

“BABY-STEPS FOR BABY BUSINESS”: DIVERSE MARKET,
CHALLENGES, AND WORKABLE INTERNATIONAL
REGULATION FOR CROSS-BORDER COMMERCIAL
SURROGACY

Ellene Ko*

ABSTRACT

Commercial surrogacy is a private contract arrangement in which the surrogate mother receives compensation from the commissioning parent(s) “beyond the reimbursement of medical expenses.”¹ The emergence of assisted reproductive technologies fueled the growth of commercial surrogacy into a multi-billion-dollar industry.² The surrogacy business is not limited to geographical or legal boundaries thanks to “fertility tourism.” Every year, thousands of intended parents travel abroad to countries where commercial surrogacy is cheaper, easier, and legal. However, commercial surrogacy is having an identity crisis on a global level. While more countries are closing their borders to fertility tourism, even criminalizing their own citizens’ pursuit of a family, some maintain their no-policy policies. The diversity of regulatory approaches in national legislation, combined with the complete absence of

* Articles Editor, *Cardozo International & Comparative Law Review*; J.D. Candidate, 2025, Benjamin N. Cardozo School of Law; B.A., 2019, Duke University. I would like to thank my faculty advisor, Professor Edward Stein, for his insightful comments and guidance during the writing process. I would also like to thank the editors of the *Cardozo International & Comparative Law Review* for their helpful suggestions and edits.

¹ *What is Commercial Surrogacy?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/> [https://perma.cc/9GHY-3H9F] (last visited May 15, 2025).

² *Surrogacy Market Growth Drivers, Industry Trend Analysis, and Forecast 2025-2034 | Rapid Growth Expected in Below-35 Segment, Driven by Higher IVF Success Rates*, GLOBENEWSWIRE (Apr. 23, 2025, 5:11 AM), <https://www.globenewswire.com/news-release/2025/04/23/3066143/0/en/Surrogacy-Market-Growth-Drivers-Industry-Trend-Analysis-and-Forecast-2025-2034-Rapid-Growth-Expected-in-Below-35-Segment-Driven-by-Higher-IVF-Success-Rates.html> [https://perma.cc/Y6BU-4EP9].

international regulation, creates several legal challenges. This Note highlights some of the challenges, including surrogacy contract fraud by agencies and parentless as well as stateless children. This Note demonstrates the need for practical measures that international regulators can implement to overcome the historical challenges of legal harmonization of cross-border surrogacy.

INTRODUCTION	460
I. THE INTERNATIONAL MARKET & LEGAL CONTEXT	463
A. Countries Allowing Commercial Surrogacy: the United States & Israel	466
1. The United States.....	466
2. Israel	469
B. Countries Prohibiting Commercial Surrogacy: Italy & the U.K.....	471
3. Italy	472
4. The United Kingdom	474
C. From Destination to Prohibition of Commercial Surrogacy: Thailand & India	476
5. India	477
6. Thailand	480
II. LEGAL CHALLENGES POSED BY CROSS-BORDER SURROGACY	482
A. Fraudulent Misrepresentation by Surrogacy Agency	483
B. Parentless and Stateless Children.....	485
III. PROPOSED APPROACH: WORKABLE INTERNATIONAL REGULATION	486
A. Information Transparency through International Cooperation.....	486
B. A Global Commercial Surrogacy Oversight Body	490
CONCLUSION	492

INTRODUCTION

In 2020, the images of thousands of abandoned babies around the world gave the transnational commercial surrogacy market a global spotlight when COVID-19 travel bans hit.³ As the pandemic closed

³ Sophia Shepherd, *Regulating International Commercial Surrogacy: A Balance of Harms and Benefits*, 32 FLA. J. L. & PUB. POL'Y 293, 294 (2022); see also Lizzie Widdicombe, *The Stranded Babies of the Coronavirus Disaster*, NEW YORKER (July

borders, intended parents of commercial surrogacy or “fertility tourists” “were unable to claim their newborns [from] surrogate mothers in Russia, Ukraine, the United States, and elsewhere.”⁴ Babies were left for months “in hospitals, orphanages, or in the hands of surrogacy agencies.”⁵ The impact of the pandemic on the reputation of the commercial surrogacy industry “was really bad.”⁶

The unprecedented events of the pandemic highlighted inherent “logistical problems” of traveling abroad in the transnational commercial surrogacy market.⁷ Preceding these problems were decades-long controversies involving numerous legal and ethical questions concerning intercountry parentage, citizenship, adoption, and contracts between surrogates and commissioning parents.⁸

In 2001, a battle between a British surrogate mother and a California couple challenging the definition of parenthood made global headlines.⁹ The dispute arose when the couple asked their 26-year-old British surrogate to terminate her pregnancy after discovering she was carrying twins, as they only wanted one baby.¹⁰ Their extensive written contract with fifty clauses provided for \$20,000 in compensation and “for every contingency,” including a verbal agreement that any fetal reduction would take place before the twelfth week of pregnancy.¹¹ The British surrogate informed the American couple of the twins at eight weeks, but the couple did not book a fetal reduction surgery until the thirteenth week.¹² The surrogate refused to undergo the procedure and filed a lawsuit in California to revoke the couple’s parental rights.¹³ Under California law, all rights to the future

20, 2020), <https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster> [<https://perma.cc/8Q6Z-GTYF>].

⁴ Shepherd, *supra* note 3.

⁵ *Id.*

⁶ Widdicombe, *supra* note 3.

⁷ Shepherd, *supra* note 3 (discussing the problems of international commercial surrogacy).

⁸ Cyra Akila Choudhury, *Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation* 3 (FIU Legal Rsch. Paper No. 16-18, 2016).

⁹ Chris Taylor, *One Baby Too Many*, TIME (Aug. 27, 2021, 12:00 AM), <https://time.com/archive/6664644/one-baby-too-many/> [<https://perma.cc/K58S-LG6M>].

¹⁰ *Id.*

¹¹ *Id.* Fetal or selective reduction is a procedure that has the goal of reducing the total number of fetuses when there is more than one fetus. *Id.*

¹² *Id.*

¹³ *Id.*

of the twins lay with the intended parents.¹⁴ The fate of the unborn twins was in the hands of a California court.¹⁵

After decades, there is still division as to “what . . . constitutes an acceptable surrogate-parenting arrangement.”¹⁶ Was the California twin case an unusually dramatic “rent-a-womb” contract dispute? Are private surrogacy agreements unenforceable cross-border commitments?¹⁷ Does regulating cross-border commercial surrogacy need uniform international rules? To this day, “[t]he lack of accord is radical.”¹⁸

This Note addresses the divergent regulation of transnational commercial surrogacy and the legal conflicts that arise in enforcing cross-border surrogacy contracts. This Note focuses on gestational “commercial surrogacy as opposed to altruistic surrogacy,”¹⁹ as commercial surrogacy “is not only the most prevalent form” in the international context but also raises implications that call for international regulation.²⁰ Part I explores both domestic and international commercial surrogacy markets, which feature regulatory approaches that span from full legalization to criminalization. Part II describes the reliance on contract law that currently prevails in the commercial surrogacy market and some of the prominent cross-border disputes that have arisen, with specific attention to fraudulent misrepresentation by surrogacy agencies abusing the lack of uniform

¹⁴ See CAL. FAM. CODE § 7960(c) (West 2024) (“‘Intended parent’ means an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction”); see also *id.* § 7960(f)(2) (“‘Gestational carrier’ means a woman who is not an intended parent and who agrees to gestate a genetically unrelated embryo pursuant to an assisted reproduction agreement.”).

¹⁵ Taylor, *supra* note 9.

¹⁶ Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, GEO. L.J. 1759, 1759 (1988) (footnote omitted).

¹⁷ See, e.g., *id.* at 1760 n.8 (citing Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. L. & MED. 243, 256 (1985)) (stating that courts should interpret “surrogacy contracts as revocable prenatal agreements, allowing natural mother to keep child if she chooses, and . . . prohibit commercial surrogacy contracts”).

¹⁸ *Id.* at 1759.

¹⁹ See Choudry, *supra* note 8, at 2. Gestational surrogacy is the process in which the surrogate carries an embryo made from the egg of the intended mother or an egg donor, removing the biological connection between the surrogate mother and child. See *Gestational Surrogacy Fact Sheet*, N.Y. STATE DEP’T OF HEALTH, https://health.ny.gov/community/pregnancy/surrogacy/gestational_surrogacy_fact_sheet.htm [<https://perma.cc/W25U-W86Z>] (last visited Nov. 3, 2024).

²⁰ Yehezkel Margalit, *From Baby M to Baby M(Anji): Regulating International Surrogacy Agreements*, 24 J. L. & POL’Y 41, 45 (2016) (footnote omitted).

regulation across countries. Additionally, this Part briefly touches upon the implications of parentage and citizenship in international family law. Finally, Part III addresses the shortcomings of the current patchwork of regulations despite a growing transnational market for commercial surrogacy in many countries and proposes a framework of international cooperation designed to improve information transparency and constitute a reasonable resolution of recurring surrogacy contract disputes arising out of the lack of uniform international regulation.

I. THE INTERNATIONAL MARKET & LEGAL CONTEXT

Despite the sensational connotation of a “child-making market”²¹ or “[s]urrogacy [as] a for-profit business,” commercial surrogacy is a lucrative business growing at a massive “industrial scale.”²² The commercial surrogacy market was valued globally at over \$14 billion in 2022 and is projected to achieve an approximate 25% compound annual growth rate in the next decade to a market value of \$129 billion.²³ There are multiple growth drivers of this booming venture. Financially well-off “intended parents in wealthy, Western nations” are the primary contributors to the market,²⁴ with “[m]any seeking cross-border surrogacy services to avoid long waitlists or higher fees” in their home countries or sidestep domestic prohibitions on

²¹ See *America's Childmaking Market is a Legal and Ethical Minefield*, THE ECONOMIST (Apr. 9, 2022), <https://www.economist.com/united-states/2022/04/09/americas-childmaking-market-is-a-legal-and-ethical-minefield> [<https://perma.cc/RGH7-TDY8>].

²² Carolyn Barber, *The Business of Renting Wombs is Thriving—and Surrogates don't Always Understand the Risks*, FORTUNE WELL (Nov. 17, 2022), <https://fortune.com/well/2022/11/17/business-thriving-surrogates-risks-reproductive-ethics-debate-america-carolyn-barber/> [<https://perma.cc/4HCF-3L7B>]. Commercial surrogacy differs from altruistic surrogacy, where a surrogate mother is not compensated. *Commercial Surrogacy vs. Altruistic Surrogacy*, WORLDWIDE SURROGACY, <https://www.worldwidesurrogacy.org/blog/commercial-surrogacy-vs-altruistic-surrogacy> [<https://perma.cc/RBB5-PXGB>] (last visited Nov. 21, 2024).

²³ *Surrogacy Market – By type (Gestational Surrogacy, Traditional Surrogacy), By Technology (Intrauterine Insemination (IUI), In-vitro Fertilization (IVF), By Age Group, By Service Provider & Forecast, 2023-2032*, GLOB. MKT. INSIGHTS (2022), <https://www.gminsights.com/industry-analysis/surrogacy-market> [<https://perma.cc/HHJ6-D9MQ>].

²⁴ Karen Gilchrist, *The Commercial Surrogacy Industry is Booming as Demand for Babies Rises*, CNBC (Mar. 7, 2023, 9:49 AM), <https://www.cnbc.com/2023/03/07/womb-for-rent-more-women-are-working-in-commercial-surrogacy-industry.html> [<https://perma.cc/NG8N-KXAC>].

commercial surrogacy.²⁵ Financial incentives are also a driver.²⁶ While the six-figure price tag of the “American gold standard” is not within the reach of many intended parents globally, countries such as Georgia, Ukraine, Mexico, and Colombia “offer affordable and secure surrogacies with low-cost surrogate mothers.”²⁷ Sociological factors, such as “the diversification of family structures beyond traditional heterosexual couples and the fertility problems associated with women waiting longer to have children,” have also “increased the demand for surrogacy services in many developed countries.”²⁸

The ban on commercial surrogacy in many countries, prohibitive costs, and the “lack of available carriers” in many home countries are leading intended parents to undergo “fertility tourism.”²⁹ For commissioning parents, choosing a country to start the surrogacy process is a search for the right balance “between legal guarantees and costs.”³⁰ The entire process is often not a single-destination journey as different phases of the surrogacy process may happen in different countries.³¹ For example:

[A] male couple may get their donated oocytes from South Africa, where there are many donors available, do the IVF, recruit the surrogate and embryo transfer in Georgia . . . due to attractive prices, and fly the gestational carrier to the USA to deliver the baby, where children may be registered by both parents.³²

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Global International Surrogacy Options | Legal and Affordable Surrogacy Worldwide*, IVF CONCEPTIONS, <https://www.ivfconceptions.com/global-international-surrogacy-options/> [<https://perma.cc/S6RY-S4VV>] (last visited Nov. 25, 2023).

²⁸ Shepherd, *supra* note 3; see also Jenny Kleeman, *Having a Child Doesn't Fit into These Women's Schedule: Is This the Future of Surrogacy?*, THE GUARDIAN (May 25, 2019), <https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy> [<https://perma.cc/UR4G-MDK2>].

²⁹ Pedro Brandão & Nicolás Garrido, *Commercial Surrogacy: An Overview*, 44 REVISTA BRASILEIRA DE GINECOLOGIA E OBSTETRÍCA 1141, 1146 (2022) (footnotes omitted).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (footnotes omitted).

Regardless of the number of countries involved in intended parents' surrogacy processes, the complexity of commercial surrogacy derives from how individual countries regulate the process. In some countries, surrogacy is prohibited in both commercial and altruistic forms, though prohibitions do not stop people from turning to the process.³³ In others, commercial surrogacy is unregulated but practiced.³⁴ In some nations, surrogacy is regulated in either a "commercial" or an "altruistic" model.³⁵ The patchwork of different international surrogacy regulatory frameworks often gives rise to cross-border legal battles, including those related to determining the "legal value of surrogate contracts"³⁶ between surrogate mothers and intended parents.³⁷ Many governments around the world have taken "[d]iverse measures" to avoid the problems of "reproductive tourism" in acknowledgment of their own social and cultural contexts.³⁸ Descriptions of the measures in the selected countries below illustrate the current global trends.

³³ See *id.* at 1149-50 (discussing "clandestine" surrogacy in China, where the practice is prohibited).

³⁴ *Id.* at 1141.

³⁵ Brandão & Garrido, *supra* note 29, at 1144.

³⁶ *Id.* at 1147.

³⁷ For example, the famous case of *Yamada v. Union of India*, or the "Baby Manji" case, highlights one such legal battle:

[A] Japanese couple used a gestational surrogate with a donor egg in India. The couple divorced before the baby was born and only the father wanted to keep the baby At the time, Japanese law did not recognize the legality of surrogacy agreements and Indian law strictly prohibited single-parent adoption. Accordingly, the baby was stuck in India for almost six months waiting for her Japanese passport following her recognition as the legal daughter of the Japanese father. India ultimately issued Baby Manji a certificate of identity, a legal document for those who are stateless.

Margalit, *supra* note 20, at 48-49 (footnotes omitted). The case was resolved by the Indian Supreme Court in 2008, making it the court's first surrogate verdict. See *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84 (2008) (India).

³⁸ Brandão & Garrido, *supra* note 29, at 1147.

A. Countries Allowing Commercial Surrogacy: the United States & Israel

1. The United States

The national landscape of surrogacy regulation in the United States “reflect[s] a patchwork approach . . . while some states prohibit the practice or remain silent on the issue, multiple states expressly enforce both surrogacy contracts and provisions within the contract.”³⁹ Without federal regulations in place that govern surrogacy, the evolving trend in the United States is that commercial surrogacy is here to stay. In this respect, the United States is moving in the opposite direction compared to other European countries.⁴⁰

Until very recently, New York was one of four states (the others being Michigan, Louisiana, and Nebraska) to prohibit commercial surrogacy.⁴¹ Prior to their legalization, surrogacy contracts were “void and unenforceable” as they were deemed by New York to be “contrary to . . . public policy”⁴² For decades, compensated surrogacy agreements subjected “the parties, their attorneys, and any other entities involved in the arrangement . . . to civil and potentially criminal penalties.”⁴³ As of 2021, the Child Parent Security Act (CPSA) allows New York residents to enter into commercial gestational surrogacy contracts.⁴⁴ The process for New York parents

³⁹ Katherine Drabiak, *Infants Born Through Surrogacy Contracts Cannot Be Canceled or Returned*, PETRIE-FLOM CTR.: BILL OF HEALTH (Sept. 5, 2023), <https://blog.petrieflom.law.harvard.edu/2021/02/08/surrogacy-contracts-canceled/#:~:text=Enforcing%20Commercial%20Surrogacy%20Contracts,and%20provisions%20within%20the%20contract> [https://perma.cc/Q3LT-GCGR].

⁴⁰ See *infra* Part II.B.

⁴¹ David Crary, *No Longer An Outlier: New York Ends Commercial Surrogacy Ban*, ASSOC. PRESS (Feb. 14, 2021), <https://apnews.com/article/new-york-surrogacy-laws-a5e4323f6b1fb82b424c272ee791d90a> [https://perma.cc/77AU-B2HZ]. While Nebraska does not explicitly ban commercial surrogacy, the state deems paid surrogacy contracts unenforceable. *Id.*

⁴² N.Y. DOM. REL. LAW § 122 (McKinney 2024).

⁴³ Joseph R. Williams, *New Surrogacy Law Brings Opportunities but Practitioners Beware*, N.Y. STATE BAR ASS'N (Mar. 9, 2021), <https://nysba.org/new-surrogacy-law-brings-opportunities-but-practitioners-beware/> [https://perma.cc/2JKE-F6C3].

⁴⁴ N.Y. FAM. CT. ACT § 581-401 (McKinney 2024). The CPSA only applies in cases “where the surrogate’s own egg is not used to conceive the child.” Williams, *supra* note 43. Genetic surrogacy arrangements—i.e., where the surrogate is the child’s biological mother—remain unenforceable in New York and are prohibited if the surrogate is being compensated.” *Id.*

seeking to “establish a legal declaration of parentage of their children born through gestational surrogacy is now statutorily supported and attainable.”⁴⁵ With “this change in New York law,” Louisiana, Michigan, and Nebraska are now the only states that prohibit commercial surrogacy.⁴⁶

In contrast, fourteen states allow commercial surrogacy by statute, though these regulations vary considerably. California, “[h]aving more statutory and published case law on surrogacy arrangements than any other state . . . is regarded as a highly surrogacy-friendly state”⁴⁷ It allows and actively regulates full surrogacy contracts with “some of the clearest, most straightforward gestational surrogacy laws in the world”⁴⁸ For example, California law lays out all the necessary provisions to include in surrogacy contracts, establishes the legal parental rights of the intended parents, and details how payment for surrogacy is to be handled.⁴⁹ California law also provides that “[p]re-birth and post-birth parentage orders are permitted and may be obtained regardless of the marital status or sexual orientation of the intended parent[s]”⁵⁰

⁴⁵ Deborah S. Kearns, Eva-Marie Cusack, Kera Reed, Meaghan T. Feenan & Olivia Morri, *Sometimes It Takes Two, Other Times It Takes Three: Parentage Proceedings Under the Child-Parent Security Act*, 55 TR. & EST. L. SECTION J., no. 4, 2022, at 5, 9.

⁴⁶ *States Where Paid Surrogacy Is Still Illegal—And Why*, FAM. SOURCE CONSULTANTS [hereinafter *States Where Paid Surrogacy Is Still Illegal*], <https://www.familysourceconsultants.com/states-where-surrogacy-is-still-illegal-and-why/> [<https://perma.cc/8XGH-X96V>] (last visited Feb. 3, 2025). In Louisiana, commercial surrogacy is illegal, and unpaid surrogacy is “only available for legally married couples who intend to use their own genetic material to create the embryo.” *Id.*; see H.B. 1102, 2022 Leg., Reg. Sess. (La. 2022) (stating that “the best interest of the children” born via surrogacy is the primary motivator for the law). In Michigan, compensated surrogacy has been illegal since 1988. *States Where Paid Surrogacy Is Still Illegal*, *supra*; see MICH. COMP. LAWS § 722.855 (West 2024) (criminalizing payments beyond pregnancy-related expenses). In Nebraska, only uncompensated surrogacy is permitted. *States Where Paid Surrogacy Is Still Illegal*, *supra*; see NEB. REV. STAT. § 25-21,200 (West 2024).

⁴⁷ *Surrogacy Laws by State*, LEGAL PRO. GRP., <https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1> [<https://perma.cc/62ZP-XU2C>] (July 2024).

⁴⁸ *Why California is a Great Place for Surrogacy*, S. CAL. REPROD. CTR., [https://www.scrivf.com/why-california-is-a-great-place-for-surrogacy/#:~:text=California%20has%20some%20of%20the,egg%20donor%20\(if%20required\)](https://www.scrivf.com/why-california-is-a-great-place-for-surrogacy/#:~:text=California%20has%20some%20of%20the,egg%20donor%20(if%20required)) [<https://perma.cc/M98A-553N>] (last visited Feb. 3, 2025).

⁴⁹ See CAL. FAM. CODE § 7962 (West 2024).

⁵⁰ *Surrogacy Laws by State*, *supra* note 47.

As a result of these inclusive and transparent regulations, California has become one of the top surrogacy destinations in the world.⁵¹

In states where surrogacy regulation is non-existent, enforcing surrogacy agreements is challenging for courts with limited case law available.⁵² As a result, courts in these states do not take a uniform approach to enforcement.⁵³ For instance, “Pennsylvania lacks statutory law relating to the enforcement of surrogacy agreements, but most county courts have been willing to enter pre-birth orders recognizing intended parents as birth parents upon the child’s birth.”⁵⁴ Given that “case law remains uncertain in most states,” there is no jurisdictional predictability necessary to safeguard the continuously growing commercial surrogacy arrangements in the United States.⁵⁵

Despite the lack of accord amongst the states, the U.S.’s robust and liberal surrogacy market “attracts a nationally diverse [client] base” from nearly 150 countries, “varied in terms of marital/coupled

⁵¹ *Why California is a Great Place for Surrogacy*, *supra* note 48. Other states have express statutory permissions for surrogacy. Connecticut permits gestational surrogacy and expressly requires that the intended parents be named on the birth certificate as the child’s legal parents. *See* CONN. GEN. STAT. §7-48(a) (West 2024). In Delaware, gestational surrogacy is expressly permitted by statute since 2013. *See* DEL. CODE ANN. tit. 13, § 8-810 (West 2024). The Delaware statute clearly establishes the “requirements and enforcement of surrogacy arrangements . . .” *Id.* In Illinois, the codified Illinois Gestational Surrogacy Act “expressly permits gestational surrogacy, sets forth the specific contractual requirements for an enforceable agreement, establishes the legal parental rights of the intended parents, and—most notably—provides that any [i]ntended [p]arent(s) who comply with and satisfy the statutory requirements are required to be named on the child’s birth certificate . . .” *Surrogacy Laws by State*, *supra* note 47; *see* 750 ILL. COMP. STAT. ANN. 47/1-47/75 (West 2024). Therefore, intended parents can “bypass[] the need for court action to obtain parental rights.” *Surrogacy Laws by State*, *supra* note 47.

⁵² Melissa Ruth, *Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent Based-Standard*, 63 VILL. L. REV. TOLLE LEGE 1, 2 (2018).

⁵³ *Id.*

⁵⁴ *Id.* at 1 (footnote omitted). The controversial case of actress Sherri Shepherd “made headlines when she sought to have a surrogacy contract invalidated in a Pennsylvania court.” *Id.* “The Montgomery County Court of Common Pleas enforced the agreement, and on appeal, Shepherd argued that the court had ‘usurped legislative authority’ by upholding the agreement where there was no statute on point.” *Id.* (footnote omitted) (quoting Lizzy McLellan, *Actress Takes Surrogacy Case to State Supreme Court*, LEGAL INTELLIGENCER (Jan. 13, 2016), <https://www.law.com/thelegalintelligencer/almID/1202746996445/> [<https://perma.cc/AM2Z-GR4P>]). Pennsylvania’s highest court affirmed the ruling, “finding public policy did not prevent the enforcement of surrogacy agreement.” *Id.*

⁵⁵ Ruth, *supra* note 52, at 2.

status, age, sexual orientation, and race.”⁵⁶ The robustness of the American surrogacy market is fueled by geographic proximity (e.g., Canada and Mexico are “the top sender countries into the [U.S.]”) and the “[l]egal clarity regarding citizenship [for children] and parental status” for intended parents.⁵⁷ The ban on the once robust commercial surrogacy markets in countries such as India and Thailand directs intended parents to the United States despite higher costs, especially for same-sex couples “who have few national options outside of [America].”⁵⁸ Further, the abundance of advanced fertility clinics pull international clientele with sufficient financial means to the U.S. market.⁵⁹

2. *Israel*

In 1996, the Israeli government legalized gestational surrogacy under the “Embryo Carrying Agreements Law.”⁶⁰ While Israel strictly

⁵⁶ Heather Jacobson, *Cross-Border Reproductive Care in the USA: Who Comes, Why Do They Come, What Do They Purchase?*, 11 REPROD. BIOMEDICINE & SOC’Y ONLINE 42, 43, 45 (2020).

⁵⁷ *Id.* at 44-45.

⁵⁸ *Id.* at 45.

⁵⁹ *See id.* Top-notch marketing of some U.S. clinics catering to international clients is also a contributing factor. Providers “push the ‘safety of American health care’ as a reason why [intended parents] should choose . . . the [United States] over other countries” *Id.* Another aspect packaged by the U.S. market and purchased by foreign intended parents is “more ethical practices (such as ‘open’ programmes in which surrogates and intended parents know each other, and the use of financially stable surrogates alone) and ‘cultural similarities’ between intended parents, providers and surrogates.” *Id.* (citation omitted) (quoting Ingvill Stuvøy, *Accounting for the Money-Made Parenthood of Transnational Surrogacy*, 25 ANTHROPOLOGY & MED. 280, 281 (2018)).

⁶⁰ *Surrogacy in Israel*, MINISTRY OF HEALTH [hereinafter *Surrogacy in Israel*], <https://www.gov.il/en/service/embryo-carrying#:~:text=The%20conditions%20that%20must%20be,less%20than%2039%20years%20old> [https://perma.cc/XDA5-HA9H] (last visited Nov. 24, 2023); *see* Embryo Carrying Agreements (Agreement Approval and Status of the Newborn) Act, 5756-1996 (Isr.). The Act:

[A]llows entering into contracts between designated parents – spouses or individuals, at least one of whom has a genetic relation with the newborn, and a carrying mother (hereinafter: Surrogate) who agrees to conceive by way of an implantation of a fertilized ovum. The Surrogate agrees to carry the pregnancy for designated parents and to return the newborn, after the birth, to the designated parents.

regulates foreigners who wish to take part in its domestic surrogacy market, its “legal infrastructure” does not prohibit Israeli citizens from seeking cross-border surrogacy.⁶¹ Rather, “Israel merely verifies that the surrogacy agreement was signed according to the [law]” of the jurisdiction where the contract was “issued and that the surrogate mother waived her parental rights without coercion.”⁶² The law in Israel is influenced in part by the necessity to respond to problems raised by Jewish religious law.⁶³ Israel “was the first country in the world” to require that surrogacy contracts be approved by the state.⁶⁴

Broadly, the law contains two parts: “the first part deals with the surrogacy agreement, and the second part covers the status and parenting of the newborn.”⁶⁵ The agreement is considered to be a private contract by the “parties operating in the ‘free market,’ but the agreement must be submitted to a state authorization committee for validation.”⁶⁶ The committee is responsible for ensuring that the contract is consistent with the law (e.g., providing for the statutorily-mandated equitable and reasonable monthly compensation to the surrogate), that “both parties signed the contract of their own free will,” and that the terms and conditions therein pose no risk to the “[surrogate’s] health or the child’s welfare.”⁶⁷ The agreement cannot “include clauses that prevent the surrogate from receiving any medical treatment of her choice, including abortion.”⁶⁸ The law protects intended parents by forbidding surrogate mothers from withdrawing from surrogacy agreements, unless justified by a “genuine change”

Surrogacy in Israel, supra.

⁶¹ Noy Naaman, *Bordering Legal Parenthood*, 33 YALE L.J. 333, 349 (2022) (stating that Israeli citizens are not required to seek “authorization” for cross-border surrogacy).

⁶² *Id.* at 349-50 (footnote omitted).

⁶³ *Id.* at 338-39. For an overview of the influence of Jewish law on secular law in Israel, see Sophie Goodman, *The Impacts of Jewish Law on Policies and Law in Israel*, MICH. STATE INT’L L. REV. BLOG (May 14, 2018), <https://www.msuir.org/msuir-legalforum-blogs/2018/5/14/the-impacts-of-jewish-law-on-policies-and-law-in-israel> [<https://perma.cc/W7SF-SBCS>].

⁶⁴ Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. & HEALTHCARE POL’Y 111, 115 (2015).

⁶⁵ NUPHAR LIPKIN & ETTI SAMAMA, ISHA L’ISHA—HAIFA FEMINIST CTR., *SURROGACY IN ISRAEL: STATUS REPORT 2010 AND PROPOSALS FOR LEGISLATIVE AMENDMENT 8* (2010).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 9.

that occurs “prior to the issue of [a] parental order.”⁶⁹ The law on surrogate motherhood allows for a preconception agreement to include payments to be made to the surrogate mother.⁷⁰

Many Israeli intended parents have capitalized on the surrogacy option that their pro-natalist regime has granted.⁷¹ However, male couples and single men were long excluded by the Israeli surrogacy law, which only opened the legal surrogacy route to heterosexual couples and single women.⁷² However, in 2021, the Israeli Supreme Court announced a landmark decision that lifted surrogacy restrictions for LGBTQ+ people and provided them with equal access to surrogacy.⁷³ The dream of becoming parents could now be fulfilled at home rather than on the other side of the world.

B. Countries Prohibiting Commercial Surrogacy: Italy & the U.K.

Surrogacy contracts are “illegal or unenforceable” in many European jurisdictions.⁷⁴ France, Germany, Spain, Switzerland, and Italy, for instance, outlaw surrogacy arrangements in any form.⁷⁵ However, these countries do not always agree on how to treat children born from transnational surrogacy in terms of citizenship.⁷⁶ Recent legislative moves in Italy and the U.K. illustrate the diverging ideological trends surrounding cross-border surrogacy.

⁶⁹ *Id.* at 8.

⁷⁰ *Id.*

⁷¹ See generally Sigrid Vertommen, *Surrogacy at the Fertility Frontier: Rethinking Surrogacy in Israel/Palestine as an (Anti)Colonial Episteme*, 14 HIST. OF THE PRESENT 108 (2024).

⁷² *Id.* at 108, 127. The authors clarified that heterosexual couples are also eligible to enter a surrogacy agreement domestically but choose to undergo cross-border surrogacy abroad because of cheaper cost, faster search time, and desire to distance themselves from the surrogate. *Id.* at 109.

⁷³ *Israel: Supreme Court Authorizes Surrogacy Arrangements for Gay Men*, LIBR. OF CONG., [https://www.loc.gov/item/global-legal-monitor/2021-07-29/israel-supreme-court-authorizes-surrogacy-arrangements-for-gay-men/#:~:text=Viewed%20as%20a%20landmark%20ruling,sex%20couples%20and%20single%20men,\[https://perma.cc/VJ96-PPY2\]](https://www.loc.gov/item/global-legal-monitor/2021-07-29/israel-supreme-court-authorizes-surrogacy-arrangements-for-gay-men/#:~:text=Viewed%20as%20a%20landmark%20ruling,sex%20couples%20and%20single%20men,[https://perma.cc/VJ96-PPY2]) (last visited Nov. 21, 2024).

⁷⁴ Shepherd, *supra* note 3, at 297.

⁷⁵ *Id.* at 297-98.

⁷⁶ *Id.* at 298.

3. Italy

The newborn Chiappa was born via surrogacy in Seattle and then traveled to Milan with his intended parents.⁷⁷ The same-sex Italian couple held their infant son's American birth certificate and passport, excited to start a new chapter as a family.⁷⁸ Little did they know, their son would soon become a tourist in their home country.⁷⁹ In July 2023, the Italian parliament approved a bill imposing fines on people undertaking "disgraceful" transnational surrogacy.⁸⁰ All forms of surrogacy have been banned in Italy since 2004. The proposal to extend the ban to include overseas surrogacy was led by the then Prime Minister, who came to power in October 2013.⁸¹ If the bill passes, "Italy would be the first country to legislate the prosecution of surrogacies done abroad in countries where it is legally allowed."⁸² The current draft proposes that Italian citizens who travel abroad to contract with foreign surrogates "could face prosecution resulting in up to two years in prison and fines of upwards of €1 million."⁸³

The current Italian law prohibits and punishes under criminal law any resort to domestic surrogacy.⁸⁴ Further, only married,

⁷⁷ Jason Horowitz, *Surrogacy Emerges as the Wedge Issue for Italy's Hard Right*, N.Y. TIMES (Apr. 4, 2023), <https://www.nytimes.com/2023/04/04/world/europe/italy-surrogacy-same-sex-couples.html> [<https://perma.cc/C6KF-RALN>].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Angela Giuffrida, *Italian Parliament Approves Bill to Criminalise Surrogacy Abroad*, THE GUARDIAN (July 26, 2023), <https://www.theguardian.com/world/2023/jul/26/italian-parliament-approves-bill-criminalise-people-seeking-surrogacy-abroad> [<https://perma.cc/XLG3-G9Q8>].

⁸¹ *Id.*

⁸² Dale Seufert-Navarro, *Meloni's Surrogacy Ban Foreshadows a Troubling Future for Italy*, CAROLINA POL. REV. (Aug. 17, 2023), <https://www.carolinapoliticalreview.org/editorial-content/2023/8/17/melonis-surrogacy-ban-foreshadows-a-troubling-future-for-italy> [<https://perma.cc/3H4L-R2ZW>].

⁸³ *Id.*

⁸⁴ See Ismini Kriari & Alessia Valongo, *International Issues Regarding Surrogacy*, 2 IT. L.J. 331, 332 (2016) (stating that Italian law prohibits "medically assisted procreation" techniques); Legge 19 febbraio 2004, n. 40, G.U., Feb. 24, 2004, n. 45 (It.); OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., CALL FOR INPUTS – REPORT OF THE SPECIAL RAPPORTEUR ON THE SALE AND SEXUAL EXPLOITATION OF CHILDREN 6 (2019) [hereinafter CALL FOR INPUTS], https://www.ohchr.org/sites/default/files/Documents/Issues/Children/SR/Surrogacy/CivilSociety/Joint_submission_SurrogacyItaly.docx [<https://perma.cc/KU4J-MGU4>] ("While in 2002 the Court of Rome authorised a physician to carry out altruistic surrogacy in Italy (Trib. di Roma, sex. XI, 14/02/2000), surrogacy is currently regulated under article 12,

heterosexual couples are permitted to use Assisted Reproductive Technologies (ART).⁸⁵ Consequently, many Italian intended parents “decide to embark on a surrogacy journey abroad . . . despite the uncertainties . . . arising out of this choice” upon returning to their homeland with a newborn child.⁸⁶ This poses serious challenges to the parental status of couples or individuals who have children through cross-border surrogacy.⁸⁷ While the Italian Civil Code recognizes “parentage by natural reproduction or by assisted reproductive technology,” there are no laws that “establish[] any legal parentage . . . to Italian citizens doing surrogacy abroad.”⁸⁸ Cases like baby Chiappa are not a complete surprise given this legislative silence. Italy’s lack of parentage laws concerning cross-border surrogacy often subjects intended parents to “prolonged battles before Italian Courts to obtain recognition of their rights as parents, which they legitimately acquired abroad.”⁸⁹

Many justifications for the ban under Italian law are deeply rooted in the notion of public policy.⁹⁰ According to this view, “the state has an [ethical] interest in preventing children from being turned into commodities” and protecting them from negative “psychological and social development” from “uncertain” maternity.⁹¹ Another perspective focuses on how surrogacy renders women mere “means to an end” and not “human[s] worthy of [dignity and] respect” as per Article 2 of the Italian Constitution.⁹² These justifications are said to bolster “the state’s intrusion into reproductive decisions in the area of commercial surrogacy contracts.”⁹³ Some opposition politicians outcried that the proposed law is targeting LGBTQ+ people as part of

paragraph 6, law 40/2004 . . . which punishes whoever, in any form, produces, arranges or advertises the sale of gametes, embryos, or surrogacy, with imprisonment from three months to two years and a fine ranging from 600,000 to one million euros.”).

⁸⁵ Kriari & Valongo, *supra* note 84.

⁸⁶ CALL FOR INPUTS, *supra* note 84.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Kriari & Valongo, *supra* note 84, at 343.

⁹¹ *Id.* at 332 (describing uncertain maternity due to the “separation of the various mother figures”).

⁹² *Id.* at 332-33; *see also* Art. 2 COSTITUZIONE [COST.] (It.).

⁹³ *Id.* at 334.

the government's "conservative agenda."⁹⁴ The ideological clash between "an act of freedom to rent one's womb" and "an act of love to consider children as an over-the-counter product in a supermarket" will be difficult to balance out in the near future.⁹⁵

4. *The United Kingdom*

The United Kingdom is not a popular spot for surrogacy, perhaps "due to the non-commercial nature of surrogacy in the UK"⁹⁶ In the U.K., altruistic surrogacy is permitted, but commercial surrogacy is outlawed under the Surrogacy Arrangements Act 1985 (the Surrogacy Act).⁹⁷ Consequently, British intended parents are increasingly seeking cross-border surrogacy arrangements in countries where more secure legal frameworks exist.⁹⁸

In the U.K.,⁹⁹ "the surrogate is the legal mother of any newborn child."¹⁰⁰ Consequently, foreign intended parents "would need to return to their home country to establish legal parenthood."¹⁰¹

⁹⁴ *Surrogate Parenthood is 'Inhuman,' Italy's Giorgia Meloni Says*, REUTERS (Apr. 12, 2024), <https://www.reuters.com/world/europe/surrogate-parenthood-is-in-human-italys-meloni-says-2024-04-12/> [<https://perma.cc/GJW6-E963>].

⁹⁵ Emma Bubola, *Has Power Moderated Italy's Leader? Not to Same-Sex Parents*, N.Y. TIMES (Aug. 18, 2024), <https://www.nytimes.com/2024/08/18/world/europe/italy-same-sex-parents-meloni.html> [<https://perma.cc/MQ5U-WRTX>].

⁹⁶ Lottie Park-Morton, *International Surrogacy Arrangements (Part 3): The UK as a Surrogacy Destination*, REFORMING SURROGACY L. (June 12, 2023), <https://reformingsurrogacylaw.blog/2023/06/12/international-surrogacy-arrangements-part-3-the-uk-as-a-surrogacy-destination/#:~:text=Opting%20for%20the%20UK%20as,perceived%20shortage%20of%20available%20surrogates.> [<https://perma.cc/4DG3-B5HJ>].

⁹⁷ Surrogacy Arrangements Act 1985, c. 49 (UK).

⁹⁸ See Vasanti Jadvā, Helen Prosser & Natalie Gamble, *Cross-Border and Domestic Surrogacy in the UK Context: An Exploration of Practical and Legal Decision-Making*, 24 HUM. FERTILITY 93, 100 (2021) (stating a majority of the British intended parents interviewed sought surrogacy in the United States due to its "legal framework . . . which offered certainty and peace of mind to parents").

⁹⁹ In the U.K., surrogacy is governed by the Surrogacy Arrangements Act 1985 and certain provisions of the Human Fertilisation and Embryology Act 2008.

¹⁰⁰ Park-Morton, *supra* note 96. For a detailed overview of the surrogacy process in the U.K., see *The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales*, DEP'T OF HEALTH & SOC. CARE [hereinafter *The Surrogacy Pathway*], <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales> [<https://perma.cc/NMU2-KP7V>] (last visited Oct. 14, 2024).

¹⁰¹ Park-Morton, *supra* note 96.

However, simply taking the child out of the U.K. does not establish the legal parentage of the intended parents.¹⁰² Instead, “the surrogate, as the legal mother, would need to travel with the intended parents and the child, or she can give written authorisation for the intended parents to remove the child from the [U.K.’s] jurisdiction.”¹⁰³ The lengthy application process receives criticism as it does not reflect the shared intentions of all parties and prioritize “the best interests of the child.”¹⁰⁴ The agony is shared with British intended parents. The legal complexity at home, especially related to parental rights, is reportedly the most common reason for pursuing cross-border surrogacy for U.K. intended parents, America being a top destination for its “better legal framework”¹⁰⁵

However, it seems change may be happening for a more regulated altruistic surrogacy system in the U.K. The driver of change is “to dissuade [British] citizens from opting for international surrogacy agreements, which can bring a greater risk of exploitation of women and children.”¹⁰⁶ In March 2023, the Law Commission of England and Wales proposed the introduction of “a robust new system to govern domestic surrogacy, which will work better for children, surrogates and intended parents.”¹⁰⁷ The report includes key recommendations, including “a new regulatory route for domestic surrogacy arrangements” that will enable intended parents to become a child’s legal parents at birth as opposed to ordinarily waiting anywhere from six to twelve months.¹⁰⁸ Immediate legal parentage “would be subject

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See Surrogacy Laws to Be Overhauled Under New Reforms – Benefitting the Child, Surrogate and Intended Parents*, L. COMM’N (Mar. 29, 2023) [hereinafter *Surrogacy Laws to Be Overhauled*], <https://lawcom.gov.uk/surrogacy-laws-to-be-overhauled-under-new-reforms-benefitting-the-child-surrogate-and-intended-parents/> [https://perma.cc/EV3V-3PEL].

¹⁰⁵ Jadvā et al., *supra* note 98, at 102.

¹⁰⁶ *Surrogacy Laws to Be Overhauled*, *supra* note 104.

¹⁰⁷ *Surrogacy*, L. COMM’N, <https://lawcom.gov.uk/project/surrogacy/> [https://perma.cc/4NE5-4UPA] (last visited Apr. 20, 2025). The Law Commission of England and Wales and the Scottish Law Commission are independent bodies established by statute to make recommendations to government to reform the law in England, Wales, and Scotland. The U.K. Government considers their recommendations when deciding whether to change the law. *See About Us*, L. COMM’N, <https://lawcom.gov.uk/about-us/> [https://perma.cc/QXQ8-4ESZ] (last visited May 15, 2025); SCOTTISH L. COMM’N, <https://www.scotlawcom.gov.uk> [https://perma.cc/X2NP-BLFU] (last visited May 15, 2025).

¹⁰⁸ *Surrogacy*, *supra* note 107.

to the surrogate having the right to withdraw consent.”¹⁰⁹ The new pathway incorporates “screening and safeguard[s],” including medical and criminal records checks, independent legal advice, and counseling.¹¹⁰ The recommendations, however, are not a new pathway for commercial surrogacy to open in the U.K. Under the new scheme, surrogacy in the U.K. would continue to operate on a strictly altruistic basis, meaning that commercial surrogacy arrangements will remain unenforceable.¹¹¹

While the focus of the reforms is to make British domestic surrogacy arrangements a more attractive option, cross-border surrogacy agreements may not be completely out of the picture. The report also recommends legal and practical measures to safeguard the welfare of those children of British intended parents who opted for cross-border surrogacy arrangements.¹¹² If the British government accepts the recommendations and Parliament enacts the bill, British intended parents who go abroad for surrogacy may be able to bring children born to foreign surrogate mothers to the U.K. more quickly as the bill permits the application for British nationality to be undertaken before the child’s birth.¹¹³ From a British perspective, the possible regulatory future of commercial surrogacy, considering a recent review of the legal framework, illustrates that legal reform is necessary.

C. From Destination to Prohibition of Commercial Surrogacy:

¹⁰⁹ *Id.*

¹¹⁰ L. COMM’N & SCOTTISH L. COMM’N, BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW VOLUME I: CORE REPORT 30 (2023), https://webarchive.nationalarchives.gov.uk/ukgwa/20250109093958mp_/https://cloud-platform-e218f50a4812967ba1215eaccede923f.s3.amazonaws.com/uploads/sites/30/2023/03/1.-Surrogacy-core-report.pdf [<https://perma.cc/Q52S-5CUB>].

¹¹¹ *Id.* at 14.

¹¹² L. COMM’N & SCOTTISH L. COMM’N, BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW VOLUME II: FULL REPORT 494-95 (2023), https://webarchive.nationalarchives.gov.uk/ukgwa/20250109102443mp_/https://cloud-platform-e218f50a4812967ba1215eaccede923f.s3.amazonaws.com/uploads/sites/30/2023/03/2.-Surrogacy-full-report.pdf [<https://perma.cc/VW6F-YHAX>].

¹¹³ *Id.* at 509.

*Thailand & India**5. India*

India used to be the hope of many intended parents across the globe searching for “affordable” surrogacy.¹¹⁴ Fueled by low-cost surrogacy arrangements, the once “largely unregulated” Indian surrogacy market was the “backbone of an estimated \$400 million-a-year industry.”¹¹⁵ However, it took one baby to change the law. In 2008, the famous case of Baby Manji disrupted India’s booming commercial surrogacy market.¹¹⁶ In this case, a Japanese couple traveled to India in search of a local surrogate.¹¹⁷ A fertility doctor in India “arranged a surrogacy contract with a married Indian woman” and supervised the creation of an embryo from the father’s sperm and an anonymous donor’s egg.¹¹⁸ The following year, a month after the couple’s divorce, Baby Manji was born.¹¹⁹ Unlike her ex-husband, the wife—the intended mother—expressed no interest in being a parent to Baby Manji.¹²⁰ While Baby Manji had several de facto mothers—the intended [Japanese] mother who contracted for the surrogacy, the [anonymous Indian] egg donor, and the [Indian] gestational surrogate—Baby Manji was legally motherless because the surrogacy contract did not legally bind any of these mothers in terms of “parental responsibilities.”¹²¹ The surrogacy contract did not foresee the situation that arose “[n]or did any existing laws help to

¹¹⁴ Annie Gowen & Rama Lakshmi, *India’s ‘Rent-a-Womb’ Industry Could Close Doors to Foreigners*, WASH. POST (Oct. 18, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/10/28/indias-rent-a-womb-industry-could-close-doors-to-foreigners/> [https://perma.cc/6ESJ-U9EZ].

¹¹⁵ *Id.*

¹¹⁶ See KARI POINTS, KENAN INST. FOR ETHICS, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI (2009), https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji_Case2015.pdf [https://perma.cc/Z647-D4PH].

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.* (footnote omitted).

¹¹⁹ *Id.* As compensation for carrying Baby Manji, the surrogate “received a house worth 325,000 rupees (US \$6,825), a payment of 50,000 rupees (US \$1,050), and 5,000 rupees (US \$105) per month for living expenses while pregnant.” *Id.* at 4-5. This “monthly total was equal to ‘the salary of a well-paid blue-collar job’ in India” in 2008. *Id.* at 5 (quoting Rhys Blakely, *Surrogacy Orphan Trapped in Red Tape After Mothers Abandon Her*, LONDON TIMES, Aug. 7, 2008, at 16).

¹²⁰ POINTS, *supra* note 116, at 2.

¹²¹ *Id.* at 2, 5.

clarify the matter.”¹²² The “existing definitions of family and citizenship under Indian and Japanese law” were unfit to grapple with what “the parentage or nationality of Baby Manji” was.¹²³ The Baby Manji case rose to a “legal and diplomatic crisis”¹²⁴ as it “was becoming clear that [the Japanese father] and [the newborn baby in India] were caught between two legal systems.”¹²⁵

In light of the Baby Manji controversy¹²⁶ and the “potential for commercial exploitation,” calls mounted in 2008 for “national surrogacy legislation.”¹²⁷ The growing negative publicity toward foreign parents engaging in fertility tourism “led to strengthened regulations regarding medical visas in India in 2012.”¹²⁸ In 2015, the Indian government issued a directive prohibiting foreign intended parents from entering surrogacy arrangements in India.¹²⁹ This directive was codified into law in 2021 with the Surrogacy (Regulation) Act, which strictly limited surrogacy services to Indian citizens and introduced regulations to protect the rights of surrogates.¹³⁰ The resulting ban was an “expression of the government’s reservations about the growing business of transnational surrogacy in India.”¹³¹ However, the decision to ban foreign clients did not receive glowing reviews. Many clinic owners and fertility specialists criticized the ban as a lose-lose move, discriminating against foreign intended parents who were desperate to fulfill their dreams of having children and closing the door for a poor Indian

¹²² *Id.* at 2.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 2, 6.

¹²⁶ Baby Manji’s father had to take the matter to India’s Supreme Court, and the Indian government issued Manji an identity certificate, which did not mention Manji’s “nationality, mother’s name, or religion” and “was valid only for Japan.” POINTS, *supra* note 116, at 6-7. After the Japanese embassy issued Manji a one-year visa, Manji eventually flew home to Japan with her father and grandmother, who had come to India to take care of her. *Id.* at 7.

¹²⁷ *Id.*

¹²⁸ Yuri Hibino, *Non-Commercial Surrogacy in Thailand: Ethical, Legal, and Social Implications in Local and Global Contexts*, 12 ASIAN BIOETHICS REV. 135, 135 (2020) [hereinafter *Non-Commercial Surrogacy in Thailand*].

¹²⁹ *Id.* at 141.

¹³⁰ The Surrogacy (Regulation) Act, 2021 (India).

¹³¹ Nishtha Lamba, *Why Ban Commercial Surrogacy?*, HINDU BUS. LINE (Jan. 19, 2018), <https://www.thehindubusinessline.com/opinion/why-ban-commercial-surrogacy/article8124254.ece> [https://perma.cc/T5U9-9ZKV].

woman to earn around 400,000 rupees (\$5,900) and have the “chance to build a house” or pay for her children’s education.¹³²

The Surrogacy (Regulation) Act of 2021 came into force in January 2022.¹³³ The law “expressly prohibit[s]” domestic commercial surrogacy and the exploitation of surrogate mothers and children born through surrogacy by “confer[ring] different rights and protections”¹³⁴ Any person or entity, including a surrogacy clinic or registered medical practitioner, is prohibited from engaging in any form of commercial surrogacy that encourages a woman to become a surrogate mother.¹³⁵

Even though the Act was enacted with the “woman-centric” intention of combating the exploitation of surrogates, there are concerns that illegal agreements will be created underground if there are markets fed by willing parents and surrogate women.¹³⁶ The altruistic intention of a surrogate is also a questionable reality in India, as women in these situations “are rarely the final decision-makers” in matters concerning their bodily autonomy.¹³⁷ The socioeconomic realities of Indian society, interwoven with moral conundrums and national stigma, drove India to enact a law that Indian society dislikes.

¹³² Nirmala George, *Indian Surrogates Feel Hurt by Gov’t Ban on Foreign Clients*, SAN DIEGO UNION-TRIBUNE (Nov. 17, 2015), <https://www.sandiegouniontribune.com/sdut-surrogates-feel-hurt-by-indias-ban-on-foreign-2015nov17-story.html> [<https://perma.cc/S46X-GCM4>]; see also Roli Srivastava, *Factbox: Which Countries Allow Commercial Surrogacy?*, REUTERS (Jan. 19, 2017), <https://www.reuters.com/article/us-india-women-surrogacy-factbox-idUSKBN1530FP/> [<https://perma.cc/K56S-F6QD>].

¹³³ Paramjit S. Jaswal & Jasdeep Kaur, *SURROGATE MOTHERHOOD IN INDIA: An Analysis of Surrogacy (Regulation) Act, 2021*, 4 SHIMLA L. REV. 257, 258 (2021).

¹³⁴ *Id.* at 258-59; see Surrogacy (Regulation) Act, 2021, § 4 (prohibiting the commercialization of surrogate motherhood or motherhood procedures in surrogacy clinics and any other location where such procedures may be performed).

¹³⁵ Surrogacy (Regulation) Act, 2021, § 3(v).

¹³⁶ G. Seetharaman, *Ban on Surrogacy for Foreigners: How Govt’s Recent Decision Will Push a Booming Industry into Black Market*, ECON. TIMES (Nov. 8, 2015), <https://economictimes.indiatimes.com/news/politics-and-nation/ban-on-surrogacy-forforeigners-how-govts-recent-decision-will-push-a-booming-industry-into-blackmarket/articleshow/49703554.cms?from=mdr> [<https://perma.cc/9C28-MW8T>].

¹³⁷ Jaswal & Kaur, *supra* note 133, at 264; see also Seetharaman, *supra* note 136 (“Surrogacy preys on poor women. We cannot pretend that women in India suddenly have choice and autonomy where their reproduction is concerned. Who a woman gives birth to or what the sex of the baby will be is decided by their families. They claim ownership over women’s wombs.”).

6. Thailand

Once a flourishing destination country known as “the womb of Asia”¹³⁸ for foreign wishful parents, Thailand currently criminalizes commercial surrogacy.¹³⁹ In 2015, Thailand passed a federal law¹⁴⁰ completely prohibiting commercial surrogacy for international intended parents in the wake of several controversial scandals, notably the “Baby Gammy” incident that sparked fierce debate in 2014.¹⁴¹ The case highlighted “the complications of an unregulated surrogacy process” and lax laws.¹⁴² The Baby Gammy incident “quickly made national headlines, and the Thai government began taking steps to restrict the surrogacy process”¹⁴³

At the time of the first surrogacy birth in Thailand in 1991, there was no domestic legislation regulating the practice.¹⁴⁴ Under the current Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act), only “married, heterosexual, Thai couples” may engage in surrogacy in Thailand.¹⁴⁵ The law prohibits any monetary exchange between the surrogate mother and the

¹³⁸ Abby Phillip, *A Shocking Scandal Led Thailand to Ban Surrogacy for Hire*, WASH. POST (Feb. 20, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/20/a-shocking-scandal-led-thailand-to-ban-commercial-surrogacy-for-hire/> [https://perma.cc/MPS3-5GDM].

¹³⁹ *Thailand: New Surrogacy Law*, LIBR. OF CONG. (Apr. 6, 2015) [hereinafter *ART Act*], <https://www.loc.gov/item/global-legal-monitor/2015-04-06/thailand-new-surrogacy-law/> [https://perma.cc/XFF6-GCBZ] (“If anyone is involved in surrogacy for profit, he/she will be sentenced upon conviction to imprisonment for up to ten years or a fine of up to 200,000 Baht (about US\$6,140).”).

¹⁴⁰ *Id.* (“The National Legislative Assembly of Thailand enacted the Protection of Children Born Through Assisted Reproductive Technologies Act (ART Act). This act significantly protects children born through Assisted Reproductive Technologies (ART) and sets the legal procedures the spouses (referred as ‘applicants’) must follow in order to have such children.”).

¹⁴¹ See Kayla Kaufman, *The Womb of Asia No Longer: Thailand Bans Commercial Surrogacy*, BOWDOIN REV. (May 18, 2015), <https://bowdoinreview.com/2015/05/18/the-womb-of-asia-no-longer-thailand-bans-commercial-surrogacy/> [https://perma.cc/SCW5-U66V]. The scandalous “Baby Gammy” case “involved an Australian couple who took home only one baby from the set of twins they paid a Thai surrogate mother to carry.” *Id.*

¹⁴² *All You Need to Know About Completing a Surrogacy in Thailand*, SURROGATE.COM, <https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-thailand/> [https://perma.cc/ZD9E-SY2L] (last visited Mar. 30, 2025).

¹⁴³ *Id.*

¹⁴⁴ *Non-Commercial Surrogacy in Thailand*, *supra* note 128, at 145.

¹⁴⁵ *Id.*; Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 § 3 (2015) (Thai.).

intended parents.¹⁴⁶ In its current legal state, surrogacy in Thailand is not an option for foreign intended parents.¹⁴⁷ The Thai government implemented this law with the “primary aim” of “restrict[ing] rampant commercial surrogacy and . . . eliminat[ing] access to surrogacy for foreign intended parents,” whom the government viewed as “the source of the major scandals” that tainted Thailand’s reputation.¹⁴⁸

The passage of the ART Act in Thailand was viewed as essential to protecting the often marginalized Thai surrogates and children born via commercial surrogacy.¹⁴⁹ However, skepticism about robust enforcement still exists.¹⁵⁰ Critics argue that the law has not actually prevented the now prohibited surrogacy practices in Thailand but has rather forced it underground, “making [the practice] less visible and less regulated [and] increasing the risk of coercive and abusive practices.”¹⁵¹ Furthermore, criminalizing commercial surrogacy means that those women who continue to enter into surrogacy arrangements “are far less likely to get valuable legal or medical advice or to ask the police for help if they run into trouble.”¹⁵²

In a bid to increase medical tourism in the country, Thailand announced a plan in March 2024 to end the ban on “foreigners availing themselves of domestic commercial surrogacy services”¹⁵³ The

¹⁴⁶ Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 §§ 40-41.

¹⁴⁷ See *Assisted Reproductive Technology (ART) that Uses Surrogacy in Thailand*, U.S. EMBASSY & CONSULATE IN THAI., <https://th.usembassy.gov/u-s-citizen-services/child-family-matters/birth/surrogacy/> [<https://perma.cc/TW4A-GD4V>] (last visited Oct. 29, 2023) (advising U.S. citizens “not to engage in commercial surrogacy arrangements in Thailand”).

¹⁴⁸ *Id.* National Legislative Assembly member Wanlop Tankananurak “hailed the law” as stopping the disgraceful national brand as “the world’s womb.” Michele Goodwin, *Thailand Bans Foreign Commercial Surrogacy*, PETRIE-FLOM CTR.: BILL OF HEALTH (Oct. 28, 2023, 2:58 PM), <https://blog.petrieflom.law.harvard.edu/2015/03/02/thailand-bans-foreign-commercial-surrogacy/> [<https://perma.cc/BE8V-XTFV>].

¹⁴⁹ Goodwin, *supra* note 148.

¹⁵⁰ *Id.* (“The ‘rule of law,’ or ‘law on the books’ is often not enough to impact law in action and social practices. Merely enacting laws and policies prohibiting commercial surrogacy will not end the practice.”).

¹⁵¹ *Id.* (“[I]t remains to be seen whether the law would be implemented, enforced, and successful in achieving its goals.”).

¹⁵² Zsombor Peter, *Thailand Prepares to Lift Commercial Surrogacy Ban*, VOA NEWS (Mar. 10, 2024, 10:16 AM), <https://www.voanews.com/a/thailand-prepares-to-lift-commercial-surrogacy-ban/7521512.html> [<https://perma.cc/8M77-ZW8N>].

¹⁵³ Bloomberg, *Thailand Takes Steps to End Ban on Surrogacy Services for Foreign, Same-Sex Couples*, YAHOO! NEWS (Apr. 1, 2024, 6:00 PM), <https://www.yahoo.com/news/thailand-takes-steps-end-ban-220000962.html>

plan is a part of a “package” intended to ameliorate the falling birthrates in Thailand.¹⁵⁴ While the bill is en route to the National Assembly for a vote, fears are mounting that legalizing commercial surrogacy will bring on an “expansion” of abuse and human trafficking.¹⁵⁵ The Thai government has been urged “to create clear rules for the hospitals and clinics licensed to provide surrogacy services,” establish a “standardized contract for the couples and surrogate mothers to sign,” and “vigorously follow up with both parties . . . after the babies are delivered.”¹⁵⁶ Those who do not welcome the change also voice that Thailand should become a party to the Hague Convention on Child Protection, which would be vital in assisting authorities “with cross-border problems that might arise with couples from overseas.”¹⁵⁷ Supporters of the decriminalization plan emphasize that surrogate mothers will be in a better position to report exploitation and receive necessary assistance.¹⁵⁸ They also argue that exploitation is less likely to happen because there will be a better regulatory safety net in place for surrogates who seek legal and medical advice.¹⁵⁹

II. LEGAL CHALLENGES POSED BY CROSS-BORDER SURROGACY

What has happened or is currently developing in the six countries discussed in this Note is a microcosm of the global commercial surrogacy landscape, which is subject to diverse legal treatments.¹⁶⁰ As described, this legal diversity facilitates cross-border surrogacy—

[<https://perma.cc/ZTS3-2RXJ>]. Further, Thailand may permit same-sex couples to engage in commercial surrogacy once the country legalizes same-sex marriages later in 2024. *Id.*

¹⁵⁴ Peter, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ In September 2023, while this Note was being developed, the Georgian government announced it intends to pass legislation that would ban commercial surrogacy for foreigners, effective January 1, 2024. In June 2023, Prime Minister Irakli Garibashvili declared that a ban was needed to “protect surrogate mothers and children . . . and to prevent child trafficking . . .” Only altruistic surrogacy will be permitted and strictly for Georgians. Caitlin Allen, *Georgia’s Proposed Ban Could Change the Landscape for Hired Pregnancies*, NEW LINES MAG. (Feb. 27, 2024) <https://newlinesmag.com/reportage/georgias-proposed-ban-could-change-the-landscape-for-hired-pregnancies/> [<https://perma.cc/8KYE-64WY>].

citizens living in a country where commercial surrogacy is prohibited can travel to a country where the process is legalized. Many of the ethical problems that cross-border surrogacy raises, especially concerns related to the exploitation, coercion, and dehumanization of surrogates, prompted various countries to permanently prohibit the practice for citizens and foreigners alike. Legal concerns “become exacerbated” in the cross-border surrogacy context because of the multi-party nature of international arrangements.¹⁶¹ While contemporary debates focus on high-profile abuses inflicted on surrogates in unequal power dynamics, intended parents are often the subject of exploitation as they are trapped in the conflicting regulatory maze. Furthermore “conflicting citizenship laws . . . can leave surrogate-born children stateless and their intended parents fighting for parental rights.”¹⁶² This Part discusses two specific challenges that intended parents and surrogate-born children experience.

A. Fraudulent Misrepresentation by Surrogacy Agency

Cases where emotionally vulnerable intended parents, excited at the prospect of bringing a child into the world, rely on misinformation presented by fertility treatment clinics in destination countries are common.¹⁶³ The misrepresentation problems are acute because the Internet plays a significant role in creating geographical, cultural, and language barriers between the intended parents and the surrogate.¹⁶⁴ A “sophisticated surrogate scam[]” by sham surrogacy agencies that lured potential parents with “glossy brochures,” phantom surrogates, and “even staged meetings” are the cruel side of what is typically a “hopeful” journey.¹⁶⁵ A U.K.-registered global surrogacy agency brokered surrogacy contracts for its international clients, selling the illusion of legitimacy by “bearing the name of its UK entity” and touting a “world renowned reputation.”¹⁶⁶ The global agency issued

¹⁶¹ Margalit, *supra* note 20, at 43.

¹⁶² Shepard, *supra* note 3, at 293.

¹⁶³ Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L. J. 1147, 1149 (2013).

¹⁶⁴ *Id.* at 1168.

¹⁶⁵ Tyler Rodgers, *The Silent Epidemic of Surrogate Scams: A Private Investigator's Inside Look*, PURSUIT MAG. (Nov. 2, 2023), <https://pursuitmag.com/the-silent-epidemic-of-surrogate-scams-a-private-investigators-inside-look/> [<https://perma.cc/MC4X-36WF>].

¹⁶⁶ Shanti Das, Simon Bowers & Malia Politzer, *Global Surrogacy Agency Accused of Putting Women at Risk with 'Unethical' Medical Procedures*, THE

contracts violating U.K. laws and operated in “grey markets where surrogacy is neither legal nor illegal”¹⁶⁷ Lax regulation allowed this agency to freely operate, using the absence of legal restrictions to market propaganda such as the declaration that it “provide[s] ‘the best possible service to [its] intended parents.’”¹⁶⁸ This agency targeted international intended parents without ready access to surrogacy services.¹⁶⁹

In the U.S., a shocking tale brought about a FBI investigation to catch a San Diego-based surrogacy agency that illegally created an inventory of babies to sell to unwitting would-be parents.¹⁷⁰ Even more shocking was that two reproductive law attorneys took part in the fraud.¹⁷¹ They used their expert knowledge to “circumvent[] surrogacy regulations that require contracts between surrogates and intended parents to be executed before pregnancy occurs,” forcing a pre-recruited “inventory of surrogates” to travel to Ukraine and “become implanted with embryos from anonymous donors” prior to the signing of any surrogacy agreement.¹⁷² The two lawyers used the internet to recruit surrogates and intended parents, inducing them “to ‘assume’ the non-existent surrogacy agreement” and taking between \$100,000 and \$150,000 from intended parents.¹⁷³

Blind reliance on these kinds of misrepresentations may induce desperate intended parents to agree to contracts with unfavorable terms, potentially increasing the total costs they incur and lowering their chances of bringing home a newborn child. In contrast, intermediary surrogacy agencies pocket a great deal of money,

GUARDIAN (Dec. 18, 2022, 3:00 AM), <https://www.theguardian.com/society/2022/dec/18/global-surrogacy-agency-accused-of-putting-women-at-risk-with-unethical-medical-procedures> [<https://perma.cc/GWW9-EUG5>].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Surrogacy Scam: Played on Emotions of Vulnerable Victims*, FED. BUREAU OF INVESTIGATIONS (Sept. 13, 2011), <https://www.fbi.gov/news/stories/surrogacy-scam-played-on-victims-emotions> [<https://perma.cc/NXN4-6XJC>].

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* The scheme unraveled “when one of the surrogates, nearly seven months pregnant, was worried that parents had not been found for the baby she was carrying. She contacted a lawyer, who then contacted the FBI’s San Diego office.” *Id.* For more surrogacy scam cases, see Ellen Trachman, *Buyer Beware: A Maryland Surrogacy Agency Was Scamming Vulnerable Hopeful Parents*, ABOVE THE L. (Jan. 8, 2020, 1:15 PM), <https://abovethelaw.com/2020/01/buyer-beware-a-maryland-surrogacy-agency-was-scamming-vulnerable-hopeful-parents/> [<https://perma.cc/YWE9-22FL>].

leveraging their inside knowledge to fraudulently maneuver in the current unregulated international surrogacy market. Caveat emptor seems to be the only viable answer at this present stage of cross-border surrogacy industry.

B. Parentless and Stateless Children

Intended parents fight for parental rights. A home country in which surrogacy is illegal “would likely recognize the birth mother-surrogate as the legal parent.”¹⁷⁴ However, the birth country where the surrogate is usually based would assign the legal parentage of the child to the intended parents.¹⁷⁵ As “neither sees a legal relationship between the child and its citizens,” both the home and birth countries would refuse to assign citizenship to the child.¹⁷⁶ This is referred to as the “problem of the stateless child.”¹⁷⁷ As a result, some surrogate-born children have been trapped in their birth country for many months or even years. This scenario is like the real-life case of Baby Manji in India in 2008. Baby Manji was stateless as “existing definitions of family and citizenship under Indian and Japanese law” were not able to determine the parentage and nationality of Baby Manji.¹⁷⁸

One international instrument that attempted “to establish common principles and work towards the harmonization of substantive domestic law” is the Convention on the Rights of the Child, which mandates that children “be registered immediately after birth.”¹⁷⁹ Europe’s 1975 Convention on the Legal Status of Children Born out of Wedlock was another effort to bring some consistency to citizenship laws, albeit at a regional level.¹⁸⁰

The approach of international treaties concerning statelessness and the right to nationality to ameliorate the problem of stateless

¹⁷⁴ Carson Cook, Comment, *The Rights of Stateless Children Born from Cross-Border Reproductive Care*, 37 EMORY INT’L L. REV. 287, 295 (2023) (footnote omitted).

¹⁷⁵ *Id.* (footnote omitted).

¹⁷⁶ *Id.* (footnote omitted).

¹⁷⁷ See Margalit, *supra* note 20, at 55. A stateless person is one who is “not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

¹⁷⁸ POINTS, *supra* note 116, at 2.

¹⁷⁹ Cook, *supra* note 174, at 299; Convention on the Rights of the Child, art. 7(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁸⁰ Cook, *supra* note 179, at 302; European Convention on the Legal Status of Children Born Out of Wedlock, Oct. 15, 1975, E.T.S. No. 85.

children has been to “obligat[e] the birth country to grant citizenship”.¹⁸¹ While the application process may be lengthy, “citizenship in the birth country is preferable to no citizenship at all.”¹⁸² However, the problems that the stateless child faces do not end there. While “birth-country citizenship is the default remedy for the stateless child in cross-border arrangements, the child will have a different nationality than its parents . . . which will likely cause administrative hurdles and potential immigration problems” unique to cross-border contexts.¹⁸³ Could a transnational agreement that requires all countries to recognize parental rights established in other jurisdictions put an end to stateless surrogate-born children?

III. PROPOSED APPROACH: WORKABLE INTERNATIONAL REGULATION

A. *Information Transparency through International Cooperation*

Examining cross-border surrogacy reveals stories that are more striking than fiction. Cross-border scams, stateless babies, and the criminalization of the journey to parenthood are increasingly common in the world of cross-border surrogacy. Commercial surrogacy is having an identity crisis. Many countries, in a bid to resolve the complexities of cross-border surrogacy, “have moved to a total prohibition or criminalization of the practice.”¹⁸⁴ However, a “complete ban” poses numerous problems, such as black markets, which would heighten the preexisting exploitation of surrogates as “the conditions and the stipulations of surrogacy agreements [made in that context] would be much more problematic”¹⁸⁵ The black market would give fraudulent surrogacy agencies disproportionate power over emotionally vulnerable and under-resourced intended parents.¹⁸⁶ Prohibitions on surrogacy may also “raise the transaction

¹⁸¹ Cook, *supra* note 179, at 308; *see* Convention on the Reduction of Statelessness art. 1, Aug. 30, 1961, 989 U.N.T.S. 175.

¹⁸² Cook, *supra* note 179, at 308.

¹⁸³ *Id.*

¹⁸⁴ Margalit, *supra* note 20, at 63 (footnote omitted).

¹⁸⁵ *Id.* at 64-65.

¹⁸⁶ *See* Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. INT'L L. 329, 344 (“When a service is traded illegally, the parties providing them have no legal recourse. Intermediary exploitation and dishonesty is effectively granted immunity where the activity is illegal . . .”).

costs and negative externalities associated with international surrogacy without preventing the practice.”¹⁸⁷

“[L]egal diversity and the continuous difficulty of fitting transnational surrogacy disputes into national law” point to the pressing need to establish an international governance system.¹⁸⁸ Industry professionals and organizations have proposed “some models of ‘ideal’ commercial surrogacy laws and arrangements.”¹⁸⁹ In 2011, the Hague Conference on Private International Law attempted to map out a convention addressing the pressing issues of international surrogacy arrangements.¹⁹⁰ The Permanent Bureau of the Convention proposed that it should collect voices on “the practical needs in the area . . . and the prospects of achieving consensus on a global approach.”¹⁹¹ In 2017, an expert group suggested the possibility of “implementing an international birth certificate” and “adopt[ing] a direction towards legalizing surrogacy”¹⁹² In 2023, it was decided during the course of another Hague Conference on Private International Law that the work of unifying private international law on surrogacy should continue through another meeting of “a group of experts”¹⁹³ This movement aims to “provide ‘predictability, certainty and continuity’ of legal parentage” in the cross-border context, with an emphasis on “human rights, including those enshrined in the U.N. Convention on Rights of the Child.”¹⁹⁴ Specific measures include “defin[ing] surrogacy in international law, develop[ing] an

¹⁸⁷ Margalit, *supra* note 20, at 65.

¹⁸⁸ Brandão & Garrido, *supra* note 29, at 1150.

¹⁸⁹ *Id.*

¹⁹⁰ See HAGUE CONF. ON PRIV. INT’L L., PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (2011), <https://assets.hcch.net/upload/wop/genaff2011pd11e.pdf> [<https://perma.cc/R829-8P34>]. The Permanent Bureau suggested “further work” in certain enumerated areas should there be “sufficient interest among Members of the Hague Conference” *Id.* at 25.

¹⁹¹ *Id.*

¹⁹² *Surrogacy: Will the Hague Convention Force the Legalization of Surrogacy in Member States?*, ORDO LURIS INST. FOR LEGAL CULTURE (July 24, 2023), <https://en.ordoiuris.pl/family-and-marriage/surrogacy-will-hague-convention-force-legalization-surrogacy-member-states> [<https://perma.cc/8CCW-FZTV>].

¹⁹³ *Id.*

¹⁹⁴ *Id.* (quoting EXPERTS’ GRP. ON PARENTAGE/SURROGACY PROJECT, FINAL REPORT: THE FEASIBILITY OF ONE OR MORE PRIVATE INTERNATIONAL LAW INSTRUMENTS ON LEGAL PARENTAGE 7 (2017)).

international instrument recognizing foreign court rulings on parentage, and unify[ing] the laws regarding surrogacy.”¹⁹⁵

The goal of international cooperation is admirable. However, there is skepticism about the effectiveness of an international convention on cross-border surrogacy, especially considering that the commercial surrogacy market is characterized by a plethora of different domestic approaches.¹⁹⁶ Countries with apprehensive attitudes towards ethical and moral turpitude of commercial surrogacy would not easily change their stance to join the international pact. Therefore, it would not be constructive to aim at the unification of the conflicting rules.¹⁹⁷ However, there is “value in having a consensus about [international] norms and standards” to protect intended parents, surrogates, and children.¹⁹⁸ Significant cooperation between countries is particularly necessary as circumventing domestic regulations is as simple as Googling a surrogate mother and hopping on a plane.

It is time for a more pragmatic multilateral approach.¹⁹⁹ A Hague Convention, “with its unique global capacity to regulate international familial matters,”²⁰⁰ should take a new focus when addressing the issues of cross-border surrogacy. Rather than aiming at the unification of the diverging domestic rules, a convention should “find the widest common denominator” so that the appropriate system can be built.²⁰¹ Acknowledging the complexity of diverse cultural, ethical, and political factors that frame domestic laws, the plan forward should involve “a flexible approach.”²⁰² Lessons gained from the creation of previous Hague treaties indicate that it “is difficult to harmonize

¹⁹⁵ *Id.*

¹⁹⁶ Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT'L L. 627, 635 (2011).

¹⁹⁷ *Id.*

¹⁹⁸ Chandler Michaels, Note, *A Booming Baby Business: International Surrogacy Arrangements and the Need for Regulation*, 54 N.Y.U. J. INT'L L. & POL'Y 1, 28 (2022).

¹⁹⁹ See Trimmings & Beaumont, *supra* note 196, at 633 (footnote omitted) (“It has been widely recognized that there is an urgent need for a multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy.”).

²⁰⁰ Margalit, *supra* note 20, at 68.

²⁰¹ *Id.* at 72.

²⁰² Trimmings & Beaumont, *supra* note 196 (“The way ahead in the general area of jurisdiction, applicable law and recognition should involve a flexible approach, an effort to recognise and make compatible the varying national systems that apply to surrogacy.”).

diverging points of view of various nations in family law.”²⁰³ Mohapatra suggests that anti-surrogacy countries should not be required to change their stance on commercial surrogacy for the sake of unity.²⁰⁴

Instead, an international convention on surrogacy should have such countries certify their stance that commercial surrogacy is illegal, so that intended parents have legitimate access to international surrogacy services in other countries.²⁰⁵ Understandably, such a neutral endorsement makes international cooperation questionable. Mohapatra points out that an international convention would solve one of the main problems in international surrogacy that cause bitter legal disputes—agencies selling false hopes to intended parents that the legal concerns are easy to manage.²⁰⁶

The first step is that an international convention should establish transparency of substantive domestic laws on surrogacy, especially related to legal parentage and a child’s citizenship status to establish information transparency. This is critical as agencies are often the sole bodies governing the surrogacy arrangement without resorting to legal counsel about the chronic problems in international surrogacy such as travel documents, the parent-child relationship, and citizenship.²⁰⁷ The majority of intended parents seek cross-border surrogacy services “due to financial concerns,” and the prospect of legal disputes and a stateless baby interferes with the rosy journey to parenthood.²⁰⁸ An international convention aimed at spelling out legislative differences between the intended parents’ home country and the destination country would help create a more transparent market so that intended parents do not get embroiled in a costly journey due to a mistaken understanding of facts and laws.²⁰⁹

²⁰³ Margalit, *supra* note 20, at 72.

²⁰⁴ Seema Mohapatra, *Adopting an International Convention on Surrogacy—A Lesson from Inter-Country Adoption*, 13 LOY. UNIV. CHI. INT’L L. REV. 25, 36 (2016).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 53.

²⁰⁷ *Id.* at 32.

²⁰⁸ *Id.* at 32, 36.

²⁰⁹ *See id.* at 37 (footnote omitted) (“Although [an international convention] may not prevent all of the ‘legal limbo’ about the legality of surrogacy arrangements or the legal parenthood of the intended parents, it may serve to at least have international acknowledgement of this problem, define the issue, and inform intended parents about their options.”).

An unconventional yet flexible approach to such international cooperation can boost the participation of countries regardless of their policy on commercial surrogacy because the potential benefit of preventing their domestic courts from having to sort out the legal conundrum of controversial surrogacy cases could be high. The current “lack of international regulation” and the slow progress of global conventions with the big ambition of complete legal unification has led to corruption in the cross-border surrogacy market, with “agencies and middleman . . . stand[ing] to gain the most in these transactions.”²¹⁰ An international convention focused on establishing a clear legal framework for its signatories will be a more “practical” step in facilitating international regulation.²¹¹

B. A Global Commercial Surrogacy Oversight Body

Rawls once said that “the correct regulative principle for anything depends on the nature of that thing.”²¹² As a neutral international entity, the Hague Convention should lead a global effort to combat surrogacy fraud. Mohapatra suggests that the regulation of intercountry adoption can serve as an appropriate model for cross-border surrogacy because the drivers of these two familial arrangements are substantially aligned.²¹³ While “[a] pregnant woman may share less intimacy with the unborn child in surrogacy than with a woman who places her child up for adoption,” the triangle between the child, the birth mother, and the prospective parents is uniquely complex in both arrangements.²¹⁴

However, legislation regulating adoption is often not applicable to surrogacy as “there are recognized, fundamental differences between the two processes.”²¹⁵ One difference is that in surrogacy, the start of the “reproductive process” is marked by the signing of a contract, while conception is a necessary precursor to the adoption process.²¹⁶ Another key difference is that “an intended parent may be

²¹⁰ Mohapatra, *supra* note 204, at 37.

²¹¹ *Id.*

²¹² JOHN RAWLS, A THEORY OF JUSTICE 29 (1971).

²¹³ Mohapatra, *supra* note 204, at 38 (“[B]oth usually stem from infertility and offer an option for legal parentage absent biological relationship.”).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 38-39.

biologically related to the child, while the same is not true with adoptive parents.”²¹⁷

Establishing a global agency was a proposal for solving intercountry adoption corruption.²¹⁸ Similar to current cross-border surrogacy, the “piecemeal” intercountry adoption system was criticized for its lack of clarity on different levels of regulation across countries.²¹⁹ Under-regulated countries played a role in contributing to the corruption reported.²²⁰ Advocates of the establishment of a global oversight body did not propose starting with the big ambition to harmonize international regulation. Rather, a “small but permanent international agency” responsible for establishing procedural rules and due diligence guidelines for intended parents and surrogates was deemed to be effective.²²¹ As predominant in intercountry adoption, corruption or fraud tends to occur at the agency level.²²² Thus, an oversight effort at a national level would not fully respond to the needs of the international arrangement.

Understandably, critics may argue that sovereignty concerns will keep countries from embracing the proposal of a global oversight body and the viability of effective enforcement.²²³ However, experiences from intercountry adoption show that developing states are willing to accept many kinds of assistance—for example, developmental aid, technical aid, or aid following a crisis.²²⁴ Bringing together an international force would involve time and effort, but the Hague Convention would be a great starting point for establishing solid preventative measures to protect the intended parents, surrogates, and the child from commercial surrogacy fraud.

Under the control tower authority of a global oversight body, the shared cooperation between the sending country (in the cross-border

²¹⁷ *Id.* at 39.

²¹⁸ See Sara Dillon, *Making Legal Regimes for Intercountry Adoptions Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 201 (2003).

²¹⁹ *Id.* at 254.

²²⁰ *Id.*

²²¹ Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. UNIV. L. REV. 349, 401-02 (2005).

²²² *Id.*

²²³ See Cook, *supra* note 174, at 309 (footnote omitted) (“[E]xisting international law on statelessness faces the same challenges all international law faces: the necessity of consent and the paramount importance of state sovereignty.”).

²²⁴ Blair, *supra* note 221, at 395.

surrogacy context, the birth country of the child) and the receiving country (i.e., the home country of the intended parents where the child will likely grow up) could also follow the intercountry adoption approach. At the very least, requiring more scrutiny of the agency that interacted with the intended parents and the authority of the receiving state seems reasonable because the probability of agency fraud is higher, and the welfare of child depends more on the effort of the receiving state. For example, if an event leads to suspicion on the part of the receiving country, the global oversight body should alert the relevant government body of the receiving country, discuss how to proceed and, ideally with the support of the state of origin, take the next appropriate step. Specifically, receiving countries should be called upon to (a) apply the principles of the Hague Convention to all cross-border surrogacy agreements, (b) provide additional supervision of domestic surrogacy agencies,²²⁵ and (c) give detailed and timely follow-up reports on the status of completed agreements. The shared responsibility between global and national supervision would be a small but impactful step to make the international regulation workable.

CONCLUSION

Technology has allowed humans to make many dreams come true, including infertile parents bringing a baby home. Like any dream, this is fundamental to the core but there is a cost to intended parents and surrogates brokered by surrogacy agencies.. However, a complete ban may not be a prudent policy in the face of the rapid advancement of reproductive technology and the growing demand from desperate would-be parents. Unfortunately, international regulation has not been successful in catching up with the pace of the cross-border surrogacy boom. International efforts, specifically small measures that focus on prevention, should be implemented to expedite the urgent need for regulation at the international level. Taking baby steps for baby business is the proper focus.

²²⁵ See Trimmings & Beaumont, *supra* note 196, at 641 (arguing that a Hague Convention on surrogacy should strive to “develop a system of supervision of [agencies]”).