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Surrogacy, Intermediaries, and the Sale of Children

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SURROGACY, INTERMEDIARIES, AND THE SALE OF CHILDREN

David Smolin & Maud de Boer-Buquicchio

I. Introduction

This chapter demonstrates the centrality of the legal prohibition of sale of children to analysis and regulation of surrogacy as it is usually practiced in the contemporary world. The chapter acknowledges and responds to arguments against the applicability of the prohibition of sale of children to surrogacy, including concerns with the negative impacts of prohibitions, such as black and gray markets, and sympathy toward the understandable desire to form families. The chapter focuses on the links between the sale of children and other rights deprivations. The chapter explains why intermediaries are often most responsible for the sale of children and related human rights deprivations. Hence, intermediaries are often either direct sellers of children, or at a minimum act as facilitators or accomplices of the sale of children. Intermediaries facilitate and structure commercial surrogacy markets which practice or risk sale of children, and which lack adequate safeguards to protect the rights of the child. The chapter proposes an enforcement and regulatory focus primarily on intermediaries.

A. An Inconvenient Topic

Sale of children is the often unmentioned elephant in the room in discussions of surrogacy, and especially commercial surrogacy. The topic is inconvenient. To the degree that surrogacy constitutes the sale of a child it would be inherently illegal and a serious violation of fundamental norms.[1] Surrogacy arrangements that constitute the sale of children cannot be fixed by better regulation, but should instead be prohibited.[2] For those who feel a need to ensure a legal and safe space for the practice of commercial surrogacy, the concept of sale of children can be an obstacle.

The motivation varies. Some are committed to a right to procreate (or right to family formation or the enjoyment of family life), and may view surrogacy as an important means for specific categories of persons, such as same-sex couples, couples with medical and fertility issues, and single persons.[3]

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[1] United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, art 35; Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) 2171 UNTS 227.

[2] See sources cited fn 1.

[3] Eg European Convention on Human Rights, Art 8; D NeJaime, 'The Nature of Parenthood,' (2017) 126 *Yale Law Journal* 2260; C Joslin, 'Nurturing Parenthood Through the UPA '(2017), 127 *Yale Law Journal Forum* 589 (2018); D NeJaime, R Siegel, & D Barak-Erez, 'Surrogacy, Autonomy, and Equality,' (2020) *Global Constitutionalism Seminar Vol,* Yale Law School, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3732265; Oireachtas Joint Committee

Restricting commercial surrogacy may be seen as particularly burdening such groups and individuals and hence is viewed by some as violating equality principles, even when prohibitions of commercial surrogacy are of a general nature and are applicable to everyone.[4]

Some are concerned that prohibiting commercial surrogacy will push the practice of surrogacy underground into black and gray markets, where unsafe and exploitative practices may flourish outside the reach of the law.[5] From this perspective, it can appear better to permit and regulate commercial surrogacy in an attempt to create safe surrogacy practices that balance the rights and interests of all involved.

A focus on the right to procreate and with avoiding black and gray markets have sometimes created powerful motivations to avoid the legal conclusion that commercial surrogacy arrangements constitute the sale of children. There is a tendence to limit the concept of sale of children and restrict its application in multiple ways, which often involve strained and illogical legal analysis reliant on legal fictions.[6] This creates other risks: First, there is the risk that artificial restrictions on the legal concept of sale of children that stray far from intuitive and literal meanings will carry over into other areas beyond surrogacy, generally undermining the prohibition of sale of children.[7] The human rights accomplishment secured by the formal prohibition of the sale of children will be largely lost as the concept is minimized in scope and rationalized away, crippling an important instrument in the difficult struggle against the commodification of children. As UNICEF noted in its Handbook on the Optional Protocol on the Sale of Children (OPSC):[8]

"The bitter reality is that, despite the CRC's pledge of protection for the child as a subject and a rights holder, children are still too often seen as objects and commodities. They are treated as merchandise rather than as persons whose rights must be respected and protected.[9]

Second, there is the risk that the law will specifically legitimate what are literally and intuitively markets in children in the context of surrogacy and beyond. Such markets may be regulated and purportedly legal, but they will nonetheless be, in literal and intuitive terms, markets in children. The

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on Surrogacy , Opening Statement (2022), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_international_surrogacy/submissions/2022/2022-05-05_opening-statement-ranae-von-meding-representative-equality-for-children_en.pdf.

[4] See sources cited fn 3.

[5] See Jack Glaser, Womb for Rent: Regulating the international surrogacy market, Brown Political /review, Nov. 6, 2016, available at https://brownpoliticalreview.org/2016/11/womb-for-rent-regulating-international-surrogacy-market/; 'Commercial Surrogacy & Black Market: The Unlikely Duo' (2020) *International Journal of Advanced Legal Research,* available at https://www.ijalr.in/2020/10/commercial-surrogacy-black-market.html.; Parliament of India, 2020. Report of the Select committee on The Surrogacy (Regulation) Bill 2019, at para. 2.20, available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/70/137/1_2020_2_17.pdf (reporting comments of Dr. Sheela Sarvanan).

[6] See infra Section V.

[7] See infra Section V.

[8] Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) 2171 UNTS 227 [hereinafter OPSC].

[9] UNICEF, handbook on the optional protocol on the sale of children, child prostitution and child pornography, p ix, https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf.

legal legitimation of literal and intuitive markets in children is incompatible with the protection of children as "persons whose rights must be respected and protected."[10]

The rights of the child are generally viewed as "universal, indivisible, interdependent and interrelated."[11] Hence, the rights of the child not to be sold are essential to the other rights of the child, because when children are "treated as merchandise" they are not viewed as "persons whose rights must be protected and respected."[12] Concretely, this means that those who advocate for commercial surrogacy markets commonly do not recognize in theory or practice other rights of the child, such as the best interests of the child, identity rights, and protections against exploitation.[13]

This chapter focuses on the application of the prohibition of the sale of children to surrogacy arrangements. An accompanying focus on the role of intermediaries in facilitating markets in children highlights one of the most important regulatory gaps as to surrogacy arrangements.

B. Our Solutions: Overlapping Child Rights Protections

1. Reports of the UN Special Rapporteur and the Verona Principles

Each of us have been involved in prior efforts to address these dilemmas. Maud de Boer-Buquicchio, in the role of United Nations Special Rapporteur on the Sale and Sexual Exploitation of Children produced two reports on surrogacy, the first of which particularly focused on the sale of children.[14] David Smolin was a member of the Core Expert Group that created the Verona Principles, or "Principles for the protection of the rights of the child born through surrogacy," which were released by International Social Service in February 2021.[15] These efforts took a broadly similar approach to the prohibition of sale of children as applied to surrogacy.[16] This approach begins with a basic legal analysis of the OPSC.[17] In deference to the integrity of the important legal effort to define and prohibit the sale of children, this approach refuses to artificially limit the scope of the prohibition. This approach acknowledges that states may rationally prohibit all commercial surrogacy as the sale of children, but nonetheless also acknowledges the possibility that some kinds of commercial surrogacy may not meet the definition of sale of children.[18] Hence, this approach describes a regulatory pathway in which some regulated forms of commercial surrogacy may not constitute the sale of children.[19] At the same time,

[10] Ibid.
[11] Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1), para 16(a), https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.
[12] See UNICEF Handbook, [n 9], p ix.
[13] See 2018 thematic report on surrogacy and sale of children (A/HRC/37/60), presented at the 37th session of the Human Rights Council, para 26 - 33 [hereinafter 2018 SR Report]; section IB 3 below.
[14] 2018 thematic report on surrogacy and sale of children (A/HRC/37/60), presented at the 37th session of the Human Rights Council [hereinafter 2018 SR Report]; 2019 thematic report to the General Assembly in October 2019 on safeguards for the protection of the rights of children born from surrogacy arrangements (A/74/162).
[15] International Social Service, Principles for the protection of the rights of the child born through surrogacy, February 2021, https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.pdf
[16] See SR 2018 Report; See Verona Principles 14.1-14.13.
[17] SR 2018 Report, para 35, 41-51; Verona Principles 14.1-14.4.
[18] SR 2018 Report, para 41, 51, 72, 75; Verona Principles 14.5, 14.6.
[19] See SR 2018 Report, para 72, 75; Verona Principles 14.7.

this approach acknowledges that most commercial surrogacy as currently practiced does constitute the sale of children.[20] Further, the line is not between regulated and unregulated commercial surrogacy, but rather between rightly regulated commercial surrogacy and both unregulated and wrongly regulated commercial surrogacy.[21] Indeed, some forms of regulated commercial surrogacy attempts to legitimate a contract-based, market-based approach in which the regulated legal regime meets the OPSC definition of sale of children.[22]

2. Pathways for properly regulated commercial surrogacy

The SR 2018 Report in paragraph 72 summarizes the conditions under which commercial surrogacy would not necessarily constitute the sale of children:

"Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. 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 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. If the surrogate mother chose to maintain parentage and parental responsibility, she may be legally obligated to share parentage and parental responsibility with others, including the intending parent(s). However, the surrogate mother would not be obligated to relinquish her own status by the surrogacy arrangement. Any choice by the surrogate mother after the birth to legally and physically transfer the child to the intending parent(s) must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation."[23]

Principle 14 of the Verona Principles provide quite similar recommendations concerning regulations necessary to avoid the sale of children.[24] One small but significant difference is that the Verona Principles allow for a permissible relaxation of the requirement that the surrogate mother have parentage at birth. Under this alternative possibility, the surrogate mother still would be accorded a post-birth opportunity to confirm or revoke any pre-birth consents, but if she confirms consent post-birth the surrogate mother would not be considered a parent.[25]

[20] See SR 2018 Report, para 41, 51.
[21] See SR 2018 Report, para 30-33, 72-73, 75; Verona Principles 14.7, 14.9, 14.13.
[22] See SR 2018 Report, para 27, 33, 41, 47, 48, 51, 56, 72; Verona Principles 14.9.
[23] SR 2018 Report, para 72.
[24] See Verona Principles [n.], 14.6 & 14.7.
[25] Verona Principles10.5 & 14.7.

The SR 2018 report also stressed other necessary safeguards that relate to other rights of the child, beyond the prohibition of the sale of children. Hence, the 2018 report summarized:

> "A properly regulated system of commercial surrogacy would also provide necessary protections for children, including post-birth individualized best interests of the child determinations, appropriate suitability reviews of intending parents, and protections of rights of origin and access to identity. For the protection of all parties, it is appropriate to conduct screenings and reviews of surrogacy arrangements prior to pregnancy, but pre-birth processes cannot be conclusive as to parentage and parental responsibility, which can only be determined upon appropriate review after the birth. Similarly, appropriate protections of surrogate mothers, consistent with retaining the status of mother at birth, would include retention of rights of informed consent in regard to all health-care decisions, and freedom of movement and travel — including the principle that such rights cannot be alienated by contract. Appropriate regulation of the financial and medical aspects of surrogacy, and strict regulation of intermediaries, would also be necessary."[26]

The Verona Principles usefully provide greater detail as to regulations necessary to protect all of the rights of the child in the context of surrogacy arrangements.[27] Claire Achmad's work, *Children's Rights in International Commercial Surrogacy* (2018), is a very useful academic study. For present purposes, it is important to point out, as described immediately below, that the rights of the child not to be sold, and the other rights of the child, are in practice strongly linked.[28]

3. The prohibition of the sale of children also safeguards other rights of the child

Unregulated and wrongly regulated surrogacy constitutes or unduly risks the sale of children, while also typically failing to protect other fundamental rights of the child. Hence, unregulated and wrongly regulated surrogacy arrangements commonly fail to provide adequate governmental or judicial screening of intending parents, a best interests of the child review, or protection of rights of origin and access to identity.[29]

These overlapping rights deprivations are not accidental but stem from the overall design of commercial surrogacy systems. Children are the products of commercial surrogacy systems. The clients are the intended parents, who are in very expensive "pay to procreate" or "pay to care" systems.[30] Hence, these systems commodify children while typically failing to provide safeguards to protect the rights of the child. Wherever there is a potential conflict between the rights of the child and the interests of intermediaries and intending parents, commercial surrogacy systems typically choose to privilege the interests of the profit-seeking intermediaries and the paying clients, the intending parents. Suitability review and best interests of the child determinations place the paying clients, the intending parents, under unwelcome scrutiny in a way that may frustrate the wishes of intending parents to

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[26] IbId, para 73. We would emphasize here the importance of creating and maintaining records, ultimately accessible to the surrogate-born person, that include information on the surrogate mother and any gamete donors, in order to preserve the child's rights of origin and access to identity. See Verona Principle 11.

[27] Verona Principles, supra n .

[28] See Section IB(3).

[29] See 2018 SR Report, para 26 – 33.

[30] Nigel Cantwell has used the term "pay to care" to critique the flaws of intercountry adoption systems. Eg N Cantwell, 'Today's inter-country adoption system is not fit for purpose,' *Korea Times,* https://www.koreatimes.co.kr/www/opinion/2022/05/801_328691.html

achieve parentage---hence they are eliminated.[31] Rights to identity and access to origins add obligations to profit-seeking intermediaries and may frustrate the desire of some intended parents to pretend that no one else has familial ties to "their" surrogate-born children. Products are objects and do not have rights and indeed these rights of the child if enforced would render the products potentially "defective" (with unwelcome familial ties to those outside of intended parents) and undeliverable (if screening rules out an intended parent). Hence, these systems commonly dispense with safeguards that would protect children as human persons.

4. Would regulatory systems work?

We have marked out clear, but as of yet little used, pathways whereby commercial surrogacy could be practiced in a way that would not necessarily constitute the sale of children, and in which other rights of the child would be protected. Practically, there remain several issues which need to be addressed.

First, there is the question of governmental enforcement capacity. Many nations may practically lack the capacities to enforce such regulatory regimes, as protecting the most vulnerable participants in surrogacy arrangements can be particularly difficult. Without adequate enforcement capacity protections of the rights of the child and of surrogate mothers will fail.

Second, there is the question of priorities, given limited governmental capacities. For some nations, there may be more pressing needs in areas like provision and regulation of basic health services, that rationally preclude allocation of scarce governmental and societal resources toward development and maintenance of a properly regulated commercial surrogacy system.

Third, the question of whether to create regulatory regimes for domestic commercial surrogacy should be separated from the question of whether to open such a system to foreign intending parents. Nations are not obligated to open themselves to foreign intending parents, and doing so can overwhelm some nations with demand pressures and monetary inducements which could corrupt and undermine domestic systems. Further, "states that permit surrogacy should limit access to surrogacy to intending parents from States which permit surrogacy,"[32] we would add that states that permit *commercial* surrogacy should limit access to *commercial* surrogacy to intending parents from States that permit *commercial* surrogacy. Protecting the rights of the child is too difficult and uncertain in surrogacies where intending parents have traveled internationally to evade domestic laws, as the cooperation and clarity necessary to protect the rights of the child are lacking. [33]

Fourth, a properly regulated surrogacy system likely would face similar problems as to black markets, gray markets, and competition from less regulated systems, as would states that prohibit commercial surrogacy. This problem of regulated markets competing with underground black markets is common in other spheres. For example, California created a heavily regulated legalized market for

[31] California Family Code, ss 7960-7962; Uniform Parentage Act, Art 8 (2017), https://www.uniformlaws.org/viewdocument/final-act-96?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments; 2021 New Hampshire Revised Statutes Title XII - Public Safety and Welfare Title 168-B – Surrogacy, https://law.justia.com/codes/new-hampshire/2021/title-xii/title-168-b/ ; American Bar Association, Report to the House of Delegates 112B (2016) [hereinafter ABA report].

[32] Verona Principles 18.3.

[33] See Sharon Shakargy 'Choice of law for surrogacy agreements: in the in-between of status and contract,' (2020) 16:1 *Journal of Private International Law*, 138-162, DOI: 10.1080/17441048.2020.1741121 (discussing choice of law issues). This issue is discussed further in Section VIII below (conclusion).

marijuana, but the black market nonetheless is twice as large as the legal market.[34] As to surrogacy, Israel, for example, has created a heavily regulated surrogacy system, but in response Israelis still choose to go to other, less regulated nations for surrogacy, sometimes to save money.[35] Proponents of commercial surrogacy therefore advocate against both prohibitions and most forms of regulations. Indeed, the American Bar Association specifically urged the United States government in its international negotiations on a possible treaty to adopt the positions that "any focus on regulating the international surrogacy market itself is misguided" while specifically rejecting "regulation of the surrogacy industry for the purpose of reducing human rights violations."[36]

The ABA pointed out that "[i]n order to maximize profits, international surrogacy brokers will operate in the countries with the lowest regulatory restrictions."[37] The desire to avoid the creation of black markets or incentives to travel to less regulated systems therefore can become a race to the bottom, which is used to justify stripping away even the most basic human rights protections. Virtually every rights-protective regulation of surrogacy can be dismissed as adding costs, causing delays, or restricting surrogacy in such a way as to fuel black markets and less regulated markets. Hence, the justification of avoiding black markets must at some point be met with a determination to uphold human rights, lest the argument undermine all rights-protective regulations.

C. Constants and Changing Contexts

Significantly, the 2018 Report concluded that "Commercial surrogacy as currently practiced usually constitutes sale of children as defined under international human rights law."[38] So far as we can ascertain, the same is true today. Most commercial surrogacy remains unregulated, underregulated, or wrongly regulated. Hence, attempts to legitimize commercial surrogacy under almost all of the legal models in place in 2018, and today, would be attempting to wrongly legitimize the sale of children.

Unfortunately, the same is true as to adherence to the other standards mentioned in the 2018 report, related to child rights norms like the best interests of the child, protection from exploitation, abuse and neglect, and rights of access to origins and identity. Most commercial surrogacy occurs under legal regimes which fail to provide adequate safeguards as to these fundamental rights of the child.

There have been four additional developments related to the contexts in which commercial surrogacy, and especially cross-border commercial surrogacy, is practiced. These developments make the prospects for an effectively regulated system of international surrogacy much more difficult.

First, the global COVID pandemic obviously made any kind of arrangement requiring cross-border travel much more difficult, profoundly impacting surrogacy arrangements.[39] Even as the crisis abates to some degree, the determination (for example) of China to maintain zero COVID, and the

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[34] A Nieves 'California's legal weed industry can't compete with illicit market,' (2021) *Politico,* https://www.politico.com/news/2021/10/23/california-legal-illicit-weed-market-516868

[35] B Sales, 'Why Israeli couples have surrogate pregnancies in Nepal,' (2015) *Jewish Telegraphic Agency* https://www.jta.org/2015/04/27/israel/why-israeli-couples-have-surrogate-pregnancies-in-nepal.

[36] ABA report [n], at pages 14, 7.

[37] ABA report at 10 (n number omitted).

[38] 2018 SR Report, para 41.

[39] Eg C Sakimura & E Galpern, 'Ethics of Surrogacy During COVID-19 Pandemic,' https://www.geneticsandsociety.org/article/ethics-surrogacy-during-covid-19-pandemic; L Widdicombe, 'The Stranded Babies of the Coronavirus Disaster,' (2020) *New Yorker*; L Goswami, S Larmar, J Broddy, 'The impacts of the COVID-19 pandemic on surrogacy in India,' (2021) 20(1-2) *Qualitative Social Work,* 472 – 478.

continuing presence of the constantly evolving virus in many places, makes it still a different world as to cross-border arrangements.[40]

Second, the Russian invasion of Ukraine has deeply impacted two of the most important nations which have served as global commercial surrogacy centers. There has been significant press coverage of the extreme situations faced by Ukrainian surrogate mothers caught in the midst of the war.[41] The future of Russia as a global surrogacy center has become unclear given the increasingly negative relationships between Russia and many European States, the United States, and some other nations. Indeed, in late May 2022, proposed legislation banning foreigners access to surrogate mothers in Russia received almost unanimous support in its first reading.[42] A sponsor of the legislation, who is from the ruling United Russia party, estimated that 40,000 surrogate born children had left Russia to be raised by foreigners.[43] He stated:

"we cannot follow the fate of one single baby….We don't know who their parents are, their so-called 'mom' and 'dad', and why they are purchasing a baby….Why should we spend our funds on resolving the demographic problems of other countries?"[44]

Third, the combination of Russia's invasion of Ukraine and increasing conflict between China and the United States appears to be a part of a broader failure of decades of efforts to integrate China, Russia, and indeed all nations into a particular kind of international world order.[45] Whatever one thinks of those efforts and goals, their success would have created a much easier environment in which to both practice and regulate cross border family formation, such as found in intercountry adoption and international surrogacy. The hopes of constructing orderly and safe cross border family formation systems are based on establishing cooperation and trust between states, and require relatively easy travel cross-border.[46] Such does not appear to be the context of the future. Instead, the world seems to be dividing into complex cross-border alliances, which create various rival factions of nations.[47] While

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[40] See, e.g., Z Jun, 'What Justifies China's Zero-COVID Policy?' (2022), https://www.project-syndicate.org/commentary/shanghai-lockdown-why-china-keeps-its-zero-covid-strategy-by-zhang-jun-2022-05; W Song, 'China: Why is the WHO concerned about its zero-Covid strategy?' (2022), *BBC,* https://www.bbc.com/news/59882774; J Chen & Y Chen, 'China can prepare to end its zero-COVID policy, Nature,' (2022), https://www.nature.com/articles/s41591-022-01794-3.

[41] Eg, E Galpern, 'War in Ukraine Exacerbates Problems with Surrogacy Industry,' (2022), https://www.geneticsandsociety.org/biopolitical-times/war-ukraine-exacerbates-problems-surrogacy-industry (including links of press coverage of impact of war on surrogacy arrangements); Susan Dominus 'It's a Terrible Thing When a Grown Person Does Not Belong to Herself' (2022) *New York Times*, https://www.nytimes.com/2022/05/03/magazine/surrogates-ukraine.html.

[42] 'Russia moves to bar foreigners from using its surrogate mothers,' (2022), https://www.reuters.com/world/europe/russia-moves-bar-foreigners-using-its-surrogate-mothers-2022-05-24/.

[43] Ibid.

[44] Ibid.

[45] Eg H Brands, 'America's war for global order is a marathon,' (2022) *Foreign Policy,* https://foreignpolicy.com/2022/01/25/americas-war-for-global-order-is-a-marathon/; A Friedberg, 'How the West got Russia and China Wrong, The failed strategy of engagement,' (2022) https://iai.tv/articles/how-the-west-got-russia-and-china-wrong-auid-2094

[46] Eg 1993 Hague Adoption Convention, Art 1b.

[47] See H Brands, 'America's war for global order is a marathon,' (2022) *Foreign Policy,* https://foreignpolicy.com/2022/01/25/americas-war-for-global-order-is-a-marathon/; A Friedberg, 'How the West got Russia and China Wrong, The failed strategy of engagement,' (2022), https://iai.tv/articles/how-the-west-got-russia-and-china-wrong-auid-2094; R Wright, 'Russia and China Unveil a Pact Against America and the West,'

this would not be identical to the cold war of the twentieth century,[48] it also would not be the positive environment presumed when, for example, the 1993 Hague Adoption Convention was created right after the end of the cold war.

Fourth, the patterns of international surrogacy from developing nations are increasingly similar to the negative patterns that occurred in intercountry adoption. In intercountry adoption, patterns labeled "cycles of abuse" or "slash and burn adoption" emerged decades ago.[49] Intermediaries from developed nations would start working in a developing nation with weak governmental capacity and chronic corruption. The numbers of intercountry adoptions from that country would increase dramatically. Bad actors would be attracted to the opportunities for profit and good actors would be corrupted, leading to illicit practices and eventually publicized scandals. Then, in response to scandals, there would be moratoria. One country might open, close, and re-open numerous times. Intermediaries would also move on to another developing nation with weak governmental capacity and chronic corruption, and the cycle would repeat. This pattern particularly relates to the history of intercountry adoption from, for example, Cambodia, Ethiopia, Guatemala, India, Uganda, and Vietnam.[50] Eventually, the patterns became strong enough that the reputation of intercountry adoption was globally compromised, despite the accomplishment of creation and increasing ratification of the 1993 Hague Adoption Convention, and the good work of the Permanent Bureau of the Hague Conference on Private International Law.[51]

Similar patterns have emerged as to international surrogacy arrangements from Thailand,[52] Cambodia,[53] Nepal,[54] and India.[55] Each of these countries were for a time important centers for international surrogacy arrangements, were subject to scandals, and then moved to limit especially international commercial surrogacy.[56] Intermediaries have responded by moving surrogacy

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(2022) *New Yorker,* https://www.newyorker.com/news/daily-comment/russia-and-china-unveil-a-pact-against-america-and-the-west.

[48] See ibid.

[49] See D Smolin, 'Child Laundering' (2006) 52 *Wayne Law Review* 113, 132 – 135; D Smolin, 'Can the Center Hold? The Vulnerabilities of the Official Legal Regime for Intercountry Adoption,' p 271, in R Ballard, N Goodno, R Cochran, Jr., and J Milbrandt *The Intercountry Adoption Debate* (EDS. 2015).

[50] See D Smolin, Child Laundering, pp 135-46; D Smolin, 'The Case for Moratoria on Intercountry Adoption,' (2021) 30 *Southern California Interdisciplinary Law Journal* 501, 506-507 and sources cited.

[51] See D Smolin, 'Case for Moratoria,'; See Committee Investigating Intercountry Adoption, *Consideration, Analysis, Conclusions, Recommendations and Conclusions* (2021) [hereinafter the Dutch Report].

[52] Eg Y Habino, 'Non-commercial Surrogacy in Thailand: Ethical, Legal, and Social Implications in Local and Global Contexts,' (2020) 12(2) *Asian Bioeth Review*; 135–147, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7747428/ [hereinafter Habino, Thailand]

[53] Eg ibid.; P Fronek, 'Current Perspectives on the Ethics of Selling International Surrogacy Support Services,' (2018) 8 *Medicolegal and Bioethics* 11, 12; 'Cambodia: 33 women found in raid on child surrogacy ring' (2018) *The Guardian*, https://www.theguardian.com/world/2018/jun/23/cambodia-33-pregnant-women-found-in-raid-on-child-surrogacy-ring; K Meta & C Maza, 'For poor surrogates, a loaded bargain' (2016) *The Phnom Penh Post,* https://www.phnompenhpost.com/national-post-depth/poor-surrogates-loaded-bargain.

[54] R Abrams, 'Nepal Bans Surrogacy, Leaving Couples With Few Low-Cost Options' (2016) *The New York Times,* https://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html

[55] See sources cited fn 45; The Surrogacy (Regulation) Act, 2021 (NO. 47 OF 2021)[25th December, 2021.][hereinafter India 2021 Act], https://egazette.nic.in/WriteReadData/2021/232118.pdf ; https://legalbots.in/blog/surrogacy-regulations-in-india-surrogacy-regulation-act-2021; https://www.thehindu.com/news/national/explained-surrogacy-assisted-reproduction-in-india-laws-offence-problems/article65443258.ece see also Section below.

[56] See sources cited fns 52 – 55.

arrangements to other countries, or even moving surrogate mothers across borders at various stages of a surrogacy.[57] The cycle of abuse continues.

D. The Inevitability Thesis

These negative contexts are important because they rebut the inevitability thesis. The inevitability thesis presumes that contemporary trends make the large-scale and growing practice of international and domestic commercial surrogacy inevitable, and hence it is best to acquiesce and concentrate on building strong regulatory systems. These historical forces include advances in Artificial Reproductive Technologies (ART), increasing acceptance of same-sex marriage, and broader acceptance of the goals of associating procreation with intention and choice increasingly untethered from biological limits or sex stereotypes. If the growth of commercial surrogacy as a large-scale pathway to family formation is inevitable, the thinking goes, prohibition is pointless and merely channels these inevitable practices into less safe black and gray markets. The inevitability thesis is not so much stated as presumed in many discussions of black and gray markets and/or the necessity of broadscale legalization of commercial surrogacy.[58]

To the contrary, commercial surrogacy remains either illegal or unrecognized in the law in most of the world.[59] Further, the trends suggest that most manifestations of cross-border commercial surrogacy tend toward abusive and illicit practices. The high end of the market (California and other jurisdictions in the United States) may be more orderly, but its total costs of $100,000 to $200,000[60] per birth exclude most people. Further, such systems commonly employ a contract-based form of surrogacy that meets the international definition of the sale of children, while stripping children of other fundamental rights such as access to origins and identity, best interests of the child review, and protections against abuse.[61] The lower cost countries are built on the vulnerability and desperation of poor women, while also not protecting the rights of children, and shift over time due to the cycles of

[57] See Habino, Thailand, supra fn ; Fronek, supra fn ; 'Cambodia's surrogate mothers risk jail for Chinese couples' (2018), *Bangkok Post,* https://www.bangkokpost.com/world/1598562/cambodias-surrogate-mothers-risk-jail-for-chinese-couples; 'Cambodia: 33 women found in raid on child surrogacy ring' (2018) *The Guardian*, https://www.theguardian.com/world/2018/jun/23/cambodia-33-pregnant-women-found-in-raid-on-child-surrogacy-ring.

[58] Eg https://brownpoliticalreview.org/2016/11/womb-for-rent-regulating-international-surrogacy-market/; ABA Report, https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2016/2016-midyear-112b.pdf.

[59] R Abrams, 'Nepal Bans Surrogacy, Leaving Couples With Few Low-Cost Options' (2016) *The New York Times,* https://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html: "When you look at the global map currently," said Doron Mamet, a co-chief executive officer of Tammuz, a surrogacy agency based in Israel, "there are only a few options that are open."; V Piersanti, F Consalvo, F Signore, A Del Rio & S Zaami, 'Surrogacy and 'Procreative Tourism.' What Does the Future Hold from the Ethical and Legal Perspectives?' (2021) *Medicina*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7827900/ https://www.mdpi.com/1648-9144/57/1/47/htm.

[60] See B Braverman, 'How Much Surrogacy Costs and How to Pay for It,' (2022) *U.S. News,* https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it; 'Understanding surrogacy costs' https://www.circlesurrogacy.com/parents/how-it-works/surrogacy-cost (advertising cost of "only .. $148,750" for surrogacy only and $172,750 for surrogacy and egg donation); 'Understanding IVF Costs,' https://www.samelovesurrogacy.com/intended-parents-in-vitro-fertilization/financial-considerations/ (advertising estimated total costs of $160,000 for "singleton" and $206,000 for twins).

[61] See SR 2018 Report, para 26, 27 ; D Smolin, 'Surrogacy as the Sale of Children,' (2016) 43 *Pepperdine Law Review* 265, 325-336 [hereinafter Smolin, Pepperdine]; California Family Code, sections 7960-7962; UPA [n31]; 2021 New Hampshire Revised Statutes [n. 31]; ABA report [n. 31].

abuse pattern.[62] As a result, it is unlikely that there will be an orderly, safe, and regulated system of global commercial surrogacy in the foreseeable future.

The inevitability thesis is fatally flawed in confusing surrogacy with technological and societal advance.[63] Surrogacy is not a technology but instead instrumentally uses one person's body and procreative bodily functions for the benefit of others. While the means have changed over time, the intrinsic possibilities of exploitation and abuse in such an arrangement have always been present and most likely will always be present. Surrogacy-like arrangements in the context of concubinage are pictured in the ancient Biblical book of Genesis[64] and addressed in the ancient Babylonian Code of Hammurabi.[65] The adaptions of artificial insemination and then IVF and embryo transfer do not change the essential aspect, which is one human being undergoing pregnancy and childbirth for the purpose of producing a child for another. Just as in Genesis and ancient Babylon, such arrangements are inherently subject to human conflict, exploitation of inequality and vulnerability, and mistreatment of children.[66] The basic "technology" of the human body undergoing pregnancy and childbirth has and will remain unchanged until and unless an artificial womb is created, which would create its own set of legal and ethical issues.[67]

Once the inevitability thesis is eliminated, much of the impetus for legitimating commercial surrogacy also falls. Commercial surrogacy is not a glittering leading edge of new vistas of human procreative freedom, but is the same old use of one person's body and procreative functions for the benefit of another. Surrogacy markets[68] will only rarely treat children as rights holders because the premise of such markets is children as products---baby markets.[69] It has taken literally millennia to

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[62] See Section VI infra; fns 41 – 49 and accompanying text (on cycles of abuse); Fronek, fn 45; R Abrams, 'Nepal Bans Surrogacy, Leaving Couples With Few Low-Cost Options' (2016) *The New York Times,* https://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html; K Meta & C Maza, 'For poor surrogates, a loaded bargain' (2016) *The Phnom Penh Post,* https://www.phnompenhpost.com/national-post-depth/poor-surrogates-loaded-bargain

[63] Eg 'Who Is A Parent? Surrogate Technology Outpaces Law,' *NPR*, https://www.npr.org/2012/04/14/150586618/legal-debate-over-surrogacy-asks-who-is-a-parent ("Technology is leading it" says surrogacy attorney).

[64] See Genesis chs 16, 17, 21, 29, 30 ; Smolin, Pepperdine, 290-99.

[65] Code of Hammurabi, Avalon Project, https://avalon.law.yale.edu/ancient/hamframe.asp; Smolin, Pepperdine, at 299-302. The comparison of contemporary practices to these ancient practices do not imply that they are identical in their cultural or social circumstances or structure, but simply that the use of another's body and the corollary possibilities of exploitation of the surrogate mother and mistreatment of children link these ancient practices to contemporary commercial surrogacy.

[66] See Genesis chs 16, 17, 21, 29, 30; Code of Hammurabi, supra fn ; Smolin, Pepperdine, at 290-302.

[67] See C Page, 'Artificial Womb Technology and the Safeguarding of Children's Rights Through an Analysis of the Right to Identity' (2017), https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jr-page---thesis-2017.pdf.

[68] Commercial surrogacy advocates concede they favor a market based approach, saying: "It is undeniable that the commissioning of children through surrogacy---for money---represents a market." ABA Report, 9, citing K Krawiec, Price and Pretense in the Baby Market, in Baby Markets 41 (M Goodwi, ed., Cambridge University Press 2010).

[69] Kimberly Krawiec, Price and Pretense in the Baby Market, in Baby Markets 41 (M Goodwin, ed., Cambridge University Press 2010), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5507&context=faculty_scholarship; D Spar, The Baby Business x-xi, xvi (2006); D Smolin, 'The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export,' (2018) 49 *Cumberland Law Review* 1 [hereinafter Smolin, One Hundred Thousand].

establish norms such as the prohibition of slavery, human trafficking, and the sale of children.[70] Risking these gains by artificially limiting the reach and strength of the norm against sale of children is not a risk worth taking.

II. The Basic International Norms on Sale of Children

The basic international norms on sale of children, and related norms related to human trafficking and the abolition of slavery, are well-known.[71] Nonetheless, It is necessary to review some of those basic norms in the context of a discussion of surrogacy, because of the dangers of these norms being abandoned or minimized. At least one prominent state (the United States) and various commentators have maintained interpretations of these norms that are quite far from the intuitive and literal language of the law and which would radically reduce their scope.[72] Presumably these are motivated by a wish to facilitate access to commercial surrogacy or by concerns with prohibitions driving surrogacy into black and grey markets. Nonetheless, the risk is that such interpretations would undercut these basic norms in very significant ways, with negative impacts both for surrogacy and for these norms. Hence, an overview of the norms is necessary, to understand what is at risk.

Article 35 of the Convention on the Rights of the Child (CRC) states:

"State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[73]

The legal concepts of sale of children and traffic in children have had overlapping but distinct development in international law.[74] The "sale of children" is particularly developed and defined as a legal concept in the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC).[75] Human trafficking, with child trafficking as a subset, has been particularly developed in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Palermo Protocol).[76] Both treaties are dated in 2000 and together mark important achievements in the international community defining and combatting these pernicious forms of commodifying human beings.

A. Overviewing the OPSC

[70] Convention to suppress the Slave Trade and Slavery (25 Sep 1926) and Protocol (7 Dec 1953); Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) 2237 UNTS 319 [hereinafter Palermo Protocol]; Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) 2171 UNTS 227 [hereinafter OPSC].
[71] See ibid.
[72] See Section V infra; Smolin, One Hundred Thousand [n 69], pp 38–42.
[73] United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, Art 35 [hereinafter UNCRC].
[74] See Section IIC below.
[75] Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) 2171 UNTS 227.
[76] Palermo Protocol [n.].

Article 1 of the OPSC creates the state obligation for ratifying parties to prohibit the sale of children, child prostitution and child pornography as each are defined in the Convention.[77] Article 2 of the OPSC contains definitions of each of these distinct legal concepts.[78] The definition of sale of children is:

"any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any form of consideration."[79]

This definition divides into three elements. The first element is the transfer of a child, as found in the words "any act or transaction whereby a child is transferred by any person or group of persons to another…"[80] As will be discussed below, such a transfer includes either a physical transfer of a child, or a legal transfer of a child.[81] The second element is payment, as found in the words "remuneration or any form of consideration."[82] The third element is the *quid pro quo* of transfer in exchange for payment, as represented in the word "for." This requires that the payment be "for" the transfer of the child.[83] *Hence, the definition of sale of children is the transfer of a child for payment.*

It is significant that, unlike the definition of human trafficking in the Palermo Protocol, there is no requirement of "exploitation" as a separate element. This definition establishes that the transfer of a child for payment "is a sufficient harm and human rights violation in and of itself" to require legal prohibition, without having to prove an additional harm or rights violation, such as sexual or labor exploitation.[84]

Article 3 of the OPSC requires, "at a minimum," that certain forms of the prohibited acts defined in Article 2 (sale of children, child prostitution, and child pornography), "are fully covered under its criminal or penal law, whether these offenses are committed domestically or transnationally or on an individual or organized basis."[85] Article 3(a) lists acts done "in the context of sale of children as defined in article 2" that must be "fully covered in criminal or penal law."[86] It is quite clear from the language of the OPSC that while not all forms of sale of child must be criminalized, all forms of sale of children must be prohibited. The listed forms of sale of child that must be criminalized under Article 3 includes three forms of child trafficking (transfer of a child for sexual exploitation, for transfer of organs of the child for profit, and for forced labor).[87] These three identified forms of sale of child are also within the definition of child trafficking because they involve transfer of a child for a form of exploitation specifically listed in the Palermo Protocol (see analysis below).[88] The fourth and final form of sale of children that must "at a minimum" be criminalized is a particular form of sale of children in the context of adoption:

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[77] OPSC, Art 1.
[78] OPSC, Art 2.
[79] OPSC, Art 2(a).
[80] ibId.
[81] See section ; see also 2018 SR Report, para 44-49.
[82] OPSC Art 2(a); 2018 SR Report, para 43.
[83] OPSC Art 2(a); 2018 SR Report, para 50-51.
[84] SR 2018 Report, para 35; see also J Tobin, 'To prohibit or permit: what is the (human) rights response to the practice of international commercial surrogacy?' (2014) 63:2 *International and Comparative Law Quarterly*, 18-21 & 24–27; Unicef, Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 10 (2009).
[85] OPSC, Art 3.
[86] ibId, Art 3(a).
[87] Ibid, Art 3.
[88] See Palermo Protocol, Art 3.

"[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption."[89]

The inclusion of just one form of adoption-related sale within Article 3 again demonstrates that there are forms of sale of children as defined in Article 2 that are not included in Article 3. For example, if an individual steals or kidnaps a child, and then sells that child for adoption, these acts would not be within the acts specifically defined in Article 3. There would be no act of "improperly inducing consent" because there would have been no consent at all. Similarly, if a birth parent sold their own child for purposes of adoption without the inducement of an intermediary, Article 3 would not be violated, because the wrong would be done without an intermediary. However, there still clearly would be the sale of a child in both of these instances. Under these circumstances, those actions of the sale of a child would be within the state obligation of prohibition, but not within the state obligation of criminalization.[90]

Surrogacy is not specifically mentioned in the OPSC. Nonetheless, ratifying states are obligated to prohibit surrogacy arrangements that meet the definition of sale of children in Art. 2 of the OPSC, although they are not obligated to criminalize such. The absence of a specific mention of surrogacy in Article 3 of the Convention does not exempt surrogacy as a category from the prohibition of sale of children.[91]

If the prohibition of sale of children were to exclude all acts not specified in Article 3 of the Convention, this would be a very significant reduction of the scope of the Convention. Many forms of selling children for adoption or informal care would be excluded. Intermediaries would be free to kidnap and then sell children. Birth parents would be free to sell their own children (or rights to their own children). Explicit markets in children for adoption and surrogacy could be legitimated by states without violating international law. We could see the development of internet sites to bid on parental rights, with children going to the highest bidder.

Some of this may seem fantastical. However, given how much demand pressures for children for adoption have turned even regulated adoption systems into in effect markets in children---as admitted, for example, by the Dutch government in its study of intercountry adoption[92]---there is no telling what could occur if such markets were legitimated. The forces that would commodify children for various purposes are no less in the contemporary world than they have been in the past, and may be greater.[93] The means to commodify children have expanded, through the creation of modern transportation and communications, including of course the internet.[94] Hence, the need to counter

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[89] OPSC, Art 3(1)(a)(ii).

[90] OPSC, art. 1, 2, 3(a); UNICEF Handbook, 11. Unicef notes that although the criminalization requirement of Art 3(1)(a)(ii) "applies only to the acts of intermediaries, the Committee [on the Rights of the Child] has recommended that States Parties criminalize the activities of all those involved in the sale of children for the purpose of adoption; see ibid.

[91] See 2018 SR Report; Tobin [n. 84].

[92] See Committee Investigating Intercountry Adoption, Consideration, Analysis, Conclusions, Recommendations and Conclusions (2021)[hereinafter the Dutch Report].

[93] Eg UNODC, Global Report on Trafficking in Persons 2020, https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf. (providing statistics on children as trafficking victims).

[94] Eg Secretariat, 'Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Successful strategies for addressing the use of technology to facilitate trafficking in persons and to prevent and investigate trafficking in persons,' (July 23, 2021), https://www.unodc.org/documents/treaties/WG_TiP_2021/CTOC_COP_WG.4_2021_2/ctoc_cop_wg.4_2021_2_E.pdf; Ch 5 'Traffickers Use of the Internet' https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_Chapter5.pdf.

those pressures through strong and clear norms is critically important, lest the gains of recent decades in de-legitimizing such commodification be lost.

B. Overviewing the Palermo Protocol

The Palermo Protocol provides an international definition of illicit trafficking in persons:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;"[95]

This definition has three elements. The first element is "the recruitment, transportation, transfer, harbouring or receipt of persons."[96] This can be termed "transfer" so long as it is understood that any of the listed terms are sufficient to satisfy this element. The second element is the illicit means, which are described broadly as "by means of the threat or use of force or forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."[97] This is often summarized as "force, fraud or coercion" which is useful so long as it is recognized that the definition is much broader. Finally, the third element is "for the purpose of exploitation."[98] The definition of exploitation, which particularly lists "sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"[99] is not exclusive. Other forms of exploitation are possible, as indicated by the language "at a minimum."[100]

Hence, in short, trafficking in persons is transfer of a person by force, fraud or coercion for the purpose of exploitation.

The Palermo Protocol further specifies:

(c) "The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age."[101]

Hence, child trafficking only requires two elements: the transfer of a child for purposes of exploitation. What this means, of course, is that force, fraud or coercion are not required. A child is a

[95] Palermo Protocol, Art 3(a).
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid, Art 3(c) and (d).

trafficking victim even if they were not subjected to such illicit means. Children legally cannot consent to the kinds of exploitation involved in human trafficking.

C. The differences between the sale of child and child trafficking

Based on the above sections, the sale of children is defined as the transfer of a child for payment, whereas child trafficking is defined as the transfer of a child for purposes of exploitation. Hence, where there is the transfer of a child for payment which also is for purposes of exploitation, both child trafficking and the sale of children would exist. However, there is not a complete overlap between the terms. The sale of children does not require exploitation; hence, some instances of the sale of children would not constitute child trafficking. In addition, in some circumstances child trafficking would not constitute the sale of children. Thus, UNICEF's Handbook on the Sale of Children Protocol notes that the definition of human trafficking does not require that a sale of children exist, as the elements of human trafficking do not require any commercial transaction, remuneration, or payment.[102] Thus, while it is common for children to be sold during various stages of human trafficking, it is neither inevitable nor required.

There is an important debate, beyond the scope of this chapter, as to whether the sale of children for purposes of adoption is exploitative, such that it could be termed both sale and also child trafficking.[103] The position of the 1993 Hague Adoption Convention, as represented by the Convention's language and the preparatory materials, indicates that the sale of children for purposes of adoption is a form of child trafficking.[104]

In the context of surrogacy, the more important point is that international law correctly and wisely terms the sale of children a sufficient harm in and of itself, without requiring a separate element of exploitation.[105]

The concept of sale of children thus marks an extension of the set of concerns typically associated with both slavery and human trafficking. Slaves were both sold and also subjected to forced labour, and hence in the modern sense were trafficking victims. The question is whether "merely" being sold is in itself a serious wrong, even if not accompanied by wrongs such as forced labour or sexual exploitation. The premise of international law since the year 2000 is that being sold is a sufficient wrong, in itself, to require states to prohibit it.

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[102] UNICEF Handbook (n), 9-10.

[103] See D Smolin, 'Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption under the Coming Hague Regime,' (2007) 32 *Vermont Law Review* 1; D Smolin, 'Intercountry Adoption as Child Trafficking,' (2004) 39 *Valparaiso University Law Review* 281.

[104] 1993 Hague Adoption Convention, preamble & Art 1; J.H.A. van Loon, Report on Intercountry Adoption, Preliminary Doc. No. 1 of April 1990, In Preliminary Work, Proceedings of the Seventh Session 101 (May 10-29 1993); I/A Court H.R., Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C No. 351; Expert Opinion of the United Nations Special Rapporteur on the Sale and Exploitation of Children, Mrs. Maud de Boer-Buquicchio, before the Inter-American Court of Human Rights, Ramirez Brothers and Family versus Guatemala, https://www.ohchr.org/sites/default/files/Documents/Issues/Children/Submission/Opinions28April2017.PDF; D Smolin, 'Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption,' (2010) 48 *University of Louisville Law Review* 441, 447-462.

[105] SR 2018 Report, para 35; see also J Tobin, 'To prohibit or permit: what is the (human) rights response to the practice of international commercial surrogacy?' (2014) 63:2 *International and Comparative Law Quarterly,* 18-21 & 24 –27; Unicef, Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 10 (2009).

III. The Inherent Wrong of Child Sale

It is worth pondering why being sold for purposes of parentage is a wrong to the person sold, as well as a wrong to children generally. The discussion is necessary because of the demand pressures for both adoption and surrogacy which continually push toward the creation of de jure and de facto markets in children and in parental rights.[106] In the context of intercountry adoption, the demand for children in the context of "pay to care" systems has repeatedly led to the creation of de facto markets and accompanying illicit practices, despite well-intentioned regulations and the 1993 Hague Adoption Convention which were designed to prevent such abuses.[107] In the context of commercial surrogacy, the demand pressure and opportunity for substantial profits by intermediaries has led to the establishment of de jure commercial surrogacy markets in which particular jurisdictions serve intended parents from many states, including from states that do not permit commercial surrogacy.[108]

Accompanying this demand side are academic and professional arguments explicitly in favor of markets for purposes of adoption and surrogacy. On the academic side, the calls are explicit, as in a 1995 paper 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."[109] As the author notes, the proposal "is not original" and is often seen as originating in a 1978 paper that criticized restrictions on baby selling.[110] By 2009, an author in this tradition had gone beyond complaints about black and gray markets to finding that "the legal baby trade is a global market in which prospective parents pay, scores of intermediaries profit, and the demand for children is clearly differentiated by age, race, special needs, and other consumer preferences…."[111] The legal systems for adoption and surrogacy, in other words, were already thinly disguised baby markets. Nonetheless, the author still argued the necessity to eliminate formal rules that purport to limit the baby market, as those rules are seen as having the negative impacts of limiting the "number of available 'desirable children'…far short of demand," and of wrongly restricting payments to "vulnerable suppliers."[112]

On the professional side, the American Bar Association (ABA), the preeminent attorney's organization in the United States, officially urged the United States government, in regard to negotiations "concerning a possible Hague Convention,"[113] as described below in the 2018 SR report:

> The American Bar Association [ABA] notes that "it is undeniable that the commissioning of children through surrogacy — for money — represents a market". The [ABA] 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

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[106] See Dutch Report (n); UN Special Rapporteur Study on Illegal Adoptions, A/HRC/34/55, December 22, 2016, para 59-60; D. Spar [n].

[107] Eg N Cantwell, 'Today's inter-country adoption system is not fit for purpose,' *Korea Times,* https://www.koreatimes.co.kr/www/opinion/2022/05/801_328691.html; Dutch Report (n).

[108] See SR 2018 Report, para 13 -18; HCCH, 'A preliminary report on the issues arising from international surrogacy arrangements,' (March 2012), https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf; Smolin, 'One Hundred Thousand' [n.], at 29-34.

[109] D Boudreaux, 'A Modest Proposal to Deregulate Infant Adoptions,' (1995) 15:1 *Cato Journal,* 1.

[110] See ibid (citing E Landes & R Posner, 'The Economics of the Baby Shortage,' (1978) 7 *Journal of Legal Studies,* 323-348).

[111] See K Krawiec, 'Pride and Pretense in the Baby Market,' (2009) *Baby Markets, Money, Morals and the Neopolitics of Choice* Cambridge University Press, 1.

[112] Ibid.

[113] ABA Report, 1.

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 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;59 hence, it rejects "regulation of the surrogacy industry for the purpose of reducing human rights violations".[114]

The ABA demand that global commercial surrogacy markets not be restricted by regulations "for the purpose of reducing human rights violations"[115] supplements that of the United States government, which explicitly claims that the OPSC can never apply to surrogacy.[116] Hence, while the ABA argues against creating new human rights protections for surrogacy, the United States government finds important current human rights standards inapplicable to surrogacy. This is made more significant by the preeminent position of the United States as to global commercial surrogacy, including its role as providing commercial surrogacy services for intending persons evading prohibitions on commercial surrogacy in their own countries.[117]

The view that there should not be markets in parental rights is based on the premise that there are some relationships that should not be a product of a commercial market among strangers, and that the parent-child relationship is one of them.[118] Once the market element predominates and the child thus becomes a product for sale (or the rights to parent that child are for sale), the child inevitably becomes commodified and reduced to a product. Once society legitimates markets as an appropriate means for family formation, and substantial use is made of such markets, over time children in general will be increasingly commodified and reduced to products.

The contrary view supporting markets in parental rights is apparently based on the view that parents could purchase their children (or parental rights to their children) in market contexts, and still love and parent their children in the same or even better way than non-market-based family

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[114] SR 2018 Report, para 27 (n numbers omitted)(quoting ABA Report).

[115] ABA Report, 7.

[116] I 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,' (2018) *U.S. MISSION GENEVA*, 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-boer-buquicchio/; One Hundred Thousand [n], at 38-39.

[117] ABA Report, 6; https://www.surrogateparenting.com/blog/surrogacy-in-california/ ; 7 F Langitt, 'Made in the USA: Childless Chinese Turn to American Surrogates,' (2014) *NPR,* Mennesson v. France, application No. 65192/11, judgement of 26 June 2014; Labassee v. France, application No. 65941/11, judgement of 26 June 2014; F Langfitt, 'Made In The USA: Childless Chinese Turn To American Surrogates,' (2014) *NPR,* https://www.npr.org/sections/parallels/2014/04/21/305514689/made-in-the-u-s-a-childless-chinese-turn-toamerican-surrogates?ft=1&f=. ; 'International Surrogacy for Intended Parents Not in the USA,' https://californiasurrogacycenter.com/international-surrogacy-outside-usa/;

[118] Eg M Radin, 'Market-Inalienability,' (1987) 100 *Harvard Law Review* 1849; M Sandel, 'What Money Can't Buy: The Moral Limits of Markets' in Grethe B Peterson, ed, The Tanner Lectures on Human Values (Salt Lake City: University of Utah Press, 2000) vol 21, 87; T Frankel & F Miller, 'The Inapplicability of Market Theory to Adoptions' (1987) 67 *BU L Rev* 99.

formation.[119] The assumption may be that having self-consciously willed to be a parent and devoted substantial expense and effort in becoming parents, the parents would be careful and devoted parents once their intentions were fulfilled.[120] The other assumption may be that purchased children would feel themselves more valued in discovering that they were in effect purchased and obtained with great expense and effort in such market contexts. From this perspective, the purchased child is the beloved child, and the higher the price the greater the love and commitment, rendering the concerns of the OPSC irrelevant.

The question is whether the world engages in the experiment of legitimating large-scale domestic and international markets in children and parental rights to children, despite established legal norms that prohibit such "sale of children."[121] In addition to the formal legal arguments rejecting such market transactions there are concerns that, despite the sympathetic intentions of those willing to pay large sums to become parents, over time and generations legitimating such forms of family formation would alter in negative ways the expectations of parents and undermine the proper foundations of the parent child relationship.[122] Such undermining would not necessarily occur immediately or at once, but as such markets were increasingly legitimated and expanded there are foreseeable risks to the fundamental rights of children that could extend far beyond the scope of surrogacy, as cultural norms are altered.[123] Despite euphemisms to the contrary, the more honest advocates of such markets, as we have seen, recognize them for what they are---markets in children and markets in parental rights.[124] How would the systemic practices of creating, selling, and acquiring children as products of such markets change over time cultural understandings and practices and expectations?[125] The rest of this section attempts to answer that question, keeping in mind that this argument supplements rather than replaces the formal legal argument that such markets violate existing law, such as the OPSC.

In addressing this question, we assume that the vast majority of those who obtain children through commercial surrogacy are motivated by a normal desire to parent. We also assume that even where a child has been purchased (as defined by the OPSC) through a commercial surrogacy arrangement, the intending parents often will be fully capable of providing for the care and nurture of the child. Further, we assume that most intending parents who participate in commercial surrogacy view such as ethical, having been reassured by networks of intermediaries and assisting professionals of the legitimacy of such means of family formation. We also assume that most surrogate-born persons as children would be socialized into an identity with the family that raises them. Accessing the full perspectives of surrogate-born persons across the life-cycle is difficult at present; it will likely be decades before sufficient numbers emerge as adults to represent the range of experiences and viewpoints. Our analysis here, then, is not dependent on whether intending parents who purchase

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[119] Radin puts the question this way: "An idealist might suggest … that the fact that we do not now value babies in money suggests that we would not do so even if babies were sold. Perhaps babies could be incompletely commodified, valued by the participants to the interaction in a non-market way, even though money changes hands." Radin [n 118], 1026. Radin herself concludes, to the contrary, that the risks of commodification of babies and indeed human beings are too great to permit baby-selling. Ibid at 1925 – 1928.

[120] See, e.g., Johnson v. Calvert [n], 782-83, citing Shultz, 'Reproductive Technology and Intent-Based Parentage,' 1990 Wisconsin Law Review 297, 309, 323, 397. For other perspectives on intention-based legal parentage, see D Purvis, 'Intended Parents and the Problem of Perspective,' (2012) 24 *Yale J. L. & Feminism* 210; L Springett, 'Why the Intent Test Falls Short: Examining the Ways in which the Legal System Devalues Gestation to Promote Nuclear Families,' (2019) 52 *Columbia Journal of Law and Social Problems* 391.

[121] OPSC [n]; see section II supra.

[122] Radin [n 118], 1925 – 37; Frankel [n 118], at 101-03.

[123] Radin {n. 118], at 1925 – 37; Frankel [n. 118], at 101-103.

[124] Krawiec [n. 69]; Spar [n. 69], at x-xi, xvi; Smolin, 'The One Hundred Thousand' [n.].

[125] Radin {n. 118], at 1925 – 37; Frankel [n. 118], at 101-103.

children can reliably parent, or on the lived experience of persons born through commercial surrogacy arrangements, even though both are important. Rather, we are here examining the risks, across decades and generations, to the rights of children generally, and to the status of children in society generally, of normalizing family formation through purchase. Further, if babies were culturally commodified, how would that impact our view of human persons generally?[126] Recognition of the inherent and equal dignity of human persons, which necessarily requires a non-commodified value of the human person, is after all the foundation of human rights.[127]

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A product is not only a thing that is purchased; a product is also there to serve the will and interests of the owner, who retains the rights to discard or further alienate the product. This commodification is deeply contrary to the normal developmental pathways of a parent-child relationship.[128] The human infant and young child are profoundly dependent and in need of moment to moment care for years merely to keep the child alive. Indeed, the human infant is more dependent and underdeveloped than other primates and human children are dependent on their parents and other adults far longer than most species.[129] Child development is based on attachment relationships in which particular adults actively parent their children day to day in a sustained, reliable, and stable way over many years.[130] This commitment requires parents to give up much of their freedom as they must frequently choose the best interests of their children over whatever they would rather be doing that is in conflict with their children's best interests.[131] Developing standards in children's rights have recognized the key roles of early caring relationships by declaring institutional or orphanage care inappropriate for children under three years of age.[132] The practice of acquiring children as products purchased for the emotional fulfilment of the purchaser seems inconsistent with the level of commitment required for normal parenting.

The UNCRC recognizes that the "evolving capacities of the child," including the capacity of "forming his or her own views," as evaluated according to the "age and maturity of the child," play fundamental roles in the implementation of the rights of the child.[133] Parents, as those with "primary responsibility for the upbringing and development of the child," including providing for the "best

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[126] Radin calls this the issue of broader commodification impacts the "domino effect of commodification"). See, e.g., Radin [n. 118], at 1930; see generally ibid. at 1925 – 1937.

[127] See, e.g., UNCRC [n.] preamble, quoting UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, preamble 217 A (III)("recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world").

[128] See Frankel [n. 118}, at 101-103 (parents are understood as "fiduciaries" whose "power over their children is held in trust for the child's benefit," whereas baby markets conceive of children as property and products).

[129] K Wong, 'Why Humans Give Birth to Helpless Babies,' (2012) *Scientific American,* https://blogs.scientificamerican.com/observations/why-humans-give-birth-to-helpless-babies/; D Bjorklund, 'Why Youth Is Not Wasted on the Young: Immaturity in Human Development' (2007); S Herculano-Houzel, 'Longevity and sexual maturity vary across species with number of cortical neurons, and humans are no exception, The Journal of Comparative Neurology,' https://onlinelibrary.wiley.com/doi/abs/10.1002/cne.24564.

[130] Eg B van der Kolk, *The Body Keeps the Score* 107-124 (2014); J Cassidy, J Jones & P Shaver 'Contributions of Attachment Theory and Research: A Framework for Future Research, Translation, and Policy,' (2013) 25 *Dev Psychopathol.* 1415–1434, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4085672/.

[131] See UNCRC Art 18(1): "…both parents have common responsibilities for the upbringing and development of the child. Parents…have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

[132] Guidelines for the Alternative Care of Children, para 22, UN General Assembly A/RES/64/142 (2010).

[133] UNCRC, Art 5; 12(1).

interests of the child,"[134] therefore must be prepared to recognize the increasing capacities of children to form their own views and progressively give more weight to such views. Such recognition may be inconsistent with the concept of a child as a means of emotional fulfillment of the parents, and even more inconsistent with the concept of the child as a product created according to the will and specifications of the parent. Indeed, few children act precisely as the parents would wish, and many children as they grow defy the expectations of their parents. This long developmental pathway of a child, built upon the foundation of parent-child relationships and the family environment, are profoundly incompatible with the concept of a purchased product intended to fulfill the emotional needs and expectations of the adults. Successful parenting requires understanding that children are unique persons in their own right—the same insight that is the foundation of child rights, which is that children are rights-bearing persons.[135]

This is not to say that parents and families should not have expectations of children. Many expectations of children are in the best interests of the child, who should be "fully prepared to live an individual life in society."[136] However, expectations of a child as a person are quite different from the kinds of expectations that can develop if the child is viewed implicitly as a product created according to the will and specifications of the parents.

In that sense, whether one is the discount baby or the $200,000 baby, the price is wrong because the metric of economic value does not capture the worth of the child or the nature of the parent-child relationship. Moreover, this is not mere idealism but is essential for normal human development, both as children and as human persons.[137]

The common use of various forms of Assisted Reproductive Technology (ART) in surrogacy arrangements adds another layer that may tend toward viewing a child as a product. We do not intend to comment here on the ethics or law of ART apart from surrogacy arrangements that violate the literal terms of the OPSC, but only note that the nature of ART in combination with commercial surrogacy violative of the OPSC may tend to accelerate the lived experience of child as product, a kind of commodification sometimes described as a new form of eugenics or as the creation of designer babies.[138]

Most surrogacy in the contemporary world appears to be gestational, which requires IVF.[139] Once IVF is used, choice of gametes is facilitated. Commonly, gametes are purchased in a market context[140] where the gametes are selected and paid for based on the hope of replicating certain characteristics of the gamete "donor." Donor attributes such as health history, height, weight, intelligence, educational achievement, profession, talents, race, hair and eye color, attractiveness, and personality may be used in selecting gametes.[141] Intending parents of course may also choose to

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[134] Ibid, Art 18(1).

[135] N Cantwell, BICE special report for 25 years of the Convention on the Rights of the Child https://bice.org/app/uploads/2014/11/nigel_cantwell_global_report_en.pdf ("the primary objective of the [CRC is] recognition of the rights of the child as human rights.")

[136] UNCRC, preamble.

[137] Radin [n. 118]; Frankel [n. 118].

[138] See C Achmad, Children's Rights in International Commercial Surrogacy 63-64 (2018).

[139] Spar [n.], at 78 – 88; Human Rights Implications of Global Surrogacy, 7 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1009&context=ihrc; HCCH (2014) [n.], at page 59, para. 135.

[140] See M Darnovsky & D Beeson, Institute of Social Studies, Working Paper No. 601, *Global Surrogacy Practices,* page 19, 29 (Dec. 2014); Spar [n.], at 35 – 46, 99.

[141] Eg Spar [n.], at 35 – 46, 99 https://www.ohsu.edu/womens-health/choosing-sperm-donor; LLU Center for Fertility & IVF, 'How to Be Happy Choosing an Egg Donor or Sperm Donor,' (2018), https://lomalindafertility.com/choosing-egg-donor-sperm-donor/.

exclusively use their own gametes, but same-sex couples, individuals with certain health issues, and individuals without a partner particularly require "donor" gametes.

Once gametes are selected, typically embryos are produced in larger batches. This creates opportunities for preimplantation genetic diagnosis/screening (PGD/PGS) for various characteristics, including presently hundreds of single-gene linked health issues,[142] as well as gender.[143] In the future, the information available through PGD and other developing technologies will presumably increase, allowing for a broader menu of reasons to select one embryo over another.[144] Despite the global controversy and criminal punishment accompanying the first births of gene-edited CRISPR infants, in the future gene-editing technology may be more broadly used to alter the genes and hence characteristics of the embryo.[145]

In addition, intending parents contractually or otherwise express the expectation that they will be permitted to choose an abortion if the fetus is diagnosed with a disorder, or a reduction abortion if more embryos implant than desired.[146] Commonly more embryos are transferred to the surrogate than the desired number of children, in order to improve the odds that at least one will successfully implant and establish the pregnancy.[147]

Given this lived experience of purchasing and selecting gametes, creating, diagnosing and selecting embryos, and testing and possibly aborting fetuses, coupled with the experience of hiring through intermediaries a stranger to undergo the pregnancy and childbirth, expectations for a certain kind of baby seems inevitable.[148] The baby is often expected to be healthy, free of various diseases and "defects," a certain gender, with future high potential for various characteristics such as intelligence, attractiveness, and achievement.[149] While parents normally have high hopes for their children, in human history this combination of markets, technology, and choice in procreation of a human infant is new. The market elements appear to push this lived experience beyond an advance in procreative choice into a lived experience of purchasing a product---a product tailor designed to meet the expectations of the purchasers. While we can pretend otherwise as a kind of legal fiction, in the longer term the lived experience would likely normalize children as products. Even Spar, generally an advocate of the inevitability of baby markets, concedes: "the sum" of individual, market-based procreative

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[142] See Spar [n.], at 114-127; https://www.ccrmivf.com/services-3/preimplantation_genetic_testing-monogenic-disorders/; 'Cornell's Preimplantation Genetic Testing (PGT) Program' https://ivf.org/treatments-and-services/advanced-ivf-techniques/pgdpgs.

[143] Spar [n.], at 121-22; https://www.fertility-docs.com/programs-and-services/gender-selection/select-the-gender-of-your-baby-using-pgd.php (offering PGD gender selection services in India, Mexico, and the US).

[144] See H Greely, 'The End of Sex and the Future of Human Reproduction' (2016); L Hercher 'A New Era of Designer Babies May Be Based on Overhyped Science,' (2021), *Scientific American,* https://www.scientificamerican.com/article/a-new-era-of-designer-babies-may-be-based-on-overhyped-science/

[145] D Cyranoski, 'What CRISPR-baby prison sentences mean for research,' (2020) *nature,* https://www.nature.com/articles/d41586-020-00001-y; T Rulli 'Using CRISPR to edit eggs, sperm, or embryos does not save lives,' (2019), *Stat*, https://www.statnews.com/2019/10/15/reproductive-crispr-does-not-save-lives/;

[146] See SR 2018 Report, para 32 and fns 78-80; Eg C Joslin, '(Not) Just Surrogacy,' (2021) 109 *California Law Review* 401, 419 & n 123 (citing Hillary L. Berk, 'The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor,' (2015) 49 *Law & Soc'y Rev.* 143, 156–57; Emma Cummings, Comment, 'The [Un]Enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements,' (2018) 49 *Cumb. L. Rev.* 85; CSR (Gujarat)[n. 271], pp 44-46).

[147] Eg SR 2018 Report, para 32; P White, 'One for Sorrow, Two for Joy?: American embryo transfer guideline recommendations, practices, and outcomes for gestational surrogate patients,' J Assist Reprod Genet. 2017 Apr; 34(4): 431–443.https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5401701/; CSR (Gujarat) [n. 271], at 44-45.

[148] Spar [n.], at 114-27; Achmad [n.], at 63-64.

[149] Ibid.

decisions could "reshape, like the old genetics, the notion of 'fitness' and transform children into perfectible goods."[150]

There are already early signs of this problem in the propensity of intended parents of surrogate-born infants to reject and abandon children that do not meet their expectations, or otherwise to change their minds after pregnancy has been established.[151] While the percentage of such cases can be expected to be small---given that most infants will through these technological processes be free of visible "defects"---the deeper issue is the subtle transformation of expectations created in family formation as a market. Many individuals will resist this conclusion and treat their purchased child "as if" the child had not been a purchased product. Yet, over time, particularly if law and society were to treat market based family formation as normal, the situation of children in families as a whole could be subtly but profoundly altered. Normalizing the sale of children for family formation over time could lead to a sense that the child needs to justify his or her existence and family status, that having been purchased one can be returned, that the child is an investment that must return benefit.

Another early sign of difficulties are lawsuits against service providers when a child of the "wrong" sex is born in the context of commercial surrogacy and/or ART.[152] The language of these claims imply that parents are profoundly wronged and entitled to substantial damages when, through medical mistakes, their expectations to control the sex of the child are frustrated.[153] Some of the language may suggest an animus against raising a child of the "wrong" sex.[154] While acknowledging that medical mistakes are involved in these lawsuits, their presence and language does not seem a proper foundation for the kind of unconditional love a child requires. A surrogate-born person might understandably experience significant distress when discovering the profound disappointment and harm claimed by their parents, due entirely to their unwanted sex at birth. Yet, this is precisely the kind of expectation made normative by the nature of contemporary commercial surrogacy arrangements. While parents commonly may have preferences regarding the sex of children, creating a legal expectation and actionable harm based on the frustrated expectation of controlling the sex of the child does not seem like a step forward.

To be clear: the sale of gametes is not, in itself, the sale of a child under international law, because gametes are not children and the OPSC definition of sale of children therefore is not met. The combination of the sale of gametes and various ART technologies also do not constitute the sale of children, again because such does not meet the definition of sale of children. Some consider markets in gametes and advancing ART technologies as in themselves very positive expansions of procreative choice. Others view those practices as inherently commodifying and leading to practices sometimes

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[150] Spar [n .], at 124.

[151] SR 2018 Report, para 74, citing T Lewin, 'Coming to U.S. for Baby, and Womb to Carry It,' (2014) *The New York Times,* https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html (prominent surrogacy attorney states that intending parents "changed their minds" significantly more often than surrogate mothers and notes 81 such cases); E Wallwork, 'British baby Gammy: Surrogate claims mum refused to take disabled twin,' (2014) https://www.geneticsandsociety.org/article/british-baby-gammy-surrogate-claims-mum-refused-take-disabled-twin.

[152] N Austin, 'Gay couple sues fertility clinic because their child is a girl when they wanted boys,' (2022), *News USA,* https://www.lgbtqnation.com/2022/07/gay-couple-sues-fertility-clinic-child-girl-wanted-boys/;

[153] Ibid.

[154] Ibid: "She explained why it was so important to have a daughter and not a son: "We didn't want to have a boy because of the assaults and because of the socialization of boys — there's constant socialization of what it means to be a 'real man.' People say, 'Oh, he's a boy, let him hit you,' and all the camouflage and guns don't help. It reinforces masculinity, and that's a reminder of the assaults every time."

termed negatively as "designer babies."[155] The OPSC does not resolve these issues insofar as practices may be commodifying without constituting the sale of a child under the OPSC. We do not here comment on the question of when the combination of markets, technology, and procreative choice is positive or negative, as to practices which do not violate the OPSC.

However, where, as here, a practice does meet the literal and intuitive definition of sale of children in the OPSC, and the question is whether to cast aside those literal and intuitive meanings, a broader context of commodification is relevant. Such a broader context and lived experience of commodification is an additional reason for maintaining the literal and intuitive meaning of the OPSC. These commodifying contexts here become an additional confirmation of the importance of maintaining the definition of sale of children as written in the OPSC. At a minimum, casting aside the legal prohibition of the sale of children, in the contexts of market pressures to obtain children for family formation, has serious long term risks for the entire child rights project, because it undermines the message of child as rights holder in favor of a legitimized practice of child as product and parental rights as commerce. It may be difficult over generations to maintain the recognition of children as rights-bearing persons if society increasingly legitimizes family formation through purchase. Either a child is a rights-bearing person or a child is a product; over time we will have to choose between the two visions.

IV. Applying the OPSC Definition of Sale of Children to Commercial Surrogacy

As described above, under the OPSC, the legal definition of sale of children has three elements: (1) transfer of a child (2) in exchange for (3) payment.[156]

By definition commercial surrogacy involves payment. Hence, the third element is met.[157]

Commercial surrogacy also involves the legal and physical transfer of a child, either of which is sufficient to meet the legal requirement of transfer. The child is physically transferred from the woman who gives birth to the intended parents, as will be discussed in greater detail below.[158]

Legally, the child is transferred from the surrogate mother to the intending parents in one of two ways. In many systems, the surrogate mother has the status of mother at birth, and a legal post-birth transfer of parentage is required. In these systems, since the surrogate mother clearly has legal parentage at birth, and the goal and intent of surrogacy is that such belong exclusively to intending parents, a legal transfer of the child from surrogate mother to intending parents is an essential and intended part of surrogacy arrangements.[159]

In other systems, the combination of a pre-implantation signed surrogacy contract, plus legal proceedings in the courts prior to birth, allow the legal transfer to occur prior to birth. However, in those systems the surrogate mother relinquishes parentage in the contract, and typically the contract requires her to participate in the legal transfer as needed, as well as to physically transfer the child. The contract itself is viewed in those legal systems as a binding relinquishment. Hence, in such systems the contract itself, or the arrangement as an implied contract, is where legal rights to the child are transferred.[160]

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[155] Second International Summit on Human Genome Editing: Continuing the Global Discussion: Proceedings of a Workshop in Brief (2019); https://www.sciencerepository.org/are-designer-babies-the-future-reality

[156] See section IIA; OPSC, Art 2(a); SR 2018 Report, para 42; Verona Principles 14.2.

[157] See SR 2018 Report, para 43; Verona Principles 14.4.

[158] See Section VB2; SR Report, para 44–49; Verona Principles 14.3.

[159] See 2018 SR Report, para 45-46; HCCH, a study of legal parentage and the issues arising from international surrogacy arrangements (March 2014), pages 7, 13, 16-18 <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>

[160] See 2018 SR Report, para 47-48; Smolin, Pepperdine [n 61], p 315; HCCH, Legal Parentage, p 18.

Hence, in law and fact commercial surrogacy involves the transfer of a child and payment. The key issue is the second element: "in exchange for."[161] It is commonly claimed the commercial surrogacy is not the sale of a child because the surrogate is paid for the services of undergoing pregnancy and childbirth, and is NOT paid for transfer of the child.[162]

Of course it is true in commercial surrogacy that the surrogate mother is paid for undergoing pregnancy and childbirth as a "service." However, it is counter-intuitive to suggest that she is only paid for such. There are several ways to test this thesis. Imagine a scenario where the surrogate mother undergoes pregnancy and childbirth, but then refuses to cooperate in legally and physically transferring the child. Has such a surrogate mother fulfilled the expectations of the surrogacy arrangement? If there is a formal contract, has the surrogate mother fulfilled all of her obligations under the contract? Would the intending parents say that they have received what they paid for, if they never receive the child? It seems obvious that in these circumstances the surrogate mother would be viewed as having violated the expectations of the arrangement and, if there is a written contract, the terms of the contract. The intending parents would consider that they had not received what they paid for.[163]

Intuitively, surrogacy is an arrangement in which the surrogate mother is paid both for undergoing pregnancy and childbirth, and also for participating in the legal and physical transfer of the child. Ads for surrogacy intermediaries show pictures of babies, or parents with babies, inviting intending parents to imagine themselves as parents of a baby. Surrogacy ads do not market the experience of hiring someone else to undergo a pregnancy and childbirth as though this were a desired service in and of itself. In surrogacy systems where there are written contracts, the surrogate mother typically promises to relinquish legal parentage and to physically transfer the child.[164] The promise of payment, and the actual payments, intuitively are in exchange for both gestational services and the transfer of the child.

Because the most obvious, intuitive, and literal conclusion is that commercial surrogacy as a category generally constitutes or includes the sale of children, states that consider all commercial surrogacy to be the sale of children are acting entirely rationally. We would not criticize such states for implementing this conclusion into law.[165] Our main message to such states, and to all states that prohibit commercial surrogacy or all surrogacy, is a reminder of their obligations to protect the fundamental rights of surrogate-born children. Regardless of legality, surrogate born children should not suffer discrimination or deprivation of their rights.[166]

However, we still adhere to the view that states may construct regulated forms of commercial surrogacy that could rationally be viewed as not constituting the sale of children. In essence, this involves separating in fact and law the payment for gestational services (pregnancy and childbirth) from a subsequent, free-will, voluntary, gratuitous transfer of the child. We described in some detail the

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[161] SR Report, para 50-51.

[162] See S Snyder, 'Reproductive Surrogacy in the United States of America,' 276, 278, in International Surrogacy Arrangements (ed. Katarina Trimmings & Paul Beaumont); 'Should Compensated Surrogacy Be Permitted or Prohibited?' Cornell Law School, *International Human Rights Policy Advocacy Clinic National Law University,* Delhi, 31 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2685&context=facpub>

[163] See SR Report, para 51; Johnson v. Calvert [n.]; H Berk, 'The Legalization of Emotions: Managing Risk by Managing Feelings in Contracts for Surrogacy Law,' (2015) 49 *Law & Society Review* 143, 162 (describing the surrogate relinquishing the baby as the "crux of the contract" and many contractual provisions as ways of managing the fear that the surrogate will refuse to do so).

[164] See H Berk, 'The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor,' (2015) 49 *Law & Society Review* 143, 156–57; Smolin, Pepperdine

[165] See Verona Principles 14.5.

[166] See SR Report, Art 77(j); Verona Principles preamble.

necessary regulatory pathways in Section IB(2) above, relying on the 2018 SR Report and the Verona Principles.

Unfortunately, states permitting commercial surrogacy rarely provide such appropriate regulations. It appears that much legislation and court decisions in permissive states have been primarily shaped by the perceived interests of intending parents and intermediaries, with the voices of the commercial surrogacy industry being dominant.[167] As famed bioethics expert Arthur Caplan explained:

"The industry doesn't like regulation; the people who use it don't like regulation … There's no Association of Children About to Be Born by Surrogate Mothers."[168]

V. Avoidance Arguments

There have been a variety of arguments proffered as to why commercial surrogacy as currently practiced generally would not constitute the illicit sale of children under the OPSC. Describing these arguments is important because it illustrates the results-orientated approach which reflects an overriding motivation to legitimate current forms of commercial surrogacy. The consequences of accepting each of these arguments as a general rule indicates how catastrophic broad acceptance of current commercial surrogacy practices would be for the legal norm of sale of children.

Each subsection below discusses one of the arguments used to avoid the application of the norm against sale of children to commercial surrogacy.

A. Avoidance Argument 1: The OPSC may never apply to surrogacy, because surrogacy is not listed in Article 3.

When then Special Rapporteur Maud de Boer-Buquicchio presented her 2018 Report on Surrogacy to the Human Rights Council, on March 6, 2018, Mr. Jan McKay responded 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."[169]

As noted above in Sections IIA and IV of this Chapter, such a view is completely contrary to the overall structure of the OPSC. Under that structure, Article 1 contains the state obligation to prohibit the sale of children, Article 2 contains the definition of sale of children, and Article 3 contains particular forms of sale of children that must be not merely prohibited, but also criminalized.[170] As noted in

[167] See Smolin, Pepperdine, at 325, 334; Joslin, 2021, at pages 420-22.

[168] S Lee, 'Varying laws can complicate surrogacy,' https://www.sfgate.com/health/article/Varying-laws-can-complicate-surrogacy-4422299.php

[169] I 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) [hereinafter US Government Statement], 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-boer-buquicchio/.

[170] OPSC, Art 1, 2, 3.

Sections II and III above, the OPSC prohibits the sale of children regardless of whether additional harms of forms of exploitation, beyond sale, are present.

The limited scope of forms of sale of children listed in Article 3 means that, if the United States were correct, many forms of sale of children would not be prohibited by the OPSC. A situation where a surrogate mother and intermediary created an online bidding process for the child to be born from an existing pregnancy, for example, would not be sale of children. As to adoption, a situation where a child is kidnapped and then sold for adoption would not be sale of a child. Similarly, a situation where a birth parent sold a child to the highest bidder for purposes of adoption without the involvement of an intermediary would not be the sale of children. The position of the United States thus radically restricts the reach of the OPSC in the interests of protecting commercial surrogacy practices, including those jurisdictions in the United States that serve as global commercial surrogacy centers.

B. Avoidance Argument 2: The Surrogate is Never a Mother, and Therefore Cannot Transfer a Child who is Never Hers

The argument has been made that commercial surrogacy is not the sale of children, because the child always belongs to the intended parents, and never belongs to the surrogate mother, sometimes renamed as a gestational carrier. The "gestational carrier" cannot sell what is never hers, goes this theory. Thus, the claim is that there is no transfer of the child.[171]

In most of the world, the general rule that the woman who gives birth is the mother of the child applies even as to births in surrogacy arrangements.[172] In those circumstances, at birth the surrogate mother has both parentage and parental responsibility, and a physical and legal transfer of the child is necessary to complete the surrogacy arrangement.[173]

However, multiple jurisdictions in the United States,[174] Ukraine,[175] and in practice India prior to recent changes,[176] have considered the intending parents as the only parents of the child at birth for purposes of commercial gestational surrogacy. The original and only birth documents under such regimes include only the intending parents, and do not include the name of the woman who gave birth: the so-called "gestational carrier" or "gestational surrogate."[177]

Nonetheless, these legal regimes precisely meet the definition of sale of children under the OPSC, because the three elements of sale are present, including transfer. Either a physical or legal transfer is sufficient to meet the element of transfer under the OPSC; in these legal regimes there are both, as explained below.

1. The inevitability of physical transfer of the infant regardless of whether the surrogate mother is considered a mother

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[171] Snyder [n. 160] at 278; Cornell [n. 160] at 31.

[172] HCCH, parentage, [n.], at 7, 13, 16-18.

[173] Ibid, 16-18; SR, para 45-46.

[174] See, e.g., California Family Code Sections 7960-62; Johnson v. Calvert [n.]; Uniform Parentage Act, Art 8 (2017); 2021 New Hampshire Revised Statutes Title XII - Public Safety and Welfare Title 168-B – Surrogacy, https://law.justia.com/codes/new-hampshire/2021/title-xii/title-168-b/; Washington State Statutes sections 26.26A 700 – 785, https://app.leg.wa.gov/RCW/default.aspx?cite=26.26A.; Smolin, Pepperdine, at 325-36; 2018 SR at para. 31-33, 47-49.

[175] O Reznik & Y Yakushchenko, 'Legal considerations surrounding surrogacy in Ukraine.' Wiad Lek. 2020;73(5):1048, 1049; https://www.dominuslegal.com/en/surrogacy-in-ukraine-practical-issues-and-legal-risks/.

[176] https://www.latestlaws.com/legal-faqs/surrogacy-laws-faqs; see infra Section V; India 2021 Act [n 55].

[177] See sources cited fns 172-74; 2018 SR, para 47.

As a general rule, one does not need to be a mother, a parent, or have lawful responsibility for a child in order to sell a child under the OPSC. Thus, UNICEF, in analyzing the OPSC, refers to scenarios in which a child is sold from one trafficker to another trafficker or from a trafficker to a final buyer.[178] This rule follows from both the intentionally broad definition of sale in Art. 2(a) of the OPSC,[179] and also from Article 3, which prohibits the "offering, delivering, or accepting, by whatever means" of a child for purposes of sexual exploitation, commercial organ transfer, or forced labour.[180] The other form of sale involves improperly inducing consent, "as an intermediary" for adoption.[181]

Thus, the "seller" under the OPSC clearly could be someone who has obtained the child illicitly by kidnapping, purchase, coercion, or fraud. Indeed, Article 3 of the OPSC is focusing primarily on traffickers of children as those who sell children. While parents can and sometimes do traffic their own children, quite commonly child traffickers are not parents and have no lawful custody or lawful responsibility for the children they traffic. A sale of a child for sexual exploitation or labour would often involve a person who controls the child through force, threat, and coercion, selling the child for profit into various exploitative uses. As to adoption, Article 3 of the OPSC seems to focus particularly on the misdeeds of intermediaries as the sellers of children, rather than the parents.[182]

From that point of view, commercial surrogacy may constitute the sale of children regardless of whether or not surrogate mothers are ever accorded parentage and regardless of the "gestational carrier" label. So long as the "gestational carrier" is paid for facilitating physical transfer of the child, sale could occur. In other instances, to be explored below in Section VI, it may in fact be the intermediaries who most control the child, and thus are the sellers who effect physical transfer, even if such intermediaries (like intermediaries for adoption under Art 3 of the OPSC) never have any legal responsibility or rights to the child.

A surrogate mother, whether genetically related or not, is clearly expected to facilitate the physical transfer of the child from herself to the intending parent(s). A part of this expectation is that the surrogate mother will facilitate transfer by giving birth in a place known to and accessible to the intending parents and/or intermediaries.[183] Surrogate mothers clearly understand that they are expected to facilitate the transfer of the child, and where there are written contracts they typically express this expectation.[184] Thus, surrogacy contracts commonly contain undertakings such as agreeing to "immediately after birth…surrender all rights to the Child, including the right to custody,"[185] to

[178] UNICEF Handbook [n.] at page 9.
[179] See ibid, 9-10; supra section IIA & C.
[180] OPSC, Art 3(1)(a)(i).
[181] OPSC, Art 3(1)(a)(ii).
[182] Ibid, Art 3.
[183] See, e.g., Berk (2015), at 168; infra fns and accompanying text; LexisNexis(R) Forms 187-100.222, Agreement for Gestational Surrogacy, at para 3 & 11, 12[hereinafter Lexis/Nexis Contract ("Surrogate and ___ … agree to notify Intended Parents at the onset of labor…Surrogate [add if desired: and that Intended Parent may be present during the delivery of the Child.]")
[184] See Berk 2015 [n], at 168; H Berk, 'Savvy Surrogates and Rock Star Parents: Compensation Provisions,' (2020), 45:2 *Contracting Law & Social Inquiry*, 398–431, at pp 417-18; A Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker,' (2010) 35:4 *Signs*, pp 969, 976-77; In re Baby M., 537 A.2d 1227, 1240, 1241-42 (N.J. 1988); Lexis/Nexis Contract [n. 180], at para 3, 11, 12.
[185] Lexis/Nexis Contract [n. 180], at para. 3.

"surrender custody of the Child to Intended Parents"[186] and to "relinquish any and all parental rights, custody and control …"[187]
A description of contracting for surrogacy in India indicates that, although the surrogate mothers did not read the contract which was written in a language they did not understand (English), one of the few things they understood was that they were obligated to "give up the child."[188]

2. Commercial Surrogacy Systems that define the infant at birth as solely the child of the intending parents nevertheless include a legal transfer of the child

A legal model common among some states in the United States is best understood as a form of contractual commercial surrogacy legitimized by state case law and/or state statute.[189] This contract-based legal regime is designed to establish the intended parents as the sole parents at birth and on the original and only birth certificate.[190] In order to avoid the implication of parenthood for surrogate mothers, where genetically unrelated to the child they are relabeled as "gestational carrier" or "gestational surrogate."[191] This legal regime is restricted to gestational surrogacy in which it is presumed the surrogate mother is not genetically related to the child. However, the intending parents are not required to have any genetic connection to the child. This legal regime is often designated as a kind of "intention" based system of parentage, but the only intention that matters is what is established in the contract. The intentions of a surrogate mother who "changes her mind" and seeks parentage are disregarded, even if that change of mind occurs before birth. Hence, "intention" based parentage is really contract-based parentage.[192] Indeed, one model surrogacy agreement by a US based intermediary operating internationally bluntly states: "The Surrogate and Surrogate's Husband represent that they believe the child[ren] conceived pursuant to this Agreement is morally and contractually that of the" intended parent(s).[193]

The focus on contractual parentage intentionally avoids numerous safeguards. There are no state-mandated suitability reviews of the intended parents, criminal background checks, or child abuse registry checks; there is no best interests of the child review either before or after birth.[194] The only state-required safeguards may include safeguarding of the funds through escrow accounts, a

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[186] Ibid, at para 12.
[187] K Foden-Vencil, 'An Explicit Contract Makes Surrogacy Viable For An Oregon Woman,' (2015), *NPR,* https://www.npr.org/sections/health-shots/2015/07/09/417116553/an-explicit-contract-makes-surrogacy-viable-for-an-oregon-woman; contract at https://media.npr.org/documents/2015/july/Surrogacy_contract_sample_070215.pdf. See also In re Baby M., 537 A.2d 1227, 1240, 1241-42 (N.J. 1988); Johnson v. Calvert [n.] at 778.
[188] Pande 2010 [n.], at 977.
[189] See, e.g., California Family Code Sections 7960-62; Johnson v. Calvert [n.]; Uniform Parentage Act, Art 8 (2017); 2021 New Hampshire Revised Statutes Title XII - Public Safety and Welfare Title 168-B – Surrogacy, https://law.justia.com/codes/new-hampshire/2021/title-xii/title-168-b/; Washington State Statutes sections 26.26A 700 – 785, https://app.leg.wa.gov/RCW/default.aspx?cite=26.26A.; Smolin, Pepperdine, at 325-36; 2018 SR at para 31-33, 47-49.
[190] Ibid (sources cited fn 189).
[191] See e.g., California Family Code 7960(f)(2); RCW 26.26A 700(2); UPA [n.], at art. 801(2).
[192] See sources cited fn 189; sources cited fn 120.
[193] All about surrogacy sample GS Contract (Section II), https://www.allaboutsurrogacy.com/sample-gestational-surrogacy-contract/. The web site All About Surrogacy is apparently operated by the intermediary Family Source Consultants, which apparently has twenty-seven staff members: https://www.familysourceconsultants.com/about-us/fsc-staff/.
[194] See sources cited fn 189.

requirement that the surrogate mother and intending parent(s) have independent legal representation, and sometimes a requirement for intended parents to have a medical exam and meet with a counselor.[195] Where required, the counseling sessions are not a screening or evaluation, but simply an opportunity for the intended parents to discuss common issues that arise in relationship to surrogacy.[196]

Under these legal regimes, the existence of a valid pre-implantation commercial surrogacy contract establishes parentage by operation of law.[197] Although there may be court proceedings to finalize this conclusion of legal parentage, the judges are required to enforce the surrogacy agreement as to parentage regardless of any information about the best interests of the child, the suitability of the intending parents or the desire of the surrogate mother to maintain custody or visitation----indeed, such information would be irrelevant to any proceedings.[198] Thus, presented with evidence of a pre-implantation gestational surrogacy agreement, and the meeting of the requirements of independent legal representation, the court has no choice but to award parentage at birth solely to the intending parents as directed in the contract.[199] There are no procedural mechanisms for receiving any information about the suitability of intending parents, nor for any best interests determinations, as both are considered contrary to the goal of facilitating parentage as established in the contract. There are no limitations on the amount or timing of payments; the escrowing of funds facilitates that the payments be made according to the contract.[200] Thus, while courts may be involved, parentage is established in the contract, and the role and duty of the courts is to implement the contract and create parentage contrary to the general rule, still existing in state law, that the woman who gives birth is the mother of the child.[201]

Under these regimes, a genetically-unrelated woman who gives birth is still the mother of the child at birth, in the absence of a pre-implantation gestational surrogacy agreement.[202] Hence, signing the contract represents a relinquishment of parentage and parental responsibility that would otherwise exist; without the contract the genetically-unrelated woman who gives birth is by operation of law a mother with parentage. Further, there is typically contractual language in which the surrogate mother promises to relinquish parentage or custody, and acknowledges that contractually the child belongs solely to the intending parents.[203] In this kind of legal regime, the contract itself clearly constitutes a sale of parental rights for consideration, and hence the sale of a child under the OPSC.[204]

Johnson v. Calbert (1993), the California Supreme Court decision that established this contractual intention method of commercial surrogacy, is further evidence of the central role of the contract in determining parentage.[205] The case concerned a contractual commercial surrogacy in which the surrogate mother sought parentage. The Court held that the intending mother, who was genetically-related to the child, was the sole mother of the child under California law.[206] California law

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[195] Ibid.

[196] See, e.g., UPA, Art 802; RCW 26.26A.705; https://southwestsurro.com/blog/why-intended-parents-need-psych-eval.; https://fertilitycounselingcenter.com/intended-parents-consultation/.

[197] See, e.g., UPA, art 809(9); RCW 26.26A.740

[198] See, e.g., SR Report, para 31; Cook v. Harding, 190 F. Supp. 3d 921 (C.D. Cal. 2016); California Family Code [n]; UPA at art. 8; ABA Report, at 15-18 (objecting to best interests of the child determinations or suitability review for intending parents); New Hampshire Statutes [n. 186]; Washington State Code [n.].

[199] See ibid. (sources cited in prior citation).

[200] See ibid.

[201] See ibid.

[202] See, e.g., UPA section 201(1); Cal. Family Code section 7610(a).

[203] See supra fns 183-187 and accompanying text.

[204] See 2018 SR, para. 33; 47-49; Verona Principles 14.7, 14.9; Smolin, Pepperdine, at 325-36.

[205] 19 California Reporter. 2d 494, 851 P.2d 776 (1993); see also Smolin, Pepperdine, at 325-36.

[206] Johnson [n. 202], at 778-82; Smolin, Pepperdine, at 325-36.

had a presumption that the woman who gives birth is the mother, and the presumption remained applicable regardless of genetic relationship. However, the Court held that in a conflict between the woman who had given birth and another woman who demonstrated through medical tests a genetic relationship, parentage would be determined according to the surrogacy contract—even if the surrogate mother prior to birth changed her mind and sought parentage.[207] The Court relied on the surrogate mother "voluntarily contracting away any rights to the child" to reject the dissent's argument that the best interests of the child standard should be used to adjudicate the conflict.[208] Further, the Court relied on contractual provisions in which Johnson "agreed she would relinquish 'all parental rights' to the child in favor of" the intending parents.[209] Hence, the language of the very case establishing this model of commercial surrogacy, explicitly acknowledged that the surrogate mother contracted away parentage---a legal transfer. The only "intention" that mattered was the intention expressed in the surrogacy contract.[210]

Johnson v. Calvert was decided in 1993 as an early stage of the development of this contractual intention approach to commercial surrogacy.[211] The articulation of the surrogacy contract as a tie-breaker in a conflict between a genetic mother and a gestational mother (or woman who gave birth) did not last. As this contractual approach has been codified into law in various states and under model laws, any requirement that intending parent(s) have any genetic relationship to the child has been intentionally eliminated. Hence, under these contractual surrogacy legal regimes, the surrogacy contract alone, even in the absence of any genetic relationship between an intending parent and the child, determines parentage.[212]

3. Contract-Based Commercial Surrogacy is a Minority Rule with Global Significance

The significance of these contractual intention systems go far beyond the United States for three reasons. First, the United States has long been a major global commercial surrogacy destination whose intermediaries market themselves to prospective intending parents in multiple countries, including prohibitionist countries.[213] In practice, then, prohibitionist countries—and sometimes international or regional courts—are required to surrogacy arrangements conducted under these regimes.[214] It is interesting, for example, that the European Court of Human Rights in *Mennesson v. France* appeared to accept on face value the representation of the French intending parents that "in accordance with Californian law, the 'surrogate mother' was not remunerated but merely received

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[207] Johnson [n. 202}, at 778-82; Smolin, Pepperdine, at 325-36.
[208] Johnson [n. 202], at 782 n. 10; Smolin, Pepperdine, at 332.
[209] Johnson [n.], at 778; Smolin, Pepperdine, at 332.
[210] Johnson [n.], at 778-82; Smolin, Pepperdine, at 325-36.
[211] Johnson [n].
[212] See, e.g, ., California Family Code Sections 7960-62; ; Uniform Parentage Act, Art 8 (2017); 2021 New Hampshire Revised Statutes [n. 186]; Washington State Statutes [n. 186]; ABA [fn], at 17 (rejecting any requirement of a genetic link between intended parents and the child).
[213] See, e.g., The Fertility Center, 'Why the United States is the Best Place for Surrogacy,' (2016), https://fertilitycenterlv.com/blog/why-the-united-states-is-the-best-place-for-surrogacy/ ("preferred surrogacy destination for international parents" including intending parents from 35 countries); https://www.circlesurrogacy.com/parents (advertises having worked with families in 70 countries including the UK, Norway, Switzerland, and Australia); https://www.familysourceconsultants.com/intended-parents/international-program/ (advertising to prospective intended parents the availability of staff fluent in Spanish, Chinese, Japanese, French & German, with interpreters used for other languages).
[214] See, e.g., Mennesson v. France [n.]; Labassee v. France [n.].

expenses."[215] This summary of California law and practice is misleading and inaccurate and perhaps resulted in a lack of judicial concern related to the sale of children and other children's rights concerns---a lack of consideration which perhaps undermines the precedential value of the *Mennesson* decision for future evaluations of surrogacies from the United States.[216]

Second, intermediaries in the United States lobby the United States government---apparently with some success—to further their interests, as the United States is involved in international organizations considering surrogacy.[217] Thus, the United States as a nation has been seeking to legitimate internationally and globally its contract-based approach to commercial surrogacy, including the treatment of international surrogacy arrangements.[218] Those efforts need to be evaluated based on a full knowledge of the nature of these commercial surrogacy regimes.

Third, other nations, like Ukraine, and previously India, have followed a similar model insofar as surrogate mothers lacking any claim to parentage or parental responsibility at birth.[219] While the role of the written contract may be less explicitly defined in positive law outside of the United States, in effect it is the surrogacy arrangement and accompanying agreements and expectations, that overcome the presumption that a woman who gives birth is the mother.[220] Hence, some of the most significant global commercial surrogacy destinations at various points of the price-differentiated global surrogacy market, have embraced explicitly or implicitly a form of contractual-based commercial surrogacy.

C. Avoidance Argument 3: Payment is for services but not for transfer of the child.

Johnson v. Calvert, as noted in Section V(B)(2) above, relied on the commercial surrogacy contract to determine competing claims for parentage between the intending mother and the surrogate mother.[221] In order to escape the conclusion that this made the contract an illicit sale of a child, the Court held that the payment was for the gestational services of pregnancy and childbirth, and not for transfer of the child.[222] However, there was no factual or legal basis for the Court's denial that payment was not consideration for both gestational services and transfer of the child, and much evidence even in the Court's opinion to the contrary.[223] Surely the OPSC cannot be escaped by a court employing a legal fiction that payment is not for transfer, when intuitively and even literally the payment is for both gestational services and transfer of the child. Otherwise, domestic law and courts would be permitted to become a vehicle for legitimizing and enforcing contracts for the sale of children.

Indeed, in Johnson v. Calvert there was nothing to separate payment for services from payment for transfer. The transfer of the child was not a separate gratuitous act of the surrogate mother but a contractual obligation enforced by the court. If there was no payment or consideration for transfer, but the entire payment was merely for gestational services, it is difficult to see why the part of the contract governing transfer would be binding, as the court found it to be. The Court, after all, relied on the surrogate mother "contracting away any rights to the child:"[224] this could not be binding unless the intending parents' promises to pay and payments were in part consideration in exchange for the

[215] Mennesson v. France, ibid, at page 2, para. 8.
[216] See generally Lupu, Yonatan and Voeten, Erik, 'The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations,' (2010). 2010. Paper 12. http://opensiuc.lib.siu.edu/pnconfs_2010/12.
[217] See ABA [n.]; US Government Statement [n. 167]; Section V(A) supra.
[218] See One Hundred Thousand [n.].
[219] See sources cited fns 175 & 176.
[220] Ibid.
[221] Johnson [n.]; Section V(B)(2).
[222] Johnson [n.], at 782; Smolin, Pepperdine, at 332.
[223] Section V(B)(2).
[224] Johnson [n. 202], at 782 n. 10; Smolin, Pepperdine, at 332.

surrogate mother's contractual promise to "relinquish 'all parental rights' to the child in favor of" the intending parents.[225]

Consider the implications if this kind of arbitrary severance of payment from transfer was allowed to govern in other family formation issues, like adoption. A birth parent could sell parental rights to the highest bidder and claim this was not the sale of a child, under the legal fiction that the payments to the birth parents were compensation for gestational services, for child care prior to placement, and in compensation for the emotional grief of relinquishing the child. A kidnapper who sold a child to another trafficker could claim that the payment was in compensation for "child care services" and not for transfer of the child. Creative judges and attorneys can always arbitrarily deny that payment was "for" transfer, but rather was entirely for something else, even as they seek to enforce the contractual obligation to transfer. This allowance of legal fictions completely contrary to the realities of the situation is a prescription for destroying the legal protections intended by the prohibition of sale of a child.

D. Avoidance Argument 4: You cannot sell a child who doesn't exist yet

Some argue that a pre-implantation contract cannot be the sale of a child because either the child, or a pregnancy, do not exist yet. The theory is that you cannot sell what does not yet exist, and thus the timing of contracting is decisive.[226]

Of course such is not the case as to the sale of property. Pre-production sale of goods is done as a matter of course as to goods that are special ordered or individualized. Sales contracts as to pro-production sale of goods are normally as binding as other contracts. It is indeed commonplace to sell goods that do not yet exist, and to create binding contracts as to such.[227]

The legal theory that you cannot sell a child who doesn't exist yet, as an interpretation of the OPSC and norm against the sale of children, would be devastating. Under such a rule, "babies could legally be sold for adoption so long as the contract or relinquishment was signed before the pregnancy, leading to the legalization of baby-farming schemes."[228] Indeed, under such a rule pregnant women could sell their children to be born, under the theory that a child does not exist until birth. Intermediaries could be paid for babies before they were conceived, and then recruit and pay women for getting pregnant for the purpose of relinquishing the child for adoption. In fact baby-farming and baby factories for adoption have some features in common with some commercial surrogacy arrangements.[229]

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[225] Johnson [n.], at 778; Smolin, Pepperdine, at 332. For a more realistic assessment that payment was for transfer of the child, despite contractual provisions seeking to avoid this result, see In re Baby M., 109 N.J. 396, 423-25, 537 A.2d 1227, 1240, 1241-42 (N.J. 1988).

[226] See SR, para 52-53; K Ekman, 'Being and Being Bought' (2014); Smolin, Pepperdine [n.], at 316-18.

[227] See, e.g., UN Convention on Contracts for the International Sale of Goods art 31(b) (1980) [CISG]("contract relates to … goods …to be manufactured or produced").

[228] SR Report, para 53.

[229] See 'There were a lot of baby farms': Sri Lanka to act over adoption racket claims, https://www.theguardian.com/global-development/2017/sep/20/baby-farms-sri-lanka-admits-adoption-racket-claims; P Obaji Jr., 'Survivors of Nigeria's 'baby factories' share their stories' (2020), *Aljazeera,* https://www.aljazeera.com/features/2020/5/3/survivors-of-nigerias-baby-factories-share-their-stories; 'Nigeria 'baby factory' raided in Lagos' (2018), *BBC News,* https://www.bbc.com/news/world-africa-43905606. ; 'Surrogacy at the crossroads: The lure of commercial baby farming' (2020) https://nordicmodelnow.org/2020/08/24/surrogacy-at-the-crossroads-the-lure-of-commercial-baby-farming/

Indeed, the foundational Baby M. case on traditional surrogacy held that the creation of the contract prior to conception indicated a contract for the sale of a child. The court viewed such contracts as improperly creating the "coercion of contract" coupled with "the inducement of money."[230] As to the timing of a commercial surrogacy contract, the results are not different for a gestational surrogacy, which also creates both the "coercion of contract" and the "inducement of money."

Hence, the timing of the contract does not ultimately impact whether or not commercial surrogacy constitutes the illicit sale of a child. Contracts entered into before or after pregnancy, and of course after birth, may all constitute the illicit sale of a child. A binding promise to relinquish a child to be born in the future, or to be conceived in the future, or a pregnancy to be established in the future through embryo transfer, may constitute the illicit sale of a child under the OPSC.

The argument that you cannot sell a child who does not yet exist again illustrates the link between protecting the child's right not to be purchased or sold, and other rights of the child. As Claire Achmad notes:

"Certain rights of the child under the UN Convention on the Rights of the Child may be negatively impacted once they are born through ICS by actions and decisions taken prior to their conception and birth."[231] Achmad usefully indicates that the rights of potential future children may and indeed should be protected during pre-conception and prenatal periods of time, regardless of viewpoints about prenatal life, and that this can be accomplished without extending rights protections to prenatal life.[232] The best interests of the child, right to identity, right to health, and protections against discrimination, exploitation and abuse are best protected by regulations that address all stages of surrogacy arrangements, including those that occur prior to birth and prior to conception or pregnancy.[233] The same is true as to child's right not to be sold. Hence, the argument that a future child cannot be sold undermines many rights of the child at issue in surrogacy arrangements.

E. Avoidance Argument 5: Markets in parental rights do not constitute the illicit sale of a child

As mentioned above, academics in the United States have over decades argued for the overt legalization of markets to govern both adoption and surrogacy.[234] This literature envisions that birth parents could legally place children with the highest bidder for adoption, while also approving commercial surrogacy arrangements.[235] Some within this academic tradition have argued that selling parental rights does not constitute the legal wrong of selling a child. Hence, under this view it is legitimate to create markets in parental rights because such are not markets in children. [236]

The distinction between sale of parental rights and sale of the child is absurd because of cause physical transfer of the child is included in the sale of parental rights. The purchaser of parental rights

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[230] In re Baby M., 537 A.2d 1227, 1240 (N.J. 1988).
[231] Achmad [n.], at 131.
[232] Ibid at 131 – 169.
[233] See UNCRC at art. 2, 3, 7, 8, 9, 19, 24.
[234] See supra fns 109-112 and accompanying text.
[235] Ibid.
[236] See E Landes & R Posner, 'The Economics of the Baby Shortage,' (1978) 7 *Journal of Legal Studies,* 323-348); D Boudreaux, 'A Modest Proposal to Deregulate Infant Adoptions,' (1995) 15:1 Cato Journal, 1; Richard Posner, Richard A. Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood," 5 Journal of Contemporary Health Law and Policy 21, 30 (1989), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2809&context=journal_articles ("The surrogate mother no more "owns" the baby than the father does. What she sells is not the baby but her parental rights.")

would also receive parental responsibility and physical custody and control of the child.[237] The distinction is also absurd because since the abolition of slavery there is no way to literally sell a child under the law. The concept, literally stated, seems to be that so long as one does not literally re-construct property rights in human beings, any kind of market in children is legitimate.[238] Certainly, accepting such a distinction would destroy the OPSC, rendering its prohibitions meaningless.

Hypothetically, even literally slavery could be defended with this kind of logic under the absurd proposition that human beings are not being sold, but only ownership interests in human beings. Even a trafficker who sold a child could argue that they were not selling a child, but only an opportunity to take care of a child.

The fact that such an influential school of legal thought would over decades make and sustain proposals for overt markets in parental rights for family formation, based in part on the purported distinction between sale of children and sale of parental rights, shows the perilous and vulnerable status of legal prohibitions of the sale of children. We are much closer than most realize to the effective repudiation of the norm against the sale of children.

F. Avoidance Argument 6: Intending parents cannot buy what is already theirs

Another common rationalization for why commercial surrogacy is not the sale of children is the argument that intending parents cannot buy what is already theirs.[239] This claim is related to the claims about the purported absence of a transfer, which have already been analyzed in depth.[240] This additional aspect of the argument, however, is also transparently inaccurate.

As a matter of property law a co-owner of property may indeed purchase what is already theirs. A co-owner of property may buy out their co-owner in order to become an exclusive owner. In addition, one can buy out another's interest in a possible but uncertain property interest---as in contracts not to contest wills.[241]

We begin examination of this claim with property law because, unfortunately, some of the rhetoric and logic of this claim tends to invoke a significant level of commodification of the child. Consider the confusion of categories in this passage from Steven Snyder, a prominent surrogacy attorney and advocate for commercial surrogacy:

"…it has become axiomatic that embryos are neither persons nor property, but they occupy an intermediate category deserving of special respect. That being said, the persons who create embryos for transfer and gestation have a proprietary interest in those embryos from the time of their formation that includes ownership, control, and decision-making authority over the use and/or disposition of the embryos. Thus, from the US perspective, intended parents who create embryos for gestation by a surrogate are actually delivering their own child into the temporary care of the surrogate for gestation and safekeeping…."[242]

[237] See ibid.
[238] Posner, Surrogate Motherhood; supra fn 236 ("The surrogate mother no more "owns" the baby than the father does. What she sells is not the baby but her parental rights.")
[239] See Snyder [n. 160], at 278-79.2018 SR Report, at para 58-59; Smolin, Pepperdine, at 322 – 325.
[240] See Section V(B).
[241] See, e.g., Gerry W. Beyer, Wills, Trusts and Estates section 10.8.14 (5th ed. 2012).
[242] Snyder [n. 160], at 278.

This incoherence reveals the commodification involved in legal claims that the child inherently belongs to the intending parents. According to Snyder, embryos are not property: yet intending parents have proprietary interests and ownership of the embryos.[243] According to Snyder, embryos are not persons: yet in embryo transfer intending parents are "delivering their own child into the temporary care of the surrogate for gestation and safekeeping."[244] The embryo in the womb of the surrogate is rhetorically transferred into a child owned and controlled by the intending parents.

Further, the "proprietary interest" in this kind of rhetoric is not dependent on a genetic connection between the intending parents and the embryo or newborn infant, but is due to being those who "create embryos."[245] The intending parents have the same "proprietary interest" in the embryos regardless of whether they purchased gametes or used their own. Commercial surrogacy regimes in the United States by law provide parentage and parental responsibility at birth to intending parents regardless of genetic connection.[246] Under these legal regimes, parentage and parental responsibility are attained by a combination of contractual intention and payment.[247]

Some legal regimes for commercial surrogacy, such as Ukraine, do require a genetic connection with at least one intending parent.[248] Even then, however, genetics is not solely determinative of parentage. Indeed, genetics typically is only one factor in assigning parentage, in situations not involving ART or surrogacy, and also as to ART and surrogacy.[249] Birth still establishes parentage apart from surrogacy, and in most jurisdictions surrogate mothers also initially have parentage.[250] We are not aware of any jurisdictions in the world where women giving birth are typically required to submit to genetic testing in order to establish parentage, in the absence of a surrogacy arrangement. For men, parentage is commonly established by marriage to the woman who gives birth, again without a requirement of a genetic test, or for unmarried different sex couples by, for example, the mother naming the father on birth documents.[251] Gamete donors under ART legal regimes commonly are not ascribed parentage.[252] Hence, in law genetics does not automatically create parentage, and certainly does not automatically exclude others, such as gestational parents, who may have parentage claims.

Thus, even if one accepted that, in surrogacy, genetically related intending parents should have parentage, that would not provide *exclusive* parentage. Exclusive parentage and parental responsibility is clearly what intending parent(s) are purchasing from the surrogate mother, with great emphasis placed on efforts to limit and sever the surrogate mother's relationship to the child. This is why surrogacy contracts, as noted above, so commonly require the surrogate to relinquish any claims to parentage and parental responsibility, and also require the surrogate mother to physically transfer the child.[253] This purchase of *exclusive* parentage and parental responsibility remains the illicit sale of a child

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[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] See supra fn 212 and accompanying text.
[247] See Section V(B).
[248] See sources cited in fn 175.
[249] See, e.g., HCCH, Private International Law Issues Surrounding the Status of Children, including issues arising from international surrogacy arrangements, (2011), https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf; HCCH 2014 [n.]; Uniform Parentage Act (2017).
[250] See HCCH 2014 [n.], at 13.
[251] See generally HCCH 2011 [n.]; HCCH 2014 [n.]; UPA [n.].
[252] Ibid (all sources cited in prior fn].
[253] See supra fns and accompanying text.

under the OPSC, even if genetically-related intending parents have or should have non-exclusive parentage.[254]

As a point of comparison: parental responsibility is normally shared by both parents, and in divorce or other contexts where child care arrangements may be legally contested conflicts can occur not only between parents, but also sometimes may involve claims for visitation or access by other persons such as grandparents or other *de jure* or *de facto* family members.[255] Buying out another person's parentage, custodial, or visitation rights to a child is impermissible in the law, and if such is done, the law will not acknowledge or enforce such. Courts do not enforce contracts for financial consideration in which individuals agree not to litigate parentage or parental responsibility. When a court reviews a separation agreement or pre-marital agreement at the time of divorce, terms governing parental responsibility, custodial arrangements, and visitation are not binding on the court, even when provisions on financial issues like alimony or property division are governed by contract. The courts generally retain an authority to review custodial arrangements under the best interests of the child standard.[256] Hence, when intending parents pay surrogates, they are still buying out the surrogate mother's de facto and de jure custodial rights and interests in the child in an impermissible way.

We would add that we are sympathetic to genetic connection being a significant factor in establishing parentage and parental responsibility for intending parents. A part of that sympathy arises from a recognition that genetic connection is important to the rights of the child to access origins and to identity.[257] Similarly, states that follow the common viewpoint that surrogate mothers at birth have parentage, should not automatically view the surrogate mother as the *only* parent.[258]

Indeed, experience indicates that in the overwhelming majority of cases surrogate mothers carry through with the arrangement and participate in whatever proceedings are necessary to transfer exclusive parentage and parental responsibility to the intending parents. Indeed, intending parents change their mind and reject the child far more often than surrogate mothers seek permanent parentage and parental responsibility.[259] Our concern here, then, is not in stopping surrogacy, but stopping surrogacy as the sale of children, as well as protecting other rights of the child at risk in surrogacy arrangements. In order to do so, it is necessary to prevent the commodification of the child and loss of the rights of the child that arises from viewing the child at birth as automatically belonging exclusively to the intending parents.

VI. Intermediaries and the Sale of Children

The Verona Principles helpfully define intermediaries as follows:

"A person, organisation or network facilitating the initiation, continuation and/or finalisation of a surrogacy arrangement. Those providing only medical, psychosocial or legal services related to a surrogacy arrangement do not meet this definition."[260]

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[254] See SR 2018 Report at para 58-59.

[255] See UNCRC art 18; K. Sandberg, 'Grandparents' and grandchildren's right to contact under the European Convention on Human Rights' (2021), https://www.elevenjournals.com/tijdschrift/fenr/2021/09/FENR-D-20-00004. K. Sandberg*https://curia.europa.eu/juris/document/document.jsf?text=&docid=201034&doclang=EN

[256] See UNCRC, art 3; John Gregory, P Swisher & R Wilson, Understanding Family Law (4th ed. 2013.

[257] See UNCRC, art 7, 8, 9; Verona Principles [n.], 11.1; Achmad [n.], at 203-04 (identity includes genetic identity);

[258] See Verona (n), principle 10.

[259] T Lewin, 'Coming to U.S. for Baby, and Womb to Carry It,' (2014) *New York Times,* https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html.

[260] Verona Principles, p. 7.

Thus, some medical providers and attorneys are intermediaries, and some are not, depending on whether their role goes beyond the provision of professional services to a broader role in facilitating the surrogacy arrangement. In practice, it appears that most intermediaries operating in the United States are surrogacy agencies, whereas in India medical providers, including fertility clinics, usually serve as intermediaries.[261] Attorneys in some locations do also sometimes serve as intermediaries.[262]

Identifying intermediaries based on their primary locations or home countries may be misleading, because intermediaries operating in global commercial surrogacy centers advertise and offer their services to intending parent from multiple countries, including many prohibitionist countries. Intending parents are the paying clients for intermediaries, and in that sense many intermediaries operate globally regardless of the physical location of the intermediary.[263] Some intermediaries also operate globally in the sense of recruiting and working with surrogate mothers in multiple countries.[264]

The 2018 report discussed the role of intermediaries in the sale of children. As to direct liability for sale of children, the report noted:

"Intermediaries who physically or legally transfer the child to intending parents in exchange for "remuneration or any other consideration" are directly liable for the sale of the child. Some intermediaries exercise extraordinary physical or legal control over the surrogate mother, and exercise direct control over the surrogate-born child. In such instances, the intermediary may be primarily responsible for the transfer of the child, and thus may be directly liable in appropriate cases for the sale of the child."[265]

The concept of direct liability addresses those situations where the intermediaries rather than the surrogate mother are the primary actors in effect selling the child, because in realistic terms it is the intermediaries who are transferring the child. We will discuss this concept further in this section.

The 2018 Report also discussed the issue of intermediaries being complicit in the sale of children. In general, complicity involves situation where one individual is liable for the actions of another. Thus, an intermediary could be secondarily complicit in wrongs directly carried out by others, including here the surrogate mother and intending parents.

The 2018 Report stated:

Intermediaries are often responsible for creating and participating in surrogacy markets, and often receive the largest profits. Where the interactions between the intending parent(s) and the surrogate mother constitute sale of children, intermediaries would normally be complicit, and hence legally responsible, given their intermediary role in establishing and mediating the relationship between the intending parent(s) and the surrogate mother. Prosecutions for sale of children in the context of surrogacy should focus primarily on intermediaries, and, absent exceptional circumstances, they should not include surrogate

[261] HCCH 2014 [n.], at page 63 para 143.
[262] Ibid at 63-64.
[263] See supra fns and accompanying text.
[264] See, e.g., https://globalsurrogacy.baby/ (advertising surrogacy programs in Colombia, Georgia, Greece, Mexico, Russia, and Ukraine).
[265] 2018 SR Report, Para 63.

mothers, who may often be regarded as exploited victims.[266]

The Verona Principles has similar provisions on intermediaries and sale:

"Activities of intermediaries can constitute or lead to the sale of the child:

a. due to the intermediaries' creation and control of commercial surrogacy markets and networks;

b. if the intermediaries exercise such control over the surrogate mother and/or child as to be responsible for transferring the child for remuneration or any other consideration.

c. intermediaries and other professionals involved in surrogacy arrangements receive remuneration for services rendered which are excessive, according to the standards of comparable work in the same profession where the work is performed.[267]

This focus on intermediaries is consistent with the explicit emphasis of the OPSC on the criminal responsibility of intermediaries for sale of children for adoption.[268] Sale of children for purposes of surrogacy is also prohibited by the OPSC, although here states have a choice between criminal and civil prohibitions.[269]

A realistic appraisal of domestic or international commercial surrogacies in many developing nations indicates that often intermediaries are the sellers of children, while intending parents are the purchasers. Intermediaries contract with intending parents to create and then direct the transfer of a child. Intermediaries recruit and control surrogate mothers in order to be able to fulfill their contracts with intending parents. Any relationship or contact between intending parents and surrogate mothers is facilitated by and under the control of the intending parents. The intermediaries are in essence the hub of the arrangement, having separate relationships with intending parents as their clients and surrogate mothers as necessary to production.[270]

The roles of intermediaries, intending parents, surrogate mothers, and surrogate-born children can be compared to those involved in producing a specialty commissioned product, such as pharmaceuticals or processed foods, that require an intricate chemical engineering or food production process. The intermediaries are like the producers and sellers of a specialty commissioned product. The intending or "commissioning" parents are like those who commission the creation of specialty goods produced to the specifications of the buyer. The intending parents provide specifications (health, gender, race, number) and may also provide specified inputs (gametes and/or embryos), with some of the embryos having been purchased by the intending parents from other sources. Surrogate mothers are like the equipment that mixes, blends, agitates, emulsifies, heats, cools, etc., or like the ovens that cooks the foods. The children are created as specially commissioned products according to specifications and inputs indicated or provided by the intending parents---and may be rejected during production (embryo selection or abortion) and after (abandonment) if they fail to meet product specifications.

This analogy of course is demeaning to surrogate mothers and surrogate-born children, but nonetheless clarifies the demeaning and dehumanizing commodification commonly occurring in

[266] Ibid at Para 62.
[267] Verona Principles 14.11.
[268] OPSC Art 3(1)(a)(ii).
[269] See section ; OPSC Art 2.
[270] See infra fns and accompanying text.

commercial surrogacies. Ironically, some pro-commercial surrogacy rhetoric embraces rhetoric that comes close to affirming this demeaning analogy, proudly declaring on behalf of surrogate mothers: "I'm just the oven, it's totally their bun."[271]

While the sections below focus on when intermediaries are directly liable as the primary sellers of children, it is important to stress that, normally, at a minimum, intermediaries would be complicit, or secondarily liable, for the sale of children where such has occurred. Intermediaries are the facilitators of surrogacies that typically bring the parties together; if those parties are engaged in the sale of children, intermediaries are legally responsible for facilitating that sale. Intermediaries typically help create the networks and markets in which the sale of children occurs. Even if intermediaries are only complicit in a sale, rather than directly liable, from an ethical and law enforcement perspective enforcement actions should focus primarily on intermediaries.

There are multiple indications of intermediaries exercising extraordinary control over surrogate mothers that fit this model of intermediaries directly selling the child to the intending parents. While these indications are often interdependent, intermediaries may be direct sellers of children even if some of these indications are not present. These indications include:

A. First indication of intermediaries as sellers: Intermediaries structuring and controlling the terms of the arrangement

Surrogacy arrangements are typically conceptualized as including a negotiated agreement, and hence an explicit or implicit contract, between the intending parents and the surrogate mother, who are viewed as the primary parties. Yet, in some contexts this is more of a legal fiction than a reality. For example, consider the following description of surrogacy contracting in India, based on research into surrogacy arrangements in five locations (Delhi, Mumbai and three locations in Gujarat) by the Centre for Social Research,[272] in a context where medical clinics and health care providers serve as the intermediaries:

"The majority (88%) of the surrogate mothers stated that surrogacy agreement between all the involved parties takes place in the form of a written contract …. the clinics normally prefer to prepare and sign the agreement when the pregnancy is confirmed by the end of the first trimester till the middle of the 4th month of pregnancy. Further, they (the clinics and the doctor) prepare the document and inform/request the commissioning parents to come to India to sign the document. …."

"However, there are many questions which remained unanswered relating to what if the pregnancy is not continued beyond two months? What if the pregnancy has to be aborted due to the abnormality in the foetus around the end of first trimester when the contract is still not signed by both the parties? When the doctors and respective people in the clinics were asked these questions they responded non-verbally with uncomfortable gestures. The delay in signing the contract puts the surrogate mother at the mercy of the clinic, doctor and the commissioning parents. …"

[271] E Gellman, 'I'm just the oven, it's totally their bun,' (2010) 32 *Women's Rights Law Review* 159-192 (2010), https://getyarn.io/yarn-clip/eeb26b00-602e-4c7f-a99f-67a734e03dd6; https://totallytheirbun.blogspot.com/2011/10/.

[272] The research was published in two studies, both titled Surrogate Motherhood-Ethical or Commercial (Centre for Social Research), one focused on three locations in Gujarat, the other on Delhi and Mumbai, with both available here: https://www.csrindia.org/csr-research-studies/. Cited hereinafter as CSR (Gujarat) or CSR (Delhi).

"Often, the surrogate mother is unable to read or write, hence, she and her husband are told about the contract by the hospital/clinic authorities in suitable language and terms, which the surrogate mother cannot verify by any means. She has to sign the agreement as she is already 4 months pregnant and being poor has great financial expectations exaggerated by the hospital/clinic authorities/doctors. … The research findings revealed that the majority of the surrogate mothers have not received any copy of the contract. …[273]"

Realistically, the concept of a proper negotiation and contracting between the surrogate mother and intending parents here is a fantasy and a fiction. The written contract is not signed by the surrogate until after she is pregnant and often already in the second trimester; she is never provided with the contract and does not have a copy of it; terms are explained to her rather than negotiated by her. Clearly, by the time the surrogate mother signs her contract the intermediaries already have entered into an agreement with the intended parents. The surrogate mother's arrangements with the intermediary are concluded for the purpose of fulfilling a pre-existing contract between the intermediary and the intending parents. It is more realistic to perceive the intermediaries as recruiting and then largely controlling the surrogate mother and her husband throughout the surrogacy process, with the written contract an additional tool of control rather than a genuinely negotiated contract.[274]

Professor Amrita Pande's description of contracting between medical clinics and surrogates in India describes the process and the understanding of surrogate mothers in this way:

"The surrogacy contract, which lays out the rights of the surrogates, is in English, a language almost none of the surrogates can read. Some essential points of the contract, however, are translated for them. In the words of surrogate Gauri, "The only thing they told me was that this thing is not immoral, I will not have to sleep with anyone, and that the seed will be transferred into me with an injection. They also said that I have to keep the child inside me, rest for the whole time, have medicines on time, and give up the child." Salma, a surrogate for a couple from Los Angeles, adds, "We were told that if anything happens to the child, it's not our responsibility but if anything happens to me, we can't hold anyone responsible. I think the legal contract says that we will have to give up the child immediately after the delivery—we won't even look at it. Black or white, normal or deformed, we have to give it away."[275]

It is telling that among the few points explained to the surrogate mother is "if anything happens to me, we can't hold anyone responsible" and her obligation to "give up the child"[276]---a transfer. Pande also indicates that the amount to be paid to the surrogate mother commonly is not even specified in advance, but is a range of possibilities left to the discretion of the intermediary and/or intending parents.[277] In this way, the surrogate mother can be further controlled through the expectation of a payment whose exact amount depend on ultimately pleasing the intermediaries and/or intending parents.

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[273] Ibid, pp 40-41 (Gujarat report); almost identical findings applied to Delhi and Mumbai. See Ibid at pages 59-60 (Delhi & Mumbai report).

[274] See A Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010), 35:4 *Signs,* pp. 969, 976-77 (describing use of contracts as a means of disciplining or controlling surrogate mothers).

[275] Ibid.

[276] Ibid at 977.

[277] Ibid at 979, 986-87.

B. Second Indication of Intermediaries as Sellers: Intermediaries exercising extraordinary control over the surrogate mother's location, movement, family life, health care, daily schedule, and travel during pregnancy

Most surrogate mothers already have children, as the capacity to successfully gestate and birth a child is basic to the role. Surrogate mothers commonly are, apart from the surrogacy arrangement, mothers, spouses, and parts of nuclear and extended families.[278] Yet, some intermediaries create the expectation that surrogate mothers will live apart from their families, and thus arrange or provide housing apart from the surrogate's family. Some intermediaries further limit visitations between the surrogate mother and her husband and children.[279] Further, some intermediaries create an expectation or obligation that surrogate mothers will not have intimate sexual relations with their partners anytime during the pregnancy, and not merely during the period of trying to become pregnant.[280]

Some intermediaries move the surrogate mothers across national borders at various stages of the surrogacy arrangement, sometimes in order to evade legal restrictions on commercial surrogacy. The point is not just that surrogate mothers move across borders, but rather that they are essentially moved by others across borders.[281]

Some intermediaries control virtually every aspect and moment of the surrogate mother's life: where she lives and her physical movements from day to day, whether and where she travels, whether, when, and how often she is permitted to visit with her husband and children; her sexual relationships, her diet, her general health care, when she wakes up and when she goes to sleep.[282] In the context of this extreme control the surrogate mother's private and family life is deeply limited.

Consider this description of the day to day to life of surrogate mothers at one of a large networks of commercial surrogacy clinics:

"[Manisha---a surrogate mother] would wait out her pregnancy with about 80 other surrogates in the clinic's dormitories on the outskirts of Anand - a requirement, Dr. Patel says, that ensures their surroundings are secure and sanitary."

"Surrogate mothers remain in Akanksha Infertility Clinic dormitories in Anand, India for almost all of their pregnancies and are monitored daily."

"For the mothers-to-be, life was pleasant if monotonous. Nurses kept close tabs on the women, who lived four to six to a room. At sunrise, they awoke on narrow beds and ate breakfast. With the afternoon came lunch, milk and snacks. Sleep followed dinner. Usually there were vitamins or injections to take. As they awaited their due dates, the surrogates bonded over television and gossip, or took classes in trades like hair-cutting and nail-painting."

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[278] CSR (Gujarat)[n.], at 30 – 33; 'How to become a surrogate mother and help others,' https://www.circlesurrogacy.com/surrogates (requiring prospective surrogate mothers to those with prior "uncomplicated pregnancies and deliveries" and describing surrogate mothers as having "children of their own").

[279] Pande (2010) [n.], at 981-85.

[280] A Pande, 'It may be her eggs but it's my blood: Surrogates and everyday forms of kinship in India,' (2009) 32 *Qual Sociology* 379, 385.

[281] See SR 2018 Report, para 29; I Johnson & C Li, 'China Experiences a Booming Underground Market in Surrogate Motherhood' (2014), *The New York Times,* https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html.

[282] Pande 2010 [n.], at 981-85; S Lee, 'Outsourcing a Life,' *San Francisco Chronicle,* https://www.sfchronicle.com/local/bayarea/item/india-surrogacy-chapter-one-23858.php [hereinafter Lee, Outsourcing].

"The women could leave to visit home only once or twice. So Raman traveled to see Manisha every few weekends. Sometimes he brought their children along, occasionally leaving them in her care when he had to work."

During their final trimesters, the women move from their dorms into the main clinic in the center of town. The nondescript, three-story concrete structure hardly looks like a medical tourism hot spot. But since Dr. Patel began her surrogacy service in 2004, about 500 women have given birth to more than 600 babies…."[283]

It is ironic that surrogacy, done in theory to effectuate a right to family life of the intending parents, is conducted in ways that so deeply interfere with the family life of the surrogate mother. In the name of the freedom and equality of the intending parents, the most basic liberties of the surrogate mother are controlled in a way that subordinates the very person, life, and health of the surrogate mother for the benefit of the intermediaries and intending parents. From a child rights point of view, it should also be noted that prolonged absence of the surrogate mother over perhaps as much as a year (the period trying to achieve pregnancy and then all the way through pregnancy) would be developmentally and emotionally devastating to the children she left behind at home.

Professor Pande's study of commercial surrogacy in Anand confirms the extraordinary control of the life of the surrogate mothers:

"The clinic and the hostel are spaces where the daily activities of the surrogates can be not just monitored but also controlled. The timetable establishes a rhythm, a rhythm meant to ensure a healthy and docile mother-worker. Varsha is a surrogate for a couple from Uttar Pradesh, India. She lists the daily schedule for the surrogates at the clinic:

'Get up at 8 a.m. and have some vitamins with our breakfast. Sleep. Get up in time for Doctor Madam's visit. Sleep. Get up for lunch. Mostly we get served a fixed lunch, along with whatever medicines we have left. The doctor wants me to eat too much here. I enjoyed it in the beginning, but now sometimes I feel like I would burst! Madam has told us that all mothers who want a healthy baby should take this diet. I know it's required for the baby, so I can't create a fuss.

… I am being extra careful now because Doctor Madam has said if everything looks all right in the ultrasound I can go visit my children. I don't want to do anything that will make Madam change her mind about letting me go home for a day or two.'"[284]

Even comparatively empowered surrogate mothers in the United States face demands for extraordinary control of their day-to-day life, as described in this study of surrogacy contracts in multiple jurisdictions in the United States:

"When drafting surrogacy contracts, lawyers insert extensive lists of rules

[283] Lee, Outsourcing [n. 281].
[284] Pande 2010 [n.], at 981-82.

the surrogate must follow based on past agreements, and particular demands of the intended parents. Intended parents have ample power since they pay for the transaction. Contract rules may include the degree of an intended parents' surveillance over the surrogate, restrictions on the surrogate's daily activities, or requiring the surrogate to consume solely organic foods and supplements while prohibiting caffeine, sugar, or fast food throughout the pregnancy. Some rules require that the surrogate engage in a particular activity—like acupuncture or going to the gym—or prohibit her from doing so—such as bans on microwaves, hairspray, manicures, or changing cat litter."[285]

In the United States such assertions of control of the day to day life of surrogate mothers are more of a negotiation between intending parents and surrogate mothers, as mediated by attorneys and intermediaries.[286]

In Ukraine, there are reports of BioTexCom, apparently the largest intermediary for Ukrainian surrogacies which claimed in 2018 to be responsible for one hundred surrogacy births per month,[287] exercising extraordinary control over surrogate mothers:

"[Alina---a surrogate mother] said BioTexCom put her up in a small apartment 32 weeks into her pregnancy with four other women, where she was forced to share a bed with another surrogate mother.

"We were all very stressed. Most of the women come from small villages and are in hopeless situations," she said. "We spent the first week just lying around, crying. We couldn't eat. This is a typical situation for surrogates."

Alina said the supervisor visited the apartment most days to check on the women's lifestyle.

"If we weren't home after 4pm, we could be fined 100 euros. We were also threatened with a fine if any of us openly criticised the company, or directly communicated with the biological parents."[288]

While a spokesperson for BioTexCom denied fining surrogate mother merely for contacts with intending parents, that denial may be evaluated in terms of multiple concerning reports about this intermediary, including the founder being placed under house arrest in 2018 for suspicion of child trafficking and tax evasion,[289] and their own statements indicating a systemic practice of going to

[285] Berk (2015) [n] 156-57.
[286] Berk (2015) [n.].
[287] Christopher Bobyn. 2018. 'Inside Ukraine's surrogacy industry where Australians are travelling to have a family,' *ABC News,* https://www.abc.net.au/news/2018-12-15/inside-ukraines-surrogacy-industry/10614172.
[288] M Roache, 'Ukraine's 'baby factories': The human cost of surrogacy,' (2018) *Aljazeera,* https://www.aljazeera.com/indepth/features/ukraine-baby-factories-human-cost-surrogacy-180912201251153.html.
[289] K Hasson, 'The Scandal-Plagued Company behind Stranded Surrogacy Babies is Also Promoting a Controversial IVF Technique' (2020), *Center for Genetics and Society,* https://www.geneticsandsociety.org/biopolitical-times/risky-business-company-behind-stranded-surrogacy-babies-also-promoting; E Lamberton, 'Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children,' (2020) *Princeton University Journal of Public & International Affairs,* https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children; 'Surrogacy: babies are waiting for their parents' (2020) https://www.youtube.com/watch?v=xPdRx_L96C0.

extraordinary degrees to keep surrogate mothers and intending parents from interacting.[290] Surrogacy cannot properly be conceptualized as an arrangement between intending parents and surrogate mothers where the intermediaries so pervasively limit and control interactions between intending parents and surrogate mothers. Such a practice rather fits the model of the intermediary as the hub of separate arrangements, one between the intermediary and the intending parents, and a second arrangement between the intermediary and the surrogate mother.

C. **Third Indication of Intermediaries as Sellers: Intermediaries exercising extraordinary control over the health-care decisions of the surrogate mother**

Surrogate mothers undergo a number of medical procedures and medical risks above and beyond normal pregnancy and childbirth.[291] Some of these medical interventions may be intrinsically necessary to the surrogacy process, while others may be unnecessary but potentially benefit intermediaries and/or intending parents. The way in which informed consent as to these health procedures are handled are clues as to whether the surrogate mother is being treated as a rights-bearing person, or instead is being inordinately controlled by intermediaries, in the interests of intermediaries and/or the intending parents.

The fundamental question is whether each medication and procedure are explained to the surrogate mother, including discussion of risks, burdens and benefits, and informed consent is regarded as essential for each.[292] Obtaining specific informed consent from surrogate mothers to each medication and procedure reportedly is not the norm in India, Mexico, Thailand, and Ukraine.[293] To the contrary, there is a pervasive lack of informed consent, and/or merely a generalized blanket consent to all procedures with minimal explanations are provided.[294] Surrogate mothers often feel themselves obligated to do whatever the intermediaries and intending parents desire of them, as described in the above sections.[295] This sense of obligation to simply go along with whatever they are told creates in practice a presumed, blanket consent to any and all medications, procedures and health risks. Of course this kind of presumed blanket consent is contrary to the normal concept of informed consent and indicates inordinate control of the surrogate mother.[296]

Even in the United States, where surrogate mothers presumably are more empowered compared to developing nations, "It is common for surrogacy agreements to require the person acting as a surrogate to consent to future medical procedures and treatments."[297] Indeed, in some jurisdictions in the United States statutory law "expressly allow for contract clauses that *require* people

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[290] Bobyn [n. 287]("Biotexcom generally keeps surrogates apart from the couples. Even the design of in-house medical facilities reflects this policy, with the ability to keep clients and surrogates separated at all times.") The photo shows an extraordinary design allowing intending parents to view on a screen live the ultrasound via CCTV, while a large opaque screen physically and visually separates the surrogate mother and intending parents. Ibid.

[291] See, e.g., A Allen, 'Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human,' (2018) 41 *Harvard Journal of Law & Public Policy* 753, 786-88; J Knocke, 'Health concerns and ethical considerations regarding international surrogacy,' (2014) 126:2 *Int J Gynaecol Obstet*, 183-86.

[292] Verona Principles 7.4; American Medical Association, Informed Consent: Code of Medical Ethics Opinion 2.1.1, https://www.ama-assn.org/delivering-care/ethics/informed-consent; Parth Shah; Imani Thornton; Danielle Turrin; J Hipskind, 'Informed Consent,' https://www.ncbi.nlm.nih.gov/books/NBK430827/.

[293] P Fronek, Current perspectives on the ethics of selling international surrogacy support services, Medicolegal and Bioethics 2018:8, 11, 14-15; CSR (Gujarat) [n.], at 43-46.

[294] Ibid.

[295] See Section VI (A) & (B).

[296] Sources cited n. 292.

[297] C Joslin, '(Not) Just Surrogacy' (2021) California Law Review 401, 415 n. 14.

acting as surrogates to undergo certain medical treatments even over their contemporaneous objections."[298] These laws purport then to remove the fundamental necessity of informed consent for a competent patient at the time of a procedure, and purport to remove the right of a competent adult patient to withdraw consent. This is a clear breach of American constitutional norms[299] and contemporary medical ethics,[300] indicative of attempts to subject surrogate mothers to the extraordinary control of intending parents or intermediaries.

In this context, it is not surprising that frequently when there is a medical decision that would benefit intermediaries and intending parents, but would raise risks or burdens to the surrogate mother, consent is presumed rather than obtained for the decision that raises risks for surrogate mothers. Indeed, some intermediaries raise risks for surrogate mothers in systemic ways. This includes selecting larger numbers of embryos to transfer, even though this raises the likelihood of higher risk multiple-pregnancies. This is done even when the numbers of embryos transferred exceeds the numbers of children desired by the intending parents. Then, when pregnancies ensue with more children than desired, surrogate mothers are systemically subjected to reduction abortions, which are done at the choice of the intermediary and/or intended parent.[301] It is presumed or contractually stated that the surrogate mother will defer the abortion decision to others[302]---this being sometimes contractually stated even in the United States, when enforcement of such contractual provisions would be apparently unconstitutional, but failure to abide by the contract nonetheless is conceptualized as a breach of contract.[303] Then, the higher numbers of multiple births plus the wishes of intermediaries and intending parents result in much higher numbers of caesarean births. For example, caesarean section rates at a large network of clinics run by an intermediary-physician in India were close to 75%, despite the much higher risks and more difficult recovery for the surrogate mothers---as well as heightened risks for the surrogate mother for any succeeding births.[304]

This preference for the interests of the intermediaries and/or intending parents over the health of the surrogate mother is likely exacerbated in contexts, like India, where doctors and medical clinics

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[298] Ibid at 415.

[299] Cruzan v. Director, 497 U.S. 261 (1990); Washington v. Glucksberg :: 521 U.S. 702 (1997).

[300] See sources n. 292 (AMA, etc.); see also American College of Obstetricians and Gynecologists, 'Family Building Through Gestational Surrogacy,' https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/03/family-building-through-gestational-surrogacy : "Although preconception counseling and contract negotiation may help prepare involved parties to resolve such issues, it is important in these situations to remember the primacy of the gestational carrier's right to autonomous decision making related to her body and health."

[301] CSR (Gujarat) [n.], at 44-46 (five embryos typically transferred at a time, commonly leading to a triplet pregnancy, and then reduction abortion, often based on sex selection).

[302] Fronek [n.], at 14; CSR (Gujarat) [n.], at 44-46; Bobyn [n. 286]("'A surrogate [in Ukraine] has no say in an abortion. She has no rights,'… Recently this clause was enforced, when a heart defect was discovered 17 weeks into the pregnancy of one of [the] surrogates."

[303] See E Cummings, 'The [Un]Enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements,' (2018) 49 *Cumb L Rev* 85; Berk [2020], at 417-20. Berk is perhaps too impressed by contractual provisions acknowledging the surrogate mother's constitutional rights related to abortion decisions, given provisions that nonetheless regard the surrogate mother's abortion decisions as subject to breach of contract remedies. This conclusion of unconstitutionality as to forced abortions is not changed by the recent case of Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022), overruling Roe v. Wade, 410 U.S. 113 (1973). Under other precedents that remain good law, competent adult patients retain a fundamental right to refuse any medical procedure, which would include abortion. See Cruzan v. Director, 497 U.S. 261 (1990); Washington v. Glucksberg :: 521 U.S. 702 (1997). A surrogate mother's decision to choose an abortion against the will of the intending parents is complicated by the patchwork of different state laws regarding abortion that are permitted after *Dobbs*.

[304] Lee, Outsourcing [n.], ch 3, https://www.sfchronicle.com/local/bayarea/item/India-surrogacy-3-24058.php.

frequently also act as intermediaries.[305] A medical clinic or physician who serves as an intermediary while also providing medical services to the surrogate mother has an inherent conflict of interest. This conflict of interest applies also in contexts where the physicians and medical clinics, although not serving as intermediaries, are chosen, provided, and/or paid by either the intending parents or intermediaries.[306]

Surrogate mothers are also expected to agree to abortions of a fetus found abnormal, according to the preferences of the intending parents and/or intermediaries,[307] and such may even be conducted against the consent of the surrogate mother, as described in this case:

"the research team came across a case in Delhi which was being dealt by a renowned IVF practitioner. The surrogate mother's two and half month old pregnancy had been forcibly aborted as the fetus was found to be abnormal by the doctor. When she objected to it, the doctor gave her Rs. 12,000/- for the whole procedure, including the blood loss and mental trauma that she suffered, and scared her away from the surrogacy centre. When this decision of the surrogacy centre was criticized by fellow surrogate mothers of the same centre who were more than 4 months pregnant, they were threatened by the doctor and the centre to keep their mouth shut."[308]

This case is unusual primarily in that the surrogate mother resisted the expectation that the intending parents and intermediaries, rather herself, would make the abortion decision. Faced with the apparently rare instance of surrogate mother resistance, the intermediary physician resorted to force in the assumption of impunity as to treatment of surrogate mothers.

Another shocking procedure called "twibbling" has been described as follows:

"two to three surrogate mothers had been impregnated for the same commissioning parents, without their knowledge. This had been done to ensure high success rate. In case the two/three surrogate mothers became pregnant, the surrogacy pregnancies would continue if the commissioning parents wanted to continue with the pregnancies. If not, the healthiest pregnancy would be allowed to continue and the other pregnancies would have to be terminated by taking abortion pills given by the doctor/clinic/centre, about which the surrogate mothers would have no clue and she would simply think that she had a spontaneous abortion. The clinic/doctor/centre simply would wash off their hands and would not pay anything to the surrogate mother."[309]

All of this raises severe human rights and women's rights issues as to the treatment of the surrogate mothers that is carried out in some commercial surrogacy centers. For purposes of children's rights, this inordinate control is another indication that, if there is a sale of a child, the intermediaries are the sellers. The inordinate control over the surrogate mother is another indication that the intermediaries contract with the intending parents, and control rather than contract with the surrogate mothers. This control of the surrogate mother then becomes in effect control of the child.

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[305] CSR (Gujarat study)[n.], at 44-46; HCCH (2014) [n.], page 63 para 143; Lee, Outsourcing [n.].
[306] Allen, at 786.
[307] CSR (Gujarat study)[n.], at 45-46; Bobyn [n. 287]("'A surrogate [in Ukraine] has no say in an abortion. She has no rights,'… Recently this clause was enforced, when a heart defect was discovered 17 weeks into the pregnancy of one of [the] surrogates.")
[308] CSR, Delhi study), [n.], at 61.
[309] CSR, Delhi Report, 61; see also S Kusum, 'Rise of Twin Surrogate Motherhood in India: Legal and Health Issues,' (2014).

D. Fourth Indication of Intermediaries as Sellers: Intermediaries directing, controlling or carrying out the transfer of the child

To the degree that intermediaries are in a position to direct the transfer of the child, and the elements of a sale of a child are met, the intermediaries may fairly be viewed as the sellers of the child. Some intermediaries clearly meet this standard. To the degree that intermediaries already control the location, health care, and day to day life of the surrogate mother, as described above,[310] this control suggests a corresponding ability to control the transfer of the child. As childbirth approaches, these intermediaries use their complete control over the location of the surrogate mother and her health care to also determine where the surrogate mother will give birth, and apparently whether or not a caesarean birth will occur.[311] These intermediaries, the sellers of the child, along with the buyers of the child, the intending parents, then appear to direct the surrogate mother in the amount of time she spends with the child at and after birth, and thus as to how and when physical transfer of the child occurs.[312] The intermediaries either receive the child from the surrogate mother and transfer the child to the intending parents, or else direct the surrogate mother when and where to handover the child to the intending parents. Since these intermediaries control the mother, the mother's handover of the child is at their direction as well. Indeed, the intermediaries have been insisting to potential surrogates and surrogates from the start that they can never consider the child theirs.

Despite the indoctrination surrogate mothers often receive that the child belongs only to the intended parents, there is indication that, particularly in India, some surrogate mothers understood the child to be theirs despite the lack of a genetic link. Professor Amrita Pande described the surrogate mothers' understandings of kinship as focused on the ties produced by gestation, child birth, and nursing regardless of genetics:

"Kinship ties instead find their basis in shared bodily substances (blood and breast milk) and shared company, as well as in the labor of gestation and of giving birth. By emphasizing connections based on shared bodily substance and by de-emphasizing the ties the baby has with its genetic mother and the men involved in surrogacy (the genetic fathers and the surrogates' husbands), the surrogates challenge established hierarchies in kin relationships—where genes and the male seed triumph above all."[313]

Indeed, even a sympathetic account of an Indian surrogacy recounted:

"Rocking Kyle [the child] back and forth, Manisha [the surrogate mother] couldn't help but feel that he was as much hers as theirs. "But I have to give it away," she reminded herself later. "I can't keep it."[314]

When surrogate mothers effectively have no choice but to transfer the child at the direction of intermediaries and intending parents, and the intermediaries have been exercising extraordinary control over all aspects of the surrogate mother's life (location, diet, daily schedule, family life, health care,

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[310] Section VI (A), (B) (C).
[311] Lee, Outsourcing [n.], ch 3, https://www.sfchronicle.com/local/bayarea/item/India-surrogacy-3-24058.php;
[312] Lee, Outsourcing [n.]; CSR (Gujarat) [n.], at 54-55; Pande (2010)[n.], at 977-80; Bobyn [n. 286].
[313] A Pande, 'It may be Her Eggs, But It's My Blood: Surrogates and Everyday Forms of Kinship in India,' (2009) *Qual Sociol* 32:379-97, at 379 (abstract).
[314] Lee, Outsourcing [n.].

travel) for essentially the entire pregnancy, then it is best to understand the intermediary as directing the transfer of the child to the intending parents as agreed between the intermediary and intending parent, the sellers and buyers of the child.

VII. Sale of Children and Altruistic Surrogacy

The 2018 SR Report notes that "truly 'altrustic surrogacy does not constitute sale of children, since altruistic surrogacy is understood as a gratuitous act, often between family members or friends with pre-existing relationships, and often without the involvement of intermediaries."[315] However, complexities are created by "the development of organized surrogacy systems labeled "altruistic," which often involved substantial reimbursements to surrogate mothers…" sometimes with "open-ended categories such as 'pain and suffering'."[316] As we have stated throughout our legal analysis of sale of children, labels alone cannot be decisive: it is necessary to apply legal definitions to the practical realities of surrogacy arrangements. Thus, payments for "pain and suffering" may in practice be the same as paying for gestational services, and intermediaries whether labeled for-profit or non-profit may nonetheless receive substantial payments, suggesting that some systems of "altruistic" surrogacy are in practice forms of commercial surrogacy, or perhaps hybrid combinations of altruistic and commercial surrogacy.

To aid analysis of these kinds of organized surrogacy systems labeled "altruistic," Section 14.8 of the Verona Principles usefully states:

"Surrogacy purporting to be altruistic and non-commercial may nonetheless result or unduly risk the sale of children when:

a. there is a provision of unregulated, excessive or lump sum "reimbursements" or consideration in any other form; or

b. there are reimbursement categories like "pain and suffering", which can be similar to payment in commercial surrogacy; or

c. reimbursement occurs which cannot be separated completely from the establishment or transfer of legal parentage and/or parental responsibility. (See para. 7).[317]

Again, according to our analysis commercial surrogacy may not always or necessarily constitute the sale of children; hence, a system labeled "altruistic" that shares features of commercial systems does not necessarily constitute or unduly risk sale under the OPSC. However, the mere labeling of a surrogacy system as "altruistic" does not shield it from analysis against the norms of the OPSC. For example, the online advertising by a global intermediary of surrogacy from Greece, which notes that in this officially altruistic surrogacy system, various payments to the surrogate mother are legal and paid, suggests the commercial nature of some officially "altruistic" surrogacy systems.[318]

[315] SR 2018, para. 69.
[316] Ibid.
[317] Verona Principle 14.8.
[318] See 'About International Surrogacy in Greece' https://globalsurrogacy.baby/surrogacy-countries/greece/.

VIII. CONCLUSION

A primary conclusion from our analysis is the necessity to focus on the role and regulation of intermediaries in surrogacy systems. The kinds of cases and systems that constitute or unduly risk sale under the OPSC almost always involve intermediaries playing substantial roles. This is particularly true in international surrogacies due to the inherent difficulties of navigating transnational surrogacy arrangements. Even in domestic commercial surrogacy, it seems to be relatively rare for unrelated strangers to find and contract with one another without the substantial involvement of intermediaries. By contrast, in truly altruistic surrogacies---which by definition do not constitute or unduly risk sale---the parties often knew each other prior to the surrogacy arrangement, and hence often proceed without intermediaries.

The Verona Principle's definition of an "intermediary" as those who are "facilitating the initiation, continuation and/or finalisation of a surrogacy arrangement" properly describes their central role.[319] The mere provision of legal, medical or other professional services does not make the provider an intermediary.[320] Intermediaries may be involved over time in hundreds of surrogacy arrangements, and therefore have an inherent advantage in shaping systems to their own advantage. By contrast, both intending parents and surrogate mothers are limited in how often they want or can participate in surrogacy and thus bring a greater inexperience to their involvement. Intending parents and surrogate mothers face substantial emotional and/or health risks in their roles, whereas intermediaries in their roles lack such vulnerabilities. It would be a mistake to analyze surrogacy in a way that rendered the role of intermediaries invisible.

We do not doubt that many intermediaries sincerely believe they are performing useful service in helping intending parents to realize their procreative dreams. Their loyalty to their paying customers presumably can sometimes be quite real. Yet intermediaries play a central role in creating highly commercialized contexts for family formation, and are necessarily committed to that commercial context, since it creates the occasion for their substantial financial benefit.

The financial incentives in intermediary-structured commercial surrogacy not only risk sale, but also risk deprivation of other rights of the child. Although a full treatment of the rights of surrogate mothers is beyond the scope of this chapter, the same can be said for the rights of surrogate mothers: intermediary-structured commercial surrogacy systems that risk sale of the child, also frequently risk serious deprivations of the human rights of surrogate mothers. It is all too easy in intermediary-structured commercial surrogacy for children to be reduced to products and surrogate mothers, particularly in the highly vulnerable contexts of poverty, to be reduced to mere means for intermediaries to fulfil the needs of their paying clients, the intending parents.

We thus encourage further research on the role of intermediaries in surrogacy systems, and further attention by states to their regulation. We also repeat the call that, where there are violations of legal norms, primary enforcement efforts should be directed to intermediaries, rather than the far more vulnerable primary parties to surrogacy arrangements.

Finally, we note the frequent dilemma of an international surrogacy arrangement where the intending parents evaded their own nation's prohibition laws to travel to a commercial surrogacy center, and now seek to bring the child back to their own country.[321] Too often, such evasive surrogacy arrangements have been viewed primarily as a technical problem of conflict of laws or choice of law, with a presumption of the normative legality of both prohibitionist and permissive systems, and an

[319] Verona Principles at page 7.

[320] Ibid.

[321] See, e.g., HCCH (2012), at para 12, 28-43; SigurðurKristinsso, 'Legalizing altruistic surrogacy in response to evasive travel? An Icelandic proposal,' (2016) 3 *Reproductive Biomedicine & Society Online,* pp 109-119

emphasis on the *fait accompli* necessity of validating the surrogacy arrangement in the prohibitionist nation.[322] Of course this could create a backdoor pathway for systemically evading the domestic policies of prohibitionist states. Without attempting a full analysis, we would emphasize the importance of the child rights lens, which cannot be reduced to an automatic validation of the surrogacy arrangement. Children in such evasive surrogacies have frequently been sold under the terms of the OPSC, and other of their rights, including to access origins and right to identity, have been violated or are at risk. Typically there has not been any, or an adequate, screening of intending parents, or best interests of the child analysis, in the commercial surrogacy jurisdiction. Proceedings in the intending parents' state thus should protect all of the rights of the surrogate-born child, which would generally require full investigation and a best interests of the child determination, rather than deferring to parentage determinations in the state of the surrogate mother.

States should work vigorously to close pathways to evade prohibitionist laws, in ways separate from proceedings to determine parentage and nationality of the child. Thus, even where prohibitionist states award parentage and parental responsibility to intending parents in evasive surrogacies after a best interests of the child determination, prohibitionist states should actively prosecute intermediaries for their role in facilitating violations of domestic and international law. In addition to enforcement actions against intermediaries, prohibitionist states should seek international cooperation from permissive states.[323] Permissive states lack a legitimate interest in allowing their legal systems to be used to evade the domestic law of other states. This is particularly true due to the grave difficulties of adequately protecting the rights of the child in international surrogacy arrangements between permissive and prohibitionist states. The necessary coordination to conduct timely and sufficient screening of intending parents, protect access to origins and rights to identity, and determine the best interests of the child, is inherently difficult in any transnational surrogacy, given that there is key information necessary to evaluate the surrogacy arrangement in both the state of the intending parents and the state of the surrogate mother which would need to be shared at multiple critical points in time; such coordination is virtually impossible where conducted between permissive and prohibitionist states. The ultimate answer to evasive international surrogacy arrangements is to prevent them through state enforcement against intermediaries that intentionally facilitate them as a business model, and through international cooperation that encourages permissive states to become inhospitable to such use of their legal systems.

[322] See HCCH 2012 [n. 108], at 19-25; HCCH, 'The Parentage/Surrogacy Project: An Updating Note' (2015), https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf.

[323] See HCCH 2012 [n.], at para. 45 ("2010, the Consul Generals of eight European States wrote a joint letter to a number of IVF clinics in India to request that they cease providing surrogacy options to nationals of their countries unless the intending parties had consulted with their embassy first.")