BABIES WITHOUT BORDERS: HUMAN RIGHTS, HUMAN DIGNITY, AND THE REGULATION OF INTERNATIONAL COMMERCIAL SURROGACY

Yasmine Ergas[*]

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 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, and judges have attempted to craft doctrines that inevitably—and necessarily—correspond to the specificities of the cases before and their own legal systems. But the inadequacy of such approaches has become increasingly evident. As a result, states have developed national 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*

---

[*] School of International and Public Affairs and 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 José Alvarez, George Bermann, Danielle Celermajer, Michael Doyle, Henry Ergas, 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 discussed earlier versions of this article including the Institut Emilie du Chatelet in Paris, the University of Sydney, Erasmus University Rotterdam, the Columbia University Human Rights Seminar, the International Law Association, and the Columbia University workshop on "Deconstructing and Reconstructing 'Mother.'" I have also benefited from conversations with William Duncan, Louise Teitz, and Hannah Baker of the Hague Conference on Private International Law, Lisa Vogel of the U.S. State Department, and Katherine Franke, Suzanne Goldberg, Alice Kesssler-Harris, Carol Sanger, and Elizabeth Scott at Columbia University. Invaluable research assistance was provided by Jenny Leon, Caroline Risacher, and Marta Garnelo. Finally, this essay could not have been written without the help, comments and support of Leonard Groopman and Sofia Groopman.

[1] Re X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 [10] (Eng.).

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, this 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 I). It then explores possible approaches to the conflicts among legal systems that underlie the Balaz case, whether through individual contracts (Part II) or treaties (Part III). This 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.

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.[2] 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, 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). Such an expansion 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.[3] Born at the same time

[2] *Cf.* Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. GENDER 67, 94 (2007).

[3] Mark Alpert, *New U.S. Export to Japan: Babies*, CNNMONEY: FORTUNE (Aug. 10, 1992), http://money.cnn.com/magazines/fortune/fortune_archive/1992/08/10/76762/index.htm.

as the Internet,[4] the global surrogacy market has expanded as service providers—including the women offering themselves as gestational carriers, lawyers proffering their counsel, and 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.[5] 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.[6] Analogous trends have emerged with respect to surrogacy: A study of five brokerage agencies reports a cumulative growth of nearly 1000 percent and a significant increase in cross-border clientele between 2006 and 2010.[7]

The case of the Balaz twins, commissioned by German citizens in India, reveals the consequences that ensue when individuals ground a basic activity of life—having children—simultaneously in legal systems whose rules conflict. Caught between German prohibitions regarding surrogacy and Indian policies seeking to promote the market in baby making,[8] Leonard and Nikolas Balaz appeared destined to become wards of the Indian state. The agreement commissioning their birth, a contract ostensibly governing all parties, was written exclusively by private actors.[9] This arrangement treated filiation as a

---

[4] See Permanent Bureau, Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* 7 (Prel. Doc. No. 10, 2012) [hereinafter Hague Conference Report 2012] ("The growth in these cross-border arrangements has undoubtedly been facilitated by the Internet, other modern means of communication, and the ease of international travel.").

[5] On factors affecting the development of the surrogacy market, see generally Sanger, *supra* note 2. For a discussion of the surrogacy market in the context of the fertility market, see generally DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 31–96 (2006).

[6] *See generally* CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION (Faye D. Ginsburg & Rayna Rapp eds., 1995); CULTURES OF TRANSNATIONAL ADOPTION (Toby A. Volkman ed., 2005); THE GLOBALIZATION OF MOTHERHOOD (Wendy Chavkin & JaneMaree Maher eds., 2010).

[7] 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." Hague Conference Report 2012, *supra* note 4, at 8.

[8] Embryonenschutzgesetz [ESchG] [Embryo Protection Act], Dec. 13. 1990, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2746, § 1, last amended by Präimplantationsdiagnostikgesetz [PräimpG], Nov. 21, 2011, BGBL. I at 2228, art. 1 (Ger.); Hillary Brenhouse, *India's Rent-a-Womb Industry Faces New Restrictions*, TIME (June 5, 2010), http://www.time.com/time/world/article/0,8599,1993665,00.html ("In 2002 [India] legalized commercial surrogacy in an effort to promote medical tourism . . . .").

[9] Balaz v. Anand Municipality, LPA 2151/2009 (Gujarat H.C. 2009) para. 2 [hereinafter *Balaz v. Anand Municipality*], *available at* http://gujarathc-casestatus.nic.in/gujarathc/tabhome.jsp (Under "CaseDetail" tab,

matter of contract rather than status, whereas the regulation of reproduction and familial relations bears the imprints of nation-building and social policies and as such is not simply a matter subject to individual negotiation. Resolutions to dramas like that of the Balaz twins require interstate coordination, possibly in the form 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. Moreover, family relations, filiation, and their nexus to nationality and citizenship lie at the heart of what has traditionally been understood as the domestic jurisdiction of states.[10] Despite the progressive expansion of the scope of international law,[11] the often-documented erosion of the Westphalian system—the "basic constitutional doctrine of the law of nations"[12]—and the contested nature of the distinction between matters that appropriately fall within the reserved domain of state jurisdiction and those that do not, when "an issue is prima facie within the reserved domain because of its nature and the issue presented in the normal case then certain presumptions against any restrictions on that domain may be created."[13] Consequently, while matters relating to domestic relations and to citizenship have been the subject of treaties, it is nonetheless likely that both national and international policymakers and courts will tread carefully. A global accord capable of imposing uniform regulations on the 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 a bifurcated regime must be understood as—indeed, can already be seen to be—

---

select " "LPA-Letters Patent Appeal" as "Casetype" and enter "2151" as "CaseNumber" and "2009" as "CaseYear," then click "Go." Download Order dated 11/11/2009.).

[10] " It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. . . . Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State." Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 20 (Apr. 6). Nonetheless the *Nottebohm* Court founded its judgment on the distinction between states' appropriate exercise of domestic jurisdiction and the effectiveness of their acts on the international plane. *Id.* at 21 ("International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions.")

[11] For an early review, see Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147 (1962).

[12] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291 (7th ed. 2008).

[13] *Id.* at 294.

apprehending the regime in a unitary manner, deriving advantages from, as well as bearing the consequences of, its segmentation. But the possibility of interstate agreement does not per se determine the legality of the accords or of the overarching regime that therefore emerges. On the contrary, such agreements will be held to the test of international human rights law, and whether they hold up will depend on the specific understandings of surrogacy and filiation as well as of human rights that legislators, administrators, and judiciaries develop in dialogue with political and civil society actors.

I. 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 seems unremarkable at first glance: A child born on Indian soil of an Indian mother and a foreign father, the Court held, is an Indian national.[14] 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 does not fall under certain narrow exceptions.[15] 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. 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.[16] Balaz and his wife, Susan Lohle, faced with her infertility, had chosen to have children through reproductive surrogacy.[17] Such a 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

---

[14] *Balaz v. Anand Municipality*, *supra* note 9, para. 16.

[15] The Citizenship Amendment Act of 2003, § 3 states that citizenship will not be conferred on a child born in India if either parent is a foreign diplomat accredited as such in India or is an enemy alien and the child is born in a place that is under enemy occupation. The Citizenship Act, 1955, No. 57, Acts of Parliament, 1955, *amended by* The Citizenship (Amendment) Act, 2003, No. 4, Acts of Parliament, 2004 (India).

[16] *Balaz v. Anand Municipality*, *supra* note 9, paras. 2, 5.

[17] *Id.* para. 2.

financial compensation).[18] 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.[19] Or they could 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, albeit not risk-free, market in commissioned children.[20] Without presuming to guess the motivations that led the Balazes to India, theirs was a reasonable choice, one made by others in their position and encouraged by government policies that see reproductive surrogacy as an aspect of an expanding health and medical tourism trade.[21]

---

[18] See Embryonenschutzgesetz [ESchG] [Embryo Protection Act], Dec. 13. 1990, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2746, § 1, last amended by Präimplantationsdiagnostikgesetz [PräimpG], Nov. 21, 2011, BGBL. I at 2228, art. 1 (Ger.), which also prohibits egg-donation, 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.

[19] As Hofman noted in 2005, "California's case law is almost legend, it is so well known. Although the state has yet to enact statutory language explicitly authorizing and regulating surrogacy, its case law addresses the issue extensively, with large reliance on the Uniform Parentage Act and emphasis on the intent of the parties." Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 Wm. Mitchell L. Rev. 449, 455 n.19 (2009). The emphasis on the role of intent in determining parentage beginning with *Johnson v. Calvert*, 851 P.2d 776, 778–83 (Cal. 1993), has made California a reliable market for surrogacy.

[20] *See* Claire Biggs & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUR. RADIO LIBERTY (June 4, 2011), http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html.

[21] Although it is difficult to find precise figures on the size of the market in reproductive surrogacy, according to one estimate it amounts to about $400 million annually in India's medical tourism industry, which is expected to reach $2.3 billion by 2012. Permanent Bureau, Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* 7 (Prel. Doc. No. 11, 2011) [hereinafter Hague Conference Report 2011]. For a critical analysis of the implications of this expansion from the perspective of the Indian women who service the industry, see Shayantani DasGupta & Shamita Das DasGupta, *Motherhood Jeopardized*, *in* THE GLOBALIZATION OF MOTHERHOOD, *supra* note 6, at 131–47 (concluding that assisted reproductive technology in India "has ultimately exacerbated women's 'unfreedoms', and therefore undermined, rather than supported, their agency"); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 15–16 (2008) (concluding that "abolition of international surrogacy is the only solution that will protect all parties given the ethical concerns involved"); *see also* Ganapati Mudur, *India Plans to Expand Private Sector in Healthcare Review*, 326 BRIT. MED. J. 520 (2003); Sunita Reddy & Imrana Qadeer, *Medical Tourism in India: Progress or Predicament?*, ECON. & POL. WKLY., May 15, 2010, at 69; Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429 (2009).

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.[22] At the Balazes' behest—and as she appears to have done innumerable times before—Dr. Nayna Patel obtained ova from one woman and engaged another to carry the embryo.[23] Jan Balaz contributed his own sperm.[24] The arrangement reflected the paradigm of surrogacy today: Gestational surrogacy, in which one woman provides ova and another carries the pregnancy, has become the marker of surrogate motherhood, superseding traditional surrogacy, in which one woman serves as both egg donor and gestator. The provider of ova, stripped of maternal reference altogether, is referred to in the sexually neutralized language of genetic donation. As a contributor of "genetic material," the ova provider is now semantically equated to a sperm donor.[25] In fact, the case law would suggest that the sperm donor is often—as in this case—the biological as well as the commissioning father. If he is not a commissioning party, and the sperm is obtained through a sperm bank then he is often compensated for his sperm.[26] In either case, he is not really a "donor" at all.[27] 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

---

[22] Sam Dolnick, *Pregnancy Becomes Latest Job Outsourced to India*, USA TODAY (Dec. 30, 2007), http://usatoday30.usatoday.com/news/health/2007-12-30-surrogacy_N.htm.

[23] *Balaz v. Anand Municipality*, *supra* note 9, para. 2.

[24] *Id.*

[25] 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, "[T]here is no biological mother." *See* Melanie Thernstrom, *My Futuristic Insta-Family*, N.Y. TIMES, Dec. 29, 2010, § 6 (Magazine), at 28. 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." *Id.* I use the term "womb provider" to highlight the implications of a way of looking at reproduction, not to endorse it.

[26] *See* Guido Pennings, *The Rough Guide to Insemination: Cross-Border Travelling for Donor Semen Due to Different Regulations*, 2 FACTS, VIEWS & VISION OBGYN 55, 56 (2010) (noting that "[w]hen countries abolish [sperm] donor anonymity or make payment for donors illegal, this has an impact on the number of candidates" and that Canadian regulations prohibiting payment have led to the fact that 80% of children born in Canada of donor-sperm have an American donor; "[i]nterestingly, this means that these donors were paid for their donation").

[27] 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).

that figure.[28] 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 "gestational carrier;"[29] others prefer to describe her function as that of having rented her womb.[30] 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."[31] 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 posited as being the ultimate product of biological material that belonged to the commissioning parents from the start).

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

---

[28] Robyn Nazar, *The Value of an Egg Donation*, AM. FERTILITY ASS'N, http://www.theafa.org/article/the-value-of-an-egg-donation (last visited Feb. 23, 2013).

[29] Lauren Andrew Hudgeons, *Gestational Agreements in Texas: A Brave New World*, 57 BAYLOR L. REV. 863, 894–95 (2005).

[30] *Id.* at 866.

[31] *Id.* at 869.

has emerged as the preferred mode for commissioned births.[32] 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.[33] It seems likely that awareness that gestational surrogates will not transmit their physical traits to the children they bear has facilitated "northern" recourse to gestational services provided in the "global south," further contributing to the general stratification of reproduction that has already been documented in reference to child-care and adoption.[34] 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

---

[32] Thus, 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." UNIF. PARENTAGE ACT, prefatory note (amended 2002), 9B U.L.A. 360 (2000). Australia (ACT), Israel, and India (under the as-yet unimplemented *Assisted Reproductive Technologies (Regulation) Bill 2010*) are among the states that recognize only gestational surrogacy arrangements. Hague Conference Report 2012, note 4, at 13 n.72, 17 n.102. Ukraine recognizes both gestational and traditional surrogacy, but in gestational surrogacy arrangements the intended parents are the presumptive parents of the child whereas in traditional surrogacy the de facto parents are the surrogate and her child. Sarah Mortazavi, *It Takes a Village To Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2272 (2012).

[33] *See* A.G.R. v. D.R.H. & S.H., No. FD 09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109–46 (2009). A panel of the New Jersey Assembly has recently approved a bill that would allow the intended mother's name to be registered on the birth certificate after a 72-hour waiting period. *See* Mary Ann Spoto, *Assembly Panel Approves Bill Allowing Women Using Surrogates To Be Named Mother on Birth Certificate*, STAR-LEDGER (N.J.), Mar. 3, 2012, http://www.nj.com/news/index.ssf/2012/03/nj_assmebly_panel_aprpoves_bil.html.

[34] The term "stratified reproduction" was first introduced by Shellee Colen. Shellee Colen, *Like a Mother to Them: Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, *in* CONCEIVING THE NEW WORLD ORDER, *supra* note 6, at 78. Colen defines stratified reproduction to mean that "physical, and social reproductive tasks are accomplished differentially according to inequalities that are based on hierarchies of class, race, ethnicity, gender, place in a global economy and migration status and that are structured by social, economic and political forces. The reproductive labor . . . is differentially experienced, valued, and rewarded according to inequalities of access to material and social resources." *Id.* at 78. In reference to transnational adoption Yngvesson notes: "[T]he 'global' dimension of motherhood is cancelled with an adoption decree that declares the adoptive mother to be the only mother of the child. But the official inivisibility of an 'other' mother, whether birth mother, foster mother or caretaker in a children's home, does not erase the complex field of relations that produce adoptable children, or the stratification of reproduction that makes transnational adoption a desirable option for 'completing' families in European and American nations and for managing an 'excess' of children in the developing world." Barbara Yngvesson, *Transnational Adoption and the Transnationalization of Motherhood: Rethinking Abandonment, Adoption and Return*, *in* THE GLOBALIZATION OF MOTHERHOOD, *supra* note 6, at 106, 122.

former, presumptive "racial" (along with other genetic) characteristics may entail premium prices, in the latter such characteristics may be less important.[35] Moreover, certain countries may find their comparative advantage in exporting eggs, rather than in providing gestators, or vice versa.[36]

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.[37] Indeed, recently published research has highlighted the importance of the gestators' physiological (and genetic) characteristics on fetal development.[38] 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;[39] similar services purchased in Gujarat were likely priced between $22,000 and $35,000;[40] and in Ukraine the price tag might have ranged from $30,000 to $45,000.[41] 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

---

[35] For examples of ethnically or racially specialized egg donation agencies, see ASIAN EGG DONATION LLC, http://aed-web.com (last visited Jan. 31, 2013); NY LIFESPRING LLC, http://www.nylifespring.com (last visited Jan. 31, 2013) (Jewish egg donors). An agency that reportedly specializes in African American egg donors and surrogates may be found at Heart to Heart Egg Donations. HEART TO HEART EGG DONATIONS, http://www.fwdonoreggs.com/index.html (last visited Jan. 31, 2013). On the specialization of this agency, see Abbie Waters, *African-American Egg Donor Program Finds Black Egg Donors*, FERTILITY NATION, http://www.fertilitynation.com/african-american-egg-donor-program-finds-black-egg-donors (last visited May 5, 2013).

[36] This is especially likely to occur if, as discussed later, particular states privilege egg donation over gestation in the definition of citizenship. Analogous market specialization is occurring in sperm donation. One British study cited Denmark as a preferred source of sperm for women seeking sperm in the United Kingdom. *See* Paul Henley, *Business Booms for Danish Sperm*, BBC NEWS (May 19, 2011), http://www.bbc.co.uk/news/world-europe-13460455.

[37] Douglas Almond & Janet Currie, *Killing Me Softly: The Fetal Origins Hypothesis*, J. ECON. PERSP., Summer 2011, at 153, 154.

[38] For a review of research on the effects of nutrition and other factors relating to maternal behavior and health on fetal development, see *id.*

[39] Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1.

[40] Andrea Whittaker, *Challenges of Medical Travel to Global Regulation: A Case Study of Reproductive Travel in Asia*, 10 GLOBAL SOC. POL. 396, 403 (2010); MED. TOURISM CORP., http://www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php (last visited Jan. 31, 2013).

[41] *See* INT'L REPRODUCTIVE TECHS. SUPPORT AGENCY, http://www.irtsa.com.ua/en/news/363.html (last visited Jan. 31, 2013).

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.[42]

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, adopted in 2002—issued birth certificates identifying Jan Balaz as their father.[43] But surrogacy is illegal in Germany,[44] Jan Balaz was reportedly aware that the birth certificates would not be accepted by the consular authorities as a basis for establishing the filiation of the twins and hence the issuance of German passports.

Faced with these difficulties, the Balazes sought Indian passports, turning to judicial procedures to do so.[45] While the lower court refused to recognize the children as Indian for want of an Indian parent, Palika modified their birth certificates.[46] The birth date, initially erroneously recorded as 14.1.2008, was corrected to 4.1.2008.[47] 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.[48] 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.[49] The Passport Authorities entertained the applications and two Indian passports were issued for the twins.[50] But shortly thereafter, Balaz received an intimation-cum-notice issued by the Government of India, Ministry of External Affairs, Regional Passport Office, which requested him to surrender both passports while the matter was pending

---

[42] See Elise Smith et al., *Reproductive Tourism in Argentina: Clinic Accreditation and its Implication for Consumers, Health Professionals and Policy Makers*, 10 DEVELOPING WORLD BIOETHICS 59, 60 (2010).

[43] *Balaz v. Anand Municipality*, *supra* note 9, para. 3 ("Surrogate mother gave birth to two baby boys on 4.1.2008. Petitioner then applied for registration of the birth of the children in the prescribed form to Anand Nagar Palika. Anand Nagar Palika issued a certificate of birth to the children as per the provisions of Registration of Birth and Deaths Act, 1969. Earlier date of birth was shown as 14.1.2008, which was later corrected as 4.1.2008 and the name of the petitioner's wife who was shown as the mother of the babies, was replaced with the name of Marthaben Immanuel Khristi.").

[44] *Id.* para. 7.

[45] The facts of the case are summarized in the proceedings of the High Court of Gujarat at Ahmedabad. *See id.*

[46] *Id.* para. 3.

[47] *Id.*

[48] *Id.*

[49] *Id.* para. 4.

[50] *Id.*

in the High Court of Gujarat.[51] 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.[52] 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."[53]

The Passport Authority at Ahmedabad 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.[54] As a decision was pending, and deadlines set and reset, negotiations among India, Germany, and the Balazes accelerated and a public opinion campaign was launched.[55] The Apex Court itself urged the Indian authorities to explore non-judicial avenues.[56] Adoption was touted as a possible pathway to establishing the children's parentage.[57] Press reports indicate that this solution may have been proposed by Germany.[58] But an action that, 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[ed], abandoned or surrendered."[59] Such children, whose adoptability is certified by appropriate state authorities, lack a parent (or have a parent who has been adjudged incompetent).[60] Moreover, because India is a party to the Hague Convention on

---

[51] *Id.*

[52] *Id.* paras. 16, 17.

[53] *Id* para. 16.

[54] *Germany May Give Visas to Surrogate Twins (Second Lead)*, THAINDIAN NEWS (Jan. 4, 2010), http://www.thaindian.com/newsportal/uncategorized/germany-may-give-visas-to-surrogate-twins-second-lead_100298948.html.

[55] *See, e.g.*, *German Twins' Father Makes Desperate Plea*, TIMES OF INDIA (Feb. 27, 2010), http://www.timesnow.tv/German-twins-father-makes-desperate-plea/articleshow/4339533.cms.

[56] *Government Given Time To Bend Adoption Law for German Couple*, THAINDIAN NEWS (Mar. 17, 2010), http://www.thaindian.com/newsportal/uncategorized/government-given-time-to-bend-adoption-law-for-german-couple_100335843.html.

[57] *Id.*

[58] *See, e.g.*, *Adoption Only Way out for Surrogate Twins: Germany*, TIMES OF INDIA (Jan. 19, 2010), http://articles.timesofindia.indiatimes.com/2010-01-19/india/28135694_1_surrogate-twins-german-couple-susan-lohle.

[59] *See* CENT. ADOPTION RES. AGENCY, GUIDELINES GOVERNING THE ADOPTION OF CHILDREN § 4 (2011) (India), *available at* http://adoptionindia.nic.in/guideline-family/Part_I.pdf.

[60] *See id.* § 2(c), 2(v), 2(zd).

Intercountry Adoption (the "Adoption Convention"), all cross-border adoptions must comply with Convention rules, including a complementarity requirement—the adoption agency must certify that no adequate national placement of the child is possible—and a ban on pre-adoption contact between the birth mother and the intended adoptive parents.[61] 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.[62] 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.[63] The parents must then adopt the children in their own countries within a specified time frame.[64] The Central Adoption Resource Agency, which was established pursuant to India's having become a party to the Adoption Convention in 2003, and which exercises exclusive competence in this domain, declared the situation beyond its jurisdiction, as it was only concerned with issues related to abandoned children.[65] The Apex Court ordered the agency to reconsider, albeit on the condition that a precedent not be created.[66] The agency duly did so and issued a No Objection Certificate for the adoption of the children.[67] Accordingly, 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).[68] In May 2010, the Balaz twins were provided the exit and entry documents that allowed them to

---

[61] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption arts. 4, 29, May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter Adoption Convention].

[62] 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* Nisha Satkunarajah, *Surrogate Child Denied German Passport,* BIONEWS (May 9, 2011), http://www.bionews.org.uk/page_94158.asp; *Surrogate Children Have No Right to German Passport, Court Rules,* LOCAL (Apr. 28, 2011, 11:41 AM), http://www.thelocal.de/society/20110428-34681.html.

[63] Guardianship and Ward Act, No. 8 of 1890, INDIA CODE (1993), vol. 8, §§ 6–7, 12, 17, *available at* http://www.childlineindia.org.in/Guardians-and-Wards-Act-1890.htm.

[64] CENT. ADOPTION RES. AGENCY, *supra* note 59, at § 27.

[65] *SC Asks Govt To Consider German Couple Plea for Adoption of Surrogate Kids,* HINDUSTAN TIMES (Feb. 25, 2010), http://www.hindustantimes.com/News-Feed/newdelhi/SC-asks-Govt-to-consider-German-couple-plea-for-adoption-of-surrogate-kids/Article1-512900.aspx.

[66] *See id.*

[67] Hari G. Ramasubramanian, *CARA Agrees To Provide No Objection Certificate in the Jan Balaz Case,* INDIAN SURROGACY L. CTR. (May 4, 2010), http://www.indiansurrogacylaw.com/blog/2010/05/cara-agrees-to-provide-no-objection-certificate-in-the-jan-balaz-case-german-coupl., Hari G. Ramasubramanian, *German Couple All Set To Take Twins to Homeland,* INDIAN SURROGACY L. CTR. (May 29, 2010), http://www.indiansurrogacylaw.com/blog/tag/surrogate-mother/.

[68] *Laws on Surrogacy: German Twins Finally Granted Visa,* LAWIS GREEK (May 27, 2010, 1:35 PM), http://www.lawisgreek.com/surrogacy-german-twins-granted-visa.

leave India for Germany.[69] The parents agreed to adopt them in Germany according to German rules.[70] In the meantime, the Balaz case and others like it may 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 eluding the difficulties that would be prompted by already identified gestational carriers making such declarations.[71]

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.[72] Ultimately, India agreed to allow the child to be entrusted to her father and paternal grandmother;[73] 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.[74] 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.[75] 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

---

[69] *Surrogate Children Have No Right to German Passport, Court Rules*, *supra* note 62.

[70] *See* Dhananjay Mahapatra, *German Surrogate Twins To Go Home*, TIMES OF INDIA (May 27, 2010), http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835_1_stateless-citizens-balaz-surrogate-mother; Hari G. Ramasubramanian, *German Couple All Set To Take Twins to Homeland*, INDIAN SURROGACY L. CTR. (May 29, 2010), http://www.indiansurrogacylaw.com/blog/2010/05/german-couple-set-twins-homeland.

[71] Abhijit Sathe, *Fake Mom of Frenchman's Twins Nabbed*, MUMBAIMIRROR.COM (Aug. 4, 2011), http://m.mumbaimirror.com/index.aspx?Page=article&sectname=News%20-%20Cover%20Story&sectid=15&contentid=20110804201108040227076607898df6.

[72] *See* KARI POINTS, THE KENAN INST. FOR ETHICS AT DUKE UNIV., COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 2 (2009), *available at* http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf.

[73] *Id.* at 6–7.

[74] *Surrogate Baby Born in India Arrives in Japan*, HINDUSTAN TIMES (Nov. 3, 2008), http://www.hindustantimes.com/Surrogate-baby-born-in-India-arrives-in-Japan/Article1-348858.aspx.

[75] Matt Wade, *Babies Left in Limbo as India Struggles with Demand for Surrogacy*, BRISBANE TIMES (May 1, 2010), http://www.brisbanetimes.com.au/world/babies-left-in-limbo-as-india-struggles-with-demand-for-surrogacy-20100430-tzbl.html.

would file an application on humanitarian and compassionate grounds for their non-biological child and then a citizenship application.[76] 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. They have also revealed the human costs of the collisions that can occur when "exporting" and "importing" states pursue conflicting policies.

India appears engaged in an ongoing review of the legal framework governing surrogacy.[77] 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

---

[76] Ravenna Aulakh, *After 6 Years and Fertility Mixup, Surrogate Twin Can Come Home*, TORONTO STAR (May 5, 2011), http://www.thestar.com/news/article/985936—after-6-years-and-fertility-mixup-surrogate-twin-can-come-home.

[77] *Govt Proposes To Bring Bill ToRegulate Surrogacy: Azad*, THE HINDU (March 19, 2013), http://www.thehindu.com/news/national/govt-proposes-to-bring-bill-to-regulate-surrogacy-azad/article4525557.ece. In July 2012, the Ministry of Home Affairs issued guidelines requiring foreign nationals traveling to India for reproductive surrogacy purposes to obtain a medical [rather than tourist] visa. The conditions for the issuance of such visa was made conditional upon the applicants: a) being a heterosexual married couple; b) being in possession of a letter from their Embassy in India or their foreign ministry stating clearly that: (i)The country recognizes surrogacy; (ii) The child/children to be born to the commissioning couple through the Indian surrogate will be permitted entry into their country as a biological child/children of the commissioning surrogacy; d) provide an undertaking that they would provide for the child/ren born of the surrogacy arrangement; c) providing a notarized agreement with the prospective Indian surrogate mother; d) obtaining the required services exclusively through a registered ART clinic; e) obtaining an exit permit prior to leaving India with the child/ren, which in turn would be conditioned on a certificate issued by the ART clinic. Andrew Vorzeimer, *New Guidelines: India Not A Viable Option for Gay Couples, Unmarried Couples or Single Individuals*, SPIN DOCTOR (Jan. 4, 2013), http://www.eggdonor.com/blog/2013/01/04/guidelines-india-viable-option-gay-couples-unmarried-couples-single-individuals/. Since the issuance of these guidelines, it appears that the government has announced a moratorium on the ban prohibiting gay and single couples leaving the country with the children born of surrogacy arrangements into which they had entered, so long as the children are born within 2013. Aloke Tikku, *Gay Foreigners Can Take Home India-Born Babies*, HINDUSTAN TIMES (MARCH 19, 2013), http://www.hindustantimes.com/India-news/NewDelhi/Gay-foreigners-can-take-home-India-born-babies/Article1-1028568.aspx. It is not clear the extent to which the Bill that will now be proposed reprises the previously developed Assisted Reproductive Technologies (Regulation) Bill 2010 [hereinafter ART Draft Bill], *available at* www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf. *See also* Rakesh Bhatnagar, *Govt Will Enact Surrogacy Law, Says the Solicitor General*, DAILY NEWS ANALYSIS (Jan. 21, 2010, 12:12 AM), http://www.dnaindia.com/india/report_govt-will-enact-surrogacy-law-says-solicitor-general_1337205. The bill had been finalized by the Union Health Ministry and sent to the Law Ministry for approval. *See* Trupti Shirole, *Bill to Regulate Surrogacy in India*, MEDINDIA (Jan. 27, 2011, 2:07 PM), http://www.medindia.net/news/Bill-to-Regulate-Surrogacy-in-India-79993-1.htm. Moreover, the Union Cabinet had been reportedly in the process of examining the Bill. Apeksha Mehta, *Is India Promoting Reproductive Tourism*, MIGHTYLAWS INDIA (May 29, 2011, 10:30 AM), http://www.mightylaws.in/643/india-promoting-reproductive-tourism.

to their domestic relations.[78] Even more, there continues to be substantial debate within India regarding the desirability of legalizing surrogacy itself, and the conditions that ought to be imposed.[79] Attempts to bring order to surrogacy are therefore caught between two conflicting 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, concerns regarding the status of the children born of surrogacy arrangements, hetero-normative concerns regarding access to surrogacy services, and fundamental objections to an industry that can be characterized as the production of children for export.[80] Legislative reform could provide the legal certainty necessary for India to maintain, or even increase, its market share. But as the 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 legal incompatibilities that permeate the international market for surrogacy are not exclusive to India. The different legal orders that crisscross transnational surrogacy have given rise to a host of difficult situations: children whose births have been registered and then de-registered (France,[81] Norway[82]); children for whom domestic courts have compelled their own reluctant consular authorities to issue travel documents (the Netherlands[83]); 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

---

[78] *See* Narendra Subramanian, *Making Family and Nation: Hindu Marriage Law in Early Postcolonial India*, 69 J. ASIAN STUD. 771 (2010).

[79] *See, e.g.*, Anil Malhotra, *Legalising Surrogacy—Boon or Bane?*, L. RESOURCE INDIA (July 14, 2010, 11:54 PM), http://indialawyers.wordpress.com/2010/07/page/2; Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES (Oct. 4, 2011), http://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html. For a recent discussion regarding the importance of state-level regulation of surrogacy, see, for example, *Proposed Bill on Surrogacy Is Not Adequate: Experts*, DNA (Oct. 10, 2011), http://www.dnaindia.com/india/report_proposed-bill-on-surrogacy-is-not-adequate-experts_1597271; K. Srivastava, *Surrogacy Mothers Need To Be Protected*, DAILY NEWS & ANALYSIS (Dec. 18, 2011, 8:00 PM), http://www.dnaindia.com/mumbai/report_surrogate-mothers-need-to-be-protected_1627181.

[80] *See, e.g.*, DasGupta & DasGupta, *supra* note 21.

[81] *France Rules Against Children of Surrogate Mothers*, CNS NEWS (Apr. 6, 2011), *available at* http://www.cnsnews.com/news/article/france-rules-against-children-surrogate-mothers; *see also* Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Apr. 6, 2011, Bull. civ. I, No. 72 (Fr.).

[82] *Dutch Consulate Over-Ruled in India IVF Case*, RADIO NETH. WORLDWIDE (Jan. 12, 2011), http://www.rnw.nl/english/bulletin/dutch-consulate-overruled-india-ivf-case.

[83] *See France Rules Against Children of Surrogate Mothers*, *supra* note 81.

policies (Iceland[84]); children whose filiation has been impugned although ultimately vindicated (Italy[85]); children "legalized" by judges in knowing tension with the objectives of national legislation (U.K.[86]); children virtually sequestered inside homes unable to obtain basic medical services because they lack a legal identity (Ireland[87]); children with two actual parents but only one (or no) legally cognizable parent.[88] Such incompatibilities have led to a variety of responses. States have taken emergency measures, stressing that such measures are not intended to set precedents.[89] Domestic courts have compelled their national administrations to resolve individual cases, often stressing that the solutions cannot be considered precedential.[90]And second-generation legislation has been proposed in France,[91] Ukraine,[92] Finland,[93] Kyrgyzstan,[94] Ireland,[95] and the Netherlands[96] to address the problems created by current law.

---

[84] Susamma Kurian, *Iceland Accepts Surrogate Baby Born in Thane*, HINDUSTAN TIMES (Dec. 21, 2010), http://www.hindustantimes.com/India-news/Maharashtra/Iceland-accepts-surrogate-baby-born-in-Thane/Article1-640934.aspx.

[85] Francesca Giulani, *Doria Pamhilj, l'ultima Dinasty: "Il Principe, il compagno e 2 figli,"* LA REPUBBLICA (Mar. 13, 2012), http://roma.repubblica.it/cronaca/2011/01/25/news/la_storia_doria_pamphilj_lultima_dinasty_il_principe_il_compagno_e_2_figli-11657574.

[86] The BBC explained:

> Laws in the UK are designed to try to prevent such [commercial surrogacy] arrangements. . . . [H]e 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 (May 19, 2011), http://www.bbc.co.uk/news/uk-13452330 (quoting High Court Justice Hedley).

[87] *Surrogacy: The Babies Born into Legal Limbo*, IRISH TIMES (Nov. 22, 2011), http://www.irishtimes.com/newspaper/features/2011/1122/1224307943752.html.

[88] *See* Hague Conference Report 2012, *supra* note 4, para. 35.

[89] *See, e.g.*, Sénat, Proposition de loi n. 234, Tendant à autoriser et encadrer la gestation pour autrui, Session Ordinaire 2009-2010 (Fr.), *available at* http://www.senat.fr/leg/ppl09-234.html.

[90] *See, e.g.*, *Surrogate Baby Born in India Arrives in Japan*, *supra* note 74.

[91] Sénat, Proposition de loi n. 234. A broad-based campaign is underway, however, to maintain the prohibition of surrogacy. *See La gestation pour autrui: une extension du domaine de l'alientation!*, LE MONDE, Feb. 2, 2011, http://www.lemonde.fr/idees/article/2011/02/08/la-gestation-pour-autrui-une-extension-du-domaine-de-l-alienation_1476850_3232.html.

[92] Anna Lelyuk, *Ukrainian Surrogacy Laws*, HG.ORG (Oct. 26, 2012), http://www.hg.org/article.asp?id=28807.

[93] *Finland Opens Door to Surrogacy*, YLE UUTISET (Sept. 23, 2011), http://www.yle.fi/uutiset/news/2011/09/finland_opens_door_to_surrogacy_2894510.html.

[94] Julia Mazykina, *Kyrgyzstan to Legalize Commercial Surrogate Maternity*, 24.KG (July 4, 2011, 1:53 PM), http://eng.24.kg/community/2011/04/07/17401.html.

[95] Carl O'Brien, *Surrogacy Guidelines To Be Issued Next Month*, IRISH TIMES (Nov. 23, 2011), *available at* 2011 WLNR 24227446.

None of the proposed solutions, however, can successfully reconcile the discrepant national frameworks in play.

Surrogacy in one state is the solution some jurisdictions have chosen.[97] A court in South Africa has ruled that foreigners wishing to employ a surrogate must intend to live in South Africa on a long-term basis, a decision that coheres with South Africa's tight regulations on foreigners wishing to adopt South African children: Prospective parents are also required to demonstrate that they will settle in the country.[98] Commercial surrogacy is banned in most Australian states; in addition, several states have made it a punishable offence (including by imprisonment) for their residents to enter into commercial surrogacy arrangements overseas.[99] The dimensions and growth of the market for babies 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 importers of children rather than exporters. An ad for a Ukrainian surrogacy agency noted, "All the activities of the [S]urrogacy agency 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, [and] Ministry of Health of Ukraine."[100] Despite these assurances, a French couple was recently arrested smuggling their commissioned children, hidden under a mattress in a van, from Ukraine to Hungary.[101] The couple declared that they were reacting to France's refusal to recognize the children's filiation and, therefore, to issue identity documents.[102] They subsequently appealed to "any

---

[96] Maike Winters, *Commercial Surrogacy: A Sign of the Times?*, RADIO NETH. WORLDWIDE (Feb. 17, 2012), http://www.rnw.nl/english/article/commercial-surrogacy-a-sign-times.

[97] 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 the United Kingdom at the time of application for a parentage order). Hague Conference Report 2012, *supra* note 4, at 14 n.91.

[98] *See SA Tightens Rules for Foreigners To Make Families*, NEW AGE (Oct. 13, 2011, 7:11 AM), http://www.thenewage.co.za/31768-1007-53-SA_tightens_rules_for_foreigners_to_make_families.

[99] Dep't of Immigration and Citizenship, *Fact Sheet 36a—International Surrogacy Arrangements*, http://www.immi.gov.au/media/fact-sheets/36a_surrogacy.htm (last visited May 5, 2013).

[100] *Surrogacy Agency*, LA VITA FELICE, http://surrogate-mothers.ru/uk/surrogacy/surrogate_motherhood_center.html (last visited May 5, 2013).

[101] *French Family Arrested for Smuggling Babies out of Ukraine*, TELEGRAPH (Mar. 25, 2011), http://www.telegraph.co.uk/news/worldnews/europe/ukraine/8405618/French-family-arrested-for-smuggling-babies-out-of-Ukraine.html.

[102] *Id.*

nation out there [that] can give our little girls citizenship so that we can finally take them home."[103] As with the Balaz twins, such dramas demonstrate that regulatory support in the exporting country alone is not enough.

India appears to be taking a very different approach as the visa requirements included in India's 2012 guidelines—which echo the proposal set forth in the 2010 Assisted Reproductive Technologies Bill—demonstrate. Rather than prohibiting international exchanges, it is seeking to impose a system of compulsory international coordination and to shift part of the cost of ensuring such coordination to its foreign clients.[104] Prior to establishing a legally valid arrangement with a surrogate, foreign commissioning parties now are 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.[105] This approach aims to avoid the types of problems that arose in the *Balaz* case. It also implicitly fosters the emergence of pressure groups of prospective commissioning parents.[106] 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 to explain the genesis of social movements that issue in legal change.[107] Thus, faced with Germany's intransigence, German potential clients for Indian surrogate services may join forces to lobby for a change in policies that would ultimately lead to the issuance of the certification that India may henceforth require.

---

[103] *French Couple Issues Appeal in Surrogacy Case*, SIFY (April 10, 2011), http://www.sify.com/news/french-couple-issues-appeal-in-surrogacy-case-news-offbeat-lekuEddfdjc.html.

[104] Assisted Reproductive Technologies (Regulation) Bill § 34(19) (2010) (India) ("[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.").

[105] *Id.*

[106] As Theodore Lowi wrote, "policies determine politics." Theodor J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUB. ADMIN. REV. 298, 299 (1972). With respect to the interactive relationship of social mobilization to international law and policy, see BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

[107] The concept of "norm entrepreneurs" has given rise to a vast literature. *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); Kathryn Sikkink & Martha Finnemore, *International Norm Dynamics and Political Change*, 54 INT'L ORG. 891 (1998).

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.[108] 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.[109]

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 as well as the prices their clients pay.[110]

Demands for compulsory coordination from exporting states may prompt the formation of international coalitions. 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 in a battle against surrogacy similar to that long undertaken against legalized abortion.[111] International organizations in concert with some states are now attempting to address the question of surrogacy.[112] As was

---

[108] *France: Surrogacy Ban Affirmed*, N.Y. TIMES, Apr. 6, 2011, at A7.

[109] *See* Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Apr. 6, 2011, Bull. civ. I, No. 72 (Fr.).

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

[111] *See, e.g.*, *Kerala Church Looks To Scupper Surrogacy Bill*, CRIB (June 30, 2010), http://www.religiousindia.org/church-in-india/kerala-church-looks-to-scupper-surrogacy-bill.

[112] *See infra* Part III.

portended by the Adoption Convention,[113] filiation norms have become a matter for international coordination, and, hence, international law.

II. 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.[114] Under this approach, legislators protect, 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 accept 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 averted the near catastrophe by basing recognition of the original birth certificate, and the consequent issuance of German passports to the twins, on the Balazes' bargain with the gestational carrier. 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. Many states have refused to recognize intent, without more, as a basis for the establishment of filiation[115]—and predictably will continue to do so.

Conflicts among legal frameworks 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

---

[113] Adoption Convention, *supra* note 61.

[114] 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 (Cal. 1993). The court, required to attribute maternity to the gestational carrier or the commissioning mother (who was also the ova-provider) or to 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.

851 P.2d at 782. On intent-based private ordering of parenthood, inter alia, see generally Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

[115] Shultz, *supra* note 114, at 326–27.

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 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.[116] 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 and/or legal models condition the feasibility of privatized solutions to filiation: One revolves around contractual autonomy and the other around the public interest. The discussion below 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 have involved the Balaz twins and many other children caught between borders.

A. Contractual Autonomy

1. Self-Determination and the Rights of Sellers and Buyers: What Is Bought and Sold?

Arguments in favor of contractual autonomy focus on rights to self-determination and to freedom of contract, particularly of the women

---

[116] On the commodification debate, see generally RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005). For a discussion of the growing role of private actors in international law, see generally Paul D. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573 (2011).

involved.[117] Fewer polemics and legal strictures have focused on men selling sperm, and, indeed, regulation is differentiated by gender.[118] If a woman wants to sell her ova or her services as a gestator, why should she be prevented from doing 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.[119]

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 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

---

[117] *See* Rene Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, L. & CONTEMP. PROBS., Summer 2009, at 37.

[118] *See id.* at 37.

[119] For an argument in favor of a free market in reproduction, see generally CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989).

marked as property of the commissioning parties.[120] The gestator provides gestation as a 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.[121] 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.[122]

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.[123] Indeed, Macpherson's definition of possessive 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)

---

[120] 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. It should be noted that this implied theory of surrogacy runs directly counter to theories underlying the legalization of abortion, which hold that for at least 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, 157 (1973) ("The Constitution does not define 'person' in so many words. . . . [T]he use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.").

[121] *See* 44B AM. JUR. 2D *International Law* § 159 (2012) (on immovable property).

[122] 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 Many Things: Why I Start with Baby M*, 44 ST. LOUIS U. L.J. 1443 (2000).

[123] C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 263–77 (1962). For a critical feminist analysis, see generally CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

personhood.[124] 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.[125] 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 individual autonomy, empowerment, and human dignity and, hence, the keystone of civil and political rights.[126]

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.[127] 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—include enforceable clauses allocating parental

---

[124] In his summary of the basic elements of the theory of possessive individualism, Macpherson includes these: "(iii) The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society;" and "(iv) [a]lthough the individual cannot alienate the whole of his property in his own person, he may alienate his capacity to labour." MACPHERSON, *supra* note 123, at 263–64.

[125] For a paradigmatic statement of this point of view, see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). In the terms used by Landes and Posner with respect to governmental regulation of "nonmarket behavior": "Nor is there any basis for a 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 & Richard A. Posner, *The Economics of the Baby Shortage*, *in* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE, *supra* note 116, at 46, 46 (footnotes omitted).

[126] 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 generally* STEFANO RODOTÀ, LA VITA E LE REGOLE: TRA DIRITTO E NON DIRITTO (2009). See also the discussion of dignity as autonomy, *infra* Part II.B.

[127] 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, e.g.*, Donald J. Boudreaux, *A Modest Proposal to Deregulate Infant Adoptions*, 15 CATO J. 117, 118 (1995) ("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 case of surrogacy, a gestational carrier would be able to sell her rights to being a "mother" but not the ability to define the rights and obligations associated with being the legal status of a "mother," since such rights and obligations may be separately regulated. It is worth noting that Boudreaux 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. *Id.* at 117. In a purely contractarian universe, however, no such default allocation would be assumed; each birth would raise anew the question of who, if anyone, is the mother.

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).[128] Whatever agreement is reached is dispositive; state policies are limited to ensuring the enforcement of the will of the parties.

2. *Translating Contractual Autonomy into the Regulation of Filiation*

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; the latter would be valid for all governmentally required purposes, but the former would be 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).[129] 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

---

[128] Recognition of parentality clauses could be seen as a further elaboration of the theory of functionally based parenthood, which is predicated on the agreement of a legal parent with either an intended parent (i.e., a person having an "intent to parent," and the intention has been reached in, and sanctioned by, agreement with the legal parent) or a "de facto" functional parent (a person whose 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 Brief for Family Law Academics as Amici Curiae Supporting Petitioner, Debra H. v. Janice R., 14 N.Y. 3d 576 (2010) (No.10-441) (discussing, inter alia, AM. LAW INST., 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 for Columbia Law School Sexuality and Gender Law Clinic as Amicus Curiae, *In re* AAR, 2013 TSPR 16 (P.R. 2013) (No. CC-2008-1010), *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=164313.

[129] Many 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.

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 person thus identified, or simply subsumed in the general category of "parent."[130] Thus, parental status could be allocated independently of role in the process of reproduction, "fractionalized" or pluralized—a situation that is 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.[131] 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. 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 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 respect for private preferences. And it understands that when transnational arrangements are involved, the role of international law is merely

---

[130] 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. *See, e.g.*, Matthew M. Stevenson et al., *Fathers, Divorce, and Child Custody*, *in* HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 379, 379 (Natasha J. Cabrera et al. eds., 2d ed. 2013).

[131] *See* Chiara Saraceno, *Verso il 2000: la pluralizzazione delle esperienze e delle figure materne*, *in* STORIA DELLA MATERNITÀ 318, 318–20 (Marina D'Amelia ed., 1997).

to facilitate the recognition of such preferences across borders.[132] 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. Norms that either national law or international agreements and customary international law detail on these issues are, in effect, suspended. The function of private international law, moreover, revolves around the application of contractual arrangements and does not, for example, extend to questioning a particular court's jurisdiction so long as that jurisdiction has been agreed to contractually. Analogously, it does not allow for exceptions based on public policy or *bonnes moeurs* that have traditionally limited a state's responsibility to recognize acts (including private contracts) of another state.[133] This last prohibition, however, runs directly contrary to numerous cases involving surrogacy in which states have invoked public policy exceptions to refuse recognition of births (and birth certificates) resulting from surrogacy arrangements.[134]

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."[135] Such theories may be grounded in differing values: the primacy of order, for example, or of economic efficiency, or of

---

[132] 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, *International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 6 EUR. REV. CONT. L. 250, 258–59 (2010).

[133] For a comparative analysis of the use of international and constitutional law and public policy exceptions to private party contracts, see generally 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 notion that private international law embeds no value orientations, see generally ALEX MILLS, THE CONFLUENCE OF PRIVATE AND PUBLIC INTERNATIONAL LAW (2009).

[134] *See* Hague Conference Report 2012, *supra* note 4, at 21 n.125 (detailing cases involving public policy exceptions in France, the Netherlands, Belgium, Japan, and Spain).

[135] *See Ethics at a Glance: Communitarian Ethics*, REGIS U. RUECKERT-HARTMAN SCH. FOR HEALTH PROFESSIONS, http://rhchp.regis.edu/HCE/EthicsAtAGlance/CommunitarianEthics/CommunitarianEthics.pdf (last visited Feb. 23, 2013) ("Strengths of the communitarian perspective include the emphasis on . . . sacrifice for the greater good as a measure of character.").

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.

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 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, children, soldiers, or workers.

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.[136] Legal limits on individual choice

[136] Thus Michael Sandel, critiquing John Rawls' view of the self, notes: "[A] self so thoroughly independent as this . . . rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake." MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62 (1998). Sandel then explicates his view of inter-subjective and intra-subjective conceptions of the self. *See id.*

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."[137] 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 for and against 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.

1. 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.[138] 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), 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.[139]

---

[137] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (describing negotiations in the "shadow of the law").

[138] *See, e.g.*, African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S . 217, 251 (entered into force Oct. 21, 1986).

[139] U.N. Charter, pmbl.; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., U.N. Doc.A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]. The first chapter of the Charter of Fundamental Rights of the European Union, art. 1, 2000 O.J. (C 364) 1, 9 [hereinafter Charter of Fundamental Rights], is titled "Dignity." It opens with Article 1, "Human dignity," which simply states: "Human dignity is inviolable. It must be respected and protected." *Id.* The European Convention on Human Rights and Biomedicine prominently features the need to ensure respect for human dignity. European Convention on Human Rights and Biomedicine, pmbl., art. 1, *opened for signature* April 4, 1997, E.T.S. 164. Article 1 posits the Purpose and Object of the Convention as entailing the responsibility of Parties to "protect the dignity and identity of all human beings . . . ." *Id.* art. 1. The European Court of Human Rights considers dignity as the foundation of all European Convention rights. *See* Pretty v. United Kingdom, 2002-III Eur. Ct. Human Rights 155, 194 (2002) ("The very essence of the Convention is respect for human dignity and human freedom."). *See generally* Christopher M. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008) (reviewing dignity and its interpretation in contemporary international

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.[140] In contemporary legal theory, dignity is generally associated with Immanuel Kant.[141] 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."[142] 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.[143] But Kant also contrasts the status of a human being "in nature" with the status of human beings as "persons."[144] As a person, a human being "cannot give himself away for any price"; in other words, a human being is not subject to commodification.[145] 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

---

law); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983) (discussing inherent dignity).

[140] On the history of dignity in contemporary international human rights law, see generally SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010). On the broader history of dignity as a juridical concept, see generally McCrudden, *supra* note 139.

[141] For an account of Kant's idea of dignity, see James Rachels, *Kantian Theory: The Idea of Human Dignity*, *in* THE ELEMENTS OF MORAL PHILOSOPHY 114–17, 122–23 (1986).

[142] McCrudden, *supra* note 139, at 659–60.

[143] Jeremy Waldron has defined dignity as, 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, Professor, N.Y. Univ. Sch. of Law, The 2011 Sir David Williams Lecture: The Rule of Law and Human Dignity (May 6, 2011), *available at* http://www.law.cam.ac.uk/faculty-resources/summary/the-2011-sir-david-williams-lecture-the-rule-of-law-and-human-dignity-video/8913.

[144] Immanuel Kant, THE METAPHYSICS OF MORALS 186–87 (Mary Gregor ed., 1996) (1797).

[145] *Id.* at 255. As Martha Nussbaum explicates, the Kant (and Marx) notion of dignity entails recognizing "each person [as] a bearer of value." MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 73 (2000). By contrast, "the core of what exploitation is, [is] to treat a person as a mere object for the use of others." *Id.*

forfeit."[146] In this perspective, contractual autonomy is limited by respect for the non-commodification—the dignity—of the human being as a person.[147]

A strong communitarian tradition sees the community as instrumental to the realization of the essential human value of the individual[148] 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 member.[149] 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.[150]

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

---

[146] *Id.* at 186–87. 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. . . . [H]e should pursue his end . . . not disavowing his dignity . . . ." *Id.*

[147] *See* Michael Rosen, DIGNITY: ITS HISTORY AND MEANING 147 (2012) (noting, in reference to suicide, "Kant's moral philosophy is not just directed to 'what we owe each other' but even more so to what we owe ourselves . . . .it would be better to understand Kant as asking first how we have to act in order to treat our dignity (our inner kernel of intrinsic value) with the proper respect").

[148] 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 U.S. and Canadian supreme courts. *See* McCrudden, *supra* note 139, at 699. Some commentators worry that the U.S. approach to rights could be undermined if the stronger European view of dignity were adopted. *See, e.g.*, Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 999–1001 (2007); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 204 (2008).

[149] Exemplifying the uneasy balance between individual liberty and community limit-setting embedded in communitarianism, the Charter of Fundamental Rights of the European Union 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 the following language 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." Charter of Fundamental Rights, *supra* note 139, pmb., art. 1. On the risks to individual liberties associated with communitarian approaches to dignity, see Carmi, *supra* note 148; Rao, *supra* note 148.

[150] McCrudden discusses communitarian approaches that do not permit dignity to be waived, and the 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, *supra* note 139, at 705–07.

"dignity consists in having a job,"[151] 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 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 [complainant] (and otherwise scarcely commonplace), to the detriment of the overall community to which the author belongs.[152]

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. . . ."[153] 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 of 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

---

[151] Wackenheim v. France, No. 854/1999, para. 3, *in* HUM. RTS. COMM., SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, No. 8, at 110, 111, U.N. Doc. CCPR/C/OP/8, U.N. Sales No. E.07.XIV.11 (2007) [hereinafter *Wackenheim*].

[152] *Id.* para. 4.5, at 112. The Committee's decision follows a ruling by the Conseil d'Etat in the same dwarf tossing case: CE Ass., Oct. 27, 1995, Rec. Lebon 372. For a critical discussion of the concept of human dignity in relation to human rights, see generally Derek Beyleveld & Roger Brownsword, *Human Dignity, Human Rights, and Human Genetics*, 61 MOD. L. REV. 661 (1998). For a discussion of *Wackenheim* and other cases that connects dignity to the concept of rights as responsibilities, see Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1130–34 (2011). 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*, 21 J. ECON. PERSPECTIVES 37 (2007). For a general discussion of the normative bases of objections to particular exchanges, see SANDEL, *supra* note 136; MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

[153] *Wackenheim*, *supra* note 151, para. 7.4, at 114.

> the interest of the community's social life; yet the autonomy of the individual has to be protected.[154]

The Human Rights Committee's view of human dignity—like that of the German Constitutional Court—ensconces the individual in the community, and as a function of the individual's place in the community, the individual's "material considerations" 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.[155] In this view, the community, rather than the individual, is the arbiter of an individual's "human dignity;" that is, of the acceptable parameters of an individual's ways of being. From the individual's perspective, *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.[156] From the community's perspective, *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."[157]

2. *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

---

[154] McCrudden, *supra* note 139, at 699–700 (citing D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 32 (2d ed. 1997)) (emphasis removed). On the tension between "community-boundedness" and "individual autonomy" that has long engaged philosophers, see, for example, JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 125–26 (Max Pensky ed., 2001).

[155] *Wackenheim*, *supra* note 151, para. 4.5.

[156] *See id.*

[157] *See* Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) ("Unlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons."); Waldron, *supra* note 143. 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* 3 (New York Univ. Sch. Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-50, 2009).

treaties.[158] As has been repeatedly noted, this contrasts with the primary subjects of other orders in contemporary states: citizens and subjects.[159] And like those of the citizen and the subject, the defining criteria of the "human" remain inherently contestable. International lawmaking bodies have addressed issues relating to the nature of humanity.[160] 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.[161] 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 have "legal rights, duties, liabilities, and other legal relations" that connect the individual to the rest of the community.[162] Although there is a certain ineffability of status, it is nonetheless understandable as a "person's legal condition insofar as it is imposed by the law without the person's consent, as opposed to a condition that the person has acquired by agreement . . . ."[163] Being human is not merely "natural,"[164] nor is it merely a matter of individual

---

158 Although this Article 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, claiming as *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 human 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).

159 The ascription of rights to humanity as such rather than to other political statuses marks a discursive rupture even though its practical effects have often proven to be limited.

160 *See, e.g.*, DOUWE KORFF, THE RIGHT TO LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (2006) (citing X v. United Kingdom, App. No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 250 (1980)), *available at* http://echr.coe.int/NR/rdonlyres/16D05FDF-4831-47EC-AE6D-A2C760B0B630/0/DG2ENHRHAND082006.pdf.

161 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMEDICAL & BEHAVIORAL RESEARCH, DEFINING DEATH 13 (1981), *available at* http://bioethics.georgetown.edu/pcbe/reports/past_commissions/defining_death.pdf; *The Uniform Determination of Death Act: An Effective Solution to the Problem of Defining Death*, 39 WASH. & LEE L. REV. 1511, 1511–15 (1982).

162 BLACK'S LAW DICTIONARY, 1542 (9th ed. 2009).

163 *Id.*

164 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, *supra* note 139, at 657. McCrudden then observes that "where human beings are regarded as having a certain worth by virtue of being human, the

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.[165]

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 charters and other law-making documents, valid in this context.[166] Take as a template the texts often referred to as the International Bill of Rights—the Universal Declaration of Human Rights,[167] the International Covenant on Economic, Social and Cultural Rights,[168] and the International Covenant on Civil and Political Rights.[169] A human is a being who can claim all the rights enumerated in the covenants and is subject to the prohibitions also encoded therein, precisely because it is the ensemble of these rights with their penumbras and emanations[170] including their (largely implicit) obligations and restrictions, that is 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

---

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?'" *Id.* Waldron also relates dignity to the status of human beings, although he relates it more closely to rank. *See* Waldron, *supra* note 152, at 1119–20.

165 On the social and legal processes entailed in the certification of a death as being the result of suicide, see Susanne Langer, et al., *Documenting the Quick and the Dead: A Study of Suicide Case Files in a Coroner's Office*, 56 SOC. REV. 293 (2008).

166 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (2nd ed. 1976).

167 Universal Declaration of Human Rights, *supra* note 139.

168 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter International Covenant on Economic, Social and Cultural Rights].

169 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

170 Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

contract does not affect; it extends beyond any one transaction to color multiple facets of an individual's position in the community. Nor is that status easily lost, for its loss does not depend simply on one's inclinations or on any private bargain one may strike. In turn, this implies that normative limits associated with the status of being human cannot be freely dis-attended. One cannot stop being human, and to be human means there are certain things one cannot do, for such actions would violate the dignity associated with one's status. The safeguarding of human dignity is not, therefore, merely up to the individual but constitutes a community obligation and prerogative, authorizing the imposition of limits on how the individual treats herself as well as others.[171]

The prohibition against commodification can be viewed as one such limit.[172] Indeed, international agreements and the jurisprudence of numerous courts reflect the notion that dignity prohibits the commodification of the human body independently of the will of the individual whose commodification is at issue.[173] In the words of the European Convention on

---

[171] This is not to suggest that in a communitarian perspective there are no limits to the community's right to regulate individual behavior.

[172] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to Biology and Medicine art. 21, Apr. 4, 1997, E.T.S. no. 164 [hereinafter Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to Biology and Medicine]. The complexities of the relationship between dignity, the understanding of the "human," and gender are beyond the scope of this Article. It is important to note, however, that if, as per Moyn's account, dignity has made its way into contemporary international human rights law in part under the impetus of Catholic understandings of humanity, the gender-differentiated view of human identity encapsulated within the over-arching figure of humanity that is central to Catholic theology may continue to have a significant influence on the interpretation of dignity, and hence may be seen as justifying limits on women's conduct that are intrinsic to womanhood rather than pertaining more generally to human beings. *See supra* note 140 and accompanying text. In this perspective, surrogacy may be seen to offend women's dignity per se and not solely because it entails the commodification of the human body. "The 'fullness of time' manifests the extraordinary dignity of the 'woman.' . . . From this point of view, the 'woman' is the representative and the archetype of the whole human race . . . [from another] the event at Nazareth highlights a form of union with the living God which can only belong to the 'woman,' Mary: the union between mother and son." Apostolic Letter from Pope John Paul II, Muilieris Dignitatem (Aug. 15, 1988), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html. While scholarship on dignity and rights has largely focused on the human generally, insufficient attention has been paid to human dignity as a potentially gendered concept, a notable exception being Reva Siegel's work. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008). For a critical discussion of current Catholic doctrine with respect to gender, see Mary Anne Case, *After Gender the Destruction of Man? The Vatican's Nightmare Vision of the "Gender Agenda" for Law*, 31 PACE L. REV. 802 (2011).

[173] H. Tristram Engelhart, Jr., *Giving, Selling, and Having Taken: Conflicting Views of Organ Transfer*, 1 IND. HEALTH L. REV. 31, 42–44 (2004); Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. FAM. L. 585, 588–91 (1988–89);

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."[174] 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.[175]

Such stances are echoed in positions regarding surrogacy. Asked to counsel the Senate on the advisability of revising France's prohibitionist legislation on surrogacy, the French national committee on ethics and biomedicine acknowledged that the meaning of dignity is contested. It contrasted the notion that "reproductive surrogacy represents an instrumentalization of women's bodies and leads to considering the child as a commodity, such that this practice is irreducibly contrary to the respect of the dignity of the human person,"[176] with a more "individualistic" view that conditions the acceptability of surrogacy on the free consent of all the parties and the gestational carrier's opinion that it does not violate her dignity. "The respect of dignity is therefore opposed by the freedom to dispose of oneself," the Committee observed, thus dissociating the position the Committee termed individualistic from the position concerning a woman's dignity before ultimately concluding that the prohibition on surrogacy should stay in place.[177] Germany and Switzerland explain their opposition to commercial surrogacy by referencing its reduction of the gestational carrier and the child she bears to objects of contract.[178] Such

---

Constance Johnson, *Council of Europe/United Nations: Organ Trafficking Treaty Proposed*, GLOBAL LEGAL MONITOR (Oct. 15. 2009), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401623_text.

[174] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to Biology and Medicine, *supra* note 172, art. 21; *see also* Charter of Fundamental Rights of the European Union, *supra* note 139, at 1.

[175] 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." Waldron, *supra* note 152, at 1131–32 (citing *Jordan v. State* 2002 (1) SA 1 (CC) at 31 (S. Afr.) (O'Regan and Sachs, JJ., concurring)).

[176] COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ [NATIONAL CONSULTATIVE ETHICS COMMITTEE FOR HEALTH AND LIFE SCIENCES], AVIS NO. 110: PROBLÈMES ÉTHIQUES SOULÈVES PAR LA GESTATION POUR AUTRUI 14, *available at* http://www.ccne-ethique.fr/docs/Avis_110.pdf.

[177] *Id.*

[178] Hague Conference Report 2012, *supra* note 4, at 8 (citing studies regarding Germany and Switzerland).

a perspective juxtaposes limitations derived from the status and dignity of human beings to the maximum contractual autonomy described above.

3. *Filiation as Status-Attribution*

However, it is not only the generic status of human beings that imposes limits on contractual autonomy. As a matter of fact and not only of theory, 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.[179] 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 areas within which it carries significance.[180] Being (or being in the process of becoming) a "mother" in the legal sense entails rights and obligations from nurturance and child care to pre- and post-partum leave, 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, "working women are entitled to equal rights . . . as men. Working conditions must allow women to fulfill their essential role in the family and ensure appropriate protection for the mother and child."[181] In a similar vein, the Constitution of Ireland recites:

> [T]he 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.[182]

More generally, the Grundgesetz of Germany provides as a basic right that "[e]very mother is entitled to protection by and care of the community."[183] The definition of "mother," at least in these jurisdictions, is a constitutional matter.

---

[179] The French Civil Code, for example, specifies that maternity is established by mentioning the name of the mother in the birth certificate. CODE CIVIL [C. CIV.] art. 311–25 (Fr.).

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

[181] Art. 37 Costituzione [Cost.] (It.), *translated in Constitution of the Italian Republic* (Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited May 5, 2013) .

[182] IR. CONST., 1937, art. 41.

[183] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I, art. 6(4) (Ger.).

This does not suggest that motherhood cannot be pluralized.[184] Rather, it highlights the state interest in the forms that such pluralization may take.

Trends favoring contractual choice with respect to parental status have gained salience as a result of advances in technology and the multiplication of legally recognized family forms.[185] Some courts and legislatures have looked to the consent of non-biological, non-marital partners to determine parental status.[186] 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.[187] Courts have also upheld 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.[188] 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 options to choose from, but paternity or maternity is still a status dependent on state sanction.

4. "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 besides childbirth, such as adoption, assisted reproductive technology,

---

[184] Greece, for example, recognizes and strictly regulates surrogacy arrangements, criminalizing any arrangement that does not conform to its legislation. *See* Hague Conference Report 2012, *supra* note 4, at 11.

[185] Russell, *supra* note 173, at 592.

[186] Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. 683, 720–27 (2000).

[187] Trends toward 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 (1998). Note 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 flowing therefrom, 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").

[188] *See supra* note 128 and accompanying text.

and immigration.[189] Pathways to maternal status include judicial disposition, administrative procedures, genetic linkage, and recognition of the de facto assumption of maternal responsibilities.[190] But no matter how it has been attained, once formalized, maternity is not a condition one can terminate "at will."[191] 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 specified procedures.[192] Moreover, some states distinguish motherhood and maternity so that legal maternity is conferred only through a positive act of registration rather than by virtue of delivery itself.[193] Some states, such as France, permit "anonymous maternity," which allows women not to identify themselves as the mothers of the children to whom they have just given birth, but there does not seem to be a trend toward the establishment of this institution.[194] Adoption, which is legal in more than eighty states (as indicated by the ratifications of the Adoption Convention)[195] and barred in others (including states following Shari'a law),[196]

---

[189] For example, U.S. regulatory practice identifies the "mother" as the provider of ova for purposes of determining nationality, with consequences that may be unforeseen by the ova provider herself and the gestator as well as the commissioning parent. See *supra* note 120 and accompanying text.

[190] Appell, *supra* note 186, at 694.

[191] On maternal separation, see Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996).

[192] 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, *supra* note 128. For a comparative analysis of the law in England, France and Germany, see Katherine O'Donovan, *"Real" Mothers for Abandoned Children*, 36 LAW & SOC'Y REV. 347, 347–78 (2002).

[193] *See supra* note 114 and accompanying text (discussing the U.S. definition of "mother" for the purposes of immigration). France attributes legal status to a mother 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, but this does not enable the substitution of the name of the woman who gave birth with that of another.

[194] Jean Ayissi, *Legère Augmentation des Accouchements Sous X en France*, LE MONDE (Sept. 22, 2011), http://www.lemonde.fr/societe/article/2011/09/22/legere-augmentation-des-accouchements-sous-x-en-france_1575729_3224.html.

[195] *See* Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status Table, HCCH, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last updated Mar. 21, 2013).

[196] Although Shari'a law generally does not allow for adoption as 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. *FAQ: Adoption of Children from Countries in Which Islamic Shari'a Law is Observed*, U.S. DEP'T STATE, http://adoption.state.gov/adoption_process/faqs/adoption_of_children_countries_islamic_sharia_observed.php (last visited Mar. 22, 2013).

generally conditions the transfer of parental rights on the formal renunciation of such rights by the birth parents.[197]

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,[198] the relinquishment of maternal rights and their transfer are subject to legal norms and, generally, state supervision. 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. In the United States, for example, states that allow surrogacy arrangements nonetheless regulate the attribution of parental status.[199] In France, the Cour de Cassation recently remarked in reference to that country'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.[200] By virtue of the "indisponibilité de l'état des personnes," individuals may not freely modify their status.[201] In a communique 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."[202] Parentage and filiation, in other words, are firmly anchored in law and not subject to private agreement.

---

[197] *See* Adoption Convention, *supra* note 61, art. 4(c)(4).

[198] *Adoption: An Overview*, LEGAL INFO. INST. (Aug. 19, 2010), http://www.law.cornell.edu/wex/adoption.

[199] For instance, under section 160.753 of the Texas Family Code, which establishes the legality of surrogacy arrangements, the commissioning parties acquire their relative parental statuses through a process of adjudication. TEX. FAM. CODE ANN. § 160.753 (West 2012).

[200] Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Apr. 6, 2011, Bull. civ. IV, No. 72 (Fr.).

[201] Press Release, Cour de cassation, Communiqué de la Première Présidence (Apr. 6, 2011), *available at* http://www.courdecassation.fr/IMG/File/communiquePP_avril_2011.pdf [hereinafter Communiqué de la Première Présidence].

[202] *Id.* The court's emphasis on this point strongly implies that the institution of "anonymous birth" discussed above should be regarded as an exceptional choice but not the default position of French law.

5. *The Implication of States and the International Community in the Production of Family Status*

The implication of states in the definition of individual status, particularly in relation to family arrangements, has deep historical roots.[203] 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 ongoing jurisdictional contests with religious and customary communities).[204] 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.[205] Analogously, states routinely prescribe rules regarding child and spousal maintenance and generally establish the scope of matrimonial, parental, and filial obligations.[206] European feminists have long argued that laws and policies that explicitly

---

[203] The French Revolution "Statalized" individual identity by instituting the "*état 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. *See* Jane Caplan, *"This or That Particular Person": Protocols of Identification in Nineteenth-Century Europe*, *in* DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLDS 49–66 (Jane Caplan & John Torpey eds., 2001). 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 revolutionary legislation and survive in many communities today. *Id.* Note that international human rights law protects every child's right to a name, a requirement that could be seen as entailing a correlative obligation of states to ensure that each child has a legally cognizable name (and therefore a personal identity). Convention on the Rights of the Child art. 7, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. The history of status documentation, and its correlative rights and obligations, is the focus of a growing area of historical research. *See generally* DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLDS, *supra*.

[204] On family law, colonial policies, and anti-colonial nation-building policies, see generally LILA ABU-LUGHOD ET AL., REMAKING WOMEN: FEMINISM, MODERNITY AND THE MIDDLE EAST (Lila Abu-Lughod ed., 1998); Narendra Subramanian, *Making Family and Nation: Hindu Marriage Law in Early Postcolonial India*, J. ASIAN STUD. 771 (2010). On the evolution of family law in the United States, see generally MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND EUROPE (1989). On Greece, see generally 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); Anna Bravo, *La Nuova Italia: madri fra oppressione ed emancipazione, in* STORIA DELLA MATERNITÀ (Marina D'Amelia ed., 1997). On the nexus between visions of the nation, gender and the family in the Italian constitutional debate, see Yasmine Ergas, *The Politics of Moral Reconstruction* (1988) (on file with the Institute for Advanced Study and the author). For a discussion of the role of the state in relation to the co-construction of the family and the market, see Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

[205] GLENDON, *supra* note 209, at 55–58, 238–51.

[206] *Id.* at 197–238.

mold family relations and that presume the existence of certain forms of family organization are central to the governance of welfare states.[207]

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 kinship,[208] and conflicts rules have frequently looked to nationality over domicile as a "connecting factor" in relation to personal status.[209] But today, international 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*."[210] 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.[211] 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."[212] Maternity protection is "proclaimed as [an] essential

---

[207] *See, e.g.*, LAURA BALBO, STATO DI FAMIGLIA: BISOGNI, PRIVATO, COLLETTIVO (1976); LAURA BALBO & RENATE SIEBERT, INTERFERENZE: LO STATO, LA VITA FAMILIARE, LA VITA PRIVATA (1979); GOSTA ESPING-ANDERSON, THE THREE WORLDS OF WELFARE CAPITALISM (1990); HELGA MARIA HERNES, WELFARE STATE AND WOMAN POWER: ESSAYS IN STATE FEMINISM (1987); JANE JENSON & MARIETTE SINEAU, WHO CARES? WOMEN'S WORK, CHILD CARE AND WELFARE STATE REDESIGN (2001); Symposium, *Gender and Public Policies*, 58 Soc. Res. 623 (1991); Jane Lewis, *Gender and the Development of Welfare Regimes*, 2 J. EURO. SOC. POL'Y 159 (1992).

[208] *See generally* Abbott v. Abbott, 130 S. Ct. 1983 (2010) (discussing whether a father had a right of custody of a child by reason of the father's *ne exeat* right, which requires that the father give his permission before the child can leave the country). For a discussion of the conflicts issues raised by the case, see Linda J. Silberman, Abbott v. Abbott, 105 AM. J. INT'L L. 108 (2011).

[209] 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 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 has traditionally 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*, 2011 PRAXIS DES INTERNATIONALENPRIVAT- UND VERFAHRENSRECHTS [IPRAX]109 (2011).

[210] Jean Zermatten, *The Best Interests of the Child Principle: Literal Analysis and Function*, 18 INT'L J. CHILD. RTS. 483, 483 (2010). Zermatten is the Director of the International Institute for the Rights of the Child and Vice-Chairperson of the United Nations Committee for the Rights of the Child.

[211] Convention on the Elimination of All Forms of Discrimination Against Women pmbl., *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

[212] *Id.* arts. 4(2), 5(1)(b).

right[] . . . incorporated into all areas of the Convention, whether dealing with employment, family law, health care or education."[213] 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) is 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.[214] International status-formation does not imply a retreat from national regulation; to the contrary, it entails additional regulation.

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. Insofar as communitarianism 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.

---

213 *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS, http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (last visited Mar. 22, 2013) (introducing the Convention and explaining its provisions).

214 *See generally* Convention Concerning the Revision of the Maternity Protection Convention, June 15, 2000, 2181 U.N.T.S. 253.

III. TREATY ZONES AND THE LIMITING POWER OF HUMAN RIGHTS LAW

A. The Necessity of International Regulation

A different approach to the problem is through international coordination and multilateral agreement. Indeed, given the obstacles to contractual autonomy flowing from the states' role in determining filiation and citizenship, a multilateral agreement represents the only possible solution, for it would assign the responsibility for crisis prevention to the very subjects with the power to address it: the states.[215] Grounds for cautious optimism on this score may be warranted: 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 has developed some preliminary recommendations,[216] and research and discussions intended to help inform such work have already been undertaken by networks of experts and government officials.[217] But a rapid survey of current regulatory scenarios reveals a wide array 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 when it is based on non-commercial (i.e. "altruistic") arrangements or exclusively within their own domestic markets to states that are broadly permissive.[218] States' apparent propensity to erect barriers to cross-border trade in this sector—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?

---

[215] Robert Keohane and David Victor have suggested that in particular situations a "complex" of "loosely coupled" regimes without a clear hierarchical structure may be more effective than one regime built around a comprehensive treaty framework. *See* Robert O. Keohane & David G.Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 7 (2011). However, the crises represented by the Balaz twins derives from the coexistence of incompatible filiation norms; any effective solution therefore requires specific state-based agreement on at least that issue. *Id.*

[216] For a full list of treaties agreed under the aegis of the Hague Conference, see *Conventions*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.listing (last visited Mar. 22, 2013). With respect to the Hague Conference's work on reproductive surrogacy, see generally Hague Conference Report 2011, *supra* note 21.

[217] For example, Katarina Trimmings and Paul Beaumont organized a workshop on surrogacy in late 2011. *See International Workshop on National Approaches to Surrogacy,* U. ABERDEEN SCH. L., http://www.abdn.ac.uk/law/surrogacy/events.shtml (last visited Jan. 26, 2013).

[218] Hague Conference Report 2012, *supra* note 4, at 9–17.

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.[219] 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 negotiation of the Convention on the Rights of the Child exemplifies the strategic use of indeterminacy. Faced with insurmountable differences, the drafters defined only an end-point of childhood (eighteen years), leaving the question of its beginning—whether at conception, birth, or some other stage—to each signatory's discretion.[220] Nonetheless, for an agreement that is to be effective in dealing with the crises associated with cross-border surrogacy, some consensus must be reached on key terms. Since disagreements are based in norms regarding filiation—specifically, the willingness of "importing" countries to recognize births occurring in "exporting" jurisdictions—these norms will 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 one to the other, and how can such statuses be acquired, lost, or modified?[221] In reproductive surrogacy, these questions raise issues that are more complex than those faced by the drafters of its closest cognate, 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 "state of origin's" exercise of jurisdiction over the child, enabling that State to issue appropriate identity

---

219 ROBERT O. KEOHANE, AFTER HEGEMONY 49–54 (1984).

220 *See* UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 1–3 (2007).

221 The Adoption Convention refers to "the child" and "the mother" without providing a definition of either. Adoption Convention, *supra* note 61, art. 16. The current uncertainties regarding the status of the child have been broached in a document presented by the Permanent Secretariat of the Hague Conference. *See* Hague Conference Report 2011, *supra* note 21. For a summary of recent discussions, see generally Council of Eur., Comm. of Experts on Family Law, Rep. of the Third Meeting of the CJ-FA-GT3, Oct. 6–8, 2010 (Dec. 14, 2010).

documents.[222] Second, the woman who gave birth was the mother.[223] Through 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.[224] Finally,

---

[222] 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* Adoption Convention, *supra* note 61, art. 4. An adoption under the Convention does not per se confer citizenship; rather it creates a legally cognizable familial status that can form the basis for a petition for citizenship. In the United States, for example, children adopted from abroad must go through an immigration process that is predicated on the adoptive parents having successfully filed a Petition to Classify Convention Adoptee as an Immediate Relative. *See Immigrant Visa Process*, U.S. DEP'T STATE, http://adoption.state.gov/us_visa_for_your_child/visas.php (last visited Jan. 26, 2013); U.S. Citizenship and Immigration Servs., Fact Sheet: Hague Adoption Convention, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=7b500c5a5d068110VgnVCM1000004718190aRCRD (last updated Feb. 29, 2008). With respect to Australia, which also does not confer citizenship ipso facto on adoption, see DEP'T OF IMMIGRATION & CITIZENSHIP, FORM 1272, APPLICATION FOR AUSTRALIAN CITIZENSHIP FOR CHILDREN ADOPTED UNDER FULL HAGUE CONVENTION ARRANGEMENTS (2013) (Austl.).

[223] *See* Adoption Convention, *supra* note 61, art. 4(c)(4) ("[T]he consent of the mother, where required, has been given only after the birth of the child."). The definite article before "mother" denotes her singularity; 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 counter-poses 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 id.* 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 section 301 of the Immigration and Nationality Act ("INA"), which defines "nationals and citizens of the United States at birth." 8 U.S.C. § 1401 (2006). 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. *Id.* § 1401(c), (d), (g). The State Department interprets the phrase "born . . . of" to mean that, in assisted reproduction cases, where the parent providing the required nexus to the United States is the mother, the provider of genetic material rather than the gestational carrier will be understood to be the mother. *See Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad*, U.S. DEP'T STATE, http://travel.state.gov/law/citizenship/citizenship_5177.html (last visited Mar. 22, 2013). The State Department 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. *See id.*

[224] "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." Adoption Convention, *supra* note 61, art. 29; *see also id.* arts. 17, 26, 27. That these legal aspects could be addressed directly by the Adoption 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. *See generally* CONCEIVING THE NEW WORLD ORDER, *supra* note 6; CULTURES OF TRANSNATIONAL ADOPTION, *supra* note 6.

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 for 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."[225]

2. Jus Sanguinis*: Law, Blood, and the Corporeal Nexus*

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.[226] 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.[227] 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.[228] 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

---

[225] CRC, *supra* note 203, pmbl., art. 21(d). *But see* Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 185 (2003) ("[S]ome would say there is no way to safeguard intercountry adoption against corruption and profiteering.").

[226] 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 generally Anderson, *supra* note 114. No consensus approach can, however, be discerned either within the United States, where state policies towards surrogacy are quite varied, or internationally.

[227] "The defining feature of matrilny is the assignment of individuals to culturally recognised categories whose membership is defined by descent traced through females." LADISLAV HOLY, STRATEGIES AND NORMS IN A CHANGING MATRILINEAL SOCIETY. DESCENT, INHERITANCE, SUCCESSION AMONG THE TOKA OF ZAMBIA 2 (1986) (internal citations omitted).

[228] Benjamin F. Gruenbaum et al., *Ovum Donation: Examining the New Israeli Law*, 159 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 40, 41 (2011).

appears to have been endorsed by numerous authorities.[229] Under the Egg Donation Law (2010), in domestic cases the recipient of the donation is the mother of the child.[230] Moreover, the woman who applies for permission to receive the donation is viewed as the "recipient," and in a surrogacy arrangement, that person may be a commissioning party.[231]

Israel is far from unique in its recent revisions to rules regarding filiation. At least twelve other countries have amended their laws since 2005.[232] 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.[233] 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.[234] As the Roman maxim had it, *pater est quem nuptiam demonstrant*: The father is he who is evidenced by the nuptial, that is, the husband of the mother.[235] The mother, however, was not the wife of the husband (which would have been tautological) but she who gave birth.[236] 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

---

229 *Id.*

230 Law Library of Congress, *Israel Reproduction and Abortion: Law and Policy* 6 (Feb. 2012), http://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf.

231 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 (Mar. 12, 2012), http://www.bionews.org.uk/page_132763.asp.

232 *See* Hague Conference Report 2011, *supra* note 21, at 5 n.15.

233 Thus, for instance, in the United States until 1934, the citizenship of a child born abroad was attributed on the basis of *paternity as determined in connection to marriage*: If the mother was married, her husband was presumed to be the father, a principle followed in Roman times and in English common law. If the mother was unmarried, the child had no legally declared father or mother from whom to inherit, and could not claim U.S. citizenship through either parent. Children born abroad to a U.S. father and an alien secondary wife in a polygamous marriage, for example, were considered *illegitimate and thus ineligible for jus sanguinis*. Kristine S. Knaplund, *Jus Sanguinis: Determining Citizenship for Assisted Reproduction Children Born Overseas* 8 (Pepperdine Univ. Legal Studies Research Paper, 2013) (emphasis added) (internal citations omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181026.

234 MAARTEN P. VINK & GERARD-RENÉ DE GROOT, BIRTHRIGHT CITIZENSHIP: TRENDS AND REGULATIONS IN EUROPE 6 (2010).

235 BLACK'S LAW DICTIONARY 1365 (9th ed. 2009).

236 Communiqué de la Première Présidence, *supra* note 201.

the child.[237] Paradoxically, in the traditional view, "*sanguinis*," though literally indicating "blood," actually stood for "law."[238]

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).[239] 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 inasmuch as they establish the legal parentage of the intending father, in particular when he is genetically related to the child.[240] 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 acknowledgment or act of recognition.[241] But states' receptivity to

---

[237] Under Roman law, the concept of the *pater familias* was very broad and incorporated multiple pathways to filiation.

[238] It might be objected that the widespread strictures against women's marital infidelity were designed to ensure that "*sanguinis*" actually denoted the physical link between the father and the child. Indeed, under the Justininan Code, once a woman notified her husband that she was pregnant, he could either "send guards or . . . give notice to her that she is not pregnant by him. . . . [U]nless he sends guards or replies giving her notice she is not pregnant by him, the husband is compelled to acknowledge the offspring." Knaplund, *supra* note 233. 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. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (denying a filiation action filed by a man who sought to prove his paternity of a child born out of wedlock because of a rebuttable presumption that that a child of born to a married woman is the child of the husband of that woman). 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. Nisha Satkunarajah, *Surrogate Child Denied German Passport*, BIONEWS (May 9, 2011), http://www.bionews.org.uk/page_94158.asp. 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. *Id.* 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." *Id.*

[239] *See* Hague Conference Report 2012, *supra* note 4, at 13–23.

[240] *Id.* at 21.

[241] Hague Conference Report 2012, *supra* note 4, at 22 nn.130–32 (citing Amtsgericht [AG] District Court Nuremnberg Dec. 14, 2009, UR III 0264/09, UR III 264/09 (Ger.).

such claims is not universally assured, as the Balaz case and others attest.[242] Moreover, it leaves unresolved the question of the attribution 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.[243]

Even as the bases for paternity recognition have been liberalized, laws allowing mothers to transmit nationality have also been promulgated in many states, thus extending *jus sanguinis* rules to maternal descent.[244] Here the assumption has been that the *jus 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, if any, they will attach the status of motherhood—gestation or ova provision.

The issues regarding parental identities reverberate with values profoundly held by domestic constituencies as well as with constitutional norms, and these may not easily align even with widely-recognized state interests. Nonetheless, international market players, whether importers or exporters, will generally privilege the commissioning parties over ova contributors and gestational carriers and thus reduce the significance attributed to the corporeal elements of maternity. Legislation that treats the gestational carrier as a direct analog 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

---

242 *See Balaz v. Anand Municipality*, *supra* note 9; Satkunarajah, *supra* note 238; *Surrogate Children Have No Right to German Passport, Court Rules*, *supra* note 62.

243 *See* Hague Conference Report 2012, *supra* note 4, at 20 (discussing "limping parentage" by citing research of twelve sets of French commissioning parents and one Belgian commissioning father, wherein children were living with at least one (if not two) "unrecognized" parent).

244 CEDAW, *supra* note 211. 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 that "States Parties shall grant women equal rights with men with respect to the nationality of their children." *Id.* 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. *See* Miller v. Albright, 523 U.S. 420, 465 (1998) (Ginsburg, J., dissenting). The State Department "reason[ed] that, for the child born out of wedlock, the mother 'stands in place of the father.'" *Id.* In 1934, Congress attributed the right to transmit citizenship on a basis of equality with men. *Id.*

exposing her to risks of coercion.[245] But legislation like the Israeli Egg Donation Law 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.[246]

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.[247] 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.[248]

C. One Regime (Complex), Two Treaty Zones

1. 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 would be composed of states whose filiation

---

[245] Hague Conference Report 2012, *supra* note 4, at 17 (reporting an incident in Ukraine allegedly involving extortion by criminal gangs).

[246] *See also* ART Draft Bill, *supra* note 77.

[247] On the intent-based test of parenthood, see *supra* note 114and accompanying text.

[248] *See* Comm. of Ministers of the Council of Eur., Steering Comm. on Bioethics, Rep. on its 39th Mtg., Nov. 30–Dec. 3, 2010 (Jan. 24, 2011), https://wcd.coe.int/ViewDoc.jsp?id=1735853&Site=CM.

policies enable them to recognize reproductive surrogacy formally, legalize it, and generally further their market shares. The other part would be composed of more restrictive rules designed to suppress commissioned births. The states allowing surrogacy might constitute a "permissive treaty zone," where comprehensive agreements 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.

Less comprehensive treaties could also be reached within this zone, allowing signatories to agree on central matters such as state responsibility for the legality of transactions, as well as process issues while adopting their own definitions of maternity, contractual requirements, and procedural mechanisms.[249] Borrowing from the Adoption Convention, such a surrogacy agreement might 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

---

[249] *See* Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIVATE INT'L L. 627, 635 (2011) (explaining the direction recently proposed by the organizers of the Aberdeen conference referred to above). *Cf.* Hague Conference Report 2012, *supra* note 6 (suggesting that this direction is a likely path); *accord* Comm. of Experts on Family Law, *Draft Instrument on the Rights and Legal Status of Children and Parental Responsibilities* 2, CDCJ (2011) 15 (Apr. 20, 2010). *But see* Comm. of Ministers of the Council of Eur., *supra* note 248, paras. 22–24 (questioning the phrase "regardless of genetic connection" and recommending that states' freedom to provide special arrangements regarding maternal filiation be limited).

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.[250] Again, on the model of the Adoption Convention, the agreement might require states to take action where a breach is seriously threatened or actually occurs.[251] Such an agreement would assign a 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[252]—a procedure to hear such complaints might be established through a successive optional protocol. But in the first instance, the agreement's success would depend on the state parties' mutual interest in ensuring smoothly flowing transactions rather than on systems imposing quasi (or actual) judicial accountability.

2. *A Prohibitionist Treaty Zone: Between Criminalization and Cooperation*

States that disallow surrogacy would presumably be limited to seeking to control cross-border transactions or only allowing their citizens to access internationally services that are prohibited domestically. 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.[253] Or prohibitionist states could promote agreements (multilateral

---

[250] See Adoption Convention, *supra* note 61, art. 6, on the structural cooperation model embedded in the Convention. See Hague Conference Report 2012, *supra* note 4, at 27, for an authoritative proposal for a cooperative framework.

[251] Adoption Convention, *supra* note 61, art. 33.

[252] *See, e.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 32.

[253] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol I]; Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507 [hereinafter Palermo Protocol II]. *But see* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010) (critiquing the criminal law approach to human trafficking embedded in the Palermo Protocols). On an individual level, even among states in which some surrogacy arrangements are legal, several criminalize any surrogacy arrangement that either does not comport with existing regulations or that entails 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, New Zealand, and the United Kingdom. Hague Conference Report 2012, *supra* note 4, at 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

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.[254] 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 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 that commissioning parties produce documentation of their own state's willingness to allow the child to be born of the surrogacy arrangement would become an element of international law.[255]

3. *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

actively prosecuting illegal surrogacy arrangements, even when entered into extraterritorially. *Id.* at 22 nn.149, 152.

[254] Hague Conference Report 2012, *supra* note 4, at 25. The Consuls General involved were those of Belgium, France, Germany, Spain, Italy, the Netherlands, Poland, and the Czech Republic. *Id.*

[255] ART Draft Bill, *supra* note 77. 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. *Id.* § 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 Report 2012, *supra* note 4, at 11 n.62 (referencing certain states in Australia and Greece, Israel, South Africa, and New Zealand).

life, privacy, and home demanded respect.[256] The Cour de Cassation rebutted that argument by holding that the annulment of the transcription of the children's 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.[257] 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.[258] 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.[259] As the Cour de Cassation explained, the regulatory regime is constituted by France and the United States, by a prohibitionist jurisdiction and a permissive jurisdiction functioning together on the basis of "stable mutual expectations about [each] others' patterns of behavior," as an integrated whole.[260] The Cassation's decision may be reversed

---

[256] *See* Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Apr. 6, 2011, Bull. civ. I, No. 72 (Fr.).

[257] *Id.*

[258] *Id.*

> [U]ne 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 familiale de ces enfant au sens de l'article 8 de la Convention européenne des droits de l'homme, non plus qu'à leur intérêt supérieur garanti par . . . la Convention internationale des droits de l'enfant. . . .

Id. The Court adopted precisely the same stance (using the same language) in another case regarding a surrogacy contract under Minnesota law. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Apr. 6, 2011, Bull. civ. I, No. 70 (Fr.).

[259] *See* Fiona Govan, *Ban on Surrogacy Creates Trade in 'Wombs for Rent,'* TELEGRAPH (Aug. 1, 2006), http://www.telegraph.co.uk/news/1525347/Ban-on-surrogacy-creates-trade-in-wombs-for-rent.html (giving examples of the ways in which prohibitionist policies may promote the development of clandestine markets); *see also* Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 300–01 (2005) (discussing the opportunistic behavior that legal differentiation favors at an individual level). Permissive states also generate prohibited exchanges: For example, a U.S. lawyer created an inventory of available babies by exporting American gestational carriers to Ukraine, where they were impregnated with sperm from anonymous donors. *Calif. Lawyer Sentenced in International Baby Selling Scam*, USA TODAY (Feb. 25, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-02-24/Surrogacy-lawyer-sentenced/53238442/1. 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. *Id.*

[260] KEOHANE, *supra* note 219, at 89. Keohane and Victor have argued that segmented, partially overlapping accords can operate together to create a multilayered "regime complex" that regulates a particular issue area. Keohane & Victor, *supra* note 215. Such a complex may be constituted by loosely coupled

on appeal to the European Court of Human Rights ("ECHR").[261] 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.[262] Moreover, the ECHR could concur with the Cassation's logic—predicating the viability of the French refusal to legitimate the filiation of children born of surrogacy arrangements on the parents' and children's effective access to other jurisdictions that provide the requisite recognitions. Were it to adopt this approach, the Court would follow the precedent it set when it based the compatibility of Ireland's restrictive abortion legislation with the Convention on the fact that prospective seekers of abortion services within Ireland could lawfully obtain information regarding the availability of such services abroad and travel to access them.[263] Thus, the ECHR would construct a regime in which the legality of prohibitionist states' policies depends upon the existence and accessibility of permissive ones, each operating in relation to the other in an integrated whole.[264] Whether or not the Court adopts this stance, the fully globalized characteristics of the international commercial surrogacy market ensure that prohibitionist and permissive jurisdictions will continue to coexist in an uneasy tension based on mutual acknowledgement and implicit coordination.

---

elements, including conflicting ones. *Id.* In my view, with respect to international commercial surrogacy, 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. See Charles M. Blow, *Friend With Benefits*, N.Y. TIMES, Nov. 12, 2011, at A21, for a recent example of states' strategic use of arms dealers. See YASMINE ERGAS, NELLE MAGLIE DELLA POLITICA (1986), for a history of abortion campaigns that utilized extraterritorial services to create pressure on restrictive domestic policies.

[261] *See* Mennesson v. France, Eur. Ct. H.R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110100.

[262] The *Mennesson* appeal to the European Court of Human Rights alleges that France is in violation of articles 8 and 14 of the European Convention. *Id.* 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. See Affaire Gas and Dubois v. France, Eur. Ct. H.R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572. 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 *under French law* by one parent was already established (the birth mother being recognized as the legal mother). *Id.*

[263] A, B and C v. Ireland, para. 241, Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332.

[264] It should be noted that, from this perspective, while the existence of a permissive jurisdiction is essential to the legality of a prohibitionist one, the reverse does not apply: all jurisdictions may be permissive, but not all jurisdictions may be prohibitionist.

D. The Test of Human Rights

1. 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, 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 with norms regarding the commercialization of human bodily products and services;[265] the sale of children;[266] the rights of women to employment[267] and to "liberty and security of person";[268] the rights of children to grow up in a "family environment" and to see that decisions concerning them be guided by their "best interests;"[269] the rights of children not to be discriminated on the basis of their parentage[270] 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;[271] the rights of adults to form a family without unjustified state interference in their privacy and their homes;[272] and the protection of maternity and the promotion of its "proper understanding."[273] Moreover, risks of abuse loom large: When young women are persuaded to "donate" ova without being fully informed of the (largely understudied) risks that may accompany the relevant hormonal treatments and surgeries; when women work as gestators, because they have been trafficked or pressured by relatives or

---

265 Charter of Fundamental Rights, *supra* note 139, art. 3.

266 Optional Protocols to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 2(a), G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263 (Mar. 16, 2001) [hereinafter Optional Protocols to the Convention on the Rights of the Child on the Sale of Children] ("Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.").

267 CEDAW, *supra* note 211, art. 11.

268 ICCPR, *supra* note 169, art. 9.

269 CRC, *supra* note 203, art. 20.

270 *Id.* art. 3.

271 *Id.* art. 9.

272 ICCPR, *supra* note 169, art. 17.

273 CEDAW, *supra* note 211, art. 5.

simply as a way out of crushing poverty and unemployment;[274] when commissioning parties are held hostage by gestational carriers or brokers who exact higher prices to "deliver" children than had been previously agreed or by border guards and consular authorities who 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 defining standards, such as that to the "highest attainable standard of physical and mental health"[275] that may be flagrantly violated, or by setting obligations upon states to prevent, prosecute, and punish particular behaviors, including human trafficking[276] and corruption.[277]

Can these many norms guide policymakers in determining the compliance of a particular treaty with human rights?[278] 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."[279] 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. For example, the right of a gestator to "security of person" and hence to determine the progress, or termination, of her pregnancy versus the right of commissioning parties to the performance of contractual agreements that may require that the pregnancy be carried to term or, alternatively, ended under only certain conditions.[280] Moreover, key terms

---

[274] See *Doctor Involved in Surrogate Mother Case Gets Probation*, FOCUS TAIWAN NEWS CHANNEL(February 22, 2011), http://focustaiwan.tw/ShowNews/WebNews_Detail.aspx?ID=201102220049&Type=aSOC, and Weena Kowitjwani, *Thai Organization Involved in Trafficking in Vietnamese Surrogate Mothers Uncovered*, ASIANEWS.IT (Mar. 2, 2011), http://www.asianews.it/news-en/Thai-organisation-involved-in-trafficking-in-Vietnamese-surrogate-mothers-uncovered-20916.html, for instances of trafficking for the purpose of surrogacy that have been reported in Taiwan and Vietnam. Numerous other cases of abuse and trafficking related to surrogacy have also been documented, leading to international attempts to promulgate rules specifically criminalizing such conduct. See United Nations Office on Drugs and Crime, Model Law Against Trafficking in Persons, http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf (providing commentary to article 2(f) that states may consider criminalizing as a form of exploitation "[t]he use of women as surrogate mothers").

[275] International Covenant on Economic, Social and Cultural Rights, *supra* note 174, art. 12.

[276] *See* Palermo Protocol I, *supra* note 253, art. 2.

[277] *See* Convention Against Corruption, pmbl., Oct. 31, 2003, 2348 U.N.T.S. 41.

[278] See Barbara Stark, *Transnational Surrogacy and International Human Rights*, 18 ILSA J. INT'L & COMP. L. 369 (2012), for a review of some of the pertinent issues.

[279] Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, para. 4, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

[280] ICCPR, *supra* note 169, art. 9.

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?[281] If a child has a right to develop in a family environment, how should that 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[282]—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" Indian rule in the case (i.e. prior to the court decision assigning

---

[281] *See* Adoption Convention, *supra* note 59. 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. *Id.* The Secretary of the Hague Conference on Private International Law has noted: "The connection between money and intercountry adoption is a fact of life and it is better to acknowledge that and try to regulate it." Jennifer Degeling, Hague Conference on Private International Law, Nordic Adoption Council Meeting, Reykjavik, Ice., Sept. 4–5, 2009, *The Intercountry Adoption to Good Practice Revisited: Good Practice and Real Practice* [hereinafter *Good Practice and Real Practice*]. There is no agreed parameter for determining "reasonable expenses," which can, in some instances, include lost income if the surrogate was previously employed (e.g., Greece) and compensation for "pain and suffering" (e.g., Israel). *See* Hague Conference Report 2012, *supra* note 4, at 12 n.66.

[282] CRC, *supra* note 203, art. 3 ("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."). But see Elizabeth B. Crawford & Janeen M. Carruthers, *The Place of Religion in Family Law: The International Private Law Imperative*, *in* THE PLACE OF RELIGION IN FAMILY LAW: A COMPARATIVE SEARCH 37, 65–65 (Jane Mair et al. eds., 2011), for a discussion of the exceptions introduced by private law agreements—specifically, in relation to child abduction—that establish conflicts rules that privilege other principles, in particular in relation to the child's domicile in U.K. jurisprudence.

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.[283] 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"[284] 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 family settings.[285] 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.[286] 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.

Faced with children actually at risk of being denied family life and status, and therefore being 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,"[287] Parliament's entitlement to prohibit surrogacy versus consideration of a child's welfare. "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

---

283 CRC, *supra* note 203, pmbl., art. 20.

284 *Id.* pmbl.

285 *Id.*

286 *Id.* art. 20 ("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 . . . .").

287 *Re* X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 [para. 24] (Eng.).

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."[288]

But other courts have adopted a contrasting view. Some have subordinated the "best interests" principle to the legality of the context in which it is being applied: Faced with a commissioning mother's request to adopt the child born of a surrogate mother and the father's consent to such an adoption, the provincial Court of Quebec refused to allow the adoption to proceed because all surrogacy is prohibited in Quebec and commercial surrogacy (at issue in this case) is prohibited throughout Canada.[289] The Court noted that the father's consent could not cure the illegality of the transactions underlying the child's birth and cited authorities for the proposition that "'the actual best interests of the child is not an autonomous standard of law in itself, it is a rule of interpretation that presupposes the legality of the process'" and that "[t]he best interests of the child, however important a notion it may be, is not a catch-all argument justifying everything and its opposite."[290] The Court concluded that "[t]his child is not entitled to a maternal filiation at any cost. For the Court to give effect to the father's authorization for the adoption of his child would be, under the circumstances, to show willful blindness and confirm that the end justifies the means."[291] In a more nuanced decision, the French Cour de Cassation deciding the *Mennesson* case also found that the "best interest" test did not require French recognition of the children's filiation, which the court

---

[288] *Id. See also* CA (Bari) 13.febbraio.2009, available at: http://www.minoriefamiglia.it/download/ca_bari_13022009.PDF, in which an Italian court held on appeal that, in a donor surrogacy case regarding recognition of a U.K. parental order that conferred parentage on commissioning parents, deference to the principle of the best interest of the child—which "in the case at issue . . . indisputably [entails] the recognition . . . [in Italy] of the foreign decisions [regarding parentage]"—was not contrary to the international public order that the Italian court was required to evaluate. *Inter alia,* the Court noted that the concept of "public order" that was to be taken into account regarded the international public order and could not be limited to a view of public order based on Italian national law; that the gestational carrier had not been paid for the gestation; that the children had been born before prohibitionist Italian legislation had come into effect. The court did not discuss whether the "best interest of the child" understood as requiring recognition of the foreign parentage order would have prevailed had a commercial surrogacy been agreement been involved.

[289] *In re* X, [2009] R.J.Q. 445, para. 78 (Can.).

[290] *Id.* paras. 69–70.

> Unless one chooses to wear blinders . . . it is not possible to dissociate the question of the validity of this consent from the preceding steps concocted by this couple in carrying out their parental project. The consent was vitiated because it formed part and parcel of an illegal undertaking and was contrary to the public order.

Id. para. 57.

[291] *Id.* paras. 77–78.

viewed as legalizing ex post facto surrogacy practices specifically prohibited by French understandings of the "ordre publique international."[292]

Along lines somewhat analogous to those put forth by the Cour de Cassation regarding California's 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 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). 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 *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.[293] 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 *Mennesson* and Quebec cases so vividly demonstrate, at least some judicial authorities will find it possible to reconcile the best interests principle with a prohibitionist stance toward surrogacy.

---

[292] Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Apr. 6, 2011, Bull. civ. I, No. 72 (Fr.). 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. CE, May 4, 2011, Juge des referes, 348778 (Fr.).The Conseil stressed the provisional nature of the document to be released and 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. *Id.* 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. *Id.*

[293] *See also Re* X and Y, [2008] EWHC, para. 24.

2. *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.[294] Such violations could arise in at least three distinct ways: if the object and purpose of the treaty run counter to *jus cogens*; if particular operational clauses in a permissive treaty run counter to *jus cogens* and if the substantive result entailed by the application of a prohibitionist treaty requires 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 slavery[295] and human trafficking,[296] sales of children are explicitly banned by the Convention on the Rights of the Child,[297] and the reduction of sales of children figures prominently among the

---

294 Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

295 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 7 U.S.T. 479, 226 U.N.T.S. 3 [hereinafter Supplementary Slavery Convention]; Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 212 U.N.T.S. 17 [hereinafter Slavery Convention].

296 Palermo Protocol I, *supra* note 253; Palermo Protocol II, *supra* note 253.

297 "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, *supra* note 203, art. 35; *see also* Optional Protocol, *supra* note 266. 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." *Id.* 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." *Id.* 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. CODE CIVIL [C. CIV.] art. 370-3 (Fr.). 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

motivations of the Adoption Convention.[298] 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 per se.[299]

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 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."[300] 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,"[301] which provide a lens through which the connection between slavery and the sale 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.[302] 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."[303] Child exploitation involves:

> Any 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

another person or group of persons against remuneration or any other advantage." Morocco Penal Code art. 467-1, as amended by Act No. 24-03 of Nov. 11, 2003.

298 *See* G. PARRA-ARANGUREN, EXPLANATORY REPORT ON THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION 3 (1993), 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 (1994).

299 *See supra* notes 158–161 and accompanying text.

300 Supplementary Slavery Convention, *supra* note 295, art. 7(a) (emphasis added); *accord* Slavery Convention, *supra* note 295, art. 1(1).

301 Supplementary Slavery Convention, *supra* note 295, art. 1.

302 *Id.* art. 1(b).

303 *Id.* art. 1(c)(i).

> 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.[304]

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; 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 per se.[305]

In all these conditions the person conveyed can neither consent nor resist the conveyance itself or the obligations attendant thereto. 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.[306] The prohibition on slavery would therefore seem to revolve around the lack of rights to self-determination of the person *in* a slave condition rather than the modalities of her conveyance to another. Just as consent to slavery does not negate slavery—indicating that the lack of consent

---

[304] *Id.* art. 1(d) (emphasis added).

[305] 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" *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 NUSSBAUM, *supra* note 145, at 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."

[306] *See* David Ellerman, *Inalienable Rights: A Litmus Test for Theories of Justice*, 29 LAW & PHIL. 571, 582 (2010); *see also* Palermo Protocol I, *supra* note 259, art. 3(b) ("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.").

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, most notably the Convention on the Rights of the Child (to which all states except the United States and Somalia are parties), the child *as such* is endowed with rights.[307] Such rights include "child-sized" rights of self-determination, precluding any other person's exercise of absolute powers.[308] 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.[309] 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.[310]

But if payment is not a necessary condition for conveyance of a human being by one person to another to be slavery, is it nonetheless sufficient to trigger a *jus cogens* violation? In other words, is payment in exchange for a person per se a jus cogens violation? 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—may be viewed as violating a *jus cogens* prohibition, obtaining a person's freedom by providing consideration cannot. More generally, overarching prohibitions on the commercialization of human beings have been critiqued for their radical cleavage of phenomena that are often enmeshed.[311] And lawmakers have

---

[307] CRC, *supra* note 203.

[308] *Id.* art. 12.

[309] CRC, *supra* note 203, art. 12 ("1. 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. 2. 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.").

[310] *See* STANDING COMM. OF ATTORNEYS-GENERAL AUSTRALIAN HEALTH MINISTERS' CONFERENCE CMTY. & DISABILITY SERVS. MINISTERS' CONFERENCE, A PROPOSAL FOR A NATIONAL MODEL TO HARMONIZE REGULATION OF SURROGACY 10 (2009) ("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.").

[311] 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. Viviana A. Zelizer, *Money, Power and Sex*, 18 YALE J.L. & FEMINISM 303 (2006). In Zelizer's words: "Where the relations are narrow and short term, we tend to call them sex work. Where they

implicitly acknowledged the difficulty of drawing black-letter lines. As noted earlier, the Convention on the Rights of the Child enjoins state parties to "take, directly, or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention" and the Adoption Convention incorporates the same reference to "improper gain," suggesting that some measure of gain may be legitimate.[312] 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.[313] Nonetheless, it seems 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. While recognition of a treaty that either implicitly or explicitly permitted the sale of children seems morally repugnant and legally difficult to reconcile with a generalized conviction that selling human beings is per se violative of their dignity, the catalog of *jus cogens* prohibitions is undefined and 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 this make it less likely to be invalidated? 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"[314]—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

---

are broad and long term, we tend to call them households." *Id.* at 308 (citations omitted). *See generally* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY (2005).

[312] Adoption Convention, *supra* note 61, 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.

[313] *Good Practice and Real Practice*, *supra* note 281, at 21 (The Secretary of the Hague Conference on Private International Law commented that "[t]he connection between money and intercountry adoption is a fact of life and it is better to acknowledge that and try to regulate it.").

[314] Charter of Fundamental Rights, *supra* note 139, art. 3.

a function of the mechanisms it prescribes rather than because of the exchanges it facilitates.[315]

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.[316] 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.[317] 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.[318] 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.[319] 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.[320] 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.[321] Save in cases in which *ius soli* rules provide a safety net, children's citizenship at birth is dependent on that of their parents; parentless, they are also stateless. And stateless, they are, as Hannah Arendt long ago noted[322]—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,

---

315 Vienna Convention on the Law of Treaties, *supra* note 294, art. 53.

316 For a careful discussion of this issue, see Claire Achmad, International Commercial Surrogacy: A 21st Century International Human Rights Challenge to Children and Women Requiring Enhanced Protection, University of Leiden (unpublished L.L.M. in Public International Law thesis) (on file with the author).

317 *See* POINTS, *supra* note 72, at 5.

318 *Id.*

319 *See Re* X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (Eng.).

320 *Id.* para. 8.

321 For a discussion of Baby Manji in this perspective, see *supra* notes 71–73 and accompanying text.

322 ARENDT, *supra* note 166, at 296.

in particular in relation to children.[323] A treaty that, 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 these conclusions 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. How a treaty regarding surrogacy is framed, what transactional narrative it encodes into international law, and 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. But who will make the necessary determinations? Surrogacy narratives are influenced by the recursive processes that bind together domestic and cross-border networks of civil society actors and judicial and legislative institutions engaged in more or less closely related dialogues as the official and unofficial representatives of one country interact with those of another. From their discussions and decisions regarding surrogacy, the nexus between the rules governing filiation and those pertaining to nationality and citizenship may emerge profoundly reconfigured. At the moment, international commercial surrogacy appears destined to remain only loosely regulated: State autonomy regarding filiation, nationality, and citizenship, whether as protected under the classical Westphalian doctrine of the "reserved domain" of state jurisdiction or as conceded in human rights regimes under doctrines akin to the margin of appreciation, will ensure the survival of conflicting legal frameworks.

---

[323] "Every child has the right to acquire a nationality." ICCPR, *supra* note 169, art. 24(3). The Universal Declaration of Human Rights also provides that "Everyone has the right to a nationality. . . . No one shall be arbitrarily deprived of his nationality." Universal Declaration of Human Rights, *supra* note 146, art. 15. 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 (S.D.N.Y. 2009).