

Note

The Rise of Gestational Surrogacy and the Pressing Need for International Regulation

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“We can both know the price of something and know that it is priceless.”
- Margaret Radin¹

I. INTRODUCTION

In recent decades, progress in reproductive technologies caused major legal, moral, and ethical controversies, both in the United States and abroad. Human reproduction is a very private and sensitive topic with many religious, social, and political undertones, and it does not naturally lend itself to easy solutions. As in many areas of scientific advancement, the science of assisted reproduction is years ahead of the law. This disparity makes it that much more difficult to regulate emerging reproductive technologies or to even know where to look for legal answers.²

Another layer of complexity comes from the popularity of “medical tourism” or, in this area, “fertility tourism.” In recent years “fertility tourism” has become a big business in countries with relatively relaxed assisted reproduction technology laws like India, the Ukraine, and even

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1. Margaret Jane Radin, *Justice and the Market Domain*, in *MARKETS AND JUSTICE* 175 (John W. Chapman & J. Roland Pennock eds., New York University Press) (1989), quoted in Casey Humbyrd, *Fair Trade International Surrogacy*, 9 *DEVELOPING WORLD BIOETHICS* 111, 113–14 (2009).

2. See generally *International Surrogacy Arrangements: An Urgent Need for a Legal Regulation at the International Level*, UNIVERSITY OF ABERDEEN SCHOOL OF LAW, <http://www.abdn.ac.uk/law/surrogacy/about.shtml> (last visited Nov. 16, 2010) [hereinafter *Int’l Surrogacy Arrangements*] (discussing the various, unique legal problems that stem from modern surrogacy).

the United States.³ This Note will give an overview of the main centers of activity in the “fertility tourism” boom, as well as highlight the main legal issues that arise in the practice of international surrogacy. Moreover, this Note will demonstrate the urgent need for international regulation of the reproductive tourism industry. Finally, it will address what kind of international regulation would be appropriate for surrogacy agreements.

II. BACKGROUND

A. SURROGACY IN THE UNITED STATES

Modern surrogacy is a process defined by scientific technology that did not exist until the end of the last century.⁴ The methods and prevalence of surrogacy have progressed and changed. This has been matched with moral and societal changes in the world.⁵ While surrogacy currently uses sophisticated technology, surrogacy is, in fact, a very old concept dating back to ancient times.⁶ In “traditional surrogacy,” the only method available until the mid-1980s, the surrogate mother uses her own egg and is the genetic mother of the child. The child is genetically related to the intended father—unless the couple uses a sperm donor—but not to the intended mother.⁷

The use of surrogates in reproduction has fluctuated at different points in history due to changing social norms and religious attitudes.⁸ One can imagine American wives in the early twentieth century not wanting their husbands consorting with other women for the sake of having a baby for the couple to raise.⁹ The most recent resurgence of surrogacy came in the 1980s when artificial insemination was introduced as a viable option for women to conceive without engaging in intercourse.¹⁰ This advance opened the door to surrogates being inseminated artificially, allowing single people and homosexual couples access to assisted reproductive technology, including the surrogacy

3. See Amit Sen Gupta, *The Commerce in Assisted Reproductive Technologies, in MAKING BABIES: BIRTH MARKETS AND ASSISTED REPRODUCTIVE TECHNOLOGIES IN INDIA* 48–49 (Sandhya Srinivasan ed., 2010).

4. See generally DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 69–85 (2006) (discussing the historical evolution of surrogacy).

5. See *id.* at 72–73 (describing the evolution of surrogacy from ancient times until the end of the twentieth century).

6. See *id.* For example in the Bible, Rachel forced her maid, Bilhah, to be the surrogate for two children fathered by Rachel’s husband. *Genesis* 30:3.

7. See *id.*

8. See *id.*

9. See SPAR, *supra* note 4.

10. See *id.* at 74–75.

market.¹¹

The 1980s and 1990s hosted several sensational court battles over surrogacy agreements, in which surrogates who were also the genetic mothers fought to keep the children they had carried for nine months.¹² The surrogate mothers in these cases were often awarded rights to the child equal to those of the biological fathers.¹³ Many courts saw the genetic link and motherly bond formed over the gestational period as trumping the contractual agreement of the surrogacy arrangement.¹⁴ This was precisely the issue the New Jersey Supreme Court had to decide the case *In re Baby M*.¹⁵ Almost immediately after the child was born, the surrogate mother, Mrs. Whitehead, decided she wanted to keep the baby and there ensued an emotionally-fraught, months-long legal battle between the two families for custody.¹⁶ The Supreme Court of New Jersey finally decided that, although the surrogacy contract was invalid, it was in the best interest of the child to grant custody to the father, Mr. Stern, with visitation rights for Mrs. Whitehead.¹⁷ The case of *Baby M* and other disputes in that period forced many states to recognize the need for legislation in the area of surrogacy.¹⁸

The success of in vitro fertilization methods in the 1990s revolutionized the surrogacy industry again.¹⁹ Couples²⁰ wanting to have a child via surrogacy now had more options as they could use donated eggs and sperm if needed. This advance meant that a gestational surrogate could be biologically unrelated to the child, potentially allowing the roles of the parties involved in a surrogacy arrangement to be clearer and easier to delineate.²¹ Unfortunately, that clarity has not emerged.²² Gestational surrogacy added another layer of complexity to

11. *See id.* at 94. Although surrogacy is only a small part of the “baby business,” it is one of the areas with the least amount of regulation across states and across national borders.

12. *See id.* at 78–79.

13. *Id.* at 79.

14. *See SPAR, supra* note 4, at 78–79.

15. *See In re Baby M*, 109 N.J. 396, 411–22 (1988) (describing the background of the case).

16. *See id.* at 414–17 (describing the legal battle over Baby M).

17. *Id.* at 452–68.

18. *See generally SPAR, supra* note 4, at 78–79 (describing some of the issues in early surrogacy disputes).

19. *See id.* at 78.

20. Couple is used as a general term here. Married couples, unmarried couples, and single people are included in this analysis.

21. *See generally SPAR, supra* note 4, at 78–96.

22. States are the primary regulators of surrogacy, if they choose to regulate at all, and there is a wide discrepancy across the United States in surrogacy rules – some states favor the genetic link, some the gestational mother and some penalize parties who attempt to make surrogacy agreements. *See generally id.* at 83–96 (describing the differences in state law).

the process: the possibility of three women being involved in the birth of a single child—the intended mother who arranges the surrogacy, an often-anonymous egg donor, and a surrogate who carries the child.²³ The lack of consistent regulation among the fifty states creates another complexity.²⁴ There is no federal law on surrogacy, and individual state regulations, if they exist at all, vary widely.²⁵ In many cases, the courts have been burdened with creating surrogacy law through judicial decisions.²⁶

As with any area of inconsistent state regulation—whether on taxes, business law, or surrogacy—activities tend to migrate to the states with the most advantageous rules.²⁷ In the United States, the surrogacy market has settled in Florida and California because of their surrogacy-friendly laws.²⁸ The 1993 case, *Johnson v. Calvert*,²⁹ set the stage for the surrogacy industry in California by giving the contracting parents rights to custody over a child born through surrogacy. In *Johnson* the surrogate mother filed for custody of the child, but the California Supreme Court ruled in favor of the contracting parents, saying that the contracting mother was the one who intended to procreate and raise the child and was thus the natural mother.³⁰ Other states, like New Jersey and Michigan, have said that surrogacy contracts are invalid and unenforceable.³¹ The disparity in regulations among the states has caused abundant forum shopping.³²

Favorable choice of law is the main reason couples in the United States choose to contract in certain states—varying costs do not seem to be a deciding factor in selecting the location of surrogacy arrangements.³³ In *Baby M*, the intended parents contracted to pay the surrogate mother \$10,000 upon delivery of the baby.³⁴ In 2010, surrogates in the United

23. See Bryn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 J. OF PHIL. SCI. & LAW (2002), http://www6.miami.edu/ethics/jpsl/archives/papers/comsur_williamsjones.html (describing the ethical dilemmas that arise from surrogacy).

24. See, e.g., Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1 (describing difficulties arising out of surrogacy situations).

25. SPAR, *supra* note 4, at 71.

26. *Id.*

27. See *id.* at 84–85.

28. *Id.* at 85.

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

30. See *id.* at 782–84.

31. SPAR, *supra* note 4, at 84.

32. See Sangeeta Udgaonkar, *The Regulation of Oocyte Donation and Surrogate Motherhood in India*, in MAKING BABIES: BIRTH MARKETS AND ASSISTED REPRODUCTIVE TECHNOLOGIES IN INDIA 74, 89 (Sandhya Srinivasan ed., 2010).

33. See generally SPAR, *supra* note 4, at 84–85. Costs are a central factor in the decision to stay in the United States or seek surrogacy abroad.

34. *In re Baby M*, 109 N.J. 396, 412 (1988).

States earned roughly double that.³⁵ In addition to the price paid to the surrogate, couples pay fees to the clinics that arrange the surrogacy, fees for any donated eggs or sperm, fees to any middlemen, and reasonable expenses of the pregnancy, which include doctor's visits and lost wages. These expenses and fees often total close to \$80,000.³⁶ High costs, combined with the very real possibility that a surrogate pregnancy may not succeed, make it prohibitively expensive for most Americans to contract for surrogacy domestically. Many Americans who desire to have genetically related children but cannot afford these expenses have gone outside the United States in search of cheaper surrogacy arrangements.³⁷ Surrogacy forum shopping is not a uniquely American thing; people from many countries look abroad to make surrogacy arrangements due to favorable laws, financial reasons, or a combination thereof.³⁸

B. INTERNATIONAL SURROGACY

The variation in surrogacy regulations among American States is mirrored in varying degrees of regulation in different countries around the world. Some countries, like India, China and Thailand, have relatively few restrictions, if any.³⁹ Other countries, like the United Kingdom, prohibit surrogacy domestically, but allow their citizens to travel abroad for the procedure.⁴⁰ Still other countries, like Spain, prohibit commercial surrogacy both at home and abroad.⁴¹ Most countries that allow surrogacy place limits on who may contract for the service. For example, in some countries, only married couples in which the wife cannot safely carry a child to term are eligible.⁴² Some countries dictate the type of compensation allowable, limiting surrogacy payments to reasonable expenses and medical costs.⁴³ Reasons to go abroad for surrogacy arrangements include avoiding laws prohibiting sex-

35. Yukari Semba et al., *Surrogacy: Donor Conception Regulation in Japan*, 24 *BIOETHICS* 348, 354 (2010).

36. See Sam Dolnick, *Giving Birth Becomes the Latest Job Outsourced to India as Commercial Surrogacy Takes Off*, *THE ECONOMIC TIMES* (Dec. 30, 2007), http://articles.economictimes.indiatimes.com/2007-12-30/news/27670848_1_surrogacy-infertile-couples-pregnant-women (describing the cost discrepancy between the United States and India).

37. *Id.*

38. Pete Shanks, *Struggling to Control Fertility Tourism*, *BIOPOLITICAL TIMES* (Apr. 17, 2010), <http://www.biopoliticaltimes.org/article.php?id=5156>.

39. See Gupta, *supra* note 3, at 48–49.

40. See Shanks, *supra* note 38.

41. See Andrew Vorzimer, *Court in Spain Annuls Registration Of Twins Born To An American Surrogate*, *THE SPIN DOCTOR* (Sept. 17, 2010) <http://eggdonor.com/blog/2010/09/17/court-in-spain-annuls-registration-of-twins-born-to-an-american-surrogate>.

42. See SPAR, *supra* note 4, at 215.

43. See Semba, *supra* note 35, at 351–52.

selection,⁴⁴ the ability of the surrogacy contract to be binding,⁴⁵ and, especially, lower costs. This kind of international forum shopping has been termed “reproductive tourism.”⁴⁶

1. India

Because of its lax regulations, advanced medical technology, and affordable surrogacy services, India has become “a top destination for fertility tourism.”⁴⁷ Surrogacy is estimated as a \$445 million a year industry in India.⁴⁸ While surrogacy arrangements in the United States can cost close to \$80,000,⁴⁹ in India they typically range from \$6,000 to \$8,000.⁵⁰ India currently has no binding laws on surrogacy. However, clinics are encouraged to follow the nonbinding guidelines issued by the Indian Council of Medical Research in 2002, and updated in 2005.⁵¹ As of fall 2011, there is a current draft bill awaiting review by the Indian Parliament that would establish significant restrictions on assisted reproduction and surrogacy in the country.⁵²

India now faces an increasing number of international surrogacy cases and conflicts of law that complicate them.⁵³ The lack of regulation in India has led to several controversial cases in recent years.⁵⁴ One infamous case in India involved baby Manji, who was born in 2008 to an Indian surrogate. Baby Manji was conceived from the sperm of her

44. See Shanks, *supra* note 38.

45. *International Surrogacy Law: British Couples Going Abroad for Surrogacy*, NATALIE GAMBLE AND ASSOCIATES, <http://www.gambleandghevaert.com/page/intsur/38/> (last visited Oct. 31, 2010).

46. See Gupta, *supra* note 3, at 48.

47. See Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L L. 1429, 1430–31 (2009).

48. *Id.* at 1432.

49. See Dolnick, *supra* note 36 (describing the struggles of one American woman to find a suitable surrogate).

50. Gupta, *supra* note 3, at 49.

51. Kari Points, *Commercial Surrogacy and Fertility Tourism in India*, THE KENAN INST. FOR ETHICS AT DUKE UNIV., 7, <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf> (last updated Dec. 3, 2010).

52. Assisted Reproduction Technology (Regulation) Bill (2010), *available at* <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>; see Rimm, *supra* note 47, at 1438; Doug Pet, *India Moves Toward Regulation of Assisted Reproduction and Surrogacy*, BIOPOLITICAL TIMES (Feb. 10, 2011), <http://www.biopoliticaltimes.org/article.php?id=5591>.

53. See, e.g., Balaz v. Anand Municipality, A.I.R. 2010 (Guj.) 21 (India); Points, *supra* note 51, at 5–6; see also Priti Sehgal, *Reproductive Tourism Soars in India: Adoption and Surrogacy Laws Have Yet to Catch Up*, THE WIP (Oct. 7, 2008), http://thewip.net/contributors/2008/10/reproductive_tourism_soars_in.html (pointing to a 150 percent rise in Indian surrogacy cases between 2006 and 2008).

54. See, e.g., Points, *supra* note 51, at 5–7.

intended Japanese father and a different Indian woman's donated ovum.⁵⁵ One month before baby Manji was born, her intended parents divorced.⁵⁶ The intended mother wanted nothing to do with the child, but the intended father, Mr. Yamada, traveled to India and tried to claim baby Manji as his own and take her back to Japan.⁵⁷ A long court battle in India ensued, in which the Jaipur High Court denied that baby Manji had any legal parents, since there was no surrogacy law directing who her parents should be.⁵⁸ Mr. Yamada was finally able to bring baby Manji home to Japan after the Supreme Court issued her a travel certificate.⁵⁹ Incompatible laws regarding parentage were the main cause of that heart-wrenching case. Other similar cases have sprung up around the world.⁶⁰

2. Japan

Japan is one of the countries that prohibits surrogacy within its borders, but does not prohibit its citizens from going abroad for that purpose.⁶¹ As seen in the case of baby Manji, conflicts of law easily arise when intended parents go abroad to engage in surrogacy.⁶² When Japanese couples attempt to register children born through surrogacy abroad as their own, or try to gain citizenship for them, problems can arise.⁶³ Under Japanese law a child's mother is defined as the woman who gives birth to that child, not the genetic mother.⁶⁴ In Japan, unlike in California, the use of a gestational surrogate will not rebut the presumption that the birth mother is the legal mother of the child.⁶⁵ Japanese courts have attempted to solve this problem on at least one occasion by recommending that the intended mother adopt the child and thus become the legal mother.⁶⁶ If the intended Japanese father is also the

55. *Id.* at 4.

56. *Id.* at 5.

57. *Id.* at 5.

58. See Points, *supra* note 51, at 5–7; Pronoti Datta, *Surrogacy Goes Into Labour*, THE TIMES OF INDIA (May 15, 2010, 5:31 PM IST), <http://timesofindia.indiatimes.com/India/Surrogacy-goes-into-labour-/articleshow/5934825.cms>.

59. See Points, *supra* note 51, at 7; Datta, *supra* note 58.

60. In another case decided by the Gujarat High Court, and expected to go the Indian Supreme Court, a German couple is fighting for the custody of two children born to an Indian surrogate. *Balaz v. Anand Municipality*, A.I.R. 2010 (Guj.) 21 (India).

61. See generally Marcelo de Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417, 419–20 (2010) (outlining the rules on surrogacy and parentage in Japan).

62. See Points, *supra* note 51, at 5.

63. See de Alcantara, *supra* note 61, at 419.

64. See *id.* at 420.

65. See *id.* at 420–21.

66. Aki Mukai, the intended mother, and genetic mother, of twins was denied legal maternity by the Japanese Supreme Court. See *id.* at 419. Mukai was later allowed to adopt the children with little difficulty. See *id.* at 427. A report from the Science Council of

genetic father, the child will gain Japanese citizenship through him.⁶⁷

3. The United Kingdom

The United Kingdom does not allow commercial surrogacy, but only allows altruistic surrogacy.⁶⁸ The difficulty of obtaining surrogacy at home means that the United Kingdom is one of the most common countries of origin of couples seeking surrogates internationally.⁶⁹ In the United Kingdom, the intended parents will not automatically be named on the birth certificate as the legal parents.⁷⁰ Intended parents are required to apply for a parental order to become the legally recognized parents.⁷¹ This procedure has caused problems in some cases, like *In re X*,⁷² wherein the parentage of twins born to a Ukrainian surrogate was decided by the court. The High Court of the Family Justice Division confronted conflict of law issues that caused the twins to be essentially stateless and parentless.⁷³ In deciding the case, the court used a balancing test weighing the best interests of the children and public policy.⁷⁴ The court determined that the children's welfare was the overwhelming factor and granted a parental order declaring the British couple the legal parents.⁷⁵ As this example highlights, not only do countries differ in their regulation of surrogacy within their own borders, they also differ in their responses to conflicts between their laws and those of other countries.⁷⁶

Japan in 2008 also recommended the adoption of children born through surrogacy as a way for intended parents to obtain a legal parent-child relationship. *See id.* at 426.

67. *See de Alcantara, supra* note 61, at 419.

68. Surrogacy is legal where the gestational carrier is only compensated for expenses directly related to the pregnancy and birth, but surrogacy is prohibited where there is a commercial basis. *See* Surrogacy Arrangements Act, 1985, c. 49, §§ 1–5 (U.K.).

69. *Int'l Surrogacy Arrangements, supra* note 2. U.K. citizens are also among the largest groups of intended parents in India's surrogacy market. *See* Datta, *supra* note 58.

70. *See* Human Fertilisation and Embryology Act, 1990, c. 37, §§ 27–28 (U.K.) (defining the legal meaning of mother and father in surrogacy cases).

71. *See id.* § 30.

72. *See In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.).

73. Under Ukrainian law the surrogate and her husband had no legal obligation to the child, while under U.K. law the intended parents were not recognized as the legal parents. This made it impossible for the intended parents to bring the children to the United Kingdom for the purpose of applying for a Parental Order. *Id.* at 76.

74. *Id.*

75. *See id.*; Natalie Gamble, *Crossing the Line: The Legal and Ethical Problems of Foreign Surrogacy*, 19 REPROD. BIOMEDICINE ONLINE 151, 151 (2009) (“In order to grant an order awarding parenthood to the British parents, the High Court had to sanction a commercial payment made to the surrogate mother.”).

76. This disconnect further complicates attempts to regulate international surrogacy. *Cf.* Ann Donchin, *Reproductive Tourism and the Quest for Global Gender Justice*, 24 BIOETHICS 323, 330–31 (2010) (pointing out the deficiencies of several proposed strategies for combating unjust surrogacy practices).

C. ATTEMPTS AT CROSS-BORDER REGULATION

As the preceding section shows, surrogacy is inconsistently regulated around the world.⁷⁷ The resulting conflicts of law can create complex, international court battles in which intended parents may need to fight to be declared the legal parents of children that are often their own biological offspring.⁷⁸ International surrogacy is in desperate need of international regulation. This is similar to the state of international adoption law in the early 1990s.⁷⁹

In the summer of 2010, eight European countries issued warnings to more than ten in vitro fertilization clinics in India.⁸⁰ The clinics were admonished against performing any surrogacy arrangements for the citizens of those eight countries until those individuals first consulted their respective nation's consul general in India.⁸¹ This action was a bold move, putting the clinics on notice that by participating in the unregulated reproductive tourism market in India, they had been acting contrary to the laws of those European countries.⁸² As a result, children born in India often had problems returning to their intended parents' home countries.⁸³ Each of the countries that issued the warning has banned surrogacy contracts or commercial surrogacy domestically and hopes to avoid messy custody cases arising from surrogacy abroad.⁸⁴ Although the letters have been well received by many in vitro fertilization clinics,⁸⁵ sovereignty issues could arise if any country decides to try to enforce the warnings, or if an intended parent tries to bring legal action after being denied surrogacy arrangements due to the letters.⁸⁶

77. See Arlie Hochschild, *Childbirth as the Global Crossroads: Women in the Developing World Who are Paid to Bear other People's Children Test the Emotional Limits of the International Service Economy*, AM. PROSPECT, Oct. 2009, at 25, 27 ("Right now international surrogacy is a highly complex legal patchwork. Surrogacy is banned in China and much of Europe. It is legal but regulated in New Zealand and Great Britain. Only 17 of the United States have laws on the books; it is legal in Florida and banned in New York.").

78. See *Int'l Surrogacy Arrangements*, *supra* note 2.

79. Ultimately international action was taken in an attempt to tackle the problems caused by States' differing adoption practices. See Convention On Protection of Children and Cooperation in Respect of Intercountry Adoption, May, 29, 1993, 32 I.L.M. 1139.

80. The participating countries were Germany, France, Poland, Czech Republic, Italy, Netherlands, Belgium and Spain. Sumitra Deb Roy, *Bar Our Nationals, European Countries Tell Surrogacy Clinics*, THE TIMES OF INDIA (July 14, 2010, 3:00 AM IST), <http://timesofindia.indiatimes.com/City/Mumbai/Bar-our-nationals-European-countries-tell-surrogacy-clinics/articleshow/6164949.cms>.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. One of the basic tenants of international law is that States enjoy sovereign

The letter sent by the European Consuls is one of the only examples of an attempt at international regulation of the industry.⁸⁷ Thus far, conflict of law issues have been handled by national courts on a case-by-case basis.⁸⁸ There are various proposals being presented to address international surrogacy issues.⁸⁹ This Note argues that the adoption of trans-national regulation is essential to the future of international surrogacy.

III. ANALYSIS – THE FUTURE OF INTERNATIONAL SURROGACY: THE CASE FOR INTERNATIONAL REGULATION

A. THE NEED FOR REGULATION

The rapidly expanding international fertility trade is in desperate need of international regulation.⁹⁰ Advances in surrogacy have outpaced the laws regulating it,⁹¹ creating major hurdles for people seeking to take advantage of scientific advances. This situation is common in medical areas dealing with sensitive ethical issues,⁹² but surrogacy is a particularly sensitive legal area because it deals not only with the rights of intended parents and the women acting as surrogates, but also with the rights of innocent children who may be born into an uncertain status—stateless and parentless.⁹³

The cases discussed in the previous section demonstrate how the current lack of consistent regulation causes a host of problems for all parties involved.⁹⁴ Although *Re X and Y* is only a single case involving a

equality. Black's Law Dictionary 1523 (9th ed. 2009) (“[N]ations have the right to enjoy territorial integrity and political independence, free from intervention by other nations.”).

87. Cf. Roy, *supra* note 80 (stating that the letters were a surprise to the surrogacy community in India despite the continued legal problems arising from international surrogacy).

88. Compare *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.) (granting a parental order to a U.K. couple for children born via a surrogate in Ukraine), with *Re G (Surrogacy: Foreign Domicile)*, [2007] EWHC (Fam) 2814 (Eng.) (declining to grant a parental order to Turkish parents for a child born to a British surrogate, and relying instead on international adoption law).

89. See Donchin, *supra* note 76, at 330–32; Humbyrd, *supra* note 1, at 116–18.

90. See Humbyrd, *supra* note 1, at 116–18; *Egg Raffles and Shadow Markets: The Fertility Industry Goes Global - and Skirts Laws*, BIOPOLITICAL TIMES (Mar. 23, 2010), <http://www.biopoliticaltimes.org/article.php?id=5125>.

91. *Int'l Surrogacy Arrangements*, *supra* note 2; see also Points, *supra* note 51, at 8.

92. *Int'l Surrogacy Arrangements*, *supra* note 2 (“It is usually the case that the law lags behind medical advances and corresponding social developments.”).

93. Cf. *Re G*, [2007] EWHC (Fam) (determining Turkish parents' legal rights towards their biological child born to a British surrogate, when problems arose attempting to take the child home to Turkey).

94. See Points, *supra* note 51, at 5–7 (discussing the particularly problematic baby Manji case).

British couple and a Ukrainian surrogate, it demonstrates the type of serious legal issues that can, and do, arise from conflicts of law in international surrogacy cases.⁹⁵ In particular, the case could signal to future intended parents that using an unmarried surrogate will allow their child easier access to a parental order in the United Kingdom⁹⁶ The decision also implicitly authorized the commercial aspect of that, and future, surrogacy arrangements by emphasizing the best interests of the children.⁹⁷ This directly contradicts the United Kingdom's law against commercial surrogacy and the public policies behind it.⁹⁸ The judge was forced to analyze this international case under the laws of the United Kingdom, while also taking into account the laws, as he could obtain and analyze them, of the Ukraine.⁹⁹ Because family courts are not likely to have expertise in complex international conflict of law questions,¹⁰⁰ it is unlikely that local case-by-case assessment will be effective, decisive or fair.¹⁰¹

The eight European countries that sent the letters to the in vitro fertilization clinics in India were attempting to head off many of these problems by requiring their citizens to consult with "their respective consulates before initiating the surrogate process."¹⁰² This would allow legal issues regarding nationality and parentage to be addressed prior to

95. Lucy Theis, Natalie Gamble & Louisa Ghevaert, *Re X and Y (Foreign Surrogacy): 'A Trek Through A Thorn Forest'*, 39 FAM. L. 239, 242-43 (2009).

96. Under U.K. law the husband of the surrogate is presumed to be the father of the child. The judge "expressed concern that other, less scrupulous, couples conceiving through foreign surrogacy could deliberately avoid any judicial scrutiny of the commercial nature of their arrangement simply by choosing a surrogate who was unmarried . . . (and potentially more vulnerable) . . ." See *id.* (demonstrating that one of the obstacles to granting the parental order was the fact that the surrogate mother was married).

97. *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.) (noting that commercial surrogacy is illegal in the U.K., but since this was a retrospective authorization, the Court had the discretion to authorize the payment already made to the surrogate in the Ukraine).

98. See Theis et al., *supra* note 95, at 243.

99. See *In re X*, [2008] EWHC (Fam), [2009] Fam. 71.

100. *E.g., id.*, [2009] Fam. at 72 (syllabus) ("Where there is a commercial element to the surrogacy it will usually require careful consideration as to why an application under section 30 should not be transferred to the High Court. Any case which involves a significant conflict of private international law or which may require authorisation to be given under section 30(7) of the 1990 Act should be so transferred.").

101. See *In re X*, [2008] EWHC (Fam), [2009] Fam. 71; *cf. Re G (Surrogacy: Foreign Domicile)*, [2007] EWHC (Fam) 2814, [3]-[4] (Eng.) (showing that the judge had to consult experts in Turkish law which contributed to the overall cost of £35,000, the sum of which "falls to be paid entirely by the British tax payer."); *but cf. In re Baby M*, 109 N.J. 396 (1988) (showing that not only family courts struggle with how to deal with the complicated issues of conflict of law in surrogacy cases, as this case was decided by the Supreme Court of New Jersey).

102. Roy, *supra* note 80.

conception of a child.¹⁰³ Although the clinics that have publically addressed the letter have said it was warmly received,¹⁰⁴ there are potential conflicts that could arise surrounding the warnings. Reproductive tourism is a booming industry in India.¹⁰⁵ If such unofficial requests affect an in vitro fertilization clinic's profits, it is highly unlikely that those clinics will feel obligated to follow the requests, especially because most clinics do not even follow their own health ministry's suggested regulations.¹⁰⁶ There may also be backlash from the citizens of those European countries who specifically go to India for reproductive services that they cannot obtain at home for legal or financial reasons.¹⁰⁷ While the aforementioned eight European countries have made requests to several in vitro fertilization clinics in Mumbai that they do not provide service to citizens who had not familiarized themselves with their countries' laws, the enforceability of such warnings is an open question.¹⁰⁸

The International surrogacy practice has also been accused of leading to the commodification of children and the exploitation of women.¹⁰⁹ These arguments underscore the urgency of the need for international regulation.¹¹⁰ If surrogacy remains haphazardly regulated around the globe, children will continue to be born into uncertain family situations and the possibility of exploitation of surrogate mothers will

103. *Id.*

104. *Id.*

105. See discussion *supra* Part II; *supra* notes 47–50 and accompanying text.

106. See Rimm, *supra* note 47, at 1430–32 (explaining that the guidelines regulating fertility services in India are “not legally binding” and are more liberal than many other countries). Rimm additionally states that fertility tourism has led to a “\$445 million dollar a year business” in India. *Id.*

107. See generally *id.*

108. See Roy, *supra* note 80 (indicating that the Indian clinics welcomed the European countries' request, which aligns with the Indian Council of Medical Research guidelines, that require interested potential parents obtain a no-objection letter from their home countries). *But see*, Rimm, *supra* note 47, at 1430–31 (explaining that the Indian Council of Medical Research national guidelines are not legally binding).

109. See Humbyrd, *supra* note 1, at 113–14 (“International surrogacy may commodify children, but the children born through international surrogacy will still be priceless.”).

110. See Humbyrd, *supra* note 1 (“International surrogacy cannot continue as currently practiced. The absence of regulations has created a market that is free but not fair, providing fertile ground for unjust and exploitative practices.”); see also SPAR, *supra* note 4, at 71–72 (“[W]hen the birth mother relinquishes this child, she frequently receives compensation This exchange makes surrogacy overtly commercial and raises charges of commodification that are difficult to dismiss. Are surrogate mothers selling their children? Are they selling, or at least renting, their bodies? And if they are, should anyone be trying to stop them? In some countries, governments have already answered yes to these questions.”); Points, *supra* note 51, at 7–8 (explaining that many Indian doctors are supporters of surrogacy regulation in their country, because it would “counteract the problem of the ‘international black market’ in commercial surrogacy”).

persist.¹¹¹ For example, in Taiwan, where surrogacy is unregulated, a surrogate put a baby girl up for foreign adoption when the intended parents and the surrogate could not agree on the amount of compensation to be paid and the child was left without parents.¹¹²

In spite of its complications, outlawing surrogacy completely is not the answer; a ban on the industry would drive the trade underground.¹¹³ When surrogacy is performed on the black market, the parties have no legal recourse in the event of disputes.¹¹⁴ In these situations, “[i]llegal surrogacy thus poses risks not only for the intended couple and the surrogate, but also for the children born through surrogacy.”¹¹⁵

B. ISSUES TO BE ADDRESSED BY REGULATION

The central legal issues to be addressed by any regulation, whether enacted by one country or enacted in a formal international agreement, “are the question[s] of legal parenthood and the nationality of the child.”¹¹⁶ These seemingly simple identifiers have proven to be complex hurdles in the international surrogacy cases decided thus far.¹¹⁷ There are many additional issues that should be addressed in any future regulation of this industry, but this Note will focus on the primary issues of parenthood and nationality.

111. *E.g.*, *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.); *Re G (Surrogacy: Foreign Domicile)*, [2007] EWHC (Fam) 2814 (Eng.); *see also* Humbyrd, *supra* note 1 (“This absence of regulation nearly ensures that a surrogate mother in a poor country has been underpaid and thus exploited by wealthier individuals. Fair Trade principles can provide a framework to ensure the ethical practice of surrogacy, and the Fair Trade practice of international surrogacy should be mandatory rather than optional.”).

112. Semba, *supra* note 35, at 354 (noting that with the current unregulated operation of international surrogacy, infants may potentially become “helpless victims”).

113. *Id.* (“[I]f surrogacy is prohibited through legislation, it will be necessary to consider the various problems that arise from clandestine cases of surrogacy.”).

114. *See id.* (“When problems occur in underground, illegal surrogacy, it is impossible for either the intended parents or a surrogate to appeal to the law for help.”); *see also Int’l Surrogacy Arrangements*, *supra* note 2 (“Legal problems arising from the lack of international regulation of surrogacy arrangements are . . . not the only cause for concern . . . Another great worry springing from the unregulated character of ‘procreative tourism’ is the potential for a ‘black market’ preying on peoples’ emotional or economic needs.”); SPAR, *supra* note 4, at 218 (explaining “The Cocaine Model” as a comparison for completely outlawing surrogacy, and noting that such regulation is likely to be “porous”).

115. Semba, *supra* note 35, at 354.

116. *Int’l Surrogacy Arrangements*, *supra* note 2.

117. *See, e.g.*, *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.); *accord Re G (Surrogacy: Foreign Domicile)*, [2007] EWHC (Fam) 2814 (Eng.) (showing that many courts have undertaken the task of analyzing the facts in each individual case to determine who the lawful parents of the children are and the children’s nationality); *see also* Gamble, *supra* note 75, at 151 (“The conflict between English and Ukrainian law [in the *In Re X* case] had the effect of abdicating parental status for both couples, and this left the children without legal parents and without rights to either British or Ukrainian citizenship.”).

1. Parenthood

In order to define parenthood, the definitions of “mother” and “father” must be given uniform legal meaning.¹¹⁸ As seen in the case of baby Manji, motherhood is defined differently in Japan and India.¹¹⁹ Both Japan and India took issue with the fact that there was no definitive mother of the child.¹²⁰ In addition to the identity of the mother being at issue, the identity of the father is also sometimes contentious, such as in the case of *In re X*.¹²¹ These cases illustrate how conflicts of law can make the determination of a child’s parents a dilemma. While the courts in both of these cases ultimately granted the contracting couple parental rights, at the beginning of each case the outcome was uncertain, and the children were, legally speaking, parentless.¹²²

The danger of being parentless has far reaching implications.¹²³ At the time of a child’s birth, if there is no legal parent, then no one has the responsibility to raise and care for that child.¹²⁴ If the intended parents change their minds anytime during the pregnancy, the child could be left to the benevolent care of the surrogate or the welfare system of the surrogate’s country.¹²⁵ Children born legally parentless are in danger of being abandoned, sold or worse.¹²⁶ Issues can arise if the surrogate mother decides she no longer wants to give up the baby and claims the child as her own, even if the child is genetically unrelated to her and is genetically related to the intended mother and father.¹²⁷ The United

118. See Points, *supra* note 51, at 5–6 (describing the difficulty of legally identifying the mother in a situation where there is a surrogate, an egg donor, and an adoptive mother).

119. *Id.*

120. See Points, *supra* note 51, at 4–7 (contrasting Japanese law, which defines the mother as the woman who gave birth to the child, with Indian law, which defines the mother as three different women: the surrogate, the anonymous egg-donor, and the adoptive mother).

121. *In re X*, [2008] EWHC (Fam), [2009] Fam. 71 (stating that under British law the husband of the surrogate is presumed to be the father of the child).

122. *Id.*; *In re Baby M*, 109 N.J. 396 (1988); see also Udgaonkar, *supra* note 32, at 89 (“The trial court came to the surprising conclusion that the child had no lawful parents at all!”).

123. See Udgaonkar, *supra* note 32, at 90–91.

124. See *id.* at 89.

125. See, e.g., *id.* at 89–90 (“It is also possible that the surrogate may wish to hand over the child but the couple may not be willing to take her. This happened in one case when the child was born with a small head, indicating a possibility of mental retardation.”).

126. See Semba, *supra* note 35, at 354.

127. See, e.g., *In re Baby M*, 109 N.J. 396 (1988); see also Udgaonkar, *supra* note 32, at 88–91; SPAR, *supra* note 4, at 69–70 (“The pregnancy was uncomplicated, and Whitehead abided by the terms of her contract for nine months. Four days after the baby was born, though, Whitehead came to visit the Sterns and disappeared with the child, later arguing, ‘I signed on an egg. I didn’t sign on a baby girl.’”).

Nations Convention on the Rights of the Child¹²⁸ recognizes that children have a fundamental right to grow up in a safe and happy family environment.¹²⁹ The lack of regulation in international surrogacy arrangements leaves children vulnerable to the very things the Convention seeks to prevent.¹³⁰

2. Nationality

The second issue that urgently needs to be addressed in formal regulations is the nationality of children born through international surrogacy.¹³¹ Children like baby Manji are often caught in “nationality-limbo” until a court can decide the child’s nationality.¹³² Pending such a decision, these children are stateless and often are not allowed to leave their country of birth.¹³³ Even when the child is allowed to leave his or her country of birth, there is no guarantee that the intended parents’ home country will grant entry or citizenship to the child.¹³⁴ Courts around the

128. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

129. *See id.* (“Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”).

130. *See generally* Udgaonkar, *supra* note 32, at 90–91 (describing situations where disputes have arisen, including uncertainty about legal parents, unwillingness of intended parents to take the child due to potential medical complications, etc.).

131. *See Int’l Surrogacy Arrangements*, *supra* note 2 (“In the absence of a global legislative response, highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the question of legal parenthood and the nationality of the child.”).

132. *See* Points, *supra* note 51, at 5 (explaining that because Indian authorities were unsure who to list as baby Manji’s mother, they could not issue a birth certificate); Sara Sidner, *Surrogate Baby Stuck in Legal Limbo*, CNN, Apr. 12, 2008, <http://edition.cnn.com/2008/WORLD/asiapcf/08/12/surrogate.baby/index.html>.

133. *See* Points, *supra* note 51, at 5 (explaining that because Indian authorities could not decide on the nationality of baby Manji, they subsequently were unable to issue a passport).

134. *See, e.g., In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [9], [2009] Fam. 71, 76 (Eng.) (“[N]ot only did these children have no right of entry of their own to the United Kingdom, for the applicants could not confer nationality on them, but the applicants had no right to bring them in; or at best the male applicant may have obtained leave to do so as a putative father or relative.”); *see also* Datta, *supra* note 58 (explaining that in multiple instances intended parents in Israel have been unable to bring their children home from India because Israeli judges have refused to order paternity tests); Gilles Cuniberti, *French Court Denies Recognition to American Surrogacy Judgment*, CONFLICT OF LAWS .NET (June 30, 2009), <http://conflictoflaws.net/2009/french-court-denies-recognition-to-american-surrogacy-judgement/> (describing a situation where a French court refused to permit a French couple who had contracted with a surrogate in Minnesota to bring their child back to France). *But see, e.g., Re G (Surrogacy: Foreign Domicile)*, [2007] EWHC (Fam) 2814, [43] (Eng.) (“Both the UK and Turkey are member states under the [Convention on Protection of Children and Cooperation in respect of Intercountry Adoption] and, under the terms of the Adoptions with a Foreign Element Regulations 2005 . . . it might have been possible for a

world thus far have been fairly amenable to granting citizenship,¹³⁵ or at least residency, to these children, because the courts generally determine that the “best interests” standard mandates that result.¹³⁶ This has not uniformly been the case, and recently there is some indication that some countries are using their immigration laws and surrogacy regulations to enforce broader social agendas.¹³⁷ For example, countries that do not allow gay marriage or gay adoption could outlaw surrogacy and immigration of children born via surrogate abroad in an attempt to prevent homosexual couples from becoming parents.¹³⁸ Regulation of the international surrogacy industry is imperative to clarify the laws of surrogacy across borders in order to protect the children born through surrogacy.¹³⁹

C. INTERNATIONAL REGULATION

The gravity of these issues calls for prompt action on the part of States, the United Nations, or both. The first step to any international regulation is the recognition that there is an addressable issue. This Note illustrates that genuine problems exist and will continue to persist in the international surrogacy industry in the absence of international regulation. These issues are causing harm to innocent children and vulnerable surrogates, as well as to naïve intended parents.¹⁴⁰ The situation is very similar to that of international adoption prior to the 1993

‘convention adoption order’ to have been made by the English court that would also have been a valid adoption in all other convention countries.”)

135. See, e.g., *In re X*, [2008] EWHC (Fam) at [10], [2009] Fam. at 76 (“[T]he grant of a parental order does not of itself confer citizenship although the evidence suggests that it is very unlikely to be denied if sought.”).

136. See *Gamble*, *supra* note 75, at 151 (“The court had the impossible task of balancing ‘two competing and potentially irreconcilable concepts’ in having to weigh up public policy against the best interests of two very vulnerable children. Ultimately, the welfare of the children was given priority, but the court considered the position very carefully and stressed that every case would be looked at on its own facts.”).

137. See *Datta*, *supra* note 58; see generally *Italian Official Claims Link between Gay Adoption, Human Trafficking*, CHRISTIAN TELEGRAPH, (Sept. 22, 2010), <http://www.christiantelegraph.com/issue10860.html> (describing a claim by an Italian official that there is a correlation between the increase in “adoption by same-sex couples and the increase in human trafficking of minors”).

138. See, e.g., *Vorzimer*, *supra* note 41 (describing a case in which a gay Spanish couple contracted with a surrogate in the United States and was then disallowed to return to Spain with the child); see also *Datta*, *supra* note 58 (explaining that there have been multiple instances in which gay Israeli men have not been permitted to obtain paternity tests for children that are biologically related to them, but born to surrogates in India, making it very difficult for these children to obtain Israeli citizenship).

139. See generally *Udgaonkar*, *supra* note 32, at 90–91; *Humbyrd*, *supra* note 1 (arguing for “free trade international surrogacy” by explaining the hardship and frustration that all parties involved may endure and stating that such problems underscore the general need for intercountry regulation of surrogacy).

140. See, e.g., *In re X*, [2008] EWHC (Fam), [2009] Fam. 71.

Hague Convention.¹⁴¹ Similar to adoption, international regulation is both feasible and integral to the protection of children and all parties involved in surrogate arrangements.¹⁴²

1. Potential Regulations

A broad-reaching international regulation would take time to develop, but such a regulation is the only viable option if people around the world want to continue contracting abroad for surrogacy services.¹⁴³ A formal set of rules would help clarify the process, as well as serve as a guide for parties navigating international surrogacy agreements.¹⁴⁴ One of the main issues to be addressed is that of the definitions of “mother” and “father.”¹⁴⁵ When these definitions are clear, it will also be important to address whether and when surrogacy agreements should be binding and what kind of compensation schemes for surrogate mothers should be permitted.¹⁴⁶

i. Definitions

As numerous court battles have shown, the concepts of “mother” and “father” in the surrogacy context are not easy to define.¹⁴⁷ Any proposed regulation of the international surrogacy industry should define these terms and require the names of a child’s parents, so-defined, to be entered as such on the child’s birth certificate.¹⁴⁸

In the surrogacy context, “mother” should be defined as the woman

141. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167 [hereinafter Hague Convention].

142. See, e.g., Humbyrd, *supra* note 1, at 116 (“International surrogacy, as currently practiced, is a *laissez-faire* system that both benefits and exploits surrogate mothers. The economic benefit to surrogate mothers is an argument against prohibition, while the economic exploitation of surrogate mothers is an argument against the status quo. The market of international surrogacy should be regulated.”).

143. See Humbyrd, *supra* note 1, at 116–18 (noting that a fair trade surrogacy system would take years to develop, but that without an international regulatory system, the surrogacy market will continue to have problems with “payment of a fair price, working conditions, and transparency and accountability”).

144. See generally Venkatesan Vembu, ‘Rent-a-Womb Trend is a Form of Neo-Colonialism’, DNA: DAILY NEWS & ANALYSIS (Mumbai), July 24, 2010 (“There aren’t really any good options. I don’t think banning it would work. It would only create a black market - and it might just happen anyway in even worse conditions. Perhaps good regulation is a safer way to go. International bodies such as the WHO and the ILO should become involved in developing some kind of an international system.”).

145. See *supra* notes 118–121 and accompanying text.

146. See Humbyrd, *supra* note 1, at 117 (“[M]utually advantageous exploitation is the only valid ethical argument against international surrogacy, and therefore fair compensation must be a condition of Fair Trade surrogacy.”).

147. See *supra* notes 118–121 and accompanying text.

148. See, e.g., Points, *supra* note 51 (presenting a situation in which a birth certificate could not be issued for a baby due to confusion regarding who should be considered parents).

who seeks out and initiates the surrogacy agreement. She need not be the woman who carries the child, or even the woman who is genetically related to the child;¹⁴⁹ she is the woman who intends to raise the child and to be the child's mother.¹⁵⁰ Sometimes, the woman genetically related to the child is an anonymous egg donor who has no intention of raising any children conceived using her donated eggs.¹⁵¹ Because the entire purpose of reproduction by surrogacy is for a woman to carry a child for the benefit of another,¹⁵² the term "mother," in this context, should not be used to define the woman who carries the child.

Although the term "father" has proven easier to define, its meaning is still ambiguous.¹⁵³ In defining this term, the added complexity of who carried the child does not come into play.¹⁵⁴ By giving his sperm to inseminate the egg,¹⁵⁵ the father plays a role in reproduction by surrogacy similar to that played in traditional reproduction. Just as some intended mothers cannot donate an egg to the surrogate, some intended fathers are unable to donate sperm and are thus genetically unrelated to the child. For this reason, the definition of "father," like the definition of "mother" above, should be the man who initiates the surrogacy agreement. Similarly, "father" should not be defined as the man who is married to the surrogate mother because he is not genetically related to the child and is not generally a party to the surrogacy agreement.¹⁵⁶ Just as anonymous egg donors should not be named as mothers, anonymous sperm donors should not be named as fathers in surrogacy arrangements.

These proposed definitions of "mother" and "father" should be independent of each other. This would prevent single men and women from experiencing problems being recognized as the parents of their intended children just because those children were conceived through surrogacy. These definitions would bind all parties to their intended roles in the surrogacy agreement, thus protecting children against being born into a situation of parental ambiguity.¹⁵⁷

149. See SPAR, *supra* note 4, at 71; see generally Williams-Jones, *supra* note 23, § 3 (presenting differing views on how the term "mother" could be construed).

150. See Williams-Jones, *supra* note 23, § 3.1.

151. See *id.* § 3.2.

152. See generally SPAR, *supra* note 4, at 71 (implying that the surrogate is never the intended mother at the outset of the agreement); see also Williams-Jones, *supra* note 23, § 5 (stating that during their pregnancies, some surrogate mothers choose to keep the baby, thereby breaking the surrogacy agreement).

153. See *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.).

154. See Points, *supra* note 51 (discussing a situation in which the fatherhood was not disputed). *Contra In re X*, [2008] EWHC (Fam), [2009] Fam. 71.

155. See *e.g. In re X*, [2008] EWHC (Fam), [2009] Fam. at 71 (syllabus).

156. See *id.* at [8], [2009] Fam. at 75 (analysis of the Ukrainian surrogate's husband's responsibilities to the baby).

157. See Points, *supra* note 51; see also *In re X*, [2008] EWHC (Fam), [2009] Fam.

Many issues regarding parenthood and nationality would be settled by defining the terms “mother” and “father” as proposed above. Children born through surrogacy would have their intended parents named on their birth certificates, thus easing visa and passport issuance problems that currently obstruct the return of children to their intended parents’ home countries.¹⁵⁸ Any proposed regulation should also require states, or at least the party seeking surrogacy,¹⁵⁹ to ensure that children born abroad via surrogacy can be considered citizens of their parents’ home countries.

ii. Surrogacy Contracts and Reasonable Compensation

Next, regulations need to address the ability to make surrogacy contracts binding.¹⁶⁰ As long as there is some educational prerequisite to entering into a surrogacy arrangement, it is in the best interest of all parties that surrogacy contracts are binding. Binding contracts create an understanding among all parties of their expectations and they protect the children involved from being exploited or abandoned.¹⁶¹

In addition to binding contracts, agreement on permissible levels of compensation for surrogates is needed.¹⁶² This could be a major point of contention for those countries that currently outlaw commercial surrogacy.¹⁶³ Those countries enacted laws against payment for surrogate services to buttress their public policies,¹⁶⁴ and they may not be amenable to signing an international agreement that endorses any type of compensation. The issue of compensation is further complicated by the difference between the financial situation of most surrogates and that of most parties seeking surrogacy.¹⁶⁵

One way to deal with the economic exploitation argument against commercial surrogacy is to use Fair Trade practices as a model for international surrogacy regulation.¹⁶⁶ Fair Trade practices could help create a fair compensation scheme similar to that in the coffee market.¹⁶⁷

71.

158. See Points, *supra* note 51, at 5 (neither a Japanese visa or passport nor an Indian passport could be issued for baby Manji).

159. See *e.g.*, The Assisted Reproductive Technologies (Regulation) Bill - 2010, § 34 (19) (draft bill 2010) (proposing that parents verify that they will be able to take the child back to their home country).

160. See *id.* § 34.

161. See Udgaonkar, *supra* note 32, at 90–91.

162. See Semba, *supra* note 35, at 354–55.

163. *Cf. id.* at 351 (noting that the United Kingdom only allows surrogacies without compensation, while surrogacy is unregulated in other countries).

164. See Theis et al., *supra* note 95, at 243.

165. See Williams-Jones, *supra* note 23, § 4.2 (noting that most surrogate mothers’ total income is just above the poverty line, while most commissioning couples have incomes of \$50,000 or more).

166. See Humbyrd, *supra* note 1, at 116.

167. *Id.*

Because it is unlikely that citizens from countries prohibiting commercial surrogacy will stop going to countries that allow commercial surrogacy,¹⁶⁸ a fair compensation scheme should be a part of any proposed regulation. Countries like the United Kingdom should recognize the benefits this type of international regulation would provide, and the ultimate goal of protecting their citizens should be weighed against any arguments against fair compensation for surrogacy. It is worth noting that some compensation for surrogates has been approved on a case-by-case basis by courts in the United Kingdom.¹⁶⁹ Thus, the United Kingdom and other countries currently outlawing commercial surrogacy may be open to a reasonable compensation scheme as part of a larger regulation of the international surrogacy industry.

iii. Shortest Path to Regulation

Because the type of regulation discussed will likely take years to develop and adopt, immediate action through immigration laws has been suggested as a temporary solution.¹⁷⁰ Adoption regulations could also be a model for a permanent regulation scheme.¹⁷¹ In addition to getting a passport or a visa, intended parents could be required to work with an accredited surrogacy service provider, just as adoptive parents are required to work with an accredited adoption service.¹⁷² As long as those accredited agencies comply with an overall regulatory scheme, this type of rule would function to protect all parties involved from exploitation.¹⁷³

Another suggestion for regulation of the surrogacy industry is modeling the regulation after the Hague Convention on Adoption.¹⁷⁴ Because the concepts of surrogacy and adoption raise similar concerns about exploitation,¹⁷⁵ it seems logical to incorporate surrogacy into the Convention. The overarching goals of the Convention on the Rights of the Child, as laid out in the Hague Convention on Adoption,¹⁷⁶ are

168. See Semba, *supra* note 35, at 354–55.

169. *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71, 72 (Eng.) (syllabus).

170. See Humbyrd, *supra* note 1, at 117. Because children born to foreign surrogates must acquire a passport or visa to travel, immigration laws can be used to regulate inter-country surrogacy.

171. See *id.*

172. See *id.* at 117 n.40.

173. See *id.* at 117.

174. See *id.* at 116–17.

175. See *id.* at 114–16 (discussing the presence of mutually advantageous exploitation in the surrogacy industry); see also Hague Convention, *supra* note 141 (considering prevention of the abduction, prevention of the sale of, and prevention of the trafficking of children to be a goal of the convention).

176. The convention's goals are: (1) ensuring that intercountry adoptions take place in the best interests of the child; (2) preventing the abduction, the sale of, and the trafficking of children; and (3) ensuring Contracting States' compliance to the convention. Hague

equally applicable to the international surrogacy context. While there would be many similarities between the Hague Convention and any proposed international surrogacy regulation, based on the proposals herein, it would not be beneficial or even recommended to amend the Hague Convention to include them. The Hague Convention is supported by many European countries, some of which do not allow commercial surrogacy.¹⁷⁷ Because of this, integrating pro-surrogacy provisions into the Hague Convention would be difficult.

D. PROBLEMS INHERENT IN ANY INTERNATIONAL REGULATIONS

The main problem with international agreements, conventions, and accords is enforceability.¹⁷⁸ The traditional theory behind these types of agreements is that the countries who sign the agreements are volunteering to abide by the rules stated therein and accept the overseeing organization as an enforcer. History has shown, however, that when a country violates the rules, the UN does not always have the ability or the desire to enforce every regulation. Each country is ultimately a sovereign state,¹⁷⁹ and its first priority is the safety and happiness of its own citizens, so international regulations are not usually top priorities.

Financing a regulatory agency to oversee a new international agreement is another key concern. Whichever international body formulates the international surrogacy regulations will also have to create an oversight agency to enforce the system.¹⁸⁰ Because the Hague Convention could add the regulation of surrogacy agreements to the Central Agencies' existing oversight duties,¹⁸¹ some think it would be easy to incorporate surrogacy regulations into the Hague Convention. But regulators should not fall into this trap. A separate agency formed with the goal of regulating international surrogacy will need to be created. Any agency associated with the Hague Convention would not be suitable for this purpose. Although this may be a hurdle to establishing an international regulatory scheme, it is still necessary that it be done in the

Convention, *supra* note 141; *see generally* CRC, *supra* note 128.

177. *See* Hague Convention, *supra* note 141 (noting that France, Germany, the United Kingdom, and other European countries support the convention); *see also* Semba, *supra* note 35 (noting that France does not recognize surrogacy agreements at all, and that the United Kingdom does not recognize commercial surrogacy agreements).

178. Cody Zimmerman, *The Legal Ramifications of Establishing UN Enforcement Organs* (2010) (available at <http://al.odu.edu/mun/docs/Issue%20brief%202010%20Establishing%20UN%20enforcement%20organs.pdf>).

179. *See id.* at 1.

180. Countries' financial issues are very real, especially with the state of the economy in the world today. However, one would hope these issues would not prevent adequate regulation of the surrogacy industry.

181. *See* Hague Convention, *supra* note 141, at art. 6 (1).

near future.

IV. CONCLUSION

Advances in reproductive technology have made it possible for some couples to create the families they would not otherwise be able to have.¹⁸² However, the current legal inconsistencies surrounding international surrogacy have created a myriad of problems for all parties involved.¹⁸³ If some form of regulation does not come soon, surrogacy may never reach its full potential.¹⁸⁴

The surrogacy industry is rapidly expanding, and the problems couples and surrogates currently encounter will not be resolved by leaving the system in its current state.¹⁸⁵ Sovereign countries have the right to rule their citizens free from interference,¹⁸⁶ but common regulation of the surrogacy industry would be mutually beneficial to the people of the signatory nations and to the people participating in cross-border surrogacy agreements. Regulation is urgently needed to resolve the issues that put the children and adults involved in international surrogacy in danger every day.¹⁸⁷

182. See SPAR, *supra* note 4, at 96.

183. See, e.g., *In re X and another (Children) (Parental Order: Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [2009] Fam. 71 (Eng.); see also Roy, *supra* note 80 (illustrating the problem arising when a citizen of a country that prohibits surrogacy demands that his or her child, born through surrogacy, be granted citizenship rights to his country).

184. See SPAR, *supra* note 4, at 96.

185. See Points, *supra* note 51, at 8.

186. See Zimmerman, *supra* note 178, at 1.

187. See Humbyrd, *supra* note 1, at 118.