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Abstract

This Article argues that most surrogacy arrangements, as currently practiced, constitute the "sale of children" under international law and hence should not be legally legitimated. Therefore, maintaining the core legal norm against the sale of children requires rejecting claims that there is a right to procreate through surrogacy. Since a fundamental purpose of law in the modern era of human rights is to protect the inherent dignity of the human person, a claimed legal right that is built upon the sale of human beings must be rejected.

This Article refutes common arguments claiming that commercial surrogacy does not constitute the sale of children and should be legally legitimated. Upon analysis, those arguments, and the corollary legal regimens legitimizing a commercial surrogacy industry, are thinly veiled rationalizations for accepting commercial arrangements involving the de jure and de facto transfer of infants in exchange for monetary compensation.

This Article describes the minimum regulatory approach under which the practice of surrogacy would not constitute the sale of children. This Article argues that legal principles applicable to adoption, which are

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designed to protect vulnerable birth parents and children and to prevent human trafficking and the sale of children, should be adapted and applied to surrogacy.

Comparison to adoption is also useful in revealing the hidden hypocrisy of the surrogacy industry. Surrogacy industry proponents claim to reflect a progressive acceptance of new means of family formation, but in fact advocate for a retrograde and pseudo-traditionalist set of legal rules that cut off significant rights of surrogates and surrogate-born persons to information, autonomy, and relationship. In a context where birth parents and adoptees are gaining new rights in the context of adoption, surrogacy proponents seek to build an industry which empowers intended contractual parents and profit-seeking intermediaries at the expense of the rights of surrogates and surrogate-born persons.

I. INTRODUCTION

When does surrogacy constitute the "sale of children," particularly as that term is defined in international law?[1] This legal question is directly relevant to currently debated questions as to whether the law should facilitate, prohibit, or regulate surrogacy under both national and international law.

This Article describes the undermining of a core legal norm in the name of an emerging and controversial rights claim. The core legal norm being undermined is the prohibition of child-selling, which itself follows from the modern abolition of slavery.[2] Both norms are closely related to the contemporary norm against human trafficking.[3] These norms can be conceptualized as rights—most directly the rights not to be sold, enslaved, or trafficked.[4] These legal norms and rights protect the "inherent dignity of the human person"[5] and the "equal and inalienable rights of all members of the human family"[6] against the powerful tendencies toward extreme commodification and de-valuation of human beings recurrent throughout history and inherent in a globalized market economy.[7]

1. *See generally* G.A. Res. A/RES/54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (May 25, 2000) [hereinafter Optional Protocol].

2. *See, e.g.*, U.S. CONST. amend. XIII; Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter Slavery Convention].

3. *See generally* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

4. *See, e.g.*, Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] ("States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.").

5. International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

6. *Id.*

7. *See* African Charter on Human and Peoples' Rights, art. 5, Oct. 21, 1986, 21 I.L.M. 59 [hereinafter African Charter] ("Every individual shall have the right to the respect of the dignity

A claimed right to procreate through surrogacy[8] is undermining the norm against child-selling. This claimed right seeks legitimation through association with a set of more established rights, which are variously termed the rights to procreation, family life, marriage, and privacy.[9] These more established rights began with a more traditional protection of heterosexual marriage and procreation through sexual intimacy within such marriages[10] and then, more controversially, have evolved in many societies (although not universally) toward protecting a broader range of relationships, whether marital or not, and inclusive of same-gender relationships.[11] As currently constructed, these more established rights protect the family as a fundamental unit of society with its own zone of self-governance,[12] while to various degrees also protecting individuals against inappropriate State interference in multiple kinds of "personal relationships" and associated activities, including consensual sexual intimacy, contraception, and procreation.[13] Despite the controversies over the extent of such rights, they

inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade . . . shall be prohibited.").

8. *See, e.g.*, Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1267–1309 (2014); Michelle E. Hollande, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 17 U.C. DAVIS J. JUV. L. & POL'Y 1, 15 (2013); John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 L. MED. & HEALTHCARE 18, 25–27 (1988). *See generally* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1996).

9. *See, e.g.*, ICCPR, *supra* note 5, at art. 23; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8, 12, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Organization of American States, American Declaration of the Rights and Duties of Man, art. VI, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (May 2, 1948) [hereinafter American Declaration]. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

10. *See, e.g.*, ICCPR, *supra* note 5, at art. 23; Loving v. Virginia, 388 U.S. 1, 2 (1967); *Skinner*, 316 U.S. at 535; *Meyer*, 262 U.S. at 390; Universal Declaration, *supra* note 9, at art. 16; American Declaration, *supra* note 9, at art. VI.

11. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Oliari v. Italy, 4 Eur. Ct. H.R. (2015); *Gay Marriage Around the World*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/
06/26/gay-marriage-around-the-world-2013/.

12. *See, e.g.*, ICCPR, *supra* note 5, at art. 23; ECHR, *supra* note 9, at art. 8, 12; Wisconsin v. Yoder, 406 U.S. 205, 216 (1972); *Meyer*, 262 U.S. at 390; Universal Declaration, *supra* note 9, at art. 16; American Declaration, *supra* note 9, at art. VI.

13. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Carey v. Population Servs. Int'l, 431 U.S.

are grounded, like other human rights claims, in the protection of human dignity.[14] Human dignity is expressed in part through familial, sexual, procreative, and parent-child relationships that, although various in forms, have occurred in every society. The controversial question here is whether the claimed right to procreate through surrogacy should be included within the sphere of the more established (and yet still developing) rights of procreation, family life, and privacy.

This Article will argue that most surrogacy arrangements as currently practiced do constitute the "sale of children" under international law and hence should not be legally legitimated. Consequently, maintaining the core legal norm against the sale of children requires rejecting claims of a right to procreate through surrogacy. Given the underlying purpose of all human rights law in maintaining the inherent human dignity of all human beings, a claimed legal right built upon the sale of human beings must be rejected.

The Hague Conference on Private International Law (HCCH) has publicly released significant documents on international surrogacy and the status of children as a part of its consideration whether to engage in further work in the field.[15] The work completed by the Permanent Bureau[16] to date has been very useful in elucidating the issues. The HCCH documents raise the question of whether multilateral international instruments—presumably one or more Conventions—should be created to address international surrogacy or the parentage issues that sometimes arise from international surrogacy arrangements.[17] This Article will argue that any such Conventions or multilateral instruments must carefully avoid legitimating any forms of surrogacy that constitute the sale of children. The

678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); *Skinner*, 316 U.S. at 535. I am putting aside for present purposes the question of abortion, sometimes included within this group of issues, because of controversy regarding the status of the human embryo or fetus, which can in some nations lead to a somewhat different treatment of this issue. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

14. *See* ICCPR, *supra* note 5, at pmbl.; Universal Declaration, *supra* note 9, at pmbl.; G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at pmbl. (Dec. 19, 1966) [hereinafter ICESCR].

15. *See The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, HAGUE CONF. ON PRIV. INT'L L. [hereinafter HCCH], http://www.hcch.net/index_en.php?act=text.display&tid=178 (last visited Sept. 24, 2015).

16. *What is the Permanent Bureau of the Hague Conference?*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=faq.details&fid=30 (last visited Oct. 6, 2015).

17. *See supra* note 15.

understandable goal of strengthening the legal position and protecting the best interests of children produced by international surrogacy should not come through legitimating the systematic selling of children. In the long term, the best interests of children as a group are not served by creating a legally legitimate pathway to the systemic sale of children, regardless of whether, in a specific individual case, an argument could be made for ex post facto adjustment of the legal status of a child who is a product of such a sale.[18]

Thus, this Article will describe the minimum regulatory approach under which the practice of surrogacy would *not* constitute the sale of children.[19] Nations that wish to accommodate the practice of surrogacy, domestic or international, are bound under international law to prohibit the sale of children[20] and hence must regulate surrogacy practice to the degree necessary to avoid the illicit sale of children. This Article will argue that international and domestic principles related to adoption, designed to protect vulnerable birth parents and children and to prevent the trafficking and sale of children in the context of adoption, should be adapted and applied to surrogacy.[21]

Comparison to adoption is also helpful in revealing the hidden hypocrisy of the surrogacy industry. On the one hand, the surrogacy industry claims to reflect a new and progressive wave of an increasing variety of family forms and means of family formation, made possible by both advances in technology and increasing societal acceptance of varied family structures.[22] The movement's rhetoric suggests it is merely asking the law to catch up with society's practices and acceptance of non-traditional family formation.[23] On the other hand, it is apparent that the surrogacy

18. *See, e.g.*, MARTHA FIELD, SURROGATE MOTHERHOOD 27–28 (1990) (arguing that it is in the interests of children and families *in general* to prohibit child selling regardless of the interests of *particular* children in individual cases).

19. *See infra* Parts II–V.

20. *See, e.g.*, Optional Protocol, *supra* note 1.

21. *See* Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 35 I.L.M. 1391 [hereinafter Hague Adoption Convention]; CRC, *supra* note 4, at arts. 20–21, 35; Optional Protocol, *supra* note 1; *infra* Part IV.

22. *See* N.H. REV. STAT. ANN. § 12:168-B (2014); Andrew Vorzimer & David Randall, *California Passes the Most Progressive Surrogacy Bill in the World*, PATH2PARENTHOOD (Jan. 20, 2013), http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world/.

23. *See* § 12:168-B; Vorzimer & Randall, *supra* note 22.

industry is lobbying for laws that place these new family forms and means of family formation into the legal form of the traditionalist nuclear family composed of a marital couple and their naturally conceived children where the marital parents have exclusivist claims to parental status.[24] While this nuclear family form, focused on exclusive control of children by a married male-female set of parents, is regarded as traditional in some Western nations, it is in fact not necessarily congruent with non-exclusivist and more fluid extended family forms that are traditional in many cultures and nations.[25] In order to accomplish this retrograde pseudo-traditionalism, the surrogacy industry seeks legal rules that cut off significant rights of the surrogates and surrogate-born persons to information, autonomy, and relationship in favor of empowering intended contractual parents and profit-seeking intermediaries.[26]

By contrast, adoption law and practice increasingly recognizes that adoptive families should not be forced into the legal form of the traditional exclusivist family because doing so requires destruction of the legitimate interests and rights of both original (birth) family members and adoptees.[27] Bans on binding pre-birth adoption contracts,[28] bans on the sale of parental rights and on baby-selling,[29] and regulations of the financial aspects of adoption[30]—in combination with the movements toward open adoption,[31]

24. *See supra* notes 22–23 and accompanying text.

25. *See, e.g.*, Riitta Hogbacka, *Intercountry Adoption, Countries of Origin, and Biological Families*, INT'L INST. SOC. STUD. 4–9 (2014), http://repub.eur.nl/pub/77406. *See generally* Riitta Hogbacka, *Exclusivity and Inclusivity in Transnational Adoption*, *in* FAMILIES AND KINSHIP IN CONTEMPORARY EUROPE: RULES AND PRACTICES OF RELATEDNESS (Riitta Jallinoja & Eric Widmer eds., 2011).

26. *See supra* notes 22–23 and accompanying text; *infra* Part IV.F.

27. *See infra* notes 28–33.

28. Hague Adoption Convention, *supra* note 21, at art. 4(c)(4); SANFORD N. KATZ & DANIEL R. KATZ, ADOPTION LAWS IN A NUTSHELL 40 (2012).

29. Hague Adoption Convention, *supra* note 21, at art. 4(c)(3); Optional Protocol, *supra* note 1, at art. 3(1)(a)(ii).

30. *See* Hague Adoption Convention, *supra* note 21, at arts. 4(c)(3), 8, 32; *Expert Group on the Financial Aspects of Intercountry Adoption*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=events.details&year=2012&varevent=284 (last visited Sept. 24, 2015).

31. *See* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 196–234 (1998); KATZ & KATZ, *supra* note 28, at 151–52; Rhoda Scherman, *Openness and Intercountry Adoption in New Zealand*, *in* INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 282–91 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012). *See generally Openness in Adoption: Building Relationships Between Adoptive and Birth Families*, CHILD

adoptees maintaining some inheritance rights from their original birth family members,[32] and adoptee rights to their information and birth certificates[33]—reflect the necessity of legally acknowledging the distinctive nature of adoptive family relationships and recognizing the human rights of all adoption triad members.

The problem of baby-selling, which is the centerpiece of this Article, is deeply interconnected to this retrograde pseudo-traditionalism of the surrogacy industry because the surrogacy industry employs the same legal fictions both to bypass legal prohibitions of child-selling and to force the surrogate-formed family into the legal form of the traditional exclusivist family.[34] Hence, the solution for surrogacy is to learn from, rather than seek to escape, the lessons learned from adoption.[35]

Ultimately, a movement and industry that seeks to legitimize practices that systemically constitute the sale of children cannot be viewed as contributing to progress, particularly in human rights terms.[36] This Article uses the mirror of the distant past through analysis of surrogacy in the scriptural book of Genesis and the ancient Babylonian Code of Hammurabi in order to remind us that there is in fact little truly new in the contemporary ethical and legal debates over surrogacy.[37] Upon examination, the contemporary surrogacy movement and industry seek a retrograde exploitation of the vulnerable and an explicit market in children that would make those in the ancient world, awash in slavery and extreme patriarchy,

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WELFARE INFO. GATEWAY (Jan. 2013), https://www.childwelfare.gov/pubPDFs/f_openadopt.pdf; Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption: From Secrecy and Stigma to Knowledge and Connection*, EVAN B. DONALDSON ADOPTION INST. (Mar. 2012), http://adoptioninstitute.org/old/
publications/2012_03_OpennessInAdoption.pdf.

32. *See* UNIF. PROBATE CODE § 2-119(b)–(d) (UNIF. LAW COMM'N 2010) (stating adoptee inherits from or through genetic family in regard to stepparent adoption, adoption by relatives, and adoption after death of both parents).

33. *See* KATZ & KATZ, *supra* note 28, at 176–209 (2012); Scherman, *supra* note 31; *State Legislation*, AM. ADOPTION CONGRESS, http://www.americanadoptioncongress.org/state.php (last visited Sept. 24, 2015); Richard Weizel, *Adoptees Are Finally Winning Birth Certificate Rights*, HUFFINGTON POST (June 16, 2014, 9:30 AM), http://www.huffingtonpost.com/2014/06/16/adoptees-birth-certificates_n_5499022.html.

34. *See infra* Part IV.

35. *See infra* Part IV.

36. *See infra* Part IV.A.

37. *See infra* Part III.E.

blush with shame.[38]

The question of the exploitation of the so-called surrogate is deeply intertwined with the question of surrogacy as the sale of children.[39] Thus, some of the same rules that would protect children from being sold would also further the rights and interests of surrogates.[40] However, this Article's primary focus on the sale of children precludes a full, independent examination of all of the issues and contexts relevant to whether and when surrogacy constitutes an illicit exploitation of the surrogate. Moreover, even if surrogacy is not deemed exploitative for the surrogate, *it can still be the illicit sale of children.*[41] Hence, this Article leaves a more complete exploration of protecting surrogates from exploitation to future work.

II. WHAT IS "SALE OF CHILDREN"?

The term sale of children has established roots in significant international legal instruments.[42] The 1989 Convention on the Rights of the Child (CRC), the fundamental and foundational legal instrument on children's rights, states in Article 35: "State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[43]

The 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) echoes Article 35 of the CRC. Article 1 states in relevant part: "The objects of the present Convention are . . . to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children."[44]

The preparatory materials for the Hague Adoption Convention indicate that the term "child trafficking" included obtaining children illicitly for purposes of adoption, as well as obtaining children illicitly for other illegal purposes.[45] This is clearest in the foundational 1990 Report on Intercountry

38. *See infra* Part III.E.
39. *See infra* Part IV.
40. *See infra* Part IV.A.
41. *See infra* Part IV.A.
42. *See, e.g.*, CRC, *supra* note 4, at art. 35.
43. *Id.*
44. Hague Adoption Convention, *supra* note 21, at art. 1.
45. *See* David M. Smolin, *Child Laundering and the Hague Convention on Intercountry*

Adoption prepared by J.H.A. (Hans) van Loon (van Loon Report).[46] Section E of the van Loon Report is titled: "Abuses of Intercountry Adoption: International Child Trafficking."[47] The van Loon Report discussed "practices of international child trafficking either for purposes of adoption abroad, or under the cloak of adoption, for other—usually illegal—purposes."[48] The van Loon Report described three principle methods of obtaining children illicitly: "[T]he sale of children, consent obtained through fraud or duress[,] and child abduction. Combinations are possible."[49] The van Loon Report noted the use of the legal system, through provision of falsified documents and legal travel documents, to "'wash' the 'commodity'"—referring to the children.[50] Hence, the van Loon Report uses the term child trafficking to encompass situations which this author has described as "child laundering": obtaining children illicitly through force, fraud, or funds, providing the children with the status of adoptable orphans through the creation of falsified documents, and then processing these children for adoption through the official, legal channels of the intercountry adoption system.[51]

Although the CRC named child trafficking, the sale of children, and the abduction of children as three interrelated but distinct phenomena,[52] at that point in time there was not an overriding and clear international definition of child trafficking.[53] This is reflected in the way that the van Loon Report uses the term child trafficking as the overarching term to encompass child trafficking, the sale of children, and the abduction of children.[54]

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in

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Adoption: The Future and Past of Intercountry Adoption, 48 U. LOUISVILLE L. REV. 441, 452–61 (2010).

46. J.H.A. van Loon, *Report on Intercountry Adoption,* HAGUE CONF. ON PRIV. INT'L L. (Apr. 1, 1990) [hereinafter van Loon], http://www.hcch.net/upload/adoption_rpt1990vloon.pdf.

47. *Id.* at 51.

48. *Id.*

49. *Id.*

50. *Id.* at 53.

51. *See id*. at 51–55. *See generally* David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006).

52. *See* CRC, *supra* note 4, at art. 35.

53. Cathy Zimmerman & Heidi Stock, *Understanding and Addressing Violence Against Women: Human Trafficking*, WORLD HEALTH ORG. 1 (2012), http://apps.who.int/iris/bitstream/10665/77394/1/WHO_RHR_12.42_eng.pdf.

54. van Loon, *supra* note 46, at 51–55.

Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Palermo Protocol) has provided a more detailed and specific legal definition of "trafficking in persons."[55] This definition of trafficking in persons implicitly provides a definition of child trafficking by specifying which elements of trafficking in persons are unnecessary when a child—defined as "any person under eighteen years of age"[56]—is the trafficking victim.[57] The essence of the definition of child trafficking under the Palermo Protocol is: "The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons.'"[58] The definition of "exploitation" under the Palermo Protocol "shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[59]

The definition of exploitation, therefore, explicitly includes sexual exploitation, forced labor, and the removal of organs but allows for the inclusion of other forms of exploitation. This has created much debate over other possible forms of exploitation.[60]

The debate in respect to intercountry adoption has been whether obtaining children illicitly for purposes of an adoption could be exploitative, particularly where the adoptive parents did not knowingly arrange or participate in an illicit adoption.[61] This author has argued that exploitation nonetheless would exist because the child's capacity and need to love and bond is exploited as a part of an illicit process whereby the child is made to emotionally attach to strangers in the place of the child's original parents and family.[62] To make this clearer, it may be helpful for the reader to imagine a kind of science-fiction scenario in which someone, without your

55. *See* Palermo Protocol, *supra* note 3, at art. 3.

56. *Id.* at art. 3(d).

57. *Id.* at art. 3(c).

58. *Id.*

59. *Id.* at art. 3(a).

60. *See, e.g.*, Jini L. Roby & Taylor Brown, *Birth Parents as Victims of Trafficking in Intercountry Adoption*, *in* THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES 303, 303–28 (Robert L. Ballard, Naomi H. Goodno, Robert F. Cochran, Jr. & Jay A. Milbrandt eds., 2015).

61. *See id.*

62. *See* David M. Smolin, *Child Laundering as Exploitation, Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 33–45 (2007).

consent, kidnapped you, altered your memories, and then provided you with a substitute set of intimate and family relationships. Would you feel exploited if you became aware of this ruse? Would it make it non-exploitative if the substitutes were better than the originals by some measures—more attractive, wealthier, smarter, and more attentive? In an analogous manner, victims of child laundering lose the memories that should have been created with their original family because they never have the experiences that would have created those memories.[63] When victims of child laundering are wrongfully taken from their original family and given at a very young age to a substitute family, they are made to love the wrong people at an age when they almost cannot help but love whoever cares for them.[64] This seems a profound exploitation of the inherent character, vulnerability, and developmental needs of young children. It may be that the intermediaries who wrongfully take the children from their original families, rather than the unknowing adoptive families, are the exploiters, but nonetheless it is exploitation.[65] Of course, in cases of child laundering of older children who have already attached to their original families, the exploitation involved is even clearer, for such children undergo the completely unnecessary and extremely painful loss of the family they love while being expected to bond to a new family.[66] In addition, older children involved in child laundering generally lose their first language and are asked to adjust to an entirely new culture and nationality under conditions that are extremely traumatic.[67]

By contrast, some have argued that being placed in an adoptive home does not constitute exploitation and hence children obtained illicitly for adoption are not trafficking victims.[68] From this point of view, the enumerated forms of exploitation under the Palermo Protocol, such as sexual exploitation and forced labor, are so unlike the situation of a child in a loving adoptive home that the term exploitation is necessarily inapplicable to an adopted child.[69]

63. *Id.*
64. *Id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *See, e.g.*, OFFICE OF THE UNDER SECRETARY FOR GLOB. AFFAIRS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2005) [hereinafter TRAFFICKING REPORT].
69. *See id.*

Further, some argue that even if the children have not been exploited where children are obtained illicitly for adoption, *their original parents* have been exploited, at least in many typical child laundering scenarios.[70] Thus, Jini Roby and Taylor Brown apply the Palermo Protocol to the experiences of original parents in documented instances of child laundering and conclude that such scenarios would indeed involve exploitation and human trafficking of those parents.[71]

However one resolves these debates, the very fact of the debate has brought attention to the distinctions between child trafficking and the sale of children. Thus, there is general agreement that a child sold for purposes of adoption is a victim of the sale of children, whether or not he or she is a trafficked child.[72]

This point is underscored by the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sale of Children Protocol).[73] This Convention, created in 2000—the same year as the Palermo Protocol[74]—contains a specific definition of the sale of children: "Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."[75]

The Sale of Children Protocol requires State parties to fully cover in their "criminal or penal law," "[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption."[76] It is generally understood that the Hague Adoption Convention is the reference point for the term "applicable international instruments on adoption" in the Sale of Children Protocol.[77] Hence, the Sale of Children Protocol specifically includes the sale of children in the context of intercountry adoption within the Protocol's definition of the sale of children.[78]

70. *See* Smolin, *supra* note 51, at 4–18, 33.
71. *See* Roby & Brown, *supra* note 60, at 303–28.
72. *See, e.g.*, TRAFFICKING REPORT, *supra* note 68, at 21.
73. *See* Optional Protocol, *supra* note 1, at art. 3.
74. *See generally* Palermo Protocol, *supra* note 3.
75. *See* Optional Protocol, *supra* note 1, at art. 2(a).
76. *See id.* at art. 3.
77. *See* Smolin, *supra* note 51, at 189 & n.322 (citing S. REP. NO. 107-4, at 2 (2002) (Conf. Rep.)).
78. *See* Optional Protocol, *supra* note 1, at arts. 2–3.

Therefore, it is clear that there is not a complete overlap between child trafficking and the sale of children. The most specific difference is that the sale of children does not require exploitation; hence, some instances of the sale of children would not constitute child trafficking.[79] The reverse is also true. In some instances, child trafficking would not constitute the sale of children.[80] Thus, UNICEF's Handbook on the Sale of Children Protocol notes that the definition of human trafficking does not require that a sale of children exist, as the elements of human trafficking do not require any commercial transaction, remuneration, or consideration.[81] Thus, while it is common, and perhaps typical, for children to be sold during various stages of human trafficking, it is neither inevitable nor required.[82] This difference between trafficking and the sale of children points out the key role that "remuneration or any other consideration" plays in the definition of sale of children.[83] As suggested by the very word "sale," the essence of the sale of children is some kind of transfer of the child in exchange for some kind of financial benefit or consideration: a quid pro quo contractual sale of a child.[84] By contrast, the essence of the legal concept of child trafficking is some kind of transfer, broadly construed as "recruitment, transportation, transfer, harbouring or receipt of persons . . . for purposes of exploitation."[85]

Most of the time, these distinctions between child trafficking and sale of children are irrelevant, as most instances of sale of children are exploitative of the children and most instances of child trafficking involve a profit or financial motive.[86] Nonetheless, the distinction matters in some instances, including adoption and (as shall be seen) commercial surrogacy.[87] Thus, it is helpful to remember that child trafficking is transfer of a child for purposes of exploitation, while sale of children is transfer of a child for remuneration

79. *See id.*; TRAFFICKING REPORT, *supra* note 68, at 10–11.

80. *Cf.* Palermo Protocol, *supra* note 3, at art. 3; Optional Protocol, *supra* note 1, at arts. 2–3.

81. UNICEF INNOCENTI RESEARCH CTR., HANDBOOK ON THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 10 (2009) [hereinafter HANDBOOK ON OPTIONAL PROTOCOL], http://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf.

82. *See id.*

83. *See* Optional Protocol, *supra* note 1, at art. 2.

84. *See id.*

85. *See* Palermo Protocol, *supra* note 3, at art. 3.

86. *See* HANDBOOK ON OPTIONAL PROTOCOL, *supra* note 81, at 9–11.

87. *See infra* Part IV.

or any other consideration.[88]

III. WHAT IS "SURROGACY"?

A. Surrogate as "Substitute"

The underlying word "surrogate" has several meanings, but the core relevant concept appears to be that of a "substitute," or one who acts in the place of another.[89] This concept of a substitute therefore implicitly involves a comparison of two persons in respect to a particular role, where one party is the normal or expected person for that role, but another instead fulfills the role as a kind of replacement.

Before the recent era of Assisted Reproductive Technology (ART), the term "surrogate mother" would have been commonly understood as one who informally "mothers" a child in place of the biological mother.[90] For example, someone might refer to an unrelated person, stepmother, sister, aunt, or grandmother as a surrogate mother if she performed mothering functions in the temporary or permanent absence of the biological mother.[91] Similarly, the term surrogate might be used when an orphaned baby animal is put in the care of an unrelated mother, sometimes in the hope of establishing a nursing relationship or joining a litter.[92]

The concept of a substitute as the basis of surrogacy indicates why the term appears to be such a misnomer.[93] In traditional surrogacy, achieved through artificial insemination (AI), the so-called surrogate is in fact the genetic and gestational mother—the natural mother.[94] Calling her a

88. *Cf.* Palermo Protocol, *supra* note 3, at art 3; Optional Protocol, *supra* note 1, at art. 2.

89. *See Surrogate*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/surrogate?show=0&t=1417823122 (last visited Oct. 6, 2015).

90. *See, e.g.*, Sara Reichman, *Lost Families*, *in* FLARES OF MEMORY: STORIES OF CHILDHOOD DURING THE HOLOCAUST 119, 119–20 (Anita Brostoff ed., 2001).

91. AMY J. L. BAKER & PAUL R. FINE, SURVIVING PARENTAL ALIENATION: A JOURNEY OF HOPE AND HEALING 112, 118 (2014) (discussing surrogate mothers in the context of parental alienation syndrome); Reichman, *supra* note 90, at 119–20.

92. *See generally* LISA ROGAK, ONE BIG HAPPY FAMILY: HEARTWARMING STORIES OF ANIMALS CARING FOR ONE ANOTHER (2013).

93. *See* FIELD, *supra* note 18, at 4–5.

94. JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 426–27 (LexisNexis ed., 2nd ed. 2006); FIELD, *supra* note 18, at 4–5; John A. Robertson, *Surrogate Mothers: Not So Novel After All*, 13 HASTINGS CTR. REP. 28, 28 (1983) (stating that the term "surrogate mother" is a misnomer as an adoptive mother is a substitute and the surrogate is the "natural mother").

substitute seems odd, when it is in fact the intended parent who is seeking to substitute herself, legally and in terms of child custody, for the natural mother.[95] It would seem more accurate in traditional surrogacy for the intended mother, particularly where genetically unrelated, to be called the surrogate.[96]

B. Sexuality, Surrogacy, and the "Surrogate Wife"

Professor Martha Field suggested that the surrogate could be labeled a "surrogate wife."[97] This terminology is reminiscent of the historical antecedents of surrogacy in scriptural Genesis narratives and the ancient world, which are described below.[98] The surrogate performs wifely roles or functions for a man in securing him a child and heir in an instance where the actual wife, for some reason, is unable to perform this procreative role.[99]

However, the terminology of surrogate wife has not been popular, presumably because it suggests a sexual intimacy between the surrogate and the genetic or intended father, which modern practice strives to deny.[100] Modern surrogacy is based upon the viewpoint that an intended father and surrogate are not connected in a sexual way, even when they are jointly involved in the fundamental procreative processes necessary to bring a child to birth.[101] Hence, in modern traditional surrogacy there is a presumption that a man whose sperm is artificially inseminated into a woman is not involved sexually with that woman, even if he intends to father the resulting child.[102] Similarly, in gestational surrogacy, whereby an embryo is created through in-vitro fertilization (IVF) and pregnancy is achieved through

95. Robertson, *supra* note 94, at 28.

96. *See id.* ("It is the adoptive mother who is the surrogate mother for the child, since she parents a child borne by another."); *see also* Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 1 (1988).

97. FIELD, *supra* note 18, at 5; *see also* Robertson, *supra* note 94, at 28 (suggesting "surrogate spouse").

98. *See infra* notes 150–241 and accompanying text.

99. *See infra* notes 150–241 and accompanying text.

100. *See, e.g.*, CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 46 (2d ed. 2006).

101. Cyril C. Means, Jr., *Surrogacy v. the Thirteenth Amendment*, 4 N.Y. L. SCH. HUM. RTS. ANN. 445, 468 (1987) ("The procreation occurs between the surrogate and the father, not between the father and his wife.").

102. RICHARD POSNER, SEX AND REASON 424–25 (1992).

embryo transfer into the woman's uterus,[103] there is a presumption that the man seeking to become a father through the surrogate gestating and birthing his child is not sexually involved with the surrogate, even when he is the genetic father.[104] This contemporary perspective truncates the biological meanings of sexuality by removing the sexuality from procreative processes. Thus, just as contraception and abortion rights are designed to permit one to engage in sexual intimacy while avoiding the conception or birth of a child, traditional and gestational surrogacy are designed to provide procreation without sexual intimacy.

Removing the sexuality from procreation may be more of a legal fiction, as, biologically speaking, any form of procreation that involves the genetic contributions of two individuals is inherently and by definition sexual. Thus, procreation is typically divided into asexual procreation and sexual procreation. Asexual procreation, used by bacteria, algae, and yeast,[105] is achieved by cell division or cloning and produces offspring genetically identical to the single parent. Sexual reproduction involves the genetic contributions of two individuals and then a fusion and genetic recombination that produces offspring genetically distinct from either of the two parents.[106] The distinction between sexual and asexual modes of reproduction is legally significant in regard to intellectual property rules regarding plants, with separate legal regimes for plants produced asexually (through grafting) and plants produced sexually (through seeds).[107] From a biological perspective, surrogacy as currently practiced—whether through AI or IVF combined with embryo transfer—is inherently part of a sexual process of procreation.

Beyond the terminology, the sexual nature of procreative processes is intimately linked to human rights and human dignity questions associated with surrogacy.[108] Does it comport with human dignity to de-couple and

103. *See* KINDREGAN & MCBRIEN, *supra* note 100, at 132–35.

104. *See* POSNER, *supra* note 102, at 428.

105. *See, e.g.*, JAMES MORRIS, DANIEL HARTL, ANDREW KNOLL & ROBERT LUE, BIOLOGY: HOW LIFE WORKS 42-2 to 42-6 (2013).

106. *See id.*

107. *See* Plant Variety Protection Act, 7 U.S.C. §§ 2321–82 (2012) (governing plants that sexually reproduce by seed); Plant Patent Act of 1930, 35 U.S.C. §§ 161–64 (2012) (governing asexually reproducing plants); J. E. M. Ag Supply, Inc. v. Pioneers Hi-Bred Int'l, Inc., 534 U.S. 124, 132, 138 (2001); ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 405–09 (5th ed. 2010); *Plant Patents*, NOLO, http://www.nolo.com/legal-encyclopedia/plant-patents.html (last visited Sept. 23, 2015).

108. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J.

commercialize the procreative aspects of human sexuality? Is creating children through such instrumental, commercialized "procreative relationships" an advance or regression of human dignity?[109]

Controversially, the possibly sexual nature of commercial surrogacy to many is analogous to prostitution or sex work.[110] Is the sale of procreative processes, such as pregnancy, gestation, and childbirth as a service similar to the sale of sexual intercourse or other sexual acts as a service?[111] Given the diversity of viewpoints and legal approaches on prostitution and sex work the analogy, even if apt in some ways, does not dictate one clearly dominant approach to surrogacy. Some perceive sex work with consenting adults as a matter of personal autonomy for both the sex worker and the customer and seek only to regulate for the purposes of preventing the involvement of children and coercion (and hence trafficking) and providing safety precautions and improved working conditions.[112] Others perceive sex work as inherently exploitative for the sex worker and seek to prohibit the sale and purchase of sexual services.[113] Among those seeking to prohibit or discourage sex work, some seek to prohibit only the purchase of sex and offer of sexual services by third parties, in order to avoid further stigmatizing the sex worker, who is to be treated as an exploited victim rather than as a criminal.[114]

1223, 1227 (2013).

109. *See, e.g.*, KAJSA EKIS EKMAN, BEING AND BEING BOUGHT: PROSTITUTION, SURROGACY AND THE SPLIT SELF 163–92 (Suzanne Martin Cheadle trans., 2010); FIELD, *supra* note 18, at 25–45; Laufer-Ukeles, *supra* note 108, at 1239; William Levada, *Instruction* Dignitas Personae *on Certain Bioethical Questions*, VATICAN (2008), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html; Joseph Ratzinger, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, VATICAN (1987), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

110. *See, e.g.*, FIELD, *supra* note 18, at 28–30.

111. *See id.*

112. *See, e.g.*, *Prostitution: A Personal Choice*, ECONOMIST (Aug. 9, 2014) [hereinafter *Prostitution*], http://www.economist.com/news/leaders/21611063-internet-making-buying-and-selling-sex-easier-and-safer-governments-should-stop; *see also 100 Countries and Their Prostitution Policies*, PROCON.ORG (Apr. 1, 2015), http://prostitution.procon.org/view.resource.php?resourceID=000772.

113. *See* EKMAN, *supra* note 109, at 3–121.

114. *See Prostitution*, *supra* note 112; *100 Countries and Their Prostitution Policies*, *supra* note 112.

Whatever position one takes regarding prostitution or sex work, surrogacy is fundamentally different to the extent that it is intended to produce a child who certainly can neither consent nor bargain. Thus, even if one views commercial surrogacy for the surrogate and intended parents as a legitimate marketplace in procreative services in which autonomous actors should be permitted to bargain within certain regulatory limits, such a view cannot itself provide an ultimate answer to the legitimacy of surrogacy. The question is whether a child is being sold along with such procreative services. If and when surrogacy includes the sale of a child, it becomes completely illegitimate under international standards,[115] even if it also involves an allegedly permissible sale of procreative services.

The analogy between surrogacy and the sale of sex acts alludes to the question of whether a child is being sold in surrogacy. It is a common truism of prostitution that the payment is made not just for the sex but also for the prostitute to leave after the sex. It is not just sex that is being purchased, but sex with no strings of continuing relationship or personal obligation.[116] Modern surrogacy is similar, since most intended parents would not pay for the procreative services of gestating and giving birth to a child if they knew the surrogate intended to keep the child or co-parent the child with the intended parents.[117] Viewed from a realistic perspective, typically the surrogate is being paid to turn over the child and walk away from both the child and the intended parents. Even in the exceptional cases in which there is a continuing relationship between the surrogate and the intended parents, co-parenting by the surrogate is not permitted or intended and a continuing relationship is at the discretion of the intended parents.[118] Hence, in the modern world, the surrogate, like the sex worker, is being paid not only for services, but also for walking away. Further, the surrogate is being paid not only for walking away from the client, but for walking away from the child by physically and legally handing over the child. This was made eminently clear in the contracts underlying the famous *Baby M.* case,

115. *See* Optional Protocol, *supra* note 1, at arts. 2–3.

116. *See, e.g.*, Jonah Goldberg, *The Cartagena-Hooker Cover-Up*, REALCLEARPOLITICS (Oct. 11, 2014), http://www.realclearpolitics.com/articles/2014/10/11/the_cartagena-hooker_cover-up_124264.html.

117. *See generally* Pamela Boykoff & Kocha Olarn, *Gay Couple in Legal Fight with Thai Surrogate over Baby*, CNN (July 22, 2015), http://www.cnn.com/2015/07/22/asia/thailand-surrogacy-gay-couple.

118. *See, e.g.*, *In re* the Paternity of F.T.R., 833 N.W.2d 634, 638, 653 (Wis. 2013).

which defined a "surrogate mother" as going through the necessary procedures "for the purpose of becoming pregnant and giving birth to a child and *surrendering the child*."[119] Hence, the analogy of surrogacy to sex work suggests the practical reality that surrogacy includes both the sale of a procreative service and also the sale of custodial rights and physical custody of a child.[120]

C. Alternative Terminologies for Surrogacy

This Article conforms to the current conventional terminology of surrogate and intended parent as a matter of convenience and communication. However, it is helpful to explore alternative terminology, as the debate over language illustrates underlying legal and ethical tensions. In addition, over time there may be a space created for serious consideration of alternative terminology.

Fundamentally, as the discussion above indicates, the term surrogate mother appears to be misleading and ambiguous.[121] One can wonder about the purpose of using such problematic terminology. Unfortunately, it appears that the terms surrogate mother or surrogate initially were used to denigrate the status of the natural mother in traditional surrogacy and to elevate the status of legal strangers who wish, essentially through pre-conception contracts for adoption of a child, to become the sole legal parents of a child.[122] My own recommended terminology for traditional surrogacy would be natural mother—or just mother—for the surrogate, and "prospective adoptive parent" for the intended, non-genetically related mother. Where the genetic father is the intended father, it would be simpler to label him as the father of the child.

Even in gestational surrogacy, the so-called surrogate mother who is not genetically related to the child has gestated and given birth to the child and the intended mother is not necessarily genetically related to the child. Here, "gestational and birth mother," or gestational mother for short, would be a

119. *See In re* Baby M., 537 A.2d 1227, 1272 (N.J. 1988).

120. *Id.* at 1240 ("[W]e have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead.").

121. *See supra* notes 89–109 and accompanying text.

122. *See Baby M.*, 537 A.2d at 1265–69 ("Surrogate Parenting Agreement" labeling Mary Beth Whitehead as "surrogate" in contract designed to eliminate Whitehead's custodial and parental rights.).

better term for the so-called surrogate. The terms "contractual parent" or "intended contractual parent" would fit for what is now termed the intended parent. It would be useful to identify the genetic parents in such arrangements as well, whether they are intended parents or not. For example, it would be helpful to use terminology such as the "genetic contractual parent" or "unrelated contractual parent." Once again, if the genetic father is the intended father, one could simply call him the father, although for clarity the term "genetic contractual parent" would also work.

The term "intended parent" is convenient, but also ideological and misleading. The term intended parent seems designed to imply that intention is, or should be, the fundamental determining factor in parentage issues,[123] which is controversial at best and demonstrably inaccurate in most instances outside of the context of surrogacy. Normally, no matter how much one person might intend to be the father or mother of someone else's biological child, this intention is totally irrelevant to parentage. Taking custody of another's child based purely on the "intention" of one party would be kidnapping. This is why I prefer the term contractual parent, or perhaps intended contractual parent, to describe the view that surrogacy is fundamentally one of *parentage by contractual agreement*.[124] Contemporary surrogacy is based on a legal theory of contractual parentage, with the relevant intentions memorialized in a contract.[125] Of course, this is why so many core legal issues related to surrogacy are contract issues, such as the enforceability of the contractual terms, what happens when parties change their minds or circumstances change, whether the contractual terms are against public policy, and whether the contractual terms explicitly or implicitly constitute the illicit sale of children.[126]

It is important to note that gestational surrogacy, arising in the field of ART, generally rejects the premise that genetics determines parentage

123. *See* MADELYN FREUNDLICH, ADOPTION AND ETHICS: ADOPTION AND ASSISTED REPRODUCTION 15 (2001) ("Fertility industry promotes the intentional view of parentage."); Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2277 (2012).

124. *See, e.g.*, *Baby M.*, 537 A.2d at 1265–73; *infra* notes 377–463 and accompanying text (discussing California statutory and case law on surrogacy). *See generally* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014).

125. *See* Margalit, *supra* note 124, at 456.

126. *See id.*

because it often involves the "donation" (more realistically purchase)[127] of gametes from individuals who have been promised protection from the status of parenthood.[128] In regard to ARTs, it is common to speak of gamete donors.[129] This terminology is designed to distance these genetic progenitors of children from the term parent and from the commercial nature of the transaction, which frequently involves payments to the donors and extensive profit-making by intermediaries in what has become an extensive market in human sperm and eggs.[130] Hence, it would be inconsistent to strip the gestational mother of the status of parenthood due to a lack of genetic link when many contractual intended parents also lack a genetic link and when one or two genetic parents are deemed "gamete donors" and not regarded as parents.[131]

The use of the term "gestational carrier" in instances of gestational surrogacy seems designed particularly to deny use of the term mother and to emphasize gestational surrogacy as a service.[132] The legal principle that one who gives birth to a child is not, even ab initio, a mother of that child is at this point an experimental and misunderstood principle.[133] Even where it is followed, it is based not merely on the status of a genetically unrelated gestational mother, but rather primarily on the theory of contractual parentage.[134] The term gestational carrier is mistakenly viewed as based on the legal theory that an unrelated gestational mother inherently is never a mother and, hence, is contracting solely for procreative services and not for the transfer or sale of the child.[135] As we will see, this theory is erroneous, for even in jurisdictions applying the rule that a gestational surrogate is, ab initio, not a mother, a woman who gestates and gives birth to a child to

127. *See* DAAR, *supra* note 94, at 201 ("'[D]onors' . . . [is] a clear misnomer given that men and women who supply their gametes to the infertile are typically paid for said contribution.").

128. *See generally* Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225 (1998); Larry I. Palmer, *Who Are the Parents of Biotechnological Children?*, 35 JURIMETRICS J. 17 (1994); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

129. *See, e.g.*, UNIF. PARENTAGE ACT § 102(8) (UNIF. LAW COMM'N 2002).

130. *See* DEBORAH SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION x–xi, 35–46 (2006).

131. John Lawrence Hill, *What Does It Mean to Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 380 (1991).

132. *See, e.g.*, CAL. FAM. CODE § 7960 (f)(2) (West 2013).

133. *See* Johnson v. Calvert, 851 P.2d 776, 783–84 (Cal. 1993).

134. *See infra* note 261 and accompanying text.

135. *See Johnson*, 851 P.2d at 783–84.

whom she is genetically unrelated remains the mother absent a valid, pre-embryo transfer surrogacy contract. Thus, it is the surrogacy agreement that renders the woman not a mother, rather than the mere status of being an unrelated gestational mother. Therefore, the gestational surrogacy contract implicitly or explicitly includes the woman's agreement to give up her parental rights and status.[136] Under these circumstances, it is unwise to use the term gestational carrier because the term implicitly includes the very sale of children it seeks to avoid and inconsistently and wrongfully diminishes the motherhood of such women.

D. Technology and Surrogacy

One of the difficulties in evaluating surrogacy is its purported newness.[137] There is an implicit narrative in which surrogacy is a product of developing technologies and, as something "new," it cannot be evaluated by the laws, ethics, and practices of the past.[138] However, there is also a contrasting narrative in which surrogacy is viewed as the "least technological of reproductive technologies," as well as "the oldest" with forms of surrogacy in the ancient world involving "normal coitus."[139] Further, even with the more scientific forms of surrogacy, many of the technologies involved are not that new.[140] The technology of artificial insemination (AI)—basic to traditional surrogacy—is not particularly new, with successful animal births through AI extending back to the eighteenth century.[141] While newer technologies related to storage and other matters may have improved the capacity to commercialize AI for human births, the basic ethical dilemmas of traditional surrogacy as a form of human procreation remain unchanged. Human procreation through IVF and

136. *See infra* Part IV.B, .E.

137. Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J. (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate.

138. *See, e.g.*, Laufer-Ukeles, *supra* note 108, at 1224–25 (citing multiple sources representative of the viewpoint that rejecting benefits of surrogacy is "reactive and anti-technological").

139. *See* BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, BIOETHICS: HEALTH CARE LAW AND ETHICS 133 (6th ed. 2008). On surrogacy-type practices in the ancient world, see *infra* Part III.E.

140. *See* Laufer-Ukeles, *supra* note 108, at 1224–25.

141. R. H. Foote, *The History of Artificial Insemination: Selected Notes and Notables*, J. ANIMAL SCI. (2002), https://www.asas.org/docs/publications/footehist.pdf?sfvrsn=0.

embryo transfer, the basic technologies underlying gestational surrogacy, are much newer. The first IVF human baby, Louise Brown, was born in 1978.[142] Even there, however, there have been almost four decades of experience with the basic technologies of IVF-related births. What is, in fact, newest in gestational surrogacy is the large-scale transfer of embryos into women who are not the contractually intended parents in the contexts of commercialization and medical tourism.[143]

Technological advancement is a double-edged sword, capable of being used for positive or negative purposes, potentially furthering human dignity, or diminishing and degrading human dignity.[144] The claim that scientific and technological advancement creates its own ethical imperative, which renders traditional ethical concerns irrelevant, is by now an old siren song with a sad history of abuse.[145] Science and technology provides for new possibilities, but the human capacities for exploiting others remain ever-present, with inequality of all kinds seemingly expanding rather than contracting in the contemporary world.[146] In a global context of extreme inequality, both within and between nations,[147] the expansion of technologies cannot be deemed to establish a kind of technological exemption from ethics and law. New technological capacities, especially for human procreation, need to be evaluated within ethical and legal norms that are deeply rooted in societies and nations and should be subject to the principles of international law.[148]

142. *See* GREGORY E. PENCE, MEDICAL ETHICS: ACCOUNTS OF GROUNDBREAKING CASES 97–98 (6th ed. 2011); Reemah M.A. Kamel, *Assisted Reproductive Technology After the Birth of Louise Brown*, 3 GYNECOLOGY & OBSTETRICS 1 (2013), http://www.omicsonline.org/assisted-reproductive-technology-after-the-birth-of-louise-brown-2161-0932.1000156.pdf.

143. *See, e.g.*, Zoe Daniel, *The Baby Makers*, ABC NEWS (Apr. 15, 2014), http://www.abc.net.au/foreign/content/2014/s3986236.htm.

144. *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (1932).

145. *See, e.g.*, Henry K. Beecher, *Ethics and Clinical Research*, 274 NEW ENG. J. MED. 367, 367 (1966) (quoting Pope Pius XII); David M. Smolin, *The Tuskegee Syphilis Experiment, Social Change, and the Future of Bioethics*, 3 FAULKNER L. REV. 229, 235 (2012).

146. *See generally* JEAN DRÈZE & AMARTYA SEN, AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS (2013); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2013); *Global Inequality*, INEQUALITY.ORG, http://inequality.org/global-inequality/ (last visited Sept. 25, 2015); Ned Resnikoff, *Global Inequality Is a Rising Concern for Elites*, AL JAZEERA AM. (Nov. 11, 2014, 12:24 PM), http://america.aljazeera.com/articles/2014/11/11/global-inequality isarisingconcernforelites.html.

147. *See supra* note 146 and accompanying text.

148. Lisa Ikemoto, *The Role of International Law for Surrogacy Must be Expanded*, N.Y. TIMES

Thus, faced with claims of newness, it may be particularly helpful to use what is ancient as a reference and comparison point, a distant but still relevant mirror.[149] Hence, the next section examines some commonly cited precedents or precursors of so-called surrogacy in the ancient world.

E. Historical Antecedents Viewed Through Multiple Perspectives

A significant historical antecedent of surrogacy occurs in the Book of Genesis, the first book in the Hebrew Bible and in both the Jewish and Christian scriptures.[150] The Book of Genesis also has a special but complex status for Muslims as a corrupted form of scripture.[151]

The *Genesis* narratives in which surrogacy occurs concern the family life of Abraham, the foundational figure in the Abrahamic, monotheistic religions of Judaism, Christianity, and Islam.[152] Hence, these stories of Abraham, Sarah, Hagar, Jacob (Israel), Rachel, Leah, Bilhah, and Zilpah have special significance for a majority of humankind, since there are approximately 3.8 billion people in the world today who identify with one of the Abrahamic religions.[153]

The existence of these stories in scriptural texts describing the family life of the foundational figure of the three major monotheistic religions makes them significant not only as a mirror of the ancient past, but also as a culture-forming set of stories that have been repeatedly told, read, and studied in diverse cultures for more than two thousand years.[154] Thus, even for those who take a highly skeptical and purely academic approach to these

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(Sept. 22, 2014) http://www.nytimes.com/roomfordebate/2014/09/22/hiring-a-woman-for-her-womb/the-role-of-international-law-for-surrogacy-must-be-expanded.

149. *See infra* Part III.E.

150. *See* RAYMOND B. DILLARD & TREMPER LONGMAN III, AN INTRODUCTION TO THE OLD TESTAMENT 37 (1st ed. 1994); GENESIS (Robert Alter trans., 1996); THE SONCINO CHUMASH: HEBREW TEXT AND ENGLISH TRANSLATION (A. Cohen ed., 1983).

151. *See, e.g.*, STEPHEN PROTHERO, GOD IS NOT ONE: THE EIGHT RIVAL RELIGIONS THAT RUN THE WORLD 41 (2010).

152. *See id*. at 26.

153. *See The Global Religious Landscape*, PEW RES. CTR. (Dec. 18, 2012), http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/; *The Global Religious Landscape: A Report on the Size and Distribution of the World's Major Religious Groups as of 2010*, PEW RES. CTR. (Dec. 2012) [hereinafter *2010 Global Religious Landscape Report*], http://www.pewforum.org/files/2014/01/global-religion-full.pdf.

154. *See infra* note 156.

Genesis narratives and doubt whether Abraham, Sarah, Hagar, and the others described in the narratives ever existed, it is necessary to see the stories as mirrors of beliefs and attitudes that have had significance in both the ancient world and the millennia since.

The stories of Abraham and his extended family are set in the ancient Middle East and Mesopotamia approximately four thousand years ago.[155] Even from an academic, historical-critical approach to these texts, there can be no doubt that *Genesis* is a very old book, compiled at least 2300 years ago from pre-existing sources reflecting much earlier times.[156] Hence, whether viewed from a secular or religious perspective, the *Genesis* narratives concerning surrogacy are a very significant mirror and vantage point from which to view our current ethical and legal dilemmas regarding surrogacy. Indeed, secular sources on surrogacy commonly cite the *Genesis* accounts as examples or antecedents of surrogacy practice.[157]

Usha Smerdon, in her significant article on global surrogacy between India and the United States, cites both the *Genesis* surrogacy narratives and the surrogacy narratives in the Bhagvata Purana, a significant Hindu text.[158] This is a useful reminder that in the global context of surrogacy, it can be useful to examine a variety of religiously and culturally significant texts to provide a broader context for evaluating contemporary practices.[159]

1. Hagar, Bilhah, and Zilpah: Scriptural and Religious Narratives

A 1994 study of surrogacy published by the American Bar Association (ABA) and authored by attorney Julia J. Tate is titled *Surrogacy: What Progress Since Hagar, Bilhah, and Zilpah!*[160] The use of the exclamation mark, rather than the question mark, suggests the author's viewpoint that

155. TERENCE E. FRETHEIM, ABRAHAM: TRIALS OF FAMILY AND FAITH 22 (2007); VICTOR H. MATTHEWS, MANNERS & CUSTOMS IN THE BIBLE 24–27 (3d ed. 2006).

156. *See, e.g.*, DILLARD & LONGMAN, *supra* note 150, at 38–52; RICHARD ELLIOTT FRIEDMAN, WHO WROTE THE BIBLE? (1987).

157. *See, e.g.*, FIELD, *supra* note 18, at 5; FURROW, GREANEY, JOHNSON, JOST & SCHWARTZ, *supra* note 139, at 133.

158. Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 16 (2008).

159. *See id.*

160. *See generally* JULIA TATE, SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH! (1994).

great progress has been made.[161] The stories of Hagar, Bilhah, and Zilpah, and their roles in reproductive practices commonly cited as ancient or Biblical forms of surrogacy, are, of course, drawn from the scriptural book of *Genesis*.[162] Unfortunately, much legal scholarship provides erroneous or misleading portraits of these ancient practices. For example, Tate's study says:

> In [b]iblical times, three little-known women, Hagar, Bilhah, and Zilpah, all served as involuntary surrogates, bearing a total of four [sic] sons, after their mistresses, Sarai, Rachel, and Leah, had given them over to their husbands, Abram and Jacob. No doubt these involuntary surrogates had very different experiences than those of today's surrogates. They had no choice about the matter, being slaves. They certainly were not paid the equivalent of today's $10,000.00 fee! Their sons were taken from them and their mistresses named them. No court intervened on their behalves when their mistresses' husbands raped them or when their children were taken from them.[163]

This ABA published study follows a strategy of distancing: by denigrating the ancient practices of surrogacy as particularly brutal, the author means to establish a contrast that will establish the ethical legitimacy of contemporary surrogacy practices. As we shall see, however, in significant ways the practice of surrogacy in *Genesis* was more humane, particularly in the context of their time, than the comparative practices today.[164] This is particularly true when one considers the developments—since Tate's study—of large-scale commercial international surrogacy.[165]

First, Tate is simply wrong when she assumes that "their sons were taken from them."[166] The Hagar *Genesis* narrative make it clear that Hagar is the primary mother raising Ishmael. Indeed, after Sarah gives birth to

161. *See id.* at 1 ("No doubt these involuntary surrogates had very different experiences than those of today's surrogates.").

162. *See Genesis* 16:1–16, 17:17–26, 21:8–21, 29:24, 29, 30:1–13; NAOMI STEINBERG, KINSHIP AND MARRIAGE IN GENESIS: A HOUSEHOLD ECONOMIC PERSPECTIVE 35–86, 115–34 (1993).

163. TATE, *supra* note 160, at 1.

164. *Cf.* Smerdon, *supra* note 158, at 16–17 (contrasting the *Genesis* narrative of Hagar and Sarah with contemporary commercial surrogacy).

165. *See id.* at 22.

166. TATE, *supra* note 160, at 1.

Isaac, Sarah demands that Abraham cast out Hagar and Ishmael together as mother and son.[167] The story of God's repeated provision and intervention for Hagar and her son Ishmael is a significant part of the *Genesis* narrative.[168] Indeed, the *Genesis* narrative has an angel of the Lord promising Hagar that God would greatly multiply Hagar's descendants.[169] This is a promise that in the narrative is clearly to be fulfilled through Hagar's status as Ishmael's mother—a status that no one in the narratives denies.[170] Thus, in the *Genesis* narrative, God considers Hagar to be Ishmael's mother.[171] Of course, in Islamic tradition Hagar (Hajar) is especially revered as a matriarchal figure who, through Ishmael, is a progenitor of the Prophet Mohammed and a devout and brave woman.[172] Indeed, Muslims remember Hagar's travails, bravery, faith, and special role as the mother of Ishmael as a part of the hajj, or pilgrimage, to Mecca.[173]

While Hagar is a particularly significant figure in *Genesis* and in Islamic tradition, the acknowledgement of her as the mother of her child would have been typical in this kind of arrangement.[174] At a time when there was no substitute for nursing, one would assume that surrogates nursed and cared for their children. As maidservants of the intended mothers, surrogate mothers likely helped raise even their mistresses' natural children, and nursed and raised the children the surrogates themselves carried and birthed.[175] The assignment of the children to the intended mothers was symbolic, while practically speaking the children were raised primarily by the surrogate mothers.[176]

The *Genesis* narratives involving Bilhah and Zilpah, the maidservants of

167. *See Genesis* 21:10.

168. *See id.* at 16:1–16, 17:17–26, 21:8–21.

169. *See id.* at 16:10.

170. *See id.* at 16:1–16, 17:17–26, 21:8–21.

171. *See id.* at 16:7–14.

172. Robert Crotty, *Hagar/Haj*ar, *Muslim Women and Islam: Reflections on the Historical and Theological Ramifications of the Story of Ishmael's Mother*, *in* WOMEN IN ISLAM: REFLECTIONS ON HISTORICAL AND CONTEMPORARY RESEARCH 165, 182 (Terence Lovat ed., 2012).

173. *See id.* at 165, 182. *See generally* PHYLLIS TRIBLE & LETTY M. RUSSELL, HAGAR, SARAH, AND THEIR CHILDREN: JEWISH, CHRISTIAN, AND MUSLIM PERSPECTIVES (2006); *Hajj: Pilgrimage to Mecca*, W. RELIGIONS, http://www.hobart.k12.in.us/ksms/worldreligions/Islam/hajj.htm (last visited Oct. 15, 2015).

174. *See* STEINBERG, *supra* note 162, at 65.

175. *See* Barbara Katz Rothman, *Motherhood: Beyond Patriarchy,* 13 NOVA L. REV. 481, 485 (1989).

176. *See* STEINBERG, *supra* note 162, at 62; Rothman, *supra* note 175, at 485.

Rachel and Leah, are the other major examples of so-called surrogate motherhood in *Genesis*.[177] Again, Tate's characterization of the arrangements as ones in which the children are simply taken from the surrogate mothers is erroneous.[178] Thus, in the *Genesis* genealogies, the sons of Jacob (Israel) who comprise the roots of the twelve tribes of Israel are grouped according to the four mothers (Rachel, Leah, Bilhah, and Zilpah) who bore sons to Jacob, with the four sons born to Bilhah and Zilpah assigned as their sons, rather than their mistresses Rachel and Leah.[179] Hence, *Genesis* reads: "[T]he sons of Bilhah, Rachel's handmaid; Dan, and Naphtali: and the sons of Zilpah, Leah's handmaid; Gad, and Asher."[180] The very structure of the twelve tribes of Israel, which comprise the family roots and structure of the nation of Israel in the Hebrew Bible,[181] are based on acknowledging the motherhood of Bilhah and Zilpah.

Tate accuses Abraham, the father of the faith for Jews, Muslims, and Christians alike, as well as Jacob, the namesake (when he is re-named Israel)[182] of the Jewish nation, as rapists of the surrogates.[183] She clearly misunderstands the nature of the relationship between the fathers and the so-called surrogates (the Bible never uses this term). The *Genesis* narrative states that Sarah gave Hagar to Abraham to be his wife.[184] The arrangement, in which a first wife gives her husband her maidservant as a wife for the sake of providing children and heirs, would have substantially raised the status and position of the maidservant—particularly if she succeeded in bearing children.[185] These wives were sometimes called concubines because they were secondary wives, lesser in position than the first wife, but wives nonetheless.[186] To their mistresses they remained servants or slaves, but in relationship to their husbands they were wives and in relationship to their

177. *See Genesis* 29:24, 29, 30:1–13.
178. *See* TATE, *supra* note 160, at 1.
179. *See Genesis* 35:23–26.
180. *Id.*
181. *See, e.g.*, *id.* at 49:1–28; *Joshua* 13–22.
182. *See Genesis* 32:28.
183. *See* TATE, *supra* note 160, at 1.
184. *See Genesis* 16:3. At this point in the text, Sarah is still named "Sarai" and Abraham is still named "Abram." *Id.*
185. *See id.* at 16:4–5; HENNIE J. MARSMAN, WOMEN IN UGARIT AND ISRAEL: THEIR SOCIAL AND RELIGIOUS POSITION IN THE CONTEXT OF THE ANCIENT NEAR EAST 105, 143–44, 451–52 (2003); STEINBERG, *supra* note 162, at 61–65.
186. *See* MARSMAN, *supra* note 185, at 485; STEINBERG, *supra* note 162, at 79.

children they were mothers.[187] The surrogates, as we call them, were not women to be used and then discarded, but rather were wives and mothers to whom other family members owed continuing and significant duties.[188]

Tate's accusation that the women were involuntary surrogates who were raped misses the point. While it is true that the text does not record whether or not the women's consent was gained, since this was consent to a form of marriage, this would have been typical in this cultural context.[189] In a world in which marriage was generally arranged by parents—and for servants or slaves by their masters—the consent of the spouses was secondary and perhaps assumed or viewed as gratuitous.[190] For example, the *Genesis* text never tells us if Abraham's son Isaac ever "consents" to the marriage his father (and father's servant) arranges for him. Isaac's bride Rebekah is brought home to him without him ever having met her.[191] Rebekah appears to be given somewhat of a choice, although she must make her decision before ever meeting her groom.[192] Jacob contracts with Laban, Rachel's father, to marry Rachel in exchange for seven years of labor, but the text never indicates whether Rachel herself (presumably a child at the time) was consulted prior to the agreement.[193] Thus, Hagar, Bilhah, and Zilpah, as servants and slaves, were involved in an arranged marriage where their consent was assumed or secondary.[194] In this respect, they were no different from innumerable women—and also men—in the ancient world, both free and slave, who could really only avoid an arranged marriage by running away. However, in this particular instance, the marriages, as grotesque as they may be by some modern sensibilities, would have been seen as a profound and permanent benefit to these women and, culturally speaking, completely different from a rape.[195] While it is possible to view them as rapes according to some modern sensibilities, such a view would condemn most marital sexual acts in the ancient world as rapes. Taking the

187. *See* MARSMAN, *supra* note 185, at 485; STEINBERG, *supra* note 162, at 65.
188. *See* MARSMAN, *supra* note 185, at 485.
189. *See id.* at 452–53.
190. *See, e.g.*, *id.* at 450–51, 472; VICTOR H. MATTHEWS, MANNERS & CUSTOMS IN THE BIBLE: AN ILLUSTRATED GUIDE TO DAILY LIFE IN BIBLE TIMES 36 (3d ed. 2006).
191. *See Genesis* 24:1–66.
192. *Id.*
193. *See id.* at 29:15–20.
194. *See id.* at 16:3, 30:4, 30:9.
195. *See* MARSMAN, *supra* note 185, at 143–44.

ideological position that in a patriarchal society, or a society with arranged marriages—whether in the past or present—marriage is always rape[196] hardly helps us evaluate the situation of Hagar, Bilhah, and Zilpah within its cultural context.

Tate perhaps believes that Hagar, Bilhah, and Zilpah were raped and impregnated against their will with the children then taken from them, presumably because she views surrogacy through the lens of modern practice, where the primary goal is to use and then discard the surrogate while taking the child from her.[197] The customs of the *Genesis* narratives, however, were different.[198] God intervenes to help Hagar and Ishmael, when Abraham (at Sarah's instigation) abandons them in the desert, and Abraham drives Hagar and Ishmael away after God promises to care for them.[199] The men and women who use surrogates in the Bible become obligated and connected to the surrogates in a way that is virtually unthinkable today.

Professor Field's insight that surrogate wife is a better label for surrogacy in some ways fits the Biblical narrative, except that the *Genesis* surrogates were real, albeit secondary, wives rather than merely surrogate wives.[200] In a polygamous context, this custom of elevating the wife's maid to secondary wife created a need to balance the primacy and status of the first rank wife (or wives in the instance of Rachel and Leah) against the need to provide status and protection to the secondary wife who was bearing children and heirs for the husband and father of the family.[201]

The "realness" of the marital status of the surrogates is made clear when Reuban, the first-born son of Jacob with his wife Leah, had sexual relations with Bilhah, Rachel's maidservant and the mother of Dan and Naphtali.[202] In today's terminology, we would say that Reuban is having sex with a surrogate his father used in the procreation of two of his half-brothers. In the terminology of *Genesis*, however, Reuban is having sex with his father's

196. *See, e.g.*, *Catharine MacKinnon*, WIKIQUOTE, http://en.wikiquote.org/wiki/Catharine_MacKinnon (last visited Oct. 15, 2015); Rebecca Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/feminism-rape/ (last updated Aug. 14, 2013).

197. *See* TATE, *supra* note 160, at 1.

198. *See Genesis* 16:3, 30:4, 30:9.

199. *See id.* at 16:1–16, 17:17–26, 21:8–21.

200. *See Genesis* 16:3; MARSMAN, *supra* note 185, at 143–44, 437–54; STEINBERG, *supra* note 162, at 61–65.

201. *See Genesis* 16:1–16, 17:17–26, 21:8–21; MARSMAN, *supra* note 185, at 143–44, 437–54; STEINBERG, *supra* note 162, at 61–65.

202. *See Genesis* 35:22.

concubine (secondary wife), although of course Bilhah is not Reuban's mother. Since Reuban is old enough to have intercourse with Bilhah, the event is occurring many years after the births of the children Bilhah bore for Jacob.[203] Yet, the Biblical narrative clearly considers Bilhah to be the secondary wife and concubine of Jacob, such that Reuban's act constitutes a kind of incest, which permanently mars Reuban's reputation and strips him of the benefits of his status as firstborn.[204]

Interestingly, the kind of slavery involved in these narratives, while repugnant in a post-abolitionist world, was in certain ways less brutal than the kinds of slavery that existed in the United States and other places in more recent history. For example, the presumed or probable children of President Thomas Jefferson and his slave Sally Hemings[205]—and any other children conceived by a master with his slave at that time—would have been born slaves. This policy of slavery passing through the mother seems to have been based on the racist perspective that black persons—including those of mixed race—were presumed to be, and best suited to be, slaves, and hence viewed as property (like livestock) rather than persons. Therefore, the child's racial identity as even partially black doomed the child to the status of presumed enslavement (absent emancipation by the master), even if he or she was the master's child.[206] By contrast, Ishmael initially was presumed to be an heir of Abraham and was sent away precisely because he was a competitive threat to the status and inheritance of Sarah's son, Isaac.[207] The sons of Bilhah and Zilpah—the slaves and maidservants of Rachel and Leah—are considered descendants of Jacob, along with the children Jacob

203. *See id.* at 29:32, 35:22.

204. *Id.* at 35:22, 49:4; *Leviticus* 18:8; *1 Chronicles* 5:1; MARSMAN, *supra* note 185, at 379 & n.44; STEINBERG, *supra* note 162, at 112–14, 121–22.

205. *See Report of the Research Committee on Thomas Jefferson and Sally Hemings*, T. JEFFERSON FOUND. (Jan. 2000), http://www.monticello.org/site/plantation-and-slavery/report-research-committee-thomas-jefferson-and-sally-hemings; *Thomas Jefferson and Sally Hemings: A Brief Account*, T. JEFFERSON FOUND., http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-sally-hemings-brief-account (last visited Oct. 15, 2015).

206. *See, e.g.*, Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105–34 (Jean Allain ed., 2012). *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1856); HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM: 1750–1925 (1976); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW: 1619–1860 (1996); Mark Tushnet, *The American Law of Slavery, 1810–1860: Considerations of Humanity and Interest*, 7 AM. B. FOUND. J. 274 (1981).

207. *See Genesis* 16:1–16, 17:17–26, 21:8–21; MARSMAN, *supra* note 185, at 451–52; STEINBERG, *supra* note 162, at 61–81.

had with the sister-wives Rachel and Leah.[208] The very twelve-tribe structure of the nation of Israel is predicated on the children of the maidservants being descendants of their father.[209] Presumably, the practice of slavery in the patriarchal narratives is not built upon any kind of viewpoint of racial superiority, and hence the practice is cabined by an understanding of the common humanity of master and slave. Slavery was an inhumane practice of the time and culture of the patriarchs, but ironically it was less brutal and inhumane than the kinds of slavery that predominated the modern world thousands of years later.

The scriptural and religious contexts of the patriarchal narratives raise particular religious questions for the estimated 3.8 billion people worldwide of either Jewish, Christian, or Islamic faith who look to Abraham as a preeminent founder of their faith.[210] While detailed analysis of such religious questions is beyond the scope of this Article, it seems appropriate to at least acknowledge the issues, given the large proportion of humankind involved. The problem is this: scriptural narratives and religious tradition describe customs and practices of extreme patriarchy, slavery, concubinage, and the use of maidservants as secondary wives to provide children for a family.[211] Do scriptural *descriptions* of the very founders of the faith being engaged in such practices make them *normative* for religious believers today? It may be surprising to secular people to understand that for many—and perhaps most—religious believers, the answer is a clear "no." For many religious believers of the large monotheistic faiths, Abraham is a father of the faith because of his "faith," trust, belief, and obedience in relationship to God, but nonetheless is simply a man of his time in many aspects of his family life and cultural practice.[212] Calling Abraham a rapist is jarring for religious believers but considering all aspects of his lifestyle normative for today would be equally jarring.

There are several lessons that could be drawn from examining the narratives and traditions concerning Hagar, Bilhah, and Zilpah. First, the

208. *See Genesis* 35:23–26.

209. *See id.* at 35:23–26, 49:1–28; DEREK KIDNER, GENESIS, AN INTRODUCTION AND COMMENTARY 126 (1967) (noting that sons born of Bilhah and Zilpah "were to count in Jacob's family as full members and heads of tribes").

210. *See The Global Religious Landscape*, *supra* note 153; *2010 Global Religious Landscape Report*, *supra* note 153.

211. *See supra* notes 160–209 and accompanying text.

212. *See, e.g.*, *Hebrews* 12:8–19 (praising the faith of Abraham).

passage of time does not automatically bring progress. Some practices later in time are more brutal and degrading to human dignity than some practices earlier in time. Dr. Martin Luther King, Jr. may have been correct when he famously said that the "moral arc of the universe is long, but it bends toward justice,"[213] but in the interim, sometimes things get worse instead of better. Of course this is undeniable in certain ways:[214] the genocides, wars, and brutality of the twentieth century were in some ways worse than those in the past, as new technologies and capacities for war and killing were unleashed upon the world.[215] Thus, it is clear that advances in technology can be used for better or worse.[216] Hence, the mere passage of time and technological advancements do not inevitably bring progress in ethics and human rights and indeed may bring new threats to human dignity and new ethical dilemmas.

A related point is that each society has groups that are particularly vulnerable and thus each society is responsible to self-consciously protect those vulnerable groups against exploitation in a manner that realistically takes account of the inequalities of that society. While the extreme patriarchy, slavery, and concubinage depicted in *Genesis* and common in that cultural milieu were brutal and inhumane in many respects, the narratives of Hagar, Bilhah, and Zilpah reveal that the customs and morals of the time worked to some degree within those negative contexts to ameliorate some of the harms.[217] In our times and diverse cultural contexts, we need to be realistic regarding who is most vulnerable to exploitation and vigilantly protect them without pretending that we have created societies in which no one is vulnerable. Equality before the law is a guiding ideal and legal principle in our time[218] but should not be used as a pretense to ignore

213. *See The Arc of the Moral Universe Is Long But It Bends Towards Justice*, QUOTE INVESTIGATOR, http://quoteinvestigator.com/2012/11/15/arc-of-universe/ (last visited Sept. 25, 2015) (indicating that King was himself quoting or paraphrasing a statement originating in the nineteenth century from Theodore Parker).

214. *See* Mark Levene, *Why Is the Twentieth Century the Century of Genocide?*, 11 J. WORLD HIST. 305, 305 (2000) (noting that an estimated 187 million people killed in political violence in the twentieth century).

215. *See generally id*.

216. *See id.* at 305–08.

217. *See* MARSMAN, *supra* note 185, at 143–44.

218. *See* African Charter, *supra* note 7, at pmbl., arts. 2–3; American Convention on Human Rights, art. 1, Nov. 21, 1969, 1144 U.N.T.S. 143; ICCPR, *supra* note 5, at pmbl., arts. 2–3; ECHR, *supra* note 9, at art. 14; ICESCR, *supra* note 14, at pmbl., arts. 2–3; Universal Declaration, *supra* note 9, at pmbl., arts. 1–2, 6–7.

the very real inequalities in our societies and the accompanying vulnerability of certain segments of society. Otherwise the ideal of equality will ironically facilitate exploitation and the expansion of inequality.

2. Code of Hammurabi

The famous Code of Hammurabi (the Code), the Babylonian law code that dates approximately to the patriarchal era described in *Genesis*[219] provides a comparative lens from which to view the Hagar, Bilhah, and Zilpah narratives and traditions, as well as providing another distant mirror and point of comparison for our own time. In the context of a patriarchal society with slavery and polygamy, the Code sought to protect the vulnerable position of women.[220] The Code assumed that many marriages are contracted or arranged between families and include a financial arrangement such as a dowry, which operated as a kind of financial asset and protection of the wife.[221] Similarly, the bride price, which could be seen from our perspective as an indication of women being sold as property, was used along with a dowry as a financial protection of women.[222]

Hence, the law provided that if a man wished to separate from a woman who had borne him children, the wife received custody of the children, as well as her dowry and an interest in property, so that she could support herself and the children.[223] After the children were grown, the wife received a permanent portion of the inheritance—in other words, a fee simple or complete ownership, rather than merely a life estate or temporary ownership.[224] Obviously, the law was structured to protect these wives against abandonment; while husbands could separate from their wives, they lost child custody and property.[225] On the other hand, a wife who had not borne the husband children received a lesser degree of financial compensation upon the end of the marriage, which included the dowry and

219. *Code of Hammurabi*, AVALON PROJECT [hereinafter *Code*], http://avalon.law.yale.edu/ancient/hamframe.asp (last visited Oct. 15, 2015).
220. *See generally id.*
221. *See id.* § 138.
222. *See, e.g.*, *id.* §§ 137–40, 160–64, 172.
223. *See id.* § 137.
224. *See id*.
225. *Id.*

bride price or a designated gift of release.[226]

The Code protects first wives who become ill by requiring the husband to support the sick wife within his own household, even if he takes a second wife.[227] Yet, if the husband takes a second wife, the sick wife is permitted to leave and take her dowry if she wishes.[228]

It is in these contexts of patriarchy, slavery, and polygamy—wherein the law nonetheless attempted to protect wives and mothers—that the Code of Hammurabi discusses the practice, found in the *Genesis* narratives, of wives giving their husbands their maidservants as a means to produce children.[229]

Consider §§ 144 to 147 of the Code of Hammurabi:

> 144. If a man take a wife and this woman give her husband a maid-servant, and she bear him children, but this man wishes to take another wife, this shall not be permitted to him; he shall not take a second wife.
>
> 145. If a man take a wife, and she bear him no children, and he intend to take another wife: if he take this second wife, and bring her into the house, this second wife shall not be allowed equality with his wife.
>
> 146. If a man take a wife and she give this man a maid-servant as wife and she bear him children, and then this maid assume equality with the wife: because she has borne him children her master shall not sell her for money, but he may keep her as a slave, reckoning her among the maid-servants.
>
> 147. If she have not borne him children, then her mistress may sell her for money.[230]

Sections 144 and 146 seem to envision the kind of custom practiced in the Genesis narratives, in which a wife provides her husband with her maidservant for purposes of childbearing.[231] In § 144, the maidservant or

226. *See id.* §§ 138–40.
227. *See id.* § 148.
228. *See id.* § 149.
229. *Compare id.*, *with Genesis* 16:1–16, 17:17–26, 21:8–21, 30:1–13.
230. *See Code*, *supra* note 219, §§ 144–47.
231. *Compare id.* §§ 144–46, *with Genesis*16: 1–16, 17:17–26, 21:8–21, 30:1–13.

surrogate does not appear to attain the status of a wife, but her existence becomes the grounds for denying the husband a second wife.[232] Section 146 is most similar to the Genesis narratives: the wife gives her husband a "maidservant as a wife and she bear[s] him children."[233] As in the Hagar-Sarah narrative, once the maidservant or second wife bears children, competition emerges between her and the first wife.[234] The Code protects the second wife or surrogate by declaring she cannot be sold, while at the same time reasserting her status as a slave, seemingly in part to preserve the status of the first wife from competition.[235]

The Code provides a broader context for the *Genesis* narratives because it discusses or presumes the same practices of extreme patriarchy, slavery, polygamy, concubinage, and the use of maidservants to provide children for the family.[236] The Code also represents a similar set of concerns with protecting women against exploitation and abandonment—as those were understood at the time—as well as balancing between protecting the status and position of first wives and protecting others, whether maidservants or maidservants elevated to second wife, who bear children for the husband and father.[237] The existence of similar—even if not identical—customs between the patriarchs of the *Genesis* narratives and the Babylonian society represented by the Code indicates that many of the practices in *Genesis* were common in those regions of the world at that time.[238] From this perspective, there is no reason to particularly associate these practices with monotheistic religion because the Code indicates that many aspects of the family life and customs of Abraham and his extended family were common to the time and region, in a cultural context where most people were not monotheists.

Of course, there is a grim irony in our quick propensity to condemn the practices of that distant era, when the present topic indicates that we struggle, in different forms, with the same issues. To the degree that surrogacy and related practices represent the sale of children—as well as the degree that surrogacy sometimes represents the exploitation of poor and vulnerable women by those who are more powerful or wealthy—it would

232. *See Code*, *supra* note 219, § 144.
233. *See id.* § 146.
234. *Compare Genesis* 16, *with Code*, *supra* note 219, § 146.
235. *See Code*, *supra* note 219, § 146.
236. *See id.* §§ 15–20, 118, 144–47, 159–96.
237. *See* MARSMAN, *supra* note 185, at 441–42, 451–52; *Code*, *supra* note 219, §§ 144–47.
238. *See Code*, *supra* note 219, §§ 144–47.

appear that we are struggling in our own time with the same destructive tendencies. Indeed, the modern world has been subject to recurrent scandals involving the illicit procurement and sale of children for purposes of adoption or procreation.[239] The tendency to commodify human beings and exploit people in the context of reproductive processes did not cease in the ancient world. Our contemporary concerns with human trafficking[240] and the sale of children[241] indicate that we must be ever-vigilant against the same tendencies to commodify and exploit, and should not fool ourselves into believing we have become invulnerable to these sins or crimes.

IV. SURROGACY AS THE SALE OF CHILDREN

A. The Committee on the Rights of the Child on Surrogacy and the Sale of Children

The Committee on the Rights of the Child (Committee) is a body of eighteen independent experts that monitors implementation of the CRC and the two optional protocols, including the Sale of Children Protocol.[242] While the Committee is not a court and cannot issue binding interpretations of the CRC and accompanying protocols, its views are obviously highly significant.[243] State parties under these Conventions are required to submit initial and periodic reports.[244] The Committee responds to these state reports

239. *See generally* NANCY C. BAKER, BABY SELLING (1978); KAREN BALCOM, THE TRAFFIC IN BABIES: CROSS-BORDER ADOPTION AND BABY-SELLING BETWEEN THE UNITED STATES AND CANADA, 1930–1972 (2011); BARBARA BISANTZ RAYMOND, THE BABY THIEF: THE UNTOLD STORY OF GEORGIA TANN, THE BABY SELLER WHO CORRUPTED ADOPTION (2007); ERIN SIEGAL, FINDING FERNANDA: TWO MOTHERS, ONE CHILD, AND A CROSS-BORDER SEARCH FOR TRUTH (2011); Katya Adler, *Spain's Stolen Babies and the Families Who Live a Lie*, BBC NEWS (Oct. 18, 2011), http://www.bbc.com/news/
magazine-15335899; Francisco Goldman, *Children of the Dirty War*, NEW YORKER (Mar. 19, 2012), http://www.newyorker.com/magazine/2012/03/19/children-of-the-dirty-war.

240. *See, e.g.*, Palermo Protocol, *supra* note 3; MARY C. BURKE, HUMAN TRAFFICKING: INTERDISCIPLINARY PERSPECTIVES (2013); E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY (2008).

241. *See, e.g.*, Optional Protocol, *supra* note 1; SKINNER, *supra* note 240.

242. *See* CRC, *supra* note 4, at art. 43; *Committee on the Rights of the Child*, UNITED NATIONS HUM. RTS., http://www.ohchr.org/en/HRBodies/CRC/Pages/CRCIndex.aspx (last visited Oct. 15, 2015).

243. *See Introduction*, UNITED NATIONS HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx (last visited Oct. 15, 2015).

244. *See* CRC, *supra* note 4, at art. 43.

with "concerns and recommendations" in its "concluding observations."[245]

Significantly, the Committee's concluding observations for India and the United States has raised the concern that surrogacy as practiced in these nations leads to the deprivation of the rights of children and the sale of children.[246] India and the United States are two of the most active nations in the field of commercial surrogacy;[247] hence, the Committee's concerns seem particularly apt. It is also particularly significant that the Committee addresses these concerns with surrogacy in the context of the Committee's discussions of adoption.[248] Typically, when surrogacy is viewed through the legal lens of adoption, its commercial aspects are interpreted as a kind of illicit sale of children.[249]

1. The Committee on the Rights of the Child on Adoption, Surrogacy and the Sale of Children in India

On June 13, 2014, the Committee issued its concluding observations in response to India's initial report on the Sale of Children Protocol.[250] In its observations, the Committee first addressed in some detail its concern with "unlawful adoption" and "the sale of children for adoption purposes."[251] It is within this context of the sale of children for adoption that the Committee addressed surrogacy.[252] It is helpful to see the full context of the Committee's statement on surrogacy:

Adoption

23. The Committee notes the measures taken to protect children

245. *See, e.g.*, *id.* at arts. 43–45; Optional Protocol, *supra* note 1, at art. 12.

246. U.N. Convention on the Rights of the Child, *Concluding Observations on the Report Submitted by India Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, ¶ 23(f), U.N. Doc. CRC/C/OPSC/IND/CO/1 (June 13, 2004) [hereinafter *India Report*]; *infra* note 271.

247. *See, e.g.*, Marcy Darnovsky & Diane Beeson, *Working Paper No. 601: Global Surrogacy Practices*, INT'L INST. SOC. STUD. 10–15, 39–46 (Dec. 31, 2014), http://repub.eur.nl/pub/77402 (focusing on India and California as two of five specific regions considered by the International Forum on Intercountry Adoption and Global Surrogacy in assessing global surrogacy practices).

248. *India Report*, *supra* note 246, ¶ 23.

249. *See generally In re* Baby M., 537 A.2d 1227 (N.J. 1988).

250. *See generally India Report*, *supra* note 246.

251. *Id.* ¶ 23.

252. *Id.* ¶¶ 23–24.

> from unlawful adoption, including the adoption of Guidelines Governing the Adoption of Children in 2011, which strengthen the prevention of illegal adoption. However, the Committee is concerned that children are still insufficiently protected from unlawful adoption, a situation which may give rise to the sale of children for adoption purposes. The Committee is particularly concerned at:
>
> (a) The practice of unregulated informal adoption as recognized by the State party in its report;
>
> (b) The stealing of babies from hospital and the lack of information on the whereabouts of children found at the Baby Cradle Reception Centers and on measures the State has taken to prevent the stealing and abandonment of babies, as well as the recognition of the root causes and any applicable sanctions for stealing and possible sale of the children;
>
> (c) The extent of use of fraudulent birth registration in the State party and the lack of adequate efforts made to prevent it;
>
> (d) Insufficient legal or policy measures taken to prevent intermediaries from attempting to persuade biological families to give children for adoption;
>
> (e) The lack of information on prohibition of illegal adoption or regulating licensing of agencies and limiting the fees; and
>
> (f) *Widespread commercial use of surrogacy, including international surrogacy, which is violating various rights of children and can lead to the sale of children.*[253]

The Committee's recommendations correspond to each of the concerns as follows:

> 24. The Committee urges the State party to:
>
> (a) Develop and implement policies and legal provisions to

253. *Id.* ¶ 23 (emphasis added).

> guarantee that all cases of adoption are in full conformity with the Optional Protocol and with the principles and the provisions of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993;
>
> (b) Take all necessary measures, including the establishment of an effective monitoring system, to prevent the stealing of babies from hospitals and their abandonment in the cradle centers, fraudulent birth registration, and intermediaries from attempting to persuade mother to give children in adoption, as well as ensure that such practices are adequately sanctioned
>
> (c) Explicitly prohibit illegal adoption and develop a programme to prevent illegal intercountry and international adoptions;
>
> (d) Effectively regulate the licensing and monitoring of agencies, as well as the fees they charge for their various services;
>
> (e) Follow up the adoptions, as appropriate, in order to prevent children from being exploited; and
>
> (f) *Ensure that the Assisted Reproductive Technology Bill or other legislation to be developed contain provisions which define, regulate and monitor the extent of surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption.*[254]

The Committee's extensive concern with the sale of children for adoption is appropriate, since India has a notoriously difficult history with abusive adoption practices, including in its intercountry adoption program.[255] It is significant that the Committee is concerned with more than formal conformance to international legal standards.[256] India had ratified the Hague Convention on Intercountry Adoption in 2003, some eleven years before the

254. *Id.* ¶ 24 (emphasis added).

255. *See, e.g.*, Smolin, *supra* note 51, at 146–63; David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 426–50 (2005); *International Adoption Fraud & Corruption*, BRANDEIS U., http://www.brandeis.edu/investigate/adoption/india.html (last updated Feb. 23, 2011).

256. *India Report*, *supra* note 246, ¶¶ 9–12.

issuance of this report.[257] The Committee evidences its awareness that mere ratification of international agreements is not enough; indeed, the Committee's role in monitoring the CRC and accompanying protocols presupposes the difficulties and importance of the implementation process, which occurs after ratification.[258] Hence, the Committee did not give India a free pass on adoption, even though India had ratified the Hague Convention on Intercountry Adoption approximately eleven years before the issuance of this report.[259] Ratification of relevant international conventions is an important first step, but it is just the beginning.

The Committee noted the need, in regard to adoption, to regulate and monitor the fees charged by agencies and to "prevent intermediaries from attempting to persuade [a mother] to give children for adoption."[260] Preventing the sale of children requires paying attention to the real world inequalities of money and power, and, in response, regulating the critical interactions between the parties and intermediaries in adoption and surrogacy.

It is highly significant that the Committee expressed concern, in the context of adoption, regarding "[w]idespread commercial use of surrogacy, including international surrogacy, which is violating various rights of children and can lead to the sale of children."[261] The Committee's comment is realistic in responding to the widespread practice of commercial surrogacy in India, conducted in part in the context of international medical tourism.[262] In regard to this concern, the Committee recommended legislation that would "define, regulate and monitor the extent of surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption."[263]

It is also significant that the Committee, in the context of the contemporary practice of commercial surrogacy, referred to criminalizing "the sale of children *for the purpose of illegal adoption.*"[264] This reiterates

257. *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Oct. 15, 2015).

258. *See generally* Hague Adoption Convention, *supra* note 21.

259. *India Report*, *supra* note 246, ¶ 24; HCCH, *supra* note 15.

260. *India Report*, *supra* note 246, ¶ 23(d).

261. *Id.* ¶ 23(f).

262. Darnovsky & Beeson, *supra* note 247, at 10–15.

263. *India Report*, *supra* note 246, ¶ 23(f).

264. *Id.*

that the Committee views the rules governing adoption, especially the prohibition of the sale of children for purposes of adoption, to be applicable to the contemporary practice of commercial surrogacy.[265]

Laws governing adoption, both international and domestic, have sought to prohibit the transfer of official custodial rights or the physical transfer of the child in exchange for financial remuneration, compensation, or consideration.[266] When traditional surrogacy became prominent, a common legal response was to insist that the so-called surrogate mother was in the same legal position as a "birth mother" in adoption.[267] This approach rendered the typical surrogacy arrangement in which the mother agreed to both gestate the child and relinquish the child for financial consideration as an illicit form of child selling under laws originally devised to cover adoption.[268] Hence, such contracts were void and unenforceable as against public policy, even when one of the intended contractual parents was a genetic parent.[269] Significantly, in a context where the widespread practice of commercial surrogacy in India consists primarily of gestational surrogacy, the Committee evidences the same approach as previously applied to traditional surrogacy. If adoption principles govern both traditional and gestational surrogacy, as implied by the Committee, this will render much of contemporary surrogacy practice as the illicit sale of children.[270]

2. The Committee on the Rights of the Child on Adoption, Surrogacy, and the Sale of Children in the United States

On July 2, 2013, the Committee issued its concluding observations on the second periodic report of the United States on the Sale of Children Protocol.[271] The Committee, as it would subsequently do in regard to India,

265. *See id.* ¶¶ 23–24.

266. *See, e.g.*, *In re* Baby M., 537 A.2d 1227, 1244 (N.J. 1988); Hague Adoption Convention, *supra* note 21, at arts. 4(c)(3), 8, 32; Optional Protocol, *supra* note 1, at art. 3(1)(a)(ii).

267. *Baby M.*, 537 A.2d at 1244.

268. *Id.* at 1248.

269. *See generally id.* at 1227.

270. *See India Report*, *supra* note 246, ¶ 23(f).

271. U.N. Comm. on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography*, U.N. Doc. CRC/C/OPSC/USA/Co/2 (July 2, 2013) [hereinafter *Observations on U.S.*].

covered the topic of surrogacy within a section titled "Adoption."[272] The concerns and recommendations stated in relevant part:

> Adoption
>
> 29. The Committee appreciates the adoption of the Intercountry Adoption Universal Accreditation Act of 2012, S. 3331 (UAA), expanding the accreditation standards in the Intercountry Adoption Act (IAA) of 2000 to cover all intercountry adoptions. . . . [T]he Committee is particularly concerned that:
>
> (a) Ambiguous definitions and legal loopholes persist despite the new accreditation act, such as for example the fact that payments before birth and other expenses to *birth mothers, including surrogate mothers*, continue to be allowed, thus impeding effective elimination of the sale of children for adoption;
>
> (b) *The absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children . . .*[273]
>
> 30. The Committee strongly recommends that the State party:
>
> (b) Define, regulate, monitor and criminalize the sale of children at federal level and in all states in accordance with the Optional Protocol, and in particular the sale of children for the purpose of illegal adoption, in conformity with article 3, paragraphs 1 (a) (ii) and 5, of the Protocol; *including issues such as, surrogacy and payments before birth and the definition of what amounts to "reasonable costs . . .*[274]

The cited portions of the Sale of Children Protocol require State parties to cover under "criminal or penal law": "Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption,"[275] as well as requiring "all appropriate legal and administrative measures to ensure that all persons

272. *Id.* ¶¶ 29–30.
273. *Id.* ¶ 29 (emphasis added).
274. *Id.* ¶ 30 (emphasis added).
275. Optional Protocol, *supra* note 1, at art. 3(1)(c)(ii).

involved in the adoption of a child act in conformity with applicable legal instruments."[276]

The Committee's strongly worded statement that surrogacy "amounts to sale of children," "if not clearly regulated,"[277] obviously leads to the question of what kinds of regulations are necessary to avoid this negative conclusion.[278] This question is unfortunately not answered directly by the Committee, but the Committee's presumption that surrogacy involves an adoption is highly suggestive of the answer. The presumption that surrogacy involves an adoption presupposes that surrogate mothers have status under international law as birth mothers and hence that rules limiting the role of money in inducing consent for adoption also apply to surrogacy.[279] Indeed, the Committee states explicitly that birth mothers *include* surrogate mothers.[280]

In the United States, surrogate mothers in traditional surrogacy arrangements usually are legally classified as birth mothers with original custodial rights to their children,[281] as indicated in the foundational *Baby M.* case.[282] In *Baby M.*, the surrogacy contract was void as against public policy, in part because the quid pro quo embodied within the contract constituted baby selling.[283] Although the *Baby M.* decision is precedent in only one jurisdiction within the United States, its reasoning has generally been accepted as persuasive in traditional surrogacy cases in the United States.[284] Hence, the same rules govern payments to birth mothers regarding adoption and birth mothers in a traditional surrogacy arrangement in the United States precisely because a post-birth adoption proceeding is required in order to recognize the intended mother as the legal mother of the child.[285] As the Committee notes, there is ambiguity in the United States about the amount and type of expenses that birth mothers can receive in either

276. *Id.* at art. 3(5).
277. *Observations on U.S.*, *supra* note 271, ¶ 29.
278. *See generally id.*
279. *See generally id.*
280. *Id.*
281. Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL'Y & L. 555, 578 (2013).
282. *See generally In re* Baby M., 537 A.2d 1227 (N.J. 1988).
283. *See id.* at 1234.
284. Peng, *supra* note 281, at 578.
285. *See* KINDREGAN & MCBRIEN, *supra* note 100, at 130–32.

adoptive or surrogacy situations; nonetheless, the underlying premise is clear that these mothers cannot be paid to relinquish their custodial rights, consent to adoption, or transfer their custodial rights.[286] In the United States, mothers generally cannot be bound to pre-birth agreements to relinquish custodial rights, consent to adoption, or transfer custodial rights.[287] Hence, those who pay expenses in the hopes of receiving a child do so with the risk that, despite those payments, the mother may elect to keep her child.[288]

The Committee does not explicitly address the current claim that gestational surrogacy—where the mother is not genetically related to the child she carries and births—should be governed by different rules than either adoption or traditional surrogacy.[289] Proponents of gestational surrogacy argue that a gestational surrogate has no claim to the child and hence any funds she receives should not be considered as payment to relinquish or transfer custodial rights.[290] As indicated below, these proponents are, in fact, wrong about the current law of gestational surrogacy. For example, in California, it is the pre-embryo transfer surrogacy contract, rather than the mere status of being genetically unrelated, that strips gestational surrogates of parental rights under California law.[291] Hence, even in California, a gestational surrogate who has not signed such a contract has the status of a mother at the birth of the child.[292] Nonetheless, whatever any jurisdiction or State might claim about gestational mothers or gestational surrogacy, the Committee's comments indicate its opinion that, under the Sale of Children Protocol, gestational surrogates are mothers of the children they carry and birth.[293] Hence, the Committee should be understood as stating that the same fundamental rules about the status of the mother who gives birth, and the same fundamental prohibitions of the sale of children, apply to adoption, traditional surrogacy, and gestational surrogacy. If the Committee had commented on surrogacy in the United States decades earlier, it might have been possible to interpret its comments as addressing only traditional surrogacy. However, the factual context of the Committee's

286. *See Observations on U.S.*, *supra* note 271, ¶¶ 29–30.
287. *See* KATZ & KATZ, *supra* note 28, at 40–51.
288. *Id.*
289. *See generally Observations on U.S.*, *supra* note 271.
290. *See infra* notes 296–97, 335 and accompanying text.
291. *See infra* notes 377–463 and accompanying text.
292. *See infra* notes 434–41 and accompanying text.
293. *See generally* Optional Protocol, *supra* note 1.

2013 Concluding Observations about the United States was that gestational surrogacy is the only kind of surrogacy widely practiced in the United States, and certainly is the dominant form of commercial surrogacy in the United States.[294] From that perspective, the Committee's comments on surrogacy in the United States have to be understood as addressing gestational surrogacy.[295]

B. Never a Mother and Other Points of Contention

One of the primary arguments by proponents of commercial surrogacy is that in gestational surrogacy, the woman who gives birth is never the mother of the child.[296] Hence, whatever she is paid cannot be viewed as compensation for relinquishing the child, consenting to adoption, or transferring custody.[297] Instead, the gestational surrogate is labeled as a mere "gestational carrier" who is paid only for the service of gestating a child.[298] As seen above, the expressed concerns and recommendations of the Committee suggest a contrary view.[299] Surrogate mothers, whether gestational or traditional, should be viewed in the same way as birth mothers in adoption contexts and payments may constitute the illicit sale of children.[300]

Presumably, proponents of surrogacy would reply that, in at least jurisdictions where surrogacy is widely practiced, domestic law agrees with the pro-surrogacy viewpoint that gestational surrogates are never mothers. This reliance on the law of the jurisdiction has numerous flaws.

First, if gestational surrogates have the legal status of mothers under the Sale of Children Protocol, and hence under international law, that would

294. Indeed, gestational surrogacy has been dominant in the United States for more than a decade. *See, e.g.*, DAAR, *supra* note 94, at 426 n.4 (citing David P. Hamilton, *She's Having Our Baby: Surrogacy Is on the Rise as In Vitro Improves*, WALL STREET J., Feb. 4, 2003, at D1 (indicating that by February 2003, gestational surrogacies already accounted for 95% of all surrogacy pregnancies)).

295. *See supra* notes 272–74 and accompanying text.

296. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. L.J. 113, 154–55 (1997).

297. *Id.*; *see also* Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 170 (2013).

298. *See* CAL. FAM. CODE §§ 7960–62 (West 2013); Johnson v. Calvert, 851 P.2d 776, 783–84 (Cal. 1993); Kerian, *supra* note 296, at 154–55.

299. *See supra* notes 242–295 and accompanying text.

300. *See supra* notes 242–295 and accompanying text.

trump the law of any jurisdiction bound by the relevant international law. Further, if particular practices under the Sale of Children Protocol constitute the illicit sale of children, State parties to the Sale of Children Protocol cannot escape their obligations by simply decreeing under their domestic law that they do not regard those practices as constituting the sale of children. Legally speaking, State parties to international conventions cannot escape their international legal obligations by redefining essential terms under their domestic law contrary to how those terms are defined under binding international law.[301] Under the fundamental principle of *pacta sunt servanda* (agreements must be kept), States that ratify treaties have the obligation to carry out their responsibilities under international agreements and cannot escape those obligations by making references to their domestic laws.[302]

Second, under international law, the concept of sale of children includes instances where individuals without lawful custody sell children. For example, intermediaries who obtain children illicitly and then sell those children to adoptive parents for purpose of adoption, or to other intermediaries for purposes of sexual or labor exploitation, would still be involved in the illicit sale of children. Thus, the Sale of Children Protocol defines "sale of children" as "any act or transaction whereby a child is transferred . . . to another for remuneration or any consideration."[303] There is no requirement that the transferor possesses legal rights to the child to violate the Sale of Children Protocol.[304] Hence, someone who literally kidnaps a child could be liable for child selling under the Sale of Children Protocol. The Sale of Children Protocol specifically requires State parties to criminalize the "offering, delivering, or accepting, by whatever means, a child" for purposes of sexual exploitation, transfer of organs for profit, or

301. *See* Vienna Convention on the Law of Treaties, arts. 26–27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

302. *See, e.g.*, *id. See generally* THOMAS BUERGENTHAL, DINAH SHELTON & DAVID P. STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (West ed., 4th ed. 2009). I am not addressing the many complex questions regarding how international agreements are implemented, self-executing versus non-self executing agreements, federalism issues, enforcement issues, effectiveness, or the broader issues as to whether international human rights law or international law are truly law. *See id*. at 412–44; MARK W. JANIS, INTERNATIONAL LAW (6th ed. 2012); Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 71 U. CHI. L. REV. 469 (2005); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1936 (2002).

303. Optional Protocol, *supra* note 1, at art. 2(a).

304. *Id.*

forced labor.[305] In addition, the Sale of Children Protocol specifically requires State parties to prohibit, as a form of sale of a child, an "intermediary" from "improperly inducing consent" for adoption, thereby addressing instances where intermediaries either never obtain legal custody or only do so through illicit means.[306] Similarly, the definition of child trafficking in the Palermo Protocol only requires the "recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation" and clearly includes individuals without legal custody exercising various forms of de facto control over children.[307] Certainly it would be perverse for the law not to address the sale of children or child trafficking by those without proper legal custody of children. Hence, even if States could redefine surrogates as never being mothers and as never having legal custody of the children they gestate and birth, that would not escape the conclusion that commercial surrogacy arrangements constitute the illicit sale of children.

Thus, the argument that gestational surrogacy cannot be the illicit sale of children because the surrogates are "never mothers" is misdirected and completely misunderstands the concept of sale of children under international law. Even if gestational surrogates were viewed as never having legal custody of the children they birth, they could still be paid for transferring de facto control and custody of the child.[308] Gestational surrogate mothers clearly have, at least, de facto control over the child or fetus during pregnancy, and unless they are enslaved or kidnaped, they have the freedom to determine where they give birth. Gestational surrogates can arrange to give birth under circumstances in which their de facto control and custody of the child or fetus continues after birth. Hence, whether stated or not, a key provision of surrogacy contracts is the surrogate's agreement to notify the intended parents of the place of birth and to physically hand over physical custody and de facto control of the child, usually immediately or shortly after childbirth.

In addition, even if gestational surrogates lack legal custody ab initio, legal systems usually still require specific judicial or administrative

305. *Id.* at art. 3(1)(a)(i).

306. *Id.* at art. 3(1)(a)(ii).

307. *See* Palermo Protocol, *supra* note 3, at art. 3(c).

308. *Cf.* Chelsea VanWormer, Comment, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 911 (2012) ("Simply having children does not make mothers.").

procedures for declaring the surrogate's lack of rights and cementing the legal rights of the intended contractual parents.[309] Hence, surrogates are explicitly or implicitly paid for not contesting legal custody and facilitating the legal acknowledgement of intended parents in court or administrative procedures.

Third, given the central role played by intermediaries in commercial surrogacy arrangements,[310] intermediaries are primary or secondary sellers of children. Those who do not properly have legal custody of children may nonetheless be guilty of selling children over whom they exercise significant de facto control.[311] Thus, as to adoption, the Sale of Children Protocol focuses explicitly on the sale of children by intermediaries rather than the birth parents.[312] If surrogacy agencies and other intermediaries are realistically selling children over whom they exercise significant de facto control, surrogacy would still constitute the sale of children regardless of whether the surrogates were participating in such sales.[313]

Fourth, proponents are incorrect when they view pro-surrogacy jurisdictions as defining genetically unrelated gestational mothers as inherently never the mothers of the children they birth. Practically speaking, in the absence of intended contractual parents committed to becoming the legal parents of the child, stating that gestational mothers are never mothers would make the children they birth into children who never had a mother.[314] Thus, genetically unrelated gestational mothers who are not in competition with contractual parents are *presumably viewed as mothers*, even in pro-surrogacy jurisdictions.[315]

Putting it another way, under present practice, there is presumably no jurisdiction in the world where women who give birth must, as a routine practice, establish their parentage through DNA testing. Even pro-surrogacy jurisdictions still habitually rely on the traditional presumption that the woman who gives birth to a child is, ab initio, the mother of that child.[316]

309. *See, e.g.*, CAL. FAM. CODE §§ 7960–62 (West 2013).

310. *See, e.g.*, *id.* § 7960(d)–(e) (defining "nonattorney surrogacy facilitator" and "surrogacy facilitator").

311. *See supra* notes 303–06 and accompanying text.

312. Optional Protocol, *supra* note 1, at art. 3(1)(a)(ii).

313. *Cf.* VanWormer, *supra* note 308, at 923–24.

314. Gamete donors who are not intended parents are typically shielded from parentage status.

315. *See* Ergas, *supra* note 297, at 170; *supra* note 293 and accompanying text.

316. *See* Ergas, *supra* note 297, at 170. *See generally* William M. Lopez, Note, *Artificial*

Even in pro-surrogacy jurisdictions, such as California, the presence of intended parents and a valid surrogacy agreement is required to rebut this traditional presumption that the woman who gives birth is the mother of the child.[317]

Hence, even in pro-surrogacy jurisdictions with laws defining gestational surrogates as not being mothers, something more than the fact of being genetically unrelated to the child is required to make birth mothers into "never mothers." That something more is *not* merely a matter of "intention," whether it be the intention of the gestational surrogate not to be a parent or the intention of the intended parents to be the parents. Mothers who give birth and intend not to parent those children remain, throughout the world, at birth, the mothers of those children.[318] Hence, the significance of the acts of relinquishment and abandonment, which are governed by various legal principles, ensure that the acts are voluntary and not part of an illicit sale of a child.[319] Similarly, merely "intending" to be someone's parent is not enough to make one a parent. Rather, these intentions of the surrogate mother and intended parents are relevant because they are a part of a contract. Thus, even in jurisdictions that legally consider some gestational surrogate mothers not to be the mother of the children they birth, a surrogacy contract entered into voluntarily by the surrogate is necessary to the legal conclusion that she is not, at birth, the mother.[320] Hence, by definition, whether explicitly or implicitly, *the surrogate in surrogacy contracts is agreeing to give up rights to the child and the status of mother that she would otherwise have absent the contrac*t. Realistically, to the degree that the surrogate is being paid or compensated for her services, such services de facto include her voluntarily agreeing to sign the contract in which she gives up her parental rights and agrees to facilitate the legal recognition of the contractual intended parents as the legal parents.[321]

Insemination and the Presumption of Parenthood: Traditional Foundations and Modern Applications for Lesbian Mothers, 86 CHI.-KENT L. REV. 897 (2011) (discussing the presumption of parenthood).

317. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); *infra* notes 377–463 and accompanying text (discussing California law).

318. *See In re* Baby M., 537 A.2d 1227, 1240 (N.J. 1988) (noting that the surrogate is the "natural mother").

319. *See, e.g.*, *id.* at 1240–44.

320. *See infra* notes 377–463 and accompanying text (discussing California law).

321. *See infra* notes 377–463 and accompanying text (discussing California law).

C. Pre-Transfer Contracts and the Sale of Children

Proponents of surrogacy also argue that the timing of contract execution can prevent surrogacy contracts from constituting the sale of children. Hence, surrogacy proponents maintain that signing surrogacy contracts, either before the transfer of the embryo into the woman or before the creation of the embryo, prevents the contracts from being for the sale of children.[322] To the degree that this reasoning is based on the idea that you cannot sell a human being who does not exist yet, or over whom you do not yet have physical custody, the argument is clearly ludicrous.[323] Would we allow a slave trade in human beings so long as the contracts of purchase dooming children to the status of slaves were made before the children were conceived or born or before the slave traders took physical custody?[324] Should we allow baby farms for purposes of adoption, whereby women become pregnant for pay for purposes of placing children for adoption—or are coerced into doing so—so long as intended parents contracted for their children with the intermediaries or birth mother prior to conception?[325] Anti-slavery and anti-trafficking legal norms, as well as prohibitions for the sale of children for adoption, cannot be evaded simply by making contracts pre-conception or prior to attaining physical custody because there is no such exception for "pre-conception" or "pre-transfer" contracts in those norms.[326] Thus, the same must be true for surrogacy.[327]

Indeed, in the foundational *Baby M.* case regarding traditional surrogacy, the Supreme Court of New Jersey viewed the creation of the contract prior to conception as a factor indicating a contract for the illicit sale of a child.[328] The court relied specifically on adoption statutes and policies that do not permit binding contracts to relinquish prior to birth and viewed such contracts as improperly creating the "coercion of contract"

322. *See Johnson*, 851 P.2d at 783–84; *see also* CAL. FAM. CODE §§ 7960–62 (West 2013).

323. *See, e.g.*, Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 214 (Ky. 1986) (Vance, J., dissenting).

324. Keith Schneider, *Mothers Urge Ban on Surrogacy as Form of 'Slavery'*, N.Y. TIMES (Sept. 1, 1987), http://www.nytimes.com/1987/09/01/us/mothers-urge-ban-on-surrogacy-as-form-of-slavery.html.

325. *See* Roby & Brown, *supra* note 60, at 313–14 & n.40.

326. *See* Palermo Protocol, *supra* note 3; Slavery Convention, *supra* note 2; Optional Protocol, *supra* note 1; *see also* U.S. CONST. amend. XIII.

327. Kerian, *supra* note 296, at 154–55.

328. *See In re* Baby M., 537 A.2d 1227, 1240 (N.J. 1988).

coupled with "the inducement of money."[329] Thus, pre-conception contracts for child custody point toward, rather than against, a conclusion that the child is being sold.[330]

Indeed, the pre-production sale of goods is commonplace in the commercial world and done as a matter of course with goods that are individualized or special ordered. Special ordering human beings "pre-production" could become a particularly egregious commodification of human beings. As technologies develop in the era of ARTs—with the practices of purchasing gametes, IVF, pre-implantation genetic diagnosis, and gene therapy or genetic enhancement—it will be particularly important to guard against the sale of "pre-ordered" designer babies produced and sold according to the buyer's specifications.[331] Thus, a rule that the pre-conception or pre-embryo transfer contract cannot be considered the illicit sale of children would create a highly dangerous rule that could facilitate the large-scale production and sale of human beings.[332]

Proponents of surrogacy attempt to combine the never a mother argument—rebutted in Part IV.B above[333]—with arguments based on the time of contracting, rebutted herein.[334] The apparent argument is that gestational surrogates can be viewed as "never mothers" when they sign surrogacy agreements before embryo transfer because prior to such transfer they have no legal claim to the embryos or to the child at birth.[335] By the time the transfer has occurred, the surrogate has voluntarily contracted away any such parental rights.[336] Presumably, the surrogate's contractually binding promise to release any custodial claims that might develop after embryo transfer is a contractual term that is essential to the willingness of other parties (intermediaries and intended parents) to proceed with the embryo transfer.[337] However, this argument merely underscores that the gestational surrogate is being paid to contract away her future custodial

329. *Id.*
330. *Id.*
331. *See* James Gallagher, '*Designer Babies' Debate Should Start, Scientists Say*, BBC (Jan. 19, 2015), http://www.bbc.com/news/health-30742774.
332. *See generally* Ergas, *supra* note 297, at 119–20.
333. *See supra* Part IV.B.
334. *See* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).
335. *See* Kerian, *supra* note 296, at 137.
336. *See id.*
337. *See Johnson*, 851 P.2d at 782.

rights because this release of her custodial rights is essential to the contract—and therefore part of what she is being paid to do.[338]

Therefore, in regard to surrogacy contracts constituting the sale of children, gestational surrogacy is not fundamentally different from traditional surrogacy. Hence, in the *Baby M.* case, the intended genetic father, Mr. Stern, would never have agreed to allow the surrogate, Mary Beth Whitehead, to be artificially inseminated with his sperm unless she had signed the contract in which she promised to "surrender custody . . . immediately upon birth of the child; and terminate all parental rights to said child pursuant to [the] Agreement."[339] Nonetheless—and indeed because of such terms—the New Jersey Supreme Court properly considered the surrogacy agreement void as against public policy because it concluded that "the money is being paid" not merely for "personal services" but also to obtain custody of the child.[340]

Thus, as a matter of logic, reliance on the *time of contracting* to avoid the prohibition on the sale of children, even when combined with other pro-surrogacy arguments, is erroneous. Allowing distinctions as to the time of contracting to avoid laws concerning slavery, human trafficking, and the sale of children would create exceptions that would largely swallow these fundamental policies against human commodification. It would effectively invite attorneys to design clever and legally legitimated contracts for the sale of human beings. Allowing the time of contracting to avoid prohibitions on slavery, human trafficking, and the sale of children would invite development of large-scale, legally shielded markets in human beings. The fundamental policies and values protected by the prohibitions against slavery, human trafficking, and the sale of children should not be subjected to destruction by such lawyers' tricks and strategies.

D. The Sale of Children Includes the Sale of De Jure or De Facto Custody of Children

Proponents of commercial markets in adoption and surrogacy have argued for the legitimacy of the commercial and contractual aspects of those practices.[341] In order to do so, they have attempted to avoid the difficulties

338. *See infra* notes 377–463 and accompanying text (discussing California law).
339. *In re* Baby M., 537 A.2d 1227, 1265 (N.J. 1988).
340. *Id.* at 1240.
341. *See generally* RICHARD POSNER, SEX AND REASON 409–17 (1992) [hereinafter POSNER,

posed by laws against baby selling, which under both domestic and international law have plainly prohibited the sale of children for adoption and have been viewed as applicable to surrogacy.[342] One argument used to justify the commercial and contractual aspects of adoption and surrogacy has been an attempted distinction between the purportedly legitimate buying and selling of custodial rights in children versus illegitimately selling children or property rights in children. Judge Richard Posner, a foundational figure in the law and economics movement, as well as other law and economics scholars, famously has argued for the establishment of a regulated and legal adoption market whereby custodial rights in children could be sold by birth mothers to the highest bidder, so long as the bidders could pass a home study as adequate parents.[343] Posner argued that such a market in adoption did not violate statutes prohibiting baby selling because only the custodial rights regarding children, and not literally the children themselves, were being sold.[344] Refining Posner's arguments, Martha Ertman argued for permitting some markets in parental rights based on weighing the positive versus negative effects, leading her to argue for "enthusiastically embracing the benefits of commodification."[345] Similarly, commercial surrogacy can be defended based on the notion that children in the modern world are not legally a form of property but are persons and, hence, it is legally impossible to sell them.[346]

Of course, the foundation of the contemporary movement against human trafficking and the sale of children is the recognition that human beings may be impermissibly commodified and treated as de facto articles of commerce through various practices, even when the law does not explicitly permit property rights in human beings.[347] It is no accident that the primary international instrument defining human and child trafficking, the Palermo

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SEX]; SPAR, *supra* note 130, at 69–96; Hollande, *supra* note 8; Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) [hereinafter Posner, *Regulation*].

342. *Cf. Johnson*, 851 P.2d at 783–84; *Baby M.*, 537 A.2d at 1240–44.

343. *See generally* POSNER, SEX, *supra* note 341; Posner, *Regulation*, *supra* note 341.

344. *See generally* POSNER, SEX, *supra* note 341, at 409–17; Posner, *Regulation*, *supra* note 341.

345. *See* Martha Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 5 (2003).

346. EKMAN, *supra* note 109, at 146 (citing STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE NEW HUMAN BODY TRADE 147–48 (2003)) (arguing that "surrogacy is not child trafficking because . . . parents don't have the right of ownership to their children").

347. *See, e.g.*, SKINNER, *supra* note 240 (citing KEVIN BALES, DISPOSABLE PEOPLE (1999)).

Protocol, is a supplement to the U.N. Convention Against Transnational Organized Crime.[348] If contemporary prohibitions of human trafficking and the sale of children laws applied only to situations where de jure, governmentally established property rights in human beings were granted, the laws would have little application. Legally established de jure slavery and slave markets in human beings were abolished during the nineteenth and early twentieth century.[349] Nonetheless, powerful forces in the marketplace and human society can treat people de facto as mere things or articles of commerce in a manner fundamentally contrary to human dignity and human rights. Individuals, private companies, and criminal organizations, sometimes facilitated by government officials, can seek profit from the de facto sale or enslavement of human beings. This is one of the key insights of the modern human rights and anti-trafficking movement. Hence, permitting markets in adoption and surrogacy based on the lack of a de jure ownership right in human beings would undermine the legal and ethical predicates of the entire contemporary anti-trafficking movement.

Even though it is true that the de jure slavery of the past and the de facto trafficking of the present are different in significant ways, both implicate similar values and concerns.[350] De jure or de facto markets in children, even if for comparatively positive and benign purposes such as assisting family formation, nonetheless implicate some of the same values as de jure slavery. It is a mere lawyer's trick to argue that selling de facto custody or legal custodial rights in children is legitimate because the law does not officially recognize property rights in children. Such an argument would basically legitimize kidnapping children for adoption so long as the law did not officially grant kidnappers property rights in children.

Similarly, it is wrong to argue for markets in the sale of parental rights merely because of the role that money already plays in adoption. So long as private actors, such as lawyers and social workers, are involved as professionals and intermediaries in adoption, there will be some degree of payment. There will be some role for money in adoption so long as the law permits original family members to receive some degree of reimbursement

348. *See* Palermo Protocol, *supra* note 3, at pmbl.

349. *See* Brooke N. Newman, *Historical Perspective: Slavery over the Centuries*, *in* HUMAN TRAFFICKING: INTERDISCIPLINARY PERSPECTIVES 24, 42–45 (Mary C. Burke ed., 2013).

350. *See generally* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139 (1990) (discussing how slaves were perceived as "de facto surrogates," similar to the surrogacy discussed in this Article).

or payment for certain expenses, such as the medical costs of pregnancy and childbirth. Nonetheless, there have been clear efforts to prevent these financial aspects of adoption from creating a market in either children or de facto or de jure custody of children under international law and most domestic systems.[351] The legal and ethical necessity of preventing markets in human beings requires maintaining the prohibitions of the sale of parental rights that pervade adoption law and also requires enforcing similar prohibitions as to both traditional and gestational surrogacy.

Under the CRC, children "shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."[352] Similarly, children have a right to preserve their identity[353] and a right not to be "separated from [their] parents against their will."[354] Creating market mechanisms to transfer parentage status, custodial rights, and de facto custody of children subjects these children's rights to a bidding war that operates completely independently of any consideration of the best interests of children.[355] It also treats children's ties to those intimately involved in their creation, whether through gestation and childbirth or genetically, as meaningless and insignificant. To the contrary, the CRC recognizes that children are human beings who will normally, over their life course, find great significance in knowing the people who are, in these fundamental ways, parents and family to them.[356] Hence, depriving children of these connections is a deprivation of rights that can only be justified by the overriding need to protect the children from even greater harms. Market mechanisms are adult centered and focus on which adults have greater bargaining power, based largely on wealth and social position; market mechanisms thereby cannot and do not properly account for the rights and

351. *See, e.g.*, Hague Adoption Convention, *supra* note 21, at arts. 4(c)(3), 8, 32; Optional Protocol, *supra* note 1; *Expert Group on the Financial Aspects of Intercountry Adoption*, *supra* note 30.

352. CRC, *supra* note 4, at art. 7(1).

353. *Id.* at art. 8(1).

354. *Id.* at art. 9(1).

355. *See* Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, B.C. THIRD WORLD L.J. 61, 66–75 (2006). *But see* Erwin A. Blackstone, Andrew J. Buck & Simon Hakim, *Privatizing Adoption and Foster Care: Applying Auction and Market Solutions*, 26 CHILD. & YOUTH SERVS. REV. 1033, 1041–46 (2004) (explaining the market mechanisms behind auctioning adoptions).

356. *See* CRC, *supra* note 4, at arts. 7–9.

best interests of children.

The law—including international law as represented by the CRC, the Sale of Children Protocol, and the Hague Adoption Convention—has generally rejected the law and economics argument for an explicit market in children for adoption.[357] Nonetheless, the fundamental principles of law protected by the legal norms against slavery, human trafficking, and the sale of children are currently threatened by jurisdictions that are facilitating or tolerating the large-scale practice of commercial surrogacy.[358] While the practice of large-scale commercial surrogacy is fairly new, the arguments in favor of it are disturbingly familiar and should be rejected, as they have been in other contexts. Indeed, it may be helpful to remember that some proponents of nineteenth century de jure slavery argued that they, too, were not actually buying and selling human beings, but only buying and selling the labor of human beings.[359] The human and lawyer's capacities to invent legal fictions and rationalizations cannot be allowed to triumph on a question of such fundamental importance.

E. Can You Buy What Is Yours?

Surrogacy proponents could argue that intended contractual parents who are also the genetic parents cannot be buying the children, since such children already belong to them.[360] The argument, in short, is that you cannot buy what is already yours. This argument in its purest form applies to the subset of surrogacy cases in which there are two intended parents who are also the genetic parents of the child. In these circumstances, it is claimed that the intended parents are the only parents of the child and hence are only receiving gestational services, and not custodial rights, from the surrogate.[361]

Even in its purest form, however, where the intended parents are the genetic parents, the principle that you cannot buy what is yours is both

357. *See generally* Atwell, *supra* note 96.

358. *See, e.g.*, FIELD, *supra* note 18, at 18 ("The Supreme Court of Kentucky, however, has held that paid surrogacy arrangements do not constitute babyselling within the meaning of that state's law because the child was no conceived when the arrangement was made. Accordingly, the court said, the legislative concern with protecting expectant mothers from financial inducements to part with the child does not apply.").

359. *See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 62 (1999).

360. *See* SCOTT B. RAE, BRAVE NEW FAMILIES 158 (1996).

361. *See id.* (describing but also rebutting the gestational "services" argument).

incorrect and misapplied.[362] With property, you can buy what is already yours if ownership is shared or if there are possible conflicting claims on the property.[363] For example, it is commonplace in property law that where property is held in some kind of joint tenancy or is shared between present and future interests, one owner can buy out the interests of others.[364] Similarly, in the law of wills, one can buy out another's interest in a possible but uncertain property interest—as in contracts not to contest wills—whereby the testator contracts with potential contestants.[365] Under such contracts, the potential contestants accept financial consideration in exchange for relinquishing their right to contest the will or otherwise claim inheritance rights.[366] Similarly, custodial arrangements for children are commonly plural in nature, not only between parents, but sometimes also involving other persons, such as grandparents. Hence, third party visitation statutes are commonplace in the United States, and courts can enter orders that create visitation rights for third parties.[367] Thus, buying out another's custodial interests in a child would still be a form of illicit sale of children, even if the purchaser prior to the sale had a custodial right or interest in the child. Hence, the law generally does not enforce contracts in which custodial interests are relinquished for financial consideration by one parent to another parent. Similarly, custodial interests are often uncertain in relationship to children, but courts do not enforce contracts for financial consideration in which individuals agree not to litigate custody as we do for inheritance—because doing so would constitute a kind of sale of custodial interests in children. Hence, when intended parents who are also genetic parents pay surrogates, they are still buying the surrogate's de facto and de jure custodial rights and interests in the child. The intended parents are buying, in short, *exclusivity—that they would be the only persons with recognized legal and de facto custodial control of the child.*

It might be contested that a child cannot have two mothers, and hence,

362. *See* PAUL CLOSE, CHILD LABOUR IN GLOBAL SOCIETY 28–30 (2014).

363. *See id.* (citing Alexander M. Capron, *Surrogate Contracts: A Danger Zone*, L.A. TIMES (Apr. 7, 1987), http://articles.latimes.com/1987-04-07/local/me-15_1_surrogate-contracts).

364. JOHN DEWITT GREGORY, PETER NASH SWISHER & ROBIN FRETWELL WILSON, UNDERSTANDING FAMILY LAW 72–73 (4th ed. 2013).

365. *Trusts*, A.B.A. 7, http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/wills/chapter_4.authcheckdam.pdf (last visited Oct. 13, 2015).

366. *See* GERRY W. BEYER, WILLS, TRUSTS AND ESTATES § 10.8.14 (5th ed. 2012).

367. *See* GREGORY ET AL., *supra* note 364, at 551–55.

where an intended parent is a genetic parent, the gestational parent is automatically ruled out. This argument, however, fails on several fronts. First, the law in many jurisdictions is increasingly structured to permit two persons of the same gender to both be legal parents of a child.[368] California's recent surrogacy bill was specifically designed to permit two people of the same gender to be legal parents, a rule directed at same gender, contractually intended parents.[369] In addition, California law now permits a child to have more than two legal parents, recognizing that children sometimes benefit from having more than two legal adult parents.[370] The ban on two mothers is thus not absolute. Hence, the decision to not permit it in instances where one woman has gestated and birthed the child and another has provided the egg is arbitrary.[371]

Second, it is an aberration that proponents and practitioners of surrogacy and assisted reproduction technologies intentionally create instances where the numbers of people involved in procreating an infant are multiplied beyond the traditional father and mother and yet seek to arbitrarily maintain exclusivist legal models where a child may only have one mother or two legally acknowledged parents.[372] This is particularly arbitrary because it is already commonplace that not every parent of a child necessarily has full custodial rights; hence, acknowledging parentage and some degree of custodial interest in a third parent would not necessarily undercut the existence of primary custody in the parents with whom the child primarily resides.[373]

Thus, the argument that you cannot buy what is already yours ultimately returns to the question of whether the genetically unrelated gestational surrogate has any custodial or parental rights to the child she gestates and

368. *See generally* Nicholas K. Park, Emily Kazyak & Kathleen S. Slauson-Blevins, *How Law Shapes Experiences of Parenthood for Same-Sex Couples*, J. GLBT FAM. STUD. 1 (2015).

369. CAL. FAM. CODE §§ 7960–62 (West 2013); *see also* Vorzimer & Randall, *supra* note 22.

370. FAM. § 4052.5; *see also* Patrick McGreevy & Melanie Mason, *Brown Signs Bill to Allow Children More than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013), http://articles.latimes.com/2013/oct/04/local/la-me-brown-bills-parents-20131005.

371. *See* Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993) (rejecting ACLU argument that the court should recognize both gestational mother and genetic mother as legal mothers).

372. *See* Laufer-Ukeles, *supra* note 108, at 1254 ("[M]ultiple parental-child relationships may be securely and safely established to the benefit of all involved. While some would object that this violates the exclusivity and privacy of parenthood where procreating and raising children involves third parties, such exclusivity may not be appropriate.").

373. *See* FAM. § 7802.

births. As indicated below in the review of California law, it is clear that she does, absent an approved form of surrogacy contract.[374] Hence, it is still the surrogacy contract that makes her a non-parent, and it is the surrogacy contract that, whether explicitly or implicitly, includes the purchase of her parental and custodial interests, both de facto and de jure and actual and potential.

The argument that you cannot buy what is already yours is obviously misapplied in the common instances where one or both intended parents are not genetic parents of the child in question.[375] Thus, in the *Baby M.* case, wherein the intended father was also the genetic father but the intended mother was not genetically related to the child, the court correctly surmised that the surrogacy contract was an attempt to sell the maternal rights of the child from the surrogate to the "adoptive" mother.[376] This same logic should apply in gestational surrogacy arrangements where there are two intended parents but only one is genetically related. In instances where there is only one intended parent and a gamete is purchased or obtained from someone who is not an intended parent, it is clear that the intended parent is seeking to purchase an exclusive parentage status from the surrogate, in a situation where otherwise the intended parent would have only a shared custodial interest in the child.

F. California, Gestational Surrogate Mothers, and the Sale of Children

California is the preeminent pro-surrogacy jurisdiction in the United States and is also a significant destination for international commercial surrogacy.[377] California has carefully crafted its laws to facilitate the practice of commercial gestational surrogacy, drafting its laws with significant input from attorneys and others active in California's "burgeoning surrogacy industry."[378] Yet ironically, upon examination, California's legal regime for gestational surrogacy has structured surrogacy arrangements such that they will generally constitute, under international standards, the illicit sale of children.

California also illustrates the thesis that even explicitly pro-surrogacy

374. *See infra* notes 377–463 and accompanying text.
375. *See, e.g.*, *In re* Baby M., 537 A.2d 1227 (N.J. 1988).
376. *See generally id.*
377. SPAR, *supra* note 130, at 84–85; Laufer-Ukeles, *supra* note 108, at 1265.
378. *See* FAM. §§ 7960–62; Vorzimer & Randall, *supra* note 22.

jurisdictions do not regard gestational surrogates as inherently, ab initio, never the mother of the children they birth.[379] Instead, California strips gestational surrogates of parentage status based on surrogacy agreements with intended parents.[380] Hence, as theorized above, gestational surrogates—like traditional surrogates—bargain away their parental rights in surrogacy agreements, indicating that commercial surrogacy arrangements constitute the illicit sale of children.[381] In order to make this point, a survey of California's case law and statutory approach to surrogacy is necessary.

In *Johnson v. Calvert*, the foundational pro-surrogacy decision from the California Supreme Court, the court explicitly approved commercial gestational surrogacy contracts.[382] *Johnson* concerned a dispute between the two intended parents—a married couple, Mark and Crispina Calvert, who were the genetic parents of the child—and the genetically unrelated surrogate, Anna Johnson.[383] Prior to embryo transfer, the parties signed a contract providing that "the child born would be taken into [the Calvert's] home 'as their child.'"[384] As the court noted, Johnson "agreed she would relinquish 'all parental rights'" to the child in favor of the Calverts.[385] Under the contract, the Calverts would pay Johnson $10,000 in several installments, with the last installment paid six weeks after birth, and pay for a $200,000 life insurance policy for Johnson.[386] Conflicts developed during pregnancy and the Calverts and Johnson claimed parentage in conflicting lawsuits.[387] At trial and on appeal, a key issue was whether "the surrogacy contract was legal and enforceable against [Johnson's] claims."[388]

The California Supreme Court held that both genetic and birth mothers had presumptions of parentage under California law.[389] Under those circumstances, the court did *not* view genetics as inherently trumping birth mother status.[390] Thus, the court noted that in an egg donation situation, the

379. *See infra* notes 386–451 and accompanying text.
380. *See infra* notes 386–451 and accompanying text.
381. *See supra* Part IV.B, .C.
382. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
383. *Id.* at 778.
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *See id.* at 782.
390. *Id.*

genetically unrelated birth mother who intends to parent the child would be "the natural mother under California law" rather than the genetically related egg donor.[391] The court held that when a conflict developed between the birth and genetic mothers, that intention was the deciding factor.[392] Hence, where "genetic consanguinity and giving birth" did not "coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[393] Thus, the court explicitly followed legal commentators who argued that intention, rather than genetics, should govern parentage in regard to reproductive technologies.[394]

However, in *Johnson*, the only intention that mattered was the intention in the surrogacy contract that was entered into prior to embryo transfer and pregnancy.[395] Johnson, the gestational surrogate and birth mother, asserted in court her intention to raise the child as her own during the pregnancy.[396] Thus, by the time the birth occurred—the time when the child became a constitutional person under U.S. Supreme Court case law[397]—Johnson had clearly and legally asserted her intention to exercise her parental rights to custody of the child.[398] However, the court completely discounted Johnson's intentions to raise the child in the court's intention-based theory.[399] Thus, where both Johnson and Crispina Calvert had "presented acceptable proof of maternity," the court decided it was necessary to inquire "into the parties' intentions *as manifested in the surrogacy agreement*."[400] Further, the court referred to "the gestator . . . voluntarily contracting away any rights to the child"[401] and noted that the contract provisions included Johnson agreeing to

391. *See id.* at 782 n.10.
392. *Id.* at 782.
393. *Id.*
394. *Id.* at 782–83 (citing John L. Hill, *What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parentage: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990); and Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 197–202 (1986)).
395. *Id.* at 782.
396. *Id.* at 778.
397. Roe v. Wade, 410 U.S. 113, 158 (1973).
398. *Johnson*, 851 P.2d at 781–82.
399. *Id.* at 782.
400. *Id.* (emphasis added).
401. *Id.* at 782 n.10.

"relinquish 'all parental rights' to the child in favor of [the Calverts]."[402] Hence, the court's intention-based theory was, in practice, a theory of contractual parentage—the only intentions that mattered were those embodied in the pre-embryo transfer contract.

Thus, even after *Johnson*, California law presumes that the woman who gives birth is the natural and legal mother of the child.[403] California law still states that a parent and child relationship may be established "by proof of having given birth to a child."[404] Thus, the term natural mother is not restricted to genetic mothers but can include a non-related gestational surrogate mother.[405] Indeed, under California law, a non-related intended parent can also be listed on the child's original birth certificate as the child's mother or father.[406] Thus, women who give birth in California generally have a presumption in favor of them being legal mothers, regardless of whether or not they are genetic parents.[407] It is the *surrogacy contract* and the corollary existence of intended parents, not the mere fact of being genetically unrelated to the child, that strips the gestational surrogate of her parentage status.[408]

This conclusion is underscored by the significant federal criminal prosecution and scandal in California concerning prominent ART attorneys in what the federal authorities described as a "baby-selling ring."[409] The federal prosecution indicated that surrogacy arrangements and contracts entered into after embryo transfer, but before birth, constituted baby-selling under California law.[410] In 2011, the Federal Bureau of Investigation (FBI)

402. *Id.* at 778.

403. *See id.* at 782.

404. CAL. FAM. CODE § 7610(a) (West 2013).

405. *See id.*; *see also Johnson*, 851 P.2d at 778–82.

406. *See* FAM. §§ 7960–62; *Johnson*, 851 P.2d at 778–82.

407. *See Johnson*, 851 P.2d at 795.

408. *See id.*; *see also* FAM. § 7962.

409. *Baby-Selling Ring Busted*, FBI (Aug. 9, 2011) [hereinafter *Baby-Selling*], http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted.

410. *See id.* ("California law forbids the sale of parental rights to babies and children but permits surrogacy arrangements if the women expecting to carry the babies, Gestational Carriers ('GCs'), and the IPs enter into an agreement prior to an embryonic transfer.") Since this was a federal prosecution, the guilty pleas procured were for separate federal crimes—conspiracy to commit wire fraud for Theresa Erickson and Hilary Neiman and conspiracy to engage in monetary transactions in property derived from specified unlawful activities for Carla Chambers. *Id.* However, the illicit "sale of parental rights" and Erickson's admission of being part of a "baby-selling ring" constituted key parts of establishing the relevant federal crimes. *Id.*

issued the following press release about the guilty plea of Theresa Erickson, a prominent California attorney "specializing in reproduction law."[411] Titled "Baby-Selling Ring Busted,"[412] the press release stated in relevant part:

> United States Attorney Laura E. Duffy announced today that Theresa Erickson entered a guilty plea . . . in which she admitted to being part of a baby-selling ring that deceived the Superior Court of California and prospective parents for unborn babies. According to court records, Erickson (an internationally renowned California attorney specializing in reproductive law) fraudulently submitted false declarations and pleadings to the California Superior Court . . . in order to obtain pre-birth judgments establishing parental rights for Intended Parents ("IPs"). California law forbids the sale of parental rights to babies and children but permits surrogacy arrangements if the women expecting to carry the babies, Gestational Carriers ("GCs"), and the IPs enter into an agreement prior to an embryonic transfer. If the GC and IPs do not reach an agreement before the GC receives the embryonic transfer, the GC cannot transfer parental rights except through a formal adoption procedure.
>
> In her guilty plea, Erickson admitted that she and her conspirators used GCs to create an inventory of unborn babies that they would sell for over $100,000 each. They accomplished this by paying women to become implanted with embryos in overseas clinics. If the women . . . sustained their pregnancies into the second trimester, the conspirators offered the babies to prospective parents by falsely representing that the unborn babies were the result of legitimate surrogacy arrangements, but that the original IPs had backed out. Erickson also admitted that she prepared and filed with the Superior Court . . . declarations and pleadings that falsely represented that the unborn babies were the products of legitimate surrogacy agreements, that is, ones that involved agreements between the IPs and the GCs prior to embryonic transfer. With these fraudulently

411. *Id.*; *see also* Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKLEY J. INT'L. L. 412, 414–17 (2012) (discussing the background and implications of Theresa Erickson's baby scam).

412. *Baby-Selling*, *supra* note 409.

> obtained pre-birth orders, the IPs' names would be placed on the babies' birth certificates and the conspirators would be able to profit from their sale of parental rights.[413]

Erickson was joined in this "baby-selling ring" by Hillary Neiman, another prominent surrogacy attorney, and Carla Chambers, a six-time surrogate, both of whom also pled guilty to federal charges.[414] The ring arranged for American and Canadian surrogates to travel to Ukraine where they were implanted with embryos created with donor sperm and donor eggs.[415] At least a dozen babies were placed with prospective parents, who paid between $100,000 and $150,000 for each child.[416] The surrogates were promised $38,000 to $45,000, which was significantly higher than normal for surrogates in the United States.[417] These illicit baby-selling activities were conducted from 2005 to 2011 by the nationally recognized Erickson, with Neiman reportedly joining the conspiracy in 2008.[418]

This baby-selling ring was designed to exploit interactions between the permissive nature of California and Ukrainian law and practice on surrogacy.[419] Clinics in Ukraine were willing to transfer embryos to surrogates without proof of a surrogacy contract.[420] California was—and is—willing to place the names of genetically unrelated intended parents on the original birth certificate of the child without any kind of adoption procedure based on proof of a pre-embryo transfer surrogacy contract.[421]

For the uninitiated, the difficulty presented by the prosecution of this baby-selling conspiracy is differentiating between what California law deems illicit baby-selling and what California law deems a lawful commercial surrogacy arrangement.[422] A commercial surrogacy contract entered into after embryo transfer—but still during pregnancy—is considered baby-selling or human trafficking with the rules limiting baby-

413. *Id.*
414. *See* Mohapatra, *supra* note 411, at 415–17; *Baby-Selling*, *supra* note 409.
415. *See* Mohapatra, *supra* note 411, at 415.
416. *See id.* at 416–17.
417. *See id.*
418. *See id.* & nn.16–17.
419. *See id.* at 417.
420. *Id.* at 416.
421. *See id.* at 417.
422. CAL. FAM. CODE §§ 7960–62 (West 2013).

selling in adoption considered applicable.[423] However, a commercial surrogacy agreement entered into prior to embryo transfer in California is considered proper and is exempted from California's criminal laws against baby-selling and from the limitations of California's adoption code.[424] While the time differential between whether the contract is made pre- or post-embryo transfer is clear enough, the rationale of the difference in legal result remains obscure. Do not both situations involve payment for both the gestational services and the contractual relinquishment of parental rights?[425]

The California Supreme Court in *Johnson v. Calvert* tried to explain the difference this way:

> Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when [Johnson] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. Anna was not the genetic mother of the child. The payments made to [Johnson] under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth.[426]

Each of the court's proffered explanations is either analytically flawed or false.[427] First, the court notes that payments were made both before and after birth in support of the conclusion that Johnson was paid for gestation, rather than relinquishment. This is illogical, since she could be paid for both gestation and relinquishment—in which case the contract still includes the illicit sale of a child. The timing of the payments, with some part paid after birth, points toward at least partial payment for relinquishment. Further, it is possible to sell rights to a child with any timed sequence of payments,

423. *See* Mohapatra, *supra* note 411, at 415–17.

424. *See* FAM. §§ 7960–62; Mohapatra, *supra* note 411, at 415–17. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

425. FAM. § 7960.

426. *Johnson*, 851 P.2d at 782.

427. *See supra* notes 428–47 and accompanying text.

particularly since the transfer of Johnson's legal rights to the child would apparently occur at signing of the contract, rather than at birth. This is indicated by the court's dismissal of Johnson's "change of heart" during pregnancy as too late.[428]

Second, the *Johnson* court appears to engage in "doublethink"[429] by simultaneously claiming that Johnson was not paid for relinquishing her child, while also chiding her for "voluntarily contracting away any rights to the child"[430] and reciting the contract provision whereby Johnson "agreed she would relinquish 'all parental rights' to the child in favor of [the Calverts]."[431] In the quid pro quo of the Calvert-Johnson surrogacy contract the Calvert's quid was financial in nature; hence, Johnson's responding consideration, including contracting away her parental rights, was clearly in exchange for financial consideration.

Third, the court's statement that Anna was not subject to financial inducement to relinquishment because the contract was made prior to conception (or before embryo transfer) is obviously false, since in fact Anna was financially induced to sign the contract.[432] It is certainly possible for someone to bargain away their not-yet-conceived children. Consider, for example, the children's story *Rumpelstiltskin* where a desperate woman is induced to bargain away her not-yet-conceived first-born child in exchange for life-saving assistance from a mysterious man.[433]

Fourth, the court seems to rely on the concept that Johnson cannot be selling the child since the child is, ab initio, the Calverts' child. Of course, the court relied on its own power to arbitrarily declare that the child was never Johnson's: the child was never Johnson's because the court says it was never Johnson's.[434] Even so, the court mischaracterized its own analysis. The court, in fact, never declared that genetically unrelated birth mothers are inherently never mothers.[435] To the contrary, it declared that under the right circumstances—and absent a surrogacy agreement—genetically unrelated

428. *Id.* at 782.
429. *See* GEORGE ORWELL, 1984 36 (Penguin Books 2003) (1949).
430. *Johnson*, 851 P.2d at 782.
431. *Id.* at 778.
432. Financial compensation was really the only inducement for Johnson to sign the contract. *Id.* at 784.
433. *See, e.g.*, PAUL O. ZELINSKY, RUMPELSTILTSKIN (1986).
434. *Johnson*, 851 P.2d at 782.
435. *Id.*

birth mothers are legal and natural mothers.[436] According to the court's own reasoning, it is the pre-embryo transfer contract that rendered Johnson not the mother of the child, not merely the lack of genetic relationship. Hence, by definition, Johnson was "contracting away" her parental rights.[437] Further, the court's reliance on the concept that you cannot sell what is not yours is misplaced. Even if Johnson has no legal claim on the child by judicial fiat, she still is being paid to willingly hand over the child after birth and not to assert or claim any such rights. Indeed, intermediaries who lack any legal custodial or parental right regarding children are nonetheless prosecuted for their roles in trafficking and the sale of children.[438] In the 2005–2011 surrogacy baby-selling ring in California, the FBI characterized the conspirators, including prominent surrogacy attorney Theresa Erickson, as profiting from "their sale of parental rights."[439] Hence, one does not need to have lawful custody of a child to be paid to hand over a child.[440] Obviously, Johnson as a birth mother had the capacity to control the place of birth, had de facto physical control of the child, and was paid in part to physically facilitate the handing over of the child to the Calverts under the contract.

Fifth, the court's reasoning that Johnson was genetically unrelated to the child as a justification for their conclusion that there was not a sale of a child contradicts other parts of the court's opinion that holds that genetics are not determinative of parentage claims in ART cases.[441] The *Johnson* court stated specifically that a genetically unrelated birth mother in a "true 'egg donation' situation" would be deemed the legal and "natural mother under California law."[442] Further, the court acknowledged that Johnson, despite her lack of genetic relationship, had "adduced evidence of a mother and child relationship as contemplated" by California law[443] and had "presented acceptable proof of maternity."[444] Under the court's analysis, where both Johnson—as birth mother—and Crispina Calvert—as genetic mother—had

436. *Id.*
437. *Id.*
438. *See supra* notes 303–06 and accompanying text.
439. *Baby-Selling*, *supra* note 409.
440. *See supra* notes 303–06 and accompanying text.
441. *See Johnson*, 851 P.2d at 782.
442. *Id.*
443. *Id.*
444. *Id.*

presented equally valid evidence of maternity,[445] and when the court declined the ACLU's contention that both should be legally acknowledged as mothers,[446] it was only the intention embodied in a surrogacy contract that tipped the balance against Johnson.[447] Hence, it was the surrogacy contract, rather than her status as genetically unrelated, that was decisive in causing Johnson to lose her parentage claim. Once again, the court engaged in a kind of doublethink, asserting one thing in one part of the opinion and then discarding it later to prove an opposite point.

In summary, the California Supreme Court in *Johnson* took a surrogacy contract, which, by its own terms and the court's own legal analysis, involved an exchange of payments for Johnson both gestating the child and "contracting away" her parental rights, and arbitrarily interpreted it as a payment for gestational services in order to avoid California's laws against child selling.

The court's arguments against the application of child-selling prohibitions to surrogacy are so transparently based on legal fictions, arbitrary dictates, and doublethink that the question must be asked: Should legal systems be permitted to evade fundamental policies against child selling, human trafficking, and related wrongs through such dubious legal analysis? If so, the *law becomes a means by which human beings are bartered and sold, rather than a remedy against such evils.* The California Supreme Court, like the United States Supreme Court in its approval of separate but equal in *Plessy v. Ferguson*,[448] has used the raw power of judging to distort both law and reality in service to the goal of facilitating practices that violate fundamental human rights.

The use of legal fictions and raw power to legalize the sale of children under California law became even clearer with California's enactment of a new surrogacy statute, which became effective on January 1, 2013.[449] The law was created with the explicit involvement of attorneys and others prominent in what an advocate describes as "California's burgeoning surrogacy industry."[450] The law was a response, in part, to the scandal of the federal convictions of prominent surrogacy attorneys Theresa Erickson and

445. *Id.* at 781–82.
446. *Id.* at 781 n.8.
447. *Id.* at 782–83.
448. 163 U.S. 537, 550–51 (1896).
449. *See* CAL. FAM. CODE §§ 7960–62 (West 2013); Vorzimer & Randall, *supra* note 22.
450. *See* Vorzimer & Randall, *supra* note 22.

Hilary Neiman in the "baby-selling ring."[451] Unfortunately, California's statute, by operationalizing the methods and rationale of *Johnson* and subsequent practice in California, makes the quid pro quo of financial inducement for a combination of gestational services and transfer of a child even more explicit.

Under California's new statute, a "gestational carrier" is defined as a woman "who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement."[452] An "intended parent" is defined as "an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction."[453] Thus, intended parents do not need to be genetically related to the child.[454] The statute requires the assisted reproduction agreements for gestational carriers to be "fully executed" prior to embryo transfer.[455] An action to establish parentage may be filed pre-birth and requires providing a copy of the "assisted reproduction agreement for gestational carriers."[456] A notarized assisted reproduction agreement for gestational carriers signed by all parties, accompanied by declarations of independent legal representation, rebuts the various statutory presumptions of parentage otherwise available under California law "as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children."[457] "Upon petition of any party to a properly executed assisted reproduction agreement for gestational carriers," the court issues an order that:

> Shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or

451. *See id.* (noting that the law was "in reaction to recent incendiary industry scandals"); *Baby-Selling*, *supra* note 409.
452. FAM. § 7960(f)(2).
453. *Id.* § 7960(c).
454. *See id.*
455. *Id.* § 7962(d).
456. *Id.* § 7662(e).
457. *Id.* § 7662(f).

> evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.[458]

Ironically then, California's new surrogacy statute makes it clear that, as was the case in *Johnson*, it is precisely the pre-embryo transfer surrogacy agreement that causes the gestational surrogate to lose her parental rights. Therefore, regardless of whether or not it is explicitly stated in the contract, by implication every such surrogacy agreement in California includes a provision by which the surrogate, in the words of *Johnson*, is "contracting away" her parental rights.[459]

The commercial nature of these arrangements is also presumed in the statute, particularly in the way the law provides for payments to intermediaries, including the "surrogacy facilitator" and the "nonattorney surrogacy facilitator."[460] These persons or organizations are involved in "advertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement,"[461] and "charging a fee or other valuable consideration for services rendered related to an assisted reproduction agreement."[462] The law presumes that both attorneys and non-attorneys will play these paid intermediary roles and provides for regulation of the handling of client funds in both instances. Similarly, the statute regulates the use of escrow, providing structure for the practice by which payments from the intended parents are held and then distributed at agreed-upon points of time to the surrogates themselves.[463] California's statutory legitimation of commercial surrogacy, upon analysis, is a thinly veiled legitimation of the sale of children. It therefore should not be viewed as a model for other jurisdictions.

458. *Id.*
459. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
460. FAM. § 7960(d)–(e).
461. *Id.* § 7960(e)(1).
462. *Id.* § 7960(e)(2).
463. *Id.* §§ 7960(c), 7961.

V. CONCLUSION: REGULATING SURROGACY

This Article is primarily focused on the question of when surrogacy constitutes the sale of children, particularly under international law standards. From that perspective, the question of appropriate legal regimes for surrogacy arises.

Certainly, it is not permissible under international law standards for nations to legitimize the systemic practice of surrogacy under circumstances when it constitutes the sale of children. Nonetheless, there is clearly pressure upon states, legislatures, and courts to do so. The large and growing global ART and surrogacy industry, related to the lucrative phenomenon of medical tourism, creates a powerful industry lobby.[464] The appeals of those who simply want to parent a child and grow a family produce sympathetic responses.[465] The dilemma of stateless children caught between permissive and prohibitory legal regimes creates an apparent imperative to provide a legal regime, or at least a legal solution, that will provide for the best interests of such children.[466] The argument that surrogacy constitutes a "win-win-win" scenario—opposed only due to irrational traditionalism—has a surface plausibility.[467]

In addition to the core understanding that commercial surrogacy, as currently practiced in many states and jurisdictions, does constitute the sale of children, there are several other factors that rebut these pro-surrogacy arguments. First, it should be understood precisely what the surrogacy industry is seeking. The industry does not merely seek toleration or acceptance of an alternative family form or reproductive practice. Rather, the industry seeks a legal regime that protects the more powerful and wealthier participants in the practice—the intermediaries and intended contractual parents—at the expense of the rights and interests of the more vulnerable participants, the so-called surrogates and children. Thus, while the industry may claim to speak for the interests of surrogates, they advocate for laws that strip surrogates of any parentage claims they may wish to assert

464. *See generally* SPAR, *supra* note 130; Vorzimer & Randall, *supra* note 22 (noting how a surrogacy advocate refers to California's "burgeoning surrogacy industry").

465. *See, e.g.*, Laufer-Ukeles, *supra* note 108, at 1224–25 (summarizing arguments of surrogacy advocates).

466. *See generally* Mohapatra, *supra* note 411 (describing cases involving the dilemmas caused by possible statelessness).

467. *See, e.g.*, Laufer-Ukeles, *supra* note 108, at 1224–25 (summarizing arguments of surrogacy advocates).

in the children they gestate and birth. Thus, the industry advocates for laws that strip birth mothers in surrogacy situations from the rights and protections that are typically accorded to birth mothers in adoption contexts.[468] Similarly, the surrogacy industry advocates for laws that deny children the information and reliable legal documents by which they might, even as adults, construct their personal history and identity.[469] Hence, the surrogacy industry seeks to reverse recent gains by adoptees in securing rights to their own information in some jurisdictions[470] by creating a legal regimen that distorts the very concept of a birth certificate. Thus, the industry seeks to create a situation where even the original birth certificate does not contain the name of the woman who gave birth to the child but instead contains only the names of the intended parents, even when they are genetically unrelated.[471]

Ironically, while the surrogacy industry may put itself forward as representing a break with the traditional family forms of the past, the industry is seeking to provide an "as if" exclusivist two-parent family to its clients, the intended parents. Hence, the surrogacy industry imposes a distorted legal form of the traditionalist nuclear family upon family constellations which are far more complex. The surrogacy industry is using legal fictions to squeeze non-traditional families into the nuclear family form traditionally predominant in some, but not all, nations and cultures. In order to do so, the surrogacy industry is seeking legal rules from governments and legal systems that cut off the legitimate rights and protections of less powerful persons impacted by surrogacy: children and surrogates.

The commercialization and commodification of babies is central to these special privileges sought by the surrogacy industry. It is clear that the surrogacy industry is selling not just services, but babies.[472] Yet the law is asked to pretend that contracts transferring parental and custodial rights and de facto custody of children are merely contracts for services.[473] The

468. *See supra* notes 377–463 and accompanying text.

469. *See supra* notes 377–463 and accompanying text.

470. *See* KATZ & KATZ, *supra* note 28, at 176–209; *State Legislation*, *supra* note 33; Richard Weizel, *Adoptees Are Finally Winning Birth Certificate Rights*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/06/16/adoptees-birth-certificates_n_5499022.html (last updated Aug. 16, 2014, 5:59 AM).

471. *See supra* notes 394, 421 and accompanying text.

472. *See, e.g.*, SPAR, *supra* note 130.

473. *See supra* notes 377–463 and accompanying text.

surrogacy industry is not seeking any kind of equal treatment under neutral principles of law, but is seeking exemptions from one of the most basic legal principles of the modern age—the prohibition of the sale of human beings.[474]

Under these circumstances, it becomes relatively easy to summarize the kinds of regulations that should be applied to surrogacy. In essence, legal systems should apply the same rules to gestational and traditional surrogacy that already apply to adoption. One model for this kind of approach is the *Baby M.* decision, which correctly applied adoption law principles to traditional surrogacy.[475] Hence, the financial aspects of both gestational and traditional surrogacy should be regulated in the same manner as adoption.[476] Payments for gestational services should be prohibited as such implicitly and necessarily include relinquishment and hence the transfer of de facto and de jure custodial rights. While "reasonable expenses" are sometimes permissible in adoption and in surrogacy, in surrogacy this must include only medical and other expenses directed related to surrogacy. Permissible "reasonable expenses" should not include the financial support or living expenses of the surrogate during pregnancy, lest such expenses become a backdoor means of selling parental rights.

In addition, all birth mothers—whether genetically related or not—should be accorded the status of birth mothers, ab initio, as the mothers of their children. Surrogacy should be subject to the rule, developed for adoption, that birth mothers cannot be held to any kind of pre-birth contractual relinquishment of parental rights.[477] Thus, an important protection against surrogacy contracts improperly transferring de facto or de jure parental or custodial rights is to declare any such provisions in pre-birth contracts unenforceable.

Similarly, as adoptees increasingly win the right to information about their parental and family heritage, these rights should apply to children born through surrogacy and ART. The increased capacities to create children in more complex and artificial ways should be accompanied by the increased rights of those children to learn, at least by adulthood, the facts about their

474. See*, e.g.*, U.S. CONST. amend. XIII; CRC, *supra* note 4, at art. 35; Slavery Convention, *supra* note 2; Optional Protocol, *supra* note 1.

475. *See generally In re* Baby M., 537 A.2d 1227 (N.J. 1988).

476. *See, e.g.*, Hague Adoption Convention, *supra* note 21, at art. 4(c)(3) (requiring that "consents [] not be[] induced by payment or compensation of any kind").

477. *See, e.g.*, *id.* at art. 4(c)(4) (stating that consent of the mother can be "given only after the birth of the child").

creation.

It is understandable if States wish to permit new means of family formation in order to promote procreative liberty, a right to family life, privacy, toleration, or the public good. However, legal recognition of these new family forms should reflect the complexities of those families rather than trying to inappropriately squeeze them into the legal forms of the exclusivist nuclear family. Thus, the proper answer to the surrogacy industry's claim to represent new, useful, and emerging forms of family formation is that it is impermissible to legally force these new practices into the patterns of the exclusivist two-parent family at the expense of the basic rights of children, including their right not be commodified. Hence, all procreative practices, whether old or new, must be subject to basic policies against the sale of human beings, policies that cannot be bargained away through legal fictions or pretenses.

While it is important to apply relevant adoption law principles to surrogacy, some legal procedures and systems created for adoption may not be suitable for processing surrogacy cases. Thus, the question has arisen whether the Hague Adoption Convention can be used to process international surrogacy cases. The 2010 Special Commission on the Practical Operation of the Hague Adoption Convention "viewed as inappropriate the use of the Convention in cases of international surrogacy."[478] The reasoning for such viewpoint is provided in a letter by William Duncan, then Deputy Secretary General of the HCCH, written on behalf of the Permanent Bureau of HCCH, which was distributed by HCCH to participants of the 2010 Special Commission.479 Deputy Secretary General Duncan noted "very serious concerns," as "it would seem at the very least ironic that the 1993 Hague Convention, which clearly opposes the idea of intercountry adoption as a commercial transaction, should be used to help to complete a commercial surrogacy arrangement."[480] Duncan also noted a number of specific violations of the Hague Adoption Convention that would be likely in a typical surrogacy arrangement, including the Article 4 rule requiring that the consent be "given only after the birth of the

478. *See Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention (17–25 June 2010)*, HAGUE CONF. ON PRIV. INT'L L. (Mar. 2011), https://assets.hcch.net/upload/wop/adop2010_rpt_en.pdf (This author participated in the Special Commission as an independent expert.)

479. On file with the author.

480. *Id.*

child" and "not induced by payment or compensation of any kind," Article 17 requiring various procedures before entrustment of the child to prospective adopters, and the subsidiarity principle requiring consideration of placement in the country of origin.[481] Duncan did not rule out the possibility of applying Convention procedures to a non-commercial surrogacy case.[482] Duncan's analysis is compelling and underscores the differences between legitimate intercountry adoptions and the current practice of commercial international surrogacy.

Upon examination, commercial surrogacy in the forms sought and practiced by the surrogacy industry usually constitutes the sale of children under international law. Thus, the legal legitimation of commercial surrogacy in some jurisdictions is a profound step backwards in the legal progress against the interrelated practices of human trafficking and the sale of children. The justifications of commercial surrogacy reflect the strong desire for certain kinds of babies in the world today; such justifications fail to explain how or why such practices are not the sale of children. As in past eras, our own era is also faced with a temptation to justify the sale of human beings in the name of some good or interest to which we are strongly attached. Hopefully, that temptation can, over time, be resisted.

481. *See id.* (quoting Hague Adoption Convention, *supra* note 21).
482. *See id.*