

# A RIGHTS-BASED CLAIM TO SURROGACY: ARTICLE 23 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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“The line between social and medical “disability” is not only blurry, it is also an arbitrary gap, susceptible to manipulation by callous politicians and social engineers. The ‘characteristic of disability’ lies in the eye of the beholder.”<sup>1</sup>

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Across cultural, physical, and political boundaries is the human desire to imprint the fabric of society by producing another being in one's likeness. This desire transcends merely the want to reproduce, but also encompasses that innate need for companionship and love. Most of us can create a family through sexual intercourse with virtually no restrictions upon us. Some choose to pursue other means, such as fostering or adoption. But there are those who have no choice. Faced with infertility or another disability, they cannot reproduce through sexual intercourse and perhaps not even with the use of assisted reproductive technology ("ART"). The only way these women and their partners can pursue their right and desire to reproduce is through the use of a surrogate. In states where surrogacy is prohibited, these individuals are denied a basic human right.

This paper argues that Article 23 of the Convention on the Rights of Persons with Disabilities (CRPD) is a powerful tool for citizens to demand that their states provide effective and appropriate assistance through surrogacy. Effective and appropriate assistance requires enforcing the surrogacy contract in a court of law and allowing compensated surrogacy. These two conditions would maximize individual liberty, while minimizing incidences of black markets and medical tourism. The CRPD is an effective instrument because it seeks to incite change by recognizing the ways in which *society* disables individuals. As a widely adopted international doctrine, the Convention also encourages international cooperation and collaboration. This is particularly advantageous when addressing the conflicts that have arisen as a result of surrogacy tourism.

In her recent article *Reproductive Rights as a Human Right: A Matter of Access or Provision*, Sara Davies argues that one reason for the lack of progress in women's reproductive health, as a human right, is the failure to clearly articulate the responsibilities of key actors in ensuring that women have access to services required to realize their reproductive rights.<sup>2</sup> She suggests that what is needed is a framework that can translate decades of rights language into action and identify the provisions of law required to address women's health. This paper seeks to establish the role and responsibility of the state in ensuring that the right to reproduce is a meaningful right for all. Drawing upon the theoretical constructs developed in disability law, this article articulates a rights-based claim to access surrogacy. The United States is used as an analytical framework, including the evolution of reproductive rights in the U.S. and the theory of disparate

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thoughtful support, guidance, and comments in preparation of this article. This article also benefited from comments by Mark Levin, Brien Hallet, and Frances Miller. Please send comments to lindsey.coffey@gmail.com.

1. Matthew D. Martin III, *The Dysfunctional Progeny of Eugenics: Autonomy Gone Awol*, 15 CARDOZO J. INT'L & COMP. L. 371, 418 (2007).

2. Sara E. Davies, *Reproductive Health as a Human Right: A Matter of Access or Provision?*, 9 J. HUM. RTS. 387, 387-97 (2010).

impact, because these concepts inform our understanding of why prohibiting surrogacy is discriminatory towards persons with disabilities.

Part I provides a brief history of the reproductive rights of persons with disabilities. Part II introduces the CRPD. The article argues that Article 23 of the CRPD augments the right to reproduce and should be interpreted as creating a positive duty on behalf of the state to enact effective and appropriate legislation that permits and regulates surrogacy. It then demonstrates that this interpretation of Article 23 is consistent with current laws and policies pertaining to persons with disabilities. This section concludes by arguing that, in the least, governments should refrain from prohibiting surrogacy because this violates the CRPD by unreasonably interfering with the right to reproduce. Part III provides an international comparative analysis and concludes that two conditions are necessary in order for the state to ensure effective and appropriate access to surrogacy—enforceable surrogacy contracts and compensation of surrogates.

Surrogacy legislation is a ripe issue for three reasons. First, the inability to procreate through traditional means affects a significant portion of the population. Of the 650 million people worldwide who have a disability,<sup>3</sup> certain physical disabilities hinder a woman's ability to engage in sexual intercourse or gestate a child.<sup>4</sup> More precisely, nine out of every one hundred women worldwide between the ages of twenty and forty-four cannot conceive a child.<sup>5</sup> Ten to fifteen percent of the U.S. population suffers from infertility,<sup>6</sup> which constitutes a disability under the Americans with Disabilities Act (ADA).<sup>7</sup> Although approximately eighty-five percent of infertility cases can be resolved through drug therapies or surgery,<sup>8</sup> for the remaining cases, surrogacy is the only available option for procreation.

Secondly, regardless of whether one agrees that surrogacy should be available as a matter of right, the reality remains that the current regimes of

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3. International Convention on the Rights of Persons with Disabilities, Aug. 14-25, 2006, *Some Facts about Persons with Disabilities*, <http://www.un.org/disabilities/convention/facts.shtml>.

4. Among other disabilities, see text accompanying note 51.

5. *ART Fact Sheet*, EUROPEAN SOC'Y OF HUMAN REPROD. AND EMBRYOLOGY (June 2010), <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/ART-fact-sheet/page.aspx/1061>.

6. *Infertility Fact Sheet*, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/faq/infertility.cfm> (last visited Dec. 27, 2011); The Assisted Reproductive Technologies (Regulation) Bill 2010 ("India's Draft ART Bill"), Ministry of Health and Family Welfare et al., <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> [hereinafter Draft ART Bill].

7. Americans with Disabilities Act (ADA), 42 U.S.C. §§12102(1)-(2) (1994 & Supp. V 2000). See also *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (holding reproduction is included within "major life activity" contemplated by the ADA).

8. *Fertility Treatment*, FERTILITY-TREATMENT.ORG, <http://www.fertility-treatment.org/> (last visited Dec. 27, 2011); Draft ART Bill, *supra* note 6, pmb1.

highly restrictive and/or ambiguous surrogacy laws<sup>9</sup> have created dangerous and irresponsible conditions—namely, reproductive black markets and surrogacy tourism.

Thirdly, the pressure for governments to address the issue of legalized surrogacy will likely intensify when India enacts its draft Assisted Reproductive Technologies (Regulation) Bill 2010 (“Draft ART Bill”).<sup>10</sup> Currently, thousands of foreign couples are evading the legal and financial constraints of their home countries by traveling to India where surrogacy is legal and unregulated. However, a provision of India’s draft ART bill would require couples to produce a certificate from their home country verifying that surrogacy is legal in their home country and that the baby will be granted citizenship and entry into the home country.<sup>11</sup> This provision will change the domestic and international landscape of the surrogacy industry.

## I. THE HISTORICAL CONTEXT

“Those who cannot remember the past are destined to repeat it”—George Santayana

Persons with disabilities have historically been denied full enjoyment of their reproductive rights. The most devastating example of this is the eugenics movement of the first half of the twentieth century.<sup>12</sup> Eugenics, a Greek word meaning “well born,” is an applied pseudo-science aimed to rid

9. The U.S. has no federal law governing surrogacy, which has resulted in a hodgepodge of state laws. State laws range from most restrictive (penalizing surrogacy arrangements with fines or imprisonment) to least restrictive (holding surrogacy arrangements legally enforceable and allowing compensation of the surrogate). Most states fall somewhere in the middle or have no clear legislation, rendering courts ill-equipped to handle surrogacy litigation. See *State Laws & Legislation*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/state/c/parenting/> (last visited Dec. 27, 2011). Most of Europe either prohibits all surrogacy arrangements or allows only altruistic surrogacy. See *Regulation (or Lack Thereof) of Assisted Reproduction Technologies in U.S. and Abroad*, THE CENTER FOR BIOETHICS & HUMAN DIGNITY, <http://cbhd.org/content/regulation-or-lack-the-reof-assisted-reproductive-technologies-us-and-abroad> (last visited Jan. 25, 2012); *Whose Child is it Anyway?*, CANADIAN FERTILITY AND ANDROLOGY SOCIETY, [http://www.cfas.ca/index.php?option=com\\_content&view=article&id=790&Itemid=523](http://www.cfas.ca/index.php?option=com_content&view=article&id=790&Itemid=523) (last visited Jan. 25, 2012).

10. The law ministry has scanned the bill and it is expected to be introduced to Parliament in 2011 or 2012. Savita Verma, *Bill to Help People Stay Single and Have Kids*, INDIA TODAY (June 13, 2010), <http://indiatoday.intoday.in/site/story/bill-to-help-people-stay-single-and-have-kids/1/101327.html>; *Govt Likely to Implement Surrogacy Bill Soon*, DEVELOPMENT CHANNEL (Feb. 24, 2011), <http://www.developmentchannel.org/government/parliament/1789-govt-likely-to-implement-surrogacy-bill-soon>.

11. Draft ART Bill, *supra* note 6, at §34(19).

12. Martin, *supra* note 1, at 376. “Our society has a history of using sterilization procedures to prevent procreation by mentally retarded individuals.” *In re Romero*, 790 P.2d 819, 821 (Colo. 1990) (en banc). During the eugenics movement, thirty U.S. states enacted statutes authorizing compulsory sterilizations. *Id.*

society of mentally deficient and socially unfit individuals.<sup>13</sup> Eugenics theory propagates the hereditary nature of “defects” and in turn the betterment of society rests in prohibiting such degenerates from reproducing their kind.<sup>14</sup> “Defects” included epilepsy, lunacy, mental illness, mental retardation, reproductive challenges, and physical handicaps.<sup>15</sup>

In the United States, Charles Davenport founded the Eugenics Committee in 1903, a subdivision of the American Breeders Association. The Committee was charged to investigate heredity in the human race and the concepts of superior and inferior blood.<sup>16</sup> As the first superintendent of the Committee, Harry Hamilton Laughlin proposed the Model Eugenic Sterilization Law in 1922, which became the foundation for many state sterilization laws.<sup>17</sup> During the eugenics movement, thirty U.S. states enacted statutes authorizing compulsory sterilizations.<sup>18</sup>

The eugenics movement was not limited to the United States; Europe and Asia also employed eugenic-based policies, including sterilizations, under the guise of improving the human race.<sup>19</sup> Nazi administrators on trial in Nuremberg after World War II cited the United States as the inspiration for its eugenics movement and Hitler’s racial purification laws.<sup>20</sup>

Forced sterilizations reached the height of popularity and legitimacy<sup>21</sup> in the United States in 1927 when the Supreme Court upheld Virginia’s

13. Martin, *supra* note 1, at 372-73.

14. *See id.* at 375 (describing a sentiment expressed by Theodore Roosevelt).

15. For example, the Wisconsin sterilization law enacted in 1913 bore the title “Sterilization of Defectives” and was “related to the prevention of criminality, insanity, feeble-mindedness, and epilepsy.” *In re. Guardianship of Eberhardy*, 307 N.W.2d 881, 889 (Wis. 1981). “Idiots” and “lunatics” were forbidden from marrying in the District of Columbia. Jonathan Matloff, *Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons with Disabilities*, 17 AM. U. J. GENDER SOC. POL’Y & L. 497, 498 (2009). Interestingly, this law remained on the books from 1901 until 2008 when a committee hearing in D.C. discovered the archaic language and overturned the law. *Id.* Connecticut prohibited the marriage of epileptics. HELEN I. CLARKE, SOCIAL LEGISLATION 99 (1957). Virginia’s 1924 sterilization law authorized coercive sterilizations of feeble-minded inmates, upheld in *Buck v. Bell*, 274 U.S. 200 (1927).

16. Martin, *supra* note 1, at 376.

17. *Id.* at 377.

18. *In re Romero*, *supra* note 12.

19. *See* Martin, *supra* note 1, at 371; *Nordic Eugenics: Here of all places*, ECONOMIST, Aug. 28, 1997, available at <http://www.economist.com/node/155244>; Takashi Tsuchiya, *Eugenic Sterilizations in Japan and Recent Demands for Apology: A Report*, 3 NEWSL. NETWORK ON ETHICS & INTELL. DISABILITY (Osaka City Univ., Osaka, Japan), Fall 1997, at 1-4, [http://www.lit.osaka-cu.ac.jp/user/tsuchiya/gyoseki/paper/JPN\\_Eugenics.html](http://www.lit.osaka-cu.ac.jp/user/tsuchiya/gyoseki/paper/JPN_Eugenics.html).

20. California, the state responsible for one third of the 60,000 sterilizations that took place in the U.S., published a favorable report on the results of sterilizations in the state that was later cited by the Nazi government as evidence that the sterilizations programs were feasible and humane. *See* Edwin Black, *Eugenics and the Nazis—The California Connection*, S. F. CHRON., Nov. 9, 2003, available at [http://articles.sfgate.com/2003-11-09/opinion/17517477\\_1\\_eugenics-ethnic-cleansing-master-race](http://articles.sfgate.com/2003-11-09/opinion/17517477_1_eugenics-ethnic-cleansing-master-race).

21. “[B]ecause of questions in respect to the constitutionality of compulsory sterilization statutes, many state legislatures withheld their approval until the landmark case

compulsory sterilization statute in *Buck v. Bell* as part of a general plan applicable to all feeble-minded.<sup>22</sup> Justice Holmes wrote, “it would be strange if [society] could not call upon those who already sap the strength of the state for these lesser sacrifices ... in order to prevent our being swamped with incompetence ... It is better for all the world, if ... society can prevent those who are manifestly unfit from continuing their kind.”<sup>23</sup>

The atrocities of WWII challenged the ethical basis of eugenic policies and soon coercive sterilizations fell out of favor in the U.S. and most of Europe.<sup>24</sup> U.S. courts established the right to procreate or not procreate as fundamental rights, “expand[ing] the cluster of rights protecting the physical integrity of the human body in other decisions relating to marriage, sexual relations, and childbearing.”<sup>25</sup>

Procreative rights<sup>26</sup> have traditionally been interpreted negatively<sup>27</sup>-obligating others not to interfere with one’s right to procreate or avoid

of *Buck v. Bell*.” *In re Guardianship of Eberhardy*, *supra* note 15, at 889. “Within ten years of *Buck v. Bell*, 20 states passed eugenic sterilization statutes.” *Id.*

22. The majority found Carrie Buck “the probable potential parent of socially inadequate offspring” and that she may be “sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization.” *Buck v. Bell*, 274 U.S. 200, 207 (1927).

23. *Id.* Carrie Buck was sterilized on October 19, 1927. *Eugenics: Carrie Buck, Virginia’s Test Case*, UNIV. OF VA. HEALTH SYS., CLAUDE MOORE HEALTH SCIENCES LIBRARY, <http://www.hsl.virginia.edu/historical/eugenics/3-buckvbell.cfm> (last visited Dec. 6, 2011). She married twice. Her daughter Vivian did not show any conclusive signs of feeble-mindedness before her death at age eight. Stephen Jay Gould, *Carrie Buck’s Daughter: A Popular, Quasi-Scientific Idea Can Be a Powerful Tool for Injustice*, NAT’L HIST. July 1, 2002, at 12. In fact, it is reported that she performed well in school. *Id.*

24. “Most competent geneticists now reject social Darwinism and doubt the premise implicit in Mr. Justice Holmes’ incantation that ‘...three generations of imbeciles is enough.’” *North Carolina Ass’n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 454 (M.D.N.C. 1976). The Wisconsin Supreme Court, discussing its own state’s sterilization law, concluded “[s]uffice it to say, the initial enthusiasm for laws requiring eugenic sterilization has waned, and many of them have been repealed.” *In re Guardianship of Eberhardy*, *supra* note 15, at 889.

25. *In re Welfare of Hillstrom*, 363 N.W.2d 871, 875 (Minn. Ct. App. 1985).

26. The right to procreate is a fundamental, constitutionally-protected right. *See Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Procreative rights are “aspects of the right to privacy which exist within the penumbra of the First Amendment to the United States Constitution.” *Conservatorship of Mildred*, 707 P.2d 760, 772 (Cal. 1985) (citing *Roe v. Wade*, *supra*, at 154; *Eisenstadt*, *supra*, at 453; *Griswold*, *supra*, at 485). The right to procreate, the right not to procreate, and the right of privacy flow “either directly from the fourteenth amendment or by its incorporation of the Bill of Rights, or from the ninth amendment, or through the penumbra surrounding all of the Bill of Rights.” *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

27. A negative right is the right to be free from interference with one’s exercise of that right. “The First Amendment has a penumbra where privacy [[including the right to procreate]] is protected from government intrusion.” *Griswold*, *supra* note 26, at 483. In *Eisenstadt v. Baird*, the Supreme Court held “[i]f the right to privacy means anything, it is the right of the individual...to be free from unwarranted governmental intrusions into matters fundamentally effecting a person as the decision whether to bear or beget a child.”

procreation. Initially, U.S. courts considered challenges to state action that interfered with the right to *avoid* procreation. These cases involved the right to access abortion services and contraception.<sup>28</sup> Later, in 1942, the Supreme Court revisited the *Buck v. Bell* issue in *Skinner v. Oklahoma*, and rendered coercive sterilizations for penal purposes unconstitutional.<sup>29</sup> Although the court never explicitly overturned *Buck v. Bell*, *Skinner* was the first time the court defended the *positive*, intentional act of procreation. Justice Douglas proclaimed the right to procreate, “one of the basic civil rights of man,” which is subject to the judiciary’s strict scrutiny.<sup>30</sup>

## II. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

When the Convention on the Rights of Persons with Disabilities (CRPD or Convention) entered into force on May 3, 2008, it was the first treaty to specifically address the needs of persons with disabilities.<sup>31</sup> The treaty was groundbreaking for its embodiment of the social model of disability and articulation of human rights within the context of disabilities.

Frédéric Mégret outlines the significant contributions of the CRPD to human rights law in his articles *The Disability Convention: Towards a More Holistic Concept of Rights* and *The Disabilities Convention: Human Rights of Persons with Disabilities or Disabilities Rights?* He rightly points out that one of the key moments in the CRPD is when it asserts concern that despite the existing human rights instruments, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights.<sup>32</sup> This travesty can be attributed to the “laissez-faire” approach expressed by previous treaties.<sup>33</sup> In contrast, persons with disabilities typically require more complex social, political, economic, and institutional arrangements in order to enjoy their rights on an

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*Supra* note 26, at 454 (emphasis added). In *Carey v. Population Servs. Int’l*, the Supreme Court again explained that regulations imposing a burden on the decision whether or not to beget or bear a child may only be justified by a compelling state interest and must be narrowly drawn. 431 U.S. 678, 686 (1977).

28. See, e.g., *Griswold*, *supra* note 26 (protecting one’s right not to procreate); *Carey*, *supra* note 27; *Eisenstadt*, *supra* note 26. The right of a woman to choose not to bear children is a constitutionally protected right, as is the right to implement that choice by use of contraception and, subject to reasonable restrictions, to terminate a pregnancy. *Conservatorship of Mildred*, 707 P.2d 760, 772 (Cal. 1985)(citing *Roe v. Wade*, 410 U.S. 113; *Eisenstadt*, 405 U.S. 438; *Griswold*, 381 U.S. 479).

29. The court unanimously concluded that if the state sterilizes the individual, he is “forever deprived of a basic liberty.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

30. *Id.*

31. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/61/611 (Dec. 13, 2006) (entered into force on May 3, 2008).

32. Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Rights*, 12 INT’L J. HUM. RTS. 261, 263 (2008).

33. *Id.*

equal basis.<sup>34</sup> Mégret explains that a specific instrument is needed because there is a dimension of experience inherent to persons with disabilities which almost requires the creation of new rights.<sup>35</sup> While confirming existing rights, the CRPD amplifies upon, evolves from, and even departs from traditional expressions of human rights in creative ways required by the issue of disability.<sup>36</sup> Mégret concludes that the CRPD's most significant contribution is its reinvention of human rights law grounded in a plural, relational concept of the human in society.<sup>37</sup>

The treaty indeed marked a major shift in the way societies view persons with disabilities. Rather than an inherent attribute of the individual, the Convention views disability as the result of an "interaction between an inaccessible environment and the person with the disability."<sup>38</sup> The former theory is referred to as the medical model of disability. This model emphasizes the surgical and medical ways one might "normalize" a person with a disability. In contrast, the social model of disability identifies the environments, or systemic and attitudinal barriers assumptively inherent in society, that exclude persons with disabilities.<sup>39</sup> In other words, it is *society* that disables the individual.<sup>40</sup> The Convention challenges States Parties to reevaluate the relational experience of persons with disabilities in order to construct accessible environments. Accordingly, States Parties are obligated to enact antidiscrimination laws, as well as eliminate those laws and practices that discriminate against persons with disability.<sup>41</sup>

Additionally, the Convention recognizes that women with disabilities are subject to double discrimination, which places them at higher risk for maltreatment, exploitation, and exclusion from social life.<sup>42</sup> Acknowledgement of this reality is particularly important because surrogacy is a gendered issue—surrogacy is necessary when the woman is

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34. *Id.*

35. See Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 496 (2008).

36. *Id.* at 498.

37. See Mégret, *supra* note 32, at 264, 274.

38. W.H.O. & WORLD BANK, WORLD REPORT ON DISABILITY 4 (2011), available at [http://whqlibdoc.who.int/publications/2011/9789240685215\\_eng.pdf](http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf) [hereinafter WORLD REPORT ON DISABILITY]; *Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights*, U.N. ENABLE (May 2008), <http://www.un.org/disabilities/default.asp?id=476>.

39. WORLD REPORT ON DISABILITY, *supra* note 38.

40. *Id.*

41. *Convention on the Rights of Persons with Disabilities: Why a Convention?*, UN.ORG, <http://www.un.org/disabilities/convention/questions.shtml> (last visited Dec. 27, 2011).

42. *Women and Girls with Disabilities*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=1514> (last visited Dec. 27, 2011); Luz Angela Melo, Human Rights Technical Adviser, U.N. Population Fund (UNFPA), Panel Discussion: *Cross-sectionalities of Gender, Disability, and Development: Towards Equality for Women and Girls with Disabilities*, 54<sup>th</sup> Sess. of the Comm'n on the Status of Women, (Mar. 4, 2010).

disabled, and only a woman can act as a surrogate. Because surrogacy occupies this fragile space where the needs of two disadvantaged groups—women and persons with disabilities—overlap, governments must tread carefully to safeguard their human rights and prevent injustices. The CRPD calls on States Parties to challenge and modify stereotypes that burden progress when adopting legislation. For example, Melissa Fraser’s note *Gender Inequality in In Vitro Fertilization: Controlling Women’s Reproductive Autonomy* suggests that the regulation and process of infertility treatments subjugate women’s interests and reproductive autonomy, which reflects the larger societal attitude that women are the “second sex.”<sup>43</sup> Proponents of surrogacy also criticize governments that ban surrogacy for adopting patriarchal legislation that assumes women cannot make informed decisions about their bodies.<sup>44</sup>

A. “Respect for and the Family” (Article 23)

Article 23 sets forth the standards governments shall meet to guarantee reproductive rights. Section 1 of Article 23 calls on States Parties to “take *effective and appropriate measures* to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships.”<sup>45</sup> Three rights must be protected and guaranteed on an “*equal basis*” with non-disabled persons in order to eliminate discrimination against persons with disabilities. Those three rights include the right to: (i) found a family, (ii) decide freely on the number and spacing of their children, and (iii) retain one’s fertility on an equal basis with others.<sup>46</sup> More specifically, States Parties shall ensure that “the *means necessary* to enable [persons with disabilities] to exercise these rights are provided.”<sup>47</sup> The italicized words (“effective and appropriate measures,” “equal basis,” and “means necessary”) function to create a state *responsibility* to eliminate discrimination.<sup>48</sup> Mégret attributes the CRPD’s

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43. See Melissa E. Fraser, *Gender Inequality in In Vitro Fertilization: Controlling Women’s Reproductive Autonomy*, 2 N.Y. CITY L. REV. 183, 190-91 (1998). See also Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 722 (2003).

44. Munyon, *supra* note 43, at 726-28; Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L L. 1429, 1447 (2009).

45. Convention on the Rights of Persons with Disabilities, *supra* note 31, art. 23 (emphasis added).

46. *Id.*

47. *Id.* art. 23(1)(b) (emphasis added).

48. “All of these obviously appear as duties of the state rather than human rights per se.” Mégret, *supra* note 35, at 506.

arguable “extension” of human rights, or “human rights ‘plus,’” to its focus on the societal dimension of the rights experience.<sup>49</sup>

B. A Legalized Surrogacy Industry: States Parties Have a Responsibility to Provide “Effective and Appropriate” Surrogacy Legislation

Article 23 creates a positive duty on behalf of States Parties to allow access to surrogacy when it obligates States Parties to provide “effective and appropriate measures” and “means necessary” to persons with disabilities to retrain their fertility and found a family. Surrogacy is included within “means necessary” because of its indispensable role in founding a family. In other words, the obligation of States Parties to protect and promote the right to reproduce arguably goes beyond merely not prohibiting surrogacy; States Parties should establish a framework for legalized and regulated surrogacy.

Access to surrogacy is indispensable to protecting procreative liberty because certain disabilities render it impossible for a woman to become impregnated through sexual intercourse and carry a baby to full term. Among these disabilities is infertility—encompassed by Section 12102 of the Americans with Disabilities Act (ADA).<sup>50</sup> Within this group are women who (i) are medically advised against carrying a baby, (ii) are unable to engage in sexual intercourse or carry a baby due to a physical characteristic, (iii) undergo a hysterectomy, (iv) suffer from certain cancers or diseases, (v) have recurrent miscarriages, and (vi) are born without a uterus.<sup>51</sup> These are human conditions, not life choices. Moreover, this reality renders the medical model of disability inapplicable to this class of persons. It is only through changing the social and legal *environment* that reproduction becomes accessible.

Providing access to surrogacy operates as an antidiscrimination measure. The Americans with Disabilities Act provides a model for understanding how antidiscrimination measures operate within the context of disabilities rights. The ADA mandates certain alterations—for example, a ramp to enter

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49. *See id.* at 507.

50. Americans with Disability Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101(2009)). The goal of the ADA is to not only remove barriers but to provide equal opportunity and full participation for people with disabilities. *Id.* § 12101(a)-(b).

51. *See also* Fiona MacCallum et al., *Surrogacy: The Experience of Commissioning Couples*, 18 HUM. REPROD. 1334 (2003). Drug therapies and surgery are typically ineffective means of treating these conditions. Moreover, *Fertility and Sterility* recently published new findings concluding that “cycle-based fertility treatments may offer a point of diminishing returns for infertile couples.” James F. Smith et al., *Fertility Treatments and Outcomes Among Couples Seeking Fertility Care: Data from a Prospective Fertility Cohort in the United States*, 95 FERTILITY & STERILITY 79, 79 (2011). After about two to three cycles the chances of success may diminish. *Id.*

a building—so that persons with disabilities can access the same facilities as persons without disabilities. These alterations are termed “accommodations,” yet it is doubtful that anyone would argue that the ability to enter a building is a “special” accommodation or privilege. Rather, these measures are meant to break down socially created barriers so that persons with disabilities can fully participate in society. This example is illustrative of the way in which *society* disables and enables individuals.

In his article *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, Michael Stein, an internationally recognized disabilities rights expert, explains that “ADA-mandated accommodations are consistent with other antidiscrimination measures” in that each accommodation remedies a class of persons’ “exclusion from [an] opportunity by questioning the inherency of established ... norms.”<sup>52</sup> He argues that “disability-related accommodations must operate as antidiscrimination provisions ... in order to alter social attitudes towards the disabled.”<sup>53</sup> Most importantly, society must recognize that these measures are not just “accommodations,” they are a right.<sup>54</sup> Similarly, surrogacy is a method for eliminating socially created barriers to reproduction for persons with disabilities.<sup>55</sup> Barrier-free access to surrogacy should be available as a matter of right, not privilege or special accommodation.

Article 23 should be read in conjunction with the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (the “Rules”),<sup>56</sup> although the Rules are non-binding. In particular, Rule 9 strengthens the position that States Parties have a positive duty to undertake the necessary measures to eliminate discrimination in and barriers to family life and parenthood and enhance personal integrity. As enumerated in Rule 9, persons with disabilities must not be denied the opportunity to experience parenthood.<sup>57</sup> States Parties should promote the right to personal integrity and ensure that laws do not discriminate against persons with disabilities in

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52. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. U. PA. L. REV. 579, 580 (2004).

53. *Id.*

54. *Id.*

55. Congruent with other U.S. states’ measures to eliminate social barriers to the enjoyment of society, family life, and personal integrity for persons with disabilities. *See, e.g.*, Conservatorship of Mildred, 707 P.2d 760 (Cal. 1985) (discussing the intent of the Lanterman Developmental Disabilities Services Act (LDDSA)). California’s Supreme Court explained “it is the intent of LDDSA that services for such clients continue to provide ‘an unbroken chain of experience, maximum personal growth and liberty’ under ‘conditions of everyday life which are as close as possible to the norms and patterns of the mainstream society.’” *Id.* at 771. LDDSA propagates that people with developmental disabilities and their families have a right to get the services and supports they need to live like people without disabilities. *The Lanterman Developmental Disabilities Services Act*, FRANK D. LANTERMAN REGIONAL CENTER, [http://www.lanterman.org/index.php/lanterman\\_act](http://www.lanterman.org/index.php/lanterman_act) (last visited Dec. 27, 2011).

56. G.A. Res. 48/96, Annex, U.N. Dec. A/RES/48/96 (Dec. 20, 1993).

57. *Id.* at 15.

the context of parenthood.<sup>58</sup> This idea of personal integrity stems from the concept of self-determination in medical decision-making and the recognition that a patient's medical decisions advance her intrinsic worth as an independent moral agent.<sup>59</sup> Procreation is arguably the greatest advancement of one's intrinsic worth.

### C. Re-Expressing Existing Rights

The Convention challenges countries to express existing rights in a manner that addresses the needs of persons with disabilities—it does not create new rights per se. Likewise, many existing laws and policies strengthen a citizen's right to demand that her state provide effective and appropriate access to surrogacy.<sup>60</sup> Canada, a nation discussed in Part III, is also bound by the Canadian Human Rights Act, which is based on the principal that “all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on ... disability.”<sup>61</sup>

Several European nations ban all forms of surrogacy, which is inconsistent with the European Disability Strategy 2010-2020. The Strategy calls on EU nations to (i) respect and protect human dignity, (ii) recognize and respect that persons with disabilities benefit from measures designed to ensure their independence, social integration, and participation in life of the community, (iii) combat discrimination based on disability when defining and implementing its policies and activities and adopt appropriate legislation, (iv) tackle obstacles to a barrier-free Europe, including attitudinal barriers, and (v) aim to empower people with disabilities so that they can enjoy their full rights.<sup>62</sup> Further, the Strategy declares that the EU will support improving the availability and choice of assistive technologies.<sup>63</sup>

Moreover, establishing a legal framework that allows regulated surrogacy arrangements is congruent with current government policies that aid access to fertility treatment and establish rights resulting from the use of

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58. *Id.*

59. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, E23BERKELEY J. GEN. L. & JUST. 18, 59 (2008).

60. *See, e.g., supra* text accompanying notes 50, 55.

61. Canadian Human Rights Act, R.S.C., ch. 33 (1976-77) (as amended by 2008, ch. H-6).

62. *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM (2010) 636 final (Nov. 15, 2010).

63. *Id.*

ART. First, some U.S. states have established a regulatory framework that recognizes parenthood based on *intent* to parent through artificial insemination, rather than genetic ties or parturition. California, Nevada, Oregon, and Wisconsin, for example, revised their family laws to affirmatively establish the paternity rights and obligations of husbands whose wives undergo IVF using donated sperm.<sup>64</sup> The husband is “treated in law as if he were the natural father.”<sup>65</sup> These laws facilitate family building through nontraditional methods by creating a presumption of paternity. States can similarly facilitate the creation of a family through surrogacy by regulating the legal rights of intending parents, surrogates, and surrogate children.

Connecticut’s Uniform Probate Code III fully embodies the idea of “intent to parent” and recognizes parenthood for the purposes of intestacy and class gifts (the Uniform Parentage Act has not been modified accordingly) in each of the following situations:<sup>66</sup> (i) a person who intended and consented to be a parent of a child created through ART, regardless of marriage status; (ii) a birth mother not acting as a surrogate, regardless of genetic ties; (iii) a person who consented to the ART of the birth mother in (ii) above; (iv) an intending parent whose baby is gestated and birthed by a surrogate, and (v) a person whose name appears on the birth certificate. A parent-child relationship does not exist between a child and a third-party gamete donor or surrogate.<sup>67</sup>

Second, several U.S. states and the U.K. have expanded access to fertility treatments and ART through insurance law. Fifteen U.S. states have passed laws requiring that insurance companies provide coverage for some level of infertility treatment—either that infertility treatment be provided as a basic health plan benefit (“mandate to cover”) or that insurance companies at least offer infertility coverage to purchasers (“mandate to offer”).<sup>68</sup> The

64. CAL. FAM. CODE § 7613(a) (2005); NEV. REV. STAT. § 126.061 (1979); OR. REV. STAT. § 109.243 (2009); WIS. STAT. § 891.40 (1979).

65. CAL. FAM. CODE § 7613(a). Likewise, the donor of semen is treated by law as if he were not the natural father. *Id.*

66. Elizabeth A. Bryant, Kimberly R. Willoughby & Constance Beck Wood, *Changes to Colorado’s Uniform Probate Code*, 39 COLO. LAW. 41, 43 (2010).

67. *Id.*

68. *Insurance Coverage in Your State*, RESOLVE: THE NAT’L INFERTILITY ASSOC., [http://www.resolve.org/family-building-options/insurance\\_coverage/state-coverage.html](http://www.resolve.org/family-building-options/insurance_coverage/state-coverage.html) (last visited Dec. 27, 2011) [hereinafter *Insurance Coverage in Your State*]. The level of infertility coverage within each of these fifteen states is highly variable. For example, some of the restrictions are: imposing a lifetime cap (Connecticut, Maryland, Rhode Island), limiting coverage to married couples (Arkansas, Hawaii, Rhode Island), requiring that the patient’s egg be fertilized with only the spouse’s sperm (Arkansas, Hawaii, Texas, Maryland), specifically excluding IFV (California, New York), and requiring two years of infertility before insurance coverage is mandated (Arkansas, Maryland, Rhode Island). *Id.* See also Daar, *supra* note 59, at 272. Note, however, that federal law—the Employee Retirement Income and Security Act (ERISA)—exempts self-insured health plans, those maintained by the majority of employers, from state insurance regulation. *Health Insurance 101*,

twelve states that have laws requiring insurance companies to cover infertility treatment are: Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island and West Virginia.<sup>69</sup> California, Louisiana, and Texas mandate that insurance companies offer infertility coverage to policyholders.<sup>70</sup> New Jersey should be commended for its progressive approach to ensuring reproductive rights.

In the U.K., although it remains very unlikely that fertility treatment is covered by private health insurance, the government has expanded access to reproductive care by providing financial assistance through the Nation Health Service (NHS).<sup>71</sup> Availability of IVF treatment on the NHS is subject to the guidelines issued by the National Institute for Health and Clinical Excellence (NICE).<sup>72</sup> NICE advocates funding IVF when the couple's chance of success is more than 10%.<sup>73</sup> Specifically, the Institute recommends that a couple should be offered up to three free cycles of IVF or intra-cytoplasmic sperm injection (ICSI) if:<sup>74</sup>

1. The woman is between 23 and 39 years of age at the time of treatment, and
2. One, or both, of the patients have been diagnosed with a fertility problem, or
3. The patient has been infertile for at least three years.

Patients in the U.K. can also subsidize the cost of infertility treatment by participating in an egg-sharing agreement. Under an egg-sharing scheme, a patient can donate eggs collected from a cycle of IVF to another woman in

RESOLVE: THE NAT'L INFERTILITY ASS'N, [http://www.resolve.org/family-building-options/insurance\\_coverage/health-insurance-101.html](http://www.resolve.org/family-building-options/insurance_coverage/health-insurance-101.html) (last visited Dec. 27, 2011). Therefore, ERISA severely limits access to infertility coverage, even within the abovementioned states.

69. Aaron C. McKee, *The American Dream—2.5 Kids and a White Picket Fence: The Need for Federal Legislation to Protect The Insurance Rights of Infertile Couples*, 41 WASHBURN L.J. 191, 204 (2001).

70. *Insurance Coverage in Your State*, *supra* note 68.

71. *Infertility—Treatment*, NHS CHOICES, <http://www.nhs.uk/Conditions/Infertility/Pages/Treatment.aspx> (last visited Dec. 28, 2011) [hereinafter *Infertility—Treatment*].

72. *Id.*

73. *Quick Facts About Fertility*, HUMAN FERTILISATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/infertility-facts.html> (last updated Mar. 23, 2011).

74. *Infertility—Treatment*, *supra* note 71. Nonetheless these are only guidelines and hence some jurisdictions only cover one cycle. *See, e.g.*, Sophie Goodchild & Jonathan Prynne, *Leading Doctor Wants the NHS to Fund More IVF Treatments*, LONDON EVENING STANDARD, May 10, 2011, available at <http://www.thisislondon.co.uk/standard/article-23948124-leading-doctor-wants-the-nhs-to-fund-more-ivf-treatments.do>. Therefore, provisions of NHS-funded treatment vary across the UK. *See id.*; *Can I Get IVF Treatment on the NHS?*, NHS CHOICES, <http://www.nhs.uk/chq/Pages/889.aspx?CategoryID=54&SubCategoryID=127> (reviewed Apr. 8; last reviewed Apr. 8, 2011); HUMAN FERTILISATION & EMBRYOLOGY AUTH., INFERTILITY: THE HFEA GUIDE 10 (2007-08), available at <http://www.hfea.gov.uk/docs/Guide2.pdf>.

return for a reduced price of IVF treatment.<sup>75</sup> These schemes not only benefit the patients monetarily, but also supplement the shortage of egg donations. Egg-sharing schemes demonstrate how a state can creatively subsidize reproductive care in order to expand access.

#### D. The Bare Minimum: Governments should Refrain from Prohibiting Surrogacy

As a “necessary measure” to ensuring the right to reproduce, governments should, in the least, refrain from prohibiting surrogacy.<sup>76</sup> A prohibition renders procreation an empty right for infertile individuals and those persons with another disability that makes child bearing unattainable. Adopting such a policy is reminiscent of the eugenics movement. One cannot argue that sterilization is unethical, but then deny an individual the right to use the reproductive talents she has retained or the measures that would assist procreation. As Judith Daar articulates in her article *Assessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, “while the eugenicists of a century ago coerced the “feeble minded” into surrendering their reproductive capacity through forced sterilizations, today’s practices act to deprive the disempowered of their capacity to reproduce by withholding the means necessary to produce a child.”<sup>77</sup>

The U.S. theory of disparate impact, which was developed in the context of employment litigation, provides a useful analogy for understanding how prohibiting surrogacy results in discrimination against persons with disabilities. When employment discrimination is alleged to be intentional, the court’s analysis proceeds under a theory of “disparate treatment”; when a neutral policy appears to produce discriminatory effects upon a class of individuals, courts examine the case under the “disparate impact” analysis. For example, in the landmark disparate impact case *Griggs v. Duke Power Co.*, the court focused on the “consequences of employment practices, not simply the motivation.”<sup>78</sup> As Michael Stein explains, “[b]ecause disability-based exclusion arises from subtle forms of exclusion and stigma that fall within the province of disparate impact theory, our focus is on that doctrine.”<sup>79</sup> Examples of seemingly neutral policies that result in disparate impact are: (1) denial of job-protected leave under the Family and Medical

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75. See, e.g., *Egg Sharing Scheme*, SALISBURY, NHS FOUNDATION TRUST, <http://www.fertility.salisbury.nhs.uk/Treatments/Pages/EggSharingScheme.aspx> (last visited Dec. 28, 2011); *Egg Share Programme*, UNIVERSITY HOSPITALS COVENTRY & WARWICKSHIRE, NHS, <http://www.uhcn.nhs.uk/ivf/treatments/esp> (last visited Dec. 28, 2011).

76. For persons with disabilities.

77. Daar, *supra* note 59, at 73.

78. *Griggs v. Duke*, 401 U.S. 424, 432 (1971).

79. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 869 (2006).

Leave Act, which disproportionately effects women because they are the sex that must gestate the child; or in the alternative, denial of paternity leave based on the stereotype that the male is the financial provider while the woman is the homemaker; (2) standardized test requirements that historically deny African American males entry to certain positions and programs; and (3) height and weight requirements that limit the female sex from entering into certain professions or services.<sup>80</sup> Here, the seemingly neutral policy of prohibiting surrogacy for all persons in fact disproportionately affects persons with disabilities because only those persons are excluded from the opportunity to reproduce as a result of the prohibition.

Furthermore, allowing legalized, regulated surrogacy is consistent with the principles set forth by several U.S. high courts. The U.S. Supreme Court's analysis in *Griswold v. Connecticut*, which struck down a state's prohibition of contraceptives, is on point here:

The present case, then, concerns a relationship lying within a zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in *forbidding the use of the contraceptives rather than regulating their manufacture or sale*, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand under the principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.<sup>81</sup>

Here, a prohibition on surrogacy is an unnecessarily broad regulation that wholly denies certain individuals the opportunity to procreate. Such a policy infringes upon one's basic civil and human rights, and therefore violates the CRPD.<sup>82</sup>

As early as 1987, in the famous *Baby M* case, the New Jersey Supreme Court declared a progressive and exemplary interpretation of the right to procreate as: "the right to have natural children, whether through sexual intercourse or artificial insemination," which includes the artificial insemination of another woman for the purposes of surrogacy.<sup>83</sup> This interpretation of procreative liberty is consistent with and in furtherance of the principles set forth in the CRPD and should serve as a model for other jurisdictions.

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80. *Id.* at 915.

81. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (emphasis added).

82. Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. *Conservatorship of Mildred*, 707 P.2d 760, 773 (Cal. 1985) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)). "Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective." *Id.*

83. *In re Baby M*, 537 A.2d 1227, 1253 (N.J. 1988).

### III. THE COMPONENTS OF “EFFECTIVE AND APPROPRIATE” SURROGACY LEGISLATION

#### A. The Adverse Effects of Unenforceable Contracts and Uncompensated Surrogacy

##### 1. *Unavailability of Surrogates- A Review of Canada and the U.K.*

Several countries, and some U.S. states, have adopted a restrictive system in which surrogacy is not illegal, but is subject to debilitating constraints.<sup>84</sup> These constraints include holding surrogacy contracts unenforceable in a court of law and prohibiting compensation of surrogates.<sup>85</sup> The supply of surrogates in these jurisdictions is so dangerously low that the practice is virtually inaccessible.<sup>86</sup> The vague laws or absence of laws regulating surrogacy in other jurisdictions force participants to take on greater risks and accept uncertainties, which also deters participation. For example, in such states, the rights of the intending parent(s), surrogate, and child are uncertain. The surrogate may decide to keep the baby and the intending parents are powerless. In response to inaccessibility, black markets have emerged and couples are resorting to surrogacy tourism.

Canada and the U.K. demonstrate these phenomena. Both countries allow altruistic surrogacy, but prohibit compensation of the surrogate.<sup>87</sup> A surrogate may only be reimbursed for reasonable medical expenses (after the production of itemized receipts) and loss of earnings in connection with the surrogacy in accordance with regulations.<sup>88</sup> In fact, couples in the U.K. risk losing their parental rights to the child if a court finds that they have paid the surrogate beyond “expenses reasonably incurred.”<sup>89</sup> Additionally, the U.K. and province of Quebec hold the surrogacy contract

84. For example, the UK, Canada, and Australia. See discussion *infra* Part III. See also *Surrogacy Laws: State by State*, *supra* note 9.

85. See Jason Burke, *India’s Surrogate Mothers Face New Rules to Restrict ‘Pot of Gold,’* GUARDIAN (London), July 30, 2010, at 19, available at <http://www.guardian.co.uk/world/2010/jul/30/india-surrogate-mothers-law>.

86. The limited compensation of UK surrogates has contributed to an acute shortage of surrogates in the UK, driving many couples to travel abroad. Ailsa Taylor, *Experts Attack ‘Fertility Tourism’ Industry,* BIONEWS (Sept. 21, 2009), [http://www.bionews.org.uk/page\\_48893.asp](http://www.bionews.org.uk/page_48893.asp).

87. Surrogacy Arrangements Act 1985, c. 49, § 1A (U.K.), inserted by Human Fertilisation and Embryology Act 1990 (c. 37, § 36(1)) (U.K.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 6(1) (Can.).

88. Surrogacy Arrangements Act 1985, *supra* note 87, c. 49; Assisted Human Reproduction Act, § 12§.

89. Denis Campbell, *Couples Who Pay Surrogate Mothers Could Lose Right to Raise the Child,* GUARDIAN (London), Apr. 5, 2010, at 9, available at <http://www.guardian.co.uk/uk/2010/apr/05/surrogacy-parents-ivf>.

unenforceable.<sup>90</sup> Both Canada and the U.K. have acknowledged that limiting payment to surrogates (as well as egg and sperm donors<sup>91</sup>) has significantly reduced the number of willing participants.<sup>92</sup> Canada reports the emergence of a black market in which couples resort to online advertisements and do-it-at-home insemination kits.<sup>93</sup> A black market is medically dangerous and intensifies the risks involved. This is comparable to the situation before *Roe v. Wade* was decided, when abortion was outlawed in many states in the U.S.<sup>94</sup>

## 2. Surrogacy Tourism—A Look at India

The inaccessibility of surrogacy in countries with restrictive reproductive policies has resulted in the rapidly growing and controversial practice of surrogacy tourism.<sup>95</sup> This refers to the act of foreign couples, generally from the U.S., the U.K., and Europe, traveling to another country to hire a woman to gestate their child. Typically, the surrogate woman is not genetically related to the child; she is inseminated with an embryo formed using the gametes of the intending parents or a third-party donor.

90. Surrogacy Arrangements Act c. 49, § 1A; Civil Code of Quebec, S.Q. 1991, c. 64, art. 541.

91. *Law Against Paying Egg Donors Drives Couples to U.S.*, CBC NEWS, Apr. 30, 2007, <http://www.cbc.ca/news/health/story/2007/04/30/fertility-tourism.html>; *Women Shopping for Super Sperm*, CANWEST NEWS SERV., Dec. 10, 2005 [hereinafter *Women Shopping for Super Sperm*], available at <http://www.canada.com/vancouver/sun/story.html?id=52e43aa6-b15c-423f-a845-13a845143e70&k=9062>.

92. See Jayden Roberts, *Desperate for a Baby, Canadians Resort to World's Baby Farms*, TOP NEWS (Dec. 11, 2010), available at <http://topnews.us/content/230276-desperate-baby-canadians-resort-world-s-baby-farms>; *Paid Surrogacy Driven Underground in Canada: CBC News Report*, CBC NEWS (May 2, 2007), <http://www.cbc.ca/news/health/story/2007/05/01/surrogates-pay.html>; Taylor, *supra* note 86.

93. See generally Sharon Kirkey, *Canadian Law Driving Infertile Couples into Black Market: Critics*, VANCOUVER SUN, Dec. 13, 2010, <http://www2.canada.com/vancouver/sun/news/archives/story.html?id=1995fb4a-b64f-40dd-b2b4-2e89b504a6ff>.

94. "Couples are getting ripped off when their fear of penalties forces them to engage in surrogacy arrangements without a contract. And, surrogates are a little bit less desirable to the couple because they are those women who are acting out of desperation." *Paid Surrogacy Driven Underground*, *supra* note 92.

95. Dr. Seang Lin Tan, an infertility expert at Montreal's McGill University, explains that "about 50 patients a year who can find their own donors—friends or relatives. But the majority can't find donors and for those who can't find donors we send them abroad." Sharon Kirkey, *Desperate Canadians Resort to Foreign Surrogates*, OTTAWACITIZEN.COM (Dec. 12, 2010), <http://www2.canada.com/ottawacitizen/news/story.html?id=f19591e1-a773-4bf2-a6b6-597c92a6ce69>. The same is true for finding a surrogate. See Kirkey, *supra* note 92. One interviewee quoted in *The Guardian* explained, "It is very difficult to find surrogates in the UK. There are lots of delays and surrogates are very rare...So, we ended up with 10 attempts, all in India." Burke, *supra* note 85.

India, the surrogacy capital of the world,<sup>96</sup> illustrates how the benefits and disadvantages of cross-border surrogacy arrangements yield a labyrinth of ethical and legal dilemmas. Indian legalized surrogacy in 2002.<sup>97</sup> With the exception of nonbinding guidelines set forth by the India Ministry of Health and Family Welfare (the Guidelines),<sup>98</sup> the practice remains unregulated. Clinics are, therefore, accustomed to adopting their own policies with little to no government oversight. For childless couples, the lack of red tape enables them to navigate the Indian surrogacy market with ease and efficiency. However, it also leaves the industry vulnerable to unethical practices.<sup>99</sup>

Further, the lower cost of reproductive services in India is attractive to foreign couples. India offers surrogacy for about \$22,000-30,000, versus \$55,000-65,000 in the U.S.<sup>100</sup> Nonetheless, the well-developed medical infrastructure and highly trained doctors assure couples that they are receiving quality care.<sup>101</sup> Additionally, Indian women are considered more trustworthy than American women because they are less likely to smoke,

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96. Burke, *supra* note 85.

97. *Id.*

98. INDIAN COUNCIL OF MED. RES., NAT'L ACAD. OF MED. SCI., NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA, (Ministry of Health and Family Welfare 2005) [hereinafter NATIONAL GUIDELINES FOR ACCREDITATION], available at [http://www.icmr.nic.in/art/art\\_clinics.htm](http://www.icmr.nic.in/art/art_clinics.htm).

99. Stories circulate of eggs and embryos stolen, fertility drugs sold illegally, missing medical records, surrogates deciding to keep the baby, as well as improper post-natal care. Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 34-35 (2009).

100. LAW COMM'N OF INDIA, GOV'T OF INDIA, REP. NO. 228, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY 11 (2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf> [hereinafter NEED FOR LEGISLATION]. Donor egg surrogacy in the U.S. can cost upwards of \$80,000—\$120,000. For examples of costs advertised by clinics and agencies, see *Anticipated Program Expenses for Gestational Surrogacy*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/index.php/> costs (last visited Dec. 23, 2011); *Surrogacy Program—Financial Information on Surrogacy Costs*, GROWING GENERATIONS, <http://www.growinggenerations.com/surrogacy-program/intended-parents/financial-information> (last visited Dec. 28, 2011); *Surrogacy—How Does it Work?*, ADOPTION.COM, <http://adopting.adoption.com/child/surrogacy.html> (last visited Dec. 28, 2011). It should also be noted that despite the cost savings, the fee surrogates earn for one birth is substantial—approximately equal to ten to fifteen years worth of work. Burke, *supra* note 85.

101. Roberts, *supra* note 92; Amana Fontanella-Khan, *India, the Rent-a-Womb Capital*, SLATE, Aug. 23, 2010, [http://www.slate.com/articles/double\\_x/doublex/2010/08/india\\_the\\_rentawomb\\_capital\\_of\\_the\\_world.html](http://www.slate.com/articles/double_x/doublex/2010/08/india_the_rentawomb_capital_of_the_world.html); Margot Cohen, *A Search for a Surrogate Leads to India*, WALL ST. J., Oct. 9, 2009, at W8, available at <http://online.wsj.com/article/SB10001424052748704252004574459003279407832.html>.

drink alcohol, or engage in drug use due to cultural and religious norms.<sup>102</sup> Some fertility clinics are even located in dry cities of India.<sup>103</sup>

Finally, in contrast to other surrogacy markets,<sup>104</sup> clinics in India typically recognize the intending parents as the baby's legal parents by placing their names on the birth certificate.<sup>105</sup> Although there is no law on point, the Guidelines state that the birth certificate shall bear the names of the genetic parents of the baby.<sup>106</sup> The Guidelines correspondingly state that the surrogate mother cannot also act as the egg donor and relinquishes all parental rights to the child.<sup>107</sup> Therefore, in theory, the surrogate mother's name should never appear on the birth certificate. Nonetheless, because these Guidelines are non-binding, each clinic adopts its own policy.<sup>108</sup> The situation is more complicated when the baby is conceived using an egg donor. Clinics will either denote only the genetic father's name on the birth certificate or both of the intending parents' names.<sup>109</sup> However, in 2009, the High Court of Gujarat set precedent when it granted a surrogate baby, born of a foreign father's sperm and an Indian woman's egg donation, Indian citizenship.<sup>110</sup> The Draft ART bill, if enacted, would address these inconsistencies by granting the intending parents legal parenthood in all surrogacy arrangements and naming the intending parents on the birth certificate.

The conflict of laws currently permeating virtually all cross-border surrogacy arrangements further complicates the issue of surrogacy tourism because the parenthood and citizenship of babies born through international surrogacy remains questionable. The predicaments of Baby M and the Balaz twins illustrate the urgent need for legislation.<sup>111</sup> Both surrogacy

102. Amelia Gentleman, *Foreign Couples Turn to India for Surrogate Mothers*, N.Y. TIMES, Mar. 4, 2008, available at <http://www.nytimes.com/2008/03/04/world/asia/04iht-mother.1.10690283.html>; Cohen, *supra* note 101; Scott Carney, *Inside India's Rent-A-Womb Business*, MOTHER JONES (Mar./Apr. 2010), available at <http://motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>.

103. Carney, *supra* note 102.

104. For example, the U.K. and Australia.

105. Draft ART Bill, *supra* note 8, at § 34.10.

106. NATIONAL GUIDELINES FOR ACCREDITATION, *supra* note 98, at ch. 3, § 3.5.4.

107. *See id.*

108. 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>. *See also* examples referenced in note 109, *infra*.

109. *See, e.g., Frequently Asked Questions*, NEW LIFE INDIA, <http://www.newlifeindia.com/FAQ> (last visited Dec. 28, 2011); MED. TOURISM CORP., <http://www.medicaltourismco.com/assisted-reproduction-fertility/surrogacy/surrogate-baby-birth-certificate-FAQ-089.php> (last visited Dec. 23, 2011).

110. *See* Pronoti Datta, *Surrogacy Goes into Labour*, TIMES OF INDIA, May 15, 2010, [http://articles.timesofindia.indiatimes.com/2010-05-15/india/28282187\\_1\\_manji-yamada-gay-couples-law-commission-report](http://articles.timesofindia.indiatimes.com/2010-05-15/india/28282187_1_manji-yamada-gay-couples-law-commission-report) (discussing the Balaz twins case, further explained in the preceding paragraphs).

111. *See, e.g., id.*

arrangements resulted in the birth of babies who were deemed stateless orphans until their statuses were established.

Baby Manji was the first stateless orphan born through a cross-border surrogacy arrangement in India. Her story sensationalized the risks inherent in an unregulated surrogacy market and ignited the campaign for new legislation.<sup>112</sup> In the Baby Manji case, a Japanese couple, Ikufumi and Yuki Yamada, traveled to India to hire a surrogate.<sup>113</sup> The arrangement was complicated by the intending parents' divorce, which occurred one month before the baby's birth.<sup>114</sup> The intending mother then decided she did not want the baby.<sup>115</sup> The intending father (Yamada) did want the baby and flew to India himself to take Manji home.<sup>116</sup> Although the couple had used an Indian egg donor, Yamada was biologically related to the baby.<sup>117</sup> Nonetheless, the Japanese embassy in India refused to grant Manji a Japanese passport or visa because the Japanese Civil Code recognizes as the mother only the woman who gives birth to the baby.<sup>118</sup> In this case, the woman who had given birth to Manji was Indian, not Japanese. Yamada then turned to adoption. Alas, an ancient guardians and ward law in India disallows a single man from adopting a baby girl.<sup>119</sup> The Indian government also refused to issue an Indian passport to Manji. A passport requires a birth certificate, which, under India law, must bear the name of both the baby's mother and father.<sup>120</sup> Because the registrars were uncertain as to who was Baby Manji's mother, the Municipal Council of Anand refused to issue a birth certificate, which prevented the processing of a passport.<sup>121</sup> After months of pleas and filings, the Rajasthan regional passport office issued Manji an identity certificate,<sup>122</sup> and the Japanese Embassy issued a temporary visa on humanitarian grounds.<sup>123</sup> Nonetheless, the identity certificate issued by the Indian government did not mention nationality, the

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112. KARI POINTS, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 2 n.1 (KENAN INST. FOR ETHICS AT DUKE UNIV. 2009), available at <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>.

113. Baby Manji Yamada v. Union of India (UOI) and Anr., (2008) 13 SCC 518, Writ Petition No. 369 of 2008; POINTS, *supra* note 112, at 2.

114. POINTS, *supra* note 112.

115. *Id.* at 2.

116. *Id.* at 5.

117. *Id.*

118. *Id.* at 5.

119. *Id.*

120. POINTS, *supra* note 112, at 5.

121. *Id.*

122. *Japan Gate-Pass for Baby Manji*, TELEGRAPH (Calcutta), Oct. 17, 2008 (explaining that Identity certificates are granted to people who are stateless or cannot get a passport from their home country), available at [http://www.telegraphindia.com/1081018/jsp/nation/story\\_9984517.jsp](http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp).

123. POINTS, *supra* note 112, at 7.

mother's name, or the mother's religion, thus leaving many uncertainties in cross-border surrogacy arrangements in India.<sup>124</sup>

In the case of the Balaz twins, two German nationals hired an Indian surrogate who was inseminated with an embryo formed by the sperm of the intending father and an anonymous Indian egg donor.<sup>125</sup> When the intending parents tried to bring the twins home to Germany, India would not issue passports to the babies.<sup>126</sup> The Indian government grants a passport only if a child's biological parents are Indian and there is no law establishing the Indian surrogate or the Indian egg donor as the babies' legal mother.<sup>127</sup> Germany would not grant the babies citizenship and entry into the country because surrogacy is illegal in that country.<sup>128</sup> The couple also tried adoption. However, the Central Adoption Resource Agency (CARA) in India initially refused on the grounds that it does not grant adopted status to surrogate children.<sup>129</sup> Finally, the high court decided, in a case of first impression,<sup>130</sup> that without guidance from the legislature, and in absence of any law positively establishing the intending mother as the babies' mother, the court was forced to conclude that the woman who gestated and gave birth to the babies was their legal mother.<sup>131</sup> Hence, the babies were born in India to an Indian mother, and therefore were entitled to Indian citizenship and passports.<sup>132</sup> After almost two years, this decision facilitated the twins' eventual travel home to Germany.<sup>133</sup>

Due to the absence of any reporting system, it is difficult to gather accurate statistics about India's surrogacy industry. Nonetheless, based on fertility clinics' reports, surrogacy tourism to India has exploded over the last few years. For example, the *Wall Street Journal* reports that PlanetHospital, a medical tourism company based out of California, sent 33 individuals/couples abroad in 2007.<sup>134</sup> Then, within the first eight months of

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124. *Id.*

125. *Jan Balaz v. Anand Municipality*, No. 3020, ¶ 2, Special Civil Application (Gujarat H.C., Nov. 11, 2009).

126. *Id.* ¶ 4-8; Brenhouse, *supra* note 108.

127. *Balaz*, No. 3020, ¶ 4, 6-8, 16.

128. *Id.* ¶ 7; 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](http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835_1_stateless-citizens-balaz-surrogate-mother).

129. *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>.

130. *Balaz*, No. 3020, ¶ 9.

131. *Id.* ¶ 16.

132. *Id.* ¶ 22.

133. Brenhouse, *supra* note 108. Once the babies were granted Indian citizenship and then Indian passports, the Indian government provided them with exit permits so that they may travel home to Germany. Mahapatra, *supra* note 128. German authorities finally agreed to provide the necessary travel documents after the Balazs went through inter-country adoption. *Id.*

134. Cohen, *supra* note 101.

2009, the company sent 600 individuals/couples abroad—all but seven traveled to India.<sup>135</sup> The surrogacy industry in India is worth approximately \$5.4 million per year<sup>136</sup> but projections for 2012 estimate that profits will reach \$2.3 billion.<sup>137</sup>

Surrogacy tourism has resulted in additional opposition to the practice of surrogacy. Particularly in India, where surrogates are often from impoverished rural communities, there are concerns about exploitation and the unequal bargaining power of surrogate women.<sup>138</sup> The fear is that women engage in surrogacy out of desperation, rather than for altruistic or well-informed reasons.<sup>139</sup> Additionally, from the perspective of the home state, creating a system that encourages surrogacy tourism is irresponsible because it ignores the needs of its citizens. Persons with disabilities and the surrogates' host states are left to bear the burden of fertility treatment. Legislatures have been criticized for allowing surrogacy tourism to be a method by which they can avoid legislating issues involving ART.<sup>140</sup> As previously mentioned, this avoidance may soon be thwarted if India's draft ART bill, requiring that couples produce a certificate validating that surrogacy is legal in their country,<sup>141</sup> becomes law. Couples will likely put more pressure on their state legislatures to pass new or updated surrogacy laws.

Several countries have begun addressing surrogacy tourism through new or updated laws. India's draft ART bill is likely to be introduced to Parliament by 2012.<sup>142</sup> In addition to the previously mentioned provisions,<sup>143</sup>

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135. *Id.*

136. NEED FOR LEGISLATION, *supra* note 100.

137. Brenhouse, *supra* note 108.

138. Smerdon, *supra* note 99, at 51-56; Rimm, *supra* note 44, at 1444-45, 1448 (explaining that because the controlling party has the power to control the flow of information, legal scholars worry that the intending parents may try to mislead or unduly influence the surrogate); Carney, *supra* note 102; Fontanella-Khan, *supra* note 101.

139. Cohen relays stories of women who acted as surrogates out of desperation, including debt and an alcoholic husband. Cohen, *supra* note 101. One woman conveyed that acting as a surrogate was a better option than selling her kidney. *Id.* See also Carney, *supra* note 102. Carney reports that one twenty-six year old surrogate told him "she opted for a Delhi clinic that recruits educated surrogates and doesn't cloister them after she learned that some clinics hire 'basically the very, very poor, strictly doing it for the money.'" *Id.* Even in the U.S., Munyon discusses how the court in the *Baby M* case invalidated surrogacy arrangements on policy concerns of the surrogate being coerced by the prospect of making money. Munyon, *supra* note 43, at 730 (citing *In re Baby M*, 537 A.2d 1227, 1241 (N.J. 1988)).

140. See G. Pennings et al., *ESHRE Task Force on Ethics and Law 15: Cross-border Reproductive Care*, 23HUM. REPROD. 2182, 2183 (2008). As will be discussed briefly *infra*, after a glimpse at the waterfall of complex issues that could potentially result from allowing surrogacy one can understand why a state would be inclined to simply ban surrogacy.

141. Draft ART Bill, *supra* note 8, at § 34.19

142. See *supra* note 10 and accompanying text.

India's law seeks to minimize the potential for exploitation. Some exemplary safeguards include: creating a national registry,<sup>144</sup> requiring a separation between the roles and responsibilities of ART clinics and the ART banks,<sup>145</sup> limiting who can act as a surrogate (women between 21 and 35, with at least one previous child of her own),<sup>146</sup> restricting a surrogate to five live births (including her own children),<sup>147</sup> and requiring that intending parents provide the surrogate with health insurance during the term of the arrangement.<sup>148</sup>

Taking a different approach, Queensland, Australia recently enacted a new altruistic surrogacy law that punishes couples who travel overseas to take part in a commercial surrogacy with a \$110,000 fine or two years imprisonment.<sup>149</sup> However, experts are urging State Parliament to reconsider the new surrogacy laws that they say will lead to infertile couples lying to authorities, friends, and family about their children's births.<sup>150</sup> Canada has seen this happen with couples who travel to the U.S. for ART procedures and then simply lie to authorities.<sup>151</sup>

In recognition of the adverse affects of Canada's restrictive surrogacy law, the Canadian Bar Association (CBA) has advocated for allowing broader rules regarding surrogate compensation.<sup>152</sup> The CBA specifically remarked that prohibiting compensation of surrogates is likely to have a negative impact on the availability of ART and encourages informal arrangements without the benefit of legal advice.<sup>153</sup>

143. For example, holding the surrogacy contract enforceable, requiring a certificate from the intending parents' home country, and requiring the surrogate relinquish all rights to the child and the intending parents are bound to accept the child.

144. Draft ART Bill, *supra* note 8, at § 3.

145. Compare *id.* § 13.3-13.5 and *id.* §§ 20-25 with *id.* § 26 (demonstrating that ART clinics are to perform only medical services, such as the artificial insemination, and ART banks are responsible for recruiting surrogates. The purpose of this separation is to ensure that doctors are solely concerned with medicine, and not profits.).

146. *Id.* § 34.5-34.6.

147. *Id.*

148. *Id.* § 34.2.

149. *Surrogacy Act 2010* (Queensl.), ch 4 pt 1, 54-56 (Austl.), available at [www.legislation.qld.gov.au/LEGISLTN/ACTS/2010/10AC002.pdf](http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2010/10AC002.pdf).

150. *New Surrogacy Law Will "Make Mums Lie,"* DAILY TELEGRAPH (Austl.), Jan. 22, 2011, <http://www.dailytelegraph.com.au/new-surrogacy-law-will-make-mums-lie/story-fn6bmg6l-1225992594035>. "University of Technology Sydney law professor Jenni Millbank said that couples who were desperate to have a child would still seek commercial surrogates overseas and simply lie about it when they return home." *Id.*

151. Datta, *supra* note 110.

152. CANADIAN BAR ASS'N, REIMBURSEMENT OF EXPENDITURES UNDER THE ASSISTED HUMAN REPRODUCTION ACT 1, 4-7 (Sept. 2007), available at [http://www.cba.org/CBA/sections\\_health/pdf/reimbursement.pdf](http://www.cba.org/CBA/sections_health/pdf/reimbursement.pdf).

153. *Id.* at 1.

Similar to Canada, the U.K. launched a three-month public consultation concluding in April 2011 on compensation of sperm and egg donors.<sup>154</sup> Fertility experts warned that due to the drastic lack of gamete donors, women were resorting to importing sperm, medical tourism, and do-it-yourself insemination kits bought on the internet.<sup>155</sup> The current policy in the U.K. permits reimbursement for loss earnings and expenses, but not for inconvenience.<sup>156</sup> The Human Fertilisation Embryology Authority is considering increasing the allowable reimbursement of donors to include inconvenience, and the consolation survey also asked the public if the Authority should change the law to allow compensation.<sup>157</sup> The Authority is scheduled to present the findings and its decision on compensation and benefits in kind on October 19, 2011.<sup>158</sup> These unfavorable results, and the potential solution of compensation, are also relevant to the practice of surrogacy.

## B. The Benefits of “Effective and Appropriate” Surrogacy Legislation

An effective and appropriate legal framework requires (1) enforcing surrogacy contracts in a court of law and (2) not prohibiting compensation of surrogates. This framework is optimal because it maximizes individual procreative liberty while minimizing the prevalence of black markets and cross-border surrogacy. A legalized and regulated surrogacy industry also provides protections for all parties, sets standards of practice, guarantees oversight of the industry, and provides a forum for redress of abuses.

### 1. Enforcing the Surrogacy Contract

Several benefits flow from enforcing the surrogacy contract. First, the rights and responsibilities of each party are known and clearly defined, which reduces risks. Arrangements absent enforceable contracts threaten the family unit with possible disintegration, causing greater emotional and

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154. *Donating Sperm and Eggs: Have Your Say*, HUMAN FERTILIZATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/5605.html> (last updated Jan. 20, 2011).

155. Kate Kelland, *Britain Wants Ideas to Boost Egg, Sperm Donation*, REUTERS, Jan. 17, 2011, available at <http://www.reuters.com/article/2011/01/17/us-fertility-britain-idUSTRE70G00R20110117>.

156. *HFEA Launches Public Consultation on Sperm and Egg Donation*, HUMAN FERTILIZATION & EMBRYOLOGY AUTH., Jan. 17, 2011, <http://www.hfea.gov.uk/6285.html>.

157. *Donation Review Web Questionnaire*, HUMAN FERTILIZATION & EMBRYOLOGY AUTH., at 2, [http://www.hfea.gov.uk/docs/2011-02-08-Donation\\_review-website-questionnaire.pdf](http://www.hfea.gov.uk/docs/2011-02-08-Donation_review-website-questionnaire.pdf) (last visited Dec. 29, 2011). Lisa Jardine, chair of the HEFA, explains that the HEFA wants to make sure it has the best policies in place so that there are no unnecessary barriers in the way of those wishing to donate while still protecting those who are born as a result of the donation. Kelland, *supra* note 155.

158. *Donating Sperm and Eggs: Have Your Say*, *supra* note 154.

psychological stress.<sup>159</sup> When the surrogacy contract is enforceable, the names of the intended parents are put on the birth certificate, the intended parents inherit all rights and responsibilities of parenthood, and the surrogate retains no rights as a legal mother.<sup>160</sup>

Second, an enforceable contract provides important protections for the surrogate. She is afforded avenues for redress if she is subjected to abusive or exploitative behavior. The same is true if the pregnancy encounters complications or the intending parents reject acceptance of the baby, which may occur when the baby is born with a disability.<sup>161</sup> Also, the parties can contract to provide additional benefits, such as health insurance coverage and pre and post-natal care.

Third, with guidance from the legislature, courts are better equipped to interpret surrogacy contracts. The “court is not an appropriate forum for making policy in such a sensitive area.”<sup>162</sup> There are inherent limitations to any case, which make the extrapolation of judicially-made policy too risky.<sup>163</sup> Moreover, the advantage of unambiguous laws and consistent outcomes is that individuals are on notice of their rights and responsibilities and the consequences of their actions. They can, therefore, conform their behavior to the expectation of the law in order to produce the outcome they desire.

Finally, holding the surrogacy contract legally binding remedies some of the concerns regarding the rights of the child. Under Article 7 of the Convention on the Rights of the Child (CRC), “immediately after birth” a child shall have the right to acquire a nationality and to be known and cared for by her parents.<sup>164</sup> The CRC also protects the child’s right to be free from arbitrary or unlawful interference with her privacy, family, or her right not to be separated from her parents.<sup>165</sup> This is particularly relevant in cross-border surrogacy arrangements where conflicts of laws (or absence of laws) between the host and home country complicate issues of parenthood and citizenship. For example, in the case of Baby Manji, the surrogate baby arguably had three mothers—the intended mother who had contracted for

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159. This is particularly true when the intending mother is not biologically related to the baby. In the famous case of *Baby M*, the surrogate mother, who was also biologically related to the child, decided to keep the baby. *In re Baby M*, 537 A.2d 1227, 1236-37 (N.J. 1988). The New Jersey Supreme Court invalidated the surrogacy contract and recognized the surrogate as the baby’s legal mother. *Id.* at 1264.

160. If the surrogate changes her mind and decides she wants to keep the baby, a court will interfere and order the surrogate to release the baby to the intending parents. *See, e.g.*, Draft ART Bill, *supra* note 8, at § 34.4 (surrogate to relinquish rights); *see also id.* § 34.11 (intending parents must accept the surrogate baby).

161. *Id.* § 34.11.

162. *In re Guardianship of Eberhardy*, 307 N.W.2d 881, 895 (Wis. 1981).

163. *Id.*

164. Convention on the Rights of the Child, G.A. Res. 44/25, art. 7, Annex, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) (entered into force Sept. 2, 1990).

165. *Id.* arts. 8, 9.

the surrogacy, the egg donor, and the gestational surrogate—yet legally she had none.<sup>166</sup> Enforcing the terms of the contract makes certain that upon birth the baby will have the same citizenship as her identifiable parents with whom she will reside.<sup>167</sup>

## 2. *Compensating the Surrogate*

Allowing compensation ensures that there are willing surrogates so that access to surrogacy is a meaningful right. Women report choosing to become a surrogate for many reasons, including the fee, empathy for childless couples, enjoyment of pregnancy, and a sense of enhanced self-esteem.<sup>168</sup> While the emotional and psychological reasons may be very strong, jurisdictions that allow compensation have a higher number of surrogates than states that do not allow compensation.<sup>169</sup>

The most widely cited reason for prohibiting commercial surrogacy is that the exchange of money creates a baby market that transforms women's bodies and children into commodities.<sup>170</sup> However, this is a simplistic and assumptive view of surrogacy. First, opponents fail to recognize that a baby market already exists—money currently exchanges hands between intending parents, hospitals, doctors, fertility clinics, and pharmaceutical companies.<sup>171</sup> The same is true of adoption and organ procurement.<sup>172</sup> Although these practices are widely cited as favorable support for the prohibition of commercial surrogacy, they are also examples of systems in

166. POINTS, *supra* note 112 (discussed in Part III A(2)).

167. See, e.g., Draft ART Bill, *supra* note 8, § 35.

168. Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 30-31 (2005).

169. Compare note 92 with reports from jurisdictions such as the U.S., India, and Israel. Further, a review of jurisdictions that allow compensated gamete donation is also convincing. No nation has a pool of donors anywhere near the size of that in the United States, where compensation is not prohibited. Peggy Orenstein, *Your Gamete, Myself*, N.Y. TIMES, July 15, 2007 (Magazine), <http://www.nytimes.com/2007/07/15/magazine/15egg-t.html?pagewanted=all>. See also Robyn Nazar, *The Value of an Egg Donation*, AM. FERTILITY ASS'N, (June 30, 2011), <http://www.theafa.org/article/the-value-of-an-egg-donation/>.

170. For example, *The Vancouver Sun* reports that Margaret Somerville, founding director of Montreal's McGill Centre for Medicine, Ethics and Law, says, "what bothers me so much is that we are totally commercializing, depersonalizing and de-humanizing the most intimate of human relationships, that of parents and children." Kirkey, *Desperate Canadians Resort to Foreign Surrogates*, *supra* note 95.

171. Carole Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J. L. & GENDER 67. See also Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 211 (2009); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 65 (2006).

172. See Goodwin, *supra* note 171 (explaining how the U.S. adoption processes, once based on the altruistic child welfare model, have morphed to reflect the desires of would-be parents and have exposed children to the free-market dynamics).

which only the supplier is unpaid, while the middlemen (doctors, lawyer, hospitals, etc.) profit. (That being said, the next section proceeds to distinguish between organ donation and surrogacy as further support of why surrogacy should be compensated.) It remains relevant, nonetheless, that opponents often *feel* it is wrong to mix money and procreation when in reality this is happening all of the time.

Second, the discourse of those who oppose commercial surrogacy on the ground that it commodifies women's bodies is the exact discourse that represses women and perpetuates the stereotype of women as baby-makers.<sup>173</sup> The fee paid to a surrogate woman is in recognition of and compensation for her services and sacrifices. It is in exchange for the surrogate refraining from certain activities (smoking, drinking, sexual contact), engaging in certain activities (going to doctor appointments), enduring discomfort (morning sickness, hormonal changes, the birth), and undergoing IVF and hormone treatment—it is not a value paid for the life of a baby. Not compensating the surrogate woman devalues and underappreciates her commitment. To assert that a woman should voluntarily undergo these sacrifices out of “the goodness of her heart” reinforces the stereotype that women's role in society is that of child-bearer.<sup>174</sup>

Lastly, the argument that commercial surrogacy commodifies women's bodies and procreation misconstrues the nature of the relationship between the surrogate and the intending parents. Opponents tend to paint a picture of a wealthy white family choosing to engage a poorer surrogate for voluntary reasons, such as convenience and vanity.<sup>175</sup> This portrayal is false. Intending couples turn to surrogacy as a last resort after years of emotional and financial sacrifice.<sup>176</sup> They sell their homes, forgo vacations, and commit

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173. Courts and legal scholars who reject commercial surrogacy as contrary to public policy often express a concern that it will reinforce a perception of women as “baby-makers” and promote the view of children as marketable goods. Rimm, *supra* note 44, at 1444. The flaw in this argument is similar to the contradiction inherent in society's acceptance of the fact that men can and do donate sperm for financial gain, yet society feels that women *should* express some altruistic reason for donating their reproductive material. See Kimberly D. Krawiec, *Foreword, Show Me the Money: Making Markets in Forbidden Exchange*, 72 LAW & CONTEMP. PROBS. i, x (2009).

174. One might argue that it is an anomaly to pay a risk premium for other jobs but then not pay a surrogate for her demanding (twenty four hours a day, seven days a week) services.

175. Rimm, *supra* note 44, at 1446 (discussing the concern that a Brave New World scenario will emerge as a result of surrogacy). Munyon discusses how one reason the court invalidated the surrogacy contract in the Baby M case was out of fear for the potential class distinctions, stating “surrogacy will be used for the benefit of the rich at the expense of the poor.” Munyon, *supra* note 43, at 730 (citing *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988)).

176. A U.K. study found that couples had considered surrogacy only after a long period of infertility or when it was the only option available. MacCallum, *supra* note 51. See also Carney, *supra* note 92 (citing one couple who turned to India as a “final stage of an expensive and emotional quest for genetic parenthood—their last option after a series of

years to trying to get pregnant, only to find their last hope in the help of another woman. Women with infertility have been shown to suffer from severe depression, comparable to cancer patients, and almost half of all infertile women report infertility to be the most devastating experience of their lives.<sup>177</sup>

To subdue the worry that the commoditization of women's bodies and baby making is a necessary consequence of a regulated commercial surrogacy industry, consider the recounts reported by Elly Teman. In *Birthing A Mother: The Surrogate Body and Pregnant Self*, Elly Teman narrates the experiences of twenty-six surrogates and thirty-five intending mothers in Israel, where compensated surrogacy is legal and regulated.<sup>178</sup> Israeli surrogates, unlike their U.S. counterparts, are not stigmatized by negative connotations that flow from seeking and receiving compensation for reproductive services.<sup>179</sup> Hence, they are more upfront from the beginning about their financial motivations.<sup>180</sup> But, as one surrogate puts it, "surrogacy begins with the money but it doesn't end with the money."<sup>181</sup> Teman concludes that although the surrogacy arrangement began as a commercial exchange, surrogates came to shift their understanding of it as a gift exchange.<sup>182</sup> Another surrogate recounted, "From a certain point onwards, even if I had won the lottery I would have continued, because the money stopped having the same meaning that it did in the beginning."<sup>183</sup> These narratives demonstrate that a profitable surrogacy industry exists where the relationships between the surrogates, intending parents, and children are much deeper than a mere commercial transaction.

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failed fertility treatments"); Burke, *supra* note 85 (reporting that one couple turned to India after a "13 year struggle").

177. INFERTILITY COUNSELING—A COMPREHENSIVE HANDBOOK FOR CLINICIANS (Sharon N. Covington & Linda Hammer Burns eds., 2d ed. 2006). *See id.* at 98 (comparing the level of stress experienced by infertile patients to that of cancer patients) and 54 (infertility and its treatment is traumatic for women); Ellen W. Freeman et al., *Psychological Evaluation and Support in a Program of In Vitro Fertilization and Embryo Transfer*, 43 FERTILITY & STERILITY 48, 50 (1985).

178. ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* 19 (2010).

179. Teman and Krawiec both comment on the guilt American women feel for seeking compensation because society projects an expectation that women should act out of altruistic, not financial, motivations. TEMAN, *supra* note 178, at 207-08; Krawiec, *supra* note 173, at x.

180. TEMAN, *supra* note 178, at 208.

181. *Id.* at 207.

182. *Id.*

183. *Id.*

### a. Surrogacy v. Organ Donation

Opponents often reference the prohibition of the sale of organs and baby selling as support for the prohibition of commercial surrogacy.<sup>184</sup> However, surrogacy is distinguishable from both practices in ways that fail to justify a full ban on compensation. The first difference is one of buying versus renting. Organ donation is permanent, whereas surrogacy services are temporary. In surrogacy, both the use of the body and the promise to refrain from/engage in certain activities are temporary. Second, there is the renewability aspect. Gamete donation and gestational services are activities that can be done more than once. In contrast, when you donate an organ, you do not grow another one in its place.

Third, unlike organ procurement, surrogacy is a service rather than a sale of goods. Especially in the case of gestational surrogacy, which is most common, the surrogate is not contributing any part of her genetic material or giving away any part of her body. Rather, she is choosing to use her body in a particular way.<sup>185</sup> Moreover, she is using her body in a natural way, and many surrogates have already experienced pregnancy and childbirth with their own children.

Fourth, organ donation arguably carries even heavier emotional and psychological consequences than surrogacy, particularly in situations where the donor is deceased. Some of the additional stresses that are relevant to the organ donation of a deceased individual include: religious beliefs about the treatment of the body after death and the afterlife, family members' emotions, societal ideas of respect for the deceased, and concern about establishing the donor's intent. This is not to underestimate the emotions involved in a surrogacy arrangement. However, it is worth noting that several studies disprove critics' concern that surrogacy arrangements result in negative psychological affects.<sup>186</sup>

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184. Rimm, *supra* note 44, at 1436. Rimm also concludes that these public policy arguments are not convincing enough to compel a full ban on commercial surrogacy in India. *Id.* at 1449-50.

185. One could argue that this is similar to professional athletes and models.

186. It has been found that surrogate mothers do not generally experience major problems in their relationship with commissioning couples in handing over the baby or from the reactions of those around them. Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196 (2003). The emotional problems experienced by some appeared to lessen over time. *Id.*; See also Ciccarelli & Beckman, *supra* note 168, at 31 (noting that surrogate mothers generally report being quite satisfied with their experience as surrogates). A study comparing families created through surrogacy and families created through natural reproduction found that families created through surrogacy indicated greater psychological well-being and adaptation to parenthood. See Susan Golombok et al., *Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1<sup>st</sup> Year of Life*, 40 DEV. PSYCHOL. 400 (2004). In addition, the absence of a genetic and/or gestational link between parents and their child does not appear to have a negative impact on the parent-child relationships or the psychological well-being of mothers, fathers, or child at age 3. S. Golombok et al., *Non-Genetic and Non-Gestational Parenthood: Consequences for*

## b. Surrogacy v. “Baby-Selling”

One might argue that, ultimately, the product of the surrogacy arrangement results in the sale of a good—the baby—which amounts to baby selling, a practice that is socially and legally forbidden.<sup>187</sup> However, surrogacy is distinguishable from baby selling because the assumptions upon which baby selling prohibitions rest are not relevant in surrogacy arrangements. The goal of baby selling prohibitions is to prevent a baby black market by eliminating financial incentives when making childbearing decisions about a child already conceived.<sup>188</sup> In other words, the legislature did not want a mother to sell her baby because of financial pressures, when she might otherwise choose to abort or keep the baby. Here, the purpose of the surrogacy arrangement is to create a baby that will join the intending parents’ family. More importantly, assuming a genetic relationship exists between at least one of the intending parents and the baby, one can argue that the intending parents cannot buy what is already theirs. Rather, if the intended parents created the embryo, they are giving the embryo to the surrogate only to care for it while it develops. The surrogate is providing a service akin to the service provided by wet nurses of the past.<sup>189</sup>

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*Parent-Child Relationships and the Psychological Well-being of Mothers, Fathers and Children at Age 3*, 21 HUM. REPROD. 1918 (2006). Research presented at an annual conference of the European Society of Human Reproduction and Embryology revealed that intending parents have better parenting skills and show more warmth towards their children than those in non-surrogacy families. *Research Shows Surrogacy Fears Unfounded*, BIO NEWS (Progress Educational Trust, London, U.K.), July 1, 2002, available at [http://www.bionews.org.uk/page\\_11396.asp](http://www.bionews.org.uk/page_11396.asp). Additional research presented years later at the same conference found that surrogate children are psychologically well and revealed no difference in self-esteem. *Surrogate Children Are Psychologically Well: Study*, AGENCE FRANCE-PRESSE, July 5, 2008, available at <http://afp.google.com/article/ALEqM5hsVjzHODQfj9pEV3qZew2VbQNRsg>. In addition, it is argued that the harm to maternal bonds arising from surrogacy is merely symbolic. Munyon, *supra* note 43, at 734. Additionally, in her study of twenty-six surrogates and thirty-five intending mothers in Israel, Elly Teman reports that Israel has succeed in creating a regulatory framework that, rather than threatening the family, reaffirms it. TEMAN, *supra* note 178, at 289. The institutions work toward the singular goal of creating only one mother. *Id.*

187. In Gloria Banks’s article discussing a commercial organ transplant system, she explains that states must first decide whether the use of human sperm and eggs procured by donation or sale constitutes a transfer of a “human life” akin to “baby selling” prohibited by existing law and policy. Gloria Banks, *Legal & Ethical Safeguards: Protection of Society’s Most Vulnerable Participant in a Commercialized Organ Transplant System*, 21 AM. J. L. & MED. 45, 50-51 (1995).

188. See Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 502 (1995).

189. Where the birth mother and genetic mother are the same, courts and legislatures have a harder time distinguishing the surrogacy arrangement from “baby-brokering.” Rimm, *supra* note 44, at 1439. But where the genetic mother is the intending mother or egg donor, courts have been more willing to view the surrogacy arrangement as a contract for “services.” *Id.*

Governments could choose to go beyond facilitating surrogacy arrangements and provide financial support. For example, nations that offer universal health care could cover the costs of the ART procedures in connection with the surrogacy arrangement and offer subsidies for payment of the surrogate. This paper does not delve into this possibility beyond acknowledging that it is an important issue for legislatures to consider. Regardless of whether insurance plans cover the cost of compensating the surrogate, a state should refrain from prohibiting the intending couple from compensating the surrogate.

### C. Proportionality—The Weighing Game

Generally, citizens are protected from *arbitrary* interference with the exercise of their human rights.<sup>190</sup> When the government does interfere, the question becomes whether it is doing so rationally and in the public interest.<sup>191</sup> Here, although a full ban on surrogacy is an unnecessarily broad state regulation, certain restrictions on surrogacy may be justified on public policy grounds or to protect the rights of others. For example, limiting surrogacy to cases of medical necessity<sup>192</sup> would address several of the concerns voiced by opponents of surrogacy. First, this provision would minimize the potential for individuals to pursue surrogacy for superficial reasons, such as convenience, vanity, and career goals.<sup>193</sup> Second, it would likely equalize the bargaining power of the intending couple and the surrogate because both parties would be indispensable to the arrangement.

Another limitation that legislatures may consider is requiring that at least one of the intending parents is genetically related to the baby (or at least in cases where that is possible). This provision, in conjunction with the medical necessity limitation, addresses the very contentious concern that sex and gamete selection operate as modern day eugenics practices. Together these restrictions would prevent intending couples from exploiting surrogacy as an opportunity to design the “perfect” baby.<sup>194</sup> Also, requiring that one of the intending parents be genetically related to the child is directly in furtherance of the right to procreate. Otherwise, opponents have a stronger case to advocate that intending parents should alternatively adopt or foster a child.

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190. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966).

191. Alison Barnes & Michael McChrystal, *The Various Human Rights in Healthcare*, HUM. RTS., Fall 1998, at 12, 13.

192. Medical necessity may exclude menopausal women. See, e.g., NAT'L INST. FOR HEALTH & CLINICAL EXCELLENCE, FERTILITY: ASSESSMENT AND MANAGEMENT (UPDATE) § 4.1.2(a) (2010), available at [www.nice.org.uk/nicemedia/live/12157/48617/48617.pdf](http://www.nice.org.uk/nicemedia/live/12157/48617/48617.pdf).

193. TEMAN, *supra* note 178, at 2; Rimm, *supra* note 44.

194. *Women Shopping for Super Sperm*, *supra* note 91.

## CONCLUSION

Elly Teman makes two striking comments in the introduction to *Birthing a Mother*. First, by threatening the understanding of families as biological facts, surrogacy reveals instead that families are social constructs.<sup>195</sup> And second, surrogacy constructs families through a marketplace, making them a matter of choice rather than fate.<sup>196</sup> “Social constructs” and “choice” are the operative words here. Disability is a function of socially created attitudinal, physical, and legal barriers. By questioning the assumptions founding these boundaries, society can eliminate discrimination against persons with disabilities, including in the realm of reproductive choice.

The first ever *World Report on Disability* is dedicated to the “moral duty to remove barriers to participation for people with disability and to invest sufficient funding and expertise to unlock their vast potential.”<sup>197</sup> Under Article 23, individuals can demand that their states take effective and appropriate measures, as well as provide the means necessary, to ensure that they retain their fertility and found a family. Surrogacy *enables* certain individuals to retain their fertility and reproduce. Accordingly, governments should fulfill their Article 23 obligations by instituting a legal framework that defines the relationships between the surrogate, intending parent, and child, enforces the surrogacy contract, and allows compensation of the surrogate. These conditions would maximize individual procreative liberty, while simultaneously minimizing incidences of black markets, surrogacy tourism, and the potential for unethical conduct.

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195. TEMAN, *supra* note 178, at 7.

196. *Id.*

197. WORLD REPORT ON DISABILITY, *supra* note 38, at ix.

