challenge pursuant to Article 263 of the Civil Code will be inadmissible, and that birth as a result of heterologous MAR [medically assisted reproduction] will not result in the establishment of legal relations of parentage between the gamete donor and the newly born child, as the key aspects of the legal status of the latter will thus be regulated.”

Also in such cases, in the event of a discrepancy between genetic parentage and biological parentage, the balance struck by the legislator affords priority to the principle of the conservation of the parent-child relationship, or the *status filiationis*. . . .

4.1.5. It must also be recalled that, in line with the principles set forth in the case law of the [European Court of Human Rights], Law no. 173 of 19 October 2015 (Amendments to Law no. 184 of 4 May 1983 on foster children’s right to affective continuity) has afforded primary importance to the interests of the child in maintaining affective bonds, which without doubt apply irrespective of blood relations, by granting legal significance to *de facto* relations established between a child who has been declared eligible for adoption and the foster family.

On the other hand, a discrepancy between genetic identity and legal identity is a premise specifically for the legislation governing adoption (Law no. 184 of 4 May 1983 on the “Right of the child to a family”), as an expression of the principle of responsibility of any person who chooses to become a parent, thus giving rise to a legitimate expectation in the continuity of the relationship.

4.1.6. . . . [T]he legislative and systemic evolution of the concept of family, which has been such as to confirm the legal significance of the parent-child relationship as a social fact, even where it does not coincide with biological parentage, also features

* Article 9 of Italy Law no. 40 of 2009 provides:

(1) Where reference is made to medically assisted procreation techniques of [a prohibited] heterologous type . . . , the spouse . . . can not perform the action of disavowal of paternity in cases covered by . . . an appeal under Article 263 of the [Civil] Code.

express recognition by this Court that “the issue of genetic origin is not an essential prerequisite for the existence of a family.”

4.2. It is in the light of these principles, which are inherent also within the changed legislative and systemic context, that the question concerning the constitutionality of Article 263 of the Civil Code has arisen.

. . . [T]he need to give specific consideration to the child’s best interests within all decisions affecting him or her is strongly rooted within both national and international law, and this Court has long contributed to this degree of consolidation.

It is consequently not apparent why, when confronted with an action pursuant to Article 263 of the Civil Code, with the exception of those brought by the child him- or herself, the court should not assess: whether the applicant’s interest in giving effect to the truth should prevail over that of the child; whether that action is genuinely capable of realising that interest (as is the case under Article 264 of the Civil Code); whether the interest in the truth also has a public aspect (for example insofar as it relates to practices that are prohibited by law, such as surrogacy, which causes intolerable offence to the dignity of the woman and profoundly undermines human relations) and requires that the child’s best interests be protected insofar as consistent with that truth.

There are also cases in which a comparative assessment of the interests is carried out by the law directly, as is the case for the prohibition on de-recognition following heterologous fertilisation. In other cases, on the other hand, the legislator imposes a mandatory requirement to acknowledge the truth by imposing prohibitions such as the ban on surrogacy. However, none of this entails the negation of the child’s best interests. . . .

* * *

In 2020, the Italian Constitutional Court considered Article 263 once again. In Judgment no. 127, the court explained that an individual who has attained parental recognition knowing that he is not the biological parent can subsequently challenge such recognition in light of the biological truth. Nonetheless, the Constitutional Court held that the reviewing court must consider other constitutional values, including “the child’s right to personal identity, which is not linked to biological truth alone but also to affective and personal ties that have developed within the family.”*

* *Press Release of 25 June 2020*, PRESS OFFICE OF THE CONSTITUTIONAL COURT.

Status-Based Criteria

Who will the state allow to enter into agreements for surrogacy to have children? Only married different-sex couples? Different-sex and same-sex couples? Married and unmarried couples? Single people? Single people who will rely on donor egg and sperm? These questions raise important equality concerns—implicating gender, sexual orientation, and marital status—as well as with autonomy concerns relating to reproductive decision-making and family formation.

(Not) Just Surrogacy

Courtney G. Joslin (2020)*

. . . [T]hree factors—restrictions on the identity of intended parents, medical need requirements, and genetic connection requirements—concern the inclusiveness (or lack thereof) of the intended parent eligibility criteria. [Four U.S. states] . . . limit enforceable agreements to those in which the intended parents are married. . . . Two of the four . . . limit enforceable agreements to those in which both married spouses provided gametes. In practice, this requirement limits the process to different-sex married couples.

But the strong trend is in favor of statutes to permit any intended parents regardless of sex, sexual orientation, or marital status. Thirteen of the twenty-two permissive states have intended parent rules that expressly include all intended parents. . . .

Medical need requirements also impact who is recognized and protected as a parent of the resulting child. Older statutes are more likely to require proof that the intended parents have a “medical need” for surrogacy. By contrast, most of the more recently enacted schemes jettison this requirement. The elimination of the medical need requirement is also a means of opening up surrogacy to a wider range of potential intended parents.

. . . [M]edical need requirements create barriers for male same-sex couples. . . . Even when medical need requirements do not screen out entire classes of people based on their identity, some advocates oppose them on the ground that they unnecessarily intrude on and interfere with choices about reproduction and family creation. . . .

* Excerpted from a 2020 draft of Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

Law No. 25 of 2016 (Third Amendment to Law No. 32 of 2006)
Portugal (August 22, 2016)*

. . . Article 8° Surrogate pregnancy

1 - “Surrogate pregnancy” means any situation in which the woman is willing to endure a pregnancy on behalf of another person and to surrender the child after delivery, renouncing the powers and duties of motherhood.

2 - The conclusion of legal transactions for surrogate pregnancies is only possible in exceptional cases, and without involving financial compensation, in cases of absence of uterus, injury or disease of this organ that absolutely and definitively prevents the woman’s pregnancy or in clinical situations that justify it.

3 - The surrogate pregnancy can only be authorized through a medically assisted procreation technique using the gametes of at least one of the respective beneficiaries, and the surrogate pregnant woman cannot, under any circumstances, be the donor of any oocyte used in the proceeding. . . .

4 - The execution of surrogate pregnancy legal transactions requires prior authorization from the National Council for Medically Assisted Procreation, that supervises the entire process, which is always preceded by a hearing by the Order of Doctors and can only be granted in the situations provided for in paragraph 2.

5 - Any type of payment or the donation of any good or amount from the beneficiaries to the pregnant woman is prohibited, except for the amount corresponding to the expenses resulting from the health care actually provided. . . .

7 - The child born through the use of a substitute pregnancy is considered to be the child of the respective beneficiaries. . . .

10 - The execution of legal transactions for the purpose of surrogacy is made through a written contract, established between the parties, supervised by the National Council for Medically Assisted Procreation. . . .

11 - The contract referred to in the preceding paragraph may not impose restrictions of behavior on the surrogate pregnant woman, nor impose rules that violate her rights, freedom and dignity. . . .

* * *

Some courts have begun to recognize the rights of same-sex couples to access surrogacy on equality grounds. In Israel, the Supreme Court found that the exclusion of same-sex couples and single men is discriminatory and violates the rights to equality

* Translation by Professor Miguel Maduro.

and parenting. In the U.S. state of Utah, the state's Uniform Parentage Act required intended mothers to demonstrate a medical need before entering a surrogacy agreement. The Supreme Court of Utah invalidated the requirement for discriminating against same-sex intended parents. Both judgments are excerpted below.

Judgment in Case 781/15

Supreme Court of Israel (February 27, 2020)*

[Before: The Honorable President E. Hayut, The Honorable Deputy President H. Metlzer, The Honorable Justice N. Hendel, The Honorable Justice A. Fogelman, The Honorable Justice Y. Amit]

[Hon. President E. Hayut:]

1. Should same sex couples and single men with a genetic relationship to the newborn be allowed access to an Embryo Carrying Agreement in accordance with the Embryo Carrying Agreements Law (Approval of Agreements and Status of the Newborn), 1996 (Hereinafter: the Agreements Law)? . . .

2. . . . The Embryo Carrying Agreement Law (Approval of Agreements and Status of the Newborn) (Amendment No. 2), 2018 . . . extended the circle of those eligible to a surrogacy arrangement under the Agreements Law, by redefining the term “intended parents” in the law to also include single women with medical conditions that prevent them from conceiving and carrying a pregnancy or women whose health would be significantly endangered by pregnancy. The term “intended parents” was however not redefined in a manner that grants same sex couples and single men the ability to use of the arrangement. . . .

7. The provisions of the Agreements Law relevant to our discussion divided the definition of “*intended parents*” in Section 1 into two separate parts: “*intended parents who are a couple*,” defined as “*a man and a woman who are a couple, who jointly enter a contract with a carrying mother for the purpose of reproduction*” and “*a single intended mother*,” who is “*a woman without a partner, who enters a contract with a carrying mother for the purpose of reproduction*.” . . .

11. The Petitioners, two male couples, argue that the arrangements created by the Agreements Law and the Egg Donation Law infringe upon their right to parenthood and family life, upon their right to equality and upon the freedom of contract given to them as a “*constitutional right derived from the right to Human Dignity*” In their opinion, no relevant difference exists, regarding access to surrogacy arrangements according to the Agreements Law, that would justify different treatment of single men and of non-heterosexual couples. . . . [T]he Petitioners believe that the surrogacy arrangement set by the Agreements Law should be interpreted in a manner that sustains

* Translation by Elazar Weiss (Yale Law School, LL.M. Class of 2020).

human rights and also allows single men and same sex couples to file requests for approval to the Approval Board. Alternatively, if such interpretation proves impossible, the Petitioners request a constitutional remedy of “reading into the law” (Reading-in) provisions that will allow extending the regulatory arrangement to single men and same-sex couples, or an integrative remedy of both sustainable interpretation and “reading into the law.” As another alternative, the Petitioners ask the court to invalidate the definitions in the Agreements Law and the Egg Donation Law that exclude them, and to complete the lacunae that would be created as a result

12. The Approval Board and the Knesset [Israel’s legislature] argue . . . that while the Petitioners’ yearning for the realization of their right to parenthood through the use of an Embryo Carrying Agreement and egg donations is understandable, it does not justify judicial interference in primary legislation of the Knesset. In their opinion, the case before us does not amount to an infringement of a constitutional right, since the infringement on the right to parenthood doesn’t pertain to the “core of the right,” but rather to certain aspects at the “periphery” of it. . . .

14. The central fundamental rights the Petitioners believe to be infringed are the right to parenthood and the right to equality. They argue that the constitutional right to parenthood includes also the right to realize the right within a specific family unit and by a specific reproductive technique. . . . In the Petitioners’ opinion, the right to equality in its essence implies that we must examine an individual’s will and desire to become a parent without taking one’s gender or sexual orientation into account, and that access to a surrogacy arrangement cannot be limited by narrowing its objective to a purely medical one.

Conversely, the Respondents believe that the Israeli surrogacy arrangement does not infringe upon the Petitioners’ constitutional right to parenthood, as it doesn’t affect the right’s core, but rather peripheral aspects of it, namely the ability to choose the *manner* in which the right to parenthood is realized. . . . As for equality, the Respondents claim that in the case before us a relevant difference does exist between women with medical conditions that prevent them from carrying pregnancy and men who wish to enter into a surrogacy arrangement, and that this distinction is not based on gender, but rather on “*anatomical-physiological differences between women and men.*” . . .

15. . . . I accept the Petitioners’ claim that the provisions of the Agreement Law as well as those of the Egg Donation Law, in as much as they are intertwined with them, which leave single men and same sex couples outside their scope, infringe upon their right to parenthood and their right to equality.

. . . [T]he right to parenthood—deriving from the right to family life and from the right of every human being to dignity—“*includes all the various medical techniques that assist reproduction; among them, it includes the ability to become a parent through surrogacy.*” . . . It is given to every person regardless of their gender or sexual

orientation, and regardless of the question of whether they choose to live solely or in a relationship, and with whom. . . .

16. . . . The discussion will . . . focus upon this two-pronged discrimination claim: first, discrimination against men, compared with women, and second, discrimination against same sex couples, compared with heterosexual couples.

17. The Respondents argue that a medical condition that prevents women from conceiving or carrying a pregnancy constitutes a relevant difference between them and single men that justifies their different treatment. This claim is based upon the physiological differences between women and men, namely the fact that women, by nature, are capable of carrying pregnancies and bearing children, while men are incapable of doing so. Is this difference indeed relevant to the question of allowing access to surrogacy arrangements?

Personally, I would answer this question negatively.

. . . In the 2018 amendment of the law the problem of single women . . . was indeed addressed, and the path was paved for these women to become mothers through surrogacy arrangements, provided that a genetic relationship between them and the newborn existed, and the rest of the law's conditions were met. The remainder of the petition before us is now beseeching us to take one step further towards the realization of the right to parenthood, and to derive from it, and from the right to equality, granting single men access to surrogacy arrangements.

. . . There are certainly countries . . . that allow men access to surrogacy arrangements, adopting the approach that use of this arrangement should not be limited to women with medical conditions, and that it should be applicable in other situations as well. . . . The advocates of this approach believe that narrowing access to a surrogacy arrangement down to people with medical conditions alone constitutes an unjustifiable limitation and ignores the social acceptance of the importance of parenthood in general, and genetic parenthood specifically, to the self-realization of the individual.

18. This approach has a certain amount of support in Israeli law. For instance, every individual who conducted a surrogacy arrangement abroad, in a state that legally recognizes the procedure, will be recognized in Israel as the newborn's parent (subject to the existence of a genetic relationship . . .). It seems irrefutable that the Agreements Law creates in this context a distinction between those eligible to use a surrogacy arrangement within Israel and those who are required to turn to surrogacy abroad in order to realize their right to parenthood. . . . As long as this distinction is based on the existence or lack of a medical condition, it constitutes an infringement of the rights of men seeking to enter surrogacy arrangements by using an egg donation to be fertilized by their sperm. In my opinion, if the issue at hand is that of utilizing fertility and birth technologies in the name of helping childless people realize their right to genetic parenthood, there is no basis for the claim that the natural physiological differences

between men and women create a relevant reason for distinguishing between them. . . . The flaws of this view [and] . . . the rationales on which it is based are likely to lead also to discrimination against women

19. The starting point, therefore, is that limiting the right to access surrogacy arrangements in Israel in a manner that narrows the application of the Agreements Law only to women with medical conditions which prevent them from conceiving or carrying a pregnancy, and excludes the entire population of men who are capable of creating a genetic relationship to a newborn infringes the right of these men to equality in realizing their right to parenthood. This infringement is enhanced in this context with regard to the subgroup of homosexual men, as surrogacy is in many ways the only way in which they are capable to achieve genetic parenthood. . . .

The sweeping exclusion of homosexual men from the scope of the surrogacy arrangement appears to be a “suspect” discrimination, which attributes to this group a lower status, and thus creating an additional, critical and humiliating infringement upon human dignity on the basis of gender or sexual orientation. . . .

37. . . . The complexity of this matter necessitates comprehensive, meticulous, and holistic regulation, that corresponds with the entire body of laws dealing with reproduction and fertility. Therefore, the preferable alternative is that the Legislator would consider the judicial criticism detailed in this judgment and would amend and supplement the Agreements Law This additional required amendment should express commitment to the rights to Equality and Parenthood of single men and same sex couples, especially with regard to the definitions section, the provision dealing with the approval of arrangements according to the Agreements Law, as well as with regard to and in the relevant provisions of the Egg Donation law that limit egg harvest, and their allocation and implantation. Considering the circumstances of the case and the complexity of this issue, it seems this alternative is the one that best fulfils the joint responsibility of all the branches of government vis-à-vis the protection of human rights, and it is compatible with the general approach of this Court, which is based on the dialogic theory of constitutional remedies.

. . . [D]ue to the serious and longstanding infringement of the right to equality and the right to parenthood of single men and same sex couples, and considering . . . that this petition has been pending before the court since 2015, as well as the fact that a partial judgement was already given prior to the statutory amendment of 2018, I suggest it be decided that insofar as the provisions of the law are not amended within 12 months from today, a supplementary judgement will be given by us, in which we will order an operative remedy

In re Gestational Agreement
Supreme Court of Utah
449 P.3d 69 (2019)

[Before: Chief Justice Durrant, Associate Chief Justice Lee, Justice Himonas, Justice Pearce, and District Court Judge Direda sitting by designation.]

Chief Justice Durrant, opinion of the Court:

. . . Petitioners N.T.B. and J.G.M. (Intended Parents) are a married same-sex male couple. Petitioners D.B. and G.M. are an opposite-sex married couple who entered into a written gestational surrogacy agreement with the Intended Parents. The four individuals filed a joint petition requesting that the district court validate their agreement, in accordance with the statutory scheme contained in Utah Code sections 78B-15-801 through 809 . . . dealing with gestational agreements. . . . [T]he district court issued an order denying the petition.

In its order, the district court expressed “concern[] about the language of” Utah Code section 78B-15-803(2)(b), which requires, as a prerequisite to court approval, the court to find that “medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child.” . . .

. . . Because a plain reading of section 78B-15-803(2)(b) works to deny certain same-sex married couples a marital benefit freely afforded to opposite-sex married couples, we hold the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment*

In *Obergefell [v. Hodges]*, the United States Supreme Court held as follows: “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” . . .

While the *Obergefell* Court did not address at length how state laws should be implemented in light of same-sex couples’ right to marry, the Court did hold that the Constitution “does not permit the State to bar same-sex couples from marriage on the *same terms* as accorded to couples of the opposite sex.” . . .

A valid gestational agreement is undoubtedly a benefit linked to marriage. Obtaining a valid gestational agreement is, in many cases, one of the most important benefits afforded to couples who may not be medically capable of having a biological

* The Fourteenth Amendment to the United States Constitution provides:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

child. Such an agreement works to secure parental rights to an unborn child and bestows rights and benefits upon the intended parents. The State has explicitly conditioned this benefit on a petitioner's marital status; no unmarried couple may obtain one. It is therefore unquestionably linked to marriage.

Application of section 78B-15-803(2)(b) results in disparate treatment of similarly situated same-sex male marriages. The statute requires that medical evidence be presented to the court, showing that the intended mother is medically incapable of bearing a child or to do so would otherwise harm her or the child. It is impossible for married same-sex male couples to meet this requirement since neither member is a "mother" under the statute. Requiring one of the two intended parents to be female precludes married same-sex male couples from entering into a valid gestational agreement—a benefit explicitly conditioned on marriage. The statute therefore treats married same-sex male couples differently than married opposite-sex couples. . . .

. . . [M]arried same-sex couples, whether male or female, are entitled under the Constitution to the same terms and conditions as married opposite-sex couples. In other words, same-sex couples must be afforded all of the benefits the State has linked to marriage and freely grants to opposite-sex couples. Because Utah Code section 78B-15-803(2)(b) works to deny certain same-sex couples a marital benefit freely accorded to opposite-sex couples, it is unconstitutional

* * *

Those who live in jurisdictions that ban surrogacy or that allow only different-sex couples to enter into surrogacy agreements may engage in surrogacy in other jurisdictions.

One Baby, Two Fathers

Lin Qiqing (2019)*

. . . Li [Yang], a chatty 34-year-old with dyed brown hair, and his 28-year-old partner Wang Jie are gay. Although same-sex sexual activity was decriminalized in 1997, and homosexuality was removed from the official list of mental illnesses in 2001, it's still extremely difficult for same-sex couples in China to have children. . . .

Until recently, the main options for gay men wanting to have children were marriages of convenience with lesbians, or duping straight women into a relationship. An estimated 40 million people in China are in marriages in which one partner is straight and the other is gay. Domestic surrogacy was banned in 2001. Adopting a healthy child from charity centers means waiting in long lines for years, and gay or single men tend to stay at the bottom of the candidate list. In recent years, with more information

* Excerpted from Lin Qiqing, *One Baby, Two Fathers: The Rise of Gay Men Turning to Surrogacy*, SIXTH TONE (Jan. 14, 2019), <https://www.sixthtone.com/news/1003427/one-baby%2C-two-fathers-the-rise-of-gay-men-turning-to-surrogacy>. This article originally appeared on Sixth Tone (www.sixthtone.com).

available and more money in their pockets, some gay male couples have started to look overseas where surrogacy is possible. But the process remains costly and time-consuming—and the challenges continue once the child is born. . . .

[After failing to have children through altruistic surrogacy and a marriage of convenience with a lesbian couple in China, Li and Wang turned to overseas gestational surrogacy.] . . . [T]he couple opted for Thailand, where having a child through surrogacy would cost 500,000 yuan [(about 70,500 USD)]. In February 2017, Li and Wang flew to Bangkok and met with the egg donor they'd selected via a Thai surrogacy agency. They asked about her health, hobbies, and if she'd had plastic surgery, and decided that she would be their baby's genetic mother. . . .

The following month, 16 eggs were removed from Li and Wang's chosen egg donor. Only two years earlier, in 2015, Thailand had banned commercial surrogacy for foreigners. To skirt the rules, Li and Wang's chosen Thai surrogate went to neighboring Cambodia in May to have the fertilized embryos inserted. Finally, in February 2018, Mumu was born. . . . [Li had kept an online journal] throughout the whole process, hoping it [would] help other gay couples—and also explain Mumu's beginnings to her when she's old enough. . . .

In 2015, [Eric] Li and [George] Zeng heard about surrogacy. Previously, the couple . . . thought they'd have to always live in secret. "It was mind-blowing, this idea of a future life in which the two of us could have a kid and live independently," recalls Li, a 35-year-old Shanghai native. "We craved that kind of life." The following year, the couple went to California and used eggs from the same donor and surrogate mother to have two children: a boy related to Li, and a girl related to Zeng. In total, the whole process—including agency fee—cost them around 1.3 million yuan [(about 183,000 USD)]. In December 2017, the couple welcomed Luke and Geneva into the world. . . .

Li and Zeng's families still haven't completely accepted their sons' sexual orientation, but the twins have no shortage of love. Both sets of parents have been helping raise Luke and Geneva since the beginning. . . . Zeng's parents see the couple as traditional husbands, the family breadwinners who shouldn't do any housework. . . . On the contrary, Li's mother urges them both to fulfill the traditional mothering role, telling them to put their children first and not work too late. . . .

Ted Zhou is 32, gay, and single. But he's not letting that stop him from becoming a father. There's already an embryo fertilized with his sperm in America, waiting to be implanted into a surrogate's womb this year. . . . Three years ago, Zhou learned about surrogacy for gay men. "My friends, a gay couple, got married and had a baby in the U.K. Suddenly, I felt it wasn't just something that happened in newspapers or on TV. If my friends could do it, maybe I could, too," Zhou says. . . . Zhou works for a medical software company, often travels to Silicon Valley, and speaks fluent English—and found he could save around 30 percent of the cost by pursuing surrogacy independently.

He's now trying to turn his expertise into an online surrogacy platform which will connect Chinese clients with overseas institutions.

In the past few years, a number of businesses have sprung up to help match Chinese couples with overseas surrogates. . . . Last summer, an American nonprofit called Men Having Babies organized their first event in the Chinese mainland, a low-key talk in a central Shanghai hotel's meeting room. Gay fathers from the U.S. and Taiwan shared their experiences, while two dozen participants eagerly quizzed them. Li Lin, the CEO of Shanghai-based surrogacy agency True Baby, estimates that around 500 gay Chinese couples seek surrogacy in America each year, although there is no official number. . . . Since it started in 2014, True Baby has helped deliver 240 babies, and around 30 percent of the agency's surrogacy clients are gay.

But with the cost of having a child through surrogacy often stretching into the hundreds of thousands of yuan, it's still not an option for everyone. True Baby's clients—who pay \$160,000 to have a baby via an American surrogate—are usually well-educated, aged between 30 and 45, from big cities, and with good jobs.

Even once the baby is born, the challenges—from access to education, to avoiding prejudice—don't stop. . . . Li and Zeng were unable to register Geneva's *hukou* [(household status)], because the police weren't happy that the mother's name was left blank By a stroke of luck, they were able to register baby Luke at another station, after Li faked emails to show he'd had a one-night stand with an American woman. Although the Beijing couple had no trouble registering baby Mumu, they face different challenges. Wang doesn't have a genetic connection to Mumu, and he can't marry Li Yang, so in the eyes of the law, he isn't her dad at all. "If she has an accident at school in the future, I can't show up as her legal guardian," Wang says quietly, when the rest of the family is out of earshot. . . .

Meanwhile, Zhou . . . has a pricey backup plan. He'll try to get his baby a *hukou* in Shanghai, but if that doesn't work out, he'll move to America. . . . Zhou plans to tell the whole story to his kid once they're old enough. He'll say: "Dad loves kids, but Dad can't have babies by himself, so he asked two good friends to help. It's not that you don't have a mother. You have two, and they live in America."

* * *

In response to concerns with reproductive tourism and its implications, some countries have constricted the range of individuals eligible to have children through surrogacy. India, once a leading site of international surrogacy, now imposes numerous status limitations on who can enter into surrogacy agreements. The ban on commercial surrogacy applies not only to foreigners, but also to members of the LGBTQ community.

Governing Surrogacy in India

Prabha Kotiswaran (2018)*

. . . India is unique in that the state has adopted a range of policy positions towards surrogacy from a liberal, contract-based model in the late 1990s to a prohibitionist, carceral model in 2016. Law has thus been a site of intense political, social and economic contestation over the status of women's reproductive labour. . . .

The [Indian Council for Medical Research (ICMR)] sought to regulate surrogacy from the late 1990s to 2008; I term this the medico-liberal phase. . . . The ICMR Guidelines permitted commercial gestational surrogacy and allowed for the compensation of gamete donors to facilitate ART. The ICMR Guidelines (Clauses 3.9.2, 3.10.3 and 3.5.3) forbade the ART Bank and clinic from facilitating monetary aspects of the surrogacy transaction leaving this negotiation to the surrogate and commissioning parents. Although the leading ART clinics claimed compliance with the ICMR Guidelines, they in fact determined levels of remuneration and matched the surrogate with the commissioning parents based on the former's financial needs. . . .

Between 2008 and 2012, various business models emerged to provide surrogacy services primarily to international commissioning parents. There were full-service clinics . . . which offered comprehensive package deals—from identifying the egg donor and surrogate to performing *in vitro*-fertilisation (IVF) treatment, to maintaining a surrogate hostel, to delivering the baby to facilitating local travel and sometimes even obtaining the exit visa. . . .

As business boomed, the ICMR went back to draft the [Assisted Reproductive Technology (ART)] Bill. The ART Bill 2008 was very similar to the ICMR Guidelines. The Bill introduced offences, placed restrictions on egg donation and reiterated that ART was available to all, irrespective of marital status. . . . The 2010 Bill changed the definition of the term 'couple' to cover two persons living in India and having a sexual relationship that was legal in India. Surrogacy was available to all single persons, married couples and unmarried couples. The Bill added requirements for foreign commissioning parents to ensure that there were no stateless babies

The ART Bill 2014 confirmed earlier restrictions by explicitly excluding LGBT commissioning parents. It also excluded foreign commissioning parents. . . . Even as the federal government refined its proposed Bill, Jayasree Wad, a lawyer, filed a public interest petition in 2015 in the Supreme Court praying that it prohibit commercial surrogacy and the import of embryos into the country, given the rampant subordination, exploitation and commodification of women and children. However, on the appointed

* Excerpted from Prabha Kotiswaran, *Law's Paradoxes: Governing Surrogacy in India*, in CROSS-CULTURAL COMPARISONS ON SURROGACY AND EGG DONATION 127 (Sayani Mitra, Silke Schicktanz & Tulsi Patel eds., 2018).

day for answering questions in court, the government decided to ban commercial surrogacy for foreigners. . . .

The policy framework for surrogacy in India has gone from a medico-liberal model in 2005 to a socially conservative prohibitionist model in 2016. Through these years, the categories of who could avail of commercial surrogacy progressively narrowed excluding gay, lesbian and transgender individuals and couples in 2012, then foreigners, including even those of Indian origin in 2015. The 2016 [Surrogacy Regulation Bill (SRB)] went a step further to prohibit commercial surrogacy and replace it with a familial model of altruistic surrogacy, wherein the surrogate had to be a close relative of the commissioning parents. . . .

Yet there has been considerable criticism of the SRB. While liberals object to depriving single men and women and gay and lesbian couples from resorting to surrogacy, feminists worry about the undue pressure that the familial altruistic model will place on women. . . . All these concerns resonated with the Parliamentary Standing Committee which sought to reverse key proposals of the SRB often harking back to the more measured drafting of the ART Bill 2014 and proposing yet another policy option—that of the compensated surrogacy model heavily regulated by the state. Whether the government will in fact heed this proposal is yet to be seen. But what is clear is that the law and governance of India’s surrogacy sector is far from settled even while the sector itself may be unable to regain its place in the highly dynamic transnational commercial surrogacy market.

* * *

The situation regarding legal regulation of surrogacy in India is dynamic. The 2016 Surrogacy Regulation Bill was referred to a second parliamentary committee, and a new version is likely to be presented when Parliament reconvenes at some point in 2020.

The Rights of Women Serving as Surrogates

When states permit surrogacy, what rights of the surrogate should they protect? The right to make decisions about her healthcare? The right to refuse implantation of multiple embryos (a higher-risk procedure)? The right to decide whether to terminate the pregnancy? Even after the question of whether or not a woman may serve as a surrogate, significant issues of liberty, privacy, and equality are at stake.

As feminists in some jurisdictions have turned attention to regulating, rather than banning, surrogacy, important questions about the rights of women serving as surrogates have moved to the fore. In the United States, surrogacy contracts frequently included

“abortion clauses” that give the intended parents the right to make termination decisions.* As the following excerpt explains, some U.S. jurisdictions have acted to restrict terms of this kind as well as others that limit the decisional authority of the woman serving as surrogate.

(Not) Just Surrogacy
Courtney G. Joslin (2020)**

. . . [K]ey issues regarding people acting as surrogates relate to their ability to make decisions about their bodies and their behavior during the course of pregnancy. Some advocates argue that “[e]nsuring that a woman retains reproductive decision-making should be a key aspect of any regulatory scheme regarding compensated surrogacy.” This position is reflected in some, but far from all, permissive surrogacy regimes. . . .

A few . . . jurisdictions expressly protect the right of the person acting as a surrogate to make a wider range of health care decisions during her pregnancy. Washington State law, for example, provides that the surrogacy agreement must permit the person acting as a surrogate “to make *all health and welfare decisions regarding herself and her pregnancy*, and not withstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable.” This language ensures that the person acting as a surrogate gets to make all medical decisions during her pregnancy. This would include, even where not otherwise expressly protected, the person’s choice of doctor. In addition to that choice, this kind of protection also protects the right to make many other decisions that may arise during the course of the pregnancy, such as whether to have a particular invasive test or a cesarean section. . . .

Three other states . . . have statutes with somewhat more limited language regarding general medical decision making. Maine law, for example, provides that “the agreement may not limit the right of the [person acting as a surrogate] to make decisions to safeguard her health or the health of an embryo.” This language clearly protects the right of the person acting as a surrogate to make at least some medical decisions during her pregnancy. It is possible, however, that a court could interpret the “safeguard” language in way that allows for enforcement of some provisions related to medical decisions that do not impose any risks to the health of the person acting as a surrogate. Under this interpretation, a court might, for example, approve the inclusion of contract clauses under which the person acting as a surrogate agrees not to engage in a range of behaviors such as smoking or drinking, or maybe even strenuous exercise. . . .

* Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAMILY LAW QUARTERLY 29 (2015).

** Excerpted from a 2020 draft of Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

Another group of permissive statutory schemes take a very different approach. The laws in these jurisdictions permit contract clauses that *limit* or *override* the medical decision-making authority of the person acting as a surrogate with respect to her own body. For example, Oklahoma law expressly allows for the inclusion of agreement clauses that require the person acting as a surrogate to “undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy.” . . .

The schemes in other permissive regulatory jurisdictions . . . do not expressly address contract clauses regarding the decision-making authority of the person acting as a surrogate. . . . Evidence suggest that attorneys in at least some of these jurisdictions routinely include such clauses in their agreements.

These kinds of clauses have been included in surrogacy agreements from the early days. Despite some early predictions to the contrary, they remain basic features of the contracts today. Their continued presence is due at least in part the express condonation of them by a number of states. . . .

. . . Some scholars argue in favor of “full contractual” enforcement of surrogacy agreements, including provisions about invasive medical treatment and abortions. Others, in contrast, argue that, at a minimum, clauses that require the person acting as a surrogate to have an abortion or that preclude her from having an abortion are unenforceable. Some also argue that clauses about other medical interventions during the pregnancy are likewise unenforceable.

. . . [L]aws that even purport to allow these kinds of contract provisions are deeply troubling. In the context of individual surrogacy arrangements, such clauses diminish the rights and interests of pregnant people and allow their bodies and their lives to be subordinated to the wishes and interests of others. Moreover, that person may experience the effects long after the arrangement has ended. If, for example, a person acting as [a surrogate] is forced to undergo an unwanted cesarean section, she might experience reduced fertility or other complication of the surgery throughout her lifetime.

. . . Applied more broadly, such an approach inhibits women’s ability to achieve full equality. Viewed through this lens, these types of surrogacy rules can be seen as contributing to efforts to curtail women’s bodily autonomy and reproductive freedom[,] . . . impact[ing] all aspects of women’s lives. . . .

* * *

Some feminist activists in the United States continue to reject surrogacy. In 2019, feminist icon Gloria Steinem, who opposed surrogacy at the time of *Baby M*, opposed a bill to allow commercial gestational surrogacy in New York:

The danger here is . . . the state legalizing the commercial and profit-

driven reproductive surrogacy industry. As has been seen here and in other countries, this harms and endangers women in the process, especially those who feel that they have few or no economic alternatives.

Under this bill, women in economic need become commercialized vessels for rent, and the fetuses they carry become the property of others. The surrogate mother's rights over the fetus she is carrying are greatly curtailed and she loses all rights to the baby she delivers.*

Other feminists supported the legislation and worked to include specific protections for women acting as surrogates. In 2020, New York legalized and regulated commercial gestational surrogacy and included in the law a Surrogates' Bill of Rights.

Surrogates' Bill of Rights

N.Y. Assembly Bill No. A09506B (enacted 2020)

. . . § 581-601. Applicability. . . . Except as otherwise provided by law, any written or verbal agreement purporting to waive or limit any of the rights in this part is void as against public policy. . . .

§ 581-602. Health and welfare decisions. A person acting as surrogate has the right to make all health and welfare decisions regarding themselves and their pregnancy, including but not limited to whether to consent to a cesarean section or multiple embryo transfer, to utilize the services of a health care practitioner of their choosing, whether to terminate or continue the pregnancy, and whether to reduce or retain the number of fetuses or embryos they are carrying. . . .

§ 581-604. Health insurance and medical costs. A person acting as surrogate has the right to have a comprehensive health insurance policy that covers preconception care, prenatal care, major medical treatments, hospitalization and behavioral health care for a term that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child . . . to be paid for by the intended parent or parents. . . .

§ 581-605. Counseling. A person acting as surrogate has the right to obtain a comprehensive health insurance policy that covers behavioral health care and will cover the cost of psychological counseling to address issues resulting from their participation in a surrogacy and such policy shall be paid for by the intended parent or parents. . . .

* Excerpted from *Gloria Steinem Calls Upon New York Gov. Cuomo to Not Legalize Commercial Surrogacy*, CENTER FOR BIOETHICS AND CULTURE (2019), <https://mailchi.mp/cbc-network.org/gloria-steinem-calls-upon-new-york-gov-cuomo-to-not-legalize-commercial-surrogacy>.

The United States-based Center for Reproductive Rights, which participated in the New York efforts, has offered a human rights framework for surrogacy laws.

Baseline Guiding Human Rights-Based Principles on Compensated Gestational Surrogacy in the United States
Center for Reproductive Rights (2019)*

Personal and Bodily Autonomy

1. Every person has the right to make decisions about their reproductive life. As is consistent with human and constitutional rights, a person acting as gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement, including during attempts to become pregnant, pregnancy, delivery, and post-partum. . . . [T]his right cannot be waived, should be affirmatively acknowledged by all parties from the beginning of a matching process, and must be expressly included in any contract governing a compensated gestational surrogacy arrangement. The potential for a breach of contract, unique to this circumstance, is a separate issue and its potentiality should not override the gestational surrogate's fundamental right to reproductive decision-making authority.

Equality and Non-Discrimination

2. Laws and policies regarding compensated gestational surrogacy must not discriminate against people on prohibited grounds, such as race/ethnicity, gender, sex (including sex stereotypes, gender identity, gender expression, and sexual orientation), marital status, nationality, religion, and/or disability. Additionally, laws and policies must not result in differential treatment based on such distinctions or reflect particular beliefs about motherhood or parenthood that exclude or discriminate against individuals seeking to enter into a compensated gestational surrogacy arrangement, particularly with regards to single individuals, same-sex couples, people who are transgender, and people with disabilities. . . .

Rights of the Child

6. Rights protections adhere at birth. Human rights do not apply prior to birth and laws and policies concerning compensated gestational surrogacy do not grant pre-natal rights protections to an embryo or fetus. States may not use the regulation of compensated gestational surrogacy as a mechanism by which to apply human rights protections to an embryo or a fetus. . . .

Privacy and Family Life

* Excerpted from *Baseline Guiding Human Rights-Based Principles on Compensated Gestational Surrogacy in the United States*, CENTER FOR REPRODUCTIVE RIGHTS (July 1, 2019).

8. The right to private and family life includes the right to decide whether or not to become a parent. Pre-birth parentage orders in compensated gestational surrogacy arrangements help establish legal clarity by establishing who the future child's legal parents will be if and *once the child is born*. The process to petition for and to receive a judicial pre-birth parentage order must include affirmative participation by the person acting as gestational surrogate or their independent legal representation and by the intended parent(s). Pre-birth parentage orders neither grant fertilized eggs, embryos or fetuses the status of persons under the law nor grant any party parental rights over them. . . .

PARENTAL RECOGNITION

Who are the parents of the resulting child? Is the woman who acts as a surrogate a parent? Are the intended parents the legal parents by operation of law? At the moment of the child's birth? Is only a genetic intended parent the legal parent? Must a non-genetic intended parent adopt the child?

Questions of parental recognition implicate the constitutional interests of the intended parents, as well as the woman serving as the surrogate. Does one or the other have a superior right to parentage? Questions of parental recognition also implicate equality interests, given that men may have paths to parentage that are not available to women, different-sex couples may have access to parentage that same-sex couples are denied, and married couples may be recognized as parents in ways that unmarried couples and single persons are not. Questions of parental recognition also implicate the rights of the child—including the generalized interest in children's welfare that would shape an approach to parentage, the more specific interest of a particular child born through a surrogacy arrangement, and the potential interest in knowing the identity of the woman who served as the surrogate or donated the egg.

The following materials address parental recognition, first as a question of domestic law (i.e., is the person a parent under the law of the jurisdiction where the surrogacy occurred?), and then as a transnational question (i.e., how should the intended parents be treated under the law of their home jurisdiction after evading that jurisdiction's law to engage in surrogacy in a permissive jurisdiction?).

Parental Rights and Recognition Under Domestic Law

Soos v. Superior Court
897 P.2d 1356 (Ariz. Ct. App. 1994)*

[Before: Judges John L. Claborne, Ruth V. McGregor, and Rudolph J. Gerber]

* The Arizona Supreme Court denied the petition for review on July 11, 1995.

CLABORNE, PRESIDING JUDGE. . . .

. . . The Father and his then wife, Pamela J. Soos (“the Mother”), entered into a surrogate parentage contract with Debra Ballas (“the Surrogate”) because the Mother was unable to have children because of a partial hysterectomy. Eggs were removed from the Mother and fertilized *in vitro* . . . by sperm obtained from the Father. Pursuant to a “Host Uterus Program” at the Arizona Institute of Reproductive Medicine, the fertilized eggs were implanted in the Surrogate. The Surrogate became pregnant with triplets.

During the pregnancy of the Surrogate, the Mother filed a petition for dissolution of marriage requesting shared custody of the unborn triplets. The Father responded to the petition, alleging that he was the biological father of the unborn triplets, and that pursuant to A.R.S. section 25-218 (1991), the Surrogate was the legal mother of the triplets. The Father further alleged that since the Surrogate was the legal mother of the triplets, the Mother had no standing to request custody.

In September of 1993, the Surrogate gave birth to triplets. The Father and the Surrogate filed a request for order of paternity with the Maricopa County Superior Court. An order was entered naming the Father as the natural father of the triplets, and the Father took custody of the triplets.

The Mother responded by . . . attack[ing] the constitutionality of A.R.S. section 25-218(B) declaring the Surrogate to be the legal mother. The trial court in its minute entry said:

THE COURT FINDS that there is not a compelling state interest that justifies terminating the substantive due process rights of the genetic mother in such a summary fashion.

The current law could leave a child without any mother, as a gestational mother may have no desire to do more than she was hired to do, which is to carry and give birth to a child. The current law also ignores the important role that generations of genetics may play in the determination of who a child is and becomes. The current law does not consider what is in the best interest of each individual child.

THE COURT FINDS A.R.S. § 25-218(B) to be unconstitutional.

. . . We agree with the trial court and the Mother that A.R.S. section 25-218(B) is unconstitutional because it violates the Mother’s equal protection rights.

A.R.S. section 25-218 provides in relevant part:

A. No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.

B. A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.

C. If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. *This presumption is rebuttable.* . . .

The question before us is whether the State's reasons for enacting the surrogate parentage contracts statute are sufficient to withstand constitutional scrutiny under the due process, equal protection, and privacy rights guaranteed by the United States and Arizona Constitutions. We must keep in mind that we are dealing with a custody issue between the biological mother and biological father and the constitutional issues surrounding their competing interests. This is *not* a case of the surrogate mother versus the biological mother. We are *not* dealing with the constitutional questions that arise when the surrogate mother wishes to keep the child she bore. Thus, we limit ourselves to the question of whether the statute withstands constitutional scrutiny when it affords a biological father an opportunity to prove paternity and gain custody, but does not afford a biological mother the same opportunity. . . .

. . . A parent's right to the custody and control of one's child is a fundamental interest guaranteed by the United States and Arizona Constitutions. . . .

A.R.S. section 25-218(C) allows a man to rebut the presumption of legal paternity by proving "fatherhood" but does not provide the same opportunity for a woman. A woman who may be genetically related to a child has no opportunity to prove her maternity and is thereby denied the opportunity to develop the parent-child relationship. She is afforded no procedural process by which to prove her maternity under the statute. The Mother has parental interests not less deserving of protection than those of the Father. "By providing dissimilar treatment for men and women who are thus similarly situated," the statute violates the Equal Protection Clause . . . of the United States and Arizona Constitutions. . . .

GERBER, Judge, specially concurring. . . .

. . . I agree with the trial court's reason for holding the statute unconstitutional, namely that it imposes the burden of motherhood on a surrogate mother who almost certainly does not wish it and did not contract for it. Her contract is to carry the child, not to nurture and raise it. The statute thrusts these burdens on her as a duty well beyond her contract.

The Nature of Parenthood

Douglas NeJaime (2017)*

. . . Within the contemporary parentage regime, those who believe they are parents on social grounds, including those who have been parenting their children for many years, may be denied parental status. . . . [I]t is difficult to imagine a system that satisfies all those who make claims to parental recognition. But it is especially troubling that the law rejects claims in ways that preserve longstanding forms of inequality. . . .

As a practical matter, lack of parental recognition shifts individuals out of the ordinary parentage regime and into the adoption scheme. . . . The process can be “lengthy and costly” and may be prohibitively expensive for some parents. . . . The process itself can be intrusive, subjecting those who have coparented for many years to invasive home studies. . . .

Many of those who believe they are parents on social grounds but are denied legal recognition will successfully navigate the adoption process and emerge, eventually, with legal rights to their children. The harms of the adoption process, though, are not only material but also dignitary. . . . Resort to adoption is based on the notion that “a child who is born as the result of artificial reproduction is somebody else’s child from the beginning.” . . . Adoption requirements thus intervene in ways that reproduce normative distinctions between biological and nonbiological parents. . . .

The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties “non-parents”—casting them as third parties who are otherwise strangers to the family. . . . [T]hose parents lacking legal status not only experienced “less validation and support from the outside world,” but also reported feeling “insecure about [their] role in the family.” They found nonrecognition “demeaning” and reported frustration with “being the invisible dad.”

. . . [T]he burdens imposed on social parent-child bonds are not distributed evenly. Those who break from traditional norms governing gender, sexuality, and family—by not marrying, by separating motherhood from biological ties, or by forming a family with a same-sex partner—are channeled into adoption or denied parental status in ways that others are not. . . .

Approaches to . . . gestational surrogacy . . . suggest that, even as courts and legislatures liberalized motherhood and recognized same-sex parenting, they sustained biologically grounded, gender-differentiated views of parenthood. Nonbiological mothers in different-sex couples and non-biological fathers in same-sex couples struggle for parental recognition, *even when they are married to the biological parent*. If these parents fail to adopt their children, they may be deemed legal strangers even after raising

* Excerpted from Douglas NeJaime, *The Nature of Parenthood*, 126 YALE LAW JOURNAL 2260 (2017).

the children. These dynamics may reflect judgments about women who separate motherhood from biological connection, as well as men who fill roles traditionally demanded of women.

Those who are invested in gender-based family roles *and* their biological basis often oppose surrogacy regardless of its form. Both traditional and gestational surrogacy challenge the connection between the physical fact of pregnancy and the social role of motherhood. Through this lens, surrendering the child, even when the woman is not genetically related, “is contrary to the natural instincts of motherhood.” But most states have departed from this view and instead have increasingly accommodated gestational surrogacy where the intended mother is the genetic mother. That woman is the legal mother, and the gestational surrogate is not.

Gestation and birth—the sex-based reproductive features that licensed legal distinctions between motherhood and fatherhood—no longer inevitably produce the social role of motherhood. Genetics—itself not a sex-based reproductive difference—can ground legal motherhood. Yet in [many] states, the surrogate’s nonrecognition occurs *only* when the intended mother is the genetic mother. With egg-donor gestational surrogacy, birth reemerges as necessarily producing legal motherhood—with no change in the surrogate’s role or in the intentions of the parties. . . .

If the biology of reproduction can be detached from the social role of motherhood, it is difficult to maintain distinctions between the two forms of gestational surrogacy. The law’s differential treatment of genetic intended mothers and nonbiological intended mothers suggests that biological connection generally—whether gestation or genetics—creates maternal attachments. At stake is the maintenance of motherhood as a biological status—not the specific relationship between pregnancy and motherhood.

The act of surrogacy challenges the “maternal instinct,” and instead suggests that a mother’s attachment is constructed. The genetic intended mother, whom law recognizes, can maintain a connection between the biological and social aspects of motherhood, even if not through pregnancy. The nonbiological intended mother, in contrast, renders maternal attachment the product of social arrangements, rather than biology. The surrogate and the nonbiological intended mother reveal the mother-child bond to be in important ways like the father-child bond—volitional and constructed.

Through this lens, the law of parental recognition may reflect stereotypes that view the social role of motherhood as flowing naturally from biological ties. A mother’s biological tie to her child—established most often through gestation but also through genetics—both defines and limits her parental status. While the legal status of motherhood derives solely from biological connections, biological connections may, but need not, determine the legal status of fatherhood. . . .

The law's construction of parenthood situates women as biologically connected not only to reproduction but also to child-rearing—itself a form of uncompensated labor that drastically shapes a woman's life opportunities. While biological fathers can be displaced by men and women who lack biological ties, the law attempts to ensure the biological mother's presence. From this perspective, women—naturally, inevitably—bear the burdens of child-rearing. . . .

Gay men engaging in surrogacy challenge the centrality of the mother-child relationship in ways that different-sex couples engaging in surrogacy do not. Their parental recognition, and the corresponding production of “motherless” families, threatens gender differentiation—not merely biological sex differentiation. . . . Genetic intended mothers had emerged since *Baby M*'s rejection of traditional surrogacy as viable candidates to supplant the surrogate. But fathers engaging in egg-donor gestational surrogacy simply could not replace the mother. . . .

These results are troubling. They make paths to parenthood more difficult and fraught for those who break from norms that have traditionally structured family life, and they reiterate views about motherhood and fatherhood that harm both women and men. . . .

Raftopol v. Ramey
Supreme Court of Connecticut
12 A.3d 783 (Conn. 2011)

[Before: Chief Justice Rogers and Justices Norcott, Katz, Palmer, Vertefeuille, Zarella, and McLachlan]

McLACHLAN, J.

This appeal raises the question of whether Connecticut law permits an intended parent who is neither the biological nor the adoptive parent of a child to become a legal parent of that child by means of a valid gestational agreement. . . .

. . . The plaintiffs [(Raftopol and Hargon)], who were domestic partners living in Bucharest, Romania, entered into a written agreement . . . with Ramey, in which she agreed to act as a gestational carrier for the plaintiffs. . . . [E]ggs were recovered from a third party egg donor and fertilized with sperm contributed by Raftopol. Three of the resulting frozen embryos were subsequently implanted in Ramey's uterus. . . . Ramey gave birth to two children

Prior to the expected delivery date, the plaintiffs brought this action, seeking a declaratory judgment that the gestational agreement was valid, that the plaintiffs were the legal parents of the children and requesting that the court order the department to issue a replacement birth certificate reflecting that they, and not Ramey, were parents of the children. . . . [T]he trial court issued a ruling declaring that: (1) the gestational

agreement is valid; (2) Raftopol is the genetic and legal father of the children; (3) Hargon is the legal father of the children; and (4) Ramey is not the genetic or legal mother of the children. [The Department of Public Health appeals.] . . .

. . . We conclude that § 7-48a* allows an intended parent who is a party to a *valid* gestational agreement to become a parent without first adopting the children, without respect to that intended parent's genetic relationship to the children. . . .

. . . What is clear from the text of the statute is that if the birth is subject to a "gestational agreement" and if a court of competent jurisdiction orders the department to do so, the department is both authorized and required to issue a replacement birth certificate in accordance with that order. . . .

. . . [I]t is unclear from the text of § 7-48a (1) which types of gestational agreements are intended to be included within the statutory phrase "gestational agreement"; (2) whether a court may order the department to issue a replacement birth certificate naming an intended parent as the parent, despite the fact that the intended parent is the parent neither by conception nor adoption; and (3) whether the statute creates a new means by which persons may become legal parents.

. . . The department's contention that the legislature expressed an intent, via the plain language of § 7-48a, that only a biological intended parent may gain parental status absent adoption proceedings . . . leads to the not very remote possibility of a child who comes into the world with no parents Suppose an infertile couple who desire to have children but cannot supply the womb, the eggs, or the sperm These intended parents would need to rely on third party egg and sperm donors to produce embryos that are implanted in a gestational carrier pursuant to a gestational agreement. If § 7-48a confers parental status only on biological intended parents, the intended parents are not the parents of any resulting child, nor are the gestational carrier, any spouse she may have, the gamete donors, or any spouses each may have. Every possible parent to the child would be eliminated as a matter of law, yielding the result of a child who is born parentless The legislature cannot be presumed to have intended this consequence The mere fact, however, that the department's proposed interpretation of § 7-48a leads to an absurd result does not necessarily lead to the conclusion, based on the language of the statute, that § 7-48a confers parental status on Hargon by virtue of the

* Connecticut General Statutes Section 7-48a provides:

. . . (b) If the birth is subject to a gestational agreement, the Department of Public Health shall create a replacement certificate of birth immediately upon: . . . Receipt of a certified copy of an order of a court of competent jurisdiction approving a gestational agreement and issuing an order of parentage pursuant to such gestational agreement The department shall prepare the replacement certificate of birth for the child born of the agreement in accordance with such order. The replacement certificate of birth shall include all information required to be included in a certificate of birth . . . except that the intended parent or parents under the gestational agreement shall be named as the parent or parents of the child. . . .

gestational agreement. . . . In light of the many remaining ambiguities, we turn to extratextual sources in order to discern the intent of the legislature. . . .

. . . [The removal of more specific statutory language and comments from a legislator suggesting that the statute may help intended parents avoid adoption proceedings in Probate Court] clarifies that § 7-48a does not merely provide for a ministerial order by a court, but rather, has effected a substantive change in the law and has created a new way by which persons may become legal parents. . . .

With respect to whether this substantive change in the law was intended to include nonbiological intended parents, . . . the legislative history is inconclusive, but we already have rejected, on the basis of our plain language analysis, the department's contention that only biological intended parents may acquire legal parentage solely by virtue of a valid gestational agreement. . . . [W]e conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children. Such intended parents need not adopt the children in order to become legal parents. They acquire that status by operation of law, upon an order by a court of competent jurisdiction pursuant to § 7-48a. . . .

. . . Parentage . . . is not an issue that should be addressed in a "piecemeal" fashion. . . . [O]ur existing statutes provide few answers and raise many questions. . . .

We highlight some of the issues that remain unresolved in our current statutory scheme by looking to the laws of other jurisdictions [I]t appears that there are three general approaches to the determination of legal parentage. Those three approaches define parentage based on: (1) the intent of the parties; (2) the genetic relatedness of the parties; or (3) giving birth.

How a state defines parentage is merely the starting point. Additional issues that some states have addressed, for example, include whether to recognize compensated gestational agreements, whether to limit the availability to married couples, infertile intended parents, age limitations, what protections to put in place to safeguard the gestational carrier's right to make decisions regarding healthcare and termination of the pregnancy until the child has been delivered, whether to require that the spouse of the gestational carrier either consent or be made a party to the contract, what measures to put in place to safeguard the legal rights of the parties, who should be required to obtain health insurance coverage, whether to require that at least one intended parent contribute genetic material, and whether to require mental and physical health evaluations and home studies.

Further guidance may be provided by article eight of the Uniform Parentage Act of 2000. Among the provisions included in the act are: specific procedural requirements for the hearing to validate the gestational agreement, including a residency requirement; joinder of the spouse of the gestational carrier, if she is married; a required finding by

the court that the intended parents meet the standards of suitability applicable to adoptive parents and a finding of voluntariness as to all parties to the gestational agreement; procedures upon termination of the gestational agreement; procedures upon the birth of the child, including the issuance of a court order declaring parentage and directing the responsible agency to issue a birth certificate naming the intended parents as parents to the child; the effect of a subsequent marriage of the gestational carrier; and the effect of a nonvalidated gestational agreement.

We emphasize that the legislature is the appropriate body to make the public policy determinations implicated by these issues. Because of the uncertainties created by the existing statutory scheme, we respectfully would suggest that the legislature consider doing so. . . .

* * *

In the following judgments from the Constitutional Court of Colombia and the Family Division of the United Kingdom High Court, the courts were asked to determine whether a surrogacy agreement exists and how to assign custodial rights to the child in light of that determination. In both cases, the courts conducted child-centered analyses.

Judgment T-968 of 2009

Constitutional Court of Colombia (Second Review Chamber)

December 18, 2009*

The Second Review Chamber of the Constitutional Court, composed of Magistrates María Victoria Calle Correa, Luís Ernesto Vargas Silva and Gabriel Eduardo Mendoza . . . offers the following Judgment. . . .

[Sarai, a 22-year-old Colombian woman, and Salomón, a 54-year old American man, conceived twins, Samuel and David, through IVF. Originally, Sarai entered into a gestational surrogacy agreement with Salomón and his wife, Raquel. However, after several IVF attempts failed, Sarai alleged that the parties regarded the agreement as terminated. According to Sarai, Salomón remained in contact and even visited her in Colombia, over time developing a relationship with her. She allegedly agreed to have a child with him on the condition that he would not separate her from the child and would support her and the child. Salomón denied these events, alleging that the gestational surrogacy agreement turned into a genetic surrogacy agreement. Sarai and Salomón went to a new IVF clinic presenting themselves as husband and wife, where four embryos were implanted in Sarai's womb. On March 21, 2006, she gave birth to twins and registered them as extramarital children. Salomón alleged that Sarai reneged on the agreement in November of 2005, after he had paid her close to \$14,208,750.]

* Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

After the registration of the minors as extramarital children, without a known father, . . . began a torturous process of confrontation, complaints, and lawsuits which culminated in the assignation of provisional custody to the father, followed by the removal of the children [to the United States] on September 5, 2008, authorized by a judgment from the Tenth Family Judge of Cali, which is the subject of the present action of *tutela*.*

Against this authorization the mother presented an action of *tutela*, which was awarded to her by the Family Chamber of the Superior Tribunal for the District of Cali. The Tribunal . . . ordered the Tenth Family Judge to issue a new order within fifteen . . . days. . . . The Judge . . . issued a new order . . . , against which Salomón lodged an action of *tutela* alleging a violation of due process. He was granted the protection sought, and the Tenth Family Judge issued a new order, which was revoked by the Civil Cassation Chamber of the Supreme Court of Justice. . . . [T]o date, the order issued by the Family Chamber of the Superior Tribunal for the District of Cali . . . has not been materially observed, such that the violation of the fundamental rights of the minors Samuel and David to have a family and to care and love . . . persist. . . .

There are no express prohibitions against or requirements for [surrogacy agreements] within Colombian jurisprudence. However, our doctrine has long considered assisted reproduction techniques, including surrogacy, juridically supported through constitutional article 42-6, which provides that “Children within or outside marriage, adopted or conceived naturally or with scientific assistance, have equal rights and duties.” . . . [A] normative vacuum . . . has set in motion facts and decisions with harmful and irreparable consequences to the fundamental rights of the minors involved.

Our doctrine has come to see surrogacy as a positive mechanism to solve a couple’s infertility problems and has highlighted the urgent need to regulate the matter in order to avoid, for example, for-profit mediation of surrogacy agreements, endangerment of the rights and interests of newborns, treatment of human bodies in ways contrary to law, and great conflicts that arise when disagreements between the parties involved develop. . . .

This Chamber must note . . . that the process that resulted in the birth of the minors Samuel and David did not constitute a surrogate pregnancy, for Sarai is the biological mother of the minors. Furthermore, even if her initial intention was to be a surrogate mother, Salomón’s own declarations make clear that, at least since November of 2005, she made known to him her intentions to raise the children. . . .

Upon reviewing the . . . orders of the Tenth Family Judge, this Chamber must conclude that [the Judge] . . . based these orders on an assumption about the moral, affective, and economic ineptness of the mother, and that it was precisely this *ex ante*

* A *tutela* is a writ that enables any person whose fundamental rights are being threatened or violated to request that a judge with territorial jurisdiction protect that person’s fundamental rights. The Colombian Constitutional Court has the authority to review any *tutela* judgment issued by the lower courts.

bias that has impeded the superior interest of the minors and their right not to be separated from their mother and live under her protection and care.

For the Tenth Family Judge, Sarai unjustifiably reneged on her verbal contract to surrender her children after the birth. Economic considerations were her primary considerations in deciding to conceive children, and her economic constraints prevent her from providing her children the wellbeing and opportunities they enjoy with their father, who, according to the order “. . . has a better right to have the children than . . . Sarai, for the simple reason that he was the one who sought out any means through which he could have a son, fought for it, looked to science for assistance, and has sacrificed himself in coming constantly to this city to fight for his kids, so that they are not taken from him, so that he may be by their side.”

In this way, both the Constitution and the constitutional precedent that clearly establishes judicial criteria for determining the superior interest of the minor were completely ignored. We are concerned specifically with (i) the guarantee of integral development for minors, (ii) the guarantee of conditions for the exercise of their fundamental rights, (iii) and the balance between the rights of children and the rights of parents, where the rights of the minor prevail.

Furthermore, even if we might argue that the mother has a lesser right to her children than the father because she initially agreed [to act as a gestational surrogate] . . . , this does not per se make the mother unable to demand observance of the rights of her children. . . . The Judge forgets that this woman has undertaken a constant fight before the courts to recover her children, and that perhaps she has sacrificed more despite her economic situation in order to recover them. . . .

[T]his Chamber concludes that no circumstances exist which constitute sufficient reason to separate . . . Samuel and David from the maternal family environment

[The Court upheld the judgment entered by the Civil Cassation Chamber of the Supreme Court of Justice, itself upholding the judgment of the Family Chamber of the Superior District of Cali reversing the authorization to remove the children from Colombia. The Court further ordered that the father was to bring the children to Colombia three times per year until courts settled the custody of the children. Finally, it ordered the Colombian Institute of Family Wellbeing to supervise the return of the children to their mother and to provide her with psychological services that might be required to reestablish her relationship with her children.]

H & B v. S

U.K. High Court of Justice, Family Division
[2015] EWFC 36

The Honourable Ms Justice Russell DBE:

1. This case is about the future arrangements for an infant girl (M) who was born on 27th January 2014. M was born as the result of artificial or assisted conception and of an agreement, the basis of which is highly contested, between S (the 1st Respondent and the mother) and H (the 1st Applicant and the father) and B (the 2nd Applicant) his partner. H is in a long-term and committed relationship with B and was at the time of conception. H and B contend that they had an agreement with S that she would act as a surrogate and that H and B would co-parent the child but that S would continue to play a role in the child's life. S says that she and H entered an agreement that excluded B that H would be, in effect, a sperm-donor and that she would take on the role of M's main parent and carer. . . .

2. Very sadly this case is another example of how "agreements" between potential parents reached privately to conceive children to build a family go wrong and cause great distress to the biological parents and their spouses or partners. The conclusions this court has made about the agreement between the parties which led to the conception and birth of this child will inform the basis of future decisions the court has to make about the arrangements for the child. The lack of a properly supported and regulated framework for arrangements of this kind has, inevitably, lead to an increase in these cases before the Family Court. . . .

49. . . . [T]he agreement leading to M's conception and birth . . . has been referred to by Miss Isaacs QC, counsel for the Applicants as a "failed surrogacy" agreement. As the Applicants on their own case have always accepted that S was to play a continuing role in the child's life, that description is not quite accurate. . . .

50. . . . The dispute about the agreement is largely based on S's assertion that she and H decided to parent a child together, and that B was to play no part other than as the child's father's "boyfriend"; to use her word. S has sought to present herself throughout the proceedings as a victim and someone whose "rights" as a mother and as a woman have been trampled over and abused. . . . She describes H and B in an openly disparaging and dismissive way

51. S repeatedly made allegations, wholly unsupported by any objective evidence, about H and B; about their relationship and about their lifestyles. . . . [S]he repeatedly relied on stereotypical views on the nature of their relationship suggesting that she knew "*they have an open relationship, what gay people call it, have sex in groups.*" There is no foundation to this claim which I consider to be a reflection of her deliberate attempt to discredit H and B in a homophobic and offensive manner. . . .

54. . . . It is . . . inconceivable that B was not aware of what was going on In this as in much else I do not accept the evidence of S. Her later use, in evidence, of the term "sperm donor" is completely at odds with the tone and contents of her emails in February. It is not possible to accept both from what H told her in the emails and from the obviously close relationship of H and B (which I have seen at close quarters throughout the trial) that S could have ever thought that she was having a child with H

to the exclusion of B; she says so herself in her emails. I conclude that she must have either deliberately misled the Applicants about her intentions or changed her mind as the pregnancy progressed.

55. On the balance of probabilities, and for the reasons set out above and in the following paragraphs of this judgment, I find that S deliberately misled the Applicants in order to conceive a child for herself rather than changing her mind at a later date. Having at first encouraged H to be involved S was already trying to exclude H not long before M was born from involvement with the birth and with the child. . . . It [is] highly unlikely that S could ever have thought H, who had told her he so desperately wanted a child in his emails, would decide to act as a sperm donor for her, there was no reason for him to do and it would have been entirely at odds with his own plans and wishes.

56. S has consistently done all she can to minimise the role that H had in the child's life and to control and curtail his contact with his daughter. Far from being a child that she conceived with her good friend, as she describes it, her actions have always been of a woman determined to treat the child as solely her own. . . .

57. . . . It is not in the interests of any child to use breast-feeding, or co-sleeping, to curtail that child's interaction with another parent or to deny her an opportunity to develop a healthy relationship with that parent. I have little doubt that that is what S set out to do, at least in part, and it was an action which was contrary to M's best interests and emotional well-being. . . .

112. The guardian recommended that M should live with H and B and that her contact with S should be reduced to once a month and that it should be supervised. In her oral evidence the guardian was concerned about S's negative view of B and how that would affect M, with whom she has formed an attachment and who is and will remain an important figure in M's life. She was concerned, and with good reason, that continued conflict, S's negative estimation of H and B and her rancorous attitude towards their relationship would affect M causing her emotional harm and confusion about her identity. The guardian told me that her concern was that S could not prioritise M's needs over her own. . . .

116. . . . I have used the welfare checklist as the basis for my decision because I am concerned with how to best provide for M's physical, emotional and educational needs Although M is not yet at school it is more likely than not that the parent who can best meet all her other needs and is most likely to be able to provide her with a secure home and stable upbringing with room to grow emotionally for the remainder of her infancy is more likely to meet her educational needs [and] fulfil her potential in the future. The latter requires that M is afforded the scope to grow up in an environment where conflict is at a minimum. . . .

122. While to move a young child from her mother is a difficult decision and is one which I make with regret as I am aware that it will cause S distress I conclude that

H is the parent who is best able to meet M's needs both now and in the future. It is he who has shown that he has the ability to allow M to grow into a happy, balanced and healthy adult and it is he who can help her to reach her greatest potential. I accept the evidence of the guardian that H and B have had a child-centred approach throughout. . . .

123. H thought carefully about having a child and his discussions with S in the emails that they exchanged in February 2012 are an illustration of his awareness of the difficulties that would be encountered as well as a clear expression of his very great desire to have a child; and to have that child with B. . . .

124. The best that can be said for S is that she deluded herself about the nature of the agreement she was reaching first with H and later with H and B. It is very unlikely that such an obviously astute and determined woman would have left anything to chance when it came to having a baby. . . . The emails that she sent were deliberately misleading and S continued in the deceit, allowing H to believe that he and B would be the main carers for the baby until pregnancy was well advanced.

125. It is not the function of this court to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place. It is the function of the court to decide what best serves the interests and welfare of this child throughout her childhood. It is, however, a fact that M was not conceived by two people in a sexual relationship. The pregnancy was contrived with the aim of a same-sex couple having a child to form a family assisted by a friend, this was ostensibly acquiesced to by all parties at the time the agreement was entered into and conception took place. . . .

126. M should live with her father H and his partner B as it is in her best interests to do so; I reach that conclusion having had regard throughout to the welfare checklist and to M's interests now and in the long term. . . .

Parentage Across Borders

Commercial Surrogacy—Some Troubling Family Law Issues

Mary Keyes and Richard Chisholm (2013)*

. . . [W]hat is the right approach to making orders that will benefit the applicants and the particular children before the court, but may also give effect to criminal actions, and by rewarding criminal arrangements may put at risk the human rights of other children, as well as birth mothers and egg donors in Third World countries?

* Excerpted from Mary Keyes & Richard Chisholm, *Commercial Surrogacy—Some Troubling Family Law Issues*, 27 AUSTRALIAN JOURNAL OF FAMILY LAW 105 (2013).

The courts must assess these matters in the light of the available evidence in each case. What do they have? The cases show that there is always some evidence of the surrogacy arrangement and of the suitability of the applicants to have parental responsibility for the child. In some cases the birth mother is a party and has filed a document consenting to the orders, and an affidavit to the effect that she intends to relinquish all her rights and obligations in relation to the children and that she consents to the proposed orders.

The amount of information, especially about the surrogacy arrangements and the position of the birth mother, varies from case to case. At one extreme is *Ellison*, where as a result of Justice Ryan's initiative in appointing an independent children's lawyer and seeking the intervention of the Australian Human Rights Commission, the court obtained a family report and fairly detailed information. As a result, there was evidence that identified the children and their paternity, and thus excluded the possibility that it was a case of child trafficking. There was evidence from the birth mother, who consented to the orders. . . .

In some other cases, the evidence does not go much further than establishing the surrogacy arrangements, the mother's consent to the proposed orders and the suitability of the applicants. There is rarely evidence about the circumstances leading up to the surrogacy arrangements, or such matters as the mother's ability to give informed consent, or the availability of counselling, although in some cases there was evidence that someone had explained the legal issues to her and had translated the court documents. . . .

In some cases the mother is not a consenting party at all, and the application proceeds on an undefended basis. . . . [I]n these cases there is always evidence that persuades the court that it is in the child's interests to make the parenting orders sought. This is hardly surprising, given that the applicants' evidence is uncontradicted, that no-one else is claiming the role of parent or offering to care for the children, and that the applicants have had the care of the children for some months before the matter comes to court. As we have seen, in some cases it is unclear whether the mother had given an informed consent, and even, in at least one case, whether the child was indeed the child of the alleged surrogacy arrangement. Yet in all the cases, even where the evidence did not exclude improper pressure on the mother and/or egg donor, the court made the requested parenting orders.

Was it wrong to do so? Answering this question takes us back to legal principle. The court can either make or refuse to make the parenting orders. Refusing to make the parenting orders would deny legal support to the only people in a position to care for these children. Even if the courts suspected or believed that the mother's consent had been coerced, or, perhaps, even if it suspected that the children had been trafficked, refusing to make the parenting orders would presumably leave the applicants looking after the children without legal authority, or have the children taken from the only people they knew as parents, and placed with the state child protection authorities,

perhaps then becoming state wards, going into foster care, or being adopted by somebody else.

. . . In *Ellison*, the court accepted as ‘demonstrably correct’ the following submission by the [Human Rights Commission]:

the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it’s probably too late to ask whether—or to inquire into the legality of the arrangements that had been made

. . . How should we understand the court’s acceptance of the submission that it was ‘too late’ to inquire into the legality of the arrangements? If it is ‘too late’ to inquire into the legality of the arrangements, and if the proposed orders would benefit the children, must the court make the orders regardless of the circumstances of the surrogacy? If so, it would seem that much of the evidence so carefully obtained in *Ellison* . . . might be legally irrelevant. The logic of the submission seems to be that if the proposed orders will benefit the children before the court, the orders must be made regardless of the criminality of the arrangement, and regardless of whether the mother and egg donor were subjected to duress or fraud. Indeed, if in fact the children were not surrogate children at all, but victims of child trafficking, the court would still be ‘faced with having the children in front of it.’ Even then, on the basis of the Commission’s successful submission, would it not still be ‘too late’ to do anything other than make the orders that would benefit the children?

* * *

The 2018 Report of the U.N. Special Rapporteur, excerpted earlier in this chapter, viewed current practices of commercial surrogacy as violating principles against “the sale of children”:

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.

In 2019, the Special Rapporteur issued a new report taking a more measured approach and suggesting the need for frameworks that deal with the reality of transnational surrogacy.

Report on the Sale and Sexual Exploitation of Children

United Nations Special Rapporteur (July 15, 2019)*

. . . 18. The primary consideration of the best interests of the child born from a surrogacy arrangement should be the starting point of any analysis of the international legal framework. No matter whether the State in question adopts a prohibitive, tolerant, regulatory or free-market approach to surrogacy arrangements, the child's best interests must always form the basis of decision-making. . . . [B]est-interests assessments must balance protection factors, which may limit or restrict rights, and empowerment measures, which enable the full exercise of rights. . . . [T]he child's best interests is a threefold concept, including a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.

19. . . . Major issues arise in the context of jurisdictions where surrogacy contracts are null and void, unenforceable or even subject to criminal sanctions, with grave repercussions for the child born from an international surrogacy arrangement.

20. It is therefore imperative that States put in place clear frameworks for the protection of children and for ensuring the primacy of their best interests, in the context of surrogacy arrangements. In light of the global demand for surrogacy, even the most domestically prohibitive States must deal with the consequences of surrogacy arrangements, and it is therefore in the best interests of children to ensure that there is a clear decision-making framework in place to provide clarity and certainty.

21. Consistent with the general principles of the Convention on the Rights of the Child, it is crucial to ensure that laws, policies and practices in relation to surrogacy comply with the principles of non-discrimination, the best interests of the child, the right to life, survival and development, as well as the right of children to express their own views. In the case of international surrogacy arrangements, it is of particular importance that different national legal frameworks do not lead to discriminatory situations. . . .

22. . . . [T]he Committee on the Rights of the Child highlights that young children “may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values,” and recalls the responsibility of States parties “to monitor and combat discrimination in whatever forms it takes and wherever it occurs—within families, communities, schools or other institutions.” . . .

25. Article 7** of the Convention on the Rights of the Child . . . protects the right of the child to identity, which includes the right to birth registration, the right to a name,

* Excerpted from U.N. Special Rapporteur on the Sale and Sexual Exploitation of Children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography, and Other Child Sexual Abuse Material*, U.N. Doc. A/HRC/74/162 (July 15, 2019).

** Article 7 of the UN Convention on the Rights of the Child provides:

the right to acquire a nationality, and the right, as far as possible, to know and be cared for by his or her parents. . . .

28. The obligations contained in article 7 are of fundamental importance for the rights of the child born of surrogacy. The obligation to register births is essential to prevent abduction, sale of or traffic in children, while the right to acquire a nationality requires States to prevent statelessness of children as part of the right to identity. . . . In the context of international surrogacy arrangements across countries with different legislation or regulation, there is a real risk that a child will be unable to receive the nationality either of his parents or of the State where he or she was born. . . .

31. . . . [T]he Convention on the Rights of the Child establishes the obligation, through article 8, to “respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” States parties also have the obligation to provide a remedy in case of illegal deprivation “of some or all of the elements of his or her identity.”

32. Although surrogacy changes the constitutive elements of identity, by breaking the link between genetic, gestational and social parenthood, the fundamental rights of the child remain the same. . . . In particular, the Special Rapporteur notes that a refusal to grant legal recognition to children born through surrogacy arrangements by prohibitionist States can be detrimental to children’s best interest and lead to violations of the rights of the child. . . .

38. . . . [T]he Special Rapporteur wishes to emphasize that a blanket enforcement of anonymity for gamete donors, and/or the surrogate, including by only recording the intending parents on the birth certificate, will prevent the child born from a surrogacy arrangement from having access to his or her origins. This is a particularly common violation of the rights of the child and is amplified in the case of international surrogacy arrangements. . . .

74. . . . [T]he Special Rapporteur reiterates the urgent need for holistic regulation of surrogacy, in particular when it comes to international surrogacy arrangements. The existence of oversight mechanisms is of vital importance in order to prevent any sale and exploitation of children in the context of surrogacy. . . .

91. The Special Rapporteur has observed that the prohibition of surrogacy arrangements carried out abroad is problematic as domestic laws prohibiting surrogacy will often be sidestepped. States will inevitably be confronted with surrogacy

1. The child 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.

2. States Parties shall ensure the implementation of these rights . . . , in particular where the child would otherwise be stateless.

arrangements carried out abroad, leading to issues surrounding, inter alia, rights to identity, access to origins and the family environment for the child. Such surrogacies should neither be automatically rejected nor accepted, the only valid consideration being the best interests of the child.

92. A pragmatic response on the part of prohibitionist jurisdictions is necessary and should be in line with human rights standards, including sufficient safeguards to deal with commonly observed violations of the rights of the child. . . .

93. . . . [J]urisdictions allowing surrogacy should verify that intending parents coming from abroad will be able to return to their countries of origin with their surrogate-born child, and that legal parentage will be recognized by the authorities of their country of origin

94. . . . [E]ven though the best interests of the child are extensively mentioned in most legislation reviewed, there is often a lack of detail as to the constitutive elements of such determinations, although, in the specific context of surrogacy, assessments and determinations regarding the best interests of the child are fundamental. The question as to whether the determination of the best interest of surrogate-born children should be carried out through judicial or administrative proceedings is the discretionary decision of the State and depends on the circumstances of the case. . . .

Mennesson v. France

European Court of Human Rights (Fifth Section)

No. 65192/11 (2014)

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of: Mark Villiger, *President*, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, Vincent A. De Gaetano, André Potocki, and Aleš Pejchal, *judges*[:]

. . . 7. The first and second applicants[, the Mennessons,] are husband and wife. They were unable to have a child of their own because the second applicant is infertile.

8. After a number of unsuccessful attempts to conceive a child using *in vitro* fertilisation (IVF) with their own gametes, the first and second applicants decided to undergo IVF using the gametes of the first applicant and an egg from a donor with a view to implanting the fertilised embryos in the uterus of another woman. Accordingly, they went to California, where the process is legal, and entered into a gestational surrogacy agreement.

. . . [I]n accordance with Californian law, the “surrogate mother” was not remunerated but merely received expenses. [The applicants] added that she and her husband were both high earners and therefore had a much higher income than the applicants and that it had been an act of solidarity on her part.

9. On 1 March 2000 the surrogate mother was found to be carrying twins and, in a judgment of 14 July 2000, the [California court], to which the first and second applicants and the surrogate mother and her husband had applied, ruled that the first applicant would be the “genetic father” and the second applicant the “legal mother” of any child to whom the surrogate mother gave birth within the following four months. The judgment specified the particulars that were to be entered in the birth certificate and stated that the first and second applicants should be recorded as the father and mother. . . .

11. [The surrogate gave birth to twins and] . . . the first applicant went to the French consulate in Los Angeles to have the particulars of the birth certificates entered in the French register of births, marriages and deaths and the children’s names entered on his passport so that he could return to France with them. . . .

18. . . . [The] public prosecutor instituted proceedings against the [Mennessons] . . . to have the entries [of parentage] annulled He observed that an agreement whereby a woman undertook to conceive and bear a child and relinquish it at birth was null and void in accordance with the public-policy principle that the human body and civil status are inalienable. He concluded that, as the judgment of the [California court] . . . was contrary to the French concept of international public policy and of French public policy, it could not be executed in France and that the validity of civil-status certificates drawn up on the basis of that judgment could not be recognised in France. . . .

26. . . . [On appeal before the Court of Cassation, the Advocate General] observed that the third and fourth applicants[, the twins,] had been living in France for ten years and “[were being] brought up there by genetic and intended parents in a *de facto* family unit in which [they were receiving] affection, care, education, and the material welfare necessary to their development” and that this effective and affective family unit—fully lawful in the eyes of the law of the country in which it had originated—[was] “legally clandestine,” “the children having no civil status recognised in France and no parent-child relationship regarded as valid under French law.” . . .

27. . . . [O]n 6 April 2011 the Court of Cassation . . . gave judgment dismissing the appeal [as contrary to French public policy]. . . .

60. The Government [explained] that the reason for the refusal to record the particulars of the US birth certificates in the French register of births, marriages and deaths was that this would have given effect to a surrogacy agreement, which was formally forbidden under a domestic public-policy provision and constituted a punishable offence if performed in France. French law accordingly reflected ethical and moral principles according to which the human body could not become a commercial instrument and the child be reduced to the object of a contract. . . .

68. The applicants . . . observed that the measure in question had “grossly disproportionate consequences” for the situation of the third and fourth applicants: without recognition of a legal parent-child relationship with the first two applicants, they did not have French nationality, did not have a French passport, had no valid residence permit (even if, as minors, they could not be deported), and might find it impossible to obtain French nationality and thus be ineligible to vote and ineligible for unconditional leave to remain in France; they could also be prevented from inheriting under the first two applicants’ estate. Furthermore, in the event of the first applicant’s death or should the first two applicants separate, the second applicant would be deprived of any rights in respect of the children, to their and her own detriment. . . .

72. The Government stressed that in the interests of proscribing any possibility of the human body becoming a commercial instrument, guaranteeing respect for the principle that the human body and a person’s civil status were inalienable, and protecting the child’s best interests, the legislature—thus expressing the will of the French people—had decided not to permit surrogacy arrangements. The domestic courts had duly drawn the consequences of that by refusing to register the particulars of the civil-status documents of persons born as the result of a surrogacy agreement performed abroad; to permit this would have been tantamount to tacitly accepting that domestic law could be circumvented knowingly and with impunity and would have jeopardised the consistent application of the provision outlawing surrogacy.

. . . [The] failure to register the legal father-child relationship . . . was due to the fact that the first and second applicants had entered into the surrogacy arrangement as a couple and that the respective situations of each person in that couple were indissociable. They also considered that, having regard to the various different ways in which the legal parent-child relationship could be established under French law, giving priority to a purely biological criterion “appear[ed] highly questionable.” Lastly, they submitted that “in terms of the child’s interests, it seem[ed] preferable to place both parents on the same level of legal recognition of the ties existing between themselves and their children.” . . .

78. . . . [T]here is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. . . .

79. This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.

80. However, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned.

The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced. . . .

99. . . . [Non-recognition] also affect[s] the children themselves, whose right to respect for their private life—which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship—is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children’s best interests, respect for which must guide any decision in their regard.

100. This analysis takes on a special dimension where . . . one of the intended parents is also the child’s biological parent. . . . [I]t cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof. Not only was the relationship between the third and fourth applicants and their biological father not recognised when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of *de facto* enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard. . . .

101. Having regard also to the importance to be given to the child’s interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed. . . .

* * *

In response to the European Court of Human Rights’ decision in *Mennesson*, France considered different ways to establish a legal parent-child relationship between the intended parents and the twins born from the surrogacy arrangement. While the biological intended father can now be designated as the father on the children’s birth certificates, French law still prohibits this designation for the non-biological mother. France’s Court of Cassation requested an advisory opinion from the European Court of Human Rights on two questions:

1. By refusing to enter . . . the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the ‘intended mother’ as the ‘legal mother,’ while accepting registration in so far as the certificate designates the ‘intended father,’ who is the child’s biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? . . .
2. In the event of an answer in the affirmative . . . , would the possibility for the intended mother to adopt the child of her spouse, the biological

father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?

In the U.S. context, as *Raftopol* suggested, adoption is seen as a harm—i.e., the non-biological intended parent should not have to adopt the child. On this view, parentage by operation of law provides the remedy. In contrast, the French Court, in the following excerpt, views adoption as the remedy to an otherwise restrictive domestic surrogacy regime.

Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Agreement Abroad and the Intended Mother
European Court of Human Rights (Grand Chamber)
Request No. P16-2018-001 (2019)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Guido Raimondi, *President*, Angelika Nußberger, Linos-Alexandre Sicilianos, Robert Spano, Vincent A. De Gaetano, Jon Fridrik Kjølbro, André Potocki, Faris Vehabović, Iulia Antoanella Motoc, Branko Lubarda, Yonko Grozev, Carlo Ranzoni, Georges Ravarani, Pauliine Koskelo, Tim Eicke, Péter Paczolay[, and] Lado Chanturia, *judges*, . . . [d]elivers the following opinion . . . :

. . . 32. Firstly, [the Court] will address the question whether the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement, which requires the legal relationship between the child and the intended father, where he is the biological father, to be recognised in domestic law, also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, who is designated in the birth certificate legally established abroad as the “legal mother,” in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law.

33. Secondly, if the first question is answered in the affirmative, it will address the question whether the child’s right to respect for his or her private life . . . requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child

37. In order to determine . . . whether Article 8 of the Convention requires domestic law to provide a possibility of recognition of the relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, two factors will carry particular weight: the child’s best interests and the scope of the margin of appreciation available to the States Parties. . . .

40. The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother . . . has a negative impact on several aspects of that child's right to respect for its private life. . . . [I]t places [the child] in a position of legal uncertainty regarding his or her identity within society. In particular, there is a risk that such children will be denied the access to their intended mother's nationality . . . ; it may be more difficult for them to remain in their intended mother's country of residence . . . ; their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the intended father dies; and they have no protection should their intended mother refuse to take care of them or cease doing so.

41. The Court is mindful . . . that, in the context of surrogacy arrangements, the child's best interests . . . include other fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother, such as protection against the risks of abuse which surrogacy arrangements entail and the possibility of knowing one's origins.

42. Nevertheless, in view of the considerations outlined at paragraph 40 above and the fact that the child's best interests also entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment, the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests

43. As regards the [member state's margin of appreciation], . . . despite a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there is no consensus in Europe on this issue.

44. However, . . . where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. . . .

45. . . . Other essential aspects of [the children's] private life come into play where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare. This lends further support to the Court's finding regarding the reduction of the margin of appreciation.

46. In sum, given the requirements of the child's best interests and the reduced margin of appreciation, . . . the right to respect for private life . . . of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a

possibility of recognition of a legal parent-child relationship with the intended mother

48. The second issue concerns the question whether the right to respect for private life of a child born through a gestational surrogacy arrangement abroad, in a situation where he or she was conceived using the eggs of a third-party donor, requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used

51. The Court notes that there is no consensus in Europe on this issue: where the establishment or recognition of a legal relationship between the child and the intended parent is possible, the procedure varies from one State to another. The Court also observes that an individual's identity is less directly at stake where the issue is not the very principle of the establishment or recognition of his or her parentage, but rather the means to be implemented to that end. Accordingly, the Court considers that the choice of means . . . falls within the States' margin of appreciation.

52. In addition . . . , Article 8 of the Convention does not impose a general obligation on States to recognise *ab initio* a parent-child relationship between the child and the intended mother. . . .

53. . . . Depending on the circumstances of each case, other means may also serve those best interests in a suitable manner

54. What is important is that . . . an effective mechanism should exist enabling that relationship to be recognised. Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship. . . .

55. In sum, given the margin of appreciation available to States as regards the choice of means, alternatives to registration, notably adoption by the intended mother, may be acceptable in so far as the procedure laid down by domestic law ensures that they can be implemented promptly and effectively, in accordance with the child's best interests. . . .

* * *

Commercial surrogacy is unlawful in Australia, but altruistic surrogacy is generally permitted and has been the subject of recent law reform at the state level. Many Australian couples travel abroad to engage in commercial surrogacy. When they return home, who is the parent? In *Berneires & Dhopal*, the Family Court of Australia sustained a judgment refusing to grant parentage to the non-biological intended parent, but urged the legislature to address this problem.

Bernieres & Dhopal
Family Court of Australia
[2017] FamCAFC 180

[Bryant CJ, Strickland and Ryan JJ:]

[The appellants, Ms. and Mr. Bernieres (Australian citizens and residents) entered into a gestational surrogacy agreement with respondents Ms. Dhopal and her husband Mr. Kesai (Indian citizens and residents). Mr. Bernieres donated his sperm to fertilize an ovum belonging to an anonymous donor. The child was born in India in 2014 and was issued an Australian Certificate of Citizenship and passport. Upon returning to Australia, the intended parents sought parenting orders and a declaration of parentage in relation to the child from the Family Court of Australia. The Trial Judge denied their claim, and the intended parents appealed.]

. . . 9. [The Trial Judge (His Honour)] first noted that the appellants sought “parenting orders and a declaration of parentage in relation to [the child]” and that the respondents . . . had not “filed a response to the application, nor [did] they seek any orders and by implication [supported] the orders sought by the [appellants].” . . .

12. His Honour subsequently turned to the commercial surrogacy arrangement. First, his Honour noted that the current arrangement could be described as “gestational surrogacy” pursuant to which the birth mother had no genetic link with the child and the second appellant had donated his sperm. Thus, the only genetic relationship was between the child and the second appellant. . . .

14. His Honour summarised the issues for determination and explained that the “principal submission of the [appellants was] that a declaration of parentage should be made in their favour notwithstanding that the first [appellant] is not the biological progenitor of [the child].” His Honour noted that the appellants relied upon s 69VA* of the [Family Law] Act in this regard and that there was an assumption throughout the submissions that “it is axiomatic that the second [appellant] will be entitled to a declaration arising from the biological connection, but that the focus and complexity of the legislative matrix dealing with parentage focusses on the first [appellant].” . . .

16. His Honour turned to the definition of “parents,” and noted that there was no general definition of a parent

21. Further, his Honour explained that the use of “the power by the Family Court is limited to situations where the application is incidental to the determination of another

* Section 69VA of the Australia Family Law Act provides:

As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

matter within Commonwealth power” which could create “difficulties for the applicants in circumstances where a parent may be seeking a declaration of parentage for the purposes of obtaining a passport for a child that is not ‘incidental to the determination of any other matter within the legislative powers of the Commonwealth’ before the court.” . . .

28. The appellants had argued that the expression “child of the marriage” . . . was ambiguous and that the definition of “child of the marriage” provided for in s 60F(1)* of the Act was not exhaustive. The appellants supported this proposition by reference to art 3.2 of the *United Nations Convention on the Rights of the Child* (“the Convention”) and asserted that “such an interpretation would ensure that children with an intended parent who cannot be declared a parent under s 69VA will receive the care and protection that is necessary for their wellbeing” and would “enable the court to allocate the full range of parental responsibilities and provide appropriately for the welfare of the child.” His Honour rejected this argument as he was not satisfied there was any ambiguity in the term “child of the marriage” and thus there was no need to consider the Convention. His Honour therefore found that the child was not a child of the marriage

32. His Honour then discussed the problems and tensions arising in respect of surrogacy agreements such as this. In particular, his Honour noted that the “potentially onerous obligations as set out in the [surrogacy] agreement, despite their almost certain lack of enforceability, may nonetheless represent a powerful and persuasive element weighing heavily upon the [birth] mother.” Further, his Honour found that although the “legislation has not kept pace with the reality of international surrogacy arrangements . . . it cannot be assumed that the only approach is to revert to the biological connection as an alternative definition of ‘parent.’” Rather, his Honour considered that care “must be taken in respect of any approach which has as its heart a determination based purely on a genetic connection without more being considered.” Thus, in conclusion his Honour found that as the state legislation did not provide for the circumstances of the child’s birth, the second appellant was not the parent of the child

35. In conclusion, his Honour summarised the policy considerations surrounding international commercial surrogacy and explained that he could “well understand the dismay of the [appellants] that they are not able to secure for all purposes that which they fervently seek namely, recognition and a declaration of parentage.” His Honour thus noted the need for “urgent legislative change” in this regard. . . .

* Section 60F(1) of the Australia Family Law Act provides:

. . . [A] child is . . . a child of a marriage if: (a) the child is the child of both parties to the marriage, whether born before or after the marriage; or (b) the child is adopted after the marriage by both parties to the marriage, or by either of them with the consent of the other.

65. There is no question that the father is the child's biological father, but that does not translate into him being a parent for the purposes of the Act. Further, the mother is not even the biological mother, and thus is even less likely to be the "legal parent." . . .

96. Having found no merit in . . . [the appeal, it] must be dismissed. . . .

* * *

As Keyes and Chisholm explained in the excerpt that began this section, other family courts in Australia have provided relief to intended parents who engaged in surrogacy abroad. As Australian expert Jenni Milbank explains:

The Australian approach to legal parentage is particularly complex in the context of trans-national surrogacy arrangements. Australian law does not recognise parental status granted in other jurisdictions unless specifically prescribed under legislation for particular purposes. Overseas commercial surrogacy arrangements are also excluded from specifically enacted domestic surrogacy laws that enable transfer of legal parentage in certain circumstances. In the absence of Australian parentage the child would, in some circumstances (such as birth in India), be both stateless and parentless; in others the child would have the citizenship of the birth country (United States, Thailand) but no parents (California, British Columbia); or only a mother there (Thailand).

Thus Australian administrators and judges have had to grapple with the claims of Australians trying to return to Australia with a foreign born child with whom they usually have a genetic link and a primary caregiving role, but no legally recognised relationship. Recognition has occurred through ad hoc liberalisation of interpretations of 'parent' and 'child' in particular pieces of legislation, which has left parents in a state of ambiguous, labyrinthine and 'limping' legal parentage. In recent years many hundreds of intended parents have returned to Australia under a process which accords citizenship by descent to the child but does not allow for legal parentage to be regularised more broadly. While it is entirely understandable for decision-makers to try to 'find' a parent in order to avoid outcomes such as leaving children stateless orphans abroad, this result also flies in the face of clear legislative wording and intent of domestic assisted reproduction and surrogacy laws.*

In 2019, in *Masson v. Parsons*, [2019] HCA 21, the High Court of Australia issued an important ruling, outside of the context of surrogacy, on the meaning of "parent" in the law. The case considered whether a man who provided sperm for assisted

* Jenni Milbank, *Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy*, 27 AUSTRALIAN JOURNAL OF FAMILY LAW 135 (2013).

reproduction by the woman who gave birth—when that woman was in a *de facto* partnership with the other intended parent—could be a parent of the child. The court determined that the claimant could be a parent because he provided his sperm with the expectation of being a parent, he was listed on the birth certificate as a parent, he provided care and financial support to the child, and others considered him the child's father. In so ruling, the court held:

Although the Family Law Act contains no definition of “parent” as such, a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning. Here, there is no basis in the text, structure or purpose of the legislation to suppose that Parliament intended the word “parent” to have a meaning other than its natural and ordinary meaning. To the contrary, s 4(1) provides that, when used in Pt VII, “parent,” “in relation to a child who has been adopted, means an adoptive parent of the child.” That implies that there is an accepted meaning of “parent” which, but for the express inclusion of an adoptive parent, would or might not extend to an adoptive parent. Section 61B, which defines “parental responsibility” by reference to the legal duties, powers, responsibilities and authority of parents; s 69V, which provides for evidence of parentage; and s 69W, which provides for orders for carrying out parentage testing procedures, are also consistent with a statutory conception of parentage which accords to ordinary acceptance. Section 60B(1)* perhaps suggests that a child cannot have more than two parents within the meaning of the Family Law Act. But whether or not that is so, s 60B(1) is not inconsistent with a conception of parent which, in the absence of contrary statutory provision, accords to ordinary acceptance: hence, as it appears, the need for the express provision in s 60H(1)(d) that, where a child is born to a woman as a result of an artificial conception procedure while the woman is married to or a *de facto* partner of an “other intended parent,” a person other than the woman and intended partner who provides genetic material for the purposes of the procedure is not the parent of the child.

The extent to which this decision affects parentage orders with respect to surrogacy is yet to be seen.

* Section 60B(1) of the Australia Family Law Act provides:

The objects of this Part are to ensure that the best interests of children are met by: (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and . . . (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

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