

# Accounting for the Selfish State: Human Rights, Reproductive Equality, and Global Regulation of Gestational Surrogacy

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## Abstract

*Gestational surrogacy is a relatively new method of procreation made possible by advances in assisted reproductive technology (ART). In gestational surrogacy, a woman (gestational carrier) gestates a fetus that is often biologically unrelated to her on behalf of a third party. While this form of procreation has often been celebrated for allowing infertile and fertility-challenged persons to parent biological offspring, it has also prompted a series of complex human rights-related debates. Inconsistent and extreme state responses to gestational surrogacy have led to myriad tragedies: states have arrested gestational carriers, forced carriers to raise children born through the process, denied individuals access to their biological offspring, refused to allow individuals to participate in the practice because of their sexual orientation, denied citizenship to children born through surrogacy arrangements, and in some cases, placed children in orphanages.*

*This Article argues that state responses to surrogacy raise serious questions about the state's discretion to cabin and eliminate reproductive choice and autonomy. In responding to surrogacy, states have primarily acted with self-interest and with little consideration for the rights of parties to surrogacy practices, both within their jurisdictions and especially outside their borders. Through bans and restrictions on surrogacy, states have undermined their treaty*

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*commitments to protect rights of reproduction, autonomy, choice, and non-discrimination, among others. A review of state reactions to surrogacy reveals that state interests (1) can be addressed without a deprivation of rights through proper internal regulation and inter-state cooperation, (2) are inappropriate in that they are based in impermissible discrimination and harmful stereotypes, or (3) are unjustified when placed in balance with the important rights at issue.*

*This Article will proceed as follows: Part I introduces the underlying problem and argument. Part II tells the story of A, C, and K, gestational carriers who were arrested in Cambodia in 2018, charged with human trafficking, and forced by the Cambodian government to raise the babies they birthed through the surrogacy process. Part III summarizes state bans and restrictions on surrogacy practices. Part IV considers the human rights at stake in surrogacy arrangements and the various perspectives and interests that have been advanced to justify curtailing those rights. It concludes that no justification withstands scrutiny when weighed against the benefits of this rights-enabling practice. Part V considers regulatory proposals, as well as whether a mandate exists within the human rights system for state cooperation on surrogacy arrangements. This final Part concludes that, while a clear mandate is not currently evident, one should exist as regulation is the only viable response to protecting and ensuring equal enjoyment of critical reproductive and related rights. True global enjoyment of human rights depends now, and will depend more and more, on how states respond to transnational human rights challenges like that of surrogacy; state cooperation across borders is and will become increasingly necessary to satisfy treaty commitments involving equal and full realization of fundamental rights.*

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## I. INTRODUCTION

It is not a novel observation that human rights, despite their international application, are unequally enjoyed. In the last seventy years, since the adoption of the Universal Declaration of Human Rights (UDHR), global well-being may have improved but global equality has not.<sup>1</sup> The question of how to make human rights truly *global* is the most pressing challenge for the human rights system. Though this system of law and the institutions that support it are still relatively new, they have not produced the hoped-for worldwide standard: rights with some agreed-upon substance that are enjoyed by all regardless of identity, status, or nationality. State accountability and cooperation have both been major barriers to global rights. Too often, states prioritize their own interests, even when doing so adversely impacts human rights elsewhere and the global project of human rights overall. State responses to the coronavirus health crisis are just the latest devastating example of self-interested state action.<sup>2</sup> Another is the quickly disappearing right of refuge, which has been all but upended by an impressive series of state contortions aimed at avoiding the trigger of the right at a nation's border.<sup>3</sup>

State reactions to gestational surrogacy, an assisted reproductive technology (ART) that allows a woman to gestate a fetus on behalf of a third party, are a recent example of rights quashed by self-interested state action.<sup>4</sup> In a tumultuous series of flip-flops and muddled policy approaches, states have imposed bans and restrictions on the practice of surrogacy, arrested individuals seeking to reproduce through surrogacy (often called intended parents), charged women carrying fetuses in surrogacy arrangements (referred to here as gestational carriers) with human trafficking, forced them to raise the children born through the process, denied intended parent(s) access to their genetic offspring, denied individuals access to the practice because of their sexual orientation, refused entry and citizenship to children born of surrogacy, and placed these children in orphanages. Many states have banned the practice domestically while ignoring or tacitly facilitating their citizens' participation in these (oft-unregulated) practices outside their borders. Together, state responses to surrogacy have created an unstable and avoidably tragic environment for the

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<sup>1</sup> See generally Toby Freeman et al., *Why Do Some Countries Do Better or Worse in Life Expectancy Relative to Income? An Analysis of Brazil, Ethiopia, and the United States of America*, 19 INT'L. J. FOR EQUITY HEALTH 2 (2020). For a historical treatment of how human rights have failed to promote and have even undermined social and material equality, see SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

<sup>2</sup> Michael Ollove, *How Misinformation, Federalism and Selfishness Hampered America's Virus Response*, STATELINE (Aug. 18, 2020), <https://perma.cc/DY7W-EH8U>.

<sup>3</sup> See, e.g., *A World in Flight*, COUNCIL ON FOREIGN RELATIONS, <https://perma.cc/Q5SK-GW7R>.

<sup>4</sup> *Gestational Carrier (Surrogate)*, AM. SOC'Y FOR REPROD. MED. (2012), <https://perma.cc/C5VL-368V>.

women participating in these arrangements, the hopeful individuals pursuing the possibility of procreating in this manner, and the children eagerly anticipated by expectant families.

In the face of increasing demand, the “industry” of gestational surrogacy has grown exponentially over the last decade. Current estimates indicate market revenue of 4.2 billion USD, which is expected to exceed 33.5 billion USD by 2027.<sup>5</sup> Rising levels of infertility, women’s increasing participation in the workforce, and gradually inclusive societal definitions of family have prompted hopeful parents, many of whom are unable to have biological children of their own, to seek out gestational surrogacy arrangements. While exact figures are hard to determine, estimates suggest that between 5,000 and 15,000 children are born each year through surrogacy arrangements, and it is predicted that the number will only increase.<sup>6</sup>

In gestational surrogacy, an embryo biologically unrelated to the gestational carrier (or surrogate) is implanted into the carrier’s uterus through in-vitro fertilization (IVF). The gestational carrier carries the fetus to term on behalf of a third party (the intended or commissioning parent(s)).<sup>7</sup> Surrogacy is considered compensated (sometimes referred to as “commercial”) when the gestational carrier receives some payment above expenses incurred in the process (such as medical care or lost wages).<sup>8</sup> Surrogacy arrangements in which the gestational carrier enters into an agreement with intended parent(s) but is not compensated are often referred to as “altruistic.”<sup>9</sup> Gestational surrogacy is transnational when the gestational carrier and intended parent(s) are nationals of different states.<sup>10</sup> Intermediary agencies are often engaged to match the gestational carrier and intended parent(s) and manage and coordinate the process, while IVF clinics perform the necessary medical services.<sup>11</sup>

Gestational surrogacy, especially when compensated, has prompted ardent debate among commentators, advocates, states, and human rights mechanisms. Supporters see it as a promising procreative method that opens up the possibility

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<sup>5</sup> *Surrogacy Market Revenue to Cross USD 33.5B by 2027: Global Market Insights Inc.*, CISION PR NEWswire (June 9, 2021), <https://perma.cc/XN8M-U342>.

<sup>6</sup> HAGUE CONF. ON PRIVATE INT’L L., A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS 130 (2014) [hereinafter HAGUE CONF. ON PRIVATE INT’L L., A STUDY OF LEGAL PARENTAGE], <https://perma.cc/N938-4SJ3>.

<sup>7</sup> Shelun Tsai et al., *Surrogacy Laws in the United States: What Obstetrician-Gynecologists Need to Know*, 135 OBSTETRICS & GYNECOLOGY 717, 718–19 (2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> For example, New Hope Fertility Center (India), Ovation Fertility (U.S.), IVI RMA Global (Spain), Extraordinary Conceptions (U.S.), Clinic Scanfert (Russia), Care Fertility Group (U.K.), Bourn Hall Fertility Clinic (UAE), and NOVA IVI Fertility (Spain).

of having biologically related children to individuals previously denied this experience. Opponents have cast it as exploitation and commodification, with some classifying all surrogacy arrangements as the sale of children or human trafficking.

Yet, a review of state bans and restrictions reveals that state responses to gestational surrogacy arrangements have been made without consideration of the rights of the parties involved and with little effort to consider possible solutions to preserve those rights. Moreover, the factors that appear to have primarily motivated states indicate a lack of value placed on human rights more broadly. Nationalism, a state's interest in restricting or controlling women's reproduction for its own ends, discrimination against the LGBTQI+ community, unwillingness to reform systems of parentage and citizenship to respond to developments in reproductive technologies, and aversion to addressing substandard conditions that can make surrogacy practices potentially harmful have primarily driven state bans and restrictions.

This Article argues that the state interests motivating state bans and restrictions on surrogacy do not justify eliminating or curtailing this rights-enabling practice. A review of interests motivating state bans and restrictions indicates that (1) legitimate concerns can be addressed by proper internal regulation and inter-state cooperation, (2) many bans and restrictions are inappropriate because they are based on discriminatory application of rights and harmful stereotypes, and (3) others are unjustified when weighed against the important reproductive and related rights at issue. The rights at stake—principles of non-discrimination and reproductive autonomy, choice, and freedom—are vital and often under threat. A human rights approach to gestational surrogacy must mandate state cooperation and regulation to ensure protection of these rights and some measure of global equality in their enjoyment.

Part II of this Article tells the story of A, C, and K, gestational surrogates arrested in Cambodia, charged with human trafficking, and forced by the Cambodian government to raise the babies they birthed through the surrogacy process. Part III summarizes bans and restrictions imposed on surrogacy by states and charts the global dynamics that have led to the current conditions of transnational surrogacy practices: deprivation of the rights of marginalized communities, namely disempowered women from the Global South and members of the LGBTQI+ community. Part IV considers the human rights at stake in surrogacy arrangements. It assesses the state interests that have motivated state action on surrogacy in the context of human rights, summarizes the largely disappointing reactions of human rights mechanisms thus far, and argues that both states and human rights mechanisms have inadequately valued the important rights at stake. Finally, Part V considers transnational regulatory proposals as well as the critical shortcomings of the international human rights

system that make it difficult to motivate or compel state cooperation or regulation despite the evident and increasing need. In this Part, the Article discusses the need to consider global cooperation in addressing human rights if any measure of equality in the enjoyment of human rights is going to exist across state borders.

## II. A, C, AND K

In July 2018, the Cambodian government raided a residence where thirty-two gestational carriers were living.<sup>12</sup> The women were arrested, charged with human trafficking, and taken to a prison hospital where they were detained—some for the duration of their pregnancies—without legal representation or any further legal process.<sup>13</sup> The government released the women five months later, in December 2018, after a public advocacy campaign by international organizations.<sup>14</sup> As a condition of release, however, each woman was required to keep and parent the child they were carrying (or had given birth to in the interim) until the child reached adulthood.<sup>15</sup>

I, along with students in the Global Human Rights Clinic at the University of Chicago Law School, interviewed three of these women in March 2019 during a collaborative research project with the United Nations (U.N.) Office of the High Commissioner for Human Rights (OHCHR).<sup>16</sup> We met the women in a coffee shop in Phnom Penh. Two of them brought the babies they gave birth to through the arrangement. To protect the identities of the women, I will refer to them as A, C, and K.

Through an interpreter, A, C, and K explained that before serving as gestational carriers, they had moved with their families to Phnom Penh from smaller provinces to find work. They had all found jobs in garment factories, where they earned the equivalent of 120–150 USD per month for 12-hour daily shifts. Their husbands worked in construction for about 5–10 USD per day. None of the women were aware that compensated surrogacy had been banned in Cambodia a year earlier. All three were in debt to private lenders for amounts ranging from 2,000 to 18,000 USD. They had taken on this debt to pay for basic family expenses or in hopes of leaving their jobs in the garment factories, where labor was demanding and often dangerous, and establishing their own small

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<sup>12</sup> Matt Blomberg, *Surrogate Mothers from Cambodia Given Suspended Jail Terms in Landmark Case*, REUTERS (Mar. 31, 2020), <https://perma.cc/HYY7-EZMK>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Cambodian Surrogate Mothers Detained for Human Trafficking Released After Agreeing to Keep Babies*, ABC NEWS AUSTRALIA (Dec. 6, 2018), <https://perma.cc/UTT3-3PQ9>.

<sup>16</sup> UNIVERSITY OF CHICAGO LAW SCHOOL: GLOBAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY 31–33 (2019), <https://perma.cc/P7EX-CCG3>.

businesses. C, for example, had taken on a private loan of approximately 4,000 USD to pay for her mother's medical expenses.

As A, C, and K recalled, a co-worker at the garment factory introduced them to the alternative of surrogacy. The co-worker explained they could earn 10,000 USD for having a baby on behalf of a foreign couple unable to have children. They were told the embryo of the couple would be implanted in them through a medical procedure, and the commissioning couple would then raise the child. They were told they would receive payment in stages and would be provided with group housing during pregnancy so that medical professionals could monitor the pregnancy. They also met with other gestational carriers who described the surrogacy process, laid out the difficulties involved, and attested to being paid in full. They all had children and thought that it sounded like an incredible earning opportunity. K, for example, planned to use money earned from surrogacy to buy her own land. She currently lives on state-owned property from which she can be expelled at any time. None of the women felt coerced.

A, C, and K all recalled undergoing a medical examination involving a blood test. They did not remember being warned of the medical risks or receiving any information about the intended parent(s). None of the women had documentation detailing terms of the arrangement in their possession, nor did any of them remember signing a contract. After the implantation process, A, C, and K were all paid 500 USD and taken to accommodations where they joined other gestational carriers. They were told they would stay in these accommodations while pregnant so that they could be monitored and would receive meals and medical care. Otherwise, they remembered that they had been instructed to rest.

A, C, and K, along with the other women in the facility, were arrested on July 21, 2018. At the time of their arrest, A was one month pregnant, C was eight months pregnant, and K was four months pregnant. The police brought them to a police station where they were detained and ultimately charged with human trafficking. They were then held in a police hospital for five months without a conviction. C gave birth during this time. In December 2018, after news of the arrest reached the media, they were released on the condition that they care for and raise the children they had birthed through the surrogacy process until the child reached the age of eighteen. In the end, as a result of the interrupted process, neither A, C, nor K earned full compensation. A received 500 USD, C received 3,000 USD, and K received 1,100 USD.

At the time we met with them, A, C, and K had to report to the police every month and confirm that they still had the child under their care. They believed efforts were made by the surrogacy agency and intended parent(s) to claim the children. The agency contacted C and asked if she and the baby would meet with the intended father. She agreed and met with him but did not allow him to take the child for fear of being imprisoned by the Cambodian



government. C stated that the intended father filed a claim in a Cambodian court seeking custody of the child, but she never heard anything further about the claim.

Since the arrests of A, C, and K, the Cambodian government has charged other gestational carriers, employees of surrogacy agencies, and doctors from fertility treatment centers with human trafficking and sale of children.<sup>17</sup> Despite recent criticisms by the U.N. Committee on the Elimination of Discrimination Against Women, the government continues to view all compensated surrogacy arrangements as the sale of children. Cambodia's Secretary of State and Chair of the Human Trafficking National Committee described the actions of the gestational carriers as "exchang[ing] their children for money."<sup>18</sup> The government is currently drafting regulations restricting surrogacy to altruistic forms between nationals. The regulations criminalize any Cambodian woman who participates in compensated surrogacy and only allow heterosexual, married couples who are Cambodian nationals to participate in these arrangements as intended parents.<sup>19</sup>

### III. THE SELFISH STATE

The Cambodian government's reaction to gestational surrogacy arrangements received a great deal of media attention, but this reaction is not unique. Over the last twenty years, states have imprisoned gestational carriers, placed babies in orphanages, and denied intended parents' claims to parentage. In the absence of global regulation and coordination, state reactions to surrogacy practices have created a complicated and erratic landscape of legalization, bans, and restrictions. Some states permit surrogacy arrangements while others outlaw them. Some prohibit compensation to the gestational carrier while others restrict who can commission a gestational carrier (e.g., only married heterosexual couples), restrict who can be a gestational carrier (e.g., requiring the gestational carrier be married or previously have had children), or only permit agreements between citizens.<sup>20</sup> In all cases, state interests have taken priority over the

<sup>17</sup> Ouch Sony, *Tammy Davis-Charles, 2 Others Handed 18 Months in Prison over Surrogacy*, CAMBODIA DAILY (Aug. 3, 2017), <https://perma.cc/ML42-7D32>.

<sup>18</sup> Lea Goetz, *U.N. Call to Stop Criminalization of Surrogates in Cambodia*, BIONEWS (Nov. 18, 2019), <https://perma.cc/QGL5-GJTJ>.

<sup>19</sup> UNIVERSITY OF CHICAGO LAW SCHOOL: GLOBAL HUMAN RIGHTS CLINIC, *supra* note 16, at 35; *see also* Letter from Gender and Development for Cambodia (GADC), Gender and Development Network (GADNet), and Center for Reproductive Rights, to CEDAW (Sept. 20, 2019), <https://perma.cc/XZ4Q-8UXF>.

<sup>20</sup> Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMPAR. L. 369, 370 (2011); *see also* *International Surrogacy Agreements*, AUSTL. GOV'T DEP'T HOME AFFS., <https://perma.cc/FNF6-W2YN>; *International Surrogacy & ART Arrangements*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://perma.cc/HTB8-3YBV>.

preservation of and respect for the human rights and entitlements of the parties involved in these practices.

### A. The States that Built the Industry

A group of comparatively wealthy states, where intended parents have the resources to consider surrogacy, have adopted such restrictive policies around surrogacy that they have effectively propelled the development of a transnational industry. In these states, domestic surrogacy arrangements are either banned or restricted to their altruistic (uncompensated) forms.

Italy,<sup>21</sup> France,<sup>22</sup> Germany,<sup>23</sup> Spain,<sup>24</sup> Japan,<sup>25</sup> and China<sup>26</sup> have banned domestic surrogacy arrangements since the practice became widely available in the mid-1990s.<sup>27</sup> In many of these states, parentage is transferred by maternity.<sup>28</sup> Thus, a gestational carrier is always considered the legal mother of the child regardless of whether the child is the genetic offspring of the gestational carrier.<sup>29</sup>

The U.K.,<sup>30</sup> the Netherlands,<sup>31</sup> Australia,<sup>32</sup> Canada,<sup>33</sup> Portugal,<sup>34</sup> and some parts of Latin America<sup>35</sup> have prohibited compensated surrogacy arrangements.

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<sup>21</sup> Connie Atkinson & Veronica Dindo, *The Legal Position of International Surrogacy in England and Italy and the Recognition of Foreign Parental Orders*, KINGSLEY NAPLEY (Jan. 6, 2021), <https://perma.cc/59TM-AA9Q>.

<sup>22</sup> Claire Legras, *Why Has France Banned Surrogate Motherhood?*, OXFORD UNIV. PRESS BLOG (Feb. 23, 2015), <https://perma.cc/M7E8-VLV8>.

<sup>23</sup> *Germany: Federal Court of Justice Rules on Legal Motherhood of Surrogate*, LIBR. OF CONG. (Apr. 29, 2019), <https://perma.cc/Z54D-JXQM> (maternal surrogacy declared illegal in Germany, carrying a one-year term of imprisonment or a fine); Adoption Placement Act, Dec. 22, 2001, 2002 BGBI I at 354, as amended, §§ 13b, 13c, 14 (Ger.).

<sup>24</sup> DIRECTORATE-GENERAL FOR INT'L POL'Y, A COMPARATIVE STUDY ON THE REGIME OF SURROGACY IN EU MEMBER STATES 108 (2013), <https://perma.cc/RRQ9-3D4Y>.

<sup>25</sup> Sachi Spaulding, *Surrogacy and Japan: A Case for Regulation*, 38 UCLA PACIFIC BASIN L.J. 61, 62 (2021).

<sup>26</sup> Wang Xiaodong & Shan Juan, *Birth by Surrogacy to Remain Prohibited*, CHINA DAILY (Feb. 9, 2017), <https://perma.cc/TC9V-UGHZ>.

<sup>27</sup> *Id.*

<sup>28</sup> DIRECTORATE REL. WITH NAT'L PARLIAMENTS: INSTITUTIONAL COOP. UNIT, SPOTLIGHT ON PARLIAMENTS IN EUROPE: THE CITIZENSHIP OF CHILDREN BORN TO SURROGATES 3 (2018) [hereinafter SPOTLIGHT ON PARLIAMENTS IN EUROPE: THE CITIZENSHIP OF CHILDREN BORN TO SURROGATES], <https://perma.cc/2BAL-FPET>; HAGUE CONF. ON PRIVATE INT'L L., A STUDY OF LEGAL PARENTAGE, *supra* note 6, at 7, 17.

<sup>29</sup> HAGUE CONF. ON PRIVATE INT'L L., A STUDY OF LEGAL PARENTAGE, *supra* note 6, at 7.

<sup>30</sup> Gloria Torres et al., *A Review of Surrogate Motherhood Regulation in South American Countries: Pointing to a Need for an International Legal Framework*, 19 BMC PREGNANCY & CHILDBIRTH 46, 47 (2019), <https://perma.cc/U9DJ-Y2BQ>.

<sup>31</sup> Jaden Blazier & Rien Janssens, *Regulating the International Surrogacy Market: The Ethics of Commercial Surrogacy in the Netherlands and India*, 23 MED. HEALTH CARE & PHIL. 621, 622 (2020).

These states technically allow surrogacy but bar any compensation to the gestational carrier that exceeds support, assistance, or reimbursement for expenses. Because few women are willing to serve as uncompensated gestational carriers, surrogacy is effectively not available in these states.

### 1. “Not in My Backyard”

In the early to mid-2000s, citizens of states that restricted domestic surrogacy arrangements began traveling abroad to participate in transnational arrangements. In most cases, surrogacy arrangements outside state borders were neither explicitly permitted nor prohibited by the state. Yet, these arrangements raised new questions about parentage and citizenship. With few exceptions, state reactions to these unsanctioned arrangements resulted in tragic outcomes for the parties. In a series of high-profile cases, states refused to allow children into the parents’ country of residence,<sup>36</sup> rejected birth certificates,<sup>37</sup> withheld citizenship,<sup>38</sup> or removed children from their intended parents’ homes and placed them in foster care.<sup>39</sup>

Perhaps the most well-known case is that of Baby Manji.<sup>40</sup> Baby Manji was born in 2008 in India to a married couple from Japan who had engaged an Indian gestational carrier. One month before Manji’s birth, the couple divorced; the father was given sole custody of Manji under the agreement in Japan.<sup>41</sup> However, when he attempted to take the child from India to Japan, the Japanese Embassy refused to issue Manji a passport. Although Manji’s intended father was also her biological father—she was conceived using his sperm and an egg from an anonymous donor—Japanese law did not permit the transmission of citizenship from the father to the child. Instead, the Japanese government

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<sup>32</sup> Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers’ Participation in International Commercial Surrogacy Contracts*, 48 GOLDEN GATE U.L. REV. 162, 168 (2018).

<sup>33</sup> *Id.*

<sup>34</sup> *Portugal: New Law Further Regulates Surrogate Pregnancy*, LIBR. OF CONG. (Aug. 14, 2017), <https://perma.cc/28V6-HK24>.

<sup>35</sup> Torres et al., *supra* note 30; Cooperman, *supra* note 32, at 168.

<sup>36</sup> See, e.g., Don Melvin, *Boy Stuck 2 Years in Ukraine Arrives in Belgium*, NBC NEWS (Feb. 26, 2011), <https://perma.cc/L26D-92UM>.

<sup>37</sup> See, e.g., Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412, 417–21 (2012).

<sup>38</sup> See, e.g., Meghan Downey, *Can Regulating Surrogacy Prevent Statelessness?*, THE REG. REV. (Mar. 26, 2020), <https://perma.cc/S6MU-22AL>; Mohapatra, *supra* note 37, at 417–20.

<sup>39</sup> See, e.g., Richard F. Storrow, *International Surrogacy in the European Court of Human Rights*, 43 N.C.J. INT’L L. 38, 40, 55 (2018); Molly Quell, *Rights Court OKs Iceland’s Denial of Parental Rights in Lesbian Adoption Case*, COURTHOUSE NEWS SERV. (May 18, 2021), <https://perma.cc/2F74-UZ5X>.

<sup>40</sup> Baby Manji Yamada vs. Union of India and Another, (2008) 13 SCC 518 (India).

<sup>41</sup> Downey, *supra* note 38.

regarded Manji as an Indian citizen since her birth mother (the gestational carrier) was Indian.<sup>42</sup> The Indian government, which recognized and regulated transnational surrogacy arrangements at the time, recognized Baby Manji's intended mother, a Japanese citizen, as Baby Manji's legal mother. As a result, the Indian Embassy denied Baby Manji an Indian passport because citizenship was determined by the child's intended mother. The Indian government also prevented the father from legally adopting Baby Manji because its adoption laws prevent a single male from adopting a female child.<sup>43</sup> Additionally, once Manji had been born, the gestational mother's contractual responsibilities for the baby ended and so the baby became a ward of the Indian state.<sup>44</sup> After several months, Baby Manji was finally issued a certificate of identity that implicitly recognized the custodial rights of Baby Manji's genetic father, allowing him to return Baby Manji to Japan.<sup>45</sup>

In another 2008 case, Baby Samuel Ghilain and his intended parents, two legally married Belgian men, faced similar legal and bureaucratic obstacles. Like Baby Manji, Samuel was conceived from the sperm of one of the intended parents and an egg from an anonymous donor with the assistance of a gestational carrier in Ukraine.<sup>46</sup> Both Belgium and Ukraine refused to recognize Samuel as a citizen.<sup>47</sup> As a consequence, his intended parents were unable to take him out of Ukraine.<sup>48</sup> Samuel was legally stateless for nearly two years, and without legal parents in the country, he was placed with a foster family and then an orphanage until he was almost a year and half old.<sup>49</sup>

These high-profile cases, combined with domestic social pressures, ultimately compelled many countries to moderate their positions on transnational surrogacy. While states maintained domestic bans and restrictions, they began to accommodate foreign surrogacy arrangements.<sup>50</sup> Of the states that maintain domestic bans—Italy, France, Finland, Germany, Spain, Nepal, Norway, and Iceland—all except Italy grant exceptions or provide some

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<sup>42</sup> *Id.*

<sup>43</sup> Mohapatra, *supra* note 37, at 419.

<sup>44</sup> Downey, *supra* note 38.

<sup>45</sup> Mohapatra, *supra* note 37, at 420; *see also* Baby Manji Yamada, *supra* note 40.

<sup>46</sup> Melvin, *supra* note 36.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Mary Carolan, *Irish Father Wins Surrogacy Case over Child Born in India*, IRISH TIMES (Mar. 6, 2013), <https://perma.cc/JU83-HTTM>; Antony Starza-Allen, *Italy Will Not Recognize Intended Parent of Surrogate-Born Child, Court Rules*, BIO NEWS (May 10, 2019), <https://perma.cc/N6XD-SPHU>; *European Human Rights Court Orders France to Recognize Surrogate-Mother Children*, RFI (June 26, 2014), <https://perma.cc/XN5S-FYZX>.

mechanism to recognize children born of surrogacy outside their borders. Accordingly, the transnational surrogacy market has continued to grow.<sup>51</sup>

Italy maintains a hardline position that refuses to recognize any children born through foreign arrangements. In 2014, an Italian court ordered that a baby born through an arrangement between a Ukrainian gestational carrier and Italian intended parents be put up for adoption by the intended parents.<sup>52</sup> The court characterized the baby as “a child of no one.”<sup>53</sup> In 2016, Italy’s then-interior minister called for gestational carrier parents to be treated as sex offenders, declaring: “We want wombs-for-rent to become a universal crime, which is punished with a jail term. Just as happens for sex crimes.”<sup>54</sup> In 2019, the Italian Supreme Court refused to recognize the non-biological Italian father of a child born through surrogacy in Canada.<sup>55</sup> Both the non-biological father and biological father, a same-sex Italian couple who married in Canada,<sup>56</sup> sought legal status as parents to this child. They obtained a Canadian judicial order that recognized the legal parentage of the non-biological Italian father,<sup>57</sup> but the Italian Court declined to execute it and only allowed the biological father legal parentage.<sup>58</sup>

Italy aside, most other states with domestic bans have made some exception for foreign arrangements. In Germany, for example, the practice of surrogacy has been banned since the passage of the Embryo Protection Act in 1990,<sup>59</sup> but in 2008, a German couple had twins with the assistance of a gestational carrier in India.<sup>60</sup> After two years of litigation, the Government of Germany—which had refused to recognize the children as German citizens—granted them visas to enter Germany, but only after the intended parents adopted the children in accordance with German law governing inter-country

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<sup>51</sup> Mohapatra, *supra* note 37, at 413.

<sup>52</sup> Ismini Kriari & Alessia Valongo, *International Issues Regarding Surrogacy*, 2 *IT. L.J.* 331, 348 (2016), <https://perma.cc/JG9D-AQEF> (citing Corte di Cassazione, Ruling No. 24001 (Nov. 11, 2014)).

<sup>53</sup> *Id.*

<sup>54</sup> Crispian Balmer, *Italian Minister Says Surrogacy Should Be Treated Like a Sex Crime*, *REUTERS* (Jan. 6, 2016), <https://perma.cc/V4JW-57FJ>.

<sup>55</sup> Associazione Luca Coscioni et al., *Call for Inputs: Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, OHCR (May 2019), at 7 (summarizing Corte di Cassazione, Ruling No. 12193 (May 8, 2019)).

<sup>56</sup> Lorenzo Acconciamezza, *The Italian Constitutional Court Asked to Rule on Surrogacy Arrangements and Public Policy*, *EUR. ASSOC. OF PRIVATE INT’L L.* (Sept. 28, 2020), <https://perma.cc/T3D2-2SMS>.

<sup>57</sup> Associazione Luca Coscioni, *supra* note 55.

<sup>58</sup> *Id.*; Acconciamezza, *supra* note 56.

<sup>59</sup> *See Embryo Protection Act*, *KINDERWUNSCH DORTMUND*, <https://perma.cc/377V-QEAA>.

<sup>60</sup> Dhananjay Mahapatra, *German Surrogate Twins to Go Home*, *TIMES OF INDIA* (May 27, 2010), <https://perma.cc/VT7B-PV5G>.

adoptions.<sup>61</sup> In 2015, the German Federal Court of Justice recognized two German men in a same-sex relationship as the legal parents of a child born through a gestational carrier in California, even though only one was the biological father.<sup>62</sup> Although the surrogacy arrangement itself was illegal under German law, the Court determined that it was in the best interests of the child's care to maintain a legally recognized parent-child relationship with both of the intended parents.<sup>63</sup> A similar court decision was issued in Switzerland in 2014. The court granted parentage of a child born through surrogacy in the U.S. to two men—despite the fact that surrogacy is illegal in Switzerland<sup>64</sup>—because the court prioritized the child's welfare.<sup>65</sup>

In a case in Norway, a single mother commissioned an Indian gestational carrier to carry twins from an anonymous Scandinavian sperm donor and an Indian egg donor.<sup>66</sup> Once the children were born, neither India nor Norway would grant the children citizenship: India held that the Norwegian mother was the legal parent, while Norway asserted that the Indian gestational carrier was the legal parent.<sup>67</sup> After a great deal of pressure and public debate, Norway allowed the children to travel to Norway where they were placed under the care of a guardian until their adoption was resolved.<sup>68</sup>

The European Court of Human Rights (ECtHR) has played an important role in moderating European state responses to transnational arrangements to the extent these responses adversely impact the child born of surrogacy. The Court has consistently found that some form of recognition of the parentage of intended parents is in the best interests of the child. In two cases involving

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<sup>61</sup> *Id.*; see also Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L.R. 117, 130 (2013).

<sup>62</sup> Jan von Hein, *German Federal Court of Justice on Surrogacy and German Public Policy*, CONFLICTOFLAWS.NET (Mar. 4, 2015), <https://perma.cc/5K82-NZ7Y> (summarizing Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 2014, XII ZB 463/13 (2014)).

<sup>63</sup> *Id.*; see also *Limited Win for Surrogacy, Gay Parenthood in Germany*, DW NEWS (Dec. 19, 2014), <https://perma.cc/Q5D8-VVK4>.

<sup>64</sup> See Bundesgesetz über die medizinisch unterstützte Fortpflanzung [FMedG] [Federal Act on Medically Assisted Reproduction] Dec. 18, 1998, SR 810.11 (2000).

<sup>65</sup> *Same-Sex Couple Given Parental Rights to Surrogate Child*, SWI (Aug. 26, 2014), <https://perma.cc/4HE5-927D>; Malcom Curtis, *Swiss Gays Recognized as Parents of Child*, THE LOCAL (Aug. 25, 2014), <https://perma.cc/HZB7-2AG6>.

<sup>66</sup> Emma Batha, *International Surrogacy Traps Babies in Stateless Limbo*, REUTERS (Sept. 18, 2014), <https://perma.cc/X6HB-FJ3F>; Sumitra Debroy, *Stateless Twins Live in Limbo*, TIMES OF INDIA (Feb. 2, 2011), <https://perma.cc/T2HS-MNGC>.

<sup>67</sup> Batha, *supra* note 66.

<sup>68</sup> Isak Ladegaard, *Surrogacy Changes Perception of Family*, SCIENCE NORWAY.NO (May 18, 2013), <https://perma.cc/8AP7-W745>; MARIT MELHUUS, PROBLEMS OF CONCEPTION: ISSUES OF LAW, BIOTECHNOLOGY, INDIVIDUALS AND KINSHIP 85 (2012).

France, *Mennesson v. France*<sup>69</sup> and *Labassee v. France*,<sup>70</sup> two French couples returned to France with children born through surrogacy in the U.S. French authorities refused to register the children's birth certificates and the French Court of Cassation dismissed the couple's claims, holding that the surrogacy arrangement violated the French Civil Code.<sup>71</sup> The ECtHR decided in favor of the intended parents, finding that the refusal to recognize the parent-child relationship was harmful to the child.<sup>72</sup> The Court was concerned that denying legal recognition would create a "contradiction" that would "undermin[e] the children's identity within French society,"<sup>73</sup> and that the refusal to issue the children French birth certificates amounted to a violation of the right to respect for their private life.<sup>74</sup>

States outside Europe with long-standing domestic restrictions have made similar concessions to their citizens for arrangements abroad. In Hong Kong, recent jurisprudence indicates that the state may be relaxing legislative restrictions on foreign arrangements. The 2019 case *FH and MH v. WB and others* concerned a married couple who were Hong Kong permanent residents and had twins through a gestational carrier in the U.S. The High Court declared that the intended parents from Hong Kong were the children's legal parents.<sup>75</sup> Despite the fact that the children had been born through an illegal arrangement, as compensated surrogacy is prohibited under Hong Kong law,<sup>76</sup> the court found that it was in the best interests of the children that they have the same rights of residence as the intended parents.<sup>77</sup> Similarly, in Japan, where surrogacy is

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<sup>69</sup> *Mennesson v. France*, App. No. 65192/11 Eur. Ct. H.R. (2014).

<sup>70</sup> *Labassee v. France*, App. No. 65941/11 Eur. Ct. H.R. (2014).

<sup>71</sup> Press Release, Eur. Ct. Hum. Rts., Totally Prohibiting the Establishment of a Relationship Between a Father and His Biological Children Born Following Surrogacy Arrangements Abroad Was in Breach of the Convention (June 26, 2014) (press release issued by the Registrar of the Court).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Labassee v. France*, CHILD RTS. INT'L NETWORK, <https://perma.cc/X4G7-TJ96>; *Mennesson v. France*, CHILD RTS. INT'L NETWORK, <https://perma.cc/84VT-WFV7>; see also *Labassee*, supra note 70. For a more recent similar decision, see Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Req. No. P16-2018-001, Eur. Ct. H.R. (2019).

<sup>75</sup> *Hong Kong Court Decision: FH and MH v WB and Others [2019] HKCFI 1748: Hong Kong Court Granted Parental Order Concerning Surrogate Children After Considering Issues Such as Delay, Expenses and Possible Breach of the Surrogacy Law*, UNIV. H.K. CTR. FOR MED. ETHICS & L. (Aug. 30, 2019), <https://perma.cc/7VSV-FSS4>.

<sup>76</sup> Vera Raposo & U Sio Wai, *Surrogacy in Greater China: The Legal Framework in Taiwan, Hong Kong, Macao, and Mainland China*, 34 PACIFIC BASIN L.J. 135, 141 (2017) (citing Human Reproductive Technology Ordinance, (2000) Cap. 561, § 17 (H.K.)).

<sup>77</sup> Marcus Deale, *Update on the Complexities of Hong Kong Surrogacy Law: Parental Orders, Criminal Liability and the Authorization of Expenses*, INT'L BAR ASS'N (Apr. 2020), <https://perma.cc/D6RD-SF82>.

unregulated but culturally frowned upon,<sup>78</sup> a 2007 Supreme Court decision held that legal parenthood of Japanese intended parent(s) who entered into a surrogacy arrangement abroad would be recognized by way of an adoption or a special adoption.<sup>79</sup>

China prohibits surrogacy by preventing Chinese medical institutions and professionals from participating in surrogacy domestically but does not restrict couples from seeking gestational carriers outside of the country.<sup>80</sup> Reports indicate that wealthy Chinese couples often pursue overseas arrangements<sup>81</sup> and are, in fact, a major proportion of the transnational surrogacy market.<sup>82</sup>

Some states permit surrogacy domestically but prohibit its compensated forms. As a result, the availability of willing gestational carriers is limited and unable to meet the increasing demand. Canada, for example, permits only uncompensated surrogacy, except in Quebec, where all forms of surrogacy are prohibited.<sup>83</sup> Increasingly, Canadian intended parent(s) have sought foreign surrogacy arrangements.<sup>84</sup> In response, the Canadian government has established procedures that allow children born through transnational surrogacy arrangements to obtain Canadian citizenship.<sup>85</sup> Similarly, the U.K. limits domestic surrogacy to its uncompensated forms, but explicitly permits intended

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<sup>78</sup> See generally Patrick Balazo, *Cross-Border Gestational Surrogacy in Japan and the Spectre of Statelessness*, (Inst. on Statelessness & Inclusion: Statelessness Working Paper Series, Paper No. 2017/51, 2017), <https://perma.cc/3R2J-DEBK>.

<sup>79</sup> SCI. COUNCIL OF JAPAN ASSISTED REPROD. TECH. REV. COMM., ISSUES RELATED TO THE ASSISTED REPRODUCTIVE TECHNOLOGIES CENTERED ON SURROGATE PREGNANCY: TOWARD A SOCIAL CONSENSUS 36 (2008), <https://perma.cc/3KFQ-3JY4>.

<sup>80</sup> Chen Shasha, *Chinese Legislator to Propose Allowing Gestational Surrogacy Among Specific Groups*, GLOB. TIMES (Mar. 2, 2021), <https://perma.cc/HRY4-MKKR>.

<sup>81</sup> Michelle FlorCruz, *Rich Chinese Couples Want American Surrogate Moms for Easier Immigration and 'Designer Babies'*, BUS. INSIDER (Nov. 7, 2013), <https://perma.cc/6EGH-9EQM>.

<sup>82</sup> Alexandra Stevenson & Cao Li, *A Chinese Celebrity Scandal Puts Surrogate Births on Trial*, N.Y. TIMES (Jan. 20, 2021), <https://perma.cc/73S4-L2FL>; Shan Li, *Chinese Couples Come to U.S. to Have Children Through Surrogacy*, L.A. TIMES (Feb. 19, 2012), <https://perma.cc/553V-G9XN>.

<sup>83</sup> *Prohibitions Related to Surrogacy*, GOV'T OF CAN. (Feb. 5, 2020), <https://perma.cc/THZ3-E3XE>; Colleen Morawetz, *Whose Kid Is It Anyway? Parentage Contracts for Surrogacy in Quebec*, MCGILL J.L. & HEALTH (Nov. 20, 2015), <https://perma.cc/3BLJ-SAXX>.

<sup>84</sup> Morawetz, *supra* note 83.

<sup>85</sup> Canadian intended parent(s) must provide proof of biological connection or legal parentage by way of the original birth certificate or other relevant records like surrogacy contracts, court orders, hospital records, etc. *Who is a Parent for Citizenship Purposes when Assisted Human Reproduction (AHR), Including Surrogacy Arrangements, is Involved?*, GOV'T OF CAN. (July 15, 2020) [hereinafter *Who is a Parent for Citizenship Purposes*], <https://perma.cc/LU5X-SYZH>.



parent(s) to engage in surrogacy arrangements abroad, so long as they follow the U.K. government's instructions.<sup>86</sup>

## 2. "Out of Sight, Out of Mind"

By creating explicit or implicit caveats for foreign arrangements, these approaches to transnational surrogacy have enabled states to sidestep domestic debates about the definitions of marriage, parentage, equality, and reproduction. They have also allowed states to avoid responsibility for the surrogacy arrangements themselves. None of the states discussed above have imposed any meaningful requirements on the nature of the foreign agreements or conditions surrounding the conception, gestation, and birth of a child. Evidently, countries are concerned about commodification, exploitation, and other risks associated with compensated gestational surrogacy arrangements only to the extent that these risks occur within their own borders.

This double standard is quite explicit in some state policy approaches. For example, to grant a British passport to a child born of surrogacy abroad, the U.K. requires several documents, including proof of genetic parentage, proof that an ART process took place, documentation that the gestational carrier consented, and documentation confirming the identity of the gestational carrier.<sup>87</sup> But there are no requirements of any kind imposed on the surrogacy agreements themselves. The U.K. government simply notes that "[s]urrogacy agreements are not enforceable by U.K. law, even if you have a signed document with your surrogate and have paid their expenses."<sup>88</sup> The Irish government, which adopted a similar approach, has recently admitted to the "double standard" created by maintaining domestic restrictions while allowing external arrangements.<sup>89</sup>

In the Netherlands, recent proposed legislation was criticized for effectively encouraging intended parent(s) to engage in foreign arrangements that lack transparency.<sup>90</sup> The proposed law would criminalize surrogacy arrangements that promise the gestational carrier a "significant advantage," where a significant advantage is "anything that provides a benefit to her beyond mere reimbursement of certain surrogacy-created expenses."<sup>91</sup> In effect, the law

<sup>86</sup> Amel Alghrani & Danielle Griffiths, *The Regulation of Surrogacy in the United Kingdom: The Case for Reform*, 29 CHILD & FAM. L.Q. 165, 169 (2017); *Guidance: Surrogacy Overseas*, GOV.UK (Feb. 11, 2020), <https://perma.cc/BS57-LFVB>.

<sup>87</sup> *Id.*

<sup>88</sup> *Surrogacy: Legal Rights of Parents and Surrogates*, GOV.UK, <https://perma.cc/GP79-TFJM>.

<sup>89</sup> Pat Leahy, *Officials Warn against 'Double Standard' on Commercial Surrogacy*, IRISH TIMES (Jan. 27, 2022), <https://perma.cc/24LD-PRCS>.

<sup>90</sup> Ellen Trachman, *The Netherlands' Surrogacy Laws are Troubling and Dangerous*, ABOVE THE L. (July 29, 2020), <https://perma.cc/HJN4-P3PM>.

<sup>91</sup> *Id.*

would “push[] hopeful parents to countries where the process is deliberately murky, and therefore not easy to prove that the surrogate received compensation.”<sup>92</sup> In public education materials, the Dutch government warns intended parents that surrogacy abroad can result in exploitation of the gestational carrier and that bringing a child home will be difficult.<sup>93</sup> It does not, however, impose any requirements to ensure such arrangements are not exploitative, unjust, or abusive.

Similarly, the Canadian government provides a list of documents that parents must submit to obtain Canadian citizenship for children born through foreign surrogacy arrangements.<sup>94</sup> It does not, however, have any specific requirements for the content of foreign surrogacy arrangements. It simply advises Canadians who travel to Mexico for compensated arrangements to “seek independent legal advice before entering into any agreement.”<sup>95</sup>

## B. “Host” States: Where Women Labor as Gestational Carriers

On the other side of the transnational surrogacy equation are the “host” states for these practices. The number of host states where surrogacy is permitted and regulated has decreased over time. Some state hosts to surrogacy arrangements instituted bans after widely publicized reports criticized these countries for providing substandard conditions for surrogacy. Others instituted bans following complications from the cross-border nature of these arrangements. In other countries, surrogacy became a flashpoint for debates on women’s reproductive roles and has been viewed as a threat to the institutions of family and marriage. Surrogacy continues to be performed in many of these states informally and without legal protections, creating an unstable and sometimes dangerous environment for the parties involved.

### 1. From “Markets” to Bans

Throughout the 2000s, women in India, Thailand, Nepal, and Cambodia gestated the majority of children born through surrogacy globally.<sup>96</sup> Twelve thousand babies are estimated to have been born via surrogacy in India alone.<sup>97</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Surrogacy Outside the Netherlands*, GOV’T OF THE NETH., <https://perma.cc/93N7-Z55D>.

<sup>94</sup> *Who is a Parent for Citizenship Purposes*, *supra* note 85.

<sup>95</sup> *Government of Canada Services and Information in Mexico City, Mexico: Adoption and Surrogacy*, GOV’T OF CAN., <https://perma.cc/K8PA-EZN6>.

<sup>96</sup> See generally Jutharat Attawet, *Mapping Transnational Commercial Surrogacy Arrangements in South and Southeast Asia*, 89 MEDICO-LEGAL J. 128 (2021).

<sup>97</sup> Priya Shetty, *India’s Unregulated Surrogacy Industry*, 380 THE LANCET 1633, 1633 (2012).

In these states, gestational surrogacy practices were considered by many to be an attractive employment opportunity for women with limited options.

The Indian government legalized compensated gestational surrogacy arrangements in 2002 as part of a state initiative to encourage foreigners to use India's inexpensive yet high-quality medical care—then an important source of state revenue.<sup>98</sup> At its height, surrogacy provided an attractive income alternative to many women working in India's low-wage informal labor sector—women could earn up to twenty times the average yearly income.<sup>99</sup> An estimated three thousand surrogacy clinics generated an annual revenue of over 400 million USD (others estimate revenue as high as 2 billion USD).<sup>100</sup> Anand, Mumbai, Delhi, Hyderabad, and Bangalore, in particular, were central locations for surrogacy due to the availability of well-regarded medical clinics, inexpensive pharmaceuticals, and a community of women interested in labor as gestational carriers.<sup>101</sup>

Though legal, compensated gestational surrogacy was initially not regulated at all and ultimately not well-regulated. In 2005, the Indian Council of Medical Research (ICMR), a government-funded council that coordinates biomedical research, issued surrogacy guidelines in an effort to establish medical and ethical standards for arrangements.<sup>102</sup> These guidelines required confidentiality, transparency, and the provision of proper information to the gestational carriers and intended parent(s).<sup>103</sup> They also required that intended parent(s) absorb all medical expenses incurred by the gestational carrier during pregnancy and the post-natal period.<sup>104</sup> However, the guidelines did not regulate compensation, nor did they provide the gestational carrier with any legal representation or assistance. Moreover, reports indicated that, in practice, carriers were obliged to comply with medical processes but were provided little explanation of the procedures and risks involved.<sup>105</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; see also Sharmila Rudrappa, *Why is India's Ban on Compensated Surrogacy Bad for Women?*, 43 N.C.J. INT'L L. 70, 77 (2018); *GNI Per Capita, Atlas Method (Current US\$): India*, WORLD BANK (Feb. 4, 2022), <https://perma.cc/7LLD-WFVZ> (showing that India's average per capita income in 2016 was 1,680 USD per year).

<sup>100</sup> Francesca Nardi, *Two Sides to Every Coin: India's New Ban on Commercial Surrogacy*, GEORGETOWN L. O'NEILL INST. FOR NAT'L & GLOB. HEALTH L. (Aug. 15, 2019), <https://perma.cc/W742-565C>.

<sup>101</sup> Sharmila Rudrappa, *India's Reproductive Assembly Line*, 11 CONTEXTS 22, 23 (2012).

<sup>102</sup> R.S. Sharma, *Social, Ethical, Medical & Legal Aspects of Surrogacy: An Indian Scenario*, 140 INDIAN J. MED. RSCH. 13, 16 (2014).

<sup>103</sup> INDIAN COUNCIL OF MED. RSCH. & NAT'L ACAD. OF MED. SCI., NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA 58 (2005), <https://perma.cc/RKB8-5S53>.

<sup>104</sup> *Id.* at 63, 69.

<sup>105</sup> *Id.*

Following the public scandal of the 2008 Baby Manji Case,<sup>106</sup> the Indian Council for Medical Research responded with a series of restrictive regulations, including only allowing heterosexual couples married for a minimum of two years to participate in surrogacy as intended parents.<sup>107</sup> However, reports of the Indian government's mismanagement persisted. Some reports documented the absence of fully informed consent of gestational carriers. They found that gestational carriers had insufficient knowledge or understanding of the medical processes involved and/or the terms of their contracts.<sup>108</sup> Other accounts found that surrogacy agencies failed to provide adequate medical care; some gestational carriers reported receiving little or no postnatal care.<sup>109</sup> There was also documentation of strict or unfavorable terms in surrogacy contracts, including low compensation and limitations on gestational carriers' ability to make personal medical decisions.<sup>110</sup>

In 2019, the Indian government revived a 2016 bill that banned all forms of compensated transnational surrogacy and, further, barred single and same-sex

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<sup>106</sup> *Baby Manji Yamada*, *supra* note 40.

<sup>107</sup> INDIAN COUNCIL OF MED. RSCH. & NAT'L ACAD. OF MED. SCI., *supra* note 103; Nishat Hyder, *India Limits Surrogacy Visas to Married Couples*, BIONEWS (Jan. 21, 2013), <https://perma.cc/5QA5-K24C>.

<sup>108</sup> See Rudrappa, *Why is India's Ban on Compensated Surrogacy Bad for Women?*, *supra* note 99, at 77 (finding that gestational carriers interviewed in India had not received information about the medical procedures they would undergo, including cesarean sections and "fetal reduction" operations to terminate unwanted embryos if too many embryos resulted in successful pregnancies); NORDIC COUNCIL OF MINISTERS, REPRODUCTIVE TECHNOLOGY AND SURROGACY 36 (2015), <https://perma.cc/4H8E-W3MC> (stating that gestational carriers at several Indian clinics "had no knowledge about the hormones injected into them"); Malene Tanderup et al., *Informed Consent in Medical Decision-Making in Compensated Gestational Surrogacy: A Mixed Methods Study in New Delhi, India*, 94 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 465 (2015) (interviewing fourteen gestational carriers and twenty doctors and finding that gestational carriers in India were not adequately informed and that doctors, rather than gestational carriers or intended parent(s), were making medical decisions).

<sup>109</sup> See, e.g., Rudrappa, *Why is India's Ban on Compensated Surrogacy Bad for Women?*, *supra* note 99 (finding that none of the gestational carriers interviewed in India received post-natal care); MIRANDA DAVIES, *BABIES FOR SALE?: TRANSNATIONAL SURROGACY, HUMAN RIGHTS AND THE POLITICS OF REPRODUCTION* 270 (2017) (reporting that gestational carriers often give birth through caesarian sections, which are riskier for gestational carriers, solely for the convenience of intended parent(s)).

<sup>110</sup> See, e.g., SHEELA SARAVAN, *Addressing Global Inequalities in Surrogacy*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 42 (E. Scott Sills ed., 2016) (finding that gestational carriers in India received only 15–20% of the total amount paid by intended parents); Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL L.J. & PUB. POL'Y 684, 693 (2018) (finding that many gestational carriers in India were not permitted to leave surrogacy hostels during the duration of the process, except under special circumstances); Kishwar Desai, *India's Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection*, THE GUARDIAN (June 5, 2012), <https://perma.cc/74KU-5C2Q> (explaining that gestational carriers often assume liability for all medical, psychological, and financial risks of the surrogacy process).

intended Indian citizen parents from participating in domestic surrogacy arrangements.<sup>111</sup> India's foreign minister stated, "[we] do not recognise live-in relationships and homosexuality. We don't want to give them this entitlement."<sup>112</sup> The bill became law in December of 2021.<sup>113</sup>

The surrogacy market in Thailand, despite its high-quality medical infrastructure,<sup>114</sup> met a similar fate. Between 2006 and 2010, Thailand's transnational surrogacy market experienced a 1,000% growth.<sup>115</sup> The industry generated an estimated 130 million USD in annual revenue. By 2014, Thailand was home to roughly twenty surrogacy agencies.<sup>116</sup> Arrangements between Thai carriers and same-sex foreign couples were common in Thailand and met with less discriminatory opposition than in India.<sup>117</sup> At the time, some referred to Thailand as the "Womb of Asia."<sup>118</sup>

For several years, the Thai government did not intervene or take a position on the growing surrogacy industry.<sup>119</sup> The Medical Council of Thailand issued guidelines prohibiting medical practitioners from participating in compensated surrogacy.<sup>120</sup> However, these guidelines only applied to Thai doctors and did not regulate brokering agencies or foreign doctors practicing in Thailand.<sup>121</sup> Further, these guidelines were not firmly enforced. In 2010, the Thai cabinet approved a draft law to regulate ARTs in Thailand, including surrogacy, but the National Assembly never ratified it. Under Thai law, intended parent(s) were required to

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<sup>111</sup> Surrogacy (Regulation) Bill, 2019, Bill No. 156 of 2019 (India); Neha Thirani Bagri, *A Controversial Ban on Commercial Surrogacy Could Leave Women in India with Even Fewer Choices*, TIME (June 30, 2021), <https://perma.cc/VTX9-CY9V>.

<sup>112</sup> Ananya Sengupta, *Bigoted Nationalism Enters Womb*, TEL. ONLINE (Aug. 25, 2016), <https://perma.cc/TB43-UY62>.

<sup>113</sup> Surrogacy (Regulation) Act, 2021, Bill No. 47 of 2021 (India), <https://perma.cc/9E9C-DVUC>; Neetu Chandra Sharma, *Govt Notifies Laws to Regulate Surrogacy, Assisted Reproductive Technology*, BUSINESS TODAY.IN (Jan. 26, 2022), <https://perma.cc/T9C8-MRGQ>.

<sup>114</sup> Erik Cohen, *Surrogacy as International Business and National Disgrace of Thailand*, 14 ASIAN ANTHROPOLOGY 115, 118 (2015).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Thailand Bans Commercial Surrogacy for Foreigners*, BBC NEWS (Feb. 20, 2015), <https://perma.cc/F4N4-5SZ8>; see also Mitsutoki Shigeta: 'Baby Factory' Dad Wins Paternity Rights, BBC NEWS (Feb. 20, 2018) [hereinafter *Shigeta*], <https://perma.cc/2YN3-785R>; Flora Carr, *Japanese Man Granted Sole Custody of 13 Children He Fathered with Thai Surrogate Mothers*, TIME (Feb. 20, 2018), <https://perma.cc/PC68-YHWP>.

<sup>119</sup> Cohen, *supra* note 114, at 118.

<sup>120</sup> *Id.* at 120.

<sup>121</sup> *Id.*

adopt their babies, but surrogacy agencies often circumvented the law by placing the intended parent(s)' names directly on the birth certificate.<sup>122</sup>

The Thai transnational surrogacy industry was eventually officially banned in 2015 following two high-profile cases.<sup>123</sup> The first was the *Baby Gammy* case which involved an Australian couple, the Farnells, and twins born to a Thai gestational carrier, Pattaramon Chanbua.<sup>124</sup> At birth, one of the twins was diagnosed with Down Syndrome. The Farnells took the baby born without Down Syndrome—Pipah—and left the baby with Down Syndrome—Baby Gammy—with Pattaramon. Pattaramon raised Baby Gammy and sought to have Pipah returned to her as well, but Australian courts denied her request, finding that it was in the best interests of the child to remain with the Farnells.<sup>125</sup> Baby Gammy was later granted Australian citizenship but remained in Thailand.

The second public controversy that resulted in Thailand's ban of surrogacy occurred when Mitsutoki Shingeta, the son of a wealthy Japanese billionaire, commissioned thirteen Thai gestational carriers to gestate embryos fertilized using his sperm and donor eggs.<sup>126</sup> The police were notified by an anonymous call and, believing Shingeta was orchestrating a human trafficking ring, raided his residence to find nine babies, each cared for by a separate nanny.<sup>127</sup> The police removed the babies from Shingeta's residence, along with Shingeta's four other children, who were being cared for by nannies elsewhere in Thailand. Shingeta then filed suit against Thailand's Ministry of Social Development and Human Security seeking custody of his children. Three years later, after the court concluded that he had not committed any unlawful act, Shingeta was awarded custody. The court found that he had the desire to parent and the means to do so, and that there was no evidence of ill intent other than the wish for a "big family."<sup>128</sup>

These two cases prompted the Thai legislature to pass the Protection for Children Born through Assisted Reproductive Technologies Act in 2015. The Act limited gestational surrogacy to arrangements between nationals where the intended parents were heterosexual Thai couples married for three years or

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<sup>122</sup> *Id.*

<sup>123</sup> *Thailand Bans Commercial Surrogacy for LGBTs, Singles, Foreigners*, LGBTQ NATION (Aug. 7, 2015), <https://perma.cc/Z9R6-8X9E>.

<sup>124</sup> *Farnell v. Chanbua* [2016] 56 Fam LR 84 (Austl.).

<sup>125</sup> *Id.*; *Baby Gammy: Surrogacy Row Family Cleared of Abandoning Child with Down Syndrome in Thailand*, ABC NEWS AU (Apr. 13, 2016), <https://perma.cc/YJS7-WX3S>.

<sup>126</sup> *Shigeta*, *supra* note 118; Carr, *supra* note 118.

<sup>127</sup> Ellen Trachman, *Rich Guy Uses Surrogates to Have 13+ Kids. This Is Why We Can't Have Nice Things*, ABOVE THE L. (Mar. 7, 2018), <https://perma.cc/DK25-C3UB>.

<sup>128</sup> Kaweewit Kaewjinda, *Japanese Man Given Custody of 13 Surrogate Kids*, WASH. POST (Feb. 20, 2018), <https://perma.cc/YMR8-QU5Q>.

more.<sup>129</sup> The Act made it a criminal offense for anyone to participate in transnational gestational surrogacy.<sup>130</sup> It also limited gestational carriers to blood relatives of the husband or wife who had a previous pregnancy and banned all form of surrogacy for profit.<sup>131</sup> A member of parliament stated that the law would prevent Thailand from continuing to function as the “the womb of the world.”<sup>132</sup>

Similar scandals—either cross-border regulatory complications or accusations of substandard internal protections or care—led other countries in the region to close their borders to such arrangements. Nepal and Israel, for example, captured the world stage in 2015 after an earthquake in Nepal left over 100 Israeli intended parents stranded with their babies and still-pregnant gestational carriers.<sup>133</sup> At the time, Israel did not allow homosexual couples to participate in surrogacy within its borders, so many traveled to Nepal.<sup>134</sup> In a well-publicized rescue operation, the Israeli government commissioned planes and flew the Israeli intended parents, babies, and some gestational carriers to Israel.<sup>135</sup> While the rescue operation was celebrated in Israel, media reports criticized the country for prioritizing the safety of Israeli citizens and their babies over the gestational carriers who had completed their pregnancies or were no longer breastfeeding.<sup>136</sup> The Nepali Supreme Court responded by issuing a temporary stay on all surrogacy arrangements.<sup>137</sup> Later that year, Nepal limited

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<sup>129</sup> Protection of a Child Born by Medically Assisted Reproductive Technology Act (2015), <https://perma.cc/5HK7-KAAE> (unofficial English translation); Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBR. OF CONG. (Apr. 6, 2015), <https://perma.cc/PWH4-YSFA>; Patricia Fronek, *Current Perspectives on the Ethics of Selling International Surrogacy Support Services*, 8 MEDICOLEGAL & BIOETHICS 11, 12 (2018).

<sup>130</sup> *Thailand to Ban Commercial Surrogacy in Wake of Gammy Scandal*, THE GUARDIAN (Aug. 12, 2014), <https://perma.cc/EH3E-KBYS>; Cyra Akila Choudhury, *Transnational Commercial Surrogacy: Contracts, Conflicts and the Prospects of International Legal Regulation*, OXFORD HANDBOOKS ONLINE (Dec. 2016), <https://perma.cc/U5SY-Y5GF>.

<sup>131</sup> Umeda, *supra* note 129.

<sup>132</sup> *Thailand Bans Commercial Surrogacy for Foreigners*, *supra* note 118.

<sup>133</sup> Tovah Lazaroff, *Israeli Planes Bring Home Babies Born in Quake-Struck Nepal*, JERUSALEM POST (Apr. 27, 2015), <https://perma.cc/W6Y3-DLEL>.

<sup>134</sup> Aeyal Gross, *It Takes an Earthquake in Nepal to Talk About Surrogacy in Israel*, HAARETZ (Apr. 30, 2015), <https://perma.cc/G42P-V2RQ>.

<sup>135</sup> Jane Onyanga-Omara, *Babies Born to Surrogate Mothers Flown Out of Nepal*, USA TODAY (Apr. 27, 2015), <https://perma.cc/WAY4-KG2A>.

<sup>136</sup> Debra Kamin, *Israel Evacuates Surrogate Babies from Nepal but Leaves the Mothers Behind*, TIME (Apr. 28, 2015), <https://perma.cc/ZTN2-2THT>.

<sup>137</sup> Supreme Court of Nepal, Case 072-WO-0119 (July 14, 2016) (Nepal); *Surrogacy Services Are Banned in Nepal*, U.S. EMBASSY NEPAL (June 4, 2021) <https://perma.cc/2QWS-RYL3>.

surrogacy to infertile married Nepali couples, excluding all single men or women, transgender couples, and foreign nationals.<sup>138</sup>

The industry then moved to Cambodia, where women like A, C, and K began participating in surrogacy.<sup>139</sup> The government started to raid facilities and arrest parties involved in surrogacy in 2017, beginning with an Australian nurse and two Cambodian assistants who were arrested for managing a compensated surrogacy clinic.<sup>140</sup> These initial arrests were followed by several raids that resulted in arrests, prosecution, and conditional release of Cambodian gestational carriers.<sup>141</sup>

## 2. Existing Markets: Impact of Absent Cross-Border Regulation, Nationalism, and Discrimination

The same dynamics that led former surrogacy host countries to close their borders to surrogacy have plagued nearly all host states. To varying degrees, complications caused by the absence of cross-border regulatory mechanisms, nationalism and nativism around women's reproduction, substandard delivery of basic health services and rule of law infrastructure, and discrimination based on marital status, gender identity, and sexual orientation have created difficult, and sometime dangerous, environments for these arrangements. Currently, Colombia, Israel, Mexico, Russia, and the U.S. permit both transnational and domestic surrogacy arrangements. But, in all countries, nationalist and conservative (sometimes religious) movements have periodically, and often increasingly, undermined the rights and protections of the parties involved in these arrangements.

Russia has experienced the most dramatic shift in its treatment of transnational surrogacy arrangements. In Russia, surrogacy has been a legal treatment for infertility since 1993,<sup>142</sup> and the practice is subject to federal regulation.<sup>143</sup> The country's compensated transnational surrogacy industry, until recently, was well-established: estimates suggest that about 3,500 babies were

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<sup>138</sup> *Surrogacy Services Are Banned in Nepal*, *supra* note 137.

<sup>139</sup> Sarah Haaji, *Cambodia Proves Fertile Ground for Foreign Surrogacy After Thailand Ban*, THE GUARDIAN (Aug. 19, 2016), <https://perma.cc/6PSQ-93NC>; Nilanjana Bhowmick, *After Nepal, Indian Surrogacy Clinics Move to Cambodia*, ALJAZEERA (June 28, 2016), <https://perma.cc/9EJA-ZDNW>.

<sup>140</sup> Sony, *supra* note 17; *Australian Nurse Sentenced to 18 Months' Jail in Cambodia on Surrogacy Charges*, THE GUARDIAN (Aug. 3, 2017), <https://perma.cc/CV6Z-LFLG>.

<sup>141</sup> Blomberg, *supra* note 12.

<sup>142</sup> Nataliya Shok, *Abortion and Surrogacy: Linked in Russian Reproductive Policies and Bioethics*, RUSSIA FILE (Mar. 25, 2021), <https://perma.cc/UCZ2-WED7>.

<sup>143</sup> On the Basics of Health Protection of Citizens in the Russian Federation, Federal Law No. 323-FZ, ch. 6, arts. 51–57 (Nov. 21, 2011) [hereinafter Russian Federal Law on Family and Reproductive Health Issues], <https://perma.cc/AZ2Z-8FGM> (supplemented by art. 53.1 on Mar. 1, 2022) (“Protection of Maternal and Child Health, Family and Reproductive Health Issues”).



born through surrogacy each year.<sup>144</sup> While Russian law did not explicitly allow for the participation of LGBTQI+ parents, some commentators predicted that recent cases establishing parentage for single fathers would help lay the legal groundwork for a more inclusive policy approach to surrogacy.<sup>145</sup>

In recent years, however, there has been significant conservative pushback by lawmakers and religious institutions, especially against the LGBTQI+ community. In July 2020, the Russian Constitution was amended to define marriage as between a man and a woman.<sup>146</sup> Also in 2020, the government arrested four fertility doctors who had assisted in international surrogacy arrangements and charged them with child trafficking.<sup>147</sup> The government threatened to arrest single fathers and “people of non-traditional sexual orientation” who had children through surrogacy arrangements. That year, several gay parents with children born through surrogacy fled the country in fear of future retribution.<sup>148</sup>

In 2021, lawmakers introduced restrictions that would prohibit non-Russians from participating in surrogacy arrangements.<sup>149</sup> The restrictions were prompted by a highly publicized police investigation into the death of a baby born to a Russian gestational carrier and Filipino intended parents.<sup>150</sup> The baby had died of natural causes while recovering from a brain operation. Still, lawmakers argued that restrictions on surrogacy were necessary to avoid the use of Russian women as “incubators for foreigners.”<sup>151</sup> They stressed that surrogacy was a threat to “national interests” and a departure from principles of “motherhood, childhood, and family in Russia.”<sup>152</sup>

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<sup>144</sup> Theo Merz, *Single Fathers with Children Via Surrogates Flee Russia Amid Crackdown*, THE GUARDIAN (Oct. 15, 2020), <https://perma.cc/7BZG-B978>; see also Oliver Carroll, *Gay Men in Russia with Surrogate Children Warned They Face Arrest*, THE INDEPENDENT (Oct. 2, 2020), <https://perma.cc/6M3U-LF8E>.

<sup>145</sup> Christina Weis, *Russia State Duma Proposes Bill Restricting Surrogacy . . . Again*, BIO NEWS (Mar. 15, 2021), <https://perma.cc/AT6B-2HXJ> (citing Russian Federal Law on Family and Reproductive Health Issues, *supra* note 143).

<sup>146</sup> *Russian Constitution Change Ends Hopes for Gay Marriage*, NBC NEWS (July 13, 2020), <https://perma.cc/2BGD-UDQ3>.

<sup>147</sup> Merz, *supra* note 144; Carroll, *supra* note 144; Nataliya Vasilyeva, *Russian Investigators Press Human Trafficking Charges Against Four Doctors*, THE TELEGRAPH (Oct. 11, 2020), <https://perma.cc/P5L2-TJPR>.

<sup>148</sup> Carroll, *supra* note 144.

<sup>149</sup> *Panic Womb: Russia's Liberal Surrogacy Rules are under Threat*, THE ECONOMIST (Mar. 18, 2021), <https://perma.cc/KR5J-UMZG>.

<sup>150</sup> *Id.*

<sup>151</sup> AFP, *8 Arrested in Russia's First Surrogacy Probe*, MOSCOW TIMES (Aug. 30, 2020), <https://perma.cc/QUE4-5AC3>.

<sup>152</sup> *Id.*; *Russia Considers Banning Surrogacy for Unmarried People, Foreigners*: RBC, MOSCOW TIMES (Jan. 20, 2021), <https://perma.cc/7FZM-S3M2>; Weis, *supra* note 145.

In March 2022, following Russia's invasion of Ukraine, Russian lawmakers introduced legislation that would bar foreigners from engaging Russian gestational carriers.<sup>153</sup> At the time of writing, this legislation has been approved by one house. In a move clearly motivated by nationalism, one lawmaker noted that 40,000 babies had left Russia through surrogacy arrangements and asked why Russians should "spend our funds resolving the demographic problems of other countries."<sup>154</sup>

Conversely, the conversation around surrogacy in Colombia has benefited from a social commitment to reproductive autonomy and non-discrimination around sexual identity. Colombia is currently the only country in the world where compensated gestational surrogacy arrangements are both legal and guaranteed by constitutional protections for non-citizens and LGBTQI+ intended parent(s).<sup>155</sup> The Colombian Constitution prohibits discrimination based on sexual identity, a right that applies to both nationals and foreigners,<sup>156</sup> and the Constitutional Court has ruled that any exclusion of same-sex parents from surrogacy arrangements violates these prohibitions.<sup>157</sup> The Constitutional Court has also consistently overturned any restrictions on women's reproductive and sexual autonomy (most recently decriminalizing abortion),<sup>158</sup> which has created an environment in which gestational carriers can freely exercise their right to bodily autonomy.<sup>159</sup>

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<sup>153</sup> *Russia Moves to Bar Foreigners from Using Its Surrogate Mothers*, REUTERS (May 24, 2022), <https://perma.cc/2CLE-WJWX>.

<sup>154</sup> *Id.*

<sup>155</sup> *Gay Surrogacy*, SURROGACY COLOM., <https://perma.cc/9KSF-56S8>; see also William Houghton & Leon Altamirano, *Surrogacy in Colombia*, SENSIBLE SURROGACY, <https://perma.cc/9G2M-MLFE>; *Surrogacy in Colombia*, GROWING FAMS., <https://perma.cc/YE3L-7NRG>.

<sup>156</sup> CONSTITUTEPROJECT.ORG, COLOMBIA'S CONSTITUTION OF 1991 WITH AMENDMENTS THROUGH 2015 25 (2015), <https://perma.cc/BYN7-LJP5>. Under Article 100, "[a]liens in Colombia shall enjoy the same civil rights as Colombian citizens." *Id.*

<sup>157</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 18, 2015, Sentencia C-071/15, <https://perma.cc/TY7U-6L7F> (Colom.); see also *Colombia Lifts Same-Sex Adoption Limits*, BBC (Nov. 5, 2015), <https://perma.cc/BWR5-ENLK>; CÓDIGO DE LA INFANCIA Y LA ADOLESCENCIA [COD. INF. ADOL.] [CHILDHOOD AND ADOLESCENCE CODE] art. 22, <https://perma.cc/P9Z8-23KS>.

<sup>158</sup> Julie Turkewitz, *Colombia Decriminalizes Abortion, Bolstering Trend Across the Region*, N.Y. TIMES (Feb. 22, 2022), <https://perma.cc/X55W-8KY8>; Corte Constitucional de Colombia, *Nota De Prensa: Conducta del aborto solo será punible cuando se realice después de la vigésimo cuarta (24) semana de gestación y, en todo caso, este límite temporal no será aplicable a los tres supuestos fijados en la Sentencia C-355 de 2006* [Press Release: Conducting Abortions Will Only Be Punishable when Carried out After the Twenty-Fourth (24) Week of Gestation and, in Any Case, this Time Limit Will Not Be Applicable to the Three Cases Set out in Judgement C-355 of 2006], <https://perma.cc/JG7N-4HFU>.

<sup>159</sup> CTR. FOR REPROD. RTS., BODIES ON TRIAL: REPRODUCTIVE RIGHTS IN LATIN AMERICAN COURTS 52–53 (2003), <https://perma.cc/WCD7-GUEN>.

In 2009, the Constitutional Court ruled that gestational surrogacy practices were protected by the Colombian Constitution.<sup>160</sup> The Constitutional Court found that Article 42, clause 4 of the Constitution—which guarantees that “[c]hildren born in or out of wedlock, procreated naturally or with scientific assistance, have equal rights”—suggested “consider[ation] [of] surrogate motherhood as a positive mechanism to solve the problems of infertility in couples.”<sup>161</sup> However, the Constitutional Court also noted that there was an “urgent need” for regulation to guard against “lucrative [compensated] arrangements,” “lack of protection of the rights and interests of the newborn,” “acts utilizing one’s own body contrary to the law,” and “major conflicts that arise when there are disagreements between the parties involved [in a surrogacy arrangement].”<sup>162</sup> Despite the Constitutional Court’s recommendations and various proposals to establish protections for parties involved, regulations have yet to be put in place.<sup>163</sup>

Despite these protections, conservative forces within Colombian society have periodically turned their attention towards surrogacy. Lawmakers have proposed limitations on transnational surrogacy to prevent Colombia from becoming the site of “reproductive tourism” for foreign gay parents.<sup>164</sup> Limitations would require that all intended parents be HIV-negative heterosexual couples and that foreign intended parents live in Colombia for at least a year.<sup>165</sup> In 2016, a congresswoman from the right-wing party Centro Democrático proposed an even more restrictive law that would permit only domestic altruistic surrogacy arrangements.<sup>166</sup> While these prohibitionist proposals have yet to receive widespread support, they continue to reflect a live debate on the topic.

The Mexican surrogacy industry has also benefited from an increasing state commitment to reproductive freedoms and autonomy for women. Gestational

<sup>160</sup> *Surrogacy Laws and Regulations in Colombia*, SURROGACY COLOM., <https://perma.cc/PDK9-ZCF9> (citing C.C., diciembre 18, 2009, Sentencia T-968/09, <https://perma.cc/J2PH-BDHY>).

<sup>161</sup> C.C., diciembre 18, 2009, Setencia T-968/09, <https://perma.cc/6HTE-PU9E>.

<sup>162</sup> *Id.*

<sup>163</sup> Laura Montoya Ávila, *Maternidad Subrogada: Una Práctica no Reglamentada en el Ordenamiento Jurídico Colombiano* [Surrogate Motherhood: A Practice Not Regulated in the Colombian Legal Order], UNIVERSIDAD CATÓLICA DE COLOMBIA (2018), <https://perma.cc/KGR6-KDMH> (discussing the lack of legal guidance on surrogacy practices in Colombia); Gabriel Enrique Prado Álvarez & José Andrés Osorio Aldana, *Análisis Jurisprudencial de la Maternidad Subrogada en Colombia: Vacío Jurídico en la Ley Penal Colombiana* [Jurisprudential Analysis of Surrogacy in Colombia: Legal Vacuum in Colombian Criminal Law], UNIVERSIDAD DE MANIZALES (2019), <https://perma.cc/V8BY-87BR> (discussing recent legal developments regarding surrogacy in Colombia).

<sup>164</sup> Torres et al., *supra* note 30.

<sup>165</sup> Proyecto de Ley 037 de 2009 Cámara, Gaceta del Congreso (2009), <https://perma.cc/4BPU-C9AZ>.

<sup>166</sup> *Id.*

surrogacy is only regulated in two states in Mexico: Tabasco and Sinaloa. The State of Tabasco, in particular, experienced a surge in compensated surrogacy arrangements after Thailand and India began imposing more stringent restrictions.<sup>167</sup> In 2016, Tabasco passed laws banning foreign intended parent(s) from participating in surrogacy.<sup>168</sup> Mexican gay and lesbian parents were also prohibited from participating in the surrogacy process.<sup>169</sup> In a 2021 decision, the same year abortion was decriminalized,<sup>170</sup> the Mexican Supreme Court found Tabasco's limitations unconstitutional, reasoning that the exclusion of same-sex couples or single persons, whether male or female, from the opportunity to enter into a compensated surrogacy contract, amounted to discrimination based on suspicious categories (sexual orientation and marital status, respectively), which failed strict scrutiny.<sup>171</sup> The industry remains open to gay intended parents, and estimates indicate that 70–80% of foreign intended parents are gay couples.<sup>172</sup>

Reproductive rights advocates have argued for increased regulation, noting that its absence creates uncertainty and the potential for exploitation.<sup>173</sup> They have, however, also resisted bans, noting that prohibitions are unlawful restrictions on women's reproductive autonomy.<sup>174</sup> The Information Group on Reproductive Choice (GIRE) released a 2015 report entitled *Girls and Women Without Justice: Reproductive Rights in Mexico*, which argued for protection of women's ability to participate in surrogacy as well as necessary regulation.<sup>175</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> Karla Cantoral Domínguez, *Gestación Subrogada en México: Su Proyección en las Relaciones Privadas Internacionales* [Surrogacy in Mexico: Its Projection in International Private Relations], 25 BARATARIA: REVISTA CASTELLANO-MANCHEGA DE CIENCIAS SOCIALES 163 (2019), <https://perma.cc/H2H4-8ZQF>; *Surrogacy is Rejected by Feminists in Mexico*, YUCATAN TIMES (June 8, 2021), <https://perma.cc/NYW9-54DD>.

<sup>169</sup> *Surrogacy is Rejected by Feminists in Mexico*, *supra* note 168; Domínguez, *supra* note 168.

<sup>170</sup> Vanessa Romero, *Mexico's Supreme Court Has Voted to Decriminalize Abortion*, NPR (Sept. 7, 2021), <https://perma.cc/LDA7-VJPH>.

<sup>171</sup> Acción de Inconstitucionalidad 16/2016, Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation] (June 7, 2021), <https://perma.cc/RD2E-2PGJ>; *Surrogacy is Rejected by Feminists in Mexico*, *supra* note 168; Comunicados de Prensa No. 158/2021, SCJN (June 3, 2021), <https://perma.cc/CTH2-3HFS>.

<sup>172</sup> Daniela Bandelli, *Gestational Surrogacy in Mexico: The Social Vision of Progress and Autonomy Underlying the Regulatory Policy Making and Discourse*, 4 RIVISTA TRIMESTRALE DI SCIENZA DELL'AMMINISTRAZIONE 1, 6 (2019).

<sup>173</sup> GIRE, SURROGACY IN MEXICO: THE CONSEQUENCES OF POOR REGULATION (2017), <https://perma.cc/7VPS-ZHD2>.

<sup>174</sup> *Id.*

<sup>175</sup> GIRE, NIÑAS Y MUJERES SIN JUSTICIA: DERECHOS REPRODUCTIVOS EN MÉXICO [GIRLS AND WOMEN WITHOUT JUSTICE: REPRODUCTIVE RIGHTS IN MEXICO] 236 (2015), <https://perma.cc/GS5T-GCW6>.

In Israel, surrogacy has long been accepted and regulated but was not available to same-sex couples and single intended parents until recently.<sup>176</sup> In 2020, the Israeli Supreme Court ruled that a law expanding access to surrogacy to single women, but not to gay men, “disproportionately harmed the right to equality and the right to parenthood.”<sup>177</sup> It gave the Israeli Parliament one year to change the law in accordance with the decision, but at the end of 2020, the law remained unchanged.<sup>178</sup> In 2021, the court revisited the status of the unchanged surrogacy law, ruling that it “cannot abide the continued serious damage to human rights caused by the existing surrogacy arrangement,” and ordered coverage to be extended, giving the legislature six months to draft guidelines for the expanded law.<sup>179</sup> Finally, in January 2022, the Israeli Parliament amended the Surrogacy Arrangements Law and abolished the definitions of “designated parents” and “designated single mother” in Article 1 that had excluded “single men and same-sex couples from the surrogacy arrangements.”<sup>180</sup>

Surrogacy regulations require advanced authorization from a state committee, known as the Gestational Carrier Agreement Approval Board. The Israeli Ministry of Health has also published guidelines for the surrogacy process and has instituted an approval process.<sup>181</sup> Though Israel ensures contractual agreements between intended parent(s) and the gestational carrier have full and informed approval from all parties, it does not “involve itself in [ ] the payment amount.”<sup>182</sup>

Currently, the U.S. is the most popular destination or “host” to surrogacy arrangements. The U.S. surrogacy market has flourished with little controversy despite increasing restrictions on reproductive freedom, live debates on marriage equality, and regional nativism. Informal surrogacy communities have developed in small towns, supported by a cadre of attorneys, ART clinics, and matching

<sup>176</sup> Derek Stoffel, *Israel Airlift of Nepal Babies Fuels Debate around Surrogate Mothers*, CBC (May 2, 2015), <https://perma.cc/4T7E-5ENJ>.

<sup>177</sup> Associated Press, *Israel Will Open Surrogacy to Same-Sex Couples as of Next Week*, L.A. TIMES (Jan. 4, 2022), <https://perma.cc/48DU-PACD>.

<sup>178</sup> *Id.*

<sup>179</sup> *Israeli Court Annuls Parts of Surrogacy Law Excluding Gays*, ASSOCIATED PRESS (July 11, 2021), <https://perma.cc/8H9A-99JR>; *Arad Pinkas v. Committee for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) Law, 5756-1996*, VERSA (Aug. 3, 2017), <https://perma.cc/53TB-R5UW> (summarizing HCJ 781/15 Itai Arad-Pinkas v. The Committee for the Approval of Agreements for Surrogacy (2017) (Isr.)).

<sup>180</sup> *Amendments to the Surrogacy Arrangements Law*, ISR. MINISTRY OF HEALTH (Jan. 4, 2022), <https://perma.cc/4HG2-WZM8>; *Surrogacy in Israel*, ISR. MINISTRY OF HEALTH <https://perma.cc/A88Y-YJTA>.

<sup>181</sup> *Surrogacy in Israel*, *supra* note 180.

<sup>182</sup> Orly Halperin, *Israel's New Surrogacy Ruling is More Just, but Still Discriminatory*, HAARETZ (Jan. 24, 2022), <https://perma.cc/K75F-3W85>.

agencies.<sup>183</sup> Gestational carriers and intermediaries connect through social media sites; support groups and referral services abound on Facebook.<sup>184</sup> Many U.S. states allow compensated surrogacy for foreign or domestic intended parents, and most of these states do not restrict participation of intended parent(s) based on their gender identity or sexual orientation. State laws regulate the terms of surrogacy agreements through legislation, and these agreements are enforceable in U.S. courts.<sup>185</sup>

Today, most surrogacy agencies outside the U.S. recommend that intended parent(s) seek arrangements with U.S.-based gestational carriers, notwithstanding the comparably hefty price tag of such arrangements.<sup>186</sup> According to the U.S. Centers for Disease Control and Prevention, approximately 16% of intended parent(s) participating in gestational surrogacy in the U.S. are not U.S. residents.<sup>187</sup> Some reports estimate that approximately 10,000 babies were born in compensated arrangements in the U.S. between 2010 and 2014,<sup>188</sup> a number that rivaled those born in India during the same years.<sup>189</sup> A first-time gestational carrier in the U.S. is compensated between 30,000 and 60,000 USD. Gestational carriers with previous experience in surrogacy are typically paid higher amounts.<sup>190</sup> This is in contrast to the 5,000–10,000 USD that gestational carriers in India, Thailand, and Cambodia often received.<sup>191</sup> In addition to direct compensation, gestational carriers in the U.S. may receive other forms of

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<sup>183</sup> For example, Rockford, Illinois—a town of 150,000 people—has become a regional center for surrogacy, as women engage in referrals. *Surrogacy in Rockford, IL*, SURROGATE.COM (2021), <https://perma.cc/9699-GQQJ>.

<sup>184</sup> See, e.g., Egg Donors, Surrogates, and Intended Parents (An Independent Match Group), FACEBOOK, <https://perma.cc/N52A-RJCG>.

<sup>185</sup> Daniella Bandelli, *Surrogacy in the United States: The Horse Is out of the Barn*, SOCIO. DEBATES ON GESTATIONAL SURROGACY 67, 67–68 (2021); see also Tsai et al., *supra* note 7, at 718–19. For an analysis of how marriage equality is motivating evolution in understandings of parenthood in the U.S., see Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).

<sup>186</sup> Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), <https://perma.cc/MYG7-L7MA>; Karen Smith Rotabi et al., *Regulating Commercial Global Surrogacy: The Best Interests of the Child*, 2 J. HUM. RTS. SOC. WORK 64, 68 (2017).

<sup>187</sup> *Key Findings: Use of Gestational Carriers in the United States*, CDC (2016), <https://perma.cc/C2DR-56L8>; Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435, 438 (2016).

<sup>188</sup> Kiran M. Perkins, *Differences in the Utilization of Gestational Surrogacy Between States in the U.S.*, 5 REPROD. BIOMED. & SOC'Y ONLINE 1, 2 (2018), <https://perma.cc/P9J2-M4CA>.

<sup>189</sup> Shetty, *supra* note 97, at 1633.

<sup>190</sup> *Surrogate Compensation*, PHYSICIAN'S SURROGACY (2021), <https://perma.cc/8JJP-D6QD>; *Surrogate Financial Information*, CREATIVE FAM. CONNECTIONS (2022), <https://perma.cc/JJM9-ZS39>.

<sup>191</sup> Yuri Hibino, *Non-Commercial Surrogacy in Thailand: Ethical, Legal, and Social Implications in Local and Global Contexts*, 12 ASIAN BIOETHICS REV. 135, 140 (2020); Blomberg, *supra* note 12.

support, including lost wages, payment of legal fees, medical care, and/or life insurance.<sup>192</sup>

This level of compensation, combined with the fact that the labor can be performed from home, has made surrogacy attractive to some women in the U.S. In accounts of their experiences, gestational carriers describe how they are able to earn money for down payments and education while caring for their children.<sup>193</sup> A 2010 report found that 15–20% of U.S. gestational carriers were military wives who participated in surrogacy while stationed on military bases.<sup>194</sup>

Forty-six out of fifty states in the U.S. permit compensated surrogacy.<sup>195</sup> Twenty-seven states will enforce compensated surrogacy contracts in state courts.<sup>196</sup> In many of these states, intended parent(s) do not have to demonstrate a medical need<sup>197</sup> or be genetically related to the resulting child.<sup>198</sup> Sixteen jurisdictions provide for automatic determinations of parentage.<sup>199</sup> Eight states civilly ban some or all forms of surrogacy while others have left it unregulated.<sup>200</sup>

In the twenty-seven states where compensated surrogacy contracts are enforceable, legislation sets forth requirements for the terms of the arrangement between the gestational carrier and the intended parent(s).<sup>201</sup> Many of these laws also regulate the surrogacy agents and intermediaries operating within the state.<sup>202</sup> A recent example, New York State's Child-Parent Security Act of 2020,<sup>203</sup> legally recognizes the child-parent relationship established through

<sup>192</sup> Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 WASH. L. REV. 658, 673 (2010); Tsai et al., *supra* note 7, at 718.

<sup>193</sup> J.P., *We Bought a House with Surrogacy Job*, REPROD. SCI. MED. CTR., <https://perma.cc/DE6W-V363>; A.W., *I Finished School with the Surrogacy Money*, REPROD. SCI. MED. CTR., <https://perma.cc/FYC2-68EN>.

<sup>194</sup> Astrid Rodrigues & Jon Meyersohn, *Military Wives Turn to Surrogacy: Labor of Love or Financial Boost?*, ABC NEWS (Oct. 14, 2010), <https://perma.cc/L2X3-4K3C>.

<sup>195</sup> See Tsai et al., *supra* note 7, at 719; Marsha J. Tyson Darling, *New York State Creates New Governance of Commercial Gestational Surrogacy*, 26 NEW BIOETHICS 328, 328 (2020).

<sup>196</sup> Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CAL. L. REV. 401, 409 (2021). California, Delaware, Illinois, Maine, Nevada, New Hampshire, New Jersey, Rhode Island, New York, Vermont, Virginia, Washington, and the District of Columbia allow for compensated surrogacy for all intended parent(s) who find a qualified and willing carrier. *Id.* at 433.

<sup>197</sup> The following jurisdictions do not include a medical need requirement: Arkansas, California, Connecticut, Delaware, Iowa, Maine, Nevada, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Utah, Vermont, Washington, and the District of Columbia. *Id.*

<sup>198</sup> Joslin, *supra* note 196, at 436.

<sup>199</sup> *Id.* at 439–40.

<sup>200</sup> *Id.* at 432.

<sup>201</sup> *Id.* at 409.

<sup>202</sup> *Id.*

<sup>203</sup> See *The Child-Parent Security Act: Gestational Surrogacy Agreements, Acknowledgment of Parentage and Orders of Parentage*, N.Y. DEP'T OF HEALTH (2021), <https://perma.cc/NTC5-VKAX>.

surrogacy agreements (and other forms of assisted reproduction) and regulates the terms of surrogacy agreements.<sup>204</sup> The Act creates a Surrogates' Bill of Rights, ensuring the rights of gestational carriers to receive compensation for the surrogacy<sup>205</sup> and to make their own healthcare decisions, including whether to terminate or continue the pregnancy.<sup>206</sup> It also requires all agreements to provide comprehensive health insurance coverage and mental health counseling paid for by the intended parent(s) throughout the entire surrogacy process, which includes one year after the child's birth.<sup>207</sup> Intended parent(s) must also cover the cost of disability and life insurance.<sup>208</sup> The Act establishes the right to legal counsel of the gestational carrier's choosing and compensation for legal fees paid for by the intended parent(s).<sup>209</sup> Under the Act, the intended parent(s) are responsible for all co-payments, deductibles, and other out-of-pocket medical costs associated with the pregnancy, including costs incurred for a period of time after the birth or termination of the pregnancy.<sup>210</sup>

Another recent example is Colorado, which passed similar legislation in May 2021.<sup>211</sup> The Colorado Surrogacy Agreement Act codifies many of the guidelines proposed by the American Society of Reproductive Medicine:<sup>212</sup> a prospective gestational carrier must be at least twenty-one years of age; have previously given birth to at least one child; have completed both a medical evaluation by a licensed doctor regarding the surrogacy and a mental health consultation with a licensed mental health professional; and have independent legal representation by a Colorado-licensed attorney who has been chosen by the gestational carrier.<sup>213</sup> Intended parent(s) must be at least twenty-one years of age, have completed a medical evaluation, and also have independent legal representation from a Colorado-licensed attorney throughout the surrogacy arrangement.<sup>214</sup> Under the Colorado Act, the gestational carrier retains decision-making power over both her health and the pregnancy.<sup>215</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> N.Y. FAM. CT. ACT § 581-502(6) (McKinney 2021).

<sup>206</sup> N.Y. FAM. CT. ACT §§ 581-601, 581-606 (McKinney 2021).

<sup>207</sup> *Id.* § 581-402(6).

<sup>208</sup> *Id.* § 581-606.

<sup>209</sup> *Id.* § 581-603.

<sup>210</sup> *Id.* § 581-402(6).

<sup>211</sup> COLO. REV. STAT. § 19-4.5-101 et seq. (2021).

<sup>212</sup> See Ethics Comm. of the Am. Soc'y for Reprod. Med., *Consideration of the Gestational Carrier: An Ethics Committee Opinion*, 110 FERTILITY & STERILITY 1017 (2018).

<sup>213</sup> COLO. REV. STAT. § 19-4.5-104(1) (2021).

<sup>214</sup> *Id.* § 19-4.5-104(2).

<sup>215</sup> *Id.* § 19-4.5-112.



To facilitate state-to-state regulation on definitions of parentage, the Uniform Law Commission drafted a Uniform Parentage Act of 2017 (UPA), which a number of states have adopted.<sup>216</sup> As of January 1, 2022, Connecticut was the most recent state to adopt the model law.<sup>217</sup> The model law<sup>218</sup> requires that states update parentage laws to facilitate recognition of same-sex marriage and families, as well as gestational surrogacy and other ART practices.<sup>219</sup> The UPA defines “parentage” in a manner that accommodates the practice of gestational surrogacy.<sup>220</sup>

A few state laws also contain provisions regulating the activities of surrogacy agencies or intermediaries.<sup>221</sup> California requires surrogacy facilitators operating in the state to use either trust or escrow accounts in which they may not have a financial interest.<sup>222</sup> Washington requires gamete banks or fertility clinics involved in assisted reproduction to maintain identifying information and medical history about each gamete donor.<sup>223</sup>

The U.S. has also developed regulations to facilitate the transfer of citizenship of U.S.-citizen intended parent(s) to their children born of surrogacy abroad.<sup>224</sup> Under 2021 guidance, as long as one member of a couple married under U.S. law either gives birth to the child or provides the genetic material for the embryo (sperm or egg), the couple may transmit U.S. citizenship.<sup>225</sup> Nevertheless, the new guidance is limited in that it requires “the relevant jurisdiction recognize[] both parents as the child’s legal parents.”<sup>226</sup> The

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<sup>216</sup> Uniform Parentage Act, UNIF. L. COMM’N (2017), <https://perma.cc/PP8B-TGSZ>.

<sup>217</sup> CONN. GEN. STAT. § 46b-450 et seq. (2022). For discussions around implementation, see Letter from Douglas NeJaime, Anne Urowsky Professor of Law, to Chairs Winfield and Stafstrom, Vice Chairs Kasser and Blumenthal, Ranking Members Kissel and Fishbein, and Members of the Joint Committee on Judiciary (Mar. 5, 2021) (on file with the Connecticut General Assembly).

<sup>218</sup> Uniform Parentage Act, *supra* note 216.

<sup>219</sup> *Id.* at 1–3 (explaining that the UPA “seeks to ensure the equal treatment of children born to same-sex couples,” “updates the surrogacy provisions to reflect developments in that area,” and “includes a new article—Article 9—that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers”).

<sup>220</sup> *Id.* art. 1, § 102(16).

<sup>221</sup> Jordan Stirling Davis, *Regulating Surrogacy Agencies Through Value-Based Compliance*, 43 J. CORP. L. 663, 669 (2018).

<sup>222</sup> CAL. FAM. CODE § 7961 (West 2019).

<sup>223</sup> WASH. REV. CODE § 26.26A.825 (2019).

<sup>224</sup> USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 5, 2021), <https://perma.cc/EAE4-NQPN>.

<sup>225</sup> *Id.*

<sup>226</sup> Kimberly M. Bennett, *Transmission of Citizenship to Children Born Abroad Through Assisted Reproductive Technology*, NAT’L L. REV. (Aug. 25, 2021), <https://perma.cc/D6U3-MSG>; KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RSCH. SERV., R43782, EXECUTIVE DISCRETION AS TO

American Bar Association has proposed that U.S. policy move to an intent-based parentage model that does not rely on the laws of the host country.<sup>227</sup> These regulations, however, do not set any standards or requirements for circumstances or terms of surrogacy arrangements outside the U.S.<sup>228</sup>

#### IV. THE RIGHTS OF HUMANS

##### A. State Interests

All of the states discussed above, with the exception of the U.S.,<sup>229</sup> have committed to uphold the six core U.N. treaties that set forth the basic framework of civil, political, and socio-economic rights.<sup>230</sup> These countries have all agreed to ensure the set of human rights relevant to surrogacy arrangements—bodily autonomy, reproductive freedom, right to decide on the number and spacing of children, right to found a family, equality and non-discrimination based on gender and sexual identity, and the right to enjoy the benefits of scientific progress.<sup>231</sup>

And yet, while the rights of gestational carriers, intended parent(s), and children have played some role in state policy decisions, bans and restrictions have been predominantly motivated by concerns unrelated to the rights of the individuals involved. In fact, state policies have explicitly undermined protected

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IMMIGRATION: LEGAL OVERVIEW (2014) (discussing limitations on the Executive's authority to change the immigration system through executive action).

<sup>227</sup> See generally *Assisted Reproductive Technologies*, AM. BAR ASS'N, <https://perma.cc/D6CS-ESJJ>.

<sup>228</sup> See CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN LAW 21 (2016) (discussing the general rule that U.S. statutes only apply domestically in the context of criminal law).

<sup>229</sup> The U.S. has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>230</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 212 [hereinafter CERD]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; and Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>231</sup> Right to equality and non-discrimination (e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 art. 2 (Dec. 12, 1948) [hereinafter UDHR]; ICCPR art. 26; ICESCR art. 2; CEDAW art. 2; CRPD arts. 5 and 6); right to health (e.g., UDHR art. 25, ICESCR art. 12, CEDAW art. 12); right to privacy (e.g., UDHR art. 12; ICCPR art. 17); right to bodily autonomy (e.g., ICCPR arts. 7 and 17, CEDAW art. 12 and GR 24); right to reproductive autonomy (e.g., ICESCR GC 22, CEDAW art. 12 and GR 24); right to decide number and spacing of children (CEDAW art. 16); right to information (e.g., UDHR art. 19; ICCPR art. 19); right to benefit from scientific progress (e.g., UDHR art. 27, ICESCR art. 15(b)); rights of persons with disabilities (e.g., CRPD arts. 5, 6, 7, 12, 17, and 23).

rights, for instance, by preventing LGBTQI+ couples or single individuals from entering surrogacy arrangements or restricting citizen women from exercising their reproductive autonomy. Even in cases where human rights concerns may have catalyzed a state response, states have opted for outright bans and restrictions that curtailed autonomy and limited the possibility of rights enjoyment over regulations. In banning or severely restricting surrogacy, these states have effectively transferred the associated risks and regulatory complications to other states and left parties vulnerable.

Two general categories of state interests have compelled most restrictions on surrogacy. The first category is *ideological*, which includes inflexible definitions of sexual and gender identity, marriage, family, and parentage (in particular, motherhood). Ideological concerns have also touched upon state control of women's reproduction (such as reserving the reproduction of biologically female citizens for the benefit of the state), nationalism, and notions of commodification. This set of concerns has, at its core, less to do with the realities of the practice as they are experienced by the parties and more to do with what the practice means for social, national, or religious values and definitions.

The second set of concerns that have compelled restrictions relates to the *actual conditions* under which surrogacy is performed. These concerns have focused on the arrangements themselves and the degree to which they protect parties and respect parties' rights. These concerns include whether surrogacy arrangements are implemented with the appropriate health care and assistance, including the autonomy and informed consent of the carrier, and in a context in which the terms of the agreements are enforceable and can be adjudicated.

### 1. Ideological state interests

States like Italy, France, Germany, and Spain have largely been motivated by ideology. Policy makers in these states view surrogacy as a practice that undermines a particular conception of maternity and motherhood.<sup>232</sup> The gestational carrier—regardless of her own perception or intent—is considered the mother of the child, even when that child is genetically unrelated to the carrier.<sup>233</sup> Because surrogacy does not comport with the state's definitions of motherhood and maternity, and the implications they have on definitions of citizenship and parentage, states have banned the practice.

Many of these ideological commitments are rooted in stereotypes of maternity and traditional conceptions about the role of women in society. For

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<sup>232</sup> SPOTLIGHT ON PARLIAMENTS IN EUROPE: THE CITIZENSHIP OF CHILDREN BORN TO SURROGATES, *supra* note 28, at 3; HAGUE CONF. ON PRIVATE INT'L L., A STUDY OF LEGAL PARENTAGE, *supra* note 6, at 7, 17.

<sup>233</sup> HAGUE CONF. ON PRIVATE INT'L L., A STUDY OF LEGAL PARENTAGE, *supra* note 6, at 17.

example, one commentator posited that the French fear that assisted reproductive technologies may “unsettle the very foundations of society” by unmooring fixed understandings of how families are constituted—the “fixed” understanding being that a child belongs with their gestational mother and biological father.<sup>234</sup> Claire Legras, a former Justice in the French Administrative Supreme Court (Conseil d’État), has speculated that “surrogacy could threaten the symbolic image of women.”<sup>235</sup> Similarly, the Japanese Federation of Bar Associations cited concerns about the “risk of deterioration in family relationships” as reason to ban gestational surrogacy.<sup>236</sup>

State desire to control the reproductive capacities of female populations has also been a powerful ideological motivator.<sup>237</sup> This is evident in the nationalistic language that permeates many state justifications for restricting surrogacy. For instance, in discussions surrounding Thailand’s ban on surrogacy, Thai lawmakers warned that the country was on the verge of becoming the “womb of Asia.”<sup>238</sup> Headlines in India similarly proclaimed that Indian women were “renting their wombs” or “[p]imping their pregnancies” and criticized gestational carriers for producing children for wealthy foreigners rather than the Indian people.<sup>239</sup> Russia has closed its borders to foreign intended parents as its relationship with the global community has deteriorated following its invasion of Ukraine. Moreover, surrogacy arrangements involving foreign intended parent(s) from countries which host states had dubious diplomatic relations with (for example, Cambodia and China) or spurned for discriminatory reasons (for example, Russia and the Philippines) also prompted bans.

By far the most prominent state ideological motivation for surrogacy restrictions is anti-LGBTQI+ sentiment; specifically, the desire to limit the

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<sup>234</sup> Storrow, *supra* note 39, at 44 (citing Daniel Vigneau, *Génétique et Procréation Assistée en France*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS 135–64 (Marie-Thérèse Meulders-Klein et al. eds., 2002)).

<sup>235</sup> Legras, *supra* note 22.

<sup>236</sup> Marcelo De Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417, 425 (2010).

<sup>237</sup> See generally Ruth McElro, *Whose Body, Whose Nation?: Surrogate Motherhood and Its Representation*, 5 EUR. J. CULTURAL STUD. 325 (2002) (analyzing legislation of women’s reproductive rights from a feminist perspective); ASHA NADKARNI, *EUGENIC FEMINISM: REPRODUCTIVE NATIONALISM IN THE UNITED STATES AND INDIA* (2014) (discussing legislation of women’s reproductive rights in the U.S. and India in the name of reproductive nationalism); Andrea Whittaker, *Stop Thai Women’s Wombs from Becoming the World’s Womb: Reproductive Nationalism and the Closure of Commercial Surrogacy in Thailand*, in THE REPRODUCTIVE INDUSTRY: INTIMATE EXPERIENCES AND GLOBAL PROCESSES 125–44 (Vera Mackie et al. eds., 2019) (analyzing depictions of surrogacy in Thai media as reflecting reproductive nationalism).

<sup>238</sup> Natalie Condon, *Fragmentary Sexuality: The Transnational Gestational Surrogacy Market in Thailand and the Nationalist ‘Baby Gammy’ Scandal*, 1 RADICL: REED ANTHROPOLOGY REV. 1, 14 (2016). See generally Whittaker, *supra* note 237 (discussing Thai media coverage of surrogacy).

<sup>239</sup> Brosnwyn Parry, *Surrogate Labour: Exceptional for Whom?*, 47 ECON. SOC’Y 214, 216 (2018).

reproduction of non-heterosexual persons. The list of states that have banned or restricted surrogacy with the goal of denying non-heterosexual persons and couples access to parentage is long and includes Ukraine,<sup>240</sup> Russia, India, Italy, and Cambodia.<sup>241</sup> For many more states, this desire has been at least one of the factors motivating a ban or restriction. For instance, though there were numerous criticisms and concerns about the conditions of surrogacy in India, restrictions were primarily driven by state efforts to re-instill traditional notions of family. India's restrictions explicitly banned non-heterosexual persons from participating in surrogacy arrangements.<sup>242</sup>

Another ideological position used to justify restrictions relates to the belief that compensated surrogacy commodifies the human body. The U.K., the Netherlands, Australia, Canada, Portugal, some U.S. states, and some parts of Latin America have cited concerns about commodification as the basis for limiting surrogacy to its uncompensated forms. Those who oppose compensated surrogacy for this reason argue that the human body should not be treated as an "object" to be exchanged for compensation.<sup>243</sup> Debates around commodification turn on whether the carrier is providing a gestation "service" or renting her body and whether the baby born of surrogacy is being "sold" or already belongs to the intended parent(s) upon birth.<sup>244</sup> This somewhat philosophical debate aside, most states with this concern have also created workarounds that allow citizens to participate in surrogacy outside their borders, ostensibly tolerating commodification of the bodies of non-citizen women.

## 2. Surrogacy conditions

The second category of state interest concerns the *conditions* under which surrogacy is performed. Reports of substandard conditions and regulation appear to have influenced some states (Thailand, Nepal, India, and Cambodia)

<sup>240</sup> Ukraine has long prohibited same-sex couples from participating in surrogacy arrangements. See generally Sergii Antonov, *Methods of Legal Regulation for Surrogacy in Ukraine and Abroad*, 2020 L. UKR.: LEGAL J. 139 (2020). However, the country has recently reconsidered this exclusion. See Sophie Williams, *Ukraine to Consider Legalising Same-Sex Marriage Amid War*, BBC NEWS (July 12, 2022), <https://perma.cc/W2G9-K5PA>. The recent war in Ukraine has effectively halted its participation in the industry more generally.

<sup>241</sup> See *infra* Part III (discussing Russia, India, Italy, and Cambodia).

<sup>242</sup> Sital Kalantry, *When "Creeping Jurisdiction" Goes Awry: The Social Action Litigation to Ban Surrogacy*, CORNELL L. SCH. RSCH. PAPER NO. 18-18 1, 9 (Mar. 22, 2018).

<sup>243</sup> Heather Jacobson, *Commercial Surrogacy in the Age of Intensive Mothering*, 69 CURRENT SOCIO. MONOGRAPH 193, 198 (2021); see also Virginie Rozée et al., *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, 20 BMC WOMEN'S HEALTH 234 (Oct. 15, 2020), <https://perma.cc/EE6Z-5TA3>; Blazier & Janssens, *supra* note 31; Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33 J. APPL. PHILOS. 125, 127 (2016).

<sup>244</sup> See, e.g., Wilkinson, *supra* note 243, at 127, 131–32.

to restrict surrogacy within their own borders. Improper medical care, inadequate informed consent, and restrictions on gestational carriers' freedom of movement have all been documented within the industry. Ironically, all of these conditions are created by the states themselves when they fail to comply with other human rights commitments. States that have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, commit to providing basic reproductive health care, which includes developing practices of informed consent and regulation of medical care providers.<sup>245</sup> States that have ratified the International Covenant on Civil and Political Rights (ICCPR) commit to promoting and protecting the rule of law and ensuring that adjudicatory mechanisms for contract enforcement are accessible.<sup>246</sup> Yet, criticisms directed at states for failing to provide safe and adequate surrogacy conditions have prompted bans rather than instigated efforts to address the root causes of substandard conditions.

Relatedly, states have banned or restricted surrogacy out of concern that transnational arrangements expose citizens (and the children born through surrogacy) to harms caused by the absence of mechanisms for cross-border agreements and regulations. For example, Thailand's ban was, in part, motivated by the refusal of the Australian intended parents in the Baby Gammy case to take custody of Baby Gammy and the Australian government's unwillingness to intervene.<sup>247</sup> Because there has been no mechanism or expectation for coordination among states on surrogacy, states have banned and restricted surrogacy to avoid the conflicts that arise as a result.

Regardless of whether these state interests are legitimate, state parties to the core international human rights treaties (which describes most states at this point) are obligated to respect and protect human rights in all policies and practices. When states make choices that restrict rights without (1) considering the burdens such restrictions place on those rights or (2) weighing their interests against the consequences of those burdens, they violate their treaty obligations under the fundamental principle of proportionality.<sup>248</sup> In any assessment of human rights restrictions, the principle of proportionality, applied in some

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<sup>245</sup> ICESCR, *supra* note 230.

<sup>246</sup> ICCPR, *supra* note 230.

<sup>247</sup> Amy Sawitta Lefevre, *Baby Gammy: Thailand Government Moves to Ban Commercial Surrogacy After Controversy Around 'Abandoned' Down's Syndrome Boy*, THE INDEPENDENT (Aug. 13, 2014), <https://perma.cc/64KA-FMNH>.

<sup>248</sup> Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L.J. 1, 10 (2012). See generally Juan Cianciardo, *The Principle of Proportionality: The Challenges of Human Rights*, 3 J. CIV. L. STUD. 177 (2010) (describing proportionality as the principle that "prescribes that all statutes that affect human rights should be proportionate or reasonable" and explaining its three sub-principles: adequacy, necessity, and proportionality *stricto sensu*).

manner by most international, regional and domestic bodies addressing human rights violations, requires meaningful effort to preserve a right before limiting it.

Thus far, states have taken action on surrogacy without a proper calculation of the domestic and global impact that bans and restrictions have on the rights at stake. They have not considered whether concerns about the conditions of surrogacy might be addressed either by their own action or through cooperation with other states. As will be discussed further below, poor disempowered women and the LGBTQI+ community—the target of discrimination worldwide—have largely shouldered the consequences. Once again, despite the goals of the international human rights system, access to fundamental rights varies dramatically by citizenship, economic resources and protected aspects of identity.

## B. Human Rights Mechanisms

One would assume international human rights mechanisms would hold states accountable for these clear rights-restrictive approaches, but they have not. In fact, they have done little to discourage state bans and restrictions, struggling instead to separate out ideological principles from a rights-based analysis. The few mechanisms that have considered this issue have conflated the real potential harm posed to the parties by the existing lack of state cooperation with ideologically based and vague assertions that surrogacy may violate prohibitions on the sale of children or lead to impermissible commodification of the human body.<sup>249</sup>

The most prominent example of this approach is the 2018 and 2019 reports of the then-U.N. Special Rapporteur on the sale of children, Maud de Boer-Buquicchio, a lawyer and academic from the Netherlands who took a special interest in surrogacy. In her January 2018 report, the Special Rapporteur argued that most arrangements, including all compensated and most uncompensated ones, constituted sale of children in violation of international human rights law and called for state bans and restrictions.<sup>250</sup> The Special Rapporteur argued that “reimbursement” for the gestational carrier that “goes

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<sup>249</sup> The Committee on the Rights of the Child, for example, suggested in its 2013 response to the U.S. that compensated surrogacy could constitute sale of children or serve to disguise the sale of children without elaboration. *See* U.N. Comm. on the Rts. of the Child, Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography, Adopted by the Committee at Its Sixty-Second Session (Jan. 14–Feb. 1, 2013), ¶ 29, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 13, 2013) (explaining that there are payments to surrogates “impeding effective elimination of the sale of children for adoption”).

<sup>250</sup> *See generally* Human Rights Council, Rep. 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).

beyond reasonable and itemized expenses incurred as a direct result of the surrogacy arrangement,” as well as the involvement of for-profit intermediaries, very often indicated that the arrangement involved sale of a child under international law.<sup>251</sup>

The Special Rapporteur expressed particular concern with what she referred to as the “market-based” model of surrogacy endorsed by the American Bar Association (ABA).<sup>252</sup> She saw the ABA’s position that surrogacy arrangements should assign parentage in accordance with the intent of the parties (rather than viewing the process as one of adoption, for example) as opening the door for “a new generation of human rights violations” while erasing the advances made in protecting the rights of children globally.<sup>253</sup> She also argued against the “legal fiction” advanced by the ABA and some states that gestational carriers are “never-a-mother.”<sup>254</sup> According to the Rapporteur, this perspective that the child born by a gestational carrier belongs to the intended parents (so there is no meaningful transfer of the child from carrier to intended parent(s) upon its birth, or no “sale”<sup>255</sup>) would open the door for myriad infringements on the gestational carrier’s rights over the fetus.<sup>256</sup>

Human and reproductive rights organizations responded to the Special Rapporteur’s report with concerns and objections. Human Rights Watch urged her to reconsider the issue,<sup>257</sup> noting the “over-broad view of the applicability of the prohibition on the sale of children to surrogacy that would unnecessarily, disproportionately or in a discriminatory fashion limit the options of surrogacy as a means of founding a family and exercising reproductive rights.”<sup>258</sup> A coalition of reproductive rights organizations, including the U.S.-based Center for Reproductive Rights and the Mexican GIRE, described the 2018 report as

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<sup>251</sup> *Id.* ¶ 39.

<sup>252</sup> *Id.* ¶¶ 26–38. *See generally* ABA, REPORT AND RESOLUTION 112B (2016), <https://perma.cc/K96E-K3V4> (arguing for regulation but rejecting the use of the adoption-based model for surrogacy arrangements and stating that “[t]he legal position of intended parents creating their own child through a surrogacy arrangement should be viewed as distinct from the legal position of adoptive parents seeking to raise someone else’s existing child as their own.”).

<sup>253</sup> Rep. of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, *supra* note 250, at ¶ 27.

<sup>254</sup> *Id.* ¶ 57.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Heather Barr, *Intersecting Human Rights Issues Central to U.N. Discussion of Surrogacy*, HUM. RTS. WATCH (June 3, 2019), <https://perma.cc/TG5A-MAJX>; *Submission to the Special Rapporteur on the Sale and Sexual Exploitation of Children*, HUM. RTS. WATCH (2019), <https://perma.cc/9GUF-7BWW>.

<sup>258</sup> *Submission to the Special Rapporteur on the Sale and Sexual Exploitation of Children*, *supra* note 257.



“deeply problematic” and argued that it had misconstrued the sale of children doctrine under international law.<sup>259</sup> GIRE noted the

serious risk of equating free and consensual surrogacy agreements with a crime as serious as the sale of children. Far from protecting the interests of children, a prohibitionist stance could have a result contrary to what is intended, leading to the criminalization of gestational carriers and putting the human rights of children born as a result of these agreements at risk.<sup>260</sup>

The Special Rapporteur released a second report in July 2019 which moderated some of the positions expressed in her 2018 report.<sup>261</sup> Following her first report, Cambodia had arrested gestational carriers, including A, C, and K, and charged them with sale of children and human trafficking.<sup>262</sup> The Rapporteur, in her second report, conceded “that further efforts should be made to develop holistic empirical research that ensures the interlinkages between the practice of surrogacy and the fundamental human rights of equality and non-discrimination of all parties involved.”<sup>263</sup> While the report made reference to women’s right of autonomy over their bodies,<sup>264</sup> it did not alter the position that surrogacy arrangements were best prohibited.<sup>265</sup>

The UNESCO International Bioethics Committee took a similar stance in its December 2019 report, which concluded that all compensated surrogacy should be prohibited for two reasons.<sup>266</sup> First, the Committee concluded that “[o]n the grounds of human dignity [sic] payment for human cells or bodily parts cannot be accepted, nor payment for using one woman as the carrier of someone else’s child as in surrogacy.”<sup>267</sup> Second, it found too great a potential

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<sup>259</sup> CTR. FOR REPROD. RTS. ET AL., EXPRESSION OF CONCERN WITH REGARD TO THE SPECIAL RAPPOREUR ON THE SALE AND SEXUAL EXPLOITATION OF CHILDREN’S CALL FOR INPUT ON HER INTENDED REPORT ON “SAFEGUARDS FOR THE PROTECTION OF THE RIGHTS OF CHILDREN BORN FROM SURROGACY ARRANGEMENTS” 4 (June 17, 2019), <https://perma.cc/5LLR-H25E>.

<sup>260</sup> GIRE, CONTRIBUTION FOR THE SPECIAL RAPPOREUR ON THE SALE AND SEXUAL EXPLOITATION OF CHILDREN INCLUDING CHILD PROSTITUTION, THE USE OF CHILDREN IN PORNOGRAPHY, AND OTHER MATERIALS EXHIBITING THE SEXUAL ABUSE OF CHILDREN, <https://perma.cc/7S28-WTA7>.

<sup>261</sup> Human Rights Council, Rep. 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 (Jan. 15, 2019).

<sup>262</sup> Blomberg, *supra* note 12.

<sup>263</sup> Rep. of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, *supra* note 261, at 4.

<sup>264</sup> *Id.* at 22.

<sup>265</sup> *Id.* at 16.

<sup>266</sup> UNESCO, Rep. of the Int’l Bioethics Comm. on Assisted Reproductive Technologies (ART) and Parenthood, SHS/IBC-26/19/2 (2019).

<sup>267</sup> *Id.* ¶ 163.

for economic coercion caused by poverty.<sup>268</sup> It further stated that the absence of basic healthcare, education, and training in some countries adds layers of vulnerability that “may lead to a situation in which the persons involved, mostly women, are at risk for exploitation.”<sup>269</sup> Though it acknowledged the state’s role in creating these vulnerabilities, it concluded that all compensated surrogacy arrangements should be banned.<sup>270</sup>

Only the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee, which focused its attention on the reproductive and bodily autonomy rights at issue, counseled towards law reform and increased protections rather than bans. Its first and only treatment of surrogacy to date was in its 2019 concluding observations to Cambodia’s sixth periodic report. In these observations, the Committee expressed concern about Cambodia’s criminalization of gestational carriers, as well as its requirement that they raise the children born through the surrogacy process.<sup>271</sup> The Committee recommended that Cambodia “ensure that any laws, regulations and policies on surrogacy take into account the unequal power relations between the parties to a surrogacy arrangement, particularly the weak position of women acting as gestational carriers, to prevent deprivation of liberty and exploitation, as well as coercion, discrimination and violence against them.”<sup>272</sup> The Committee also recommended that Cambodia address the underlying socioeconomic circumstances that made surrogacy an attractive employment option for women.<sup>273</sup>

### C. Rights and Interests in Balance

Rather than opting for bans and restrictions that curtail rights, what would it look like to consider the rights at issue and explore possibilities for preserving them? Setting aside state interests unrelated to human rights, three primary arguments have been used to justify bans and restrictions (1) as necessary to ensure the “best interests” of the children born through the process, (2) as mandated by international law because all compensated (and possibly altruistic) surrogacy constitutes sale of children or human trafficking, or (3) as the best course for avoiding the adverse impact of substandard protections or conditions. A human rights analysis of all three arguments suggests the need for

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<sup>268</sup> *Id.* ¶ 165.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* ¶ 80.

<sup>271</sup> Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Periodic Rep. of Cambodia, 14–15, U.N. Doc. CEDAW/C/KHM/CO/6 (Nov. 12, 2019).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* ¶ 47(b).

cooperation, regulation, and state responsibility, not bans or restrictions that inherently limit individual rights.

### 1. The “Best Interests of the Child”

A central debate illustrated in the Special Rapporteur’s two reports and the ABA’s 2016 resolution is whether the “best interest of the child” standard applies to surrogacy arrangements. Article 3(1) of the Convention on the Rights of the Child (CRC) requires that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”<sup>274</sup> The Special Rapporteur argues that the best interests of the child should be the primary determination in all surrogacy arrangements and concludes that this standard counsels signatory countries to adopt bans and severe restrictions.<sup>275</sup> The ABA argues that the “best interests of the child” standard is not applicable because this standard is only triggered once a child is born.<sup>276</sup> This distinguishes surrogacy arrangements from adoptions, according to the ABA. In the context of adoption, the state interest is in ensuring the well-being of a citizen with rights, the adopted child.<sup>277</sup> In a surrogacy arrangement, the state interest is limited to the existing parties.<sup>278</sup> Thus, any additional requirements imposed in the service of the “best interests” of the prospective child that are imposed only on surrogacy arrangements—as opposed to other forms of procreation—are merely unjustifiable burdens on a particular procreative method and distract from actual concerns of abuse and exploitation of children, which should always be addressed.<sup>279</sup>

The CRC Committee’s own commentary on this standard indicates that the ABA’s interpretation is correct. The CRC Committee has confirmed that the ‘best interests of the child’ standard does not apply in any way prior to the birth of a child.<sup>280</sup> In fact, there is general agreement that a fetus has no rights under

<sup>274</sup> G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989); *see also* African Union, African Charter on the Rights and Welfare of the Child (July 1, 1990).

<sup>275</sup> Rep. of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, *supra* note 250, ¶¶ 28, 70, 71.

<sup>276</sup> ABA, REPORT AND RESOLUTION 112B, *supra* note 252 at 7–8, 15–16.

<sup>277</sup> *Id.* at 3.

<sup>278</sup> The ABA resolution explains that the only interest a “potential” child could have is whether the child will be born at all. *Id.* at 8.

<sup>279</sup> *Id.* at 7.

<sup>280</sup> In General Comment No. 7, the Committee defines early childhood as: “all young children: at birth and throughout infancy during the preschool years; as well as during the transition to school.” Comm. on the Rts. of the Child, General Comment No. 7 (2005) Implementing Child Rights in Early Childhood, ¶ 4, U.N. Doc. CRC/C/GC/7/Rev.1 (2006).

international human rights law.<sup>281</sup> The CRC Committee has also noted that assessments of whether a law, policy, or practice is serving the ‘best interests of the child’ should not be prospective or theoretical.<sup>282</sup> The goal of most surrogacy arrangements is the same as the goal in most natural birthing processes—to bring a child into a loving home with dedicated parent(s). In other words, the goals of procreation are not altered by its method.<sup>283</sup>

Once a child is born through gestational surrogacy “the best interests of the child” standard mandates state action. Specifically, children born through surrogacy must be protected from discrimination imposed by the circumstances of their birth, including discrimination resulting from state actions that render them stateless or parentless.<sup>284</sup> States must resolve any conflicts related to parentage and the transfer of citizenship that may adversely impact children born in these arrangements. The standard would also require that states address any conditions of surrogacy that may harm the child or prevent them from being born in safe and appropriate circumstances.<sup>285</sup> The standard, thus, while clearly supporting regulation of surrogacy, does not support a ban or severe restriction.

## 2. The Sale of Children

The second human rights-related argument is that all compensated surrogacy constitutes sale of children. This is largely a semantic debate that originates in formalistic interpretations of international law.<sup>286</sup> Whether or not a “sale” has occurred depends on the legal framework a state applies to compensated surrogacy arrangements.<sup>287</sup> If the embryo “belongs” to the

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<sup>281</sup> See UDHR art. 1 (“All human beings are born free and equal in dignity and rights”). The word “born” was used intentionally to exclude any antenatal application of human rights. An amendment was proposed and rejected that would have deleted the word “born”, in part, it was argued, to protect the right to life from the moment of conception. *Id.*; L.C. v. Peru, Communication No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (CEDAW Comm.) (2011) (showing that a state violated a pregnant girl’s rights by prioritizing the fetus over her health when it postponed essential surgery until she was no longer pregnant); *Baby Boy v. United States*, Resolution 23/81, Case 2141, ¶ 18(b), OEA/Ser.L/V/II, doc. 9 rev. 1 (Inter-Am. Comm’n H.R.) (Mar. 6, 1981) (finding that a law permitting unrestricted access to abortion was compatible with the right to life provision of the American Declaration).

<sup>282</sup> See generally Comm. on the Rts. of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, art. 3, ¶ 1, U.N. Doc. CRC/C/GC/14 (2013).

<sup>283</sup> ABA, REPORT AND RESOLUTION 112B, *supra* note 252, at 8.

<sup>284</sup> *Id.*

<sup>285</sup> For an exploration of what constitutes children’s best interests, see DAVIES, *supra* note 109, chs. 9–11.

<sup>286</sup> Ergas, *supra* note 61, at 184–85.

<sup>287</sup> Jason K.M. Hanna, *Revisiting Child-Based Objections to Commercial Surrogacy*, 24 *BIOETHICS* 341, 342 (2010); Michael Meyer, *The Ideas of Selling in Surrogate Motherhood*, 4 *PUB. AFFS. Q.* 175, 176–80 (1990).

intended parent, as it does in the U.S., the child that may emerge from gestation is not “sold.” If the embryo, fetus, or even child “belongs” to the gestational carrier until birth, as in Japan, the child could technically be said to have been exchanged for compensation.

In either scenario, the sale of children argument misses the purpose of this prohibition under international law (and, notably, has been used to argue against other forms of assisted reproduction). Article 35 of the CRC was intended to act as a “fail-safe protection” against the sale or abduction of children for the purposes of exploitation.<sup>288</sup> Again, the goals of those engaged in most surrogacy arrangements are not exploitative. The concern that a surrogacy arrangement could be motivated by nefarious intentions such as human trafficking<sup>289</sup> is certainly relevant to regulation and implementation but does not justify banning the practice entirely.

The closely related argument that compensation commodifies reproduction and/or the human body is similarly largely philosophical.<sup>290</sup> Questions about whether an embryo is “property” or whether a gestational carrier is providing the “service” of gestating a fetus are only important from a human rights perspective to the extent that they reveal whether the persons involved have been denied basic protected rights, including those that guarantee agency, autonomy, and equality. The circumstances under which surrogacy is practiced could certainly infringe on human dignity (as could the circumstances of a biological birth) but the practice of surrogacy does not inherently do so.

### 3. Substandard Conditions and Exploitation of Gestational Carriers

The third human rights-related concern relates to the worry that surrogacy arrangements harm “vulnerable” women, particularly in cases where women are in economic need and where practices have been implemented with inadequate standard-setting and regulation. These concerns are legitimate and should be prioritized to ensure arrangements are both human-rights compliant and enabling. Any circumstances in which a woman is coerced into surrogacy, misled as to the terms, deprived of recourse when there are disputes and disagreements,

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<sup>288</sup> RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 531 (rev. 3d ed. 2007).

<sup>289</sup> See generally Nishat Hyder-Rahman, *Commercial Gestational Surrogacy: Unravelling the Threads Between Reproductive Tourism and Child Trafficking*, 16 ANTI-TRAFFICKING REV. 123 (2021) (arguing that while trafficking may occur during surrogacy, commercial gestational surrogacy is not itself human trafficking under international law).

<sup>290</sup> See, e.g., H.V. McLachlan & J.K. Swales, *Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood*, 8 HEALTH CARE ANALYSIS 1 (2000) (arguing that commercial surrogacy should be illegal because it commodifies both mothers and babies).

or not provided with a reasonable standard of medical care constitute infringements on her rights.

While these concerns are clearly legitimate, they have been used to justify bans and restrictions without comprehensive consideration of whether such concerns can and should be addressed in ways that also protect the rights at issue. There are many rights invoked in surrogacy arrangements, but two sets of rights—important and often deprived for discriminatory reasons—have been mostly ignored (or undervalued) by calls to ban and restrict: (a) the rights of gestational carriers, specifically rights that guarantee women bodily autonomy and reproductive freedom and choice, including the basic socio-economic rights needed to enable them; and (b) the rights of intended parent(s), specifically their rights to equality, privacy, reproduction, and benefit from scientific progress, among others.

*a) Rights of Gestational Carriers*

The first set of rights are those that ensure women can control their own bodies and make reproductive choices. These rights are well established under international human rights law.<sup>291</sup> They protect women's ability to choose whether to become pregnant, donate an egg, terminate a pregnancy (under some circumstances), or avoid a pregnancy.<sup>292</sup> Together, they entitle women to choose to engage in surrogacy as long as that choice does not infringe on the rights of others or is not justifiably restricted by a state interest.<sup>293</sup>

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<sup>291</sup> These include the right to privacy, health, and reproductive freedom. Under UDHR art. 12, ICCPR art. 17, European Convention on Human Rights (ECHR) art. 8, American Convention on Human Rights (ACHR) art. 11, and ASEAN Human Rights Declaration princ. 21, women are protected against arbitrary and unlawful interferences with their privacy. Under UDHR art. 25 and ICESCR art. 12, women have the right to the highest attainable standard of health. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14, The Right to the Highest Attainable Standard of Health, ¶ 8, U.N. Doc. E/C.12/2000/4 (2000); Comm. on Econ., Soc. & Cultural Rts., General Comment No. 22, On the Right to Sexual and Reproductive Health (Art. 12), U.N. Doc. E/C.12/GC/22 (2016).

<sup>292</sup> Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14, *supra* note 291, ¶¶ 8, 14; Comm. on Econ., Soc. & Cultural Rts., General Comment No. 22, *supra* note 291 (discussing multiple dimensions of sexual and reproductive health); Comm. on the Rts. of Persons with Disabilities, General Comment No. 3 (Art. 6), Women and Girls with Disabilities, ¶¶ 40, 44, U.N. Doc. CRPD/C/GC/3 (2016); Hum. Rts. Comm., *Amanda Jane Mellet v. Ireland*, ¶ 7.8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); Comm. on Civ. & Pol. Rts., *Siobhán Whelan v. Ireland*, ¶ 7.9, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); *Pretty v. The United Kingdom*, App. No. 2346/02 Eur. Ct. H.R. ¶ 61 (2002); *Artavia Murillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 257 ¶¶ 222–53 (Nov. 28, 2012) (discussing whether embryos are protected as persons under international law).

<sup>293</sup> This is the general requirement of the principle of proportionality applied, in some form, by most human rights bodies and domestic courts evaluating human rights claims. *See* Engle, *supra* note 248.

The rights to privacy and physical integrity protect women against harms inflicted on their bodies, including physical assault, inhuman and degrading treatment, forced sterilization, and restrictions on freedom of movement.<sup>294</sup> These rights also ensures women can make informed decisions about their bodies, including reproductive decisions. Various human rights treaty bodies have found, for example, that sterilization without informed consent,<sup>295</sup> as well as denial of an abortion where it was legal or where the fetus was not viable,<sup>296</sup> violate women's physical integrity and autonomy.

The right to access the highest attainable standard of health also includes a right to reproductive health and informed consent. It guarantees that

women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.<sup>297</sup>

Article 16 of CEDAW reaffirms women's right to decide freely and responsibly on the number and spacing of their children, and to have access to the information, education, and means to do so.<sup>298</sup>

Prohibitions that bar all women or certain groups of women from exercising reproductive freedoms—including the choice to carry a fetus to term on behalf of a third-party—raise concerns about discrimination since reproductive restrictions have a unique impact on the rights of women.<sup>299</sup> The rights to equality and non-discrimination are core principles of human rights, enshrined in the U.N. Charter, UDHR, and human rights treaties. CEDAW

<sup>294</sup> Amanda Jane Mellet, ¶ 7.8, U.N. Doc. CCPR/C/116/D/2324/2013; Siobhán Whelan, ¶ 7.9, U.N. Doc. CCPR/C/119/D/2425/2014; Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14, *supra* note 291, art. 12, ¶ 8.

<sup>295</sup> Comm. on Civ. & Pol. Rts., *M.T. v. Uzbekistan*, ¶¶ 2.1–2.4, U.N. Doc. CCPR/C/114/D/2234/2013 (2015); *I.V. v. Bolivia*, Case. 270.07, Inter-Am. Comm'n H.R., Report No. 40/08, ¶¶ 1–2, 80, OCEA/Ser.L/V/II.134, doc. 5 rev. (2008); Comm. on the Elimination of Discrimination Against Women, *Szijarto v. Hungary*, ¶¶ 2.2–2.3, U.N. Doc. CEDAW/C/36/D/4/2004 (2006).

<sup>296</sup> Hum. Rts. Comm., *Amanda Jane Mellet v. Ireland*, *supra* note 292; Comm. on Civ. & Pol. Rts., *Siobhán Whelan v. Ireland*, ¶ 7.9, U.N. Doc. CCPR/C/119/D/2425/2014 (2017). Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also protects women's reproductive rights in relation to abortion. AFRICAN UNION, THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA 4 (July 2003).

<sup>297</sup> Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14, *supra* note 291, ¶ 14.

<sup>298</sup> CEDAW art. 16(1)(e).

<sup>299</sup> Hum. Rts. Comm., *Amanda Jane Mellet v. Ireland*, *supra* note 292, ¶¶ 1–3.20, 7.2–10, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); *Amanda Jane Mellet v. Ireland*, Annex II: Individual Opinion of Committee Member Sarah Cleveland (Concurring) U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

requires that countries remedy *de jure* and *de facto* gender discrimination, including discrimination as to reproductive choices.<sup>300</sup> Articles 3 and 5 of CEDAW require that states work to eliminate stereotypical assumptions and adopt appropriate measures to ensure full and equal enjoyment of social, political and economic rights for women.<sup>301</sup> As Martha Nussbaum has correctly noted, stigma of women's bodies and gender stereotyping are at least partially responsible for objections to surrogacy.<sup>302</sup>

Discrimination limiting women's reproductive autonomy is drastically compounded for marginalized women, poor women, women of color, and women living in the Global South.<sup>303</sup> The limits and restrictions placed on the rights and freedoms of these groups of women in the context of reproduction have been well documented.<sup>304</sup> In the case of surrogacy bans aimed at protecting vulnerable women, there is an implicit assumption that poor and marginalized women cannot freely choose to be a gestational carrier because general conditions of poverty (and inequality) eliminate their ability to consent to the practice.<sup>305</sup> This is a problematic assumption for the exercise of human rights generally and the rights of women specifically, as women uniformly experience poverty and inequality at higher rates.<sup>306</sup> In contrast, few commentators or

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<sup>300</sup> CEDAW art. 11. In addition, ECHR, ACHR, the African Charter on Human and Peoples' Rights (ACHPR), as well as the ICCPR, also require states to ensure non-discrimination in the context of laws and policies around reproductive rights and choices. ACHPR art. 2; ACHR arts. 1, 17, 24; ECHR art. 14; ICCPR art. 3; CESCPR art. 2; CEDAW arts. 1, 16. *See generally*, Comm. on the Elimination of Discrimination Against Women, *L.C. v. Peru*, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011); Comm. on Civil & Pol. Rts., *K.L. v. Peru*, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); Comm. on Civil & Pol. Rts., *V.D.A. v. Argentina*, ¶ 9.3, U.N. Doc. CCPR/C/101/D/1608/2007.

<sup>301</sup> Working Group on the Issue of Discrimination Against Women in Law and in Practice, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends* (Oct. 2017), <https://perma.cc/U9G2-7HCF>.

<sup>302</sup> Martha C. Nussbaum, "Whether from Reason or Prejudice": *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (1998).

<sup>303</sup> *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990).

<sup>304</sup> Mercedes Mateos Diaz et al., *Worlds Apart: Reproductive Health and Rights in an Age of Inequality*, UNFPA STATE OF WORLD POPULATION (2017), <https://perma.cc/367D-JLJQ>.

<sup>305</sup> *See* Wilkinson, *supra* note 243, at 138 ("[E]ven if impoverished women's consents to be surrogates are defective, we nonetheless have good reason to accept their consents [especially as the defect is one that has little to do with any defects in surrogacy practice, but is rather a structural flaw that would afflict almost any paid activity that these women agreed to]. To do otherwise would be to restrict still further their range of options, and also to harm them if paid surrogacy really is their best option. The point of insisting on valid consent is to protect the consentor—and insisting on it where this will be clearly harmful and option-constraining would be perverse.").

<sup>306</sup> *Facts and Figures: Economic Empowerment*, U.N. WOMEN (July 2018), <https://perma.cc/JTY5-G6GV>; *see also* Wilkinson, *supra* note 243, at 138–41 (explaining that background poverty does not constitute exploitation in surrogacy arrangements).



policy-makers have questioned the motivations of American gestational carriers who openly explain that they are participating in surrogacy to help pay off mortgages or send their children to college.<sup>307</sup> In other words, the gender, race, ethnicity and socio-economic position of certain women have justified their exclusion from exercising a reproductive right in a manner that others who are more fortunate in the luck of birth and place have been able to access.<sup>308</sup>

When former gestational carriers from the global south and otherwise marginalized communities are actually interviewed, they explain their decision to choose surrogacy over other forms of available employment. Surrogacy, for some, has been important to their path of upward mobility,<sup>309</sup> much as it has been for gestational carriers in the U.S. As Sharmila Rudrappa reports in her book *A Discounted Life*, a significant proportion of the Indian gestational carriers she interviewed considered compensated gestational surrogacy preferable to other employment options.<sup>310</sup> They saw other forms of labor, including garment work, as less desirable due to lower pay, longer hours, sexual harassment, and worse health risks.<sup>311</sup> In other interview-based studies, women consistently stated that they preferred surrogacy over domestic and factory work, often for similar reasons.<sup>312</sup> For instance, A, C, and K described choosing surrogacy over garment work in Cambodia because of the higher pay and comparably better hours and working environment.<sup>313</sup>

The coercion identified by states and human rights mechanisms in surrogacy arrangements does not stem from the process of surrogacy itself or the actors involved in surrogacy; it results from underlying factors like substandard health care, the absence of fair wages and safe and healthy working conditions, or inaccessible legal mechanisms for marginalized and impoverished women in certain states. These structural and institutional factors are ultimately what limit women's choices because of their gender, race, ethnicity, along with the many other factors that lead to inequality, oppression, and marginalization.<sup>314</sup>

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<sup>307</sup> U.N. WOMEN, *supra* note 306.

<sup>308</sup> See Crenshaw, *supra* note 303.

<sup>309</sup> Rudrappa, *Why Is India's Ban on Compensated Surrogacy Bad for Women?*, *supra* note 99, at 71–72 (describing similar cases); Rozée et al., *supra* note 243, at 9.

<sup>310</sup> See SHARMILA RUDRAPPA, *DISCOUNTED LIFE* (2015).

<sup>311</sup> Wilkinson, *supra* note 243.

<sup>312</sup> Rudrappa, *India's Reproductive Assembly Line*, *supra* note 101, at 27.

<sup>313</sup> University of Chicago Law School: Global Human Rights Clinic, *supra* note 16, at 31–33.

<sup>314</sup> As scholars have increasingly observed, the human rights system has struggled to adequately address the rights of women where rights are denied on the basis of intersecting identities. See Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003); Ivona Truscan & Joanna Bourke-Martignoni, *International Human Rights Law and Intersectional Discrimination*, 16 EQUAL RTS. REV. 103 (2016).

The cause of these inequalities is a state's decision to limit certain women's choices rather than improve the conditions under which those choices are made. States have failed to create the conditions that allow women to exercise their reproductive rights free from discrimination and stereotyping.<sup>315</sup> They have failed to provide carriers medical care, for example, infringing on women's equal enjoyment of reproductive rights and right to health.<sup>316</sup> The experiences of A, C, and K in Cambodia illustrate these dynamics. A, C, and K were deprived of a number of rights for reasons not inherent to the practice of surrogacy itself. They were, instead, the result of state (in)action—a failure to regulate and ensure access to reproductive health care, to set and enforce standards on informed consent, and to ensure proper advice and representation during the process.<sup>317</sup> This deprivation of rights is a failure of governance, and it is the state's responsibility to *remedy* such deprivation rather than restrict the rights of its citizens to *accommodate* it.

*b) Rights of Intended Parent(s)*

The second set of rights that have been insufficiently considered are the rights of intended parent(s). There is no right to gestational surrogacy.<sup>318</sup> This seems obvious since participation in a surrogacy arrangement requires the availability and willing participation of a gestational carrier.<sup>319</sup> However, the *ability* to engage a gestational carrier—and restrictions upon certain groups doing so—implicates several rights, including the rights to equality, privacy, reproduction, and benefit from scientific progress, among others.<sup>320</sup>

As discussed above, states have instituted policies that deny certain groups the right to enter into a lawful surrogacy contract.<sup>321</sup> Surrogacy is the only form

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<sup>315</sup> Christina Zampas et al., *Operationalizing a Human Rights-Based Approach to Address Mistreatment Against Women During Childbirth*, 22 HEALTH & HUM. RTS. J. 251, 256 (2020) (“Many states have failed to put in place a protective legal and policy framework to ensure that women receive care that is respectful of their needs and desires and that prevents and addresses mistreatment during childbirth. . . . Underpinning these laws and practices are harmful gender stereotypes.”).

<sup>316</sup> Kevin Ponniah, *In Search of Surrogates, Foreign Couples Descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://perma.cc/Y4BZ-NEFJ>; Rudrappa, *Why is India's Ban on Compensated Surrogacy Bad for Women?*, *supra* note 99, at 70, 77.

<sup>317</sup> University of Chicago Law School Global Human Rights Clinic, *supra* note 16, at 31–33.

<sup>318</sup> Christine Strachle, *Is There a Right to Surrogacy?*, 33 J. APPLIED PHIL. 146 (2016).

<sup>319</sup> *Id.*

<sup>320</sup> Among these many rights are the right to equality and non-discrimination (e.g., UDHR art. 2; ICCPR art. 26; ICESCR art. 2; CEDAW art. 2, CRPD arts. 5 and 6); reproductive autonomy (e.g., CESCRC GC 22, CEDAW art. 12 and GR 24); right to decide number and spacing of children (e.g., CEDAW art. 16); right to found a family (e.g., UDHR art. 16; CRPD art. 23); right to information (e.g., UDHR art. 19; ICCPR art. 19); right to benefit from scientific progress (e.g., UDHR art. 27, ICESCR art. 15 (b)); and rights of persons with disabilities (e.g., CRPD arts. 5, 6, 7, 12, 17, and 23).

<sup>321</sup> Strachle, *supra* note 318, at 151.

of ART that makes it possible for LGBTQI+ persons who are unable to gestate a fetus to have biological children.<sup>322</sup> The practice could support significant advancements for gender equality, marriage equality, non-discrimination in the private sphere, and even women's equal participation in the world of work.

Determining rights and freedoms in the context of ARTs is a relatively new challenge for international human rights. There is some support for the position that the right to found a family, combined with reproductive rights, could also support a right to reproductive assistance (limited by the rights of others, of course). The Inter-American Court of Human Rights (IACtHR) has recognized the right to personal integrity and liberty and the right to family life.<sup>323</sup> Article 11 of the American Convention on Human Rights protects couples' access to artificial reproductive technology.<sup>324</sup> The ECtHR has also noted that states must keep pace with social and scientific developments in their regulation of reproductive technologies.<sup>325</sup>

In general, the U.N. human rights treaty bodies have stated that sexual orientation and gender identity are included in the prohibited grounds of discrimination under international human rights law.<sup>326</sup> Resolutions issued by the U.N. Human Rights Council and the U.N. General Assembly confirm that discrimination based on gender identity or sexual orientation violates human rights treaty obligations.<sup>327</sup> The rights that surrogacy enables, including the right to found a family,<sup>328</sup> should therefore be protected against discrimination on the basis of sexual orientation.

As has been described above, a disturbing number of states have restricted surrogacy based on an interest in curtailing or eliminating basic rights of the LGBTQI+ community, including the ability to establish a family. How human

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<sup>322</sup> *Id.* at 148.

<sup>323</sup> Artavia Murillo et al., *supra* note 292.

<sup>324</sup> *Id.*

<sup>325</sup> S.H. and Others v. Austria (App. No. 57813/00), Grand Chamber, Eur. Ct. H.R. (Nov. 3, 2011); Dickson v. United Kingdom (App. No. 44362/04), Grand Chamber, Eur. Ct. H.R. (Dec. 4, 2007) (finding a violation of Article 8, right to respect for private and family life, due to a denial of access to artificial insemination facilities to a prisoner).

<sup>326</sup> U.N. High Comm'r for Hum. Rts., Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

<sup>327</sup> G.A. Res. 67/168, Extrajudicial, Summary or Arbitrary Executions (Mar. 15, 2013); Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011).

<sup>328</sup> The right to found a family is widely recognized in international law—it is contained in UDHR (art. 16), ICCPR (art. 23), CESC (art. 10(1)), ECHR (art. 12), ACHR (art. 17), ACHPR (art. 18), and in the ASEAN Human Rights Declaration (princ. 19). *See also* Comm. on Civ. & Pol. Rts., General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses ¶ 5 (July 27, 1990).

rights obligations are assessed and applied in these cases will have significant implications for the future evolution of equality guarantees more broadly.

## V. STATE COOPERATION TO EQUALIZE RIGHTS

All rights-based concerns about surrogacy practices could be addressed by state compliance with already existing human rights obligations paired with a system of global cooperation and regulation that sets standards and reconciles state approaches to the practice.<sup>329</sup> A system that sets standards and engages in effective regulation would curtail selfish and short-sighted action that propels human rights violations outside a state's borders while effectively preserving access to surrogacy for its own citizens. Standard-setting and cooperation could define and potentially fund acceptable conditions for the practice of surrogacy. Overall, regulation and cooperation could equalize the enjoyment of relevant rights, a much-needed direction for human rights principles more generally.

To adequately address the human rights harms at issue, the level of state cooperation must be substantial. State cooperation is particularly needed to, among other things, protect children from statelessness or challenges to parentage and citizenship; protect intended parent(s) from the insecurity of transnational arrangements; set non-discrimination standards for the exclusion of intended parent(s) based on prohibited aspects of identity and private choices; enable, with an eye towards equal enjoyment, the right to autonomy for women interested in participating in these arrangements; and ensure proper standards, terms of agreement, and enforcement mechanisms while also minimizing geographical forum shopping (and deal seeking).

### A. Human Rights-Focused Frameworks

A range of regulatory proposals have been put forward, including a human rights-style treaty,<sup>330</sup> coordinated domestic regulation,<sup>331</sup> use of fair-trade

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<sup>329</sup> For examples of proposals, see Rutuja Pol, *Proposing an International Instrument to Address Issues Arising out of International Surrogacy Arrangements*, 48 GEO. J. INT'L L. 1309, 1330 (2019); Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT'L L. 627 (2011); Bruce Hale, *Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?*, 36 SUFFOLK TRANSNAT'L L. REV. 501, 506–07 (2013). For a particularly helpful compilation of perspectives and writings on surrogacy regulation and its impact on rights, see Douglas NeJaime et al., *Surrogacy, Autonomy, and Equality*, 2020 GLOBAL CONSTITUTIONALISM SEMINAR VOLUME, YALE L. SCH. (2020).

<sup>330</sup> Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665, 680 (2012).

<sup>331</sup> Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240 (2013).

models,<sup>332</sup> an instrument of private law, and a separate regulatory agency.<sup>333</sup> The Parentage/Surrogacy Project of the Hague Conference on Private International law, an intergovernmental organization with the mandate of unifying private international law,<sup>334</sup> has been engaged in the development of a private international law instrument and a separate protocol on legal parentage in the context of international surrogacy arrangements for over a decade.<sup>335</sup> Similarly, the European Parliament suggested an international regulatory regime for compensated surrogacy arrangements in 2016,<sup>336</sup> although the scheme has yet to be adopted and the scope of the regime would be limited to EU states.

These and other proposals can address many of the human rights-related concerns expressed by opponents to transnational surrogacy practices.<sup>337</sup> Safeguards contained in various proposals have included the appointment of a guardian to care for the gestational carrier and child until the child is delivered to the intended parent(s); the provision of independent legal consultation, psychological assistance, and a personal bank account for the gestational carrier; measures to ensure the gestational carrier has freedom to decide to terminate the pregnancy; and measures to ensure that the intending parent(s) receive accurate information regarding the prevailing legal practices and ramifications in both countries involved in the agreement.<sup>338</sup>

One iteration, the fair-trade model, would set universal standards for all surrogacy arrangements through an international agreement.<sup>339</sup> The fair-trade model would standardize surrogacy contracts, create a certification process, and set minimum medical, ethical, and safety conditions for reproductive clinics. The model would also establish a geographically variable floor on minimum payment amounts to secure some measure of equality between states, provide benefits to the global south, and discourage forum shopping.<sup>340</sup> One suggestion has been to

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<sup>332</sup> Sharon Bassan, *Fair Trade as an Instrument for the Regulation of Risks in the Cross-Border Surrogacy Market*, 7 EUR. J. RISK REG. 750 (2016); see also Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120, 138–39 (2012) (noting that a fair compensation scheme could play a role in broader regulation of the global surrogacy industry).

<sup>333</sup> Davis, *supra* note 332, at 143.

<sup>334</sup> *About The HCCH*, HAGUE CONF. ON PRIVATE INT'L L., <https://perma.cc/4Q47-4W3R>.

<sup>335</sup> *The Parentage/Surrogacy Project*, HCCH, <https://perma.cc/V4YF-EV7Z>.

<sup>336</sup> EUR. PARLIAMENT, REGULATING INTERNATIONAL SURROGACY ARRANGEMENTS: STATE OF PLAY 4 (2016), <https://perma.cc/E7KS-SPBE>.

<sup>337</sup> Davis, *supra* note 332, at 140; Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL'Y 41, 68, 72, 77 (2015); see also Ergas, *supra* note 61, at 170.

<sup>338</sup> Margalit, *supra* note 337, at 74–77.

<sup>339</sup> Bassan, *supra* note 332, at 763; Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEV. WORLD BIOETHICS 111, 118 (2009).

<sup>340</sup> Bassan, *supra* note 332, at 758.

designate the World Health Organization as a monitoring partner that could facilitate connections between fair trade bodies, NGOs, international institutions, states, and market participants to ensure compliance among all actors.<sup>341</sup>

Whatever the system of regulation, it would be a complex undertaking requiring significant state commitment. As Yasmine Ergas notes in *Babies Without Borders*, state autonomy around matters of citizenship and family law, along with the doctrine of margin of appreciation, make it extremely difficult to motivate states to cooperate in the manner necessary to properly regulate surrogacy.<sup>342</sup> Moreover, it is not clear under the various mechanisms proposed how standards and compliance systems would be funded and resourced, though the potential profitability of the market and high level of demand suggest that a regulatory mechanism would likely be well-resourced. Regardless, to date, all proposals remain proposals and states show little sign of moving towards global regulation.

The remaining question is what will or what *should* motivate states to make this effort. This is a question pertinent to many other human rights challenges with transnational implications. It is also a deeply important question for the human rights system more generally, which was intended to set a standard for human well-being through state accountability and global cooperation. Today, the stark realities of inequality in the enjoyment of basic human rights by the world's citizens threatens to undermine this vision.

## B. State Cooperation

As is becoming strikingly clear in the context of climate injustice and compelled migration, there is no real mandate for state cooperation on most human rights issues. The drafters of the U.N. Charter and UDHR contemplated state cooperation to protect human rights<sup>343</sup> but, to date, no meaningful mechanisms to motivate or compel state cooperation have been implemented. Generally, state obligations to protect human rights outside their own borders are extremely limited. Extraterritorial obligations are considered by states to be overly burdensome and an infringement on sovereignty.<sup>344</sup> States are generally

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<sup>341</sup> Torres et al., *supra* note 30, at 12.

<sup>342</sup> Ergas, *supra* note 61, at 188.

<sup>343</sup> See Magdalena S. Carmona, *The Obligations of 'International Assistance and Cooperation' Under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8*, 13 INT'L J. HUM. RTS. 86, 87 (2009). Articles 22 and 28 of the UDHR also refer to the importance of international cooperation.

<sup>344</sup> See generally Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014) (discussing the gradual development of extraterritorial application of human rights obligations and various states' arguments before human rights tribunals); Margot E. Salomon & Ian Seiderman, *Human Rights*

only held accountable for violations that occur in contexts over which they exercise some jurisdiction or have some authority and control.<sup>345</sup>

In the last decade, it has become particularly clear that extraterritorial limits on human rights obligations have hampered our ability to address the most imminent human rights challenges. Efforts to protect human rights in the context of the COVID pandemic,<sup>346</sup> address the refugee crises, and reverse or minimize the harms of climate change and other environmental disasters<sup>347</sup> necessitate a global cooperative response.

There are a few doctrinal proposals that seek to expand state obligations beyond borders. The duty to cooperate, rooted in the cooperation mandates of the U.N. Charter and Articles 22 and 28 of the UDHR, is probably the most long-standing of these doctrines. However, the force and even the meaning of these provisions have been debated.<sup>348</sup> Most states only recognize a duty to protect and enforce human rights domestically, or in bilateral and multilateral agreements. Beyond national borders and specific agreements, they do not recognize a duty to cooperate with other states.<sup>349</sup>

There is, however, a fair amount of authority to support a duty to cooperate to protect socio-economic rights. Article 2(1) of ICESCR states that each party agrees to take steps “through international assistance and cooperation” to fulfill the rights under the convention.<sup>350</sup> In General Comment No. 3, the ICESCR Committee<sup>351</sup> notes “the essential role of such cooperation in facilitating the full realization of the relevant rights.”<sup>352</sup> The Committee also

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*Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 3 GLOB. POL’Y 458, 460 (2012) (noting the need for state cooperation and burden-sharing to fulfill extraterritorial obligations regarding economic, social, and cultural rights).

<sup>345</sup> See Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25 LEIDEN J. INT’L L. 857, 874–76 (2012) (describing various types of state control).

<sup>346</sup> Rana M. Essawy, *The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity*, EJIL:TALK! (Apr. 22, 2020), <https://perma.cc/E7UH-G9BM>.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*; SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 13, 30 (2006).

<sup>349</sup> See Anne Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. INT’L L. 883, 887 (2010); see also Emily A. Mok, *International Assistance and Cooperation for Access to Essential Medicines*, 12 HEALTH & HUM. RTS. 73, 77 (2010) (“Though many States have acceded to numerous international agreements recognizing obligations to assist and cooperate in the provision of access to medicines, such agreements are often not ratified at the national level and, in consequence, are ignored and often relegated to rhetoric.”).

<sup>350</sup> ICESCR art. 2(1).

<sup>351</sup> Comm. on Econ., Soc. & Cultural Rts., General Comment No. 3, The Nature of States Parties’ Obligations, E/C.12/1991/23 (1990).

<sup>352</sup> *Id.* at ¶ 13.

explains that the phrase “to the maximum of its available resources” applies not only to the resources within a state, but also to “those available from the international community through international cooperation and assistance.”<sup>353</sup> In spite of these standards, the U.K., Czech Republic, France, Portugal,<sup>354</sup> and Canada<sup>355</sup> have all stated that they believe international cooperation on socio-economic rights is merely a moral obligation, not a legal one.

The Responsibility to Protect (R2P) is a related doctrine that recognizes some extraterritorial duty to protect human rights.<sup>356</sup> R2P was developed in response to several mass atrocities at the end of the twentieth and beginning of the twenty-first centuries, including the genocide in Rwanda.<sup>357</sup> The concept, developed by the International Commission on Intervention and State Sovereignty, affirmed the notion that sovereignty is not just protection from outside interference, but also creates positive state responsibilities to protect the welfare of its population, as well as an obligation to assist the populations of other states where necessary.<sup>358</sup> The R2P was adopted unanimously by heads of state and governments at the 2005 U.N. World Summit and has been reaffirmed twice by the U.N. Security Council.<sup>359</sup> Until now, however, its application has been limited to cases of genocide, war crimes, ethnic cleansing, crimes against humanity, and the incitement of such crimes.<sup>360</sup> While the principle recognizes some obligation of the global community to assist states in protecting their own populations, it is likely to remain narrow in scope.<sup>361</sup>

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<sup>353</sup> *Id.* The Vienna Declaration and Programme of Action—the 1993 agreement that reflects consensus from the World Conference on Human Rights—also advances a duty to cooperate on socio-economic rights. World Conference of Human Rights, *Vienna Declaration and Program of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993).

<sup>354</sup> Comm’n on Hum. Rts., Economic, Social and Cultural Rights: Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Second Session, ¶ 76, U.N. Doc. E/CN.4/2005/52 (Feb. 10, 2005).

<sup>355</sup> *Id.* ¶ 82.

<sup>356</sup> G.A. Res. 63/308, The Responsibility to Protect (Sept. 14, 2009).

<sup>357</sup> Press Release, U.N. Secretary-General, Secretary General Presents His Annual Report to the General Assembly, U.N. Press Release SG/SM7126 (Sept. 20, 1999).

<sup>358</sup> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001); *Responsibility to Protect*, U.N. Office on Genocide Prevention and the Responsibility to Protect, <https://perma.cc/7NLB-UDFZ>.

<sup>359</sup> The General Assembly also agreed to “consider” its adoption by resolution in October 2009. G.A. Res. 63/308, The Responsibility to Protect (Sept. 14, 2009).

<sup>360</sup> G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005); S.C. Res. 1674 (Apr. 28, 2006); S.C. Res. 1894 (Nov. 11, 2009).

<sup>361</sup> U.N. Secretary-General, Implementing the Responsibility to Protect, U.N. Doc. A/63/677 (Jan. 12, 2009); Krista N. Schefer & Thomas Cottier, *Responsibility to Protect (R2P) and the Emerging*



An emerging doctrine, Common Concern of Humankind (“Common Concern”), may be the most flexible principle to support state cooperation. The principle was adopted to overcome the legal limitations that made it difficult for the international community to address climate change<sup>362</sup> and was officially recognized by the U.N. in 1988, when the General Assembly adopted Resolution 43/53 on the “Protection of Global Climate for Present and Future Generations of Mankind.”<sup>363</sup>

Issues of common concern are defined as those issues that transcend the boundaries of an individual state and require collective action.<sup>364</sup> Up to this point, the Common Concern doctrine has primarily been used in the language of treaties and has been limited to the environmental context. The 1992 Convention on Biological Diversity affirms, for example, that “the conservation of biological diversity is a common concern of humankind.”<sup>365</sup> Common Concern has also appeared in treaties and agreements relating to food and agriculture, intangible cultural heritage, and the relationship between environment and development.<sup>366</sup> The international community has not defined a specific pathway for designating an issue as one of common concern.<sup>367</sup> The doctrine has not yet prompted meaningful state action.<sup>368</sup>

In the transnational surrogacy context, if states cooperated, shared resources, made meaningful commitments to protect the relevant rights involved, reconciled policy approaches, and standardized the practice of surrogacy, human rights concerns could be alleviated, especially those prompted by uneven state regulation of quality and standards in reproductive health care, education, and information. That said, the current mandate for a duty to cooperate is generally quite weak, even where state action creates the problem and all or most states are impacted by the problem.

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*Principle of Common Concern*, in THE RESPONSIBILITY TO PROTECT (R2P): A NEW PARADIGM OF INTERNATIONAL LAW? 123, 130, 132–34 (Peter Hilpold ed., 2015).

<sup>362</sup> Schefer & Cottier, *supra* note 361, at 129.

<sup>363</sup> *Id.*

<sup>364</sup> Dinah Shelton, *Common Concern of Humanity*, 39 ENV'T POL'Y & L. 83, 83 (2009).

<sup>365</sup> 1992 Convention on Biological Diversity, 1760 U.N.T.S. 79 (May 5, 1992).

<sup>366</sup> Zaker Ahmad, *Climate Technology, Trade, and the Doctrine of Common Concern*, 5 WORLD TRADE INST. ADVANCED STUD. 5, 30 (2021).

<sup>367</sup> *Id.* at 33.

<sup>368</sup> See Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, 52 ARCHIV DES VÖLKERRECHTS 293, 297–98 (2014) (recognizing the doctrine’s “sketchy” state and limited scope, especially regarding climate issues); Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 AM. J. INT’L L. 409, 413 (2021).

## C. Transnational Equality and Human Rights

International human rights law has developed in ways that exacerbate this environment of weak state cooperation.<sup>369</sup> While the human rights system does not guarantee equality in rights enjoyment, it does implicitly promise that some standard is met within and across states, regardless of geography, identity, and other forms of social and economic stratification. Finding this common standard in the enjoyment of rights is both the greatest promise and greatest challenge of the human rights system.<sup>370</sup> Article 1 of UDHR states that humans are all “equal in dignity and rights” and Article 2 guarantees rights are enjoyed in a non-discriminatory manner.<sup>371</sup> Equality is incorporated into all major human rights treaties and the doctrine of equality is central to any meaningful calibration of rights enjoyment.<sup>372</sup>

However, human rights mechanisms have almost uniformly focused on ensuring that states comply with human rights directives—with some measure of equality—only within state borders.<sup>373</sup> Mechanisms have tolerated dramatically varying levels of rights enjoyment and diverse, often inconsistent, state interpretations as to what respecting a right means.<sup>374</sup> While some variation is understandable, and even inevitable, it has become difficult to even identify what exactly a right entails. This is especially the case in the context of socio-economic rights where mechanisms have granted states wide discretion for interpreting treaties and pacing progress under the progressive realization doctrine.

Human rights philosophers like John Tasioulas have attempted to identify core obligations and set basic standards for immediately realizable socio-economic rights.<sup>375</sup> Similarly, Anand Grover, the former Special Rapporteur on the right to health, attempted to set basic standards for reproductive health.<sup>376</sup>

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<sup>369</sup> For an explanation of what might *actually* motivate states to comply with human rights norms and a corresponding duty to cooperate (in contrast to what *should* motivate states—my concern here), see Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process* (Oct. 28, 1994), 75 NEB. L. REV. 181, 205 (1996).

<sup>370</sup> Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 787 (2005).

<sup>371</sup> UDHR arts. 1, 2.

<sup>372</sup> Dorothy Estrada Tanck, *The Principle of Equality Before the Law in International Law*, 11 CUADERNOS DERECHO TRANSNACIONAL 322, 339 (2019) (Spanish).

<sup>373</sup> See Allen Buchanan, *Equality and Human Rights*, 4 POL. PHIL. & ECON. 69 (2005).

<sup>374</sup> For a discussion of how the margin of appreciation creates unequal application of reproductive rights, see Christine Ryan, *The Margin of Appreciation in A, B and C v. Ireland: A Disproportionate Response to the Violation of Women's Reproductive Freedom*, 3 UCL J.L. & JURIS. 237 (2014).

<sup>375</sup> JOHN TASIOULAS, MINIMUM CORE OBLIGATIONS: HUMAN RIGHTS IN THE HERE AND NOW (2016).

<sup>376</sup> U.N. Secretary-General, Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. A/66/254 (Aug. 11, 2011).

But, in practice, these rights have very different meanings depending on the state context. Gestational surrogacy illustrates these differences well. The right to reproductive and bodily autonomy includes the right to gestate a fetus on behalf of another as long as no other rights are infringed upon. Yet, a woman in Colombia might enjoy this aspect of the right (if she chooses to) but a woman in Cambodia will not. Similarly, a German same-sex couple with the means to travel to the U.S. can exercise their rights to found a family free from discrimination but one without such means cannot. This is despite all parties residing in states with the same human rights treaty commitments. Obviously, resources, means, and state priorities and capacity always play some role in how rights are realized but, at present, these limitations are the end of a conversation about rights, not the beginning. Our tolerance for drastic inequality around rights has burdened, as it often does, the most marginalized, disempowered, and, in the case of the LGBTQI+ community, persecuted members of the global community.

In the context of surrogacy, there are resources and momentum behind an advance in reproductive technology that, implemented well, is rights-enabling for all parties. However, meaningful state cooperation and regulation would have to set a foundation for such a system.<sup>377</sup> While state cooperation may not be an appropriate solution for every human rights issue, here it is the only realistic and viable solution. Gestational surrogacy has an intensely transnational character that requires coordination on citizenship and parentage mechanisms and standard setting for the practice. Without the expectation of cooperation, states have restricted their citizen-women's reproduction for their own nationalist ends, imposing an undue burden on women's bodily autonomy. States have also propelled the complications of surrogacy elsewhere, creating instability and risk for the parties involved and a burden on guaranteed rights elsewhere. States have also been motivated by discrimination in restricting the practice, burdening vulnerable groups including members of the LGBTQI+ community, women in conditions of poverty, and others who experience compounded discrimination at the intersection of their various identities.<sup>378</sup> Cooperation, standard-setting, and regulation could curb these various state harms and better hold states accountable for human rights treaty violations. It would also represent a significant step forward in realizing the promise and principle of the human rights system – equal enjoyment of basic rights—here the crucial rights

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<sup>377</sup> See Stency Mariya Mark, *Commercial Surrogacy with Special Reference to Capabilities Approach*, 3 GLS L.J. 71, 72–76 (2021) (arguing that a right to reproductive autonomy cannot be meaningfully exercised without the requisite political, economic, and social environment).

<sup>378</sup> See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW/C/GC/28 (2010).

of reproduction and bodily autonomy—for all members of our global community.

## VI. CONCLUSION

In an age of rapid technological advancement, constant vigilance is required to ensure values and agreed-upon principles remain meaningful. Reproductive technologies have undergone dramatic changes in the last decade and are only going to continue to present new possibilities. Scientists estimate, for example, that an external womb will be functional to gestate a human child in around thirty years.<sup>379</sup> Our questions around reproduction will become quite different then.

As technological advancement continues to revolutionize and globalize our world, new and unexpected human rights issues may take on transnational importance. For instance, economic and social rights will be impacted by new financial technology agents that operate across borders and outside traditional regulatory structures. Some predict that temporary migration for labor purposes will increase, further eroding the relevance of state borders. All these developments only make it more urgent and necessary to address human rights through meaningful state cooperation.

Surrogacy provides a window into the consequences of self-interested state action and a fragmented human rights response. Thus far, vital rights of reproduction and autonomy have been recognized and distributed unequally in the context of surrogacy practices, raising questions about what global human rights mean in practice. A human rights system that allows for vast differences in rights enjoyment will not lead us toward greater accountability or a functional global standard.

What matters most now is whether we commit to some measure of equality in the realization of fundamental human rights, whether we do so in creative ways, and in a manner that expects and normalizes state cooperation.

State cooperation and state responsibility, in both setting proper internal standards and acting with concern about the standards in other states, is possible. It is also necessary for the integrity of the human rights system as a whole and, in the context of surrogacy, critical for the meaningful enjoyment of reproductive rights, freedoms, and autonomy.

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<sup>379</sup> *The World's First Artificial Womb for Humans*, BBC NEWS (Oct. 16, 2019), <https://perma.cc/H63D-CYT6>.