Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy

Yasmine Ergas

Available at: https://works.bepress.com/yasmine_ergas/1/
Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy

Yasmine Ergas*
Institute for the Study of Human Rights
Columbia University

Numerous colleagues have provided a sounding board, and sound advice, for this article. Special thanks are due to Jose’ Alvarez, Danielle Celermajer, Michael Doyle, Ira Katznelson, Claire Kelly, Kenneth Prewitt, Jack Snyder and Celia Wasserstein Fassberg. Thanks are also due to participants in the seminars and workshops at which I have delivered earlier versions of this article including at the University of Sydney, the University of Rotterdam, the Columbia University Human Rights Seminar, the International Law Association and the Columbia University workshop on Deconstructing and Reconstructing ‘Mother.’ Conversations with Hannah Baker and William Duncan of the Hague Conference on Private International Law, Lisa Vogel of the U.S. State Department, and Katherine Franke, Suzanne Goldberg, Alice Kesseler-Harris, Carol Sanger and Elizabeth Scott at Columbia University especially helped to guide my thinking. Invaluable research assistance was provided by Jenny Leon, Caroline Risacher and Marta Garnelo.
Table of Contents

ABSTRACT 2

I. INTRODUCTION: INTERNATIONAL COMMERCIAL SURROGACY AND INTERNATIONAL LAW 3

II. CHRONICLE OF A BIRTH FORETOLD 7

A. THE BALAZ TWINS: TRAPPED BETWEEN PERMISSIVE AND PROHIBITIONIST JURISDICTIONS 7

B. INTERNATIONAL COMMERCIAL SURROGACY: FILIATION, CITIZENSHIP, AND CONFLICTING NATIONAL LEGAL FRAMEWORKS 18

III. CONTRACT, FILIATION, AND THE LIMITS OF CHOICE 32

A. CONTRACTUAL AUTONOMY 34

1. SELF-DETERMINATION AND THE RIGHTS OF SELLERS AND BUYERS: WHAT IS BOUGHT AND SOLD? 35

II. TRANSLATING CONTRACTUAL AUTONOMY INTO THE REGULATION OF FILIATION 40

B. COMMUNITARIAN PERSPECTIVES 44

1. COMMUNITARIANISM AND HUMAN DIGNITY: REFRAMING SELF-DETERMINATION 46

II. HUMAN DIGNITY AND THE STATUS OF THE “HUMAN.” 53

III. FILIATION AS STATUS-ATTRIBUTION. 57

IV. “MOTHER” AS STATUS. 60

V. THE IMPLICATION OF STATES AND THE INTERNATIONAL COMMUNITY IN THE PRODUCTION OF FAMILY STATUS. 64

IV. TREATY ZONES AND THE LIMITING POWER OF HUMAN RIGHTS LAW 69

A. THE NECESSITY OF INTERNATIONAL REGULATION 69

B. UNSETTLING FILIATION—AND CITIZENSHIP 71

1. SURROGACY AND THE INADEQUACY OF THE ADOPTION ANALOGY 71

II. JUS SANGUINIS: LAW, BLOOD, AND THE CORPOREAL NEXUS 76

C. ONE REGIME (COMPLEX), TWO TREATY ZONES. 82
I. A PERMISSIVE TREATY ZONE: BETWEEN MAXIMALIST ASPIRATIONS AND MINIMALIST POSSIBILITIES

II. A PROHIBITIONIST TREATY ZONE: BETWEEN CRIMINALIZATION AND COOPERATION

III. MUTUAL RECOGNITION, IMPLIED COOPERATION, AND RECIPROCAL ADVANTAGE: ONE REGIME FROM TWO ZONES.

D. THE TEST OF HUMAN RIGHTS


II. CAN A TREATY ON INTERNATIONAL COMMERCIAL SURROGACY SURVIVE JUS COGENS SCRUTINY?

A. PERMISSIVE TREATIES AND THE PROBLEM OF THE SALE OF CHILDREN.

B. PROHIBITIONIST TREATIES AND THE PROBLEM OF STATELESSNESS

Abstract

In recent decades, a robust international market in commercial reproductive surrogacy has emerged. But, as German citizens Jan Balaz and Susan Lohle discovered when they struggled to engineer the last-minute diplomatic compromise that saved their commissioned twins from becoming wards of the Indian state, conflicts among legal frameworks have placed the children born at risk of being “marooned, stateless and parentless.”¹ States have tried to address the individual dramas through ad hoc solutions – issuing emergency entry documents for children caught at borders or compelling administrative authorities to recognize birth certificates related to surrogacy arrangements that run counter to domestic public policies. The inadequacy of such approaches has become increasingly evident. As a result, states have developed national

¹ Re X and Y (Foreign Surrogacy) [2009] Fam 71 at 76C (Hedley, J.)
legislation and, together with international institutions and civil society networks, begun to seek international agreements. Indeed, international coordination represents the only viable solution to the individual dramas and diplomatic crises that have characterized the market in international commercial surrogacy. But will that be possible? This article explores whether and to what extent, a coordinated approach is likely to be found, and the role and limits of international law.

After a brief introduction (Part I), the article examines the vicissitudes of the Balaz twins as emblematic of the filiation and citizenship issues that the international market in commercial surrogacy raises (Part II). It then explores possible approaches to the conflicts among legal systems that underlie the Balaz case whether through individual contracts (Part III) or treaties (Part IV). The article predicts that, at least in the short term, an effective legalizing regime based on a unifying set of rules and norms is unlikely to emerge. Ultimately, a new regime will require a long-term renegotiation of the meanings of filiation, its significance for citizenship and the re-interpretation of fundamental norms relating to human rights.

I. Introduction: International commercial surrogacy and international law.

The means of baby making have expanded precipitously in the last three decades, prompted by scientific advances and transformations in social organization and gender relations. At the same time, globalization has favored the search for cross-border solutions to the problems associated with reproductive difficulties (or, more simply, with the decision to have children without engaging in their production). The rapid expansion of transnational adoptions that, beginning in the 1970s, highlighted the existence of a growing market for babies in which particular states came to be characterized as exporters and others as importers (and some as both), de-facto
functioned as a global “learning experience,” showing individuals without enormous resources in, say, material means or worldly knowledge, the path to foreign destinations in their quest to reproduce. Born at the same time as the Internet, the global market in surrogacy has accelerated as service providers—from individual women offering themselves as gestational carriers to lawyers proffering their counsel, from agencies buying and selling gametes to medical institutions—have transacted over long distances, transferring goods (gametes) to bodies (gestational carriers) and then products (children) across jurisdictional lines. The political economy of reproduction that has emerged is fully globalized: analyses of “care chains” have documented the migration of women from the global south to provide nanny and elder-care services in the “north” and the distribution of children available for transnational adoption evinces similar patterns. Analogous trends have emerged with respect to surrogacy: a study of five brokerage agencies reports a cumulative growth of nearly 1,000 per cent and a significant increase in cross-border clientele between 2006 and 2010.


3 The agencies, surveyed by the Aberdeen University research project on international surrogacy arrangements, are based in the United States, India and the United Kingdom. Separately, one agency reported that in 2008 “‘almost forty percent of the agency’s new clients are from outside the [country] … compared with less than a fifth in previous years.’” Cited in Hague Conference on Private International Law, A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, drawn up by the Permanent Bureau, Preliminary Document No. 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy Conference (henceforth, “Hague Conference 2012”) at 7.
The case of the Balaz twins, commissioned by German citizens in India, described in part II highlights the consequences that ensue when individuals ground a basic activity of life—having children—simultaneously in multiple legal systems whose rules conflict. Caught between German prohibitions regarding surrogacy and Indian policies seeking to promote the market in baby making, Leonard and Nikolas Balaz appeared destined to become wards of the Indian state; they ran this risk (or, were made to do so) despite the agreement of all the parties ostensibly involved in the transactions surrounding their birth. That agreement, however, was forged exclusively among private actors, whereas the regulation of reproduction and familial relations bears the imprints of nation-building and social policies: as part III of this article argues, filiation entails matters of status rather than contract, and is not, therefore, simply subject to individual negotiation. Rather, resolutions to dramas like that of the Balaz twins require interstate coordination. Part IV therefore explores the possible characteristics of an agreement on international commercial surrogacy. Such an agreement requires negotiations over deeply held values that, in many states, implicate constitutional principles and may have significant distributive consequences for domestic constituencies. Moreover, family relations, filiation and their nexus to nationality and citizenship lie at the heart of what has traditionally been understood as the essential domestic jurisdiction of states. Despite the often-documented erosion of the Westphalian system, the "basic constitutional doctrine of the law of nations,"4 -- the idea that the reserved domain of ‘state action’ can be cleaved from that of inter-state agreement, and that the former is appropriately left to states’ own determination while the latter constitutes the subject matter of international law – still holds sway, suggesting that both national and international policy-makers and courts will tread carefully when perceived encroachments of the domestic jurisdiction of states is at issue. A global accord capable of imposing uniform regulations on the

4 IAN BROWNlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291 (7th ed. 2008).
transnational surrogacy market is therefore difficult to envisage, but a bifurcated regime, based on
the reciprocal acknowledgment of a permissive and a prohibitionist “treaty zone,” seems more
likely. Both states and individuals operating in such a bifurcated regime must be understood as—
indeed, can already be seen to be—apprehending the regime in a unitary manner, deriving
advantages from, as well as paying the consequences of, its segmentation. But the possibility of
explicit and implicit agreement among states does not per se determine the legality of the specific
accords or of the overarching regime that therefore emerges. To the contrary, the constituent
accords of the regime governing international commercial surrogacy will be held to the test of
international human rights law; whether that test can successfully be met will depend on the
specific understandings of surrogacy as well as of human rights norms that legislators,
administrators, and judiciaries develop in dialogue with political and civil society actors.
II. Chronicle of a birth foretold.

A. The Balaz twins: trapped between permissive and prohibitionist jurisdictions

In November 2009, the High Court of Gujarat passed down a judgment that at first glance, seems unremarkable: a child born on Indian soil of an Indian mother and a foreign father, the Court held, is an Indian national. The decision could be seen as a straightforward application of current law, which, since December 2004, has attributed citizenship to children born in India if both parents are citizens of India or one parent is a citizen and the other is not an illegal immigrant. But the decision portended a radical reordering of the legal status of the children and parents implicated in India’s thriving surrogacy industry and, indeed, of the industry itself.

The case was not a straightforward one. Rather, a German citizen, Jan Balaz, had sought a declaratory judgment of the Gujarat Court that his twin children, born in Anand as a result of surrogacy arrangements, could be considered Indian nationals. Balaz and his wife, Susan Lohle, faced with her infertility, had chosen to have children through reproductive surrogacy. Such a


6 The Citizenship Amendment Act of 2003, s. 3. Citizenship will not be conferred on a child born in India if either parent is a foreign diplomat accredited as such in India, or an enemy alien and the birth takes place in a place under enemy occupation. Citizenship Amendment Act of 2003, s.4. Special rules also apply to the children of Indian citizens living abroad.

http://www.helplinelaw.com/docs/20CITIZENSHIP%20AMENDMENT%202003 accessed 2/10/10
solution would have been impossible in Germany, as in numerous other countries of the European Union, which has banned surrogacy in all its forms, whether “commercial” (i.e. for payment) or “altruistic” (i.e., rendered without explicit financial compensation). The Balazes might have considered other possibilities. They could, for example, have traveled to California, a state in which the surrogacy market is relatively mature, as measured by the existence of a reasonably settled legal framework, a well-oiled system of service providers (mediators, clinics, sellers and buyers) and a steady flow of transactions. They might also have chosen to go to Ukraine, where a permissive governmental attitude and the considerable availability of service providers coupled with a reliable medical system has generated a thriving market in commissioned children. Other possible candidate countries were also available. Nonetheless, without presuming to guess the motivations that led the Balazes to India, theirs was a reasonable choice, one made by growing numbers of people in their position and encouraged by government policies that see reproductive surrogacy as an aspect of an expanding health and medical tourism trade.

See, § 7 I Nr. 7 of the German Embryonenschutzgesetz (Embryo Protection Act 1990, which also prohibits egg-donation in § 1 I Nr. 1) and provides that no medical practitioner should perform artificial insemination or embryo donation on a woman, who is willing to hand the child over to commissioning parents upon birth in accordance with a surrogacy agreement.


Although it is difficult to find precise figures on the size of the market in reproductive surrogacy, it has been estimated at representing c.US $ 400 million p.a. of India’s medical tourism industry, which is estimated to reach US $2.3 billion by 2012. Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, Hague Conference on Private International Law, Preliminary Document no.11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p.6. For a critical analysis of the implications of this expansion from the perspective
The birth of the Balaz twins appears to have proceeded according to plan. The Balazes engaged the services of Dr. Patel, a leading surrogacy entrepreneur who has recently garnered the attention of western media.⁹ At the Balazes' behest—and as she appears to have done innumerable times before—Dr. Patel obtained ova from one woman and engaged another to carry the child(ren). Jan Balaz contributed his own sperm. The arrangement reflected the now-canonical paradigm of surrogacy: as technology has advanced, traditional surrogacy in which one woman serves as both egg donor and gestator has been superseded. Gestational surrogacy, in which one woman provides ova and another carries the pregnancy, has become the marker of surrogate motherhood. The provider of ova, stripped of maternal reference altogether, is referred to in the sexually

of the Indian women who service the industry, see Syantani DasGupta and Shamita Das DasGupta, Motherhood Jeopardized, in THE GLOBALIZATION OF MOTHERHOOD, supra n.n.


⁹ “Giving birth the latest job outsourced to India.”

neutralized language of genetic donation. As a contributor of “genetic material,” the ova provider is now semantically equated to the sperm donor. In fact, the sperm donor is often—as in this case—the biological as well as the commissioning father; if he is not a commissioning party, then he is paid for his sperm. In either case, he is not really a "donor" at all. The egg donor is also not a “donor” in any sense that can reasonably be associated with gratuitous gifting. To the contrary, prices for ova range, in the United States, from approximately $8,000 to (reportedly) many multiples of that figure. And the womb provider has been reduced to a figure that alternates between a sherpa and a landlord: some refer to her as the “embryo carrier” or the

10 The language of surrogacy is fraught with ambiguity. Arguably, the surrogate is not a surrogate at all if she is indeed a “mother.” Another way of referring to the woman who bears the child would be as a “birth mother,” borrowing a term from adoption discourse. But promoters of surrogacy have a strong stake in distinguishing surrogacy from adoption, emphasizing, for instance, the but-for nature of the reproduction at issue (there would have been no child but for the arrangement among the parties), hence clearly differentiating the lexicon of surrogacy from that of adoption. In the words of an employer of surrogate services: “there is no biological mother.” If maternity is radically disjoined from its physical correlate then the so-called “surrogate mother” is neither mother nor surrogate but simply a “womb provider.” See, Melanie Thernstrom, Meet the Twiblings, N.Y. TIMES, Dec. 29, 2010, available at http://www.nytimes.com/2011/01/02/magazine/02babymaking-.t.html?_r=1&scp=1&sq=%22meet%20the%20twiblings%22&st=cse I therefore use the term «womb provider» to highlight the implications of a way of looking at reproduction, not to endorse it.

11 The legislation of several countries requires that there be a biological nexus between at least one of the commissioning parents and the child in order for the arrangement to constitute legal "surrogacy" (as opposed, say, to a simple—and prohibited—sale).
“gestational carrier;” others prefer to describe her function as that of having rented her womb. Either way, like the ova donor, she is stripped of any reference to maternity; the notion that gestation entails a biologically interactive process, in which a particular woman is actively engaged and by which she not only procreates another but also subjects herself to modification, is elided. Moreover, in the current language of commercial reproduction, the attribute “parent” has been reserved for the commissioning parties, now denominated the “intended parents.” These linguistic practices have become so well established that they are routinely reduced to acronyms: GC denotes the “gestational carrier,” IPs, the “intended parents.” The recodification entailed is normatively freighted, implicitly indicating how one ought to think: it is acceptable for eggs and sperms to be transferred because they are donated, not sold; it is acceptable for the gestational carriers to have contractual rather than parental rights because they are providing a service for third parties; it is acceptable to restrict references to parenthood to the “intended parents” as the other parties involved are only providers of either raw materials or services (in fact, surrogacy is the vehicle whereby the “intended parents” realize their parenthood, which is what is “intended,” presumably, by all the parties); finally, it is acceptable for all parties to engage in the transaction because it is not commercial and does not reify the children themselves as transactional objects (they are always-already the children of their intended parents).

The recodification of the processes involved in reproduction remains intensely contested. Nonetheless, the separation of the two female functions—ova provision and gestation—has had an important impact on the market for babies. Structurally, the separation of functions is reflected in the segmentation of the market: distinct specialized agencies match egg providers, sperm providers, and gestators with potential clients. Legally, in the United States and several other countries in which surrogacy is permitted, gestational surrogacy has emerged as the preferred
mode for commissioned births. In the United States, the advent of gestational surrogacy has also accompanied a lull, if not an actual calming, of polemics against surrogacy, although no unifying legal framework has been adopted by state legislatures and recent case law suggests that the enforceability of surrogacy arrangements, even when noncommercial and solely gestational, is far from settled. Internationally, growing awareness that gestational surrogates will not transmit their physical traits to the children they bear has likely facilitated a “cross-racial” market in baby making, further contributing to the stratification of reproduction that has already been

---

12Thus, the Prefatory Comment of the U.S. Uniform Parentage Act notes: “The practice of having a woman perform both functions [i.e. genetic and gestational] is generally strongly disfavored by the assisted reproduction community. Experience has shown that the gestational mother’s genetic link to the child sometimes creates additional emotional and psychological problems in enforcing a gestational agreement.” Uniform Parentage Act 9 (p.84). Israel, Iran, (under new draft guidelines) India, and Russia Ukraine are amongst the states that will only recognize gestational surrogacy arrangements.

documented in reference to adoption. To put it bluntly, Caucasians wanting Caucasian children can now hire non-Caucasian women to bear them, so long as the “genetic material” is Caucasian. Although empirical studies are scarce, this suggests that the market for ova and that for gestational carriers will evince different dynamics: whereas in the former, "racial" (along with other genetic) characteristics may entail premium prices, in the latter such characteristics may be less important. Moreover, certain countries may find their comparative advantage in exporting eggs, rather than in providing gestators, or vice-versa.

14 See Ginsburg and Rapp n.2 and Brenda S.A. Yeoh & Shirlena Huang, “Mothers on the Move: Migration policies and citizenship among Ecuadorian immigrant women,” in Chavkin and Maher n. 2 at 31-54.


16 This is especially likely to occur if, as will be discussed further on in this article, particular states privilege egg donation over gestation in the definition of citizenship. It should be noted that analogous market specialization is occurring in respect to sperm donation. One British study reported the emergence of Denmark as a preferred source of sperm for women seeking sperm in the UK. See Paul Henley, Business Booms for Danish Sperm, BBC NEWS EUROPE, 19 May 2011, available at http://www.bbc.co.uk/news/world-europe-13460455.
This is not to suggest that there are no contextual conditions that the market for gestational
carriers will seek—to date, wombs come in female bodies, and their ability to perform their labor
is dependent on a variety of factors, minimally including the general health of the womb provider,
the quality of the physical and social environment in which her gestational functions take place,
her abstention from harmful practices and the conditions of delivery. Indeed, recently published
research has highlighted the importance of the gestators’ physiological (and genetic)
characteristics on fetal development. Valuation of such factors plays a role in determining
demand along with the pricing of the services purchased. A California surrogacy could have cost
the Balazes between $80,000 and $120,000; similar services purchased in Gujarat were likely
priced between $22,000 and $35,000; and in Ukraine the price tag might have ranged from
$30,000 to $45,000. Given the elimination of race as a limiting factor, the widespread
availability of the internet and its ability to link potential suppliers of genetic components and
gestational functions with demand, and the ease of international travel, the market for baby
making has become global. Reproductive tourism entrepreneurs operating in numerous countries
seek to ensure that client demands are met, competing on a combination of quality guarantees,
ease of access, and price.

For a review of research on the effects of nutrition and other factors relating to maternal
behavior and health on fetal development, see Douglas Almond and Janet Currie, Killing Me
Softly: The Fetal Origins Hypothesis, JOURNAL OF ECONOMIC PERSPECTIVES, April 2011, at
153–72.

MEDICAL TOURISM CORPORATION, http://www.medicaltourismco.com/assisted-reproduction-
fertility/low-cost-surrogacy-india.php (India); INTERNATIONAL REPRODUCTIVE TECHNOLOGIES

Some countries seem to be developing specializations in the global ordering of the “baby-
making” market. For example, while India may be emerging as a center for gestation and
When, as anticipated, the surrogate mother engaged to carry the Balaz children gave birth, the registrar of Gujarat Anand Nagar Palika—following procedures at least implicitly permitted by the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technique Clinics in India that India adopted in 2002—issued birth certificates identifying Susan Lohle as their mother and Jan Balaz as their father. But here the planned course of events ran aground, for the German consulate refused to honor the birth certificates—or, more precisely, to recognize the Balazes as the parents of the twins. Because surrogacy is illegal in Germany, in the view of the German authorities, the birth certificates neither established the filiation of the twins nor, consequently, provided a basis for the issuance of German passports to the children, which would allow their repatriation to Germany. The children were, in effect, “without papers.”

Faced with these difficulties, the Balazes sought Indian passports, turning to judicial procedures to do so.**20** While the lower court refused to recognize the children as Indian for they lacked an Indian parent, the Gujarati Anand Nagar Palika recalled their birth certificates. The birth date, initially erroneously recorded as 14.1.2008 was corrected to 4.1.2008. More significantly, the name of Susan Lohle (Jan Balaz’s wife), who had originally been identified as the mother, was replaced with that of the gestational carrier. The passport applications identified the children as Balaz Nikolas and Balaz Leonard; Jan Balaz appeared as the father and the gestational carrier as the mother. The Passport Authorities entertained the applications and two Indian passports were issued for the twins. But shortly thereafter Balaz received an intimation-cum-notice issued delivery, Denmark has emerged as a preferred sperm-provider for English clients. See, BBC (May, 2011).

**20** The facts of the case are summarized in the proceedings of the High Court of Gujarat at Ahmedabad. See, Jan Balaz v. Anand Municipality, n.5.
by the Government of India, Ministry of External Affairs, Regional Passport Office, which requested him to surrender both passports while the matter was pending in the High Court of Gujarat. On appeal, the High Court of Gujarat recognized the nationality right of the children: they were Indian, it held, because they were born on Indian soil to an Indian mother. The gestational carrier, in other words, was now the natural (and only) mother. In the Court’s words, “the only conclusion that is possible is that a gestational mother who has blood relations with the child is more deserving to be called as the natural mother. She has carried the embryo for full 10 months in her womb, nurtured the babies through the umbilical cord.”

The Passport Authority at Ahmadabad nonetheless refused to reissue the passports that the Court’s decision would have authorized. The Apex Court—India's highest court—was seized of the case on December 15, 2009. As a decision was awaited, and deadlines set and reset, negotiations among India, Germany and the Balazes accelerated and a campaign for public opinion was engaged. The Apex Court itself urged the Indian authorities to explore non-judicial avenues. Adoption was touted as a possible pathway to establishing the children's parentage. Press reports indicate that this solution may have been proposed by Germany. But an action which, in a German perspective, could transform illegality into legality by re-construing the illegally-born twins into legally-adopted children, in an Indian perspective threatened to have the opposite effect. Surrogacy is not banned in India; the births were not per se illegal. Adoption, however, is reserved to children who are “orphan, abandoned or surrendered.” Such children, whose adoptability is certified by appropriate state authorities, lack a parent (or have a parent who

---

21Balaz v. Anand Municipality, n. 5, para. 16.

has been adjudged incompetent). Moreover, because India is a party to the Hague Convention on Inter-country Adoptions, all cross-border adoptions must comply with Convention rules that, inter alia, include a complementarity requirement—the adoption agency must certify that no adequate national placement of the child is possible—and that also ban all pre-adoption contact between the birth mother and the intended adoptive parents. Jan Balaz, as the biological father of the twins whose paternity, in an Indian perspective, appeared uncontested, could only adopt his own children through an infraction of the law. Susan Lohle’s adoption of them was similarly compromised. Moreover, Indian law allows foreign parents to assume custody of Indian children only in a provisional guardianship arrangement. (The parents must then adopt the children in their own countries within a specified time frame.) Asked to consider the Balaz request for adoption, the Central Adoption Resource Agency—established pursuant to India’s having become a party to Hague Convention on Inter-country Adoption in 2003 and which exercises exclusive competence in this domain—had therefore declared the situation beyond its jurisdiction, as the Centre is only concerned with issues related to abandoned children. The Apex Court ordered the

23 See India Adoption Guidelines, I (2)(c), I(2)(v), I(2)(zd).


25 But a German court has recently affirmed that paternity in surrogacy cases is attributable in the first instance to the husband of the woman who gives birth and not to the sperm provider or commissioning male. See N. Satkunarajah, Surrogate Child Denied German Passport, BIONEWS, May 9, 2011, http://www.bionews.org.uk/page_94158.asp and Surrogate children have no right to German passport, court rules, THE LOCAL, GERMANY’S NEWS IN ENGLISH, April 29, 2011 at http://www.thelocal.de/society/20110428-34681.html
Centre to reconsider, albeit on the condition that a precedent not be created.  

The Centre duly did so. But before the requisite procedures could be undertaken—two years, it should be noted after the children's birth and when the impending expiry of Jan Balaz's own Indian visa raised the possibility that the children would become wards of the state—the children were provided German visas (and Indian exit documents). In early May 2010, the Balaz twins left India. The parents agreed to adopt them in Germany according to German rules. In the meantime, the Balaz case and others like it seem to have spurred a market for false declarations of motherhood. Commissioning parents seeking Indian passports for their children have apparently been able to engage women willing to declare themselves mothers, thus perhaps eliding the difficulties that would be prompted by already identified gestational carriers making such declarations.  

B. International commercial surrogacy: filiation, citizenship, and conflicting national legal frameworks

The Balaz case is part of a line of disputes that have embroiled India. In 2008, Baby Manji—a child commissioned by a Japanese couple who divorced prior to her birth—had been prevented from being expatriated by the conjoined operation of Japanese rules that prohibit surrogacy and


Indian rules that restrict adoption.\textsuperscript{28} Ultimately, India agreed to allow the child to be entrusted to her father and paternal grandmother; concomitantly, the Japanese authorities issued a special visa on humanitarian grounds, the implication again being that this decision was not to be regarded as setting precedent.\textsuperscript{29} More recently, a Canadian couple failed to obtain travel documents for twins they had commissioned: DNA tests required by the Canadian authorities revealed that neither intended parent was genetically related to one of the children, suggesting a medical error in the Indian fertility lab. Ottawa ultimately issued a citizenship card to the twin who is biologically related to the couple and travel papers to the other child, with the apparent understanding that the family would file an application on humanitarian and compassionate grounds for their non-biological child and then a citizenship application.\textsuperscript{30} Taken together these cases have highlighted a lack of legal certainty that may ultimately undermine the demand for Indian reproductive surrogacy services while heightening the financial costs associated with the risks of uncertainty. And, they have revealed the human costs of the collisions that can occur when "exporting" and "importing" states pursue conflicting policies.


\textsuperscript{29} Surrogate Baby Born in India Arrives in Japan, HINDUSTAN TIMES (November 3, 2008).

India is now engaged in a review of the legal framework governing surrogacy that appears designed to encourage international demand. This process is complicated not simply by the federal structure of the state, but also by the role of personal law, for Indian citizens may be subject to the jurisdiction of communal/religious authorities in regard to their domestic

relations. Even more, there has been and continues to be substantial debate within India regarding the desirability of legalizing surrogacy itself. Attempts to bring order to surrogacy are therefore caught between two contradictory trends: one favoring India's economic use of the reproductive capacities of women in an extension of the health tourism that has been actively fostered; the other highlighting fears of exploitation, in particular in regard to women, and fundamental objections to an industry that can be characterized as the production of children for export. Legislative reform may nonetheless provide the legal certainty necessary for India to maintain or even increase its market share. But, as the experience of Balazes and the other cases referred to above demonstrate, the problem is not solely that of the internal consistency and overall coordination of the Indian legal framework. At issue here is the coherence of the Indian legal system with that of the other market participants.

The difficulties produced by the legal incompatibilities that permeate the international market for surrogacy is not a problem that pertains to India alone. Children whose births have been

\[32\] See Narendra Subramanian, Making Family and Nation: Hindu Marriage Law in Early Postcolonial India., J. OF ASIAN STUDIES 771(2010)

\[33\] Inter alia, see DasGupta and DasDasGupta, n. 8.

\[34\] Although the reform has not yet been passed, it appears that some Indian courts are already applying it, and that at least some players in the market for surrogacy services are already factoring in the impact of its provisions. See Iain Macintyre, Dutch Consulate overruled in India IVF case, RADIO NEDERLAND WEERDOMROPE, available at http://www.rnw.nl/english/bulletin/dutch-consulate-overruled-india-ivf-case.
registered and then de-registered (Spain, France, Norway); children for whom domestic courts have compelled their own reluctant consular authorities to issue travel documents (the Netherlands); children denied entry visas into the commissioning parents' home states altogether (Germany); children for whom parliaments have authorized emergency passports as special dispensations given their own prohibitionist national policies (Iceland); children whose filiation has been impugned although ultimately vindicated (Italy); children “legalized” by judges in


38 See France rules against children of surrogate mothers, supra n. 42.


40 Doria Pamhilj, l’ultima dynasty, il principe, il compagno, e 2 figli, LA REPUBBLICA (13 March 2012),
knowing tension with the objectives of national legislation (U.K.\textsuperscript{41}); children virtually sequestered inside homes unable to obtain basic medical services because they lack a legal identity (Ireland\textsuperscript{42}); children with only one (or no) legally-cognizable parent while living with more\textsuperscript{43} constitute only a limited sample of the difficulties caused by the incompatibility of the different legal orders that criss-cross transnational surrogacy. Such incompatibilities have led to a variety of responses. States have taken emergency measures, stressing that such measures are not intended to set precedents. Domestic courts have compelled their national administrations to resolve individual cases, often stressing that the solutions cannot be considered precedential.\textsuperscript{44}


\textsuperscript{41} High Court Justice Hedley declared to the BBC that although “Laws in the UK are designed to try to prevent such [commercial surrogacy] arrangements …he has agreed to give retrospective approval for commercial surrogacy on at least four occasions. ‘The statute does give power to the High Court retrospectively to authorize these payments and the reason we do so is not because we want to encourage commercial surrogacy but because of the impossible position which the child born as a result of the arrangement finds themselves in when they're back in this country.’” High Court judge approves commercial surrogacy, BBC News UK (May 19, 2011)


\textsuperscript{42} Surrogacy: The Babies Born into Legal Limbo, THE IRISH TIMES (Nov. 22,2011),


\textsuperscript{43} See Hague Conference (2012), n.3.

And. second-generation legislation has been proposed from France\textsuperscript{45} to Uzbekistan, Finland\textsuperscript{46} to Kyrgyzstan,\textsuperscript{47} Ireland\textsuperscript{48} and the Netherlands\textsuperscript{49} to address the problems created by current law. Yet none of the solutions proposed can successfully address the conflicts engendered by the discrepant national frameworks in play.

Surrogacy in one country is the solution some states prefer.\textsuperscript{50} A court in South Africa has recently ruled that foreigners wishing to employ a surrogate must intend to live in South Africa on a long-


\textsuperscript{50} States that impose domiciliary requirements include Greece (both the commissioning mother and the gestational carrier must be domiciled in Greece), Australia (where surrogacy is legal), South Africa and the United Kingdom (one or both commissioning parties must be domiciled in
term basis, a decision that coheres with South Africa’s tight regulations on foreigners wishing to adopt South African children, who are also required to demonstrate that they will settle in the country.\textsuperscript{51} And Australia has developed a model framework that would simultaneously bring order to the internal market and ban international surrogacy.\textsuperscript{52} Residents of, say, New South Wales (where commercial surrogacy is banned but altruistic surrogacy has been allowed since 2010)\textsuperscript{53} would not benefit by going to Tasmania, in which the Surrogacy Bill is pending debate and vote in the Legislative Council. According to Tasmanian legislation, it is illegal to draw up surrogacy arrangements, advertise for a surrogate, or access assisted reproductive technology for the purpose of surrogacy\textsuperscript{54}. But if the model framework were implemented in both states, surrogacy would be legal, if provided without charge and under specified conditions. However, should an Australian citizen in either state be unable or unwilling to access the services of a nationally-based gestator, recourse to the commercial options available in other countries, such as the UK at the time of application for a parentage order). Hague Conference 2012, n.3, p. 14, n. 90.


\textsuperscript{52} Standing Committee of Attorneys-General Australian Health Ministers’ Conference Community and Disability Services Ministers Conference Joint Working Group, A Proposal for a National Model to Harmonise Regulation of Surrogacy (January 2009).

\textsuperscript{53} New South Wales, Surrogacy Regulation 2011 under the Surrogacy Act 2010, Publishes LW 11 February 2011 (2011 no. 54)

India, would be prohibited. The dimensions of the baby-market, and its seemingly explosive growth suggest that autarky in surrogacy is doomed to repeat the history of all autarky: regulatory failure, soaring transaction costs and externalities associated with growing illegality, and, ultimately, combined international and internal pressure for rule revision.

States opting for national closure are more likely to be child-importers than exporters. Exporters compete along various dimensions, including regulatory support for the industry. An ad for a Ukrainian surrogacy agency noted: "All the activities of the surrogacy motherhood center are approved by the Ministry of Justice of Ukraine, Administration of Justice in Kharkov Region and State Committee of Ukraine for Regulatory Policy and Entrepreneurship, Ministry of Health of Ukraine," and provided a detailed list of the Civil Code provisions that would regulate private contractual arrangements. Despite these assurances, a French couple was recently arrested smuggling their commissioned children, hidden under a mattress in a van, from Ukraine to Hungary: the couple declared that they were reacting to France's refusal to recognize the children's filiation and, therefore, to issue identity documents. They subsequently appealed to "any nation out there [that] can give our little girls citizenship so that we can finally take them home." As with the Balaz twins, such dramas demonstrate that regulatory support in the exporting country alone is not enough.

---


The new legislation currently debated in India defines the problem quite differently. Rather than seeking to prohibit international exchanges, it is set to impose compulsory coordination and to shift part of the cost of ensuring such coordination to its foreign clients. Prior to establishing a legally valid arrangement with a surrogate, foreign commissioning parties would be required to provide documentation attesting to their own national authorities’ recognition of the legality of surrogacy and corresponding ability to issue citizenship papers to the children who might be born. This approach aims to avoid the human and diplomatic costs emblematically represented by the Balaz twins. It also implicitly fosters the emergence of pressure groups of prospective commissioning parents. Rather than simply accept their own countries’ prohibitionist stances, prospective commissioning parents will likely mobilize to promote reform; India’s new law will then have elicited the emergence of those "norm entrepreneurs" whom political scientists invoke.

57 India Assisted Reproductive Technologies Bill, n.31.
58 Id S. 34: "[T]he party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party’s origin or residence as the case may be."
to explain the genesis of social movements that issue in legal change.\textsuperscript{60} Thus, faced with Germany's intransigence, German potential clients for Indian surrogate services may join forces to lobby for a change in policies, one that would ultimately lead to the issuance of the certification that India may henceforth require. Indeed, in France, which has also adopted a prohibitionist stance, a movement seeking reform has gathered strength in part as a result of high-profile legal cases. Two proposals are before the French Senate—one presented by each leading political force—that would allow for the recognition of the parentage of children born through surrogacy but a forceful movement has also emerged in opposition of any such legalization.\textsuperscript{61} But can one exporter's attempts at compulsory coordination succeed? Or will it simply provide the impetus for the development of a more lucrative and more exploitative—albeit narrower—clandestine market?

Every request for certification, every increase in regulatory power, simultaneously represents an attempt to bring agreed-upon rules to bear on a transaction and an opportunity for gatekeepers to pervert the exercise of public power into private gain. Markets in people or body parts, like those regarding sex workers, illustrate the risk that prohibition, especially when accompanied by criminal sanctions, may simultaneously enhance the role of entrepreneurs and state functionaries willing to engage in illicit activities and increase the exploitation of the actual service providers.

\textsuperscript{60}The concept of “norm entrepreneurs” has given rise to a vast literature. See Kathryn Sikkink & Martha Finnemore, International Norm Dynamics and Political Change, 54 INTERNATIONAL ORGANIZATION 891 (1998); Margaret E. Keck & Kathryn Sikkink, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

\textsuperscript{61} See supra n. 45.
as well as the prices their clients pay. A high-end market is already developing that has factored the risks of sanctions into its activities: an advertisement posted on a blog for surrogate mothers read "CGS, a private surrogate search firm, is actively seeking a qualified Surrogate Mother for an international client in Paris, France," and offered "a comprehensive compensation package of USD $150,000 plus expenses, including medical and travel." The ad then detailed the requirements for the job, which included being a permanent resident and currently living in the US, being a non-smoker, being between 21 and 43 years of age (although for “repeat Surrogate Mothers” the age limit was “flexible”) and being able to obtain a valid US passport for international travel. The language of the ad mimicked that of executive search firms; the images with which the agency represented itself to potential clients depicted a Caucasian woman proudly displaying her pregnant belly. It is possible that agencies charge premiums based on the aura associated with being American and on their ability to offer the services of “white” surrogates: the racialization of the market may contribute to the high price being offered. But one blogger noted in response to the ad that couples engaging surrogates in France can be prosecuted and may

62 For a useful collection of essays regarding sex work, see Vanessa E. Munro and Marina Della Giusta (eds.), DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION (Aldershot: Ashgate, 2008).

63 "CGS, a private surrogate search firm, is actively seeking a qualified Surrogate Mother for an international client in Paris, France.”

CGSurrogate@aol.com " http://www.surrogatemother.com/forum/topics/surrogate-search-usa-to-paris?page=1&commentId=1955157%3AComment%3A168651&x=1#1955157Comment168651 accessed 062810

An internet search using google found one posting for CGSurrogate representing it as a private surrogate search firm based in Atlanta, Georgia. See http://www.myspace.com/cgsurrogate
find themselves unable to import the children foreign surrogates have borne on their behalf, prompting the agency itself to admit in the same blog string, "USD $150,000 plus expenses" has priced in the risks associated with illegality.\textsuperscript{64}

\textsuperscript{64} The blog string, from which the following is excerpted, is revelatory.: See

“\textbf{Permalink} Reply by Dawn M. on June 1, 2010 at 11:21pm

Surrogacy is illegal in France. Couples who do surrogacy there are prosecuted. Some times couples from France who do surrogacy here in the states also run into problems when they travel back to France with child that are born via surrogacy.

Huge on going case in France between the French government and a French couple who had twins via surrogacy in India. You can google it its big news in France.

Beware.

- ◀ Reply

\textbf{Permalink} Reply by Kailia on June 17, 2010 at 11:52am

Maybe that's why the compensation offering is so high!

- ◀ Reply

\textbf{Permalink} Reply by CGSurrogate on June 24, 2010 at 5:13pm

Dear Applicants:

This is exactly why the compensation package is so lucrative; it also includes experienced legal and civil representation for all parties involved.
Demands for compulsory coordination from exporting states may also catalyze international coalitions of the pressure groups that may emerge in multiple countries. If lobbies in Germany and Japan, for example, seek to change their governments’ policies, they may join their efforts—all the more readily if they can find (or found) an international NGO to help support their claims. If such lobbies coordinate among themselves, and with local groups in India, they may then lead to a transnational social movement. They will likely confront equally-organized international opposition: the Catholic Church, for example, which is well-positioned to mobilize across borders and to exert international pressure, has repeatedly issued pronouncements against the legalization of surrogacy and could easily choose to engage against a campaign surrogacy similar to that long undertaken against legalized abortion.65 International organizations in concert with some states

CGSurrogate Compliance dept. #34838
http://www.surrogatemother.com/forum/topics/surrogate-search-usa-to-paris?page=1&commentId=1955157%3AComment%3A168651&x=1#1955157Comment168651
(accessed 081811) (emphasis added).

Taiwan, where surrogacy is prohibited, recently arrested a Taiwanese businessman and three Uzbek women he had imported to serve as surrogates for himself and his physician. See Central News Agency, Men Probed for importing surrogate moms, Taiwan News, 2010-05-21, available at: http://taiwannews.com.tw/etn/news_content.php?id=1262582&lang=eng_news

65 See, e.g., Catholics demand ban on Taiwan surrogacy, UCANEWS.COM,
are now attempting to address the question of surrogacy. Filiation norms, hitherto largely ensconced within the province of states’ domestic jurisdiction, are evermore becoming a matter for a matter for international coordination, and, hence, international law.

III. Contract, filiation, and the limits of choice.

Some have argued that the answer to the filiation crisis that surrogacy has heightened lies in the application of an intent-based paradigm of parentage. Under this approach, legislators protect, 070110; Kerala Church looks to scupper surrogacy bill, UCANEWS.COM, http://www.ucanews.com/2010/06/25/kerala-church-looks-to-scupper-surrogacy-bill/ accessed 070110.

66 See infra Section IV.

67 For a recent argument for the intent-based test of parentage, see Linda S. Anderson, Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families 62 ARK. L. REV.29 (2009). The “intent” based test was first articulated in Johnson v. Calvert (851 P.2d 776 (1993). The Court, required to attribute maternity to one of the gestational carrier, the commissioning mother who was also the ova-provider or neither (as the lower court had done) “conclude[d] that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law.” Inter alia, on intent-based parentage, see On intent-based private ordering of parenthood, inter alia, see Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender-Neutrality, 1990 Wis. L. Rev. 297 (1990).
and courts enforce, the intentions of the parties embedded in their contracts. It may be that dramas like that of the Balaz twins would be avoided if all states were to recognize private contracts regarding reproduction: states would then recognize whatever filiation rules and the corresponding attributions of maternity and paternity private parties negotiated, and apply their citizenship and immigration rules on that basis. Had Germany adopted such a stance, it could have based the recognition of the original birth certificate and the consequent issuance of German passports to the twins on the Balazes’ bargain with the gestational carrier and the near-catastrophe would have been averted from the very beginning. This legal posture would have been acceptable to India; but it contravened Germany’s policy on reproduction and filiation, leading to the refusal to recognize a parental nexus between the Balazes and the twins and thus to the rejection of the request for German identity papers on which entry rights into Germany could have been based. As this section argues, many states have refused to recognize intent without more as a basis for the establishment of filiation – and predictably will continue to do so.

Conflicts among legal frameworks, such as those implicated in the Balaz case, impede the flow of children and parents from the states in which the genetic components are extracted and assembled and in which births take place to those of the newly-constituted family’s intended residence. Incompatible norms complicate or foreclose altogether the recognition of parental statuses on which rights to transmit citizenship—and hence to obtain identity documents and international exit and entry rights—are predicated. The issue of filiation as it relates to definitions of maternity and paternity that constitutes the fundamental stumbling block: while concerns about commodification – often raised in debates over reproductive surrogacy -- may underlie filiation laws and policies, it is the rules regarding states’ recognition of the nexus between particular

______________________________
children and particular parents that govern the attribution of nationality and citizenship. Thus, the viability of solutions predicated on contractual autonomy with respect to the legal identification of a “mother,” “father,” or “child” is a function of the frameworks regulating filiation that operate both at the national and international level.

Two normative-legal models can be traced that condition the feasibility of privatized solutions to filiation and the identities with which it correlates: one that revolves around contractual autonomy and the other around the public interest. The arguments for these models are briefly sketched below in specific reference to the dilemmas reproductive surrogacy raises and to the roles assigned to international law. This discussion is only intended to render each model in ideal-typical terms: many intermediate positions have been espoused by advocates and policy-makers, and no one state’s policies conform in every respect to either model. In political and philosophical debates each model is tempered by limiting considerations: contractual autonomy, and the “market liberalism” it recalls, by concerns for the harm of others; the public interest, and the “communitarianism” with which I will associate it here, by concerns for individual liberty. Nonetheless, the discussion of these models allows the identification of the policy elements, domestically and internationally, that would be required if contractual autonomy were indeed to be promoted as the solution to the dramatic scenarios that the Balaz twins, and many other children caught between borders, emblematically represent.

A. Contractual autonomy

i. Self-determination and the rights of sellers and buyers: what is bought and sold?

Arguments in favor of contractual autonomy focus on the rights to self-determination and to freedom of contract of the sellers and buyers of the relevant goods and services, in particular of the women involved. (Fewer polemics and legal strictures have focused on men selling sperm, and, indeed, regulation is differentiated by gender.\textsuperscript{69}) If a woman wants to sell her ova or her services as a gestator, why should she not be allowed to do so? And if a buyer is willing to meet the seller’s terms, why not allow the transaction to occur? The prohibition of such exchanges does not stop them, it can be argued, but raises their transaction costs and negative externalities. The implicit argument is that a person’s right to dispose of herself—and hence of her bodily parts and bodily services—is neither legitimately nor effectively subject to governmental control.\textsuperscript{70}

This argument rests on three premises. First, the objects exchanged are characterized as pertaining directly to the ova (and sperm) provider or to the gestator—their bodily products and her services and/or her rights in the child she will bear—rather than to the child itself. Specifically, the exchange with the gestator is not characterized as constituting a market in human beings—“baby selling”—but as establishing a market in the rights a person has to her body products and labor and to “own” her own rights. Second, this configuration of the exchange between the gestator and the provider of the ova and sperm, on one side, and the commissioning parties on the other situates the transaction squarely within the decision-making ambit of protagonists capable of consent. The child—already elided as an object of the exchange—is also

\textsuperscript{69}See Rene Almeling, Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation, 72 Law and Contemporary Problems 37, 37-58.

\textsuperscript{70}For an argument in favor of a “free market in reproduction,” see Carmen Shalev, BIRTH POWER: THE CASE FOR SURROGACY (1989).
elided as a subject of the exchange. There is, therefore, no need to “represent” the interests of the child, for example through a state-appointed guardian. Finally, the relevant transactions take place prior to conception, such that—once acquired—the constitutive parts of the embryo, the resulting embryo, and the fetus whose existence is predicated on the embryo and that is, in turn, the predicate of the child, are always already property of the commissioning parties.

The future child is postulated as being nothing other than the mechanical result of the transformative processes that are set in motion from the moment that the “genetic material” is acquired to that in which the embryo develops and on through fetal evolution. Body parts, pre-embryo, embryo, and fetus are endowed with an identity that is separate from that of the gestator and is marked as property of the commissioning parties.71 The gestator provides gestation as a

71 Differently, the commissioning parties would have to be posited as having a property interest in the body of the gestator, which, given the unseverability of the (living) body from the “person”, would be contrary to the basic tenets of possessive individualism. See infra n. and accompanying text. It should be noted that the implied theory of surrogacy outlined here runs directly counter to many theories on which the legalization of abortion is premised holding that, at least for a certain period of time, the embryo and developing fetus are a part of the body of the woman and hence cannot be attributed an identity separable from hers on which legal rights—and a state interest in their protection—can be predicated. See Roe v. Wade, (410 U.S. 113, 314 F. Supp. 1217) (1973), Blackmun J. noting that: “The Constitution does not define "person" in so many words … the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application. [All this … persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.” (Internal references omitted.) In the Court’s tripartite scheme, which distinguishes the degree of legitimate state interest on the basis of the phase of pregnancy, in the first period, the decision regarding the continuation of the
service, but she has no direct ownership, parental affiliation or identity interest in the embryo/fetus—which therefore cannot be conceptualized as an element of her body, let alone her “self” — nor, hence, can she have the sort of parental/maternal interest in the child that might have resulted from her having had an original interest in the elements and processes through which the child was formed. To the extent the gestator has property rights at all, these are characterized as “immovable;” her uterus being equated with any other form of real estate. Consequently, decisions regarding the disposition of the “movable” property constituted by the embryo or fetus (or, eventual child), whether pre- or post-delivery, are simply not hers to make. It is these premises that enable the surrogacy contract to be described as engaging parties able to consent to the goods exchanged and services performed and as revolving around fully alienable goods and services.\textsuperscript{72}

The argument for contractual autonomy resonates with the “possessive individualism” that Macpherson attributed to modern political philosophers and that feminist theorists have at times critiqued and at other times endorsed.\textsuperscript{73} Indeed, Macpherson’s definition of possessive pregnancy is entirely within the sphere of privacy of the woman (with her physician): the implication being that, at least at this point, the embryo and developing fetus are components of her body. Even in the second phase, where the state may regulate to the extent to which such regulation reasonably relates to the woman’s health, the fetus does not have an identity separable from that of the mother. Such an identity only emerges with viability.

\textsuperscript{72} These premises constitute the implicit representations of a surrogacy contract. For an in-depth analysis of the contractual issues raised by reproductive surrogacy, see Carol Sanger, (Baby) M Is for the Many Things: Why I Start with Baby M, 44 St. Louis U. L.J. 1443 (2000).

individualism highlights the distinction between the individual’s property in “his own person,” which he possesses but may not exchange, and his property in his capacity to labor, which he may alienate: a distinction that maps onto the notion that reproductive surrogacy entails the exchange of money (or other benefits) for the work of gestation rather than payment for pregnancy, which could be viewed as a state of being and a moment (if not element) of (female) personhood.\textsuperscript{74}

Ultimately, this argument for contractual autonomy places the burden of justification on those who seek to maintain or impose regulation rather than on those who press to abolish it.\textsuperscript{75}

Precisely because its central concept is that of the autonomous evaluation of interests, it tends to view relations among persons through the prism of individual choice. And, through the concept of individual choice, it presents itself as a human rights argument, as a close relation to the argument that individual self-determination as explicated through individual choice is a hallmark of

\begin{flushleft}
\textsuperscript{74} In his summary of the basic elements of the theory of possessive individualism, Macpherson includes “(iii) The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society” and “(iv) Although the individual cannot alienate the whole of his property in his own person, he may alienate his capacity to labour.” Id. at 263-64.

\textsuperscript{75} For a paradigmatic statement of this point of view, see ROBERT NOZICK, ANARCHY, THE STATE AND UTOPIA. In the terms used by Landes and Posner with respect to governmental regulation of “nonmarket behavior:” “nor is there any basis for the presumption that government does a good job of regulating nonmarket behavior: if anything, the negative presumption created by numerous studies of economic regulation should carry over to the nonmarket sphere.” Elisabeth M. Landes and Richard A. Posner, The Economics of the Baby Shortage, in Ertman and Williams, n. 72 at 46 (citations omitted).
\end{flushleft}
individual autonomy, empowerment and human dignity and, hence, the keystone of civil and political rights.\textsuperscript{76}

At its starkest, this view leads to the conclusion that not only is the assumption of parental roles a matter for individual determination, but the contents of such roles—their correlative behavioral commitments—are also subject to individual choice.\textsuperscript{77} Neither giving birth nor contributing ova or sperm need automatically correlate with maternity or paternity as socially understood and legally prescribed roles. Individual contracts for reproductive services can—indeed must—

\textsuperscript{76} On individual self-determination as an emerging norm in international law and central tenet of human rights, see THOMAS FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM (1999); see also STEFANO RODOTA’, LA VITA E LE REGOLE: TRA DIRITTO E NON DIRITTO, (2009). See also the discussion of dignity as autonomy Section III(B).

\textsuperscript{77} Some commentators limit the alienability of parental rights by noting that only that which already pertains to such rights—and not that which is excluded, either by necessary implication or by explicit regulation—may be exchanged. See Donald J. Boudreux, A Modest Proposal to Deregulate Infant Adoptions, 15-1 The Cato Journal, http://www.cato.org/pubs/journal/cj15n1-7.html (“When a birth mother gives a child up for adoption, she legally transfers her parental rights to the adoptive parents; the adoptive parents gain all those rights, but only those rights, that the birth mother possessed before the adoption.”) In the specific case of surrogacy, gestational carriers would be able to sell their rights to being “mothers” but not the ability to define the rights and obligations associated with being “mother,” since such rights and obligations may be separately regulated. It is worth noting that Boudreux begins from the assumption that ‘mother rights’ vest in the woman who will (or has) given birth, and that it is she who contracts them away. In a purely contractarian universe, however, no such default allocation would be assumed: each birth would raise anew the question “who is the mother” (if anyone).
include enforceable clauses allocating parental status (one might think of these as “parentality clauses”) as well as other conditions directly relating to the constitution of the embryo, its implantation, the conduct of the gestation, and the delivery and transfer of the child and to conflict resolution (including, for example, with respect to jurisdiction and choice of law).  
Whatever agreement is reached is dispositive; state policies are limited to ensuring the enforcement of the will of the parties.

**ii. Translating contractual autonomy into the regulation of filiation**

---

78 Recognition of parentality clauses could be seen as a further elaboration of the theory of functionally-based parenthood, which is predicated on the consent between an intended (i.e., a person having an “intent to parent,” which intention has been reached in, and sanctioned by, agreement with the legal parent) or a “de-facto” functional parent (a person who, with the consent of the legal parent has, for a specified period of time and with an intent to form a parent-child relationship, actually performed care-taking tasks to an extent at least as significant as those performed by the legal parent). For a review of the literature regarding functional parenthood, see Suzanne B. Goldberg Attorney for Amici Curiae in Support of Petitioner-Appellant, in the case of Debra H. v. Janice R., Court of Appeals, State of New York, November 16, 2009, at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=164291, discussing, inter alia, the American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002). For a discussion that situates functional parenthood in the context of international legal norms, see Brief of the Columbia Law School Gender and Sexuality Law Clinic, AAR Amicus Brief, Second Parent Adoption in Puerto Rico, November 9, 2009 at: http://www.law.columbia.edu/sexuality-gender-law-clinic/issues/family.
Translated into practice this means that similarly situated parties can engage in domestic or trans-border transactions on vastly differing terms. One contract might specify that the gestator is the “mother” at birth, provide for her to relinquish her maternal status within a given period in favor of a commissioning party (with or without the possibility of the gestator changing her mind), and establish that two birth certificates be issued, an “original” and an “amended” one, with the latter being valid for all governmentally required purposes but the former being preserved in a public register and rendered accessible on the basis of agreed terms (for example, only to the children born of the particular agreement or their legal representatives so as to ensure that such children may know the identities of their biological procreators).

Another contract might attribute maternal status to a commissioning party from a particular moment of gestation or delivery while specifying that the gestator is not to be considered the “mother” at all, make provision for only one birth certificate, not allow the gestator to change her mind, and not allow access to any identifying information regarding the gestator or the sperm and ova donors. And a third contract might make provision for two contractually recognized and formally denominated mothers, each with specified rights and obligations: for example, assigning one custodial rights and the ability to decide on education while granting the other visitation rights and the ability to claim a child deduction for tax purposes, receive a child allowance, or access reserved social services.

Similarly, rights and obligations associated with paternity could be distributed, for example, between the sperm provider, the partner of the gestator, or one of the commissioning parties. Moreover, attributions of gendered parental roles could be made independently of the sex of the

---

79 Many different permutations of rights and obligations are possible with respect to access to information, on a spectrum that ranges from full and public access to the specific identities of the biological parents to restricted access to limited information, for example regarding particular genetic diseases.
person thus identified, or simply subsumed in the general category of “parent.” Thus, parental status could be allocated independently of role in the process of reproduction, “fractionalized” or pluralized: a situation that is, indeed (and in my view, rightly), becoming more frequent although it is often fraught with difficulties and paradoxes because “pure contractual” models in which state action merely registers the intent of the parties without reflecting any substantive norms is hard (if not impossible) to find. And yet state action is precisely what is at issue, for private arrangements regarding filiation are designed to convey rights, whose recognition and enforceability cannot simply be ensured by the individual parties to the agreements or by any self-policing parental or other associations they may form. At a minimum, any agreement among the parties requires the state to inscribe particular individuals on birth certificates, to distribute financial benefits, to enforce decisions made by one person rather than another with respect to habitation, education, medical and public services, and religious affiliation, and to recognize applicable jus sanguinis rules with respect to nationality and citizenship.

If the parties’ states of citizenship (or residency) or if the forum within which the contract were “performed” (a term that, in this perspective, would itself be subject to contractual definition) were to recognize individual autonomy in questions relating to the attribution of parental status, all contracts would be equally valid and cognizable by each state’s courts and states would be required to act accordingly. This model, then, depends on a registrar-state that merely records and acts upon the parties’ decisions regarding filiation and parental rights and obligations. Such a state identifies its normative orientation and interests with the respect for private preferences. And, it understands that when transnational arrangements are involved, the role of international

---

80 But many states differentiate between benefits and legal presumptions applicable to mothers and fathers, and hence the attribution of the status of “mother” or “father” continues to matter

law is merely to facilitate the recognition of such preferences across borders. Further, at least for purposes of these agreements, under the contractual autonomy model both international and municipal law are required to remain silent as to substantive norms regarding filiation, the assignment of parental identities, and their attendant rights and responsibilities, as well as with respect to the conditions directly pertaining to the performance of the reproductive services, and the transfer of the end product, that is, the child. To the extent that either national law or international agreements and customary international law detail norms on these issues, such norms are, in effect, suspended. And the specific function of private international law revolves around the application of contractual arrangements. It does not, for example, extend to questioning the constitutional (or other) bases for the exercise of a particular court’s jurisdiction so long as that exercise has been contractually agreed. Analogously, it does not allow for those exceptions motivated by public policy or bonnes moeurs that have traditionally been understood as limiting a state’s responsibility to recognize acts (including private contracts) of another state. This, however, runs directly contrary to numerous cases involving surrogacy in which

---

82 This, as Horatia Muir Watt rightly notes, is not what is entailed under the rubric of “private party autonomy,” which in fact establishes the ability of a party in one jurisdiction to submit a particular transaction to the rules of another jurisdiction, not to compose her own or avoid state regulation altogether. See, Horatia Muir Watt, “Party Autonomy” in international contracts: from the makings of a myth to the requirements of global governance, available at www.columbia.edu/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf.

83 For a comparative analysis of the use of international and constitutional law and public policy exceptions to private party contracts, see PARTY AUTONOMY: CONSTITUTIONAL AND INTERNATIONAL LAW LIMITS IN COMPARATIVE PERSPECTIVE (George Bermann ed., 2005.) For a discussion of the normative convergence of private and public international law that belies the
states have invoked public policy exceptions to refuse recognition of births (and birth certificates) resulting from surrogacy arrangements.\textsuperscript{84}

\textit{B. Communitarian perspectives}

At the other end of the spectrum lie theories that assign a central role in defining individual choices—and individual identities—to institutions representing a “general good.” Such theories may be grounded in differing values—the primacy of order, for example, or of economic efficiency, or of continuity with the past. Here I will focus on “communitarian” theories, for they contrast most sharply with the individualism that informs the contractual autonomy model and they continue to function as a source of legitimation of public policy.

The history of political thought is replete with debates regarding communitarianism that are beyond the scope of this essay. For present purposes it is sufficient to distill a few elements that can help delineate an alternative perspective to the contractual autonomy model. But before proceeding, it is important to reiterate that I am outlining a model, not describing actual historical processes. I am not asserting that any given community has articulated a unitary view of the general good, nor that such a community as organized and governed by a central political authority (a state) does or has represented an uninflected “general good” that effectively equates with a similarly uninflected “collective interest,” nor again that such a “general good” must contain any particular values such as justice, liberty and equality. I use “communitarianism” as a

\textsuperscript{84} See Hague Conference 2012, n.3, (detailing cases involving public policy exceptions in France, the Netherlands, Belgium, Japan, and and Spain), p. 18.

---

\textsuperscript{84} See Hague Conference 2012, n.3, (detailing cases involving public policy exceptions in France, the Netherlands, Belgium, Japan, and and Spain), p. 18.
generic term to represent theories that allocate the capacity to elaborate shared values to the community, identify the well-being of the community with an idealized vision of itself that such values are meant to instantiate, and further identify the well-being of the individual with the well-being of the community.

For communitarians thus understood, the general good aligns the collective interest in a particular social order with the individual interest in its realization. The common vision of the general good represents an alchemical abstraction of particular visions, just as the collective interest represents an abstraction of more particular interests. That interactive processes of definition and transformation link the general and the particular does not undermine this proposition, for communitarians will at least implicitly assume that a working definition of the general good will emerge from -- and be transformed by -- debate, negotiation, and implementation. Such processes may privilege the fulfillment of specific social functions, such as reproductive activity or industrial production, and the promotion or protection of specific actors, such as mothers or children or soldiers or workers.\textsuperscript{85}

The fundamental interdependence of individuals, the very constitution of individuals as socially situated persons, is taken as legitimating a collective interest in their ways of being, the modalities of their interactions, and the kinds of choices that are available to them.\textsuperscript{86} Legal limits

\textsuperscript{85} See, for a recent argument in favor of the attribution of legal status based on the recognition of the value of particular social functions, the current debate regarding functional parenthood, \textit{supra} n. 78 and accompanying text.

\textsuperscript{86} Thus Sandel, critiquing Rawls’ view of the self as an “antecedently individuated subject, standing always at a certain distance from the interests [and experiences] it has,” notes: “But a self so thoroughly independent as this … rules out the possibility of a public life in which, for
on individual choice constitute legitimate exercises of power when they emanate from authoritative decision-making processes that are expressive of the general good. While individual choice operates within societal parameters, private negotiation rightly occurs in the “shadow of the law.”\footnote{The phrase is borrowed from Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1978-1979).} Consequently, struggles over regulatory authority concern not the legitimacy of regulation per se but the legitimacy of the normative perspectives that regulation expresses and supports; the burden of justification shifts from arguments pro and con state intervention to arguments regarding its qualities: the objectives it pursues, the incentives it creates, the social categories it favors or penalizes, ultimately, the vision of the general good that it promotes.

\textit{i. Communitarianism and human dignity: reframing self-determination}

Like the contractual autonomy model, the communitarian model presents itself as a human rights argument. At one level, the communitarian argument revolves around a version of group rights: the primacy of the general good, as defined through shared normative frameworks, authorizes the community to limit the parameters of individual choices.\footnote{See, e.g., African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 Part I, Ch. II, Duties.} But the communitarian argument can also be configured in terms more closely resonant with the human rights of individuals, particularly by reference to human dignity. Dignity figures in the Preambles of the United Nations Charter and the Universal Declaration of Human Rights (as well as several of its articles), good or ill, the identity as well as the interests of the participants could be at stake.” Sandel then explicates his view of inter-subjective and intra-subjective conceptions of the self. M.SANDEL, \textit{LIBERALISM AND THE LIMITS OF JUSTICE} 173 (1998) [hereinafter Sandel, Liberalism] at 62.
is generally ascribed a foundational status in UN human rights treaties, constitutes a central element of European and Latin American human rights law and jurisprudence, and has acquired salience in the United States.\(^9\)

Although it is primarily through the mobilization of Christian theologians and political figures—that the concept of human dignity seems to have initially been integrated into the legal instruments that currently form the basis of international human rights law, as a juridical concept dignity has a long lineage that can be traced to Roman law and is not exclusive to any particular

religious tradition.\footnote{On the history of dignity in contemporary international law, see SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010). On the broader history of dignity as a juridical concept see McCrudden, supra n.89. It is important to stress that I am concerned here with the specifically legal, rather than moral and philosophical, discourses regarding dignity.} In contemporary legal theory, dignity is generally associated with Immanuel Kant. In particular, as McCrudden points out, ‘the conception of dignity most closely associated with Kant is the idea of dignity as autonomy; that is, the idea that to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.’\footnote{McCrudden, n.89.} In this sense, dignity could be said to cohere with the contractual autonomy model delineated earlier, for individuals choosing freely to exchange their own bodily goods and services (and the children thereby produced) for consideration might be seen as explicating a fundamental right to make decisions regarding themselves.\footnote{Waldron has defined dignity as \textit{inter alia} entailing a person’s capacity and right to explain her own reasons, and has seen this principle as instantiated in legal institutions such as the right to trial. See, Jeremy Waldron, The Rule of Law and Human Dignity, 2011 Sir David Williams Lecture, Cambridge University, Public Lectures from the Faculty of Law} But Kant also contrasts the status of a human being “in nature” with the status of human beings as “persons.”\footnote{Immanuel Kant, The Metaphysics of Morals (Edited by Mary Gregor, Introduction by Roger J. Sullivan), (1996), p. 186} As a person, a human being is “exalted above any price,” in other words, not subject to commodification.\footnote{Id. As Nussbaum explicated Kant (and Marx) the notion of dignity entails recognizing “each person as a bearer of value.” By contrast, “the core of what exploitation is, [is] to treat a person as a mere object for the use of others.” Martha C. Nussbaum, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000), p. 73.} “[H]e possesses a dignity (an absolute inner
worth) by which he exacts respect for himself from all other human beings.”\textsuperscript{95} Moreover, a human being is bound not to disregard his or her own dignity; “[h]umanity in his person is the object of the respect which he can demand from every other human being, but which he also must not forfeit.”\textsuperscript{96} In this perspective, contractual autonomy is limited by respect for the non-commodification – the dignity – of the human being as a person.

A ‘strong’ communitarian tradition sees the community as instrumental to the realization of the essential human value of the individual\textsuperscript{97} and endows the community with the right and obligation to intervene to safeguard the dignity of each member independently of the desire of any particular

\textsuperscript{95} Immanuel Kant, n.93, p.186 (emphasis in the original).

\textsuperscript{96} Id. 186-187. Moreover: “Since he must regard himself not only as a person generally but also as a human being… his insignificance as a human animal may not infringe upon his consciousness of his dignity as a rational human being. … he should pursue his end … not disavowing his dignity…. ” (Emphasis in the original.)

\textsuperscript{97} McCrudden contrasts the “more communitarian” approach of the German Constitutional Court to dignity to the more “individualistic” interpretations of the Hungarian Constitutional Court as well as of the US and Canadian supreme courts. See, McCrudden, supra n.89, at 699. Some commentators have expressed concern that the U.S. approach to rights could be undermined were the stronger European view of dignity to be adopted. See, e.g., Neomi Rao, On the Use and Abuse of Dignity in Constitutional Law, 14 Colum. J. of European 201 (2007-2008). See also Guy E. Carmi, Dignity—The Enemy from Within—A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification, Journal of Constitutional Law, Apr. 2007, at 957-1001.
member. This obligation applies even if the impugned act causes no manifest harm to either the actor or another, and even if compliance with the rules of dignity imposes costs on the actor or the community or both. Conduct that violates a defined version of human dignity is taken as inherently damaging to the self as well as to the community: once such conduct has occurred, no other consequences need flow to prove harm. Perhaps most significantly, the community is authorized to defend its conception of dignity even as against that of its own member whose conduct is at issue.

A noted Comment of the Human Rights Committee illustrates this perspective. Responding to a complaint against a French ban on dwarf-tossing in which the complainant alleged that the law deprived him of a job whereas “dignity consists in having a job,” France argued that the ban on dwarf-tossing contracts constituted “a classic instance in administrative police practice of reconciling the exercise of economic freedoms with the desire to uphold public order, one

98 Exemplifying the uneasy balance between individual liberty and community limit-setting embedded in communitarianism, the European Charter of Fundamental Rights specifies in the Preamble that “the Union … places the individual at the heart of its activities,” but then girds individual choice within precise parameters, including, under the rubric of the “Right to the Integrity of the Person” (Chapter I, Art. 3): “In the fields of medicine and biology, the following must be respected in particular: … the prohibition on making the human body and its parts as such a source of financial gain.” On the risks to individual liberties associated with communitarian approaches to dignity, see Rao, n.97; Carmi, n.97.

99 McCrudden discusses communitarian approaches that do not permit dignity to be waived, and to difficulties courts encounter in determining whether – and to what extent – dignity should be evaluated from the subjective perspective of the person at issue or in relation to an ‘objective’ standard. See McCrudden, n. 89, at 705-707.
element of which is public morals. Public order has long incorporated notions of public morals and it would be shocking were the basic principle of due respect for the individual to be abandoned for the sake of material considerations specific to the author [who had brought the complaint] to the detriment of the overall community to which the author belongs. The Committee concluded that “the State party has demonstrated . . . that the ban on dwarf tossing . . . was necessary in order to protect public order, which brings into play considerations of human dignity.”


The notion that certain goods and services are “res extra commercium,” i.e., per se not susceptible to the exercise of private rights and hence outside the reach of commercial transactions, is of Roman derivation, and is today applied to such issues as cultural property and the ownership of space as well as to transactions in (some) bodily parts. For a discussion of “morally repugnant” contracts (and an economist’s accommodation to that notion), see Alvin E. Roth, Repugnance as a Constraint on Markets, J. OF ECON. PERSPECTIVES XXI-3, at 37-58 (2007). For a general discussion of the normative bases of objections to particular exchanges, see Michael Walzer, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998) [hereinafter Sandel, Liberalism].
dignity.”[101] In a similar vein, the German Constitutional Court, in the Lifetime Imprisonment case, observed: “The free person and his dignity are the highest values of the constitutional order. The state . . . is obliged to respect and defend it. This is based on the conception of man as a spiritual moral being endowed with the freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated self-regarding individual but rather a person related to and bound by the community. In light of this community-boundedness, it [i.e., the freedom of the individual to determine and develop himself] cannot be ‘in principle unlimited.’ The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community’s social life; yet the autonomy of the individual has to be protected.”[102]

The Human Rights Committee’s view of human dignity—like that of the German Constitutional Court—ensconces the individual in the community, and it is in function of that community that the individual’s ‘material considerations’ (and right to ‘determine and develop himself’) may be limited: certain transactions are not allowable because they fail to comport with a normative vision of the social order (in Wackenheim’s terms, the “public order, one element of which is public morals”) within which freedom of individual choice is, of necessity, constrained. In this view, it is the community, rather than the individual, who is the arbiter of his or her “human dignity,” that is, of the acceptable parameters of an individual’s ways of being (“the basic


[102]McCrudden, n.89 at 700 (CITING D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 32 (2nd ed., 1977)) (emphasis added). It is beyond the scope of this paper to seek a resolution to the tension between “community-boundedness” and “individual autonomy” that has long engaged philosophers. See JURGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 126 (Max Pensky, ed., 2001).
principle of due respect for the individual”). From the perspective of the individual, Wackenheim teaches, to be “human,” in the sense of acting in conformity with one’s “human dignity,” requires accepting particular behavioral rules (founded in a system of values identifiable as “public morals”) with which one may or may not agree but which the community articulates and applies. From the perspective of the community, Lifetime Imprisonment indicates, to construct a society of “humans” who realize their “human dignity” requires constraining individual action and ways of being so as to conform to the community’s definition of such dignity (thus safeguarding individual autonomy within this “community-boundedness”). In turn, however, this depends on the community’s definition of the “human.”

**ii. Human dignity and the status of the “human.”**

In the era of human rights, the “human” has attained a new centrality and value, constituting the primary subject of the social vision articulated in the Universal Declaration of Human Rights, and reaffirmed through successive treaties. As has been repeatedly noted, this contrasts with the

103 See Jeremy Waldron, n. 106; Robert C. Post, Three Concepts of Privacy, 89 Geo. L.J. 2087 (“Unlike autonomy, dignity depends upon intersubjective norms of conduct that constitute respect among persons.”) Moreover, no summary of legal texts is sufficient to provide a substantive definition of dignity: what is needed, in Waldron’s terms, is a “jurisprudence of dignity, not a hornbook analysis.” Jeremy Waldron, Dignity and Rank, Tanner Lectures, Berkeley, April 2009, p.4.

104 This contrasts, as Hannah Arendt noted, with views that revolved around other statuses such that the “human” was a residual category that denoted exclusion from rights-bearing categories. Although this essay stresses the legal construction of the human as a status, the naturalization of that construction should also be noted. Joseph Slaughter acutely notes: “A tautologized contemporary human rights law posits the primary existence of what it seeks to articulate,
primary subjects of other orders: in contemporary states, citizens and subjects. And like those of the citizen and the subject, the defining criteria of the “human” remain inherently contestable. Treaty negotiations, treaty bodies, courts, international organizations, like their domestic counterparts, have variously addressed issues such as when a “human” can be said to have come into existence, what features characterize it, what are the minimum conditions required for its subsistence, what is the behavior that comports with being or not being human, and when a human may be said to have ceased to be. Ongoing contests—for example, regarding fetuses or the identifying criteria of death—simultaneously denaturalize the vision of the “human” and highlight its political constitution and shifting juridical crystallizations. To be “human” is to occupy a particular position, albeit one whose substantive properties are not only historically mutable but also variable across legal orders.

To be “human,” then, is at least theoretically to have particular status, that is, to be in a “legal relation [that connects an] individual to [the] rest of the community” and that fashions the ensemble of “rights, duties, capacities and incapacities which determine a person to a given class” into a more general condition. Although there is a certain ineffability of status, it is nonetheless understandable as a “legal personal relationship, not temporary in nature nor terminable at the mere will of the parties, with which third persons and the state are concerned, [such that] [w]hile claiming as a a priori what is simultaneously, impossibly and necessarily a posteriori … That is, the human rights personality preexists society and law and comes into being through social interaction and the collective declaration of rights. Ultimately, of course, the personalities are one and the same; underwriting and underwritten by human rights, the human personality is both natural and positive, pre-social and social, premise and promise.” Joseph R. Slaughter, Human Rights, Inc.: The World Novel, Narrative Form and International Law 79 (2007).

105 Black’s Law Dictionary 712 (7th ed. 1999)
[the] term implies relation it is not a mere relation.”106 Being “human” is not merely “natural,”107 nor is it merely a matter of individual will or of private agreement: one cannot declare oneself or another to be “human” or suddenly transmogrify into another type of animal or an inert entity, for state-defined pathways and their attendant certifications to come into play. Just as entry into the status of human requires conformity with legally prescribed criteria (conception/live birth, brain and cardiac function) and state-approved attestation (birth certificate, identity documents), exit is also dependent on legally prescribed criteria and the attendant certifications (lack of discernible brain and/or cardiac function; death certificates). Even suicide marks the legally cognizable end of a life only when it is appropriately documented and takes a particular physiological form, being denoted by the kinds of events (such as the absence of brain or cardiac function or both) that, in a given legal order, signify death.

Moreover, if to be human, as Hannah Arendt famously noted, is to have the “right to have rights,” historicity requires that this description be taken out of its generic form: at any given time and place, to be human is to have the right to these rights, as specified in these rights-endowing

106 Id. (emphasis added).

107 McCrudden notes that whereas in Roman law dignitas was associated with particular statuses, Cicero and others deployed a broader conception of dignity, associating it with “human beings as human beings, not dependent on any particular additional status.” McCrudden then observes that “where human beings are regarded as having a certain worth by virtue of being human, the concept of human dignity raises important questions such as ‘What kinds of beings are we? How do we appropriately express the kinds of beings we are?’” McCrudden n.89 at 657. Waldron also relates dignity to the status of human beings, although he relates it more closely to rank. See, Waldron n. 93 and n.106.
charters and other law-making documents, valid in this context.\(^{108}\) Using as a template the texts often referred to as the International Bill of Rights—the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights—a human is a being who can claim all of the rights that are enumerated in the Covenants precisely because it is the ensemble of all these rights that are essential to the realization of “human-ness.” In sum, the status of ‘human’ is both complex and sticky. Once attained, it engenders an ontological transformation that mere contract does not effect; it extends beyond any one transaction to color multiple facets of an individual’s position in the community. And it is not easily lost, for its loss does not depend simply on one’s inclinations nor on any private bargain one may strike. Rules relating to status and to the behavior with which it must be correlated in order for “dignity” to be ensured thus stand at the antipodes of maximum contractual autonomy.

Both international agreements and the jurisprudence of numerous courts reflect the notion that dignity entails a firm prohibition against the commodification of the human body. In the words of the European Convention on Human Rights and Biomedicine (echoing the European Charter of Fundamental Rights), “the human body and its parts shall not, as such, give rise to financial gain.”\(^{109}\) And the South African Constitutional Court noted: “Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these


aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected.”

Such decisions may be invoked by courts in other states as enunciations of a general principle that invalidates commercial surrogacy agreements (or legislation); indeed, several European states explain their opposition to commercial surrogacy by referencing its reduction of the gestational carrier and the child she bears to objects of contract.\(^{111}\)

**iii. Filiation as status-attribution.**

As a matter of fact, the legal attribution of parental status—for example, via inscription on a birth certificate—declares and constitutes the individual as a parent, whose entry into, exit from, and specific obligations with respect to this status extend beyond the exclusive reach of individual negotiation.\(^{112}\) Of all statuses, maternity may be among the “stickiest,” as evidenced by the rules regarding its voluntary rejection or termination and as further manifested in the breadth of policy

---

\(^{110}\) The Court went on to explain the limitation of the freedom to contract prostitution services:

We do not believe that [the provision prohibiting prostitution] can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. Constitutional Court of South Africa, 9 Oct. 2002, Case CCT31/01, Jordan v. the State per O’Regan and Sachs JJ. Concurring. As cited by Waldron supra n. 106, 23.

\(^{111}\) Hague Conference on Private International Law (2012), n. x at 8, citing studies regarding Germany and Switzerland

\(^{112}\) Art. 311-25 of the French Civil Code, for example, specifies that maternity is established by mentioning the name of the mother in the birth certificate.
areas within which it carries significance. Being (or being in the process of becoming) a “mother” in the legal sense entails rights and obligations that cross areas of social organization, from pre- and post-partum leave to child custody and pension rights. In numerous jurisdictions, motherhood is constitutionalized, and, in some, women’s social citizenship is directly linked to maternity: in the words of the Italian Constitution, “the working woman has the same rights . . . as the [male] worker. Work conditions must ensure her fulfillment of her essential family function and provide special adequate protection to the mother and the child.”

In a somewhat similar vein, the Constitution of Ireland recites: “the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.”

More generally, the Grundgesetz of Germany provides as a basic right that: “Every mother is entitled to protection by and care of the community.”

The definition of “mother” at least in these jurisdictions is a constitutional matter. This does not entail that motherhood cannot be pluralized. Rather, it highlights the state

113 It is worth noting the pathways into entry into and exit from maternity as a legal status generally differ in significant respects from those entailed by paternity.

114 Constitution of the Italian Republic, art. 37, available at

http://web.tiscalinet.it/claufi/costituzione.htm (“La donna lavoratrice ha gli stessi diritti e, a parità di lavoro, le stesse retribuzioni che spettano al lavoratore. Le condizioni di lavoro devono consentire l'adempimento della sua essenziale funzione familiare e assicurare alla madre e al bambino una speciale adeguata protezione.”)


116 Grundgesetz (1949, 2009) art. 6 (4)

117 Greece, for example, recognizes and strictly regulates surrogacy arrangements, criminalizing any arrangement that does not conform to its legislation. See, Hague Conference (2012), p. 11
interest in the forms that such pluralization may take.

Trends towards granting more importance to contractual choice with respect to parental status have gained salience, particularly as a result of the development of assisted reproductive technologies and the recognition of the plurality of family forms. Some courts and legislatures have looked to the consent of non-biological, non-marital partners to determine parental status. Thus, for example, men or women who had consented to their partner’s use of third-party sperm or ova in order to bear a child have been found to have consented to assuming the rights and obligations of parenthood for the children thus conceived. Courts have also found in favor of the recognition of “functional” parents: those who have assumed parental responsibilities for children and performed the attendant roles, generally on a basis of consent with the already recognized legal parents. And the legalization of surrogacy in some states is a prominent indicator of possible movement in the direction of greater choice with respect to maternity. But these trends point to an expansion of the regulated forms of parenthood—including maternity—rather than to a retreat of regulation in favor of contractual autonomy. There may be more

---

118 Trends towards greater private party autonomy and the recognition of individual contractual ability have also been documented with respect marriage, at least in the United States. See Elizabeth S. Scott & Robert E. Scott, Marriage as a Relational Contract, 84 Va. L. Rev. 1225, 1225-1334 (1998). It should be noted, however, that here—as with parental status—although there may now be greater scope for individual choice, as the recent mobilizations in regard to same-sex unions have highlighted, ultimately the recognition of a person as married or not, and the rights and obligations that flow from that recognition, are directly dependent on state sanction and engender a transformation of the status of the persons involved into “spouses” (or, depending on the legal order, “husbands” and “wives”).

119 See supra n. 78 and accompanying text.
options to choose from, but parentality (whether maternal or paternal) is still a status dependent on state sanction.

iv. “Mother” as status.

Legal recognition as a “mother” generally appears to be incident to childbirth but other pathways to maternal status come into play in a variety of contexts, such as adoption, assisted reproductive technology, and immigration. Such pathways include judicial disposition, administrative procedures, genetic linkage, and recognition of the de facto assumption of maternal responsibilities. But no matter how it has been attained, once formalized, maternity is not a condition one can exit “at will.” Dereliction of responsibilities can expose the woman who gives birth to charges of abandonment unless the abandonment itself takes place within legally recognized “safe havens” where mothers can leave their children without fear of prosecution or in accordance with other legally-specified procedures.

120 For example, US regulatory practice regarding identifies the “mother” as the provider of ova for purposes regarding the recognition of nationality, with consequences that may be unforeseen both by the ova provider herself and by the gestator as well as by the commissioning parent. See note xx and accompanying text.

121 On maternal separation, see Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375 (1996).

122 The creation of “safe havens” has a long tradition in Europe, and has recently been resumed in the United States and elsewhere as an attempt to reduce risks of infanticide. For a discussion of maternal abandonment, its historical treatment and the establishment of safe havens see Sanger, n. 121. With respect to US policies, see also Kimberly M. Carrubba, A Study of Infant Abandonment Legislation, Legislative Counsel Bureau, State of Nevada, December 2000 at http://www.leg.state.nv.us/Division/Research/Publications/Bkgnd/BP01-03.pdf. For a
motherhood and maternity so that legal maternity is conferred only through a positive act of registration rather than by virtue of the physical fact of delivery itself. Although in some states—France and Austria, for example—“anonymous maternity,” which allows women not to identify themselves as the mothers of the children to whom they have just given birth, is possible, there does not seem to be a general trend towards the establishment of this institution. Adoption, which is legal in over 80 states (as indicated by the ratifications of the Hague Convention on Inter-Country Adoption124) and barred in others (including states following Shari’a law125),


123 See infra n.146 and accompanying text (discussing the U.S. definition of “mother” for the purposes of immigration). France attributes legal status to mothers only upon inscription of her name in the child’s birth certificate. However, the duty of inscription falls to the officier d’etat civil (the state officer for civil status), who must compile the birth certificate (on the basis of the declaration of anyone who was present at the birth) within three days of the birth itself. A declaration that provides a different name than that of the woman who actually gave birth is a criminal offense. A woman who delivers may choose not to be identified as the mother (“accouchement sous X”): this would leads to no mother being identified it does not enable the substitution of the name of the woman who gave birth with that of another.


125 Although Shari’a law generally does not allow for adoption as, for example, institutionalized in the Adoption Convention, in some states similar transfers of parental status may be effected through guardianship. Adoption of Children from Countries in which Islamic Shari’a law is observed, U.S. DEPT. OF STATE,
generally conditions the transfer of parental rights on the formal renunciation of such rights by the birth parents.

Neither the institution of anonymous birth, nor adoption (in its internationally sanctioned form), nor surrogacy imports a private contract model into filiation: the state remains a crucial player. Although “private” adoption is possible in some jurisdictions, the relinquishment of maternal rights and their transfer are subject to legal norms and, generally, state supervision. And surrogacy, although it often does contain contractual elements, cannot function without state sanction precisely because, as with both anonymous birth and adoption, ultimately the recognition of filiation is determined by the state and not solely by the agreement of the parties. For example, in the U.S. states that allow surrogacy arrangements, the attribution of parental status is nonetheless subject to regulation. And the French Cour de Cassation recently remarked in


For instance, under See Tex. Family Code § 160.753 of the Texas Family Code, which establishes the legality of surrogacy arrangements, the commissioning parties acquires their relative parental statuses through a process of adjudication, as follows:

ESTABLISHMENT OF PARENT-CHILD RELATIONSHIP. (a) Notwithstanding any other provision of this chapter or another law, the mother-child relationship exists between a woman and a child by an adjudication confirming the woman as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law, regardless of
reference to France’s refusal to legitimate filiation based on surrogacy arrangements that such arrangements are incompatible with the fundamental principle of the "indisponibilité"—or unavailability—of status. By virtue of the "indisponibilité de l'état des personnes," individuals may not freely modify their status. In a communiqué explicating the relevant decision, the court noted: "In effect, it is a matter of principle in French law, that the mother of the child is she who gives birth."\(^{127}\) Parentage and filiation, in other words, are firmly anchored in law and not subject to private agreement.

---

the fact that the gestational mother gave birth to the child.

(b) The father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law.


The Steering Committee on Bioethics of the Committee of Ministers of the Council of Europe recently reiterated the necessity for states to determine clear rules regarding filiation, in particular in cases involving medically assisted procréation. See Council of Europe, Committee of Ministers, 1107 Meeting 2 March 2011, para. 19, available at https://wcd.coe.int/ViewDoc.jsp?id=1735853&Site=CM.

\(^{127}\)"En effet, il est de principe, en droit français, que la mère de l'enfant est celle qui accouche."

Communiqué de la Première présidence relatif aux arrêts 369, 370 et 371 du 6 avril 2011 rendus par la Première chambre civile, at http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/presidence_relatif_19635.html (emphasis added.) The Court’s emphasis on this point strongly implies that the
v. The implication of states and the international community in the production of family status.

The implication of states in the definition of individual status, in particular in relation to family arrangements, has deep historical roots. In the modern era, from Greece to India, Italy to the United States, family policies have been intrinsically tied to strategies of nation building (albeit often in the context of intense and on-going jurisdictional contests with religious communities).

The institution of “anonymous birth” discussed above should be regarded as an exceptional choice but not the default position of French law.

The French revolution "statalized" individual identity by instituting the "etat civil" thereby shifting responsibility for its documentation from parish registries to the state. In effect, the Law of Germinal ....sought to "nationalize" identity, and as Jane Caplan points out, the current variety of state rules pertaining to naming has continued to reinforce the linkage between individual identity, status, and nationality. The ability of the state to fully "capture" individual identity was subject to resistance, and, practices that distinguish between legal names and names used in familial or other contexts survived the law of Germinalrevolutionary legislation (and survive in many communities today). It is worth noting that international human rights law protects every child's right to a name, a requirement that could also be seen as entailing a correlative of a duty to have a legally cognizable name (i.e, to be identifiable). The history of the documentation of status, and its correlative rights and obligations, is the focus of a growing area of historical research. See DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLDS (Jane Caplan & John Torpey eds., 2001).

For an insightful discussion of the nexus between family law, colonial policies and anti-colonial nation-building policies, see Narendra Subramanian, Making Family and Nation: Hindu Marriage Law in Early Postcolonial India, J. OF ASIAN STUDIES 771(2010). For a discussion of the evolution of family law in particular in the American context, see MARY ANN GLENDON, THE
State policies define the boundaries of family ties, establishing, for example, the degrees of consanguinity within which incest prohibitions will apply and inheritance will be ensured. Analogously, states routinely prescribe rules regarding child and spousal maintenance and generally establish the scope of matrimonial, parental, and filial obligations. European feminists

TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND EUROPE (1989). With respect to Greece, see Philomila Tsoukala, Marrying Family Law to the Nation, 58 Am. J. Comp L. 873 (2010). On Italy, see generally LA FAMIGLIA ITALIANA DALL’OTTOCENTO A OGGI (Piero Melograni ed., 1988). See also Anna Bravo, La Nuova Italia: madri fra oppressione ed emancipazione, in STORIA DELLA MATERNITA’ (Marina D’Amelia ed., 1997). I have examined the nexus between visions of the nation, gender and the family in the Italian constitutional debate in "The Politics of Moral Reconstruction," paper presented to the Institute for Advanced Study, Princeton, 1988. That in regimes of personal law, religious communities play a central role in the regulation of family relations should not obscure the fact that, even in these contexts of legal pluralism, the state maintains a supra-ordinate authority setting the parameters within which religious institutions operate. Janet Halley has recently argued that modern family law and market regulation are co-constitutive. In particular, Halley and her coauthors track modern distinctions between the legal space of "the family" and that of the "market" to German legal theory and debate, notably to the work of Karl von Savigny. It is worth noting that Savigny was in part inspired by the Romantic movement, and that the volkgeist vision of the nation played into his juridical interpretation of the family. See Janet Halley & Kerry Rittich, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, Introduction to the Special Issue on Comparative Family Law, 58 Am. J. Comp. L. 754 (2010). See also Duncan Kennedy, Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought, 56 Am. J. Comp. L. 811 (2010).
have long argued that laws and policies that explicitly mold family relations and that presume the existence of certain forms of family organization are central to the governance of welfare states.130

This connection between states and familial status has been recognized in international law. In particular, international private law is replete with examples of conflicts that revolve around marriage, filiation, and kinship131 and conflicts rules have frequently looked to nationality over domicile as a "connecting factor" in relation to personal status.132 But today, international


132 As a result of the preference for nationality, forum courts find themselves applying foreign law. Although states' (and courts’) preferences for domicile or citizenship as a determining element in
institutions are also seen as producing status. An authoritative commentator on the Convention of the Rights of the Child noted: “The CRC creates a new status of the child based on the recognition that s/he is a person and has the right to live a life of dignity and since the promulgation 1989 [sic] the child has been understood to be a subject of rights.”\(^{133}\) The “child” is not the only subject of internationally defined status. The Convention on the Elimination of All Forms of Discrimination Against Women similarly operates to provide women a “new status,” one in which maternity plays a central role. The Convention promotes the “recognition of maternity as a social function” and establishes its protection as a prohibited basis for discrimination: “special measures aimed at protecting maternity . . . shall not be considered discriminatory.”\(^{134}\) Maternity protection is “proclaimed as [an] essential right[. . .] incorporated into all areas of the Convention, whether dealing with employment, family law, health care or private international law relating to personal status now appears to be in flux, throughout the 19th century and until World War II, in Europe, "citizenship played an important role as a connecting factor in the private international law relating to personal status." Jürgen Basedow, “Das Staatsangehörigkeitsprinzip in der Europäischen Union,” Praxis des Internationalen Privat- und Verfahrensrechts, 2 (2011).


\(^{134}\) Convention for the Elimination of All Forms of Discrimination Against Women, Preamble; S. 5(b), S. 4(b) (henceforth, CEDAW).
education.” 135 Woman-as-mother (or mother tout court, for the Convention does not contemplate the possibility that “maternity” could be an attribute of anyone other than a woman) thus emerges from the text as the bearer of a specific array of rights. Other instruments of human rights law also require the recognition of maternity, such as the conventions established under the aegis of the International Labor Organization in regard to the protection of maternity. 136 International status-formation does not imply a retreat from national regulation; if anything, it points to the creation of additional layers of as-yet untidily juxtaposed regulatory arenas.

In summary, a “communitarian” model implies that filiation, maternity, and paternity constitute legitimate objects of state regulation and that such regulation may take place at both the international and national levels. The postulation of “mother” (and “father” and/or “parent”) as denoting status rather than as the result of private contract, and thus of filiation as a matter of law rather than individual preference, carries with it the idea that certain behaviors—including the performance of particular paid-for services (like gestation) and the sale of particular goods (such as ova and sperm)—may inherently violate the “dignity” that accompanies such statuses as well as the more general status of human beings. This militates against contractual autonomy as a paradigm for the solution to the current dilemmas raised by the international market in reproductive surrogacy. In even the loosest communitarian framework, neither national nor international law is held to the standard of substantive silence when it comes to parental statuses and their correlative behaviors as required by the contractual autonomy model described above, nor are private agreements regarded as ipso facto preempting the power of regulation. To the


136 See, e.g., C183 Maternity Protection Convention 2000.
extent to which such a framework either explicitly or implicitly informs the policies of contemporary states, solutions to the quandaries in which Jan Balaz, Susan Lohle and their children found themselves will require state action.

IV. Treaty Zones and the Limiting Power of Human Rights Law

A. The necessity of international regulation

If individual solutions are not feasible, an alternative is to approach the problem as one of international coordination to be addressed through a multilateral agreement. Indeed, given that the obstacles to contractual autonomy flow from the role of states in determining the statuses involved in filiation and citizenship, a multilateral agreement represents the only possible solution, for it would assign the responsibility for crisis prevention to those very subjects with the power to address them: states.\footnote{Robert Keohane and David Victor have suggested that in particular situations a “regime complex” of “loosely coupled” regimes without a clear hierarchical structure may be more effective than one regime built around a comprehensive treaty framework. However, the crises represented by the Balazs twins derives from the coexistence of incompatible filiation norms; any effective solution therefore requires specific state-based agreement on at least that issue. See Robert O. Keohane & David G. Victor, The Regime Complex for Climate Change, Discussion Paper 2010-33, Harvard Project on International Climate Agreements, January 2010.} Optimism on this score may be cautiously warranted for the Hague Conference on Private International Law, under whose aegis conventions on cognate themes – inter-country adoption, child abduction, parental responsibility, and child support -- have already been agreed, has begun exploratory work on cross-frontier surrogacy and developed
some preliminary recommendations.\textsuperscript{138} Research and discussions intended to help inform such work have been undertaken by networks of experts and government officials, inter alia thanks to the initiative of scholars at the University of Aberdeen supported by the Nuffield Foundation.\textsuperscript{139} But, as the Hague Conference itself has noted, even a rapid survey of the current regulatory scenario reveals a wide dispersion of positions, from states that adopt explicit prohibitionist stances to states that have no regulations in place but have implemented ad hoc administrative and/or judicial decisions to states that have legalized surrogacy, albeit primarily solely if based on non-commercial (i.e. “altruistic”) arrangements and/or exclusively within their own domestic markets.\textsuperscript{140} States’ seeming propensity to erect barriers to cross-border trade – both by legalizing only domestic arrangements and by requiring that these be non-commercial – limits the scope of legal international commercial surrogacy. But is agreement – whether explicit or implicit—nonetheless possible? And, if so, on what basis?


\textsuperscript{139} Katarina Trimmings and Paul Beaumont organized International Surrogacy Arrangements: International Workshop on National Approaches to Surrogacy at the University of Aberdeen on August 30-September1, 2011.

\textsuperscript{140} Hague Conference (2012), esp. p. 16.
Pre-negotiation agreement is not necessary to ensure the successful establishment of an international regime. To the contrary, as Robert Keohane pointed out in his classic study *After Hegemony*, cooperation is necessary where harmony does not exist; cooperation *presumes* discord -- but then sets in motion a process of mutual adjustments that issues in a framework that each party perceives as facilitating the realization of its own ends.\(^{141}\) Thus, even within an effective regime, all participants need not agree on all issues. Both traditions of international negotiation and current legal doctrines allow for areas of disagreement: the history of the negotiation of the Convention on the Rights of the Child (amongst others) exemplifies the strategic use of indeterminacy. Faced with insurmountable differences of views, the drafters defined only an end-point of childhood (18 years), leaving the question of its beginning—whether at conception, birth, or some other stage—to each signatory’s discretion.\(^{142}\) Nonetheless, for an agreement that is to be effective in dealing with the current cross-border crises associated with cross-border surrogacy, a minimum degree of consensus must be reached on those terms from which current blockages now derive. Since such blockages are based in norms regarding filiation – specifically, the willingness of “importing” countries to recognize births occurring in “exporting” jurisdictions -- these norms will inevitably have to be addressed.

**B. Unsettling filiation—and citizenship**

1. *Surrogacy and the inadequacy of the adoption analogy*


Who, then, for purposes of filiation, is a “mother,” a “father,” a “child”? What bonds tie the one to the other, and how can such statuses be acquired, lost, or modified? In reproductive surrogacy, these questions raise issues that are more complex than those faced by the drafters of its closest cognate, the Hague Convention on Inter-Country Adoption (the “Adoption Convention”). Drafters of that convention could proceed from several basic assumptions. First, the child had a cognizable identity that preceded the adoption process and that supported the exercise of jurisdiction by the “state of origin” over the child, enabling that state to issue appropriate identity documents. Second, the woman who gave birth was the mother. Through

---

143 Thus, the adoption convention refers to “the child” and “the mother” without providing a definition of either. The current uncertainties regarding the status of the child have recently been broached in a document presented by the Permanent Secretariat of the Hague Conference 2011, n.44. They are also being addressed by the Committee of Experts on Family Law of the Council of Europe and by the Council’s Steering Committee on Bioethics. For a summary of recent discussions, see Working Party of the Committee of Experts on Family Law, Report of the Third Meeting of the CJ-FA-GT3 (Strasbourg, 6-8 December 2010), Council of Europe, CJ-FA-GT3 (2010) RAP3, Strasbourg, 14 December 2010; Steering Committee on Bioethics, n. 126.  
144 There are profound differences between adoption and surrogacy, some of which will be discussed in the next paragraphs; nonetheless, in as much as both directly relate to the transnational baby-market there are also deep thematic connections between them. 

145 Issuance of identity papers may be based on citizenship but presumably need not be, so long as the child’s state of origin can, in accordance with its internal laws, provide the certifications of adoptability (including with respect to identity) that the Adoption Convention requires and issue appropriate exit documents. See Hague Convention on Adoption, art. 4. A Hague Convention adoption does not per se confer citizenship; rather it creates a legally cognizable familial status that can form the basis for a petition for citizenship. Children adopted into the United States, for

146See Hague Convention on Adoption, 4(c)(4): (4) ("the consent of the mother, where required, has been given only after the birth of the child." (Emphasis added.) (emphasis added)). The definite article before "mother" denotes her singularity (there is one precise person to whom the referent mother applies); the lack of definition of the term "mother," a term followed immediately by reference to the birth, indicates that, without further specification, the mother is the woman to whom the child is connected by birth. Moreover, throughout the Convention, the text counterposes the child's "prospective adoptive parents" to the child's "mother" or "father," thereby signifying that the latter have the identity of parents until they renounce it or it is otherwise severed by operation of law and the correlative rights and obligations are transferred to the adoptive parents. See Hague Convention on Adoption, in particular, arts. 4, 26, 27.

A notable exception to the rule that the mother is she who gives birth is that adopted by the U.S. State Department in interpreting the Immigration and Nationality Act. S. section 301 (8 U.S.C. § 1401), that which defines “Nationals and Citizens of the United States At Birth.” Referring to children born outside of the United States, at subsections (c), (d), and (g) the Act indicates the conditions under which citizenship and nationality may be recognized to those “born
of parents” where the parents themselves satisfy particular residency and citizenship requirements. The State Department interprets the phrase “born … . of” to mean that, in cases entailed assisted reproduction, where the parent providing the required nexus to the United States is the mother, the mother will be understood to be the provider of genetic material rather than the gestational carrier. The State Department has found it necessary to warn U.S. citizens abroad considering the use of Assisted Reproductive Technologies of this interpretation. Thus, the Department’s travel website provides the following advice: “Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad: Transmission of U.S. citizenship at birth to a child born abroad is governed by Immigration and Nationality Act (INA) Sections 301 and/or 309. The Department of State interprets the INA to require a U.S. citizen parent to have a biological connection to a child in order to transmit U.S. citizenship to the child at birth. In other words, the U.S. citizen parent must be the sperm or the egg donor in order to transmit U.S. citizenship to a child conceived through ART.” See Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad, U.S. DEPARTMENT OF STATE, http://travel.state.gov/law/citizenship/citizenship_5177.html. It is noteworthy, Note, however, that the Supreme Court, in Miller v. Albright, 452 U.S. 420 (1998), a case revolving around determinations of paternity for nationality and citizenship purposes, the Supreme Court treated the identity of the mother and her link to the child as self-evident. Writing for the majority, Justice Stevens noted: “The substantive conduct of the unmarried citizen mother that qualifies her child for citizenship is completed at the moment of birth.” Id. That grant of citizenship, he stressed “rewards that choice [i.e. the choice “to carry the pregnancy to term and reject the alternative of abortion’’] and that labor [i.e. the labor of pregnancy and parturition].” Id. Although there were compelling dissents in Miller, specifically by Justices Ginsburg and Breyer, these revolved around considerations of gender discrimination but never cast doubt on the
a process subject to certification both in the child's state of origin and in the receiving state, the status of mother could be transferred, but in the first instance, the rights of motherhood vested in she who bore the child. Finally, adoption could be viewed as a “humanitarian” transaction that matched needy children with desiring parents, while the commercial transactions involved could be considered extraneous to the substance of the agreement. This cohered with prescriptions already encoded in human rights law through the Convention on the Rights of the Child, which recognizes adoption as a potential solution to “children living in exceptionally difficult circumstances” and calls for its regulation so as to ensure, among other objectives, “that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.”

identity of the mother as the woman who gave birth. I am grateful to Lisa Vogel for having brought the U.S State Department’s interpretation of maternity to my attention.

147 E.g., ”There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.” Hague Convention art 29. See also arts. 17, 26, 27.

That these legal aspects could be addressed relatively trenchantly by the Hague Convention does not, of course, imply that the social and emotional ramifications of the transfer of parental status, and the multiplication of parental figures, in adoption is not fraught with complications. On these issues, there is a burgeoning literature. See, e.g. Ginzburg and Rapp, n.2, Volkman, n.2.

Surrogacy unsettles these assumptions, and the ensuing uncertainty directly affects the child’s rights to nationality, citizenship, and, consequently, migration. In surrogacy, three potential “mothers” are in play: the egg provider, the gestator, and a commissioning party. Analogously, two potential fathers are involved: the sperm donor and a commissioning party. How each of these roles is assigned has profound societal implications. In matrilinear societies, for example, maternal descent determines the assignment of group identity; it is the sine qua non of belonging. Perhaps in response to the development of reproductive surrogacy, a significant number of Orthodox Jewish rabbis (who often espouse divergent perspectives but largely seem to accept the legitimacy of assisted reproductive treatments) have shifted their general view of the defining characteristic of maternity. Whereas Jewish law (like the French law cited earlier) once adhered to the principle that the mother is she who gives birth, the view that the mother is the ova-provider now appears to have been endorsed by numerous authorities. Under the Egg Donation Law (2010), in domestic cases the recipient of the donation is the mother of the child. Moreover,

\footnote{149 Assisted reproductive technologies have pluralized the subjects involved in reproduction, but only surrogacy involves a gestator who is by definition not the intended mother of the child to whom she has given birth. U.S. courts have adopted three different tests of parentage, roughly corresponding to this pluralization of pathways to maternity: the intent, genetic and gestational tests. For a recent discussion, see Linda A. Anderson, n.72. No consensus approach can, however, be discerned either within the United States, where state policies towards surrogacy are quite varied, or internationally.}
it is the woman who applies for permission to receive the donation who is viewed as the “recipient” and, in a surrogacy arrangement, that person may be a commissioning party. 150

Israel is far from unique in its recent revisions to rules regarding filiation. At least twelve other countries have amended their legislations since 2005. 151 The unsettling of assumptions about parental identities is particularly salient in legal systems that recognize rules of jus sanguinis with respect to nationality and citizenship. Despite the moniker, jus sanguinis has not historically depended on blood but on legally cognizable relations. In both the civilian and common law traditions, nationality has until relatively recently passed primarily through the father and the father was not biologically defined. As the Roman maxim had it, pater est quem nuptia demonstrant: the father is he who is evidenced by the nuptial, that is, the husband of the mother. The mother, however, was not the wife of the husband (which would have been tautological) but

150 I am indebted to Rabbi Edward Reichman, MD, for his discussion of the debate among religious authorities at Congregation Shearith Israel, May 7, 2011 and to Celia Wasserstein Fassberg for information regarding Israeli law. Whereas Israeli law does not specifically regulate international surrogacy, up to now the commissioning mother was required to adopt the child in Israel while the commissioning father, as sperm provider, was entitled to the recognition of his paternity on the basis of its inscription on the foreign birth certificate. But a recent judgment by a family court in Tel Aviv has determined that it is sufficient for a commissioning mother to demonstrate a genetic link to the child in order for a foreign birth certificate identifying her as the mother to be recognized as valid in Israel. See Ruth Retassie, Israel: biological mother recognized as parent in landmark surrogacy case, BIONEWS (12 March 2012) at:

http://www.bionews.org.uk/page_132763.asp

151 See Hague Conference 2011, n.44.
she who gave birth. Paternity, in this scheme, was the dependent variable—a function of the legal bond between a particular man and the woman who had gestated. Maternity was corporeal while paternity was not; nationality derived from the husband of the mother, not the male procreator of the child. In the traditional view, "sanguinis" stood for "law."  

---

152 As noted above, this is the principle that the Cour de Cassation underlined in the Mennesson case.

153 Under Roman law, the concept of the *pater familias* was substantially broader than ours and incorporated multiple pathways to filiation. See, Thomas in D’Amelia (ed), n. 81.

154 It might be objected that the widespread strictures against women's marital infidelity was designed to ensure that the blood of "sanguinis" actually denoted the physical link between the father and the child. But this objection fails to take into account the near-impossibility of either children born outside of marriage or men who had fathered children to women married to other men to bring paternity suits well into the twentieth century. For an emblematic case addressing the relevant issues under U.S. law, see Michael H. v. Gerald D., 491 U.S. 110 (1989). A recent German lower court reiterated the primacy of legal relations with respect to the establishment of paternity at least where surrogacy is involved, even though *jus sanguinis* rules would normally apply. The court sustained the German Embassy’s right to deny nationality to children born of a German father (who would normally be entitled to transmit his citizenship to his offspring) and an Indian gestational carrier. According to press accounts, the Court held that under German law “the legal father of a child born to a surrogate is considered to be the surrogate mother's husband not the biological father...in this case the biological father's German citizenship was legally irrelevant.” N. Satkunarajah, Surrogate Child Denied German Passport, BIONEWS, May 9, 2011, http://www.bionews.org.uk/page_94158.asp.
Today, paternity may be one of the most contested areas of law. In the United States as elsewhere, the bases for the recognition of paternal status have been expanded, including through the increasing consideration of corporeal elements (sexual relations, sperm contribution). Paternity, in other words, no longer flows solely from the father’s legal relationship to the mother (or adoption), but may also be based on an autonomous biological and, sometimes, affective link to the child. In countries that allow for biologically based paternity without a commitment of the father to the gestating woman, commissioning fathers who are also sperm providers may be able to advance a jus sanguinis claim to nationality for their children. In fact, some states seem to be fashioning a remedy to the difficulties associated with the filiation of children born of surrogacy arrangements by recognizing the relevant foreign birth certificates as valid acts in as much as they establish the legal parentage of the intending father, in particular when he is genetically related to the child. Moreover, even where the birth certificate does not support the recognition of paternity, paternity may sometimes be established on the basis of a legally-regulated acknowledgement or act of recognition. But states’ receptivity to such claims is not universally assured, as the Balaz case and others attest. Moreover, it leaves unresolved the question of the

155 See Hague Conference 2012

156 Hague (2012) p.19, n. 125 , citing the twins H & E case (Court of First Instance, Antwerp, 19 December2008) and the twins M & M case (Court of Appeals, Liege, 6 September 2010). The


158 In addition to the Balaz case discussed above at Part I.A, see N. Satkunarajah, Surrogate Child Denied German Passport, BIONEWS, May 9, 2011, http://www.bionews.org.uk/page_94158.asp and Surrogate children have no right to German

http://www.bionews.org.uk/page_94158.asp
attributio20n of maternity, often resulting in a situation of “limping parentage” whereby no legal
avenue for the recognition of the second parent -- now, generally, the commissioning mother -- is
available.\(^{159}\)

Even as the bases for paternity recognition have been liberalized, laws allowing mothers to
transmit nationality have also been promulgated in many—although certainly not all—states, thus
extending jus sanguinis rules to maternal descent.\(^{160}\) Here the assumption has been that the jus

\[^{159}\] On “limping parentage” see Hague Conference (2012), citing research reporting that of 12 sets
of French commissioning parents and one Belgian commissioning father, in all cases children
were living with at least one (if not two) “unrecognized” parent.

\[^{160}\] For states that either restrict or entirely deny the ability of the mother to transmit her
nationality to a child, see the states that have entered reservations to art. 9(2) of the Convention
for the Elimination of All Forms of Discrimination Against Women, which provides: “States
Parties shall grant women equal rights with men with respect to the nationality of their children.”
For information on reserving states, see Declarations, Reservations and Objections to CEDAW,
UN Division for the Advancement of Women, at

In the United States, in the early twentieth century unwed mothers of children born overseas were
accorded a right to transmit their nationality analogous to that previously reserved to married
fathers or fathers who legitimated their illegitimate children. The State Department “reason[ed]
that, for the child born out of wedlock, the mother “stands in place of the father.”’” In 1934,
Congress attributed the right to transmit citizenship on a basis of equality with men. See Miller v.
sanguinis describes an actual physical link between the mother and the child: the mother and child share a corporeal connection, metonymically described by "blood." As the Israeli case illustrates, however, legal systems now confront the question of deciding to which aspect of corporeality they will attach the status of motherhood—gestation or ova provision—if any.

The answers to these questions will condition (and reflect) states’ positioning in the surrogacy market. As debates from France to the United States, India to Ukraine reveal, the issues raised reverberate with values profoundly held by domestic constituencies as well as with constitutional norms, and these may not easily align with any—even politically dominant—constituencies’ perception of state interests. Nonetheless, market players, whether importers or exporters, will generally have incentives to privilege the commissioning parties over ova contributors and gestational carriers, and thus to reduce the significance attributed to the corporeal elements of maternity. Legislation that treats the gestational carrier as a direct analogue of an adoption birth mother— for instance, granting her a period of time in which to revise her decision with respect to renouncing maternal rights— or that establishes the unenforceability of surrogacy contracts, enhances the risk that a gestational carrier may “hold up” the commissioning parties while also exposing her to risks of coercion. But legislation like the Israeli Egg Donation Law (2010) cited earlier, which establishes that the mother is the recipient of the egg donation and that in surrogacy cases the recipient is the commissioning party, at once bolsters transactional certainty and weakens the negotiating ability of the gestational carrier.

---


162 See also India ART Bill n.31.
In keeping with rules designed to foster markets, the most coherent way for states engaged in the surrogacy market to address the question of maternal jus sanguinis rights appears to be by “legalizing” the “blood” of the mother—that is, by substituting the corporeal bond of mother and child with a legal bond (as per the Israeli case). Motherhood becomes, then, a status whose basis lies in state validation of contractual accords between the commissioning parent and—separately—the ova provider and the gestational carrier. To the extent to which both surrogacy and adoption rest on an intent-based test of parenthood, the gestational carrier is the analog of the mother who gives up her child for adoption. But, unlike the birth mother in adoption, the gestational carrier in surrogacy has never had the status of mother, consequently she has never been bound by any of the obligations nor has she ever had any of the rights normally attendant on giving birth, and she may be compensated at a market rate. In this scenario, two rules are established within one regulatory framework. Special rules apply to women who give birth to, and to those who subsequently gain parental status with respect to, children born in surrogacy arrangements; general rules apply to mothers giving birth outside of such arrangements.

C. One regime (complex), two treaty zones.

i. A permissive treaty zone: between maximalist aspirations and minimalist possibilities

If, generally, how states define the nexus between the corporeal and the legal attributes of maternity both reflects and determines the position they occupy in the market for reproductive surrogacy, a dualistic regime seems likely to emerge, one part composed by states whose filiation policies enable them to recognize reproductive surrogacy formally, legalize it, and generally

163 On the intent-based test of parenthood, see

164 See, in this perspective, the recommendations of the Steering Committee on Bioethics, n.126.
further their market shares, and the other by states that adopt more restrictive rules designed to suppress commissioned births. The states allowing surrogacy might constitute a “permissive treaty zone,” within which the issues inherent in surrogacy transactions could be decided by agreement. In such a zone, comprehensive agreements that seek to maximize market efficiency would govern a wide range of issues, from the specific attribution of parentage to the allocation of decision-making capacity over the continuation or termination of a pregnancy—including the circumstances (if any) under which commissioning parties could enforce clauses obligating a gestational carrier to abort a fetus—and the scope, structure, and timing of allowable compensation, including the rules regarding payment to brokers and providers of medical and custodial services and entitlements to insurance coverage. Such agreements would also detail state obligations, from ascertaining and certifying the consensual bases and formal validity of transactions to establishing and regulating access to records identifying the “biological contributors” (or their genetic traits) of the children born of surrogacy arrangements; from the implementation of means to obviate coercion of gestational carriers and gamete donors to ensuring their health care and living conditions; from the establishment of international coordination and monitoring systems to the specification of dispute resolution mechanisms for both individuals and states.

Alternatively, a less comprehensive agreement could be reached within this zone, allowing states to adopt their own definitions of maternity, contractual requirements, and procedural mechanisms. Such an agreement would then primarily focus on process issues, in particular

165 This is the direction recently proposed by the organizers of the Aberdeen conference referred to above. See supra n. Error! Bookmark not defined. and accompanying text; Katarina Trimmings & Paul Beaumont, International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level, J. OF PRIVATE INT’L L. 627 (December 2011). The Hague
with respect to state responsibility for ensuring the legality of transactions. Borrowing from the Adoption Convention, an agreement on surrogacy could require states to establish a "Central Authority" (or to accredit non-state bodies) to perform the monitoring and certification processes that would ensure a basic set of arrangements: for example, that the “importing” state (i.e., the state of the commissioning parties) be prepared to recognize the filiation of the children born of surrogacy arrangements before the necessary transactions are entered into, that the treatment of the gestational carrier and genetic contributors be free of coercion, that these parties be ensured health care and the gestational carrier provided adequate living conditions, and that a process for the recognition of filiation be established. Again, on the model of the Adoption Convention, the agreement might require the Central Authorities to take appropriate action where a breach of the Convention is seriously threatened or actually occurs. Such an agreement would assign a

---

Conference Preliminary Report (Hague, 2012) and reports of Recent debates in the Council of Europe suggest that this is a likely path. Council of Europe, Committee of Experts on Family Law, Working Party on the New Legal Instruments on the Rights and Legal Status of Children and Parental Responsibilities, Draft instrument on the rights and legal status of children and parental responsibilities, Strasbourg, 20 April 2010. But the Committee on Bioethics of the Council’s Committee of Ministers has questioned the phrase “regardless of genetic connection” and recommended that states’ freedom to provide special arrangements regarding maternal filiation be qualified as follows: “Exceptionally, states where surrogacy is not prohibited may provide…” Steering Committee on Bioethics, n. 126 at paras. 22, 23 and 24.

166 On the structural cooperation model embedded in the Adoption Convention, see Convention of 29 May, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (entered into force 1995), art. 6. For an authoritative proposal for a cooperative framework, see Hague Conference 2012, n. 44, p. 27.

167 Id. art. 33
high degree of autonomy to state parties, formally relying on monitoring and reporting mechanisms to ensure enforcement without providing for a mechanism allowing individual complaints to be received, although—on the model of human rights treaties—a procedure to hear such complaints might be established through a successive optional protocol. But in the first instance, the success of the Convention would depend on the state parties' mutual interest in ensuring smoothly flowing transactions rather than on systems imposing quasi (or actual) judicial accountability.

**ii. A prohibitionist treaty zone: between criminalization and cooperation**

States that disallow surrogacy would presumably be limited to seeking to control cross-border transactions — or to free ride upon their existence. Attempts at control could take the form of agreements under international law. States in a “prohibitionist treaty zone” might, for instance, pursue a criminalizing convention on the model of the Palermo Protocols against human

---

trafficking. Or prohibitionist states could promote agreements (multilateral or bilateral) with permissive states, requiring that the latter actively seek to prevent transactions involving their citizens: evidence of such a trend may be found in a joint letter sent by Consuls General of eight European states requesting that Indian IVF clinics desist from providing surrogacy services to their nationals unless such nationals had consulted with their own embassies first. In a similar vein, prohibitionist states could seek to influence the design of a permissive treaty. They might negotiate agreements designed to ensure that any accord legalizing international surrogacy assign

---

169 See Protocols to the Convention Against Organized Crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air (henceforth the “Palermo Protocol”). The criminal law approach to human trafficking embedded in the Palermo Protocol has been the object of trenchant critiques. See, e.g., Janie A. Chuang, Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking law and policy 158 U. PA. L. REV. 1655 (2010). On an individual level, even among states in which some surrogacy arrangements are legal, several criminalize either any surrogacy arrangement that does not comport with existing regulations or that entail commercial transactions (as would generally apply to international transactions). States that criminalize all non-conforming transactions include Greece and Israel; states in which criminal sanctions focus on commercial arrangements include certain states of Australia, Canada, China (Hong Kong SAR), New Zealand and the United Kingdom. Hague Conference 2012, n.44, p.11 and n.62. There is at present no indication of a movement towards a criminalizing convention, although reports suggest that some states – such as Italy and Australia -- are now more actively prosecuting illegal surrogacy arrangements, even when entered into extraterritorially. Hague Conference 2012, n. 44 at 22, nn. 149, 152.

170 Hague Conference 2012, n.44, p. 23. The Consuls General involved were those of Belgium France, Germany, Spain, Italy, the Netherlands, Poland and the Czech Republic.
responsibility for preventively verifying the status of surrogacy in the home states of the commissioning parties to those states in which surrogacy is to be performed – for example either by requiring certifications from all potential commissioning parties or by maintaining a list of prohibited jurisdictions, from which providers would be required not to accept clients. Violations could then be interpreted as breaches under the law of state responsibility rather than (or as well as) individually culpable acts. Thus, the Indian draft law’s requirement of preventive documentation by commissioning parties of their own state’s willingness to allow the child to be born of the surrogacy arrangement would become an element of international law. 171

iii. Mutual recognition, implied cooperation, and reciprocal advantage: one regime from two zones.

But prohibitionist states could also—either implicitly or explicitly—use permissive states as a “safety valve” for their internal demand, just as permissive states could profit from satisfying that demand, capitalizing on the higher prices associated with a limited supply. In the French Mennesson case, for example, the plaintiffs complained that under international human rights law the children’s best interest required recognition of their filiation and that under the European Convention on Human Rights, their right to their family life, privacy and home demanded respect. The Cour de Cassation rebutted that the annulment of the transcription of the children’s

171 Draft Bill – India, n. 31. It should also be noted that the Draft Bill indicates that prospective parents from states prohibiting surrogacy would no longer be able to access Indian surrogacy services. Draft Bill -- India s. 34(19)(a). On a domestic level, several states already require commissioning parties to seek prospective approval prior to entering into the relevant transactions even on a domestic level. See Hague Conference (2012), n.44, p. 11, n. 62, referencing certain states in Australia, Greece, Israel, South Africa and New Zealand.
birth certificates into the French registries did not deprive the children of their maternal and paternal filiation as recognized under California law and (hence) also did not deprive them of the possibility of living with the plaintiffs themselves. Therefore, the Cassation’s own decision neither interfered unduly with the children’s right to a family life nor ran counter to the principle of their best interests. In other words, France’s prohibitionist posture was authorized by the United States’ permissive legislation. Prohibitionist states will surely continue to generate internal demand for surrogacy services that they themselves deem illicit, and permissive states will continue to service that demand, each side negotiating (and acting) in full consciousness of the other’s positions. As the Cour de Cassation explained, the regulatory regime is constituted by

\[\text{Arret Mennesson. The Court adopted precisely the same stance (using the same language) in another case regarding a surrogacy contract under Minnesota law: See European Court of Human Rights, Requête n° 65941/11 Francis LABASSEE et autres contre la France introduite le 6 octobre 2011 (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=65941/11&sessionid=94378757&skin=hudoc-cc-en).}\]

For an example of the ways in which prohibitionist policies on may promote the development of a clandestine markets, see e.g., Fiona Govan, Ban on Surrogacy Creates Trade in ‘Wombs for Rent’, THE TELEGRAPH, August 1, 2006, available at http://www.telegraph.co.uk/news/1525347/Ban-on-surrogacy-creates-trade-in-wombs-for-rent.html. For a cogent argument favoring a pluralistic approach to regulation which de facto
France and the United States, by a prohibitionist jurisdiction and a permissive jurisdiction functioning together, as an integrated whole.\textsuperscript{174} The Cassation’s decision may be reversed on


Permissive states also generate prohibited exchanges: a U.S. lawyer, for example, created an inventory of available babies by exporting American gestational carriers to Ukraine, where they were impregnated with sperm from anonymous donors. When the pregnancies reached the second trimester, the lawyer offered the future children to clients for $100,000, presenting them as the products of surrogacy contracts that had fallen through. See California Lawyer Ordered to Prison in Baby Scam, \textit{THE TENNESSEAN}, February 25, 2012, available at:


\textsuperscript{174}Keohane and Victor have argued that segmented, partially over-lapping accords can operate together to create a multi-layered “regime complex” that regulates a particular issue area. Such a complex may be constituted by loosely coupled elements, including conflicting ones. Keohane and Victor, n.137. While this description may indeed apply to international commercial surrogacy, in my view the dynamic linkage between permissive and prohibitionist states can result in what is effectively and sometimes avowedly, although not formally, an integrated system rather than a loose regulatory complex. Moreover, this linkage is predicated on (rather than adaptive to) the conflict between normative and legal orientations of differing states. Further examples of such dynamic linkages between prohibitionist and permissive jurisdictions may be found in states’ strategic deployment of arms dealers who operate in violation of international
appeal to the European Court of Human Rights.\textsuperscript{175} But it may also be sustained under the doctrine of the margin of appreciation, which allows states latitude in the interpretation of obligations, in particular with respect to issues on which national legal frameworks diverge significantly.\textsuperscript{176} In either case, given the fully globalized characteristics of the international commercial surrogacy market, prohibitionist and permissive jurisdictions are likely to continue to coexist in an uneasy tension that includes forms of mutual acknowledgement and implicit coordination.

\textsuperscript{175} See Requête n° 65192/11 Sylvie Mennesson et autres contre la France, introduite le 6 octobre 2011

\textsuperscript{176} The Menesson appeal to the European Court of Human Rights alleges that France is in violation of articles 8 and 14 of the European Convention. A recent decision by the Court, which also invoked these articles, found that France’s foreclosure of same-sex second parent adoption in the context of assisted reproductive technologies was compatible with the doctrine of the margin of appreciation. The Court specifically debated – and in the majority rejected – arguments based on the best interests of the child. It should be noted, however, that in that case, parentage of the child \textit{under French law} by one parent was already established (the birth mother being recognized as the legal mother). See Affaire Gas et Dubois v. France, (Requête n° 25951/07,) Arret Strasbourg, 15 mars 2012.
D. The Test of Human Rights

i. Does human rights law require either a prohibitionist or a permissive stance? Re-reading the Balaz case through the lens of the best interests of the child

Whatever the ultimate shape of the regime that emerges, whether composed of one or two treaty zones, fundamentally prohibitionist or permissive, maximalist or minimalist, criminalizing individual conduct or assigning responsibility to states, the question of its compatibility with international human rights law will arise. Surrogacy raises fundamental issues—the nature of personhood and the attributes of human dignity, individual autonomy and the perimeters of choice, the distinction between what can be made an object of commerce, what must remain in the domain of gift, and what ought not to be transferred at all. In the lexicon of human rights law, these issues resonate inter alia with norms regarding the commercialization of human bodily products and services;\(^\text{177}\) the sale of children;\(^\text{178}\) the rights of women to employment\(^\text{179}\) and to

\(^{177}\)Charter of Fundamental Rights of the European Union, art. 3.


\(^{179}\) CEDAW.
“liberty and security of person”; the rights of children to grow up in a “family environment” and to see that decisions concerning them be guided by their “best interests”; the rights of children not to be discriminated on the basis of their parentage and not to be separated from their parents against their will unless competent authorities have determined that such separation is necessary to safeguard the child’s best interests; the rights of adults to form a family, protected from unjustified state interference in their privacy and their homes; and the protection of maternity and the promotion of its “proper understanding.” Moreover, each step of the way along the path of reproductive surrogacy, risks of abuse loom large: when young women are enticed to “donate” ova without being fully aware of the (largely understudied) risks that may accompany the relevant operations; when women are engaged as gestators, sometimes because they have been trafficked or pressured by relatives or simply by unemployment and poverty to accept contracts that often promise extraordinary financial rewards; when commissioning

182 CRC, art. 3.
183 CRC, art. 9.
184 ICCPR, art. 17.
185 CEDAW
parties are “held up” because gestational carriers or brokers exact higher prices to “deliver” children than established by previously negotiated agreements or border guards and consular authorities extort fees for either performing legal duties or ignoring unspoken but recognized illegalities. In these instances, too, human rights norms come into play, either by legitimating individual claims, such as that to the “highest attainable standard of physical and mental health,”187 or by setting obligations upon states to prevent, prosecute, and punish particular behaviors, including human trafficking188 and corruption.189

---


Can these many norms guide policymakers in determining the compliance of a particular treaty with human rights? Even more fundamentally, does human rights law require either a prohibitionist or a permissive stance? Under general international law, the “principle of harmonization” prescribes that “when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of obligations.” But this principle is only of limited assistance in regard to reproductive surrogacy, for the panoply of norms potentially implicated does not align in a neat regulatory scheme. Some rights may conflict—those of gestators, for example, to “security of person” and hence to determine the progress, or termination, of their pregnancies themselves with those of commissioning parties to the performance of contractual agreements that may require that the pregnancy be carried to term or, alternatively, ended under particular conditions. Moreover, key terms are often undefined. Sales of children may be prohibited, but what constitutes a sale? Does payment to a gestational carrier of “reasonable expenses” that amount to at least—if not more—than the average income she might earn in other forms of employment represent a wage and, hence, consideration for a service performed or for the actual goods delivered, that is, the child itself?

For a review of some of the pertinent issues, see Barbara Stark, Transnational Surrogacy and International Human Rights, ILSA Journal of International and Comparative Law, 2012 (forthcoming).


ICCPR, art.9.

The Adoption Convention allows for payment of “reasonable expenses,” but recent reviews of the implementation of the Convention acknowledge that such payments often function as surreptitious forms of compensation for the transfer of parental rights. The Secretary of the Hague Conference on Private International Law has noted: ‘The connection between money and
right to develop in a “family environment,” how should that “family environment” be defined and by whom? If “maternity” is to be protected, and the understanding of its function promoted, of what does it consist—ova provision, gestation, nurturing—and what would “protection” entail? And, finally, if children are not to be separated from their parents save for compelling reasons related to the latter’s best interests – who are the parents?

Consider how the “best interests of the child” principle -- a principle legally declared to be in a hierarchically superior position to all other principles and rules where children are concerned 194 - might have been applied in the Balaz case. If nationality and filiation are prima facie matters for individual states to determine, Germany and India would have had an equal right to assign or deny the family status and hence to confer or withhold citizenship of the twins. But the German rule regarding filiation, barring recognition of the Balazes’ parentage of the twins, prevented attribution of German nationality. From a practical perspective, with expatriation toward Germany of the twins as members of the Balaz family impossible, the children faced a substantial risk of becoming wards of the Indian state. That risk could have been obviated by the “original”

intercountry adoption is a fact of life and it is better to acknowledge that and try to regulate it,’ Jennifer Degeling, The Intercountry Adoption to Good Practice Revisited: Good practice and real practice, Hague Conference on Private International Law, Nordic Adoption Council Meeting, 2009, 4-5th November, 2009, Rejkavik, Iceland. There is no agreed parameter for determining “reasonable expenses,” which can, in some instances, include lost income (where the surrogate was previously employed) (e.g., Greece) and compensation for “pain and suffering” (e.g., Israel). See Hague Conference 2012, p. 11 n. 66.

194 “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” CRC, art. 3.
Indian rule in the case (i.e. prior to the court decision assigning maternal status to the gestational carrier), which recognized the parentage of the commissioning parties. Had Germany acquiesced to transcribing the birth certificates as initially issued, which named Susan Lohle as the mother and Jan Balaz as the father, the children would immediately have had the “family environment” required by international human rights law. The Indian rule as first applied would therefore have easily comported with the “best interests” principle. As noted earlier, the Preamble of the Convention of the Rights of the Child provides that a child “should grow up in a family environment”\(^{195}\) and further describes “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,” signaling the fundamental importance assigned to ensuring that children be integrated into family settings.\(^{196}\) The Convention also closely links participation in a family environment to the best interests of the child. Article 20 of the Convention can be read as embedding a rebuttable presumption that the best interests of the child are to be understood as entailing the integration of the child in his or her own family environment. Thus: “[A] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment . . . .”\(^{197}\) Here, the withdrawal of the child from his family environment in order to safeguard his best interests is posited as an exception to the general principle that the child will normally be integrated in such an environment. As applied to the Balaz case, then, harmonization of filiation and nationality rules with the best interests principle could be seen as requiring acceptance of the “original” Indian position on filiation, and, hence, a permissive posture with respect to surrogacy.

\(^{195}\) CRC, Preamble.

\(^{196}\) Id.

\(^{197}\) Id. art. 20.
Faced with children actually at risk of being denied access to family life and status, and correlatively stateless, some courts and policymakers have invoked the “best interests of the child” to legitimate filiations that would otherwise run counter to prohibitionist national public policies. Reaching such a conclusion, UK High Court Judge Hedley commented on his own discomfort in making a parental order in the context of an international surrogacy agreement. The court, he wrote, must “balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions.”198 “At the same time, “the child's welfare” must also be considered. “That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. . . . The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.”199 But other courts have adopted a contrasting view. The decision by the French Cour de Cassation in regard to the Mennesson case, for instance, explicitly noted that the “best interest” test did not require French recognition of the children’s filiation, which the court viewed as legalizing ex post facto surrogacy practices specifically prohibited by French understandings of the “ordre publique international.”200

198 Re X and Y, n.1. See also Corte d’Appello di Bari, causa in unico grado iscritta nel registro generale dell’anno 2008 con il numero d’ordine 175.

199 Re X and Y, n.1.

200 Thus: “… attendu qu’est justifié le refus de transcription d’un acte de naissance établi en execution d’une décision étrangère, fonde’ sur la contrariété’ a’ l’ordre public international français de cette decision, lorsque celle-ci comporte des dispositions qui heurtent des principes
essentiels du droit français; qu’en l’état du droit positif, il est contraire … de faire produire effet, au regard de la filiation, a’ une convention portant sur la gestation pour le compte d’autrui, qui, fut-elle licite a’ l’étranger, est nulle d’une nullité’ d’ordre public ….” And further: “qu’une telle annulation, qui ne prive pas les enfants de la filiation maternelle et paternelle que le droit californien leur reconnaît ni ne les empêche de vivre avec les époux X… en France, ne porte pas atteinte au droit au respect de la vie privée et familiaire de ces enfants …non plus qu’à leur intérêt supérieur garanti par l’article 3 § 1 de la Convention internationale des droits de l’enfant. » Arrêt n° 370 du 6 avril 2011 (10-19.053) Cour de cassation — — Première chambre civile. See supra n. 172. The Conseil d’Etat subsequently ordered the release of a laissez passer to twins born of an Indian surrogate and a French father, so as to enable the twins to enter France. The Conseil stressed the provisional nature of the document to be released (« le juge des référés, qui n’a pas enjoint à l’administration de délivrer un passeport aux enfants en cause, mais seulement un document de voyage leur permettant d’entrer sur le territoire national »); noted that the filiation of the children – the French father and the Indian gestational carrier – was uncontested and that the illegality of the surrogacy contract under French law did not obviate the state’s obligation to accord “primordial importance” to the children’s best interest. Although this could be indicative of a difference of views with respect to the Cassation, it should be noted that the Conseil also recognized the ultimate competence of the French courts (rather than the administrative judicial body) to determine the validity of the children’s filiation with respect to the conferral of nationality (« il est vrai, qu’il n’appartient qu’au tribunal de grande instance de Nantes de se prononcer sur le bien-fondé du refus opposé par le procureur de la République à la transcription des actes de naissance des jumelles sur les registres de l’état civil français et que seule l’autorité judiciaire pourrait trancher une éventuelle contestation portant sur le droit de ces enfants à bénéficier des dispositions de l’article 18 du code civil aux termes duquel Est français l’enfant
Along lines somewhat analogous to those put forth by the Court of Cassation in regard to Californian filiation rules, a court hearing the Balaz case might consider that, so long as the children’s filiation were recognized in India, nothing in German law necessarily prevented the Balazes from providing the children with a family environment, in India or elsewhere (including, perhaps, in Germany if a way were found to bring them into the country\(^{201}\)). Such a court might further consider the particular basis of the filiation irrelevant to determining whether the children’s “best interests” were being served (that is, whether under Indian filiation law, parentage were assigned to both commissioning parties or only to the biological father \textit{cum} commissioning party and to the gestational carrier). Alternatively, it might determine that so long as a “family environment” could be ensured, the German state was entitled to balance its interest in determining filiation policy in accordance with particular values against the “best interest” of the children to a family environment specifically constructed around the commissioning parties as their parents in the country of the commissioning parties’ citizenship.\(^{202}\) In short, if the alternative is between children becoming wards of the state and children being integrated into a family environment, the “best interests” principle will require the latter choice. But when more than one family environment is available, determining which particular configuration of parents (genetically related contributors, gestational carrier, spouse of the gestational carrier, contractually-identified intended parent(s)) most closely comports with the best interests principle can involve courts in case-specific determinations in which they balance claims advanced by commissioning parents and their children against state interests in pursuing particular public policies. As the Menesson case so vividly demonstrated, at least some judicial authorities will

\(^{201}\) Id. (“ni ne les empeche de vivre avec les epoux X….”)  

\(^{202}\) See also \textit{Re: X and Y}, n.1.
find it possible to reconcile the best interests principle with a prohibitionist stance towards surrogacy.

ii. Can a treaty on international commercial surrogacy survive *jus cogens* scrutiny?

Harmonization would be moot if either permissive or prohibitionist treaties (or both) were viewed as violating *jus cogens* norms, for treaties that contravene such prohibitions, as the Vienna Convention on the Law of Treaties specifies, are void ab initio.203 Such violations could arise in at least three distinct ways: if the object and purpose of the treaty ran counter to *jus cogens*; if particular operational clauses in a permissive treaty did so; and if the substantive result entailed by the application of a prohibitionist treaty required considering the treaty itself as de facto violative of peremptory norms.

a. Permissive treaties and the problem of the sale of children.

Would a permissive treaty that configures the central transactions involved in reproductive surrogacy as a sale of children, either through an explicit use of terminology associated with sales (“price,” “consideration,” “payment”) or because it de facto provides for a *do ut des* involving the exchange of compensation for the transfer of the child, run counter to *jus cogens* norms? There is an evident trend in international law toward the prohibition of the sale of persons. In addition to prohibitions on slavery204 and human trafficking,205 all sales of children are explicitly banned by

---


204 Slavery Convention (25 September 1926, entered into force 9 March 1927) 212 UNTS 17 and amended by the Protocol amending the slavery convention (7 December 1953, entered into force 7 December 1953) 182 U.N.T.S. 51 (together, the “Slavery Convention”); *Supplementary*
the Convention on the Rights of the Child,\textsuperscript{206} and the reduction of sales of children figures

\begin{quote}
Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956, entered into force April 30, 1957) 226 U.N.T.S. 3 (henceforth, the “Supplementary Slavery Convention”).
\end{quote}

\textsuperscript{205} Palermo Protocol.

\textsuperscript{206} “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” CRC, art.35 (emphasis added). See also Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Preamble of the Optional Protocol expresses the Parties “grave” concern “at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography.” This tripartite enumeration— sale, prostitution and pornography—indicates a distinct preoccupation with the sale of children in general and not only with sales for the particular purposes of prostitution or pornography. “Sale” is further defined in the Optional Protocol as follows: “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other compensation.” Optional Protocol, art.2(a). National legislations on adoption have reiterated the prohibition against any form of compensation, also incorporating a similar definition of “sale.” Thus, in 2001, the French Civil Code was amended to provide that the consent of the legal representative of the child to the adoption must be given freely, and obtained without any consideration (“Le consentement doit être libre, obtenu sans aucune contrepartie, après la naissance de l’enfant……”) (France, Loi n° 2001-111 du 6 février 2001 relative à l’adoption internationale, Code civil, Article 370-3 ). And the Penal Code of Morocco was amended in 2003 to criminalize all sales of children, the sale of a child being defined as “any act or transaction that produces the transfer of a child from any person or group of persons to another person or group of persons against remuneration or any other advantage.” (“tout acte ou
prominently among the motivations of the Adoption Convention.\textsuperscript{207} Arguably, the entire thrust of international human rights law, from its recurrent references to human dignity to the specific claims detailed in the various declarations and conventions, militates against any, no matter how momentary, reduction of a person to a conveyable object of exchange: at issue is the status of human beings \textit{per se}.\textsuperscript{208}

Are all exchanges of humans for consideration legally equivalent? Historically, the sale of humans has been most prominently addressed in the context of slavery. As the 1926 Convention on Slavery specified and the 1956 Supplementary Convention reiterated, a slave has “the status or
toute transaction faisant intervenir le transfert d’un enfant de toute personne ou de tout groupe de personne a’ une autre personne ou a’ un autre groupe de personne contre remuneration ou tout autre avantage.”\textsuperscript{209} Marocco Penal Code art. 467-1, as amended by Act No. 24-03 of 11 November 2003

\textsuperscript{207} See, generally, G. Parra-Aranguren, Explanatory Report On The Convention On Protection Of Children And Co-Operation In Respect Of Intercountry Adoption, available at: http://www.hcch.net/upload/expl33e.pdf (citing a Memorandum prepared by the Permanent Bureau of the Hague Conference on Private International Law in the drafting stages of the Adoption Convention that included among the requirements the new convention should be designed to meet “a need for a system of supervision in order to ensure that these standards are observed (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward”). For a discussion of the Adoption Convention in the context of norms regarding the prohibition of sales of children, see Holly C. Kennard, Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions, 14 U. PA. J. INT’L BUS. L. 632 1993-1994.

\textsuperscript{208} See \textit{supra} n. 93 and accompanying text.
condition of a person over whom any or all of the powers attaching to the right of ownership are 
exercised, and ‘slave’ means a person in such condition or status.”209 Here, the term “ownership” 
denotes the commodification of the human being involved. But the Supplementary Convention 
also details – and proscribes – several conditions “similar to slavery,”210 which provide a lens 
through which the connection between slavery and the sales of humans may be more closely 
examined. Serfdom entails both an obligation to live and labor on the land of another and the 
inability of the person under such obligation to change his status.211 Forced marriage regards the 
giving (or promise thereto) of a woman ‘without the right to refuse’ in marriage in exchange for 
payment ‘of a consideration in money or in kind.’212 Child exploitation involves ‘[a]ny institution 
or practice whereby a child or young person under the age of 18 years, is delivered by either or 
both of his natural parents or by his guardian to another person, whether for reward or not, with a 
view to the exploitation of the child or young person or of his labour.’213 In sum, such conditions 
may but do not necessarily involve: the transfer of a person for consideration, whether monetary 
or not; the delivery of a person into a state of exploitation (including, but not necessarily, of his 
labor); the exercise of a (presumed) right to convey by a person endowed with ownership rights 
over the person to be conveyed; the exercise of a presumed right to convey by a person endowed 
with familial rights over the person to be conveyed. Thus, in respect to child exploitation, it is the 
exploitation itself that leads to the prohibition rather than the compensation, which may or may 
not be received. And, in the case of the child – but presumably often also of the woman sold into 
marriage -- the transfer is effected by a person exercising familial rather than ownership rights:

209 Slavery Convention and Supplementary Slavery Convention.

210 Supplementary Slavery Convention, S.1.

211 Supplementary Slavery Convention, art. 1(b)

212 Supplementary Slavery Convention, art. 1(c)(i)

213 Supplementary Slavery Convention, art. 1(d)
there is no explicit chattelization, although the exercise of such absolute power as is implicated in these transfers may obliterate the substantive distinction between parental and property rights \textit{per se}.\textsuperscript{214}

In all these conditions the person conveyed can neither express consent to the conveyance itself or to the obligations attendant upon the situation in which, having been conveyed, she will find herself nor free herself from that situation. The characterization of a condition as analogous to slavery therefore appears to rest on the negation of the right to self-determination (and thus the a priori negation of human dignity). But it is also generally acknowledged that a person cannot voluntarily sell herself into slavery: actual consent is immaterial, since legal consent is impossible.\textsuperscript{215} The prohibition on slavery would therefore seem to revolve around the lack of

\begin{footnotesize}
\textsuperscript{214} While parental and property rights are exercised under legal separate regimes, they may both entail absolute rights over the fate of an object of exchange, be it an inanimate thing or an objectified person. Just because a transaction is situated within a familial context, it should not therefore be inured from scrutiny as a site in which persons may be treated as things, nor should ‘the family’ \textit{qua} legal institution – and the power relations that it structures -- be exempted from analysis as an expression of public policy. For a similar perspective, see Martha C. Nussbaum, \textit{WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH} (2000) at p. 245 noting that “there is no institution that, as such, has privacy rights that prevent us from asking how law and public policy have already shaped that institution, and how they might better do so.”

\textsuperscript{215} See David Ellerman, Inalienable Rights: A Litmus Test for Theories of Justice, 29 \textit{LAW AND PHILOSOPHY}, 571-599 (2010). See also Palermo Protocol, art. 3(b) providing: “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) [detailing the prohibited means] have been used.”
\end{footnotesize}
rights to self-determination of the person in a slave condition rather than the modalities of her conveyance to another: a free person cannot freely enslave herself. Just as consent to slavery does not negate slavery – indicating that the lack of consent is not a necessary feature of slavery, payment is also not required. This analysis suggests several fundamental differences between the conditions of a slave and those of a child whose filiation has been transferred from one person to another for compensation, not least that, under current international law (and all states except the United States and Somalia are parties to the Convention on the Rights of the Child), the child as such is endowed with rights. Such rights include “child-sized” rights of self-determination, precluding any other person’s exercise of absolute powers. Moreover, whereas it is a corollary of child status that the child cannot express legally binding consent to any contractual transaction, nonetheless the child’s interests can be represented by third parties deputized to perform this task taking into account the child’s own best interests.\textsuperscript{216} Australia’s National Model to Harmonise Regulation of Surrogacy, for example, constructively represents the interests of the child through the judicial process, by requiring that the transfer of parental rights be subject to a parentage order.\textsuperscript{217}

\textsuperscript{216}Article 12 of the CRC specifies: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child” and “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

\textsuperscript{217} See n. 52 s.5, “Parentage Orders:” “A parentage order would not be granted merely because the parties consent. The Court would need to be satisfied (as an overriding consideration) that the proposed order was in the best interests of the child.”
But if payment is not necessary for a conveyance of a human being by one person to another to be slavery, is payment nonetheless a sufficient condition for a *jus cogens* ban to apply? A contrary example may be provided by the payment of ransom in return for the release of a kidnappee. While kidnapping – perhaps as an activity akin to piracy – could conceivably be viewed as violating a *jus cogens* prohibition, obtaining a person’s freedom by providing consideration does not seem to be. More generally, overarching prohibitions on the commercialization of human beings have been critiqued for their radical cleavage of phenomena that are often enmeshed. And lawmakers have implicitly acknowledged the difficulty of drawing black-letter lines. Notably, the Convention on the Rights of the Child enjoins state parties to “take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper gain for those involved in it,” and the Adoption Convention incorporates the same reference to “improper gain,” suggesting that some measure of gain may be legitimate. Moreover, attentive observers of adoption markets have remarked on the failure of strategies designed to eradicate commercialization, and, indeed, have argued for its open recognition. Nonetheless, it seems

---

218 As Viviana Zelizer has shown, in intimate relations the lines between purchase and gift blur and the neat dichotomy between the one and the other that informs our judgments reveals itself to be morally blunt and sociologically thin. In Zelizer’s words: “Where relations are narrow and short term, we tend to call them sex work. Where they are broad and long term, we tend to call them households.” Viviana A. Zelizer, Money, Power and Sex, Yale J.L. & Feminism, 18 (2006): 303, 308 (citations omitted). See also Viviana A. ZELIZER, THE PURCHASE OF INTIMACY (2005).

219 Adoption Convention, Art. 8. It is worth noting that “gain” implies a potential reward that is greater than that implicated in the notion of reimbursement or cost-coverage.

220 “The connection between money and intercountry adoption is a fact of life and it is better to acknowledge that and try to regulate it,” comments the Secretary of the Hague Conference on Private International Law. Jennifer Degeling, The Intercountry Adoption to Good Practice
impossible to ignore that, at the moment at which it occurred, the sale itself stripped the person of agency and reduced her to an alienable object, one that, having been subject to the possession of one person – whether on the basis of familial or property rights -- by virtue of the exchange engaged in by that person, became the possession of another. In sum, while recognition of a treaty that either implicitly or explicitly permitted the sale of children seems morally repugnant and legally difficult to reconcile with what appears to be a generalized conviction that selling human beings is per se violative of their dignity, the catalog of jus cogens prohibitions is undefined and theoretically may not extend to the sale of human beings outside the context of slavery and conditions considered directly analogous to it.

If a permissive treaty characterized the relevant exchanges as service contracts rather than sales, would it more likely be inured from invalidation? Such a treaty might run counter to specific prohibitions—for instance, against “making the human body and its parts as such a source of financial gain”221—that might be proscribed in particular jurisdictions without necessarily rising to the level of jus cogens. But a requirement that states enforce specific performance by gestational carriers could be seen as contravening norms regarding indentured servitude and habeas corpus. A permissive treaty might, then, risk invalidation under the Vienna Convention on the Law of Treaties as a function of the mechanisms it prescribes rather than because of the exchanges it facilitates.


b. Prohibitionist treaties and the problem of statelessness

It is not only permissive treaties that may be held in breach of jus cogens rules: a prohibitionist treaty that de facto entails a substantial risk that children may be born who will be rendered stateless by the operation of the treaty itself may plausibly also incur the same risk. 222 In the case of “Baby Manji” discussed earlier, which revolved around a child born of an Indian gestational carrier at the behest of Japanese commissioning parties, the Japanese prohibition on surrogacy prevented recognition of the commissioning parties’ parental status and hence the attribution of Japanese citizenship to the child.223 Concomitantly, under then applicable Indian rules, Baby Manji was also not considered a child of the gestational carrier and thus not entitled to Indian citizenship. In Re: X and Y, children born to a Ukrainian gestational carrier as a result of an agreement with British commissioning parties found themselves in a similar quandary.224 Under Ukrainian law, the gestational carrier and her husband, having transferred X and Y to the British commissioning parties, had neither the rights nor obligations of parenthood; moreover, the children were deemed to have the nationality of their commissioning parents. But under U.K. law, which prohibited commercial surrogacy arrangements and therefore recognition of filiations derived from such arrangements, X and Y could have been found to be parentless and therefore stateless.225 Save in cases in which ius soli rules provide a safety net, children’s citizenship at


223 See Kari Points, n.28.

224 Re: X and Y, n.1.

225 For a discussion of Baby Manji in this perspective, see n. 28 and accompanying text.
birth is dependent on that of their parents; parentless, they are also stateless. And stateless, they are, as Hannah Arendt long ago noted—in fact even if not in legal theory—substantially rightless. In a legal perspective, the deprivation of nationality—the engendering of statelessness—is per se a violation of human rights norms, in particular in relation to children. A treaty which, because it prohibits surrogacy, bars the recognition of the filiation of those born of surrogacy arrangements and thereby creates a class of children destined to statelessness could well be adjudged in breach of proscriptions against the violation of peremptory norms.

None of the conclusions outlined above is foregone. Sales, enforced performance, and the engendering of stateless children may all be interpreted so as not to fit narrow readings of jus cogens prohibitions. Both how a treaty regarding surrogacy is framed, what transactional narrative it encodes into international law, as well as how human rights law is interpreted, will affect the treaty’s ability to stand up to its inevitable and legally mandated scrutiny under human rights law. Who will make the necessary determinations? Surrogacy narratives are evermore influenced by domestic and cross-border networks of civil society actors, by the interactions of the official and unofficial representatives of one country with those of another, in sum by

226 It should be noted that ius soli jurisdictions may nonetheless impose requirements—for example, relating to the length of stay or the country of residence of the parents—such that children born of surrogacy arrangements may not qualify for citizenship.

227“3. Every child has the right to acquire a nationality,” International Covenant on Civil and Political Rights, article 24 (3). The ICCPR (article 15) also provides that “Everyone has the right to a nationality” and “No one shall be arbitrarily deprived of his nationality.” On the arbitrary deprivation of nationality as a recognized tort under the Alien Torts Claims Act, see In re South African Apartheid Litigation, 617 F.Supp.2d 228 (2009).
recursive processes that bind together national and transnational, state and civil society. From these discussions and decisions regarding surrogacy and the nexus between the rules governing filiation and those pertaining to nationality and citizenship, basic elements of social and political organization may emerge profoundly reconfigured. But in the immediate international commercial surrogacy appears destined to remain only loosely regulated: state autonomy with respect to such matters as filiation, nationality and citizenship, whether as recognized by the classical Westphalian doctrine of the “reserved domain” of state jurisdiction or as conceded in tighter human rights regimes under the margin of appreciation, will ensure the survival of conflicting legal frameworks.