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The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export

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THE ONE HUNDRED THOUSAND DOLLAR BABY: THE IDEOLOGICAL ROOTS OF A NEW AMERICAN EXPORT

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The thesis of this article is controversial: The United States of America, as represented by the United States government, some states, and leading legal institutions, is actively building worldwide markets in children. The ideological roots of these actions span left–right divides, making it more difficult—and even hazardous—to advocate against it. Another important force is simply that of capitalism run amuck, as the profits generated create industries with deep pockets and large-scale resources to politically, legally, and socially further their ends. This practice of allocating children in large part through market mechanisms has attracted significant support from powerful and mainstream legal institutions. The combination of broad-based ideological support and deep financial pockets makes any engagement between supporters and opponents of these new markets in children asymmetric.

A primary present manifestation of this worldwide market is surrogacy. Adoption, in the recent past, has served as another manifestation of efforts to construct demand-driven markets in children, as well as an arena for resistance to such markets. Most likely developing Assisted Reproductive Technologies ("ARTs") will continue to offer new opportunities for the development of markets in children.

The topic deserves a book; this essay merely sketches out the elements that sustain this controversial thesis. The purposes of this sketch are to document this mainstreaming and advocacy of markets in children and to encourage research and resistance.

I. IDEOLOGICAL ROOTS

A. Law and Economics

i. Introduction

For forty years, since the publication of *The Economics of the Baby Shortage*[1] by Elizabeth Lands and Richard Posner, the law and economics

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movement has advocated for allowing the sale of parental rights.[2] While the initial paper was exploratory of the concept, the proposals over time have become more insistent and even dogmatic, as in Donald Boudreaux's article, *A Modest Proposal to Deregulate Infant Adoptions*:

> In his famous satire, Jonathan Swift "modestly" proposed slaughtering babies and feeding them to hungry Irish folk. Thanks to Swift's masterful lampoon, any proposal for modestly changing public policy affecting children risks being branded a satire. So I proclaim up front my sincerity in proposing that pregnant women, and women who have just given birth, be allowed to contract freely with adoptive parents at mutually agreeable prices for the sale of parental rights in their infants.[3]

ii. A Summary of the Law and Economics Argument for Markets in Parental Rights

It seems particularly important to convey the strength of the law and economics argument in favor of a market in parental rights. Therefore, despite my complete disagreement with its conclusions, this subsection summarizes the arguments primarily from the perspective of a proponent rather than opponent.

Adoption already involves black and gray markets in children, as the laws against baby-selling are circumvented or porous.[4] Birth mothers

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[1] Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

[2] *See, e.g.*, MARK MONTGOMERY & IRENE POWELL, SAVING INTERNATIONAL ADOPTION: AN ARGUMENT FROM ECONOMICS AND PERSONAL EXPERIENCE 187 (2018); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 165–70 (5th ed. 1998); RICHARD POSNER, SEX AND REASON 409–17 (1992); Donald J. Boudreaux, *A Modest Proposal to Deregulate Infant Adoptions*, 15 CATO J. 117, 117 (1995); Landes & Posner, *supra* note 1, at 323.

[3] Boudreaux, *supra* note 2, at 117; *see* MONTGOMERY & POWELL, *supra* note 2, at 187.

[4] *See* MADELYN FREUNDLICH, THE MARKET FORCES IN ADOPTION 9–13 (2000); POSNER, ECONOMIC ANALYSIS, *supra* note 2, at 165–72; POSNER, SEX AND REASON, *supra* note 2, at 410–16; *see also* Hague Convention on Protection of Children and Co-operation in Respect of Intercounty Adoption arts. 1(b), 8, 11, 32, May 29, 1993, 32 I.L.M. 1138 [hereinafter HCIA 1993], https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf; Convention on the Rights of the Child arts. 1, 11, 21, 32, 34, 35, 36, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography arts. 1, 2(a), 3(1), May 25, 2000, 2171 U.N.T.S. 227 [hereinafter Optional Protocol], https://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf.

already can be paid expenses, and the line between expenses and compensation is not always clear, and hence not readily enforceable.[5] Intermediaries already profit (even when labeled non-profits) from adoptions,[6] generally at the expense of birth mothers, since it is payments to the natural parents which are primarily limited under current law.[7] The laws against baby-selling have distortive and destructive effects, by inducing the negative features of black and gray markets, by preventing the most worthy person (the natural mother) from benefitting financially while allowing others to do so, and by artificially reducing supply which makes it more difficult for adults who wish it to become parents.[8]

In addition, these harms are not justified by any benefits of such restrictions. As to the children themselves, so long as prospective adoptive parents are required to pass some sort of fitness screening,[9] the matching produced by market mechanisms would be as good as, or better, than that provided by social workers and agencies, particularly as to healthy babies.[10] Hence, the risks of child abuse or neglect of the proposed system are no greater than the present system, as the primary protection of screening of prospective adoptive parents would also exist in the proposed system.[11]

Further, selling parental rights is not the same thing as selling children, as children will not be slaves, nor literally property, but simply be transferred from one parent or household to another.[12] Most of the perceived negative impacts of child selling relate to black or gray markets and hence would not apply to explicit, legalized markets in parental rights.[13]

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[5] *See* FREUNDLICH, *supra* note 4; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 152 (4th ed. 1992); POSNER, SEX AND REASON, *supra* note 2, at 410; Landes & Posner, *supra* note 1, at 337.

[6] *See* FREUNDLICH, *supra* note 4; Boudreaux, *supra* note 2, at 125; Landes & Posner, *supra* note 1, at 326.

[7] *See, e.g.*, MONTGMOERY & POWELL, *supra* note 2, at 143–44; Boudreaux, *supra* note 3, at 119–120; Landes & Posner, *supra* note 1, at 346–47.

[8] *See* MONTGOMERY & POWELL, *supra* note 2, at 143–44; POSNER, ECONOMIC ANALYSIS, *supra* note 2, 165–170; POSNER, SEX AND REASON, *supra* note 2, at 410–16; Landes & Posner, *supra* note 1, at 326.

[9] *See* POSNER, ECONOMIC ANALYSIS (4th ed.), *supra* note 5, at 153; POSNER, ECONOMIC ANALYSIS, *supra* note 2, at 169; Landes & Posner, *supra* note 1, at 343.

[10] Landes & Posner, *supra* note 1, at 342–43.

[11] *See id.*

[12] *See* POSNER, SEX AND REASON, *supra* note 2, at 410, 413; Boudreaux, *supra* note 2; Lawrence A. Alexander & Lyla H. O'Driscoll, *Stork Markets: An Analysis of "Baby-Selling"*, 4 J. LIBERTARIAN STUD. 173, 173–74 (1980). Alexander and O'Driscoll claim that their position differs from Posner's but the purported distinction between selling babies and selling parental rights appears similar. *See id.*

[13] *See* POSNER, ECONOMIC ANALYSIS (4th ed.), *supra* note 5, at 150–54; POSNER, SEX AND REASON, *supra* note 2, at 409–17.

Beyond that, the value of such prohibitions is largely irrational and symbolic.[14] Rationally, permitting such markets in parental rights would enlarge the number of children available for adoption, allowing more adults to fulfill their desires to parent, potentially decrease the numbers of abortions, empower birth mothers by allowing them more options and to benefit financially, and alleviate the current negative features of the black and gray markets in adoption: particularly the lack of information and lack of remedies for misconduct characteristic of such markets.[15] The primary losers of such legalization would be adoption professionals, agencies, and intermediaries, as empowered birth mothers could capture more of the financial benefit of the market and only use intermediaries when in their own interests.[16] Since adoption is already intrinsically a market, it is better to legalize and regulate the market in rational ways rather than irrationally restrict and distort the market.[17]

iii. ART's Contribution to the Increasing Plausibility of the Law and Economics Argument for Markets in Parental Rights

Initially, the law and economics proposal for legalizing the sale of parental rights was met with a chilly reception. Politically, some suggest that Posner's published work in this area cost him the chance to be nominated to the United States Supreme Court, with Posner known as "the guy who wants to sell babies."[18] Posner himself noted that critics of the law and economics movement used the 1978 Landes and Posner article as "an example of [the] excesses" of the law and economics movement.[19] Academic responses were often quite negative.[20] Professor Margaret Radin's famous 1987 article, *Market-Inalienability*, analyzed markets in the contexts of sex work, adoption, and surrogacy; Professor Radin noted concerns with commodification and the conceptions of children, sexuality,

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[14] *See* POSNER, SEX AND REASON, *supra* note 2, at 413.

[15] *See* MONTGOMERY & POWELL, *supra* note 2, at 143–44; POSNER, ECONOMIC ANALYSIS (4th ed.), *supra* note 5, at 150–54; POSNER, SEX AND REASON, *supra* note 2, at 409–17; Alexander & Driscoll, *supra* note 12, at 173, 177–78; Boudreaux, *supra* note 2, at 117–22; Landes & Posner, *supra* note 1, at 324, 339.

[16] *See* MONTGOMERY & POWELL, *supra* note 2, at 143–44; POSNER, SEX AND REASON, *supra* note 2, at 410–16; Landes & Posner, *supra* note 1, at 346–47.

[17] *See* MONTGOMERY & POWELL, *supra* note 2, at xv; POSNER, ECONOMIC ANALYSIS (4th ed.), *supra* note 5, at 150–54; POSNER, SEX & REASON, *supra* note 2, at 409–16; Boudreaux, *supra* note 2, at 117–18; Landes & Posner, *supra* note 1, at 324.

[18] Dinesh D'souza, *Selling Babies*, FORBES (Feb. 24, 1997, 12:00 AM), https://www.forbes.com/forbes/1997/0224/5904096a.html#228371432108.

[19] Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 59 (1987).

[20] *See id.* at 59 n.1 (quoting Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. Cal. L. Rev. 669, 688 n.51 (1979)).

and persons that could develop with such markets.[21] Professor Michael Sandel objected to some claims of the law and economics movement, basing his objections on the need for limits to markets, and the idea that "certain things should not be bought and sold."[22] While acknowledging that there often were economic contexts or aspects of children, parent-child relationships, personal intimate relationships, sexuality, and procreation, these authors were signaling the need to retain a primarily non-economic viewpoint and valuation of these aspects of human life.[23] Limitations on markets in areas like sex work, surrogacy, and adoption were necessary in order to prevent a tilting to primarily economic perspectives of sexual intimacy, procreation, children, women, men, and family relationships.[24] Such a primarily economic view, it was thought, would change human self-understanding and practice in ways contrary to human flourishing, human dignity, or our understanding of personhood.[25]

Over time, however, some of the predictions and descriptions of the law and economics advocates of markets became increasingly plausible. The rise of Assisted Reproductive Technologies ("ART") and a large-scale and ubiquitous market-based ART market made market-based understandings of human procreation increasingly plausible, both internationally, and especially in the United States, where the ART services industry was primarily privatized, paid for out of pocket by consumers.[26] The proponents of adoption markets have often been perceptive enough to reference the market-based elements of present and possibly future forms of ART.[27] Hence, Posner in 1987 noted that surrogacy already involved the sale of children,[28] and Lawrence Alexander and Lyla O'Driscoll in 1980 looked ahead to markets in children that could develop in the future

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[21] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849 (1987).

[22] Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, *in* THE TANNER LECTURES ON HUMAN VALUES 94, 100 (1998), https://tanner-lectures.utah.edu/_documents/a-to-z/s/sandel00.pdf; *see also* Jason Brennan, *Buying Babies: Adoption Markets Can Be Fair, Ethical, and Beneficial*, FOUND. FOR ECON. EDUC. (Sept. 15, 2015), https://fee.org/articles/markets-for-babies/.

[23] *See* Radin, *supra* note 21, at 1849; Sandel, *supra* note 22, at 100.

[24] *See* Radin, *supra* note 21, at 1851; Sandel, *supra* note 22, at 100.

[25] *See* Radin, *supra* note 21, at 1851.

[26] *See, e.g.*, DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 32–34 (2006).

[27] *See, e.g.*, Posner, *supra* note 19, at 72 ("In the first case the close family relative 'buys' the baby, in the second the father (and his wife) 'buys out' the natural mother's 'share' in their joint product.").

[28] *Id.*

with a combination of IVF and an artificial womb.[29] More recently, Kimberly Krawiec discussed adoption in tandem with ART-related markets.[30] The present and future development of ART as a primarily private market in human gametes, surrogacy services, and medical services, often with the involvement of for-profit intermediaries—a self-described industry—thus has become a comparison point by which to justify increased market mechanisms for adoption.[31]

Thus, authors such as Kimberly Krawiec,[32] Michele Goodwin,[33] and Deborah Spar[34] verified that, even without legalizing explicit markets in parental rights, adoption and ART in the United States nonetheless did primarily function as markets—and essentially markets in children. Features like differential "prices" for children based on race, age, and gender, highly-paid intermediaries, costly adoptions, payments for gametes and surrogacy services, and the tendency to stretch the concept of "reimbursement" for birth parent expenses, made the claim that adoption and ART comprised segments in a competitive baby market increasingly plausible.[35] The lines between permissible markets in adoption, ART, and surrogacy services, and theoretically impermissible markets in parental rights, and children, seemed increasingly arbitrary and implausible. Hence, the claim that since adoption was already a market, it should be made into a more efficient and beneficial market, were harder to dismiss as extreme. Indeed, when Professor Dorothy Roberts in 2017 published *Why Baby Markets Aren't Free*,[36] the tone of her argument suggested that she knew that her cautions about the baby market went against predominant views and trends.

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[29] Alexander & O'Driscoll, *supra* note 12, at 173.

[30] *See* Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 42 (2009).

[31] *See* SPAR, *supra* note 26, at 32–33; Alexander & O'Driscoll, *supra* note 12, at 173–74; Posner, *supra* note 19, at 72.

[32] *See* Krawiec, *supra* note 30, at 42–43.

[33] *See* Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 62–63 (2006), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1074&context=twlj.

[34] *See* SPAR, *supra* note 26, at 31, 33–35.

[35] *See, e.g.*, *id.* at 32; Goodwin, *supra* note 33, at 63.

[36] Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 U.C. IRVINE L. REV. 611, 611–12 (2017).

The rise of gestational commercial surrogacy,[37] and its explicit legalization in California[38] and then other jurisdictions in the United States,[39] made even the law and economics radicals cautious. Generally, the law and economics advocates for adoption markets had suggested that after-placement protections against abuse and neglect were insufficient protections for children in an adoption market, and thus had accepted the need for suitability screening for prospective adoptive parents.[40] As to commercial gestational surrogacy, this limitation was lifted by commercial surrogacy regimes in California and other jurisdictions.[41] Indeed, the American Bar Association specifically rejected suitability review of "intended" parents for surrogacy, whether or not they were genetically related,[42] and the Uniform Commissioners 2017 revision of the Uniform Parentage Act (RUPA of 2017), also rejected such review.[43] Washington State quickly replaced their anti-commercial law with a version of the RUPA of 2017, as a model of gestational commercial surrogacy rejecting suitability screening became legally and politically mainstream in the United States.[44] Hence, in the new marketplace of commercial surrogacy, the rejection of suitability review, and criminal or child abuse background

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[37] *See* Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120, 121–24 (2012).

[38] *See* CAL. FAM. CODE §§ 7960–62 (West 2018) (effective Jan. 1, 2016); Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993); David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 325–36 (2016) [hereinafter Smolin, *Surrogacy as Sale of Children*].

[39] *See* Zoe M. Beiner, *Signed, Sealed, Delivered-Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy*, 71 VAND. L. REV. 285, 295–97 (2018).

[40] *See* POSNER, ECONOMIC ANALYSIS (4th ed.), *supra* note 5, at 153; POSNER, ECONOMIC ANALYSIS, *supra* note 2, at 169; Landes & Posner, *supra* note 1, at 343; *cf.* HCIA 1993, *supra* note 4, at arts. 5(a), 9(a), 15, 16(1)(d), 17(d); Kathryn Webb Bradley, *Surrogacy and Sovereignty: Safeguarding the Interests of Both the Child and the State*, 43 N.C. J. INT'L L. 1, 8 n.27 (2018).

[41] CAL. FAM. CODE § 7962; *cf.* Bradley, *supra* note 40, at 8 n.27 ("Screening of prospective adoptive parents is generally required as part of the adoption process."). *See generally* Andrew Botterell & Carolyn McLeod, *Licensing Parents in International Contract Pregnancies*, 33 J. APP. PHIL. 178, 179 (2016) (arguing that a licensing requirement be included in any future Hague Convention governing international surrogacy).

[42] AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 112B, at 4 (2016) [hereinafter ABA REPORT].

[43] UNIF. PARENTAGE ACT § 813 (UNIF. LAW COMM'N 2017) ("Section 813 eliminates the prior requirement of a home study of the intended parents . . . .").

[44] S. 6037, 65th Leg., Reg. Sess. (Wash. 2018) (effective date Jan. 1, 2019); Ellen Trachman, *Washington State Flips Its Anti-Surrogacy Stance*, ABOVE THE L. (Mar. 21, 2018), https://abovethelaw.com/2018/03/washington-state-flips-its-anti-surrogacy-stance/.

checks, means that there was nothing legally to prevent a genetically unrelated pedophile or child murderer from obtaining a child through commercial surrogacy.[45] The only protections in place were the possibility that an over-burdened child protective services system, which already struggles to process some four million child abuse reports annually,[46] would take preemptive action, or the possibility that financially interested actors like agencies and so-called "gestational surrogates" might within the marketplace impose some kind of non-legal limitation. As to non-legal limitations, there are questions about how agencies and intermediaries would even learn reliably about the backgrounds of intending parents without legally enforced background checks. This task is made even more difficult by segments in the surrogacy market where foreign intending parents comprise as much as half of the clients of the industry.[47]

iv. American Favoritism of Deregulated, Market-Based Approaches to Intercountry Adoption

Many in the American adoption community have come to favor a deregulated approach to intercountry adoption that allows market forces a

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[45] Unfortunately, it appears that some pedophiles have used or attempted to use surrogacy and/or adoption to obtain children for purposes of sexual exploitation. *See, e.g.*, David Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 18–27 (2007) (discussing Masha Allen case); Kate Darvall, *Depraved gay paedophile couple who adopted a boy and shared him with a child sex ring for SIX YEARS were trying to 'buy' a second child to abuse when they were arrested*, DAILY MAIL (Nov. 15, 2017, 8:17 PM), https://www.dailymail.co.uk/news/article-5087453/Cairns-gay-couple-Mark-Newton-Peter-Truong.html; Ginger Gorman, *A journalist's second thoughts*, ABC NEWS (Jul. 9, 2013, 7:55 PM), http://www.abc.net.au/news/2013-07-10/gorman-second-thoughts/4809582; Caro Meldrum-Hanna & Deb Masters, *Boy with henna tattoo: How Australian Peter Truong groomed son to be exploited by global paedophile network*, ABC NEWS (Feb. 25, 2018, 5:36 PM), http://www.abc.net.au/news/2014-03-10/boy-with-henna-tattoo-network-exposed/5310812; Nick Ralston, *Named: The Australian paedophile jailed for 40 years*, SYDNEY MORNING HERALD (June 30, 2013, 8:03 PM), https://www.smh.com.au/national/named-the-australian-paedophile-jailed-for-40-years-20130630-2p5da.html.

[46] *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2016, at 6 (2018), https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf.

[47] *See, e.g.*, Frank Langfitt, *Made In The USA: Childless Chinese Turn To American Surrogates*, NPR (Apr. 21, 2014, 3:45 PM), https://www.npr.org/sections/parallels/2014/04/21/305514689/made-in-the-u-s-a-childless-chinese-turn-to-american-surrogates?ft=1&f (estimating that 47% of clients for a California surrogacy agency are from China); INT'L FERTILITY L. GROUP [hereinafter IFLG], HTTPS://WWW.IFLG.NET (LAST VISITED DEC. 17, 2018) (U.S. surrogacy agency notes that it has served clients "from nearly 80 countries").

larger role.[48] This approach has several roots. On the one hand, the private domestic adoption system in the United States is much more reliant on private actors, such as attorneys and private adoption agencies, than is typical in most countries.[49] This unusual American acceptance of relatively unregulated, private, market-driven approaches to adoption has long been in tension with developing international norms.[50] Second, Americans commonly blame the now almost 80% drop in international adoptions to the United States[51] on over-regulation and international organizations such as UNICEF and the Hague Conference on Private International Law.[52] Hence, the American preference for less-regulated, more market-driven adoption systems has been reinforced.

The international community, particularly starting in the 1980s, has been actively creating international standards governing adoption and the situation of children out of parental care.[53] These international norms are particularly hostile to private and for-profit actors playing significant roles in the placement of children. The foundational document, the Convention on the Rights of the Child (1987) (CRC), has been ratified by every member state of the United Nations *except for the United States*—meaning that there are 196 State Parties to the CRC with the United States the sole exception.[54] The United States prominently participated in the

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[48] *See* MONTGOMERY & POWELL, *supra* note 2, at 159–60; David Smolin, *The Corrupting Influence of the United States on a Vulnerable Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, UTAH L. REV. 1065, 1093–98 (2013) [hereinafter Smolin, *Vulnerable Adoption System*].

[49] Jonathan Dickens, *Social Policy Approaches and Social Work Dilemmas*, *in* INTERCOUNTRY ADOPTION 28–34 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012); Katherine O'Connor & Karen Smith Rotabi, *Perspectives on Child Welfare: Ways of Understanding Roles and Actions of Current USA Adoption Agencies Involved in Intercountry Adoption*, *in* INTERCOUNTRY ADOPTION 77, 78–79 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1478–97 (1992); Smolin, *Vulnerable Adoption System*, *supra* note 48, at 1089–92.

[50] *See* Smolin, *Vulnerable Adoption System*, *supra* note 48, at 1089–92.

[51] *See* Bureau of Consular Affairs, U.S. Dep't of State, *Adoption Statistics*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics.html (intercountry adoptions to the United States have dropped from a high of 22,989 in FY 2004 to 4,714 in FY 2017).

[52] *See* MONTGOMERY & POWELL, *supra* note 2, at 159–60; Elizabeth Bartholet, The International Adoption Cliff: Do Child Human Rights Matter?, in The Intercountry Adoption Debate: Dialogues Across Disciplines 193-202(Robert L. Ballard et al., eds., 2015).

[53] *See generally* CRC, *supra* note 4; G.A. Res. 64/142, Guidelines for the Alternative Care of Children (Feb. 24, 2010); HCIA 1993, *supra* note 4.

[54] Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/; High Commissioner, United

creation of the 1993 Hague Convention on Intercountry Adoption, and negotiated successfully to create an exception, used only by the United States, to permit the use of private, for-profit actors in the intercountry adoption system.[55] Nonetheless, the United States did not effectively ratify the HCIA for fifteen years,[56] until 2008, and even then did not apply HCIA standards to the majority of intercountry adoptions until 2014, pursuant to the later passage of the Intercountry Adoption Universal Accreditation Act of 2012.[57]

Intercountry adoption to the United States tripled from the early 1990's until peaking at 22,989 adoptions in FY 2004,[58] in a non-Hague system which relied on private, specialist, intercountry adoptions agencies which were usually nonprofit and financially dependent on intercountry adoption fees, and allowed agency personnel to sometimes earn very high compensation.[59] For example, two sisters, according to the United States government, managed to pocket some eight million dollars over about five years of intercountry adoptions from a single country, Cambodia.[60] As is well known, there are no effective limitations on what individuals working

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Nations, *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS., http://indicators.ohchr.org/ (last visited Dec. 17, 2018).

[55] *See* Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purposes, Implementation, and Promise*, 28 Fam. L.Q. 53, 54–61 (1994); Smolin, *Vulnerable Adoption System*, *supra* note 48, at 109–14.

[56] *See* Smolin, *Vulnerable Adoption System*, *supra* note 48, at 114; *USA Joins 1993 Hague Intercountry Adoption Convention*, HCCH (Dec. 12, 2007), https://www.hcch.net/en/news-archive/details/?varevent=141.

[57] *See* 42 U.S.C.A. § 14925 (West 2018) (effective Jan. 14, 2013); Smolin, *Vulnerable Adoption System*, *supra* note 48, at 124–25.

[58] *See* Bureau of Consular Affairs, U.S. Dep't of State, *Adoption Statistics–By Country*, TRAVEL.STATE.GOV., https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics.html (last visited Oct. 26, 2018); Bureau of Consular Affairs, U.S. Dep't of State, *Adoption Statistics–By Year*, TRAVEL.STATE.GOV., https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics.html (last visited Oct. 26, 2018); Tobias Hubinette, *International Adoptions to the United States 1946–2004*, http://www.tobiashubinette.se/american_adoptions.pdf (last visited Mar. 5, 2010); *Immigrant Visas Issued to Orphans Coming to the U.S.*, PASSPORTS USA, http://www.passportsusa.com/family/adoption/stats/stats_451.html (last visited Oct. 30, 2008). Intercountry adoption statistics for the United States generally use fiscal, rather than calendar, years.

[59] *See* Smolin, *Vulnerable Adoption System*, *supra* note 48, at 114.

[60] *See* David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping, and Stealing Children*, 52 WAYNE L. REV. 113, 135, 140–41 (2006); *Adoption Scammer Gets 18 Months in Jail*, ABC NEWS (Nov. 19, 2004), https://abcnews.go.com/WNT/story?id=267559&page=1; Richard Cross, *US ICE Agent: What Really Happened in Cambodian Adoption*, FLEAS BITING (Apr. 15, 2005), http://fleasbiting.blogspot.com/2015/07/us-ice-agent-what-really-happened-in.html.

in the "non-profit" sector can earn in the United States.[61] At the same time, for-profit attorneys continued to work in both the domestic and intercountry adoption sectors, again potentially earning significant amounts.[62]

The intercountry adoption boom in the United States, however, came crashing down after 2004, with intercountry adoptions to the United States declining by almost 80% since then, from 22,884 in 2004[63] to 4,714 in 2017.[64] In response, it became commonplace in the United States to bemoan the decline as harmful to both children and prospective adoptive families, and to blame the decline on onerous regulations.[65] Criticism was particularly leveled against the 1993 HCIA, UNICEF, the Convention on the Rights of the Child, and the United States Department of State.[66] While a competing narrative, as articulated by this author, argued that it

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[61] *See* Andrea Fuller, *Charity Officials Are Increasingly Receiving Million-Dollar Paydays*, WALL ST. J., (Mar. 6, 2017, 9:59 AM), https://www.wsj.com/articles/charity-officials-are-increasingly-receiving-million-dollar-paydays-1488754532; Jake Novak, *How tax reform will end the nonprofit executive pay scam*, CNBC (Dec. 20, 2017, 2:47 PM), https://www.cnbc.com/2017/12/20/tax-reform-smacks-down-excessive-nonprofit-executive-pay-commentary.html.

[62] *See* Smolin, *Vulnerable Adoption System*, *supra* note 48, at 112–13.

[63] BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERCOUNTRY ADOPTION NARRATIVE 2 (2015), https://travel.state.gov/content/dam/aa/pdfs/2015NarrativeAnnualReportonIntercountryAdoptions.pdf.

[64] BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERCOUNTRY ADOPTION 1 (2017), https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Annual%20Report%20on%20Intercountry%20Adoptions%20FY2017%20(release%20date%20March%2023%2020.._.pdf.

[65] *See* Elizabeth Curry, *Why the Decline in International Adoptions?*, ADOPTION.COM (Apr. 14, 2016), https://adoption.com/why-the-decline-in-international-adoptions; Nathan Gwilliam et al., *How to Solve the U.S. International Adoption Crisis*, ADOPTION.COM (Mar. 19, 2018), https://adoption.com/how-to-solve-the-us-international-adoption-crisis; Emma Penrod & Lois M. Collins, *Adoptions on the Decline, Advocates Blame Costly, Time-Consuming Regulations*, DESERET NEWS (Sept. 6, 2013, 5:25 PM), https://www.deseretnews.com/article/865585954/Advocates-blame-costly-time-consuming-regulations-for-adoption-decline.html; Bartholet, *supra* note 52; Elizabeth Bartholet, The Hague Contention: Pros, Cons and Potential, in The Intercountry Adoption Debate: Dialogues Across Disciplines 239-244 (Robert L. Ballard et al., eds., 2015).

[66] *See* Bartholet, *supra* note 52; Bartholet, *supra* note 65; Gwilliam et al., *supra* note 65; Michelle Madrid-Branch, *Saving International Adoption*, MICHELLE MADRID-BRANCH (Mar. 23, 2018), http://michellemadridbranch.com/saving-international-adoption/; Letter from Concerned U.S. Intercountry Adoption Agencies to John Kerry, U.S. Sec'y of State (Nov. 15, 2016) [hereinafter Letter from Concerned U.S. Intercountry Adoption Agencies], *available at* http://saveadoptions.org/e89151b3c5_sites/www.saveadoptions.org/files/SA-AgencyLetterFinal.pdf; *cf.* David M. Smolin, *Child Laundering and the Hague Convention On Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 442–43 (2010) [hereinafter Smolin, *Child Laundering*].

was under-regulation and resulting abuses and scandals, along with independent developments in countries of origin, that was primarily responsible for the decline,[67] this has not been the dominant view in the United States.[68] The lesson taken, however wrong, was that to flourish, intercountry adoption required a largely market-driven, laissez faire context.[69] Indeed, some directly applied the claims of Posner to intercountry adoption, explicitly arguing that birth families in developing nations should be able to negotiate their adoptions directly with adoptive parents, including allowing payments to birth families.[70] While most were not that explicit, the implication was that intercountry adoption was a win-win for all involved and hence should be deregulated, which in practice would defer to market forces.

Hence, as predicted by some law and economics proponents, what was once perceived as radical has become increasingly plausible.[71] The contexts for evaluating markets for children, particularly within the United States, have altered in favor of permitting markets in children, although usually in ways that allow some level of deniability and subterfuge. Decades of systems that place and/or create children through private actors with large-scale payments which are highly differential based on the characteristics of the child embody the characteristics of a consumer market, with the child as the product—even if officially it is merely a market in "services" and "gametes."[72] Even many who oppose explicit markets in children acknowledge that such markets are to a large degree already existing in current adoption, ART, and surrogacy systems, hence making plausible one of the pillars of the law and economics market in favor of explicit legalization—that it is better to acknowledge the realities of current practice and base any regulation on what maximizes benefit and efficiency within a market structure.[73]

In the meantime, what was initially seen as a provocative, almost satiric thought experiment put forward primarily by law and economics proponents has come to be seen increasingly, within the United States, as

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[67] Smolin, *Child Laundering*, *supra* note 66, at 443–44; David Smolin, *The Intercountry Adoption Debate is Over*, FLEAS BITING (July 7, 2015), http://fleasbiting.blogspot.com/2015/07/the-intercountry-adoption-debate-is-over.html.

[68] *See* Bartholet, *supra* note 52; Bartholet, *supra* note 65; *Get to Know Our Partners*, SAVE ADOPTIONS, http://saveadoptions.org/partners/ (last visited Oct. 29, 2018); Gwilliam et al., *supra* note 65; Letter from Concerned U.S. Intercountry Adoption Agencies, *supra* note 66.

[69] *See, e.g.*, MONTGOMERY & POWELL, *supra* note 2, at 159–60.

[70] MONTGOMERY & POWELL, *supra* note 2, at 169–71, 192.

[71] *Cf. id.* at 187.

[72] *See* SPAR, *supra* note 26, at x; Goodwin, *supra* note 33, at 63; Krawiec, *supra* note 30, at 1.

[73] Krawiec, *supra* note 30, at 9–10.

a matter of common sense.[74] The fact that most of the academics and others involved in initially furthering this proposal on adoption markets were generally not particularly active in family law practice or family law scholarship became irrelevant.[75] In part, this is because changing contexts provide increasing plausibility.[76] In addition, as will be discussed next, these law and economics concepts, generally viewed as coming from the political right, were soon supported by some rather different perspectives coming from the center and left.

B. Right to Procreate: Liberal Roots of the One Hundred Thousand Dollar Baby[77]

The political, legal, and cultural left in the United States has long critiqued the "traditional patriarchal family" bound together by heterosexual marriage and biological relationship. The critique has been based on both autonomy and equality concerns. As to autonomy, the goal has been to assert and make practical individual choice relating to sexuality, procreation, and "family."[78] These have been conceived of as personal zones of identity that are quasi-religious in their importance to the individual, and therefore about which each individual must have personal choice.[79] As to

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[74] *See* POSNER, SEX AND REASON, *supra* note 2, at 409; Boudreaux, *supra* note 2, at 117–18; Landes & Posner, *supra* note 1, at 324.

[75] *See* POSNER, SEX AND REASON, *supra* note 2, at 409; Alexander & O'Driscoll, *supra* note 12, at 173; Boudreaux, *supra* note 2, at 117; Landes & Posner, *supra* note 1, at 323.

[76] *See* SPAR, *supra* note 26, at 206–07; Goodwin, *supra* note 33, at 62–63; Krawiec, *supra* note 30, at 1–2.

[77] A portion of this subsection (text accompanying notes 77–101), is adapted by permission of Desiree Smolin and David Smolin, from a portion of David Smolin & Desiree Smolin, *The Liberal Roots of the Modern Adoption Movement*, FLEAS BITING (Sept. 6, 2013), http://fleasbiting.blogspot.com/2013/09/the-liberal-roots-of-modern-adoption.html., originally published in the online magazine *Gazillion Voices*, but apparently not currently available there.

[78] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (abortion as a fundamental right); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[79] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will

equality, the critique has viewed the traditional family as essentially sexist and heterosexist, exploiting women and LGBTQ persons. The power structures within the family favoring male, heterosexual, and cisgender persons and practices therefore are critiqued in order to further both autonomy and equality.[80] While not all heterosexual families are necessarily "patriarchal" in the historical sense, nonetheless, just as many perceive extensive racism and white privilege in the post-civil rights era, the left also remains concerned that most forms of "traditionalism" in family life contain implicit forms of patriarchy and male privilege.[81]

Within this project of critiquing the traditional family, a fundamental part involves freeing reproduction from biological constraints through technological solutions.[82] In this respect, there has been a critique of natural law arguments that found women's "role" or "destiny" to be found in the female biological role in procreation and role as a wife and mother.[83] The roles of "wife and mother" as constructed in human society were seen as placing women under—and at the mercy of—men, creating a fundamental and practical inequality between the genders.[84] The biologically distinctive roles of women in procreation became suspect as pathways into female subjugation.[85] Unless women could gain autonomy over their reproductive functions, wresting control of their sexuality from men (whether husbands, fathers, brothers, cousins, uncles, or the male-dominated state), they were doomed to a limited realm of existence, disqualified from full participation in vocations, professions, business, culture, and

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come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.").

[80] Of course, these are very broad themes and the list of citations could be endless. The somewhat arbitrary list includes the following: SIMONE DE BEAUVOIR, THE SECOND SEX (1949); SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126–54 (1989); ADRIENNE RICH, BLOOD, BREAD, AND POETRY: SELECTED PROSE 199–225 (1985); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1995); Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228 (2018), https://journals.cdrs.columbia.edu/wp-content/uploads/sites/18/2018/04/CJGL-35.2-Gamal.pdf.

[81] *See* Gamal, *supra* note 80, at 232 (discussing the influence of the patriarchal structure of the family and gender stereotypes on Girls Court).

[82] *See, e.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2265 (2017).

[83] *See* Bradwell v. Illinois, 83 U.S. 130, 140–42 (1873) (Bradley, J., concurring) (arguing that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 958–59 (1984) (asserting a constitutional concept of sex-based equality).

[84] *See* Law, *supra* note 83, at 958–59; *see also* sources cited *supra* note 80.

[85] *See* Law, *supra* note 83, at 957.

politics.[86] The emancipation of women seemed to require that women not be defined by their biological roles in sexuality and procreation. The pathway of subjugation for women seemed to stem from sexuality, leading to procreation, leading to full-time motherhood.[87] The children's saying that "first comes love, then comes marriage, then comes the baby in the baby carriage" could carry an ominous ring, for it meant that a women's sexuality inevitably led to her bondage to both a husband and to full-time motherhood. Thus, the liberal project has looked for ways of de-coupling each of these connections: de-coupling sexual activity from pregnancy, pregnancy from birth, and biological procreation from social and legal parenthood.[88]

The standard ways of accomplishing these goals are contraception, abortion, the equal acceptance of inherently non-procreative sexual practices, ART, surrogacy, and adoption.[89] The goal is to make procreation a

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[86] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53–59 (1977); Law, *supra* note 83, at 960.

[87] FIRESTONE, *supra* note 80, at 7; Law, *supra* note 83; Emma Gross, *Motherhood in Feminist Theory*, 13 AFFILIA 269, 270 (Fall 1998), http://journals.sagepub.com/doi/pdf/10.1177/088610999801300301; Amy Westervelt, *Is Motherhood the Unfinished Work of Feminism?*, THE GUARDIAN (May 26, 2018), https://www.theguardian.com/commentisfree/2018/may/26/is-motherhood-the-unfinished-work-of-feminism.

[88] *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017); Obergefell v. Hodges, 135 S. Ct. 2584, 2597–98 (2015); Roe v. Wade, 410 U.S. 113, 152 (1973) ("The right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); McLaughlin v. McLaughlin, 401 P.3d 492 (Ariz. 2017); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Courtney Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L. J., 2017, https://www.yalelawjournal.org/forum/nurturing-parenthood-through-the-upa-2017; NeJaime, *supra* note 82.

[89] *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075 (2017); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); McLaughlin v. McLaughlin 401 P.3d 492 (Ariz. 2017); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (sex equality opinions by Jack Balkin, Reva Siegel, and Robin West); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Joslin, *supra* note 88; Law, *supra* note 83; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); NeJaime, *supra* note 82; Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833–34 (2007) (surveying equality arguments after *Casey*).

choice unbounded by biology.[90] Thus, contraception minimizes the risk of heterosexual intercourse producing a pregnancy, while abortion serves as a backup for when contraception fails or is not used.[91] Adoption serves as an alternative to abortion for those who cannot accept the killing of the fetus intrinsic to abortion. Further, the full, "as if" form of adoption predominates in the United States, under which it is "as if" the child had been born to the adoptive parents, made it legally as though the biological mother had never been a mother and had never given birth.[92] Contraception, abortion, and adoption thus all emphasize (at least theoretically although not necessarily in practice) the choice of the woman, allowing her to de-couple sex from procreation and especially from legal and social motherhood.[93]

The concept of choice also operates positively as well as negatively: just as biology should not dictate that a woman become a mother merely because she is sexually active or becomes pregnant, choice dictates that any adult may choose to become a parent even when biology does not cooperate.[94] Decoupling procreation from biological capacities further extends choice over one's life course, as infertility often occurs because of choices to defer parenting until long after the peak of biological fertility has passed, typically in favor of career or personal exploration. Indeed, choice dictates the capacity to "outsource" reproductive functions by purchasing gametes and surrogacy services.[95] Choice also dictates that a single person, or a same gender couple, be able to parent a child. The prin-

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[90] *See* Joslin, *supra* note 88; NeJaime, *supra* note 82; 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, 1280–81 (2014).

[91] *See Casey*, 505 U.S. at 833–34.

[92] *See, e.g.*, MADELYN FREUNDLICH, THE IMPACT OF ADOPTION ON MEMBERS OF THE TRIAD 1, 12–13 (2001); KERRY O'HALLORAN, THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE 96–97, 357 (3d ed. 2015).

[93] The baby-scoop era of adoption, discussed elsewhere in this paper, see *infra* note 116 and accompanying text, as well as the extreme power and economic differentials found in some forms of international surrogacy in particular, and the Chinese government's population control policies, which give women little choice regarding the use of contraception and sometimes abortion, indicate that these technologies and practices do not intrinsically maximize individual choice. *See* David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1, 3–6 (2011).

[94] *See* JOHN ROBERTSON, CHILDREN OF CHOICE (1994).

[95] *See id.*; *see also* IFLG, *supra* note 47.

ciple is that regardless of age, partner-status (single, married, living together, etc.), sexual practices, or sexual orientation, one ought to be able to have a child when one wants to have a child.[96]

Hence, two primary tools of reproductive choice are assisted reproductive technologies ("ART") and adoption. Thus, under the banner of an asserted "right to procreate," and equal protection, the individual or couple or family group can decide to have a child un-tethered by the constraints of biology.[97]

Adoption, ART, and surrogacy hence fit very neatly into the broader "left" projects of making family relationships a matter of choice unbounded from any biological limitations: a repudiation of the preferred position of the "natural" through a higher preference for what is chosen.[98] Sex without unwanted children and wanted children at will either with or without sex accentuates choice over biology; the right to ART and adoption becomes the neat corollary of the right to contraception and abortion.

The concept of a right to procreate is thus conceptualized as a right to a child, or at least the means of obtaining a child.[99] The right to the means of obtaining a child necessitates permitting whatever technological, medical, social, or legal means will facilitate the capacity of any adult to obtain a child to parent.[100] Concretely, this suggests that the law should accommodate such arrangements.[101]

As to surrogacy, this viewpoint has suggested that the following rules should apply to surrogacy:

1. Commercial surrogacy should be legal, allowing for paying "gestational carriers" or "gestational surrogates" for the service of gestating and giving birth to the child. The rationale is that payments beyond "expenses" to surrogate mothers are necessary to induce sufficient numbers of women to participate as surrogate mothers, in order to make this form of ART accessible to as many as possible; in addition, women should

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[96] *See* ROBERTSON, *supra* note 94; Joslin, *supra* note 88; NeJaime, *supra* note 82; Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046259; Steven H. Snyder, *Reproductive Surrogacy in the United States of America: Trajectories and Trends*, *in* HANDBOOK OF GESTATIONAL SURROGACY 276, 276–77 (E. Scott Sills ed., 2016).

[97] *See* ROBERTSON, *supra* note 94; Joslin, *supra* note 88; NeJaime, *The Nature of Parenthood*, *supra* note 82; NeJaime, *The Family's Constitution*, *supra* note 96.

[98] *See, e.g.*, ROBERTSON, *supra* note 94.

[99] *See* Snyder, *supra* note 96, at 276–77 ("Thus, according to the US perspective of the Constitutional right to procreate and its intersection with surrogacy, it can be persuasively argued that every individual does, indeed, have the fundamental right to have a child.")

[100] *See id.*

[101] *See* UNIF. PARENTAGE ACT § 813 (UNIF. LAW COMM'N 2017); Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993); Snyder, *supra* note 96, at 276–77.

have a right to use their reproductive capacities for profit if they wish and to view gestational services as a potential kind of labor for pay.[102]

2. There should not be any screening for surrogacy or ART services parallel to the criminal background checks, child abuse registries, or social worker suitability reviews found in adoption.[103] The rationale is that the right to procreate should include both un-assisted procreation and ART, in order to provide an equal right to procreate to all; therefore un-assisted procreation and ART should be provided as much as possible on the same terms.[104] Hence, since un-assisted procreation is not subject to fitness or suitability reviews, ART and surrogacy assisted procreation also should not. In this sphere, a sharp break with adoption procedures is envisioned, as adoption procedures require suitability review and screening, including criminal background checks and child abuse registry searches for prospective adoptive parents.[105] Hence, in some contemporary surrogacy legal systems there is nothing legally to prevent a genetically unrelated pedophile or child murderer from obtaining a child through commercial surrogacy - except the possibility that financially interested actors like agencies and so-called "gestational surrogates" might within the marketplace impose some kind of non-legal limitation. Instead, legal protection of the child is left, as it is for un-assisted procreation, to the after-the fact work of the child protection systems, which even the law and economics proponents of markets in parental rights believed inadequate.[106]

3. As a corollary to the above break with adoption procedures, the right to procreate approach seeks systems whereby children born to a surrogate mother are, whether genetically related or not to intending parents,

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[102] *See, e.g.*, UNIF. PARENTAGE ACT § 813; *Calvert*, 851 P.2d at 782; CORNELL INT'L HUM. RTS.: POL. ADVOC. CLINIC & NAT'L L. U. DELHI, SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED? 31 (2017) [hereinafter SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?], https://scholarship.law.cornell.edu/facpub/1551/; N.Y. ST. TASK FORCE ON LIFE & L., REVISITING SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY ON GESTATIONAL SURROGACY 58 (Dec. 19, 2017) [hereinafter N.Y. ST. TASK FORCE], https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogacy_report.pdf; 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, 415 (1991); NeJaime, *The Nature of Parenthood*, *supra* note 82; Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 197 (1986).

[103] *See* UNIF. PARENTAGE ACT § 813; CAL FAM. CODE §§ 7960–62 (West 2018); ABA REPORT, *supra* note 42, at 2–4.

[104] *See* ABA REPORT, *supra* note 42, at 9–11.

[105] *See* UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62; ABA REPORT, *supra* note 42.

[106] *See supra* notes 9–10 and accompanying text; *see also* CAL. FAM. CODE §§ 7960–62.

only the children of the intending parents at birth.[107] Hence, the surrogate mother, renamed a gestational carrier or gestational surrogate, is never a mother, and has no ability either during pregnancy or after birth to make an effective claim to parental rights. This requires elimination of another centerpiece of adoption procedure, which is a post-birth best interests of the child review. The right to procreate rejects use of the best-interests standard at any stage, since such does not normally apply to non-assisted procreation.

4. The right to procreate approach, in order to achieve its goals, has needed to create a new theory of legal parentage. Traditionally motherhood was established by birth—*mater semper certa est*—the mother of a child is the one who gives birth.[108] Fatherhood was decided traditionally primarily through marriage, and more recently as well through genetics.[109] ART and surrogacy proponents have sought a theory of parentage instead based on contractual intention.[110] Genetics are not determinative, as gamete donors are never parents and genetically unrelated individuals and couples may become parents through ART and surrogacy. The one exception is that surrogacy advocates seek to count a lack of genetic relationship as a part of the justification for stripping "gestational carriers" from parentage, even while making genetic connection unnecessary for intending parents. In any event, here politically left theories of the family have joined forces with politically right law and economics approaches in order to create contractual intention as the overriding theory of parentage.[111] While sometimes called the theory of intention, in the statutes and case law the only intention that matters is that at the time of contracting - for gestational surrogacy, in the pre-embryo transfer contract. This combines the law and economics, and libertarian goal of governance by private contract with the liberal goal of autonomy trumping biology and tradition in the sphere of procreation. Indeed, there are also sometimes hints of a combination of governance by both property rights and contract here, as the human em-

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[107] *See, e.g.*, UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62; *Calvert*, 851 P.2d at 782.

[108] Daniel Gruenbaum, *Foreign Surrogate Motherhood: mater semper certa erat*, 60 AM. J. COMP. L. 457–505 (2012); Ingeborg Schwenzer, *Tension between Legal, Biological and Social Conceptions of Parentage*, 11 ELECTR. J. COMP. L. 1 (2007), https://www.ejcl.org/113/article113-6.pdf.

[109] *See, e.g.*, NeJaime, *The Nature of Parenthood*, *supra* note 82, at 2276–77.

[110] See UNIF. PARENTAGE ACT § 813; CAL. FAM. CODE §§ 7960–62; *Calvert*, 851 P.2d at 782; Smolin, Surrogacy as Sale of Children, *supra* note 38, at 325–36; *infra* notes 140–53 and accompanying text.

[111] *See, e.g.*, Snyder, *supra* note 96, at 276 ("The individual liberties . . . include . . . the deeply ingrained concepts of economic liberty and freedom of contract. Each citizen's personal awareness of . . . individual and collective liberties colors the sense of entitlement to make personal choices, particularly when it comes to the private arena of each individual family unit.").

bryo and fetus are viewed as belonging to the intended parent who "intended" to bring it into being, while the "gestational carrier" becomes a contracted temporary caregiver taking care of someone else's property - since the fetus is not a person until birth. Another corollary of this ideological marriage of right and left in the form of parentage by contractual intention is potentially the elimination of father and mother as legal categories, with the substitution of the gender-neutral term "parent." This accommodates both the liberal goal of making parenthood available to all regardless of sexual orientation or gender identity, and the conservative goal of moving family law from status to contract and viewing family law primarily through the lens of libertarian and economic perspectives.

5. To be clear, the surrogacy market has been built largely around heterosexual couples with fertility issues, as well as single parents. However, the recognition of a right to same gender marriage, which appears to have in view a corollary right to establish legal parentage ties to children equivalent to those enjoyed by heterosexual couples, also provides an additional impetus for the legalization of commercial surrogacy.[112] If two men wish to have a child that is genetically related to at least one of them, they require an egg and a womb. Hence, some proponents of a right to procreate by male couples believe that the law should effectuate markets in gametes and surrogacy services.[113] This assumes that the market and payment for such services are the best means toward meeting the need and demand for children - and especially genetically-related children - by same gender male couples. Arguably, altruistic surrogacy alone is unlikely to meet the demand for such services, since altruistic surrogacy usually involves friends or family, and most people likely do not have friends or family willing to act as a surrogate mother for them. In some political contexts this has made it more difficult to oppose commercial surrogacy, since we are in a period when the LBGTQ movement is achieving substantial legal, political, and social success, and commercial surrogacy is put forth as a need of a subset of such persons.

6. Although surrogacy proponents have insisted that adoption rules are generally inapplicable to surrogacy,[114] in one respect the surrogacy movement has seemed to replicate what are generally seen today by many adoption experts as the errors of the traditional American approach to adoption. The key concept here is "as if" adoption, under which the adopted child is seen as only the child of their adoptive parents and as having been completely removed from any familial relationship with their family of origin. Hence, their original parents, siblings, grandparents,

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[112] *See, e.g.*, NeJaime, *The Nature of Parenthood*, *supra* note 82, at 2265; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, *supra* note 102, at 20.
[113] *See, e.g.*, NeJaime, *The Nature of Parenthood*, *supra* note 82, at 2330; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, *supra* note 102, at 32.
[114] *See, e.g.*, ABA REPORT, *supra* note 42.

cousins, etc., are all legal strangers. This led as well to closed record adoption under which even adopted persons were denied, throughout life, information as to their origins---and especially the identity of their birth family. The legal fictions of "as if" adoption were created largely in the twentieth century.[115] The contexts included the baby-scoop era in which single mothers were often coerced or socially pressured to give up their babies, a carry-over of the predominate eugenics viewpoints of the pre-World War II era which stigmatized the offspring of "illegitimate" children.[116] In more recent years, the increasing practices of birth searches and open adoption have undermined the "as if" theory of adoption, as the vast majority of infant relinquishment adoptions are open to some degree, even as adoption statutes in many respects continue to reflect the older concept of closed adoption.[117] Many adoption professionals consider the "as if" theory of adoption to be both unrealistic and destructive, as it fails to account for the continuing significance of birth family relationships despite the legal fiction of a lack of relationship. It turns out that, from the point of view of many adopted persons, that genetic relationships matter, even if they are raised in a loving adoptive home. Genetic and gestational origins are a part of our identities and hence adoptees argue—and international law increasingly agrees—access to information about origins and identity is a right.[118]

Yet, at the same time the ART and surrogacy movements have moved beyond what was ever attempted in "as if" adoption. Hence, in "as if" adoption the original birth certificate reflected the woman who actually gave birth, and sometimes also included information on the birth father; this original birth certificate was sealed and a new one issued showing the adoptive parent(s) as the mother and father of the child. Hence, in recent decades an adoptee rights movement has, often successfully, advocated for states to open up access to these original birth certificates to adult adoptees. Regardless of records, many have used genetic relation information

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[115] *See, e.g.*, E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 74 (1998); FREUNDLICH, *supra* note 92, at 10; Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry Into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 396 (2001); Elizabeth J. Samuels, *The Strange History of Adult Adoptee Access to Original Birth Records*, 5 ADOPTION Q. 63, 63 (2001); Smolin, *Child Laundering as Exploitation*, *supra* note 45, at 4–10.

[116] *See* Buck v. Bell, 274 U.S. 200, 205 (1927); ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 1 (2017); LORRAINE DUSKY, BIRTHMARK (1979); LORRAINE DUSKY, HOLE IN MY HEART 46–47 (2015); ANN FESSLER, THE GIRLS WHO WENT AWAY (2006); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 242 (2002); Smolin, *Child Laundering as Exploitation*, *supra* note 45, at 7.

[117] *See* CHILD WELFARE INFORMATION GATEWAY, OPENNESS IN ADOPTION 3 (2013), https://www.childwelfare.gov/pubPDFs/f_openadopt.pdf.

[118] *See* CLAIRE ACHMAD, CHILDREN'S RIGHTS IN INTERNATIONAL COMMERCIAL SURROGACY 58–62 (2018); *see also* CRC, *supra* note 4, at arts. 7–9.

contained, for example, in data bases like 23andMe, to find original family members. Yet, in the face of these developments in adoption, the ART and surrogacy movements have sought systems in which there is no original birth certificate with accurate information as to who gave birth, with the only "birth" certificate showing the intending parents as the only parents. The very meaning of a "birth certificate" has been subverted in a system which no longer shows who gave birth to a child. Hence, in a context where "as if" adoption is perceived as unrealistic and regressive, the ART and surrogacy movements have successfully advocated for "never was" "as if" legal regimes—what one might call "as if" on steroids.

II. FROM IDEOLOGY TO LAW: THE LEGAL MAINSTREAMING OF THE ONE HUNDRED THOUSAND DOLLAR BABY

In the United States a left-right consensus against commercial surrogacy has been largely supplanted by a left-right predominate pro-commercial surrogacy consensus. The consensus against commercial surrogacy was crystallized in the *Baby M* case, decided in 1988 by the New Jersey Supreme Court.[119] The New Jersey Supreme Court's analysis contained several key elements:

(1) Commercial surrogacy contracts are unenforceable as against public policy.[120]

(2) Commercial surrogacy contracts violate state laws against baby-selling, or at least would if the contracts were viewed as enforceable.[121] The fact that the contract was entered into prior to artificial insemination points toward, rather than against, the conclusion that the sale of a child is involved.[122] Under surrogacy contracts, the surrogate mother is being paid not only for personal services but also for transferring custody of the child, and hence the contracts violate the laws against baby-selling.[123]

(3) Adoption principles apply to surrogacy arrangements, including the norms against baby-selling, the prohibition of payments to birth mothers beyond expenses, the norm against binding pre-birth relinquishments by birth mothers, and the treatment of surrogate mothers as mothers at birth equivalent to the position of the birth mother in adoption.[124]

(4) Where surrogacy arrangements break down due to the surrogate mother wishing to keep the child, the matter should be treated as a child

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[119] *See generally In re* Baby M, 537 A.2d 1227 (N.J. 1988) (invalidating a surrogacy contract).
[120] *Id.* at 1240.
[121] *Id.* at 1240–41.
[122] *Id.* at 1235.
[123] *Id.* at 1242 ("Baby-selling potentially results in the exploitation of all parties involved.").
[124] *Id.* at 1241.

custody dispute between the surrogate mother, who has the status of the mother of the child, and a genetically-related intending father, who has the status of the father.[125] Within this child custody dispute, courts may use visitation, primary custody and other approaches typical of child custody disputes between parents who do not live together.[126]

Significantly, during the 1980s, the predominant feminist viewpoints in the United States seemed rather troubled by surrogacy and to view it primarily as exploitative of women. Margaret Atwood's dystopian novel, The Handmaid's Tale, was published in 1985, and provided a sharply negative portrayal of surrogacy within a future totalitarian hyper-patriarchal theocracy.[127] Harvard Professor Martha Field's 1988 book, Surrogate Motherhood, reissued in 1990, generally supported the *Baby M* viewpoint that surrogate mothers should not be held to pre-birth agreements to relinquish their children.[128] Professor Field relied on then-common concerns with the commodification of children and commodification and exploitation of women.[129] Interestingly, in 2014, Professor Field maintained many of the same concerns and positions, noting that

> [surrogacy] raises serious issues of commodification—of sex, of childbirth, of birthmothers, and of children—by allowing contracts, sales, and money to govern these once noncommercialized areas of life. Such commercialization of childbirth could profoundly affect the kind of society in which we live. Surrogacy also arguably exploits women instead of liberating them.[130]

Professor Field also pointed out in 2014 that her viewpoint was not anti-surrogacy, but rather put the state in a neutral position.[131] Under her proposal, surrogacy could still be conducted, and it was only in instances of a change of mind by the surrogate mother that the non-enforcement of promises to relinquish would come into play.[132]

However, by 2014, the anti-commercial surrogacy and "neutral" theories of *Baby M* and Professor Field had become minority viewpoints

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[125] *In re* Baby M, 537 A.2d 1227, 1256 (N.J. 1988).
[126] *Id.* at 1256–64.
[127] *See generally* MARGARET ATWOOD, THE HANDMAID'S TALE (1985).
[128] MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 97–98 (1988) ("[T]here are . . . occasions in contract law on which voidable or option contracts are recognized, and the developed case law with respect to such contracts could appropriately apply to surrogacy contracts.").
[129] *Id.* at 25–32.
[130] Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1155 (2014) [hereinafter Field, *Compensated Surrogacy*].
[131] *Id.* at 1157.
[132] *Id.*

among women's rights proponents in the United States. Changes in technology and ideology led to the legal mainstreaming of commercial surrogacy and large-scale, globalized markets in commercial surrogacy.[133] The burgeoning ART and commercial surrogacy industries in the United States became a multi-billion-dollar self-described "industry," with the accompanying political power that comes with representing such a lucrative practice.[134]

The technological change was the transition from "traditional" surrogacy using AI, where the "surrogate mother" is genetically related to the child, to "gestational" surrogacy employing IVF, where typically the "gestational carrier" (as denominated under California law)[135] is genetically unrelated to the child.[136] The use of IVF also connected surrogacy more fully to the technological and market capacities of a legal, commercial market in gametes, which also more fully connects the surrogacy industry to the ART industry.[137] While the genetic link between surrogate mother and child are broken in gestational surrogacy, the opportunities expand for breaking the genetic link of intending parents to the child, as intending parents have available to them a global marketplace in gametes from which to select.[138] Opportunities for using PGD to test and select embryos

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[133] *See* Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 528 (2010); Smolin, *Surrogacy as Sale of Children*, *supra* note 38, at 287–88.

[134] ABA REPORT, supra note 42; Rory Devine, *Convicted Surrogacy Attorney: I'm the Tip of Iceberg*, NBCSANDIEGO.COM (Feb. 29, 2013), www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html (demonstrating the lucrative nature of representing the commercial surrogacy industry).

[135] CAL. FAM. CODE § 7960(f)(2) (West 2018) ("'Gestational carrier' means 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.").

[136] *See* ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 5 (2016) [hereinafter FINKELSTEIN ET AL., SURROGACY LAW AND POLICY], http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf.

[137] Smolin, *Surrogacy as Sale of Children*, *supra* note 38, at 285–88.

[138] *Id.* at 317; *see* Richard Vaughn, *30 Years After* Baby M, *Task Force Says Lift New York Surrogacy Ban*, INT'L FERTILITY L. GRP. (Jan. 31, 2018, 4:06 PM), https://www.iflg.net/ny-task-force/ ("Today, thanks to the evolution of new technologies and best practices, nearly all surrogate births occur via 'gestational surrogacy,' in which both egg and sperm are provided either by an intended parent or a (usually anonymous) donor; in other words, the surrogate is not biologically related to the child.").

arise with surrogacy, and combined with the alleged births of the first genetically edited CRISPR babies, surrogacy may become a part of a new era of designer babies.[139]

The 1993 California Supreme Court case of *Johnson v. Calvert* was the legal milestone by which the contractual-intention theory of parentage became mainstreamed into American law.[140] The contractual-intention theory combines the conservative law and economics and libertarian love of contracts with the liberal right to procreate agenda to make parenthood available to all without regard to biological limitations.[141] *Johnson v. Calvert* was a complete victory for this approach. Under the approach of contractual intention, the surrogate mother gets reduced to a "never mother" who effectively loses parental status when she signs the contract.[142] Commercial surrogacy is explicitly approved as a legitimate form of fee for "gestational services."[143] The California Supreme Court accepted the viewpoint that no sale of the child or of parental rights was involved, despite noting the contractual provision by which the surrogate mother agreed to relinquish all parental rights, and despite referencing the "gestator" "voluntarily contracting away any rights to the child . . . ."[144]

Johnson v. Calvert and its theory of parentage by intention has become the foundation of a large-scale surrogacy industry in California.[145] California became a global center for commercial surrogacy, with perhaps half of the intended parents coming from outside of the United States.[146]

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[139] *See* Ed Yong, *A Reckless and Needless Use of Gene Editing on Human Embryos*, THE ATLANTIC (Nov. 26, 2018), https://www.theatlantic.com/science/archive/2018/11/first-gene-edited-babies-have-allegedly-been-born-in-china/576661/; Smolin, *Surrogacy as Sale of Children*, *supra* note 38, at 317 ("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."); *see* James Gallagher, *'Designer Babies' Debate Should Start, Scientists Say*, BBC (Jan. 19, 2015), http://www.bbc.com/news/health-30742774 (noting that such technologies exist and are becoming more prevalent).

[140] Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

[141] *See id.* at 782–83; Hill, *supra* note 102, at 415; Stumpf, *supra* note 102, at 196.

[142] *See Calvert*, 851 P.2d at 782.

[143] *Id.* at 784 ("The payments to [the surrogate mother] 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.").

[144] *Id.* at 782 n.10 ("Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.").

[145] *See* CAL. FAM. CODE §§ 7960, 7962 (West 2018).

[146] Maud de Boer-Buquicchio (Special Rapporteur on the sale and sexual exploitation of children), *Report of the Special Rapporteur on the sale and sexual exploitation of children including child prostitution, child pornography and other child sexual abuse*

California surrogacy agencies explicitly marketed to Chinese nationals, even creating parallel Chinese language web sites.[147] When California codified *Johnson v. Calvert*'s doctrine of parentage through contractual intention into the California Code,[148] prominent industry proponents indicated that they had gotten essentially everything they wanted from the California legislature.[149]

Under the 2013 California surrogacy code, parentage for all practical purposes was determined in the surrogacy contract.[150] There was no suitability review of intended parents, no criminal background checks, no child abuse registry checks, and no best interests of the child review at any time.[151] Basically, so long as the money was there and properly escrowed and the parties represented, the contract governed, with the court lacking either the information or even jurisdiction to do anything other than grant parentage based on the contract.[152] The "gestational carrier" was a never mother who could be denied the opportunity to even see the child in the hospital once she had given birth, since she was a legal stranger to the child in the eyes of the law.[153]

Indeed, although the Supreme Court's abortion and health care case law probably forbids it, California surrogacy contracts further purport to delegate abortion decisions to the intended parents.[154] Hence, "gestational carriers" who refuse to undergo reduction abortions or abortions of

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material, 4–5, U.N. Doc. A/HRC/37/60 (Jan. 15, 2018) [hereinafter Special Rapporteur, *Sale of Children*], http://www.un.org/en/ga/search/view_doc.asp?symbol=A/hrc/37/60; Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html.

[147] Special Rapporteur, *Sale of Children*, *supra* note 146; Harney, *infra* note 163.

[148] CAL. FAM. CODE §§ 7960–62 (West 2018).

[149] *See* Andrew Vorzimer & David Randall, *California Passes the Most Progressive Surrogacy Bill in the World*, PATH2PARENTHOOD (Jan. 25, 2013), http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world.

[150] CAL. FAM. CODE §§ 7960–62.

[151] *Id.*; *see also* Cook v. Harding, 190 F. Supp. 3d 921, 927 (C.D. Cal. 2016).

[152] CAL. FAM. CODE § 7962 (f)(2).

[153] *See id.* §§ 7960–62; Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); Cook v. Harding, 190 F. Supp. 3d 921, 929–30. (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

[154] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶¶ 31–32; Field, *Compensated Surrogacy*, *supra* note 130, at 1163, 1168 n.92; Emma Cummings, Comment, *The [Un]enforceability of Abortion and Selective Reduction in Surrogacy Agreements*, 49 CUMB. L. REV. X, X (2018).

fetuses with disabilities are threatened by the attorneys of intending parents with monetary damages unless they change their mind.[155] The "gestational carrier" is truly treated as a mere means to the ends, purposes and desires of the intending parents, as the body and reproductive capacities of the "gestational carrier" are placed at the service of the intending parents.[156] In exchange for such subjugation, however, California gestational carriers are one of the highest paid in the world, with only Chinese surrogate mothers in China's grey/underground market context perhaps receiving comparable or even greater compensation.[157]

The expression "one hundred thousand dollar baby" aptly describes the California surrogacy industry, and indeed the industry where practiced throughout the United States. Cost estimates of a California surrogacy are in the range of $90,000 to $145,000, and so the expression may be conservative.[158] Of that amount, perhaps around $50,000 to $60,000 might typically go to the "gestational carrier" in combined fees and expenses, with the rest going to intermediaries such as surrogacy agencies and attorneys, the extensive medical costs of ART and childbirth, as well as travel and other expenses.[159] California, along with other locations in the United States, is generally understood to be the high end of a global market in commercial surrogacy.[160] In exchange for the higher costs, California provides not only presumably high quality medical services but also legal certainty of result and legal stability.[161] In California there is no doubt that the surrogate mother lacks parental status and any ability to contest parentage.[162] An additional bonus for some foreign intended parents is that, since the United States is one of only a small number of nations in the world with birthplace citizenship, the child born in the U.S. is a U.S. citizen.[163]

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[155] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 32; Cummings, *supra* note 154, at X.

[156] Field, *Compensated Surrogacy*, *supra* note 130, at 1175–76.

[157] *Id.* at 1166, 1182; Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Child Surrogacy*, N.Y. TIMES, Aug. 3, 2014, at A4.

[158] *See Surrogate Mother Costs*, WEST COAST SURROGACY, https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost (last visited October 30, 2018); *Surrogacy Costs*, SENSIBLE SURROGACY, https://www.sensiblesurrogacy.com/surrogacy-costs/ (last visited October 30, 2018).

[159] *Surrogacy Costs*, *supra* note 158.

[160] Field, *Compensated Surrogacy*, *supra* note 130, at 1161 ("The state that currently is the most friendly to surrogacy is California . . . ."); Snyder, *supra* note 96, at 284 ("The United States is, perhaps, the most expensive surrogacy destination . . . .").

[161] Field, *Compensated Surrogacy*, *supra* note 130, at 1166; Snyder, *supra* note 96, at 284.

[162] Field, *Compensated Surrogacy*, *supra* note 130, at 1163, 1166; Snyder, *supra* note 96, at 284 (discussing the stability of surrogacy procedures in US generally).

[163] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

For many years, *Johnson v. Calvert* and the California approach were minority approaches within the United States. However, over time, the backing of mainstream legal institutions and the predominant voices of academia have created the impression that the California approach is becoming dominant.[164] A growing number of states, either by statute or court decision, have explicitly adopted California-like approaches to surrogacy.[165] The American Bar Association, domestically through model statutes and internationally through the ABA resolution discussed above, have advocated for the contractual parentage approach.[166] More recently, the Uniform Law Commissioners in the Revised Uniform Parentage Act of 2017 followed the California model although the RUPA of 2017 did refuse to accept the delegation of health care and abortion decisions to the intending parent(s).[167] Nonetheless, the RUPA of 2017 model of contractual parentage in other significant ways strongly followed the California approach, including: the lack of suitability screening or review of intended parents, the lack of criminal background checks or child abuse registry checks of intended parents, the lack of any best interests of the child review, and the allocation of parentage based on the contract such that only the intending parent(s) would be named on the original birth certificate.[168] Significantly, Washington State, which had been one of the states with a

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wherein they reside."); Alexandra Harney, *Rich Chinese hire American surrogate mothers for up to $120,000 a child*, THE TELEGRAPH (Sept. 23, 2013), https://www.telegraph.co.uk/news/worldnews/asia/china/10328132/Rich-Chinese-hire-American-surrogate-mothers-for-up-to-120000-a-child.html.

[164] *See generally* Memorandum from Courtney Joslin, Reporter, Unif. Parentage Act 2017 Drafting Comm., to Unif. Parentage Act 2017 Drafting Comm. (Feb. 8, 2016) [hereinafter Memorandum to Drafting Comm.], http://www.uniformlaws.org/shared/docs/parentage/2016feb8_AUPA_Memo_Revision%20Drafting%20Committee%20Surrogacy.pdf (discussing differing approaches to surrogacy laws among the states).

[165] *See generally* N.H. Rev. Stat. Ann. § 168:B (2016); Uniform Parentage Act, 2018 Wash. Sess. Laws 1 ((Washington State enacted the surrogacy sections of the Revised Uniform Parentage Act of 2017, which took effect on January 1, 2019); *Gestational Surrogacy Law Across the United States*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (last visited October 30, 2018) (listing ten states, including California, with laws that clearly support commercial surrogacy and pre-birth orders for intended parents).

[166] ABA REPORT, *supra* note 42, at 6, 22.

[167] UNIF. PARENTAGE ACT § 807 (UNIF. LAW COMM'N 2017). *See* Memorandum to Drafting Comm., *supra* note 164.

[168] UNIF. PARENTAGE ACT § 807 cmt.; Memorandum to Drafting Comm., *supra* note 164.

prohibitionist approach to surrogacy, almost immediately enacted a version of the 2017 RUPA, and efforts are being made in New York State, another prohibitionist state, to follow suit.[169]

Hence, although the legal frameworks for surrogacy in the United States remain quite diverse and inconsistent, prestigious legal institutions and the weight of academic opinion are strongly supportive of the commercial surrogacy industry.[170] Of course, the ability of intending parents living in prohibitionist states to contract surrogacies in permissive states, and the fact that surrogacy is also conducted fairly freely in many states that lack statutory or precedential rules, means that the industry is firmly established throughout the United States.[171] The end result is that if you have the money, the law is no barrier to participating in the commercial surrogacy market.

III. AMERICA'S ONE HUNDRED THOUSAND DOLLAR BABY AS THE HIGH END OF A GLOBAL SURROGACY MARKET

The United States' one hundred thousand dollar baby represents the high end of the global surrogacy market.[172] Despite the high price, the United States is attractive to foreign intended parents because it is one of the few nations that offers stable legal systems explicitly supportive of commercial surrogacy.[173] Apart from the United States, cross-border surrogacies involve travel to developing nations that lack a regulatory framework for surrogacy, and which shift in and out of the global market amidst scandals and shutdowns, but which offer lower prices, or else a few Eastern European states that host international commercial surrogacy and are mid-priced.[174] Other Western nations either prohibit commercial surrogacy or lack laws facilitating it.[175]

The United Nations Special Rapporteur on the sale and sexual exploitation of Children (Special Rapporteur), in her Study on Surrogacy and

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[169] S.B. 6037, 65th Leg., Reg. Sess. (Wash. 2018); *see* N.Y. ST. TASK FORCE, *supra* note 102; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, *supra* note 102, at 12

[170] *See* Gestational Surrogacy Law Across the United States, CREATIVE FAMILY CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (last visited Nov. 17, 2018) (listing different state policies on surrogacy in the United States); *see also* FINKELSTEIN ET AL., SURROGACY LAW AND POLICY, supra note 136; SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, *supra* note 102; ABA REPORT, SUPRA NOTE 42. MEMORANDUM TO DRAFTING COMM., SUPRA NOTE 164.

[171] *See* INTERNATIONAL SURROGACY ARRANGEMENTS 392 (Katarina Trimmings & Paul Beaumont eds., 2013).

[172] *See* Snyder, *supra* note 96, at 284.

[173] *See id.*; Lewin, *supra* note 146.

[174] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 14-16.

[175] *Id.* ¶¶ 14–16.

the Sale of Children, accurately summarized the global situation regarding commercial surrogacy as follows:

> The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries, including Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have engaged in commercial international surrogacy arrangements with surrogate mothers in developing countries, such as Cambodia, India, the Lao People's Democratic Republic, Nepal and Thailand. However, California and other jurisdictions in the United States are centers for commercial international surrogacy arrangements, as are Georgia, the Russian Federation and Ukraine, creating a different set of cross-border relationships. In addition, intending parents from China frequently engage in commercial surrogacy in South-East Asia and the United States.[176]
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> National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law (i.e. in Australia, Mexico and the United States). The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational. Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit "commercial", "for profit" or "compensated" surrogacy, while explicitly or implicitly permitting "altruistic" surrogacy. Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy. Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive practices. However, Georgia, the Russian Federation, Ukraine, and some states in the United States, have fora

[176] *Id.* ¶ 14 (footnotes omitted).

> sustained period of time chosen to remain centers for international surrogacy arrangements.[177]

Indeed, as the Special Rapporteur noted, the predominant viewpoints on surrogacy in Europe are divided between a large plurality that oppose all surrogacy, and a large plurality that advocate for legalizing altruistic surrogacy and prohibiting commercial surrogacy.[178] This division was so contentious that it prevented the Council of Europe from approving a statement on surrogacy, as the group that opposes all surrogacy was unwilling to accede to a policy of prohibiting only commercial forms of surrogacy.[179] In addition, in the European context, many feminists and women's groups vocally oppose all forms of surrogacy, viewing it as inherently exploitative of women.[180] Thus, feminist groups are arguing, with possible success, that Sweden should move toward a total ban on surrogacy.[181] While the American-style pro-commercial surrogacy viewpoint is expressed by some feminists in Europe, it does not predominate among feminists as it currently appears to in the United States.[182]

The extensive travel to developing nations by comparatively wealthy and privileged intending parents from Europe, Australia, Israel, Japan, China, and the United States has cast surrogacy in a negative light for some, as the stark power and wealth imbalances involved accentuate the risks of exploitation of the surrogate mothers.[183] The level of control and manipulation of surrogate mothers in developing nations by intermediaries has suggested the view that some surrogate mothers are trafficked.[184] For example, in India, typically surrogate mothers, who generally already have children and families, live apart from their families in

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[177] *Id.* ¶ 15 (footnotes omitted).
[178] *Id.* ¶¶ 15–17.
[179] *Id.* para. 20;*PACE Rejects Draft Recommendation on 'Children's Rights Related to Surrogacy'*, PARLIAMENTARY ASSEMBLY (Nov. 11, 2016), http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6355&lang=2.
[180] *See International Statement for a Global Ban on Womb Rental*, (Sept. 24, 2018), http://abolition-ms.org/wp-content/uploads/2018/09/ENG-International-Statement.pdf (joint statement from several feminist organizations calling for a ban on surrogacy); KAJSA EKIS EKMAN, BEING AND BEING BOUGHT, PROSTITUTION, SURROGACY AND THE SPLIT SELF xiv–xv (Suzanne Martin Cheadle trans., Spinifex Press 2014); Anna Momigliano, *When Left-Wing Feminists and Conservative Catholics Unite: In Europe, a reproductive rights issue yields an unlikely partnership*, THE ATLANTIC (Mar. 28, 2017), https://www.theatlantic.com/international/archive/2017/03/left-wing-feminists-conservative-catholics-unite/520968/.
[181] EKMAN, *supra* note 180; Kajsa Ekis Ekman, *All surrogacy is exploitation – the world should follow Sweden's ban*, THE GUARDIAN (Feb. 25, 2016), https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban.
[182] *See supra* notes 180–81.
[183] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 14, 17, 29-30.
[184] See *id.*

groups housed by the agencies or clinics, and thus have their day-to-day lives totally controlled by the intermediaries.[185] The practice of intermediaries moving poor, developing nation surrogate mothers across national boundaries to avoid domestic prohibitions, as has been documented in South-East Asia amidst changing legal contexts in Cambodia, Thailand, and Laos, further suggests exploitation and trafficking.[186] In general, surrogate mothers in developing country contexts are relatively poorly paid, not well-informed as to the medical procedures and risks, and may not receive adequate medical after-care, while intermediaries appear able to become wealthy through the practice.[187] The negative implications of this kind of cross-border surrogacy may be used by American surrogacy intermediaries as further marketing for the high-end American system, where surrogate mothers are comparatively well-paid, remain at home with their families during the pregnancy, and are not so easily controlled and manipulated as in developing nation contexts.

Despite the marketing of California, as well as other jurisdictions in the United States, as a high-end, well-regulated, trouble-free surrogacy zone, the facts are somewhat to the contrary. This was even noted in the Special Rapporteur's Report, which described two instances of troubling practices related to California's surrogacy industry:

> For example, two prominent surrogacy attorneys were criminally convicted in a baby-selling ring in California, a centre for international surrogacy arrangements. According to governmental authorities, a prominent surrogacy attorney admitted that "she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over $100,000 each". The convicted attorney told the local media that, as to abusive practices, she was the "tip of the iceberg" of a "corrupt" "billion-dollar industry".
>
> Another case from California, *Cook v. Harding*, reveals the intentional regulatory omissions in a regulated commercial surrogacy jurisdiction: "The statute places no conditions on who can serve as a surrogate (beyond requiring that she not be genetically related to the fetuses) or who may solicit the services of a gestational carrier . .

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[185] Lucy Wallis, *Living inside the house of surrogates*, BBC (Oct. 1, 2013), https://www.bbc.com/news/magazine-24275373.

[186] Special Rapporteur, *Sale of Children, supra* note 146, ¶¶ 14, 17, 29-30.

[187] Yehezkel Margalit, *From* Baby M *to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL'Y 41, 51–54 (2016); *see also* Special Rapporteur, *Sale of Children, supra* note 146, ¶ 65

> . No minimum levels of income, intelligence, age or ability are required for either the surrogate or the intended parent(s)."[188]
>
> In *Cook*, the surrogacy agency matched a 47-year-old surrogate mother with a 50-year-old single intending father. Three embryos were transferred, leading to a triplet pregnancy. Conflicts arose when the intending father balked at paying the costs of the high-risk triplet pregnancy, and also demanded a reduction abortion. The surrogacy contract contained a common provision that reduction abortion decisions would be made by the intending parent. The surrogate mother refused the reduction abortion. Hence, "C.M.'s attorney informed Cook in writing that, by refusing to reduce, she was in breach of the contract and liable for money damages thereunder". It is also argued that surrogate mothers who refuse to submit to reduction abortions are liable for monetary damages, including "the cost of medical treatment (for) . . . a resulting child."[189]

Nonetheless, what the Special Rapporteur viewed as substantive flaws in the California system are, from a marketing perspective, strengths.[190] The "intentional regulatory omissions" brought to light by *Cook v. Harding* empower intending parents at the expense of surrogate mothers, and thus heighten the attractiveness of the California system to the paying customers, the intending parents.[191] Even the apparent medical risks of implanting three embryos into a forty-seven-year-old woman,[192] which would seem to defy the idea of a well-regulated surrogacy system, illustrates the market-friendly approach of California. If you are a fifty-year-old single, deaf man of relatively moderate means living with elderly parents, as was the intended father in *Cook*,[193] you might find it helpful that California does not place age or suitability limits on intending parents. Similarly, allowing forty-seven-year-old women to participate as a surrogate mothers—as occurred in *Cook*[194]—widens options, as a lack of women willing

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[188] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 30-31 (footnotes omitted) (quoting Cook v. Harding, 190 F. Supp. 3d 921, 928 (C.D. Cal. 2016)).
[189] *Id.* ¶ 32 (footnotes omitted).
[190] *See* ABA REPORT, *supra* note 42, at 10.
[191] *Id.*
[192] *See Cook v. Harding*, 190 F. Supp. 3d 921, 928 (C.D. Cal. 2016).
[193] *Id.*
[194] *See id.*

to serve as surrogate mothers, even for pay, is one of the primary limitations on the numbers. Allowing three embryos to be implanted at once creates the risk of a dangerous multiple pregnancy with attendant risks to the "gestational carrier" and surrogate-born children, but offers a greater chance of achieving pregnancy at lower costs to the intending parents.[195]

The California approach, thus, for marketing purposes, is quite willing to allow practices that risk the life and health of surrogate mothers, and even the resulting children, if it serves the interests of the customer, the intending parents, and the intermediaries who profit from surrogacy.[196] Further, the California approach is quite willing to place women's bodies under the dominion of intending parents and the industry.[197] While it is understandable why this model is attractive to the industry, the support of women's rights advocates for these features of the California approach illustrates the powers of the ideological forces favoring surrogacy in the American context. Women's rights groups, in fact, give the industry a virtual free pass as to the industry's apparent exploitation of women, apparently because of the ideological commitments of many American women's rights advocates to a particular model of procreative freedom.

IV. EXPORTING THE ONE HUNDRED THOUSAND DOLLAR BABY: AMERICA ADVOCATES GLOBALLY FOR MARKETS IN CHILDREN

The American surrogacy industry is not content to advocate only for the legalization of surrogacy within the United States, but instead advocates globally for the protection of surrogacy markets.[198] The apparent reason is economic self-interest. A very substantial proportion of the clients of the American surrogacy industry comes from outside of the United States.[199] Many of these intending parents come from countries where commercial surrogacy is either illegal or else lacking any legal framework.[200] The American surrogacy industry, including especially the lawyers and agencies that serve as intermediaries, particularly assists citizens of other nations in evading their own laws.[201] Because of the sympathies and children's rights concerns that arise once the child already exists, and a lack of enforcement, many intending parents are successful in bringing back to their home countries children born from United States surrogacy arrangements that would be illegal in their own countries.[202] The success

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[195] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 32-33.
[196] *See id.*
[197] *Id.*
[198] *See* ABA REPORT, *supra* note 42.
[199] Lewin, *supra* note 146.
[200] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 17.
[201] *See id.* ¶¶ 15–17.
[202] *Id.* ¶ 17.

of these evasions of domestic law then further fuel and legitimate the systematic practice of traveling from prohibitionist jurisdictions to permissive jurisdictions for surrogacy.

Therefore, the American surrogacy industry became particularly concerned when The Hague Conference on Private International Law (HCCH) indicated it was considering creation of an international instrument on parentage and surrogacy arrangements. The HCCH created the pre-eminent treaty in the field of intercountry adoption, the 1993 HCIA.[203] The industry presumably is concerned that any treaty containing substantive restrictions or required regulations for cross-border surrogacy would lead nations to take a tougher stance toward American surrogacies, in ways that might ultimately reduce the flow of customers to the United States. The California approach to surrogacy is contrary to typical global, and especially Western European, approaches in numerous ways, including the explicit acceptance of commercial surrogacy;[204] the lack of access to information on origins and identity for surrogate-born children;[205] the lack of any best interests of the child review;[206] the lack of any kind of suitability review or screening of intending parents;[207] the lack of a requirement of genetic connection for at least one of the intending parents;[208] the lack of upper age limits for surrogate mothers;[209] and the reduced status of "gestational carriers" to "never mothers" lacking parentage at birth.[210] Hence, if a Hague instrument addressing surrogacy had any substantive standards at all, as does the 1993 Hague Adoption Convention,[211] the result would be to characterize California-type surrogacies as deficient and to suggest that such surrogacies should not be recognized in other nations.

On the other hand, while the risks for the industry of a Hague instrument exist, there are also possible rewards. Another kind of approach to cross-border surrogacy could be imagined, in which each country was free to organize their domestic laws on surrogacies in any way they

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[203] *See generally* Hague Conference on Private International Law, *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (May 29, 1993) [hereinafter *1993 Hague Convention*], https://www.hcch.net/en/instruments/conventions/full-text/?cid=69.

[204] *See* CAL. FAM. CODE § 7962 (West 2018).

[205] *Id.* § 7962(g).

[206] *See id.* §§ 7960–7962.

[207] *See id.*

[208] *See id.*

[209] *See id.*

[210] CAL. FAM. CODE § 7962(f)(2) (West 2018).

[211] *1993 Hague Convention*, *supra* note 203, at arts. 4(c)(3), 8, 32; *see* HCCH Experts Group, *Note on the Financial Aspects of Intercountry Adoption*, ¶ 1 (June 2014), https://www.hcch.net/en/publications-andstudies/details4/?pid=6310; Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 27.

wished, but nations then promised to recognize and enforce parentage orders for surrogacies from other states. In such a regime, prohibitionist states in essence would promise to accept surrogacies conducted in permissive states, even when conducted for their own citizens traveling to evade domestic prohibitions. Such a system would, of course, further protect the capacity of California and other permissive commercial surrogacy regimes to market the $100,000 baby around the world and to gain wealthy clients particularly from states that prohibit commercial surrogacy. Indeed, a promise to mutually recognize parentage orders would legally legitimize the American role as the high end of a global surrogacy market.

In February 2016, the American Bar Association ("ABA") adopted a resolution intended to influence the United States Department of State in international negotiations concerning a possible Hague Convention on international surrogacy arrangements.[212] The ABA statement was an explicit endorsement of markets in children. Indeed, the ABA explicitly argued for an approach to surrogacy that would protect the international market, stating:

> a. That any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, will be certain; and
>
> b. That any such collective international approach allows individual member countries to regulate surrogacy within their own borders as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements; and
>
> c. That a Central Authority model to regulate surrogacy arrangements is not an appropriate model for any collective international approach regarding surrogacy; and
>
> d. That any Convention should recognize the clear distinctions between adoption and surrogacy; and
>
> e. That the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy; and

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[212] ABA REPORT, *supra* note 42, at 1.

> f. That rather than requiring a genetic link, an intent-based parentage analysis is the most appropriate parentage doctrine for surrogacy; and
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> g. That human rights abuses are not necessarily inherent in or exclusive to surrogacy arrangement; and, therefore should be addressed separately.[213]

Hence, the ABA was arguing for an approach precisely in line with the economic motivations of the American surrogacy industry. Of course, the argument that children need "certainty" implicitly claims to protect children, but it has the opposite effect. What it would mean in practice is that surrogacies conducted in jurisdictions that lack children's rights protections, like the United States, would have to be automatically granted recognition everywhere. Hence, under this regime, all countries would have to accept surrogacies conducted in ways that are dangerous for children and surrogate mothers[214] without being able to conduct independent reviews of such surrogacies.

The United Nations Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur), in her Study on Surrogacy and the Sale of Children, summarized the Report at some length:

> The American Bar Association notes that "it is undeniable that the commissioning of children through surrogacy—for money—represents a market". The American Bar Association praises this "market", noting that "market-based mechanisms have allowed international surrogacy to operate efficiently". The American Bar Association rejects application of the best interests of the child standard to surrogacy, rejects most forms of suitability review and evaluation of parental fitness of intending parents, rejects caps for compensation for surrogate mothers and gamete donors, rejects licensing requirements for surrogacy agencies, rejects rights to birth records or origins information, rejects the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, as a "model for a surrogacy convention", and rejects

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[213] *Id.*

[214] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶¶ 29–33; Christopher Coble, *Can a Surrogate Mother Be Forced to Have an Abortion?*, FINDLAW (Jan. 12, 2016, 10:10 AM), blogs.findlaw.com/law_and_life/2016/01/can-a-surrogate-mother-be-forced-to-have-an-abortion.html; *see also* Cummings, *supra* note 154, at X (discussing the major medical issue regarding the surrogate mother's informed consent for health care decisions such as abortion).

> bilateral treaties on surrogacy. The American Bar Association states that "any focus on regulating the international surrogacy market itself is misguided". Indeed, the American Bar Association urges that any international instrument on surrogacy not address human rights concerns; hence, it rejects "regulation of the surrogacy industry for the purpose of reducing human rights violations".[215]

The Special Rapporteur perceived the ABA not as a proponent of justice or rights, but rather, as advocating for intermediaries who profit from global markets in children.[216] From that perspective, the ABA's perspective was viewed as a threat to children's rights globally. For if the ABA position was "endorsed, the gains in developing children's rights norms and standards in relation to adoption will be erased, and a new generation of human rights violations will emerge."[217] While recognizing that "not all rules applicable to adoption apply to surrogacy[,]" the Special Rapporteur, in contradiction of the ABA report, maintained that "certain human rights principles are applicable to both, including the prohibition of the sale of children, the best interests of the child as a paramount consideration, the lack of a right to a child, strict regulations and limitations regarding financial transactions, rights to identity and access to origins, and protections against exploitation."[218]

The response of the United States government to the Special Rapporteur's study on surrogacy and the sale of children fulfilled the hopes of the ABA that the United States government would defend markets in children in the context of surrogacy. Thus, when the Special Rapporteur's Report was presented to the Human Rights Council in Geneva, on March 6, 2018, Mr. Jan McKay stated for the United States government:

> On the issue of surrogacy that is raised in the Report, we must reiterate our long-standing view that surrogacy arrangements fall outside of the scope of the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, because they do not involve any of the forms of exploitation identified in Article 3.[219]

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[215] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 27 (footnotes omitted).
[216] *Id.*
[217] *Id.*
[218] *Id.* ¶ 28 (footnotes omitted).
[219] Ian McKay, *Interactive Dialogue with the Special Rapporteur for the Right to Privacy Joseph Cannataci and the Special Rapporteur on the Sale and Sexual Exploitation of Children Maud de Boer-Buquicchio*, U.S. MISSION GENEVA (March 7, 2018), https://geneva.usmission.gov/2018/03/07/id-with-the-sr-for-the-right-to-privacy-joseph-cannataci-and-the-sr-on-the-sale-and-sexual-exploitation-of-children-maud-de-

It is important to remember that this statement by the United States is not a matter of some politician misspeaking or tweeting nonsense, but rather represents the carefully considered opinion of representatives of the United States government charged with representing the view of the United States on human rights matters to the U.N. Human Rights Council. These statements are carefully written and scripted in advance, as the Special Rapporteur's report was available well in advance of the event, and each country has only a very short time to present their official reaction to a Special Rapporteur Report. Seemingly, this is America's professional human rights bureaucracy at work and cannot be blamed on the mere passing views of a particular administration.

Thus, this March 2018 statement by the United States at the Human Rights Council continues the pattern of the United States government, present also under the Clinton State Department and Obama Administration, of undermining international legal norms against markets in children.[220] For many years, when faced with reports of financially-motivated illicit conduct in intercountry adoption, the United States government has maintained that buying and selling children for adoption could not constitute child trafficking.[221] The government's view has been that stealing children from parents and selling them to intermediaries was not child trafficking, so long as the children were ultimately placed with adoptive parents who did not themselves exploit the child sexually or through forced labor.[222] While it is true that the legal elements of child trafficking under the Palermo Protocol require exploitation,[223] the definition is intentionally open-ended, and is not limited to sex or labor trafficking. Arguably, being stolen away from a loving family of origin is inherently exploitative, no matter how good the replacement family.[224] In cases of older child adoption, children often express immediate pain and trauma,[225] but, for all human beings, being sold and having your family unnecessarily replaced with an-

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boer-buquicchio/. McKay also stated that "Surrogacy is legal, and regulated, in several U.S. jurisdictions, fully consistent with our obligations under the Protocol, and is lawfully practiced in many other countries." *Id.*

[220] U.S. DEP'T OF STATE, *Trafficking in Persons Report*, at 8 (June 2010), https://www.state.gov/documents/organization/142979.pdf.

[221] U.S. DEP'T OF STATE, *Trafficking in Persons Report*, at 21 (June 2005), http://www.state.gov/documents/organization/47255.pdf [hereinafter 2005 *TIP Report*].

[222] *Id.*

[223] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(c), Nov. 15, 2000, 2237 U.N.T.S. 319.

[224] *See* Smolin, *Child Laundering as Exploitation*, *supra* note 45, at 15, 45.

[225] *See id.* at 37-44.

other family are serious harms that go the core of human dignity and human identity.[226] Further, the language and work of preparation of the Hague Adoption Convention indicated a view that buying and selling children for adoption is a form of trafficking.[227] Yet, in the face of all of this, the United States government insisted that buying and selling children for adoption is not trafficking.[228] This has the practical impact of reducing remedies and interventions available to victims and also of minimizing the seriousness of the harms involved in such illicit adoption practices.

The United States government did concede that buying and selling children *for adoption* could be the sale of children under the OPSC.[229] This seems necessary, given the explicit language in the OPSC on adoption as a form of sale of children and the broad, open-ended definition of sale of children in the OPSC.[230] Even here, however, the United States government took a highly restrictive view of the norm, maintaining that the OPSC only forbade buying and selling children for adoption when both countries had ratified the Hague Adoption Convention.[231] This interpretation meant that, from the view of the United States government, the OPSC did not apply to any intercountry adoptions involving the United States until the United States had ratified the Hague Adoption Convention effective in 2008.[232] Even then, since most adoptions at that time to the United States were from countries that had not ratified the Hague Convention,[233] the United States still viewed the OPSC as inapplicable to most intercountry adoptions.[234] In effect, the United States government effectively reduced taking children illicit from their families and selling them to be only a kind of technical violation, never amounting to human trafficking and only rarely meeting the requisites of sale of children.

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[226] *See id.* at 13-18, 45.

[227] *1993 Hague Convention*, *supra* note 203, at arts. 1, 4; Smolin, *Child Laundering*, *supra* note 66, at 447–61; Smolin, *Child Laundering as Exploitation*, *supra* note 45, at 3–4; David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 300 (2004).

[228] 2005 *TIP Report*, *supra* note 221, at 21.

[229] *See id.*

[230] Optional Protocol, *supra* note 4, at arts. 1, 3.

[231] *See* Declarations and Reservations, United States of America, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, at 5(B) (Dec. 23, 2002), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&clang=_en.

[232] DEP'T. OF STATE, UNITED STATES RATIFIES THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION (2008), https://2001-2009.state.gov/r/pa/prs/ps/2007/dec/97148.htm.

[233] Smolin, *Vulnerable Adoption System*, *supra* note 48, at 1108–09.

[234] See *id.*

The stance of the United States government toward surrogacy is even worse because it proposes that buying and selling children for purposes of surrogacy does not violate any international norms binding upon the United States. Particularly, the United States claims that the sale of children in the context of surrogacy in principle does not violate the OPSC.

The government's interpretation is particularly odd because it is so clearly a complete misinterpretation of the OPSC. Article 2(a) of the OPSC contains the complete definition of sale of children: "For the purpose of the present Protocol: (a) 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."[235]

As is evident from the text of the OPSC, there is no requirement of exploitation in the definition of sale of children. The work of preparation indicates that the omission of an exploitation requirement was intentional.[236] In addition, the OPSC Preamble indicates that it is intended to "achieve the purposes" of the CRC and "the implementation of its provisions,"[237] specifically including Article 35, which states: "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*."[238]

While the United States, as the only nation on earth not to have ratified the CRC,[239] is not bound by Article 35 of the CRC, the United States has ratified the OPSC and is bound by the OPSC's intention of implementing Article 35 of the CRC.[240] The language of Article 2 and the Preamble of the OPSC, and the work of preparation, make clear that the OPSC is designed to reach all forms of the sale of children.[241] Hence, the United States' claim that the OPSC does not reach surrogacy at all is completely out of bounds.

The reliance by the United States government on Article 3 of the OPSC is clearly misplaced. Article 1 of the OPSC is the core undertaking

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[235] Optional Protocol, *supra* note 4, at art. 2.

[236] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 35; John Tobin, *To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?*, 63 INT'L & COMP. L.Q. 1, 19–20 (2014).

[237] Optional Protocol, *supra* note 4, at 247.

[238] *Id.* at art. 35 (emphasis added).

[239] *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS, http://indicators.ohchr.org/./ (last visited Oct. 29, 2018).

[240] *See Status of Ratification Table, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child Pornography*, UNITED NATIONS TREATY COLLECTIONS (Jan. 18, 2002), https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en.

[241] *See* Tobin, *supra* note 236, at 20.

of State Parties to the Convention, and states that "States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol."[242] Article 2, as noted, provides the protocol's definition of sale of children.[243] The United States, as a State Party to the OPSC, is thus required to prohibit all forms of sale of children that meet the Article 2 definition. That definition does not include an exploitation element, and its definition is inclusive of all situations that meet its broad and inclusive designation.

Article 3 involves those forms of sale of children which State Parties must cover in their "criminal or penal law."[244] This goes beyond the general undertaking of a prohibition in Art. 1, and requires a more specific form of prohibition, in the form of criminal or penal law, for particular forms of the sale of children, child prostitution, and child pornography. Technically, even Article 3 lacks an exploitation requirement, but rather is specific as to which forms of the three practices of sale of children, child prostitution, and child pornography require criminal, rather than merely civil, sanction. For example, the provision in Article 3 regarding adoption lacks a specific requirement of exploitation of the child.[245] More fundamentally, Article 3 of the OPSC in no way displaces the broader mandates of Articles 1 and 2 for State Parties to prohibit all forms of sale of children, even when not encompassed in Article 3.

While the above might sound technical, it is obvious to those who have worked in the field of children's rights. The only explanations for the United States getting this wrong are either incompetence or result-driven misinterpretation. Even incompetence would not be a complete explanation, as one would have to explain why such incompetence produced this particular result. Thus, it seems that the United States government is effectively in the corner of the industries that create and profit from the baby market. The United States government interprets international norms against the traffic and sale of children in an idiosyncratic manner that protects adoption, surrogacy, and ART markets in children. The United States government appears to have a longstanding policy of working most actively against markets in sexual exploitation of children, and to a much lesser degree labor exploitation of children, while promoting markets in children for purposes of family formation.

V. RATIONALIZING BABY SELLING

The modern American discourse on child selling has been a form of rationalization, intended to disguise from both speaker and audience the advocacy and reality of child selling. America is in the business of both

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[242] Optional Protocol, *supra* note 4, at art. 1.
[243] *Id.* at art. 2.
[244] *Id.* at art. 3.
[245] *See id.* at art. 3.

creating markets in children and also in pretending that we are not doing so. Here is a sampling:

A. Markets in babies v. Markets in parental rights

Law and economics advocates for legal markets in parental rights have long argued that such markets are ethically and legally legitimate because only parental rights to the child, rather than the child itself, is being sold.[246] A further twist on the argument is to note that the child who is sold is intended to be a beloved son or daughter, not a slave.[247]

Legally, this argument in formal terms was contrary to modern law. The baby-selling prohibitions, often created in the wake of the Georgia Tann baby-selling scandal of the early-to-mid-twentieth century,[248] are clearly designed to criminalize precisely the selling of parental rights, whether by birth parents or by intermediaries. Of course, it was this kind of prohibition of baby-selling that the New Jersey Supreme Court relied on in the *Baby M* case to determine that the sale of parental rights in the context of surrogacy would also violate laws against baby-selling.[249]

Moreover, if you follow the logic of this argument, an open market in selling babies would be perfectly legitimate so long as in the end the children were treated as family members rather than slaves. Wal-Mart or Target or Amazon could sell babies and it would be fine so long as the buyers intended to create a parent-child relationship with the child. One can easily imagine what the Amazon listings would look like, with its listing of independent sellers; children divided by race, gender, and age; and various shipping options. Surely the intent of the law is to prevent a market in babies even for the purpose of obtaining children to parent?

B. Markets in services v. Markets in babies

It is common to argue, in the context of both adoption and surrogacy, that there is a market in services, not in babies.[250] This can appear plausible because it is accurate that markets in services are involved. Legal, social work, and general "adoption" services are provided in adoptions. Medical, legal, and general intermediary services are provided in

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[246] *See* POSNER, SEX AND REASON, *supra* note 2, at 413; Landes & Posner, *supra* note 1, at 344; Brennan, *supra* note 22.

[247] *Cf.* id.

[248] *See generally* BARBARA BISANTZ RAYMOND, THE BABY THIEF: THE UNTOLD STORY OF GEORGIA TANN, THE BABY SELLER WHO CORRUPTED ADOPTION (2008).

[249] *In re* Baby M, 537 A.2d 1227, 1241 (N.J. 1988).

[250] *See, e.g.*, Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 410–11 (2012); Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 60; SPAR, *supra* note 26, at 207; Snyder, *Reproductive Surrogacy in the United States of America*, *supra* note 96, at 278.

surrogacy. The surrogate mother may be considered to be providing "gestational services." Clearly, there can be competitive markets in these services, as providers compete in local, national, and global marketplaces for such services.[251]

However, the fact that there are markets in services related to adoption and surrogacy does not determine whether or not there are also markets in parental rights, and hence, in children.[252]

As noted by the United Nations Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur): "Commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law."[253] Indeed, one viewpoint is that "the transfer of the child is of the essence of the commercial surrogacy arrangement and therefore is a part of the consideration for the payment to the surrogate mother."[254] From that perspective, commercial surrogacy necessarily constitutes the sale of children, and any other conclusion is a legal fiction. The intending parents are not paying the surrogate mother to gestate, give birth, and then retain parentage and custody of the child. Hence, generally speaking, in commercial surrogacy markets the surrogate mother attempting to retain parentage or parental responsibility/custody of the child would be considered a breach of the arrangements and accompanying agreements. Indeed, in the foundational *Johnson v. Calvert* decision, the California Supreme Court referred to the surrogate mother as "voluntarily contracting away any rights to the child"[255] and recited the contract provision whereby the surrogate mother "agreed that she would relinquish 'all parental rights' to the child in favor of" the intending parents.[256] In effect, the Court enforced a surrogacy contract in which Johnson was paid, in part, for contracting away and relinquishing her parental rights.[257]

However, the Special Rapporteur was willing to contemplate that some regulated systems could be put in place that would be sufficient to separate the sale of gestational and other services from a following gratuitous transfer of the child. In order to do so, according to the Special Rapporteur:

> First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical

[251] *See* London, *supra* note 250, at 415; Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 60–61; FREUNDLICH, *supra* note 4, at 11; INTERNATIONAL FERTILITY LAW GROUP, HTTPS://WWW.IFLG.NET. (LAST VISITED OCT. 30, 2018).
[252] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 60–61.
[253] *See id.* ¶ 41.
[254] *Id.* ¶ 75.
[255] Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal. 1993).
[256] *Id.* at 778.
[257] *See id.* at 778, 782 n. 10.

> transfer of the child. Hence, the surrogate mother would be viewed as having satisfied any contractual or legal obligations through the acts of gestation and childbirth, even if she maintains parentage and parental responsibility. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract.[258]

Hence, the Special Rapporteur recommends that "States should prohibit commercial surrogacy until and unless a proper regulatory system, which includes a clear and comprehensive legal framework, is put in place . . . ."[259] The transfer of funds and children in an unregulated context makes it impossible practically to separate the transfer of services from the illicit transfer of the child for "remuneration or other consideration."[260]

Further, under the analysis of the Special Rapporteur, the sale of children is systematically practiced in regulated commercial surrogacy systems implementing the contractual intention model of parentage.[261] The contractual intention theory of parentage is the system found in California,[262] the RUPA,[263] New Hampshire,[264] Washington State,[265] and other American jurisdictions.[266] This is the system preferred by the industry's advocates and most defended in the pro-commercial surrogacy academic literature.[267] In such systems, the "gestational carrier" or "gestational surrogate" contracts away her parentage rights prior to embryo transfer. The

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[258] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 72.
[259] *Id.* ¶ 75.
[260] *Id.* ¶ 42-43, 67.
[261] *See id.* ¶¶ 33, 51, 54–63, 68.
[262] *See* CAL. FAM. CODE § 7960 (West 2018); *Calvert*, 851 P.2d at 782.
[263] *See* UNIF. PARENTAGE ACT § 809(a) (UNIF. LAW COMM'N 2017).
[264] N.H. REV. STAT. ANN. §§ 168-B:2 (2018) (effective July 21, 2014) ("A person is the parent of a child to whom she has given birth, except as otherwise provided in this chapter and if the pregnancy was established pursuant to a gestational carrier agreement.").
[265] S.B. 6037, 65th Leg., 2018 Reg. Sess. (Wash. 2017).
[266] Beiner, *supra* note 39, at 295–97.
[267] *Cf.* Emily Gelmann, *"I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159, 180–83 (2011); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2328 (1995); Margalit, *supra* note 187, at 40–63; London, *supra* note 250, at 411–12; Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51

contracts generally contain clauses by which the gestational carrier agrees to participate in the legal and physical transfer of the child, and it is clear that such transfer is of the essence of the agreement, and therefore, a part of the consideration for which the gestational carrier is compensated.[268] The Special Rapporteur takes care to rebut the various legal fictions used by proponents of such systems to avoid the norm of sale of children, such as the time of contracting.[269] Some of these are dealt with herein.

As to adoption services, in formal terms adoption systems which protect the rights of birth mothers, consider the birth mother the mother at birth, only permit relinquishments within a reasonable time after birth, prohibit the sale of children, and regulate the financial aspects of adoption, may appear to avoid the sale of children. However, some aspects of the adoption market do appear to stray beyond a market in services into the zone of transferring a child or rights to a child for "remuneration of other consideration."[270] These include the many adoption arrangements in which intermediaries are paid according to the number of children placed, the very high intermediary fees in many adoption markets which are far beyond comparable pay for similar social services work in the same community, and the extremely high differential in adoption fees according to the relative "demand" for the kind of child involved, as classified by age, gender, race, health, and other characteristics.[271] Payments to birth mothers for private domestic adoptions of the more "desirable" categories of children reportedly blur the line between legal reimbursement of "expenses" and illegal payments to induce transfer of the child.[272] Payments to intermediaries are very difficult to regulate, as almost anything can be characterized as a form of "counseling services, legal advice, or any other innocuous service that is difficult to define as illegal."[273] Overall, it is very hard to account for the ways in which money changes hands in many adoption systems without viewing those systems as markets in children, rather

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U. RICH. L. REV. 419, 479–80 (2017); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 321–25 (1990); *see also Calvert*, 851 P.2d at 782–83.

[268] Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L. & FEMINISM 211, 218 (2016); *see* CAL. FAM. CODE §§ 7960–62 (West 2018); UNIF. PARENTAGE ACT § 809(a).

[269] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶¶ 41–63.

[270] *See* Optional Protocol, *supra* note 4, at art. 2(a).

[271] *See* Goodwin, *supra* note 33, at 65–70.; FREUNDLICH, *supra* note 4, at 11; SPAR, *supra* note 26, at 159–60.

[272] SPAR, *supra* note 26, at 186–87. *See also* Goodwin, *supra* note 33, at 61–65 (discussing the types of "exorbitant fees" that result from a "largely unregulated[ ] adoption free market); FREUNDLICH, *supra* note 4, at 9–13 (exploring the issues raised by fee charging and the lack of regulation surrounding adoptive expenses).

[273] SPAR, *supra* at note 26, at 188.

than merely markets in services. To put it another way, the service involved is the provision of a child, and payment is based on success in providing a child. At that point, however, what is the real difference between a market in providing children and a market in children? After all, a car dealer provides many services and could view even the sale of a car as the service of providing a car. When the service in question is that of providing a concrete thing (or person), the line between a market in services and a market in things or people collapses.[274]

C. Markets in Children and the Rhetorical Provocation

Another common form of rationalization is the rhetorical provocation that seeks attention through acknowledging the prevalence and advantages of markets in children, while simultaneously making a specious distinction to somehow avoid the broadly held ethical objection to child-selling.

Debora Spar's 2006 book, *The Baby Business*, is a classic example.[275] The title itself proclaims that the ART, surrogacy, and adoption markets covered in the book are all a part of "the baby business."[276] Spar, a professor at Harvard Business School,[277] repeatedly uses the terms "baby market(s)"[278] and "baby trade."[279] The preface states that "[t]he central argument of this book, therefore, is that despite popular protests to the contrary, and despite the heartfelt sentiments of parents and providers, there is a flourishing market for both children and their component parts."[280] "We are selling children,"[281] Spar proclaims, even if we would rather not admit it. Spar boldly stakes out an amoral position, refusing to "insist that this market is either good or evil."[282] Indeed, Spar takes a position of economic determinism in which "resistance is futile"[283] to baby

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[274] *Contra* SPAR, supra note 26, at 206–07 (arguing that labeling adoption as a service allows definition of "the boundaries between legitimate and illegitimate trade").

[275] See SPAR, *supra* note 26, for a discussion of the "baby trade" as an inevitable market that must be acknowledged and regulated.

[276] *Id.*

[277] Debora L. Spar Faculty Page, HARV. BUS. SCH., https://www.hbs.edu/faculty/Pages/profile.aspx?facId=6558 (last visited Sept. 11, 2018).

[278] SPAR, *supra* note 26, at 199, 208, 233.

[279] *Id.* at 206–32.

[280] *Id.* at xv.

[281] *Id.* at xix.

[282] *Id.* at xv.

[283] Spar uses the phrase "prohibition . . . is futile," rather than "resistance is futile," but the phrase well summarizes her approach to markets in children. *See id.* at 224. The phrase has various origins but in popular culture is particularly associated with the *Star Trek Next Generation* television series, where the "Borg" constantly warn those whom they attack that "resistance is futile." *Borg*, WIKIPEDIA, https://en.wikipedia.org/wiki/Borg (last visited Oct. 29, 2018).

markets, stating that governments should neither "control the industry, [n]or ban it[,]" because "[m]arkets . . . will dominate the baby business. Private enterprises will profit . . . . If there is demand for babies, there will be supply. . . . In the end, of course, the market will still win. We will continue to buy, sell, and modify our children, generating substantial profits in the process."[284] Indeed, Spar closes the book urging that "we . . . plunge into the market that desire has created."[285]

Yet, Spar seeks somehow to pull back, denying that she is actually advocating the buying and selling of children. Hence, she acknowledges that "[m]ost people agree that it is inherently wrong to sell a child, that we can never treat babies or the parents who produced them as marketplace commodities."[286] Further, "[m]ost people are repulsed by the very idea of exchanging children for money or of putting a financial price on human heads."[287] These protestations are feeble given Spar's declaration at the outset of her book that "[w]e are selling children. *The Baby Business* describes how."[288] Ironically, Spar, in a footnote, distances herself from the famous Landes and Posner article on adoption,[289] declaring it a "rare and extremely controversial argument in favor of the marketplace."[290] Here is the classic rationalization: On the one hand, we are selling children and we better get used to it as resistance to markets is futile. On the other hand, of course, selling children is wrong and almost nobody advocates for it—certainly not this author.

In 233 pages of text, Spar makes only a weak attempt to reconcile her contradictory endorsement and rejection of baby-markets. She introduces two of the classic distinctions. First, Spar, like other baby-market proponents, points to a purported lack of exploitation, noting that there is no connection to "slavery, organ theft, or child prostitution."[291] For Spar, it is a sufficient distinction that one is providing a child for family formation purposes.[292] To the contrary, and as noted by the United Nations Special Rapporteur on the sale and sexual exploitation of children (Special Rapporteur), sale of children as a legal concept does not require proof of any other form of exploitation.[293] Rather, buying and selling human beings is considered a sufficient harm of itself, against both the individual

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[284] SPAR, *supra* note 26, at xviii–xix. *See also id.* at 223–24 (proposing regulation of the "baby business" as the only viable option for society).
[285] *Id.* at 233.
[286] *Id.* at 189.
[287] *Id.* at 206.
[288] *Id.* at xix.
[289] Landes and Posner, *supra* note 1.
[290] SPAR, *supra* note 26, at 271 n.111.
[291] *Id.* at 207.
[292] *Id.*
[293] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶35; Optional Protocol, *supra* note 4, at art. 2(a); Tobin, *supra* note 236, at 28.

sold and society generally, to merit prohibition.[294] Indeed, the OPSC specifically names the buying of children for purposes of adoption as an illicit form of sale of children requiring criminal or penal sanction.[295] Selling children so people can parent is selling children!

Second, Spar, like other baby market proponents, attempts to distinguish between a market in services rather than a market in "the child itself."[296] She suggests that the "baby trade" is a market in "the provision of a child rather than the child itself."[297] As noted above, however, there is no substantive difference between a market in things or persons, on the one hand, and a market in the service of providing things or persons, on the other hand.[298] Honda or Ford could characterize themselves as service providers and they are in significant part; Honda and Ford certainly are in the business of the "provision of cars" to drivers. Nonetheless, Honda and Ford are also in the business of selling cars. As to the baby business Spar has spent a book describing, the distinction between the business of "the provision of a child" and the business of selling a child is merely semantic. This is self-delusion and rationalization in action, a distinction without a difference, except to avoid admitting that Spar is advocating for what she admits is abhorrent, which are markets in children.

This rationalization is made worse by Spar's refusal to advocate for any particular public policy or legal stance toward markets in ART, surrogacy, and adoption. Unlike the Special Rapporteur, who describes the rules under which a commercial surrogacy context would not necessarily violate the prohibition on the sale of children,[299] Spar specifically refuses to supply proposals or criteria for avoiding the sale of children.[300] Even worse, the primary public policy argument she is willing to make is against prohibitions: "[W]e could . . . choose to ban the baby business, deciding that its risks and inherent inequalities are simply too great. Yet, as this book has demonstrated, prohibition at this point seems futile: demand in the baby business is simply too high and the technologies too good."[301]

In the end, Spar lands in the typical zone of self-contradiction endemic to so many writings regarding markets in children. She concedes that the critics of baby-markets, such as Radin and Sandel, are correct:

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[294] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶35.
[295] Optional Protocol, *supra* note 4, at art. 3.
[296] SPAR, *supra* note 26, at 207.
[297] *Id.*
[298] *See* discussion *supra* Sections V(A)–(B).
[299] Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 72.
[300] SPAR, *supra* note 26, at 224.
[301] *Id.* at 223–24.

> Michael Sandel . . . states that "treating children as commodities degrades them as instruments of profit rather than cherishing them as persons worthy of love and care," and legal scholar Margaret Jane Radin has famously claimed that "conceiving of any child in market rhetoric wrongs personhood." Sandel and Radin are almost certainly right.[302]

Yet, according to Spar, the baby market is inevitable and can be ethical, so long as we simply re-conceptualize it as a market in "the provision of a child," rather than a market in children.[303]

VI. CONCLUSION: RESISTANCE IS NOT FUTILE

Contrary to Professor Spar's view that "prohibition" of the "baby-business" "seems futile," there is much that can be done. Indeed, the first step would be for the United States government, American Bar Association, Commissioners of Uniform State Laws, and advocates for intercountry adoption and international surrogacy to stop *promoting* global markets in children.[304] The United States government could acknowledge that the OPSC applies to the sale of children *in any context*, including surrogacy.[305] The United States government could acknowledge that buying and selling children for adoption is sufficiently exploitative to constitute a form of human trafficking.[306] The United States government, in its interventions at the Hague Conference on Private International law, could assist, rather than resist, the development and implementation of international norms to reign in markets in children. The American Bar Association could retract its resolution urging the United States Department of State to, in effect, promote a global market in commercial surrogacy.[307] The Commissioners of Uniform State Laws could retract or re-write the surrogacy sections of the RUPA.[308] States, which currently prohibit commercial surrogacy, such as New York, could resist the voices of those urging them to legalize forms of commercial surrogacy that would normalize markets in children.[309] State legislatures could take seriously the viewpoint of the United Nations Special Rapporteur on the sale and sexual exploitation of children, indicating that the contractual intention theory of parentage represents the sale of children.[310]

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[302] *Id.* at 199–200 (footnote omitted).
[303] SPAR, *supra* note 26, at xviii, 207, 223–24, 233.
[304] *See supra* notes 212–19 and accompanying text.
[305] *See supra* note 219 and accompanying text.
[306] *See supra* notes 220–34 and accompanying text.
[307] *See* generally ABA REPORT, *supra* note 42.
[308] *See* UNIF. PARENTAGE ACT art. 8 (UNIF. LAW COMM'N 2017).
[309] *See supra* note 169 and accompanying text.
[310] *See generally* Special Rapporteur, *Sale of Children*, *supra* note 146.

Indeed, the constant activism by governmental and non-governmental actors to create and facilitate markets in children belies the concept that markets in children are inevitable. Proponents of markets in children are continuously active precisely because the creation and facilitation of legalized markets in children requires governmental and non-governmental action and advocacy. Legal markets are not a product of the laws of nature, but are human artifacts created by governmental and non-governmental actors. Hence, we have a choice whether to create any particular legal market, a choice which should not be obscured by claims of inevitability.

Similarly, the dreaded black market is not an inevitable feature of human life in all areas, and the level of black market activity produced by a prohibition varies based on the context. For example, the almost eighty percent drop in the numbers of intercountry adoptions to the United States has not been accompanied, so far as one can tell, by any increase in "black market" illegal transfer of children to the United States for purposes of family formation.[311] Indeed, in this case, since most illicit intercountry adoption practice actually employed the channels and mechanisms of the legal intercountry adoption system, the drop in intercountry adoptions has apparently simultaneously also reduced the incidences of gray market and black market intercountry adoptions to the United States.[312]

Indeed, as to family formation, the risks of legal prohibitions leading to black markets are lessened because family formation requires explicit legal and social approval for a lifetime. The requirement of such permanent and public social sanction means that those who wish to obtain a child for family formation in a clearly illegal manner may be deterred both by the risks of exposure and also by an unwillingness to form their family in a clearly illegal manner. By contrast, the necessary and obviously justified prohibitions of markets in children for sexual exploitation more readily lead to black markets because the conduct involved requires only short-term control of a child and is conducted in secret. Further, the persons involved already understand that what they are doing is viewed by society as wrong.

Additionally, the growth of interest in ART and surrogacy is not primarily a consequence of the increased difficulties in adopting internationally or domestically, nor on limitations on adoption markets. There is, in fact, no shortage of children eligible for adoption in the United States, given that for many years there have been more than one hundred thousand children eligible for and waiting for adoption in the context of the child

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[311] *See supra* note 64 and accompanying text.
[312] *See* Smolin, *supra* note 60, at 115.

protection system.[313] Most people who want children, however, do not want those children, who are generally much older and often have experienced multiple forms of trauma, neglect, and abuse with accompanying behavioral, cognitive, educational, emotional, relational, mental health and medical issues.[314] ART and surrogacy offer what adoption generally does not, which is the possibility of a genetically-related healthy infant who has been genetically screened and selected. Hence, limitations on adoption "markets" cannot be blamed for demand for surrogacy and ART. The complex regulatory issues regarding ART and surrogacy are an inevitable development based on the development of new technologies, including IVF, PGD, and in the future applications of CRISPR.

Thus, the concept that "resistance is futile" to markets in children is analytically false, both as to the inevitability of legal markets in children and also as to the degree of black market responses to prohibitions. In each instance, we have to take responsibility to decide whether we are willing to permit such markets.

Resistance to markets in children should be both conceptual and legal. Conceptually, we should insist on the primacy of non-economic ways of understanding the "value" of human persons and of personal, procreative, and parental human relationships and processes. Here, Posner describes well what is at stake. Specifically responding to Radin's objection to commodification of human beings, and specifically in the context of discussing his proposal for legalizing a market in parental rights as an approach to adoption, Posner says: "some of us believe that this and most societies could use more, not less commodification and a more complete diffusion of the market-orientated ethical values that it promotes."[315]

To the contrary, this essay is based on the premise that Radin,[316] Sandel,[317] O'Donovan[318] and others are correct in maintaining the importance of limiting "commodification and … diffusion of … market-orientated ethical values." Radin's "market-inalienability" in its origins is ethical in challenging us to think about when markets in practice and perspective debase and diminish human life.

Put another way: were markets made for humanity, or was humanity made for markets? Are markets simply one possible societal construct for serving human beings, or are human beings primarily defined by their

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[313] CHILDREN'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERVS., NO. 24, THE AFCARS REPORT 1 (Oct. 20, 2017), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf.

[314] *See id.* at 2.; Erin P. Hambrick et al., *Mental Health Interventions for Children in Foster Care: A Systematic Review*, 70 CHILD. & YOUTH SERVS. REV. 65, 65 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5421550/.

[315] POSNER, SEX AND REASON, *supra* note 2, at 413.

[316] *See* Radin, *supra* note 21, at 1921.

[317] *See generally* Sandel, *supra* note 22; *see also supra* text accompanying note 22.

[318] *See generally* OLIVER O'DONOVAN, BEGOTTEN OR MADE? (1984).

value in the marketplace? If markets are human artifacts intended to serve human flourishing, then market mechanisms and understandings should be limited and put aside when contrary to human flourishing. Jesus is famously quoted making a similar point: "The Sabbath was made for man, not man for the Sabbath."[319] Hence, even as to divine law, the law should be interpreted so as to serve the good of humanity.

Hence, it is not enough for law and economics proponents to argue there are elements of markets involved in parent-child relationships, or that it is possible to view all aspects of human life from an economic perspective. The point is one of primacy of perspective. Should human society and law be built around a primarily economic view of the value and significance of human persons and personal, procreative, and parental relationships? Or should society and law, while acknowledging unavoidable economic aspects, insist on primarily non-economic perspectives as to certain aspects of human life?

Resistance to the primacy of the market as to parentage, adoption, surrogacy, and ART would be futile if human beings inevitably understood family formation in primarily market terms. If such were true, Posner and his disciples would not need to tirelessly advocate as they do for, in Posner's terms, "a more complete diffusion of the market-oriented ethical values . . . ."[320] Resistance is not futile because there is something in human beings that wishes to perceive values beyond self-interest, market-valuation, and economic benefit in themselves, others, and their most personal relationships. Indeed, resistance is not futile because most human beings are repulsed by primarily market understandings of family formation and parent child relationships—as admitted, for example, by Spar.[321]

Legally, since markets are indeed human constructs put in place in part by law, resistance to markets in children is not futile. If resistance were futile, the surrogacy industry would not invest in advocating for market-friendly commercial surrogacy laws. If resistance were futile, advocates for market-based surrogacy laws would not have to create dubious denials that their preferred laws meet legal definitions of the sale of children.[322] If resistance were futile, jurisdictions that once were global centers for commercial surrogacy, such as Cambodia, India, Nepal, Thailand, and the Mexican state of Tabasco would not have chosen to limit foreign commercial surrogacies conducted within their territories.[323] If resistance

[319] *Mark* 2:27 (New International Version).

[320] *See* POSNER, SEX AND REASON, *supra* note 2, at 413; *see also* text accompanying note 2.

[321] *See* SPAR, *supra* note 26, at 195–96.

[322] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 52-61; *see also supra* text accompanying notes 246-274 (rebutting arguments that certain forms of commercial surrogacy do not meet the definition of sale of children); Smolin, *Surrogacy as the Sale of Children*, *supra* note 38.

[323] *See* Special Rapporteur, *Sale of Children*, *supra* note 146, ¶ 15.

were futile, Sweden would not be actively considering a ban on surrogacy.[324] If resistance were futile, there would not be a long list of countries that prohibit either surrogacy or commercial surrogacy.[325] If resistance were futile, the numbers of intercountry adoption to the United States would not be down by almost 80%, despite the American adoption community over decades seeking to use its money and market power to obtain children across the globe.[326]

Conceptually, the concept of a right to a child also must and can be resisted. Here, account must be taken of the understandable sympathetic reaction to well-intended adults who face impediments in fulfilling their natural human desire to parent. Sympathy for ends is not the same thing, however, as sympathy for means. The means of establishing markets in children for family formation are not acceptable. As a point of comparison, we might feel sympathy for those who face impediments in forming intimate partnerships, but still resist the means of establishing markets in persons for such purposes. The concept of a right to a child undermines the very foundation of human rights itself, which is the inherent and equal human dignity of all human beings.

The effectuation of a right to a child through a doctrine of parentage by contractual intention marries liberty of contract to the right to procreate in a disastrous combination of the worst of rights claims from the right and left. From the right, this combination takes the willingness to create markets in human beings and to conceptualize familial and personal relationships in primarily market and economic terms. From the left, this combination takes the willingness to effectuate certain favored rights and equality claims through the subjugation of a class of human beings, and of less favored rights, in a manner that treats one human being as no more than a means of fulfilling the rights and wishes of another.

Resistance to markets in children will require exposing inappropriate rights and equality claims for what they are, which is the reduction of the conception and value and dignity of the human person. Resistance to markets in children will require courage precisely because there are good reasons for such markets, but of course, *not good enough reasons* to justify such a fundamental violation of human dignity. Resistance to markets in children will require the clarity to perceive what proponents obscure, and to protect what can be denigrated but not ultimately denied.

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[324] *See supra* note 181 and accompanying text.

[325] *See* TRIMMINGS, *supra* note 171, at 463–64; *see also* SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?, *supra* note 102, at 23–25.

[326] *See supra* note 64 and accompanying text.