

A PAPER BY

THE IONA INSTITUTE

**THE ETHICAL CASE AGAINST SURROGATE
MOTHERHOOD:**

**WHAT WE CAN LEARN FROM THE LAW OF OTHER
EUROPEAN COUNTRIES**

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Justice Minister Alan Shatter told the Dail on February 9, 2012, that he intends to develop proposals for legislation on surrogacy to deal with matters concerning the legal relationships of commissioning adults with children born through surrogacy. In developing these legislative proposals the welfare and best interests of children will be key considerations.

The fact that Minister Shatter seems intent only on regularising the legal relationship between the commissioning adults and the child born through surrogacy strongly indicates that he has already conceded the licitness of surrogate motherhood in itself, and does not share the concerns found in many other European countries about this practice.

This paper outlines those concerns.

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Executive Summary

Many countries of Europe have realised the dangers of surrogacy agreements and, in pursuit of the best interest of the child, enacted legislation to ban or strictly regulate surrogacy. Germany, Austria, France, Switzerland, Sweden, Norway, Italy and Bulgaria completely prohibit all surrogacy agreements¹. Surrogacy agreements are against public policy in those countries.

One of the chief reasons is that surrogacy commodifies the human body. With surrogacy the child becomes the mere object of a legal transaction, while the surrogate mother is used, effectively, as an incubator. Such commodification in itself violates the dignity of both the surrogate mother and the child.

A child born after a surrogacy agreement may have up to five adults claiming parents' rights over him or her: the genetic mother (egg donor), the gestational or birth mother (surrogate), the commissioning mother; the genetic father (sperm donor), the commissioning father, and arguably a sixth adult, namely the husband of the gestational or birth mother (presumption of paternity)

The gametes of one or both the commissioning parents may have been used. The gestational mother may be the genetic mother; this is the case when she is artificially inseminated. Such manipulations are contrary to the genetic truth. As we know from the experience both of adopted children and donor-conceived people, the genetic truth is more and more sought and cannot be lightly set aside.

Splitting the role of mother between different women in this way (egg donor, commissioning woman, and birth mother), and the role of father (sperm donor and the commissioning man) also violates the child's right to know his or her origin and identity, as guaranteed in Articles 7 and 8 of the Convention on the Rights of the Child. Moreover, such concurring claims can give rise to litigation.

Surrogacy is presented as a method of medically assisted reproduction among others, a treatment for infertility. It is often depicted as a generous altruistic action meant to help couples who cannot naturally have children, to offer them the joy of parenting.

However, reality is far from this sugar-coated picture.

Even in countries where commercial surrogacy is prohibited, women may be coerced into accepting surrogacy, e.g. through emotional pressure, threats or promises concerning their jobs etc.² Regarding socio-economic situations, commissioning parents usually are older, richer and better-educated than surrogate mothers, which creates a sharp imbalance of power. Moreover,

¹ European Parliament, Policy Department, Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU action? PE 432-738, 2010

² This already exists about egg donation, as the French General Inspection of Social Affairs noted in its February 2011 Report: *Etat des lieux et perspectives du don d'ovocytes en France*, p. 25-26 <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000113/0000.pdf>

even where surrogate mothers may not be paid, they may receive "compensation" which is sometimes so high that it is a clear incentive for surrogacy. In the European Union, in countries where surrogacy is not entirely banned, commercial surrogacy, surrogacy agencies and advertisements are prohibited and surrogacy agreements are not enforceable, because they contradict morals.

Commercial surrogacy is a booming activity in several countries. Numerous agencies profit from the suffering of infertile couples and the vulnerability of women. They charge very high fees to select surrogate mothers and, if necessary, egg donors. After a very intrusive recruitment process, agencies certify that they select only women without medical or judicial background. They create a database of women which can be consulted by commissioning parents so that they can choose the one who is more likely to produce a baby corresponding to their wishes.

Commissioning couples or individuals invest considerable amounts of money to have a child through surrogacy not to mention the emotional investment, so they have high expectations about the child. In addition to the choice of the egg donor, clinics offer preimplantation genetic diagnosis, not only to avoid genetic diseases but also to select the sex of the child.

In developing countries, clinics advertise for low-cost surrogacy: the price of a baby in India may be one fourth of the price in California.

Surrogacy implies psychological detachment on the part of the gestational mothers. She must not attach to her child. Detachment impacts both the woman and the child. More and more medical and psychological studies highlight the importance of the links created during pregnancy between the mother and the child, and their importance for the child's development. Long-term consequences on the child can be inferred from those on children relinquished for adoption or born after an in vitro fertilization with donor, since surrogacy combines aspects of both situations, and adds more complexity.

In addition to difficulties regarding the establishment of filiation and nationality of the child, problems may arise in numerous situations: if the surrogate mother's health or life are threatened during pregnancy, if the surrogate mother changes her mind and wants to keep the child, if the commissioning parents part during pregnancy and do not want the child any longer, if the child is born with a disability and neither the surrogate mother nor the commissioning parents want him or her. If a disability is detected during pregnancy, can the surrogate mother be obliged to abort? Some agencies require that they accept in advance to abort if asked to.

In surrogacy, the woman rents her body. This should at a minimum alert us to the very strong possibility that surrogacy is a new form of exploitation and trafficking in women. In surrogacy, the child is treated as a commodity, the object of a legal agreement. The aim of surrogacy is to fulfil the desire of adults, to enable foreign parents to satisfy their wish for a child at any price.

Refusal to transcribe the filiation of children obtained through international surrogacy in the civil registry is one of the most effective ways of dissuading intending parents from resorting to a surrogate mother abroad. Surrogacy is contrary to numerous international and European law provisions, especially regarding human dignity, adoption, protection of women and children and trafficking in human persons.

I. Surrogacy as Exploitation: Making Commodities of Babies and Mothers

Surrogacy compromises the dignity of the child by making the child the object of a contract—a commodity. It further compromises the dignity of the mother, even if her participation is voluntary, by merely treating her as a “womb for hire.”

The business of surrogacy is ripe with opportunities to exploit women and children. Theresa Erickson, an American attorney who was recently convicted of orchestrating a profitable illegal surrogacy ring exploiting both surrogates and contracting parents, stated that her participation in abusing the system was just the “tip of the iceberg.”³ To prevent both current and future inevitable exploitation, it is essential that the Oireachtas apply the principles embodied in existing documents, such as the Convention on the Rights of the Child and the Convention on the Adoption of Children (Revised), to the issue of surrogacy, and lead European nations in the movement to ban the practice of surrogacy.

A. The Medical, Psychological, and Social Harms of Surrogacy to the Surrogate, the Child, and the Contracting Parents

Surrogacy and the act of intentional (as distinct from biological) parenthood create a situation in which as many as five people can claim a parental status over the resulting child: the contracting parents, the genetic mother and father, and the surrogate.⁴ This reality fragments the reproductive function of marriage, resulting in several consequences: “First, it separates sex from reproduction; second, it separates motherhood from pregnancy; and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship.”⁵ Though some researchers are quick to point out that, in post-modern society, traditional families are no longer the singular norm,⁶ it is virtually uncontested that a child fares *best* when raised in a home with married, biological parents.⁷ The fact that alternative family situations exist does not

³ Rory Devine and R. Stickney, *Convicted Surrogacy Attorney: I’m Tip of Iceberg*, NBC SAN DIEGO (Feb. 29, 2012, 5:52 PM),

<http://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html>

⁴ ELIZABETH MARQUARDT, *ONE PARENT OR FIVE* 47 (2011).

⁵ Olga van den Akker, *The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK*, 15 HUMAN REPROD. 1849, 1849 (2000) [hereinafter *Importance of a Genetic Link*].

⁶ *Id.* at 1849650. See generally, Jon Bernardes, *Responsibilities in Studying Postmodern Families*, 14 J. FAM. ISSUES 35 (1993).

⁷ See, e.g., THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, & MORALS 198 (Robert P. George & Jean Bethke Elshtain, eds. 2006) (“In the last thirty years, thousands of studies evaluating the consequences of marriage for children and society have been conducted In virtually every way that social scientists know how to measure, children do better, on average, when their parents get and stay married”); THE CENTRE FOR SOCIAL JUSTICE, EVERY FAMILY MATTERS: AN IN-DEPTH REVIEW OF FAMILY LAW IN BRITAIN 57 (2009), available at http://www.centreforsocialjustice.org.uk/client/downloads/WEB%20CSJ%20Every%20Family%20Matters_smallre_s.pdf [hereinafter *Every Family Matters*] (children are healthier and better educated when brought up in married families); Marilyn Coleman, Lawrence Ganong & Mark Fine, *Reinvestigating Marriage: Another Decade of Progress*, 62 J. MARRIAGE & FAM. 1288, 1298 (2000); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J.

automatically mean that their creation should be facilitated by the State where third-party gametes and/or surrogate mothers must be used to bring a family into existence. Where there is ample evidence, as there is here, that traditional family situations are best for children, governing authorities have a legitimate interest in passing laws to promote the best possible atmosphere for children of having married, biological parents.

Before considering the medical, psychological, and social effects on surrogates and children, it is worth noting the average demographics of contracting parents and comparing them with surrogate mothers. According to one early study, the mean age of both contracting mothers and contracting fathers was thirty-eight, and “[t]hey were more likely to remain in full-time education longer, obtain higher educational qualifications, and enjoy higher socio-economic status than surrogate mothers.”⁸ Another study detailed that the age of contracting mothers ranged from twenty-nine to forty-seven.⁹ In other words, contracting parents are often pushing the age of parenting beyond natural boundaries.

1. Wanted: Good-Looking Child with High Academic Potential—Turning Children into Commodities

When a significant amount of money is invested in a transaction, expectations will increase. Most couples who turn to surrogacy as a way to have a child are affluent and have already spent considerable amounts of money attempting *in vitro* fertilization (IVF).¹⁰ IVF can cost as much as \$8,500 per round of treatment, plus the costs of medication.¹¹ In some cases, surrogacy can cost the contracting couple \$100,000 or more.¹² In economic terms, it is natural for one who has invested such significant sums in an endeavour to expect positive returns.

This significant economic investment, however, has led in some cases to the mentality that, not only can we contract to purchase children, we can choose children who are more likely to be good looking and to achieve social and academic success. This mentality has been evident for years in the egg donation industry. “[Egg donors who are] graduates and those with high IQs are in particular demand. Many contracting couples, desperate to have children, are also prepared to

MARRIAGE & FAM. 213 (2003); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876 (2003).

⁸ E. Blyth, ‘Not a Primrose Path’: Commissioning Parents’ Experiences of Surrogacy Arrangements in Britain, 13 J. REPROD. & INFANT PSYCHOL. 185, 187 (1995) [hereinafter *Not a Primrose Path*]. See also R.J. Edelman, *Surrogacy: the Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 126 (2004); Olga van den Akker, *A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy*, 26 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 277, 281 (2005) [hereinafter *A Longitudinal Comparison*] (confirming basic inequalities between surrogates and contracting mothers on most sociodemographic variables).

⁹ *Importance of a Genetic Link*, *supra* note 6, at 1851.

¹⁰ See, e.g., Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES (Nov. 28, 2008),

<http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all>.

¹¹ See, e.g., *Fee Schedules*, CTR. FOR ASSISTED REPROD., <http://www.embryo.net/html/fee.html> (last visited Apr. 9, 2012). In some European countries, IVF costs within the EU are borne by the social security.

¹² See, e.g., *Intended Parents: Gestational Surrogacy (IVF) Estimated Costs*, CTR. FOR SURROGATE PARENTING, http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=42 (last visited Apr. 9, 2012); *Intended Parents: Gestational Surrogacy & Egg Donation (IVF/ED) Estimated Costs*, CTR. FOR SURROGATE PARENTING, http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=43 (last visited Apr. 9, 2012).

pay premium prices for specific physical attributes and good looks.¹³ The willingness of infertile couples to pay significant amounts of money has had a direct impact over the increased number of women inquiring about egg donation by the motivation to pay for their education.

The women who want to give eggs or become surrogate mother have to go through a very inquisitive process. The first step is a never ending questionnaire covering all aspects of the applicant's life: physical appearance (colour of skin, hair and eyes, quality of hair, height, weight etc.), medical background of the applicant and her family, including the age and cause of death of her grand-parents, education, occupation, career goals, education and occupation of the parents and siblings, religion, musical abilities, sexual life and personal questions of all kinds. They also have to send several photos. The clinic or agency certify that no woman with medical problems or a criminal record is selected in their database, and parents are able to choose the one who is more likely to produce a perfect baby with all the optional extras¹⁴. Many clinics also offer pre-implantation genetic diagnosis, not only to avoid genetic diseases but also to enable commissioning parents to choose the sex of the baby¹⁵.

2. Psychological Detachment

Despite the way surrogacy is promoted as an option for a close friend or family member to assist a loved one unable to carry a baby to term in their quest for a child, most surrogacy arrangements are between individuals who, prior to the surrogacy arrangement, were total strangers.¹⁶ Most surrogates and contracting couples view the surrogate pregnancy as a business transaction from the outset, even when the surrogate is also the genetic mother of the child. This, in turn, causes the surrogate to psychologically detach herself from the child during pregnancy.¹⁷ It is essential to note that surrogates have reported that, despite their pre-pregnancy thought that viewing the surrogacy as an arrangement involving a component of financial gain would make it easier to relinquish the baby, many could not maintain the same mindset after birth.¹⁸

Surrogate mothers have described the detached, business-like mindset before the birth of the baby. For example,

[I]t makes it more business-like so that you look at the baby and think it's a job. I'm being paid to the time out of me life . . . and in doing so . . . it makes it not an emotional thing, it's more business-like.¹⁹

I think it's necessary in a lot of ways . . . because I feel the surrogate needs to have that to latch onto emotionally. I am doing the job, I am being paid to do a job, to keep the emotions a little bit at bay.

¹³ Eric Blyth & Abigail Farrand, *Reproductive Tourism – A Price Worth Paying for Reproductive Autonomy?*, 25 CRITICAL SOC. POL'Y 101 (2005) (citing a 2001 news article).

¹⁴ e.g. <http://mother-surrogate.com/anketa.html> ; <http://www.affordablesurrogacy.com/33.html>

¹⁵ e.g. <http://www.lasvegASFertility.net/index.html> ; http://www.fertility-docs.com/fertility_gender.phtml

¹⁶ Edelmann, *supra* note 9, at 129.

¹⁷ *Id.* at 130.

¹⁸ *A Longitudinal Comparison*, *supra* note 9, at 281.

¹⁹ Hazel Baslington, *The Societal Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57, 63 (2002).

In a way you have to be quite cold about it. I don't, from the start, see the baby as mine, so, you have to have the right attitude.²⁰

Not only do surrogates need to tell themselves from the beginning that the pregnancy is merely a business relationship in order to ease the pains of relinquishment, they need the aid of a support group to constantly psychologically condition and affirm the mindset throughout and after the pregnancy.²¹ Support groups encourage surrogates to verbalize grief rather than suppress it and attempt to act as a "safety valve" for surrogate mothers experiencing problems. Such conditioning is only required because surrogacy is not natural, and if left uninfluenced, the natural mental and physical effects are harsh and complicated. The Center for Surrogate Parenting, a well-known surrogacy organization and the group that facilitated the surrogacy of Elton John's son, charges over \$5,000 in counselling fees alone.²²

Because there is a lack of research on the long-term psychological effects of surrogacy,²³ it is unknown how detachment and relinquishment affect the surrogate mother long-term. However, because long-term difficulties have been reported by women relinquishing a child for adoption, it is reasonable to expect similar situations will manifest in surrogate mothers over time.²⁴

Moreover, more and more medical and psychological studies highlight the importance of the links created during pregnancy between the mother and the child, and their importance for the child's development. Though data is still lacking on this issue, it is inevitable that the detachment of the mother has an impact on the child, who may feel abandoned, and affect his development. Adopted children may suffer from being abandoned by their biological mother, but in the case of surrogacy suffering will be aggravated by the fact this abandonment was voluntary, decided in advance. It is also unknown how the child is ultimately affected once he or she learns the truth about the surrogacy. A comparison can be drawn between children born as a result of surrogacy arrangements and children born through sperm donor insemination, and emerging research has begun to show a myriad of psychological ramifications on children who are conceived by donor sperm.²⁵ It is also reasonable to compare with adopted children.

3. Fears During Pregnancy and the Pitfalls of a Continuing Relationship Between the Surrogate and the Contracting Parents

In a surrogacy situation, individuals from more than one household have a claim of right as the child's legal parent. Until the child is born and the contracting couple is legally declared the

²⁰ *Id.* at 64.

²¹ *See, e.g., id.* at 60 (detailing available services to surrogates through support groups).

²² *Indented Parents: Gestational Surrogacy (IVF) Estimated Costs, supra* note 13.

²³ *See, e.g.,* Edelmann, *supra* note 9, at 124.

²⁴ Olga van den Akker, *Psychological Aspects of Surrogate Motherhood*, 13 HUMAN REPROD. UPDATE 53, 59 (2007) [hereinafter *Psychological Aspects of Surrogate Motherhood*].

²⁵ ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAMES IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION (2010). The study found that young adults conceived through sperm donation experience a myriad of emotional issues. *Id.* at 7-14. For example, they "experience profound struggles with their origins and identities," with sixty-five percent of donor offspring agreeing that their sperm donor is half of who they are. *Id.* at 7. Nearly half of donor offspring admit that they think of their donor conception at least once a week, and sometimes several times a day. *Id.* at 94.

child's parents, there is always a chance someone other than the intended couple will end up with custody of the child.²⁶ This harsh reality fills the nine months before the baby's birth with anxiety, particularly for the contracting parents. As one woman testified,

We couldn't dwell on [the fact that the surrogate could change her mind] because we've got nine months to get through and if you think too long about that, you wouldn't make it. You'd be demented. . . . [T]here's nothing we could do anyway, legally It really is her baby²⁷

The surrogacy process is filled with inherent tensions for all the parties involved; tensions that do not exist in a traditional pregnancy. A contracting father observed some of the struggles of the men involved in the process:

The relationship between the surrogate mother and the [contracting] father is a difficult relationship. Here's the lady who's actually carrying your natural baby of which there is no relationship between the two parties. Very unusual, unnerving sort of relationship. . . . We worked very hard to make sure that [the surrogate mother's husband] wasn't left out. . . . It's an unusual scenario.²⁸

It is common in the United States for the contracting couple and the surrogate to make arrangements for continuing contact after the birth of the child, including the exchange of pictures, letters, phone calls, and visitation.²⁹ Despite good intentions, however, allowing continuing contact can pose many problems, including the risk that the surrogate mother would be continually reminded of the child she had relinquished, [contracting] parents' fear of interference in bringing up the child, and the possibility that previously agreed arrangements about the nature and frequency of any contact might not be realized.³⁰ Many accounts of surrogacy experiences did not suggest "excessively favourable or unproblematic experiences of surrogacy."³¹ Other worries include fear that the IVF treatments will be unsuccessful, concern about the expenses involved, fear of social stigma, and concern for the emotional well-being of both the surrogate and the contracting mother.³²

4. Exploitation: The Surrogate Mother Is Loved and Used, Then Forgotten

The exploitive effects of surrogacy on the surrogate mother often do not manifest themselves until after the baby is relinquished. Many psychologists urge that counselling should be strongly encouraged and even required for surrogates to aid the relinquishing process. This is because many women experience emotional anxiety over relinquishing the child, and counselling and

²⁶ See, e.g. Mike Celizic, *A Cautionary Tale for Couples Using Surrogates: One Couple Vows to Continue Battle with Woman Who Decided to Keep Baby*, MSNCB.com (Oct. 23, 2007, 10:56 AM), http://today.msnbc.msn.com/id/21435600/ns/today-today_news/t/cautionary-tale-couples-using-surrogates/.

²⁷ *Not a Primrose Path*, *supra* note 9, at 188. See also *Importance of a Genetic Link*, *supra* note 6, at 1852 (reporting twenty-three percent in a study of twenty-nine women worried that the surrogate mother would have an emotionally difficult time relinquishing the baby and twelve percent worried the surrogate mother would change her mind).

²⁸ *Not a Primrose Path*, *supra* note 9, at 190.

²⁹ Edelman, *supra* note 9, at 129.

³⁰ *Not a Primrose Path*, *supra* note 9, at 190. See also Edelman, *supra* note 9, at 129.

³¹ *Id.* at 187.

³² *Importance of a Genetic Link*, *supra* note 6, at 1852653.

support groups condition the surrogate to see the pregnancy as merely a business transaction rather than a traditional pregnancy.³³ Some prominent researchers have even advocated for “essential” research observing the surrogate’s own children out of concern that they could suffer fears of also being relinquished.³⁴

Though few surrogates *report* feeling exploited, most surrogate mothers expect the contracting parents to be open with the child about his or her origins and that a relationship will continue between the two families after the baby is relinquished.³⁵ In reality, however, often

this contact ceased unexpectedly after the legal proceedings had been completed. It is seen as a betrayal when the intended couple with the surrogate baby disappears from the surrogate and her children’s lives. *The long-term care and support for surrogate mothers is not always considered by the intended couples, once they remove themselves from the surrogates’ life.*

In other words, once the contracting couple gets from the surrogate what they could not accomplish on their own, the motivation to care for the surrogate’s well-being disappears. The likelihood of a surrogate becoming dissatisfied with the surrogacy arrangement increases as time passes and contact with the contracting couple diminishes.³⁶

5. Emotional Struggles of the Contracting Parents After the Baby’s Birth

It is no surprise that contracting mothers who have completed the surrogacy process and have possession of the child report that they are, overall, satisfied with the surrogacy process. It would be almost impossible for any mother to hold her child, biological or adopted, and not be thankful to have achieved motherhood. However, contracting mothers’ own accounts of their stories belie their continuing struggles beneath their joy in the final outcome. In an article arguing that the highpoints of surrogacy outweigh the pitfalls, author and contracting mother, Alex Kuczynski admitted to the emotional struggles she confronted *after* her son was born:

Indeed, a month after Max was born, I was overwhelmed by the feelings I refused to acknowledge before his birth. In my fear of allowing anything to get complicated, I had suppressed every feeling of anguish and confusion for months, for almost a year.

I was sitting on our back porch in Southampton, N.Y. The baby was asleep. It was twilight. Suddenly, my chest seized, and electric impulses pricked at my skin. What had we done? Was it right to have circumvented the natural order of things? Why had I been chosen to miss out on the act of giving birth, to be left out of the circle of life?³⁷

³³ Baslington, *supra* note 22, at 61, 63-64.

³⁴ *Psychological Aspects of Surrogate Motherhood*, *supra* note 2, at 57.

³⁵ *Id.*

³⁶ Ciccarelli & Beckman, *supra* note 2, at 33.

³⁷ Kuczynski, *supra* note 11.

Though Ms. Kuczynski's husband was able to calm her emotional reaction, it is a natural warning sign that, for the same reason that counseling and support is needed for the surrogate to deal with the relinquishing of the child, the contracting mother must be psychologically conditioned in order to accept the surrogacy process.

6. Unforeseen Complications: When Baby Becomes the Unwanted Object of a Contractual Transaction

Little is known as to what would happen if the baby, carried by the surrogate mother, is born with a disability. According to one recent study,

To date, the author is not aware of any disabled surrogate births, but this is a possibility in the future. There is no law available to ensure a [contracting] mother adopts the disabled [contracted] surrogate baby, and she could therefore renege on her contract. It would be unfair in such circumstances for the surrogate mother to be asked to bring up the baby.³⁸

The following results: a baby with two mothers with a legal claim of parentage, yet he or she is unwanted. Something about making the baby the object of a contract, a commercial transaction, projects a subconscious expectation that the child should come with a warranty. Some agencies require applicant surrogates to accept in advance to abort if they are asked to.

B. Human Trafficking and Surrogacy: Examples of Exploitation

Surrogacy laws were allegedly enacted to protect both unborn babies and parents seeking children. The examples of surrogacy exploitation, however, reveal a different backdrop of the abuses caused to both children and woman. Unfortunately, given the ethical dilemmas and newness of surrogacy issues, many human rights groups are either ignorant or remain neutral to the dangers of surrogacy. For example, Asia director for Human Rights Watch, Phil Robertson, stated, "[G]overnments are confronting something that's totally new. . . . [Human Rights Watch] like many others, [are] caught by the newness of this issue."³⁹

1. Baby-Selling Conspiracies

The United States Attorney's office and the Federal Bureau of Investigation recently unravelled a conspiracy of attorneys in the United States, specializing in reproductive law, that used Gestational Carriers (GCs) to create an inventory of unborn babies that would sell for

³⁸ *Psychological Aspects of Surrogate Motherhood*, *supra* note 2, at 58.

³⁹ Patrick Winn, *Underworld: Unpeeling an Asian Baby Farm*, GLOBALPOST (Mar. 22, 2011, 1:00 PM), <http://mobile.globalpost.com/dispatch/news/regions/asia-pacific/thailand/110310/thailand-surrogacy-human-trafficking>.

over \$100,000 each.⁴⁰ Theresa Erickson and Hilary Neiman, among others, were charged and convicted as part of a conspiracy to deceive US courts and prospective parents for unborn babies.⁴¹ In that case, according to court records, Erickson, in particular, “fraudulently submitted false declarations and pleadings to the California Superior Court in San Diego, in order to obtain pre-birth judgments establishing parental rights for Intended Parents (IPs).”⁴² Erickson and her conspirators used GCs to create an inventory of babies by “paying women to become implanted with embryos in overseas clinics. . . . [T]he conspirators offered the babies to prospective parents by falsely representing that the unborn babies were the result of legitimate surrogacy arrangements, but that the original IPs had backed out.”⁴³ With the appearance of valid surrogacy arrangements—that is, agreements between both the IPs and the GCs before embryonic transfer—Erickson obtained fraudulent pre-birth orders, allowing the IPs’ names to be placed on the babies’ birth certificates, which in turn allowed the conspirators to profit from their sale of parental rights. In addition, Erickson filed applications with one of the state’s infant and mother subsidy programs to cover medical expenses for delivering the babies.

In Asia, surrogacy for profit is largely banned because of the “tricky ethics of wealthy couples paying comparatively poorer women to bear their children.”⁴⁴ However, after shutting down an illegal surrogacy ring, “Babe 101” Thai police believe such surrogacy rings “signal[] the rise of a new phenomenon: surrogate rings cutting costs through human trafficking.” The illegal surrogacy ring, Babe 101, was operational in Thailand, Cambodia, Vietnam and Taiwan, and advertised on their website the costs of surrogacy, i.e., the price of a child, for \$32,000, plus other expenses.⁴⁵ Thai police broke up the illegal surrogacy service rescuing fourteen Vietnamese women. The victims, aged nineteen to twenty-six, were transported to the outskirts of Bangkok and confined to two houses after first being “promised . . . a job “suitable for their health” and only figured out the real situation after several months being kept in the houses without a job.”⁴⁶ Each victim’s passport had been taken from them.⁴⁷

According to several reports, the victims allegedly suffered sexual abuse at the hands of Babe 101. For example, one victim, a virgin, was initiated into having sex at a house in Cambodia when being transported from Vietnam to Thailand, because, according to Babe 101, “if you are a virgin, you cannot get pregnant.” Another victim suffered “sexual abuse” from the same man for three nights. A third victim was quoted as saying it was the second time she had joined the surrogacy ring because her “drug-addict father had already spent the money she earned previously.” This same victim, in returning to Thailand, hoped to find the baby she gave birth to three years earlier by Caesarean section since the women are only allowed to carry the child for eight months.⁴⁸ She was quoted as saying, “[T]he baby was in fact the child of a Taiwanese

⁴⁰ News Release, Office of the United States Attorney Southern district of California, *Baby Selling Ring Busted 1* (Aug. 9, 2011) (on file with the Office of the United States Attorney Southern district of California).

⁴¹ *Id.* at 1.

⁴² *Id.*

⁴³ *Id.* at 2.

⁴⁴ Patrick Winn, *supra* note 43.

⁴⁵ *Police Bust Illegal Surrogacy Ring in Thailand*, JAKARTA GLOBE, (Feb. 25, 2011),

<http://www.thejakartaglobe.com/international/police-bust-illegal-surrogacy-ring-in-thailand/425043>.

⁴⁶ *Fourteen Women Rescued from Illegal Surrogacy Ring in Thailand*, ASIAONE NEWS (Feb. 25, 2011),

<http://www.asiaone.com/News/AsiaOne+News/Crime/Story/A1Story20110225-265272.html>.

⁴⁷ *Police Bust Illegal Surrogacy Ring in Thailand*, JAKARTA GLOBE, (Feb. 25, 2011),

<http://www.thejakartaglobe.com/international/police-bust-illegal-surrogacy-ring-in-thailand/425043>.

⁴⁸ *Vietnam Baby Ring Mothers Allege Sex Abuse: Report*, ASIAONE NEWS (June 2, 2011),

<http://www.asiaone.com/News/Latest+News/Asia/Story/A1Story20110602-282118.html>.

couple. But when I gave birth to him, he looked very much like me, from his eyes, his nose and his smile. Since then, I dreamt of him several times.ö Moreover, one report regarding Babe 101 even alleged that the öwomen were forcibly impregnated with other womenø embryos or raped.ö⁴⁹ It must be recalled that Article 7 of the International Criminal Court Statute includes enslavement, forced prostitution and forced pregnancy amongst crimes against humanity.

2. “Forced” Surrogacy

Commercial surrogacy arrangements raise concerns of forced surrogacy and manipulation. Given the newness of reproductive technologies, the intersection between human trafficking and surrogacy has largely been overlooked.⁵⁰ ö[W]omenø bodies are sold internally and on the global marketplace for sex trafficking, and it seems inevitable that organized crime will shift into the surrogacy market and sales of womenø reproductive capacity.ö

India, which is at the forefront of the global surrogacy market, has raised concerns regarding the ethics of surrogacy because it is highly unregulated and open to exploitive situations.⁵¹ For example, most surrogates are generally poor, illiterate, and are recruited from rural villages. Surrogacy recruits are generally kept in clinics where they are monitored around the clock. In There are other concerns, such as örentingø of Indian womenø bodies by westerners, the lack of counseling services available to surrogates after the relinquishment of their gestational babies, [and] the use of mandated and scheduled C-sections by clinics, which allows [for] . . . quick deliveries.ö

Little attention has been paid to the plight of Indian surrogates. However, Alison Baileyø recent overview and study sheds a powerful light on the reproductive injustices faced by Indian surrogates. The actual number of surrogacy clinics in India is unknown, but as of 2008, one study estimated that about 3,000 were in operation and another estimated that there was a thirty percent annual growth rate as a result of the promotion of medical tourism by the Indian government.⁵² As of 2006, surrogacy was a \$445 million business with projections that profits would reach \$6 billion in the following years.

Given the dismal financial situations of many Indian families, surrogacy is an attractive option to Indian women. But poverty does not allow for a truly free choice to be made. As one

⁴⁹ CHILD EXPLOITATION AND ONLINE PROTECTION, THE TRAFFICKING OF WOMEN AND CHILDREN FROM VIETNAM 12 (2011), available at http://ceop.police.uk/Documents/ceopdocs/NPM_CEOP_FCO_report_trafficking_of_Vietnamese_women_and_children.pdf.

⁵⁰ Karen Smith Rotabi & Nicole F. Bromfield, *Will Global Surrogacy Be Regulated?*, RH REALITY CHECK (July 7, 2010, 7:00 AM), <http://www.rhrealitycheck.org/blog/2010/07/07/will-global-surrogacy-regulated>.

⁵¹ Nicole Bromfield, *Global Surrogacy in India: Legal, Ethical and Human Rights Implications of a Growing “Industry”*, RH REALITY CHECK (June 11, 2010, 9:00 AM), <http://www.rhrealitycheck.org/blog/2010/06/10/stateless-babies-legal-ethical-human-rights-issues-raised-growth-global-surrogacy-india>.

⁵² Allison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, 26 HYPATIA 715, 717 (2011).

Indian surrogate stated, “This is not work, this is *majboori* [a compulsion]. . . . This work is not ethical—it’s just something we have to do to survive.”⁵³ On top of this, the surrogacy industry in India also promotes discrimination in its basest forms. “Current practices suggest that surrogate donors are chosen based on their religion, caste, skin color, and attractiveness.”⁵⁴ A lighter skinned, middle class Indian woman will earn much more than a darker, poorer woman.⁵⁵

The surrogacy situation in India magnifies the problem with surrogacy world-wide, even where it is “voluntary”: Women’s bodies become commodities through which others can purchase what they wish to have, and most or all care, concern, and medical attention is directed at the child while the surrogate mother is left to fend for herself. As Ms. Bailey rightly pointed out,

What about the possible long-term, harmful effects fertility drugs, obstetric complications, or surgical procedures might have on surrogacy workers? Are these risks less morally acceptable in developing-world contexts? Are clinics or contracting parties responsible for surrogacy workers’ medical care if the gestational labor they did under contract causes cancer, sterility, or long-term pregnancy-related disabilities? Can these harms be written off as occupational job hazards?⁵⁶

Currently they are acceptable occupational hazards, and this must change.

II. Surrogacy Should Be Prohibited Under Principles Reflecting Human Rights and the Inherent Dignity of Each Human Being

While the Council of Europe has not yet written a treaty to address specifically the issue of surrogacy, tenets of law from other similar treaties provide a framework from which a consistent position on surrogacy can be synthesized. Human dignity is at the very core of human rights protection: it is the foundation of freedom, justice and peace in the world, according to the Universal Declaration of Human Rights. Throughout the treaties in force in Europe, there is a general policy in favor of protecting human dignity,⁵⁷ prohibiting human trafficking, especially

⁵³ Amrita Pande, *Not an “Angel,” Not a “Whore”*, 16 INDIAN J. GEND. STUD. 141, 160 (2009).

⁵⁴ Bailey, *supra* note 56, at 720.

⁵⁵ *Id.*; also <http://www.artbaby.in/ivf-packages/>

⁵⁶ *Id.* at 732.

⁵⁷ See Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine preamble, Apr. 4, 1997, C.E.T.S. No. 164 (“Convinced of the need to respect the human being both as a individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being.”).

in women and children,⁵⁸ ensuring the best interest of the child,⁵⁹ and against interfering with the natural process of conception and birth.⁶⁰ This is evinced by the prohibition against choosing the sex of a baby created through *in vitro* fertilization⁶¹ and the prohibition on cloning humans because such action is contrary to human dignity.⁶² Keeping in line with these established policies, the Council for Europe must adopt a policy banning surrogacy because the contractual process is wrought with potential exploitation and because surrogacy reduces the surrogate mother and baby to commodities of a contract in violation of their human dignity.⁶³

A. Existing Legal Parallels: How protection of Human Dignity in Adoption should inform Human Rights Boundaries in Surrogacy

1. Council of Europe Protections of Human Rights

The law of adoption is full of protections to preserve the human dignity of both the mother and child. For example, it is contrary to established law to permit a mother to consent to the adoption of her child before she has given birth.⁶⁴ In fact, a mother must wait six weeks after birth or as long as a competent authority believes is necessary for the mother to recover sufficiently from the effects of giving birth to the child before she may consent to an adoption. Even after waiting the appropriate amount of time, the mother must be counselled about the effects of her consent including the effect that adoption will have by terminating her legal relationship to the child, and then the mother must consent freely in writing.⁶⁵

While the timeline for adoption ensures that the mother is fully informed and has sufficient time after the birth of her child to make a thoughtful decision regarding the future of the child, the timeline for surrogacy requires the potential surrogate to make a binding decision to give up a child for adoption that has not yet been conceived. In European countries which do not entirely ban surrogacy, such conventions are usually not enforceable, because surrogacy is contrary to morals, which includes respect for human dignity. Such protection does not exist around the

⁵⁸ Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings; Article 6 of the Convention on the Elimination of all Forms of Discrimination against Women; Article 2a of the Optional Protocol to the Convention on the Rights of the Child on the sale of children; Article 3 of the ILO Convention 182 on the Worst Forms of Child Labour

⁵⁹ See Convention on the Adoption of Children (Revised) preamble, Nov. 27, 2008, C.E.T.S. No. 202 and United Nations Convention on the Rights of the Child (CRC) art. 3

⁶⁰ See Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine art. 14, Apr. 4, 1997, C.E.T.S. No. 164.

⁶¹ Convention on Human Rights and Biomedicine Art. 14; also Parliamentary Assembly of the Council of Europe RES 1829(2011) and REC 1979(2011) on Prenatal Sex Selection

⁶² Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings preamble, art. 1, Jan. 12, 1998, C.E.T.S. No. 168.

⁶³ See *supra* Part I.

⁶⁴ Article 4 of the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption; Convention on the Adoption of Children (Revised) art. 5(5), Nov. 27, 2008, C.E.T.S. No. 202.

⁶⁵ *Id.* at art. 5(2).

world and often, surrogate mothers are not able to withdraw consent once it has been given.⁶⁶ This timeline is contrary to the protections that are ordinarily afforded to mother and child.

Moreover, according to both the Hague Convention and the Council of Europe Convention on adoption, no one shall derive any improper financial or other gain from an activity relating to the adoption of a child⁶⁷. It would be contrary to the dignity of the child, because adoption would become a market. Commercial surrogacy is intrinsically contrary to this provision. It must be recalled that according to Article 2a of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, "sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration".

Difference between adoption and surrogacy

Ultimately, adoption is a decision made by the birth mother based on what is best for her child. In contrast, the decision to obtain a child through surrogacy is a decision made by potential parents whose primary motivating factor is their own desires. In pursuing their desire to become parents through surrogacy, the prospective parents create a scenario with as many as five people that could claim parental rights to a child, without counting the surrogate's husband.⁶⁸ No legal system is equipped to draw distinctions and weigh the rights of five people claiming to be the parent of one child, and any outcome will be complicated and have effects on the child.

Surrogacy 'splits' motherhood and is against the interests of the child

*International law as it currently stands states that "‘father’ and ‘mother’ mean the persons who according to law are the parents of the child."⁶⁹ The "[m]aternal affiliation of every child shall be based solely on the fact of the birth of the child."⁷⁰ Thus, the birth mother is presumed to be the legal mother of the child, in accordance with the Latin saying *Mater semper certa est* ('the mother is always certain').*

In order to protect this principle, countries such as Germany, Italy and Austria ban egg donation. In the case of *S.H. and others v. Austria*, the German Government set out why it bans egg donation and therefore surrogate motherhood.

In its submission to the European Court of Human Rights it said: "The prohibition of egg donation above all pursues the legitimate aim of protecting the child's best interests, as well as protecting the egg donor and the woman to whom the egg cell is to be transferred. *The egg donation changes the biological relationships involved by splitting up the role of the mother, as a*

⁶⁶ *Contra* Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine art. 5, Apr. 4, 1997, C.E.T.S. No. 164 ("The person concerned may freely withdraw consent at anytime.ö).

⁶⁷ Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, Article 32; European Convention on the Adoption of Children (Revised) Article 17, Nov. 27, 2008, C.E.T.S. No. 202.

⁶⁸ *See supra* Part I.A.

⁶⁹ Convention on the Adoption of Children (Revised) art. 5(6), Nov. 27, 2008, C.E.T.S. No. 202.

⁷⁰ Convention on the Legal Status of Children Born out of Wedlock art. 2, Oct. 15, 1975, C.E.T.S. No. 85.

result of which a difference is created between genetic, biological and social motherhood. The prohibition, by contrast, guarantees the unambiguousness of motherhood by preventing a genetic and a biological mother sharing in the creation of a child. It is indisputable that a child's relationship with his mother is exceptionally important in regard to his establishing an identity and developing a personality. In order to enable a child to establish such a relationship, that relationship must be exclusive. Therefore, in the opinion of the German and the Austrian legislature, in the interests of protecting the child's best interests only one woman should be able to have a biological share in a child's existence.ö

2. The European Court of Human Rights and Article 8

The European Court has repeatedly affirmed that öthe very essence of the Convention is respect for human dignity and human freedomö.⁷¹ While the law regulating adoption begins with the best interests of the child, the European Court of Human Rights recognises the relevance of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms to adoption.⁷² Article 8 states, öEveryone has the right to respect for his private and family life, his home and his correspondenceö and prohibits government interference. Litigants asserting parental rights in adoption cases frequently cite Article 8 as a legal basis for relief. Accordingly, Article 8 is particularly relevant in any discussion of surrogacy.

The Court has repeatedly declared that Article 8 does not guarantee the right to adoption. In *E.B. v. France*, the Court

reiterate[d] . . . that the provisions of Article 8 *do not guarantee either the right to found a family or the right to adopt*. . . . The *right to respect for "family life" does not safeguard the mere desire to found a family*;⁷³

Article 8 protects an existing family rather than a hypothetical or desired family. While the issue before the Court was not whether Article 8 confers a fundamental right to adopt, the Court recognised that the right to adopt is önot provided for by domestic law or by other international instruments.ö⁷⁴

This issue is clearly settled in the case-law. The Court in *Wagner and J.M.W.L. v. Luxembourg* asserted that öthe right to adopt was not included as such among the rights guaranteed by the Convention.ö⁷⁵ In *Emonet v. Switzerland*, The Court declared: öIn this context

⁷¹ *Pretty v. the United Kingdom*, 2346/02, 29 April 2002 § 65; *Christine Goodwin v. the United Kingdom*, 28957/95, 11 July 2002, § 90

⁷² See Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, *as amended* June 1, 2010, C.E.T.S. No. 5.

⁷³ *E.B. v. France*, No. 43546/02, § 8-9, ECHR 2008, § 41 (emphasis added).

⁷⁴ *Id.* at § 42, 46.

⁷⁵ *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 119-121, ECHR 2007, (quoting *Fretté v. France*, no. 36515/97, § 29, ECHR 2002-I) (quotations omitted).

the Court reiterates that the right to adoption is not included as such among the rights guaranteed by the Convention, and quoted numerous cases.⁷⁶

Thus, a line of precedent from the European Court of Human Rights holds that Article 8 does not establish a fundamental right to adopt. The Council of Europe must apply this line explicitly to surrogacy.

In *S. H. v. Austria*, the Grand Chamber recently judged that the prohibition of heterologous medically assisted reproduction techniques did not breach the right to private and family life: the Convention does not guarantee a right to in vitro fertilisation with donated ova or sperm. The Court also stated that “the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and has added a new aspect to this issue.”⁷⁷ It is obvious that surrogacy adds even more complexity to the situation.

In *Pini and others v. Romania* “The Court considers that it is even more important that the child’s interests should prevail over those of the parents in the case of a relationship based on adoption, since, as it has previously held, adoption means “providing a child with a family, not a family with a child” (§ 156).

Consistent with case law, the Council of Europe must refuse to grant a fundamental right to obtain a child and strongly affirm that there can be no right to a child, as did the Parliamentary Assembly of the Council of Europe in Recommendation 1443(2000) on International Adoption: Respecting Children’s Rights.

B. Intentionality: A Crucial Difference Between Adoption and Surrogacy

There is a profound difference between adoption and surrogacy. “In treatment for infertility, the aim is to obtain a pregnancy or baby for the infertile parent; in adoption the opposite occurs: the aim is to obtain a family for the baby or child.”⁷⁸ Even though issues of parental rights exist in adoption, the practice was established to ensure the best interest of a child by providing a loving and secure home for a child that would otherwise lack such an upbringing.

In comparison, surrogacy is centred on the desire for the commission adults to have a child who does not yet exist. It is therefore inherently adult-centred in a way adoption is not. It has the purpose of fulfilling the desire of an individual or a couple to be parents. In other words, whereas surrogacy starts with the wishes of adults, adoption starts with the rights of the child.

Contrary to adoption, a surrogacy agreement is concluded not only before the birth of the child, but even before its conception. This is also contrary to the dignity of the child and to PACE Recommendation 1443 (2000) which roundly condemns “the conceiving of children for

⁷⁶ *Emonet v. Switzerland*, 39051/03, 13 December 2007 § 66; cases cited: *Di Lazzaro v. Italy*, no. 31924/96, Commission decision of 10 July 1997, DR 90-B, p. 134; *Fretté v. France*, no. 36515/97, § 32, ECHR 2002-I, and *Pini and others v. Romania* 24 June 2004, § 140; *Emonet* was confirmed in *Gas and Dubois v. France* 25951/07, 15 March 2012

⁷⁷ *S. H. v. Austria*, [GC], 3 November 2011, Ap. 57813/00, § 105

⁷⁸ *Psychological Aspects of Surrogate Motherhood*, *supra* note 2, at 55.

adoption. Moreover, a surrogate mother will likely receive payment for her services whereas the birth mother in an adoption may not receive compensation. The prohibition of gain from activities related to adoption demonstrates a firm policy against financial transactions that involve a human body, for example, acquiring a child by buying the services of a surrogate.⁷⁹ Thus, most surrogacy arrangements, where the mother receives compensation are against public policy.

Surrogacy can easily become a form of exploitation or even trafficking. There are already documented instances of this.⁸⁰ Currently, the Council of Europe adheres to a policy that human trafficking is an offense to the dignity and integrity of the human being and therefore violates the human rights of the victim.⁸¹ Additionally, each nation that ascribed to the Convention on Action against Trafficking in Human Beings is required to legislate in order to discourage the demand that fosters all forms of exploitation of persons, especially women and children⁸² These provisions establish a policy of protection for women and children who are vulnerable to exploitation. In furtherance of this policy, surrogacy should be prohibited because of the exploitation that is inherent in promising a young woman financial benefit for consenting to use her body as a means of producing a child that she agrees to surrender before giving birth. Surrogacy is contrary to human dignity and therefore should not be permitted. Refusal to transcribe the filiation of children obtained through international surrogacy in the civil registry is one of the most effective way of dissuading intending parents from resorting to a surrogate mother abroad.

III. Current Legal Parameters and Case Law

Many countries of Europe realized the dangers of surrogacy agreements and, in pursuit of the best interest of the child, enacted legislation to ban or strictly regulate surrogacy. Germany, Austria, France, Switzerland, Sweden, Norway, Italy and Bulgaria completely prohibit all surrogacy agreements⁸³. Surrogacy agreements are against public policy in those countries. On the other hand, the United Kingdom has differentiated between commercial and altruistic surrogacy agreements and banned all commercial agreements. The reason for the prohibition against commercial surrogacy contracts is that in commercial agreements, the child is treated as a commodity that can only the wealthy can afford. All the countries of Europe should implement restrictions and regulations on surrogacy agreements to promote the best interest of the child.

⁷⁹ See e.g., Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin art. 21, Jan. 24, 2002, C.E.T.S. No. 186 (stating a policy against monetary compensation for organ donations); Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine art. 14, Apr. 4, 1997, C.E.T.S. No. 164 (The human body and its parts shall not, as such, give rise to financial gain).

⁸⁰ See *supra* Part I.B.

⁸¹ Convention on Action against Human Trafficking preamble, May 16, 2005, C.E.T.S. No. 197.

⁸² *Id.* at art. 6.

⁸³ European Parliament, Policy Department, Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU action? PE 432-738, 2010

A- Germany

The German courts read the German Constitution and the German Civil Code to ban all types of surrogacy as against public policy even though the German legislature has not expressly banned surrogacy.⁸⁴ In reaching its holding, the court considered that German law forbids a human from being made the subject of a contract and bans a third party from being used for reproductive purposes. Additionally, Article 1 of the German Constitution protects human dignity as inviolable and charges all state authority to grant human dignity respect and protection.⁸⁵ Finally, the German Civil Code defines a mother as "the woman who gave birth to it."⁸⁶ The Embryo Protection Act prohibits the transfer into a woman of an unfertilized egg cell produced by another woman (Section 1 (1) no 1 of the Act) as well as the artificial fertilization of an egg cell for any purpose other than bringing about a pregnancy in the woman from whom the egg cell originated (Section 1 (1) no 2 of the Act). Based on these principles of law, the court held that surrogacy is not permitted in Germany.

Furthermore, the German courts have taken reasonable measures to ensure that surrogate parenting is not acknowledged. When German couples hire surrogate mothers abroad and later attempt to bring those children into Germany as German citizens, the German courts have denied those requests.⁸⁷ However, instead of denying the children statehood altogether, the German Solicitor General and the courts have allowed couples to adopt the children through the Central Adoption Resources Agency.⁸⁸ By allowing couples to formally adopt their surrogate children before bringing them into the country as citizens, Germany has accommodated the needs of the children and families involved while still keeping its absolute ban on surrogate contracts.

Surrogacy is also prohibited in Austria, where the law on this issue is comparable to that of Germany. Austria refuses the splitting of motherhood between a genetic mother and a carrying mother, which is the case in IVF with ovum donation and surrogacy.

B- France

France has taken one step beyond Germany's position to ensure that surrogacy is prohibited by amending its civil code to specifically forbid all surrogacy agreements. Since 1994, Article 16-7 of the Civil Code simply states, "All agreements relating to procreation or gestation on

⁸⁴ Michael Edwards & Colin Rogerson, *Surrogacy: National Approaches and International Regulation*, FAMILY LAW WEEK (Oct. 20, 2011), <http://www.familylawweek.co.uk/site.aspx?i=ed87773>.

⁸⁵ Grundgesetz Für Die Bundesrepublik Deutschland Grundgesetz GG (Basic Law), May 23, 1949, BGBL. I at art. 1 (Ger.).

⁸⁶ Bürgerliches Gesetzbuch [BGB] [CIVIL CODE], § 1591 Maternity available at http://www.gesetze-im-internet.de/englisch_bgb/.

⁸⁷ See Dhananjay Mahapatra, *German Couple's Surrogate Kids May End up Stateless*, TIMES OF INDIA (Dec. 16, 2009, 3:36 AM IST), http://articles.timesofindia.indiatimes.com/2009-12-16/india/28087928_1_surrogate-children-surrogate-mother-german-couple.

⁸⁸ See Dhananjay Mahapatra, *German Surrogate Twins to Go Home*, TIMES OF INDIA (May 27, 2010, 2:57 AM IST), http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835_1_stateless-citizens-balaz-surrogate-mother.

account of a third party are void.⁸⁹ Before that, the *Cour de Cassation*, the highest court in France, ruled that surrogacy was contrary to the principle of the non-commercialisation of the human body⁹⁰ and to Article 1128 of the civil code, which states that only things of a commercial nature can be the object of conventions.⁹¹

In April 2011, in three different instances, the *Cour de Cassation* held that the birth certificates of children born to surrogate mothers in California and Minnesota could not be transcribed in the French civil registry: their filiation could not be recognized in French law, as surrogacy agreements are contrary to public policy.⁹² The *Cour de Cassation* held that the refusal of transcription did not violate the right to family life nor the best interest of the child. Two of these cases are now pending in the European Court of Human Rights⁹³. The applicants claim that these decisions violate Article 8 of the European Convention on Human Rights (right to private and family life) and are contrary to the best interest of the child. However, the *de facto* situation of these two families is recognised: that is, while the children are not recognised as the children of the commissioning couple, they nonetheless live in France with their social parents just like any other family. The *de facto* situation is recognised administratively: they receive the same family benefits and tax reductions everybody else, and they have social security. Moreover, they are not stateless⁹⁴ and their filiation is recognized in the United States. Refusal to transcribe filiation is one of the only means, and the most effective one, to dissuade people from resorting to a surrogate mother abroad, in violation of French law and public policy. This aims at protecting human dignity and the rights of women and children.

There is another situation in French law when filiation may not be recognized: in case of incest. In case of incest, if filiation with one parent is established, it is forbidden to establish filiation with the second parent by any means (Article 310-2 of the civil code). This is meant to protect public order and morals and dissuade people from having such intercourse. In April 2012, the European Court of Human Rights recognised that sexual relationships between siblings could seriously damage family structures and, as a consequence, society as a whole and unanimously held that criminal liability for incest did not violate Article 8.⁹⁵

⁸⁹ Code Civil [C. CIV.] art. 16-7.

⁹⁰ Cass, Civ. 1, 13 December 1989, 88-15655, « *que ces conventions contreviennent au principe d'ordre public de l'indisponibilité de l'état des personnes en ce qu'elles ont pour but de faire venir au monde un enfant dont l'état ne correspondra pas à sa filiation réelle au moyen d'une renonciation et d'une cession, également prohibées, des droits reconnus par la loi à la future mère ; que l'activité de l'association, qui tend délibérément à créer une situation d'abandon, aboutit à détourner l'institution de l'adoption de son véritable objet qui est, en principe, de donner une famille à un enfant qui en est dépourvu ; que c'est dès lors à bon droit que l'arrêt attaqué a décidé, sur le fondement de l'article 3 de la loi du 1er juillet 1901, que cette association était nulle en raison de l'illicéité de son objet* ». See also : Cass Plén. 31 May 1991, 90-20105

⁹¹ Article 1128 : « *Il n'y a que les choses qui sont dans le commerce qui puissent être l'objet des conventions* ».

⁹² Cass, Civ. 1, 6 April 2011, 09-66486, 10-19053, 09-17130; See John Weltman & Brian Manning, *Information Regarding the April 2011 Cour de Cassation Decision*, CIRCLE SURROGACY (Apr. 14, 2011), <http://www.circlesurrogacy.com/en/component/k2/item/174-memo-menesson-decision>.

⁹³ *Sylvie MENNESSON and others v. France*, 65192/11; *Francis LABASSEE and others v. France*, Ap. 65941/11

⁹⁴ The Mennesson twins are American and Miss Labassee is French. In some case, the child's nationality may be difficult to establish: Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, March 2011, available at <http://www.hcch.net/upload/wop/genaff2011pd11f.pdf>

⁹⁵ *Stübing v. Germany*, 43547/08, 12 April 2012

C- Switzerland

In Switzerland, surrogacy is expressly forbidden by the Federal Act on Medically Assisted Reproduction, which amended the Constitution.⁹⁶ The Constitution regulates the techniques and conditions of medical assistance in conception and specifically forbids Surrogate motherhood in Article 119, which reads, “[T]he donation of embryos and all forms of surrogate motherhood are unlawful.”⁹⁷ Article 31 of the Act provides the punishment for those involved in surrogate motherhood by stating that “[a]nyone who uses an assisted reproductive technique in a surrogate mother shall be liable to a term of imprisonment or to a fine, and [t]he same penalty shall apply to anyone who acts as an intermediary for surrogate motherhood.”⁹⁸ Switzerland’s express ban of surrogacy evinces the strict stance that the country takes on matters of reproductive ethics.

D- Italy

Before 2004, Italy did not have any law or regulation concerning its stance on medically assisted reproduction, including surrogate motherhood. According to the Human Reproduction section of the *Oxford Journal*, the Italian Parliament enacted Law 40/2004 to better regulate medically assisted reproduction techniques.⁹⁹ Specifically, the 2004 law forbids surrogacy and states that “all surrogate mother contracts, which require the surrogate mother to consent to third party adoption of the child following birth and to facilitate the transfer of child custody, are null under the Italian Civil Code (1942, art.1325), because the law views them as being against public policy.”¹⁰⁰ Italy joined the growing list of European countries placing strict regulations on procedures involving human reproduction.

E- United Kingdom

A few countries like Belgium, the Netherlands and Denmark tolerate surrogacy and sometimes set strict conditions. All of them ban commercial surrogacy and deny enforceability to surrogacy agreements. Filiation may be recognised only through adoption. Only two countries in the European Union expressly recognise surrogacy: the United Kingdom and Greece. In Greece, a Court order may be given, under strict conditions, prior to the birth. This poses questions on the right of the surrogate mother to withdraw from the contract especially after the childbirth and the right of the child to access information on his/her origin¹⁰¹.

⁹⁶ Federal Act on Medically Assisted Reproduction 810.11 (Reproductive Medicine Act, RMA) of 18 December 1998 (Jan. 1, 2001) (English translation) available at http://www.admin.ch/ch/e/rs/810_11/index.html#fn3.

⁹⁷ Constitution, Apr. 18, 1998, art. 119, para. 2(d) (Switz.) (English translation), available at <http://www.admin.ch/ch/e/rs/1/101.en.pdf>.

⁹⁸ Federal Act on Medically Assisted Reproduction 810.11 (Reproductive Medicine Act, RMA) of 18 December 1998 (Jan. 1, 2001) (English translation) available at http://www.admin.ch/ch/e/rs/810_11/index.html#fn3.

⁹⁹ Andrea Boggio, *Italy Enacts New Law on Medically Assisted Reproduction*, 20 OXFORD J. HUM. REPROD., 1153 (2005), available at <http://humrep.oxfordjournals.org/content/20/5/1153.full>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* P. 20

The United Kingdom accepts surrogate motherhood since 1985 and modified its right of filiation in this regard. The Human Fertilisation and Embryology Act of 2008 allows couples that desire to have children by way of a surrogate to obtain legal parenthood through a parental order which modifies the birth certificate.¹⁰² The court must ensure the mother has given her consent freely, more than six weeks after giving birth. If the surrogate mother changes her mind, she cannot be forced to surrender the child: “No surrogacy arrangement is enforceable by or against any of the persons making it”, according to Section 1A of the Surrogacy Arrangements Act, as modified by the Human Fertilisation and Embryology Act 1990. Section 54 of the Human Fertilisation and Embryology Act 2008 sets out the requirements or criteria that contracting parents must meet to obtain a parental order.¹⁰³ Section 59 of the Act allows for “reasonable payment”, meaning “a payment not exceeding the body’s costs reasonably attributable to the doing of the act”, to be paid to a surrogate mother for carrying the child. It amends section 2 of the Surrogacy Arrangements Act 1985 but does not suppress the ban on commercial surrogacy. However, when desiring parents make payments that go beyond reasonable expenses to surrogate mothers overseas, the courts have approved of them.¹⁰⁴ For example, the High Court of Justice Family Division awarded parenthood rights to a British couple who entered into a commercial surrogacy arrangement overseas even though commercial surrogacy is illegal in the United Kingdom.¹⁰⁵ Although the country’s legislation strives to prevent children from becoming a commodity, it appears that in practice it is difficult to distinguish and that authorising non-commercial surrogacy leaves the way open to all sorts of abuses.

Conclusion

Though many issues of human trafficking and exploitation have received international attention, some, like surrogacy, have been overlooked. Surrogacy commodifies both the surrogate mother and resulting baby, resulting in exploitation of the surrogate and a parental situation that is not in the best interest of the child. As news stories about illegal surrogacy rings continue to break, we are learning that they are, indeed, just the tip of the iceberg. Even surrogacy arrangements that seem to be voluntary and motivated by altruistic ideals are, when one is willing to look beneath the surface, a violation of the human dignity of mother and child. Surrogacy inherently transforms a woman’s body into a “bread oven”, a commodity, to be used and cared for while it is useful, and to be forgotten once the “contract” is fulfilled. Several countries have already taken steps to significantly limit or ban surrogacy. To maintain consistency with the principles embodied in international and European law, especially the Convention on the Rights of the Child and its second protocol, the Convention on the Adoption of Children (Revised), and the decisions of the European Court of Human Rights, we recommend the Ireland follow many other European countries by prohibiting surrogacy.

¹⁰² Edwards & Rogerson, *supra* note 95.

¹⁰³ See Human Fertilisation and Embryology Act, 2008, c. 22, § 54, available at <http://www.legislation.gov.uk/ukpga/2008/22/contents>.

¹⁰⁴ See Michael Edwards & Colin Rogerson, *supra* note 95.

¹⁰⁵ Re: X & Y, [2008] EWHC 3030, No. FD08P01466, available at <http://www.nataliegambleassociates.co.uk/assets/assets/Re%20X%20and%20Y%202008.pdf>