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# NOTES

## INTERNATIONAL, COMMERCIAL, GESTATIONAL SURROGACY THROUGH THE EYES OF CHILDREN BORN TO SURROGATES IN THAILAND: A CRY FOR LEGAL ATTENTION

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*What's clear is while one culprit's been exposed, there will always be another rogue operator, new sets of parents desperate to have children, and a willing supply of surrogates trying to better their own lives. And when this pattern plays out around the world in developing countries with next to no regulation, there are very few winners.<sup>1</sup>*

#### INTRODUCTION

In recent decades, increased demand for alternative methods of reproduction has resulted in the creation and growth of international, commercial, gestational surrogacy arrangements, where intended parents in one country pay a surrogate mother in another to birth a child who has no genetic ties to the surrogate mother. However, this widespread and somewhat concentrated growth has not been seamless. To date, international surrogacy has been plagued by many of the same ethical and legal injustices that once characterized under-regulated, pre-Hague Convention international adoption. Scandals exposing these injustices led many countries that once allowed

<sup>1</sup> Jane Cowan, *Foreign Correspondent: The Last Resort*, AUSTL. BROAD. CORP. (Aug. 7, 2014), <http://www.abc.net.au/foreign/content/2014/s4041808.htm> [<http://perma.cc/J8AR-XA4F>].

unfettered international surrogacy arrangements to create burdensome regulatory schemes or to ban the practice entirely. As certain countries were effectively removed as viable options for the international surrogacy market, other countries have become the new surrogacy epicenters.

Following the implementation of exclusionary regulation in India, Thailand arguably became the most popular epicenter for international surrogacy, described by some as the “womb of Asia.”<sup>2</sup> Thousands of couples from around the world traveled to Thailand to hire women to carry their children. Eventually, this influx resulted in a series of scandals stemming out of the largely unregulated industry. In July 2014, a baby boy—“Baby Gammy”—with Down syndrome and heart and lung defects was born as the result of a surrogacy arrangement between an Australian couple and a Thai surrogate.<sup>3</sup> Gammy’s intended Australian parents abandoned him in Thailand because of these developmental defects, leaving his impoverished surrogate mother to provide care for him.<sup>4</sup> The couple returned to Australia with Gammy’s healthy twin sister.<sup>5</sup> Outrage over Baby Gammy’s abandonment provoked international criticism of not only his intended parents, but also of Thailand’s officials, for allowing such an unregulated industry to survive. Consequently, the military junta in Thailand banned all forms of international, commercial, gestational surrogacy, effective as of July 2015.<sup>6</sup>

This Note attempts to alert the American legal community to the great threat posed by the operation of the currently under-regulated international commercial surrogacy industry through an in-depth case study of the Baby Gammy scandal specifically, and international surrogacy in Thailand generally. Thailand represents the epitome of the dangers, both past and present, associated with international commercial surrogacy. Where once the practice was rampant and unregulated, today it is banned completely. As such, the state of affairs in Thailand highlights not only the dangers of the surrogacy industry when under-regulated, but also the issues associated with remedial prohibition in lieu of regulation. Part I provides a history of international

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<sup>2</sup> E.g., *Thailand Bans Commercial Surrogacy for Foreigners*, BBC NEWS (Feb. 20, 2015), <http://www.bbc.com/news/world-asia-31546717> [<http://perma.cc/L6PQ-WJAK>].

<sup>3</sup> See Bridie Jabour, *Baby Gammy: Conflicting Reports about Baby Boy ‘Abandoned’ in Thailand*, GUARDIAN (Aug. 4, 2014, 1:39 PM), <http://www.theguardian.com/world/2014/aug/04/baby-gammy-conflicting-reports-about-baby-boy-abandoned-in-thailand> [<http://perma.cc/28NQ-MXAA>]; see also Thomas Fuller, *Thailand’s Business in Paid Surrogates May Be Foundering in Moral Quagmire*, N.Y. TIMES (Aug. 26, 2014), [http://www.nytimes.com/2014/08/27/world/asia/in-thailands-surrogacy-industry-profit-and-a-moral-quagmire.html?\\_r=0](http://www.nytimes.com/2014/08/27/world/asia/in-thailands-surrogacy-industry-profit-and-a-moral-quagmire.html?_r=0) [<https://perma.cc/G9RF-WN7F>].

<sup>4</sup> Jabour, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Law Banning Commercial Surrogacy Takes Effect Thursday*, BANGKOK POST (July 29, 2015), <http://www.bangkokpost.com/news/general/637960/law-banning-commercial-surrogacy-takes-effect-thursday> [<https://perma.cc/9ZUM-7LLV>] [hereinafter *Law Takes Effect*].

commercial surrogacy. Part II analyzes the overriding policy concerns and interests associated with each of the parties to an international commercial surrogacy arrangement. Part III provides a historical analysis of commercial gestational surrogacy in Thailand specifically. Part IV analyzes the recent Baby Gammy scandal in detail, and provides the current state of the law in Thailand, focusing in detail on the recently passed Protection of Children Born from Assisted Reproductive Technologies Bill B.E. (“ARTs Bill”).<sup>7</sup> This bill is Thailand’s national attempt to remedy its unregulated commercial surrogacy industry. Part V first discusses why regulatory, not prohibitive, remediation could (and should) take place. Part V then briefly summarizes proposed regulatory approaches to address international commercial surrogacy, highlighting the most promising forums through which to begin remedying the intolerable social and legal injustices discussed throughout this Note.

## I. HISTORY OF SURROGACY AND ITS EVOLUTION

### A. *Key Definitions and Background*

Surrogacy, though just recently making headlines, is a practice that dates back in its traditional form to biblical times.<sup>8</sup> Traditional surrogacy occurs when the surrogate mother is both the child’s genetic and gestational mother.<sup>9</sup> In more technical terms, traditional surrogacy is “where the surrogate woman’s own egg is fertilized with the intended father’s sperm . . . .”<sup>10</sup> Gestational surrogacy, in contrast, occurs when the surrogate mother is solely the child’s gestational, and not genetic, mother.<sup>11</sup> Technically, gestational surrogacy is where an “embryo is created from the gametes of the intended parents or those of donors”<sup>12</sup> and the fertilized embryo is then implanted into the surrogate mother, who carries the child to term.<sup>13</sup> Gestational surrogacy became possible

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<sup>7</sup> Though the ARTs Bill is formally referred to as the Law to Protect Children Born via Assisted Reproductive Technology, this Note will refer to it as the ARTs Bill for consistency and readability.

<sup>8</sup> Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 509-10 (2010) (“The practice of surrogacy dates back to biblical times when infertile women gave their handmaids to their husbands in order to provide their spouses with offspring.”); see also *Genesis* 16:1-4 (discussing the exchange between husband and wife Abram and Sarah, in which Sarah instructs Abram to sleep with her servant because Sarah is unable to bear a child herself); *Genesis* 30:1-13 (describing Jacob’s sexual relations with the servants of Rachel and Leah, who were both infertile).

<sup>9</sup> 1 HEALTH L. PRAC. GUIDE § 15:8 (2015).

<sup>10</sup> Tina Lin, Note, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT’L & COMP. L. 545, 550 (2013).

<sup>11</sup> See *id.* at 550-51.

<sup>12</sup> *Id.*

<sup>13</sup> Patton, *supra* note 8, at 511. There are several options in forming the fertilized embryo to be implanted in gestational surrogacy including: (1) using the intended mother’s egg and

just within the past few decades, due to the advent of assisted reproductive technology (“ART”).<sup>14</sup> Moreover, it has only become regularized even more recently, in the 1990s.<sup>15</sup> There are two types of gestational surrogacy: (1) “altruistic,”<sup>16</sup> where the intended parent(s) does not compensate the surrogate, often a relative, beyond her medical expenses; and (2) “commercial,”<sup>17</sup> where the intended parent(s) compensates the surrogate, often a stranger, beyond her medical expenses.

ART, once a mystery of the future, has become a viable and increasingly popular option for individuals as a result of advanced biotechnology, medicine, and demand.<sup>18</sup> Similarly, “it would have required significant imagination to predict that, eventually, embryos would be implanted in foreign women in faraway lands, with the resulting children being brought back to the United States”—though this is now possible through the practice of international commercial surrogacy.<sup>19</sup> Typically, intended parents contact an agency or recruiter who matches the intended parents with a viable surrogate.<sup>20</sup> A number of scholars highlight the role of international commercial surrogacy in the advent of “reproductive tourism,” where individuals achieve reproductive goals by entering and utilizing foreign nations.<sup>21</sup> Overall, modern

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the intended father’s sperm; (2) using the intended mother’s egg and a donor’s sperm; (3) using a donor’s egg and the intended father’s sperm; and (4) using both donor sperm and donor egg to fertilize the implanted embryo. *Id.*

<sup>14</sup> See Lin, *supra* note 10, at 550; Patton, *supra* note 8, at 510.

<sup>15</sup> April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 258 (2014) (“[S]ince the 1990s, we have seen the development of surrogacy, including gestational surrogacy, and the increasing normalization and globalization of its practice.”).

<sup>16</sup> See Anastasia Grammaticaki-Alexiou, *Artificial Reproduction Technologies and Conflict of Laws: An Initial Approach*, 60 LA. L. REV. 1113, 1115 (2000); Lin, *supra* note 10, at 551.

<sup>17</sup> See Patton, *supra* note 8, at 512.

<sup>18</sup> See Grammaticaki-Alexiou, *supra* note 16, at 1114 (“More and more couples as well as single persons find the answer to their prayers [to have children] in medical laboratories.”); Patton, *supra* note 8, at 510. ART offers three primary methods: artificial insemination, in vitro fertilization (“IVF”), and surrogate motherhood. Grammaticaki-Alexiou, *supra* note 16, at 1114. This Note, however, will focus solely on surrogate motherhood.

<sup>19</sup> Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1009 (2010).

<sup>20</sup> See Cherry, *supra* note 15, at 263.

<sup>21</sup> See, e.g., *id.* at 258-59; see also Lin, *supra* note 10, at 553 (“The practice of travelling to a foreign country for the purpose of utilizing its medical reproductive services is commonly referred to as ‘medical tourism,’ and may be more specifically referred to as ‘surrogacy tourism,’ ‘fertility tourism,’ or ‘reproductive tourism.’”). Cross-border fertility care (“CBFC”) is another term used to describe the concept of reproductive tourism. Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL’Y 349, 351 (2012) (“CBFC

communication, technology, and travel have facilitated intended parents' access to both international commercial surrogacy and reproductive tourism in recent decades.<sup>22</sup>

B. *Why Choose Surrogacy?*

As mentioned, surrogacy has been practiced since biblical times as a means for an infertile woman to create a family of her own.<sup>23</sup> While infertility remains a motivator for choosing gestational surrogacy today, it is no longer the sole motivator.<sup>24</sup> While some studies suggest that infertility remains a driving force in the growing popularity of gestational surrogacy, and indicate that as many as ten percent of Americans are infertile,<sup>25</sup> the frequency of infertility today results from causes other than genetic deficiencies.<sup>26</sup> Social trends emphasize women's early career development to mitigate workplace disadvantages, and delayed family planning may result in higher rates of infertility.<sup>27</sup> Researchers predict a further increase in infertility rates as a result of these professional demands on females and predict an increasingly widespread belief "that assisted reproduction might resolve any subsequent fertility problems."<sup>28</sup> Additionally, comprehensive international regulation of adoption has resulted in a number of couples opting for more liberally regulated gestational surrogacy as a means of achieving reproductive goals.<sup>29</sup>

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refers to individuals who travel from their home countries to access assisted reproductive technology (ART) to facilitate the process of creating a pregnancy where coital reproduction has failed or is otherwise not an option.").

<sup>22</sup> See Mutcherson, *supra* note 21, at 351 (discussing "ever-advancing techniques" as an impetus for growth in CBFC); Lin, *supra* note 10, at 553 (attributing increased reproductive tourism in part to advanced communication and travel).

<sup>23</sup> See, e.g., *Genesis* 30:1-13; see Patton, *supra* note 8, at 509-10 (describing infertile biblical females' solicitation of their fertile handmaids as a means of providing the infertile women offspring).

<sup>24</sup> See Cherry, *supra* note 15, at 258 (referring to gestational surrogacy as even being "the preferred method of family building" by some); Ryznar, *supra* note 19, at 1023 ("However, a couple occasionally commissions surrogacy not because of infertility, but because of avoidance of pregnancy for career or other personal reasons.").

<sup>25</sup> Ryznar, *supra* note 19, at 1024.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1024-25.

<sup>28</sup> *Id.* at 1025.

<sup>29</sup> See Lin, *supra* note 10, at 546 (describing a gay couple in Belgium that was "frustrated by the administrative difficulties of adoption and turned to surrogacy"); Patton, *supra* note 8, at 512 ("However, since it has become increasingly difficult for infertile couples to obtain children through the adoption process, more couples are turning to commercial gestational surrogacy as a means to achieve their desired end."). Moreover, global cultural trends based upon a preference for "genetic relationships over other types of relationships that constitute the human experience" may also explain the choice of surrogacy over adoption. Cherry, *supra* note 15, at 258; see also Patton, *supra* note 8, at 512 (claiming many infertile couples

C. *Why Choose International Commercial Surrogacy?*

Global medical tourism, fueled by the desirability of commercial gestational surrogacy, has both monetary and non-monetary incentives.<sup>30</sup> Even if one's home country does permit access to gestational surrogacy, an individual may nonetheless opt for international surrogacy because the service is unaffordable domestically.<sup>31</sup> Conversely, non-economic incentives can be summarized in one term encompassing numerous definitions: "unavailability."<sup>32</sup> The answer to *why* commercial gestational surrogacy is domestically unavailable to a particular individual often varies depending on cultural, social, and medical standards:

These inducements or motivations include situations where the patient belongs to a category of patients ineligible for a given procedure, or the treatment may be immoral or unlawful in the patient's home country. For example, in some countries, gay and lesbian singles and couples are not eligible for artificial insemination, in vitro fertilization, or surrogacy. An additional non-economic factor that drives global commercial surrogacy is the ability of doctors, clinics, and the intended parents to surveil and control the gestating women.<sup>33</sup>

Finally, even if commercial surrogacy is available in their home country, many individuals indicate that their decision to pursue an international arrangement was influenced by different legal processes and ramifications.<sup>34</sup>

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opt for surrogacy because they have "a natural desire to reproduce"); Trisha A. Wolf, Comment, *Why Japan Should Legalize Surrogacy*, 23 PAC. RIM L. & POL'Y J. 461, 476 (2014) (addressing the stigma associated with adoption in Japanese culture).

<sup>30</sup> Cherry, *supra* note 15, at 259-60 (explaining that medical tourism developed as a solution to "the unavailability or the unaffordability of the desired service at home"); Ryznar, *supra* note 19, at 1011 (describing individuals' desires for "the best surrogacy prices and conditions" as a motivator for reproductive tourism).

<sup>31</sup> See Cherry, *supra* note 15, at 261 ("In fact, surveys of people who travel internationally for reproductive services indicate that cost is a significant factor in their decision to access reproductive materials and services in a foreign country.").

<sup>32</sup> See *id.*; Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120, 125 (2012) (describing other forms of unavailability regarding particular procedures or processes, namely sex selection and binding contractual surrogacy agreements).

<sup>33</sup> Cherry, *supra* note 15, at 261 (footnotes omitted).

<sup>34</sup> See Ryznar, *supra* note 19, at 1011 ("Forum shopping has also been facilitated by the differences among jurisdictions' legal and policy approaches to surrogacy."); Andrea Whittaker, *Merit and Money: The Situated Ethics of Transnational Commercial Surrogacy in Thailand*, 7 INT'L J. OF FEMINIST APPROACHES TO BIOETHICS, 100, 101 (2014); Davis, *supra* note 32, at 125-26 (discussing India as a popular location for reproductive tourism because of its "lax regulations"); Patton, *supra* note 8, at 529 ("Currently, surrogacy agencies may selectively choose those nations that are conducive to commercial surrogacy arrangements.").

This concept of legal “forum-shopping” will be discussed in greater detail in Part II regarding policy concerns.

D. *The Global Legal Approach to International Commercial Surrogacy*

“Interestingly, while most legal systems around the world have sought to uniformly outlaw or heavily regulate other markets wherein humans or their parts are bought and sold—including human trafficking, embryo trafficking, prostitution, and internal organ selling—they have not yet done so with surrogacy.”<sup>35</sup> While several countries fail to explicitly address the legality of surrogacy, those that do tend to permit altruistic, but not commercial, surrogacy.<sup>36</sup> This may be a reflection of the law slowly catching up to biomedical technology advancements in recent decades, requiring regulation of the new international commercial surrogacy industry.<sup>37</sup> Countries where the performance of commercial surrogacy is prohibited include Brazil, Greece, Holland, South Africa, the United Kingdom, Switzerland, Germany, Spain, France, Norway, Australia, and most recently, Thailand and Nepal.<sup>38</sup>

Further division exists between countries such as the United Kingdom and parts of Australia that allow their citizens to obtain commercial surrogacy abroad, and those like Spain that prohibit commercial surrogacy both domestically and abroad.<sup>39</sup> Commercial surrogacy is nevertheless legal in several countries, including parts of the United States and Mexico, Ukraine, Russia, Georgia, India, and Israel.<sup>40</sup> Some of these countries, however, place

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<sup>35</sup> Ryznar, *supra* note 19, at 1011.

<sup>36</sup> See Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2259-60 (2012).

<sup>37</sup> See Grammaticaki-Alexiou, *supra* note 16, at 1113 (“And while medicine and biotechnology are running at a high speed, the law crawls on all fours, sweating and struggling to catch up. Due to this scientific progress, new situations occur, and it is rather doubtful whether old legal rules can successfully regulate certain problems that were unimaginable in the past.”).

<sup>38</sup> See Mortazavi, *supra* note 36, at 2270-71; Patton, *supra* note 8, at 523; Nick Grimm, *Australian Babies and Embryos in Legal Limbo in Nepal as Commercial Surrogacy Clinics Shut Down*, AUSTL. BROAD. CORP. (Oct. 6, 2015, 12:15 PM), <http://www.abc.net.au/worldtoday/content/2015/s4325857.htm> [<http://perma.cc/9Q92-AZ38>] (reporting on legal ramifications of Nepal’s ban effective as of fall 2015); *Law Takes Effect*, *supra* note 6.

<sup>39</sup> Compare Davis, *supra* note 32, at 125 (contrasting the legal status of commercial surrogacy in the United Kingdom with that in Spain), with Billy Adams, *Dark Side of Fertility Tourism Exposed*, N.Z. HERALD (Aug. 9, 2014, 11:03 AM), [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=11306500](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11306500) [<http://perma.cc/R2HG-AFRH>] (explaining that residents of Western Australia can legally travel abroad for commercial surrogacy services, whereas doing so is illegal for residents of New South Wales).

<sup>40</sup> See Mortazavi, *supra* note 36, at 2272; Patton, *supra* note 8, at 525; Adams, *supra* note 39.

restrictions on access to otherwise legal commercial surrogacy. For example, India and Israel bar gay individuals' access to commercial surrogacy.<sup>41</sup>

## II. POLICY CONCERNS REGARDING PARTIES' INTERESTS IN COMMERCIAL SURROGACY ARRANGEMENTS: SIMULTANEOUSLY COLLABORATING AND COMPETING

The complexity surrounding international commercial surrogacy cannot be attributed solely to variation among legal forums; the competing interests of all parties to the arrangement further complicate the issue.<sup>42</sup> The primary parties are the intended (or commissioning) parents, the surrogate mother, and the resulting child.<sup>43</sup> Furthermore, both the country in which the surrogate birth occurs and the receiving country to which the intended parents and resulting child intend to return serve as secondary parties in these arrangements.<sup>44</sup>

### A. *Intended Parents*

The intended parents' principal interest in any assisted reproductive arrangement is self-evident: producing a child. For some, this interest statement is sufficient; for others, this statement should be qualified to read producing *only a healthy child*. In this second scenario, intended parents expect to be able to contract for control over whether a surrogate will, for example, abort. The intended parents may desire an abortion because they are dissatisfied with the fetus's discovered characteristics, or perhaps because the relationship between the parents has broken down.<sup>45</sup> The surrogate mother, however, may also desire an abortion for a number of reasons, such as: no longer wanting to be a surrogate; believing that a threatened abortion could be a bargaining chip to receive more money from the intended parents in exchange for carrying the child to term; or even personal health concerns regarding the physical consequences of the commissioned pregnancy.<sup>46</sup>

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<sup>41</sup> Gavriel Fiske, *65 Surrogate Babies Born to Israeli Gay Couples Stuck in Thailand*, TIMES OF ISR. (Jan. 19, 2004), <http://www.timesofisrael.com/65-surrogate-babies-born-to-israeli-gay-couples-stuck-in-thailand/> [<http://perma.cc/788G-MFFF>]; Kerri Ritchie, *Concern as Australians Turn to Thailand for Surrogates*, AUSTRAL. BROAD. CORP (Apr. 13, 2013, 2:14 AM), <http://www.abc.net.au/news/2013-04-13/thai-surrogacy-concerns/4624388> [<http://perma.cc/4ZY8-PVGE>].

<sup>42</sup> See Lin, *supra* note 10, at 548 (explaining that a remedy to the issues created by international commercial surrogacy is "impeded by the need to balance the competing interests of various parties").

<sup>43</sup> See Ryznar, *supra* note 19, at 1022; Lin, *supra* note 10, at 548-49.

<sup>44</sup> See Lin, *supra* note 10, at 548-49 (describing the conflicting interests of the birth and receiving countries that often have differing national laws aimed at protecting their respective citizens and garnering respect for their governments).

<sup>45</sup> See Ryznar, *supra* note 19, at 1025-26, 1033.

<sup>46</sup> See *id.* at 1025.

Further, the process by which intended parents obtain custody is another source of divergence in policy, as well as a factor in forum selection.<sup>47</sup> For example, countries with uterocentric custody approaches, in which the surrogate mother has legal custody at birth, require a timely and costly parental rights transfer process that is undesirable to intended parents.<sup>48</sup> Consequently, many of the most popular commercial surrogacy destinations are those with policies that favor the intended parents, especially regarding custody of the resulting child.<sup>49</sup> Lawmakers have sought to eliminate this source of legal complexity through such measures as the shift from the uterocentric definition of motherhood, a tenet of Thai culture (among others), to automatic legal recognition of the intended parents' rights over the resulting child—as under the recently enacted ARTs Bill.<sup>50</sup> While not at the forefront of international commercial surrogacy policy debates, the intended parents' interests are still the basis for plenty of the forum shopping underlying the need for international regulation of the industry.

#### B. *Surrogate Mother*

The most polarized views about the parties in international commercial surrogacy arrangements are those regarding women's involvement as surrogate mothers. Some commentators praise the commercial surrogacy industry for providing surrogates with autonomy, while others criticize it for exacerbating the oppression of impoverished women.<sup>51</sup> Surrogate mothers themselves reflect this same sort of polarization—some describe their involvement enthusiastically as a *choice*, while others describe their involvement resentfully as the result of having a *lack of choices*.<sup>52</sup> In general, however, the primary

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<sup>47</sup> See Wolf, *supra* note 29, at 486 (discussing the issue of diverting Japanese intended parents to the surrogacy industry in Thailand, rather than in the United States or India, because of its uterocentric approach that “heightens the probability of intended parents having difficulties asserting their parental rights”).

<sup>48</sup> See *infra* note 108 and accompanying text (describing the difficult process required under Thai law to transfer parental rights from the surrogate mother to the intended parents).

<sup>49</sup> See Cherry, *supra* note 15, at 263 (“The most popular destinations are jurisdictions with few or no applicable regulations, and those with rules favorable to the individual contracting for the gestation for custody of the resulting child.”).

<sup>50</sup> See Whittaker, *supra* note 34, at 108 (“Significantly, for commissioning parents, section 27 of the draft surrogacy law removes the ambiguity over the parentage of a child born of surrogacy arrangements.”).

<sup>51</sup> See, e.g., Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L.J.* 665, 671 (2012) (discussing the risk of exploitation and continuation of gender hierarchies proliferated by the international commercial surrogacy industry); Cherry, *supra* note 15, at 274, 280 (juxtaposing differing views including liberal acceptance of commercial surrogacy for its autonomous characteristics with concerns of reinforcing oppressive gender and racial hierarchies).

<sup>52</sup> See Andrea Whittaker, *Patriarchal Bargains and Assisted Reproductive Treatment in Thailand*, 18 *GENDER, TECH. & DEV.* 9, 26 (2014) (“As in other parts of the world, Thai

interest of surrogate mothers is payment, with only a small number of women repeatedly acting as surrogates primarily out of compassion for the intended parents.<sup>53</sup> The surrogate mother's interest in being paid for her labor, regardless of whether the pregnancy results in a healthy child, can be directly incompatible with the aforementioned principal interest of some intended parents in producing only a healthy child. The Baby Gammy scandal perfectly illustrates this conflict of interests because the intended parents not only took custody of the "healthy" twin, leaving behind the child with developmental defects, but also because they allegedly withheld the surrogate mother's payments and demanded a refund from the surrogacy agency.<sup>54</sup>

#### 1. International Commercial Surrogacy Praised as a Choice for Women

Women's autonomy is the basis for policy arguments favoring females' unfettered ability to serve as commercial surrogates.<sup>55</sup> Meanwhile, liberalism is the political philosophy associated with accepting international commercial surrogacy as a means to empower women and to advance their autonomy.<sup>56</sup> Thus, women's autonomy is often described in terms of reproductive liberalism: a woman exercising her right to contract with anyone, for anything—even her reproductive abilities.<sup>57</sup> Contractual autonomy is viewed as a natural extension of the reproductive liberties already protected in many nations, such as the right to an abortion or contraception.<sup>58</sup>

Oprah Winfrey, a prominent female icon, has described surrogacy as women helping other women, indicating a surrogate mother's positive *choice* to exercise compassion and benefit emotionally from helping another woman.<sup>59</sup> Some feminists provide further support for women's unrestricted choice to

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women resort to assisted reproductive treatments with varying degrees of enthusiasm, and for differing reasons. Many women are willing participants, but . . . others speak with ambivalence and resentment about the choices they have made or the lack of choices they experience.”).

<sup>53</sup> See, e.g., Cherry, *supra* note 15, at 264; Wolf, *supra* note 29, at 487 (enumerating the primary reasons for Thai women to become surrogates: “to pay for their education, to pay off debts, or to support their families”).

<sup>54</sup> See *infra* Section IV.B.

<sup>55</sup> See, e.g., Cherry, *supra* note 15, at 273 (discussing the value of personal autonomy from a political and bioethical standpoint, naturally imposing a value of autonomy in reproductive rights and technology debates). Though many feminist and liberal groups make this argument in favor of pure reproductive autonomy, the more common policy approach regarding surrogates' rights is that of concern and a need for increased protection through restrictions on the ability to serve as a surrogate. See *infra* Section II.B.2.

<sup>56</sup> See Cherry, *supra* note 15, at 274 (describing the fundamental liberal principle that a state must protect the autonomy of its individuals).

<sup>57</sup> See *id.* (“All forms of reproductive tourism are supported by reproductive liberalism.”).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 263.

serve as surrogates because it results in increased fertility options for all women.<sup>60</sup> Finally, commercial surrogates themselves, in Thailand for example, have expressed an appreciation for the ability to serve as a surrogate, even when they are not economically desperate, because it provides additional funds to improve their standard of living.<sup>61</sup> Overall, however, praising surrogacy as a means for a surrogate mother's assertion of power over her physical body and ability to contract is not the leading approach to surrogates' rights in international commercial surrogacy arrangements.

2. International Commercial Surrogacy Criticized as a Reversion to the Oppression and Exploitation of Women

The overriding view on surrogacy with respect to surrogate mothers' involvement, rather than praise, is one of grave concern. The primary reasons for this concern are the potentially negative physical and psychological effects of pregnancy and the potential for multi-faceted exploitation. The principal physical health concerns that commentators note are the basic health risks associated with pregnancy, heightened risks associated with recurring pregnancies, and postpartum depression "being complicated by the relinquishment of the child."<sup>62</sup> Psychological concerns relate to the emotional difficulty women may naturally experience upon relinquishment of a child they have gestated for nine months.<sup>63</sup> Finally, the potential for exploitation of surrogate mothers underlying international commercial surrogacy has gender, economic, and racial bases.

a. *Reinforcement of Gender and Economic Hierarchies, Commodification of Women, and Feminization of Survival*

Oppressive social and gender hierarchies asserting a man's power over a woman in the domestic sphere are amplified by the organization of several existing international commercial surrogacy laws. In Thailand, for example, under both the past "regulation" and the recently enacted ARTs Bill, a surrogate mother must have signed consent from her husband permitting her to serve as a surrogate.<sup>64</sup> Accordingly, Thai surrogates have described "reproductive treatment [as] the time when they become most keenly aware of their unequal position and status as women, and the power relations in their

<sup>60</sup> See Ryznar, *supra* note 19, at 1028.

<sup>61</sup> See Yuri Hibino & Yosuke Shimazono, *Becoming a Surrogate Online: "Message Board" Surrogacy in Thailand*, 5 *ASIAN BIOETHICS REV.* 56, 63 (2013) (describing a surrogate mother's ability to live within her current income, but her desire to improve her own mother's living conditions with the otherwise unnecessary surrogacy funds).

<sup>62</sup> Ryznar, *supra* note 19, at 1029-30.

<sup>63</sup> See *id.* at 1030.

<sup>64</sup> Bill of Protection of Children Born from Assisted Reproductive Technologies Act. B.E., Subject No. 167/2553, trans. Chaninat & Leeds Co., Ltd. (2014), available at <http://www.thailawforum.com/thailand-draft-surrogacy-law/> [<http://perma.cc/C6ZZ-8TJH>].

matrimonial ties with their husbands and families.”<sup>65</sup> Further, individual surrogate mothers are seen as being deprecated to nothing more than “a means of production,” seen as a disposable part of a contractual arrangement which could easily be replaced with another willing surrogate.<sup>66</sup> Scholars have even voiced concern that surrogates themselves reinforce gender hierarchies by emphasizing the morality and generosity of their husband and family in their “choice” to be surrogates to preemptively rebut the stigma associated with surrogate motherhood.<sup>67</sup>

Globalization has contributed to the glorification of the service of poor women as surrogates for wealthier women, when in reality this is often not a choice, but an act of desperation.<sup>68</sup> Globalization has also further exacerbated the sense of a duty owed by a woman to her family via “the feminization of survival [that] represents an established practice wherein families are increasingly dependent upon women for their economic survival.”<sup>69</sup> Thailand, for example, has a lurid history of industries dependent upon the exploitation of women.<sup>70</sup> First, export-led industries, such as garments and textiles, were “based on the subordination of women and the exploitation of a cheap, available, single, young female workforce.”<sup>71</sup> Later, tourism fueled by the underground sex industry was similarly based on the availability of female bodies.<sup>72</sup> Finally, the growth of the commercial surrogacy industry in Thailand represents “particular gendered ideologies of the nature of women’s work and roles and . . . the mobilization of young women’s bodies as bioavailable sources of intimate labor.”<sup>73</sup> Commentators’ commodification concerns underlying commercial surrogacy have been summarized as follows:

It is an institutional practice that requires a level of female disembodiment not present in other forms of employment besides sexual prostitution. It is the use of women’s bodies primarily for the benefit of others. Moreover, it is uncontested that the process of global commercial surrogacy is one in which the bodies of women are commercialized; the reproductive capacities of their bodies are sold for the benefit of others.<sup>74</sup>

This dependency on women is not only promulgated by the domestic sphere, however, but also by state dynamics that encourage increased women’s labor,

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<sup>65</sup> Whittaker, *supra* note 52, at 26.

<sup>66</sup> See Cherry, *supra* note 15, at 271 (“[S]urrogates are reminded by the clinic doctor and others that they are merely uteruses and, as ‘merely a womb,’ she is disposable.”).

<sup>67</sup> See Brugger, *supra* note 51, at 671.

<sup>68</sup> See, e.g., Cherry, *supra* note 15, at 268.

<sup>69</sup> *Id.* at 267.

<sup>70</sup> Whittaker, *supra* note 34, at 106.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Cherry, *supra* note 15, at 280 (footnote omitted).

in both licit and illicit institutions.<sup>75</sup> Despite the lack of an international treaty on commercial surrogacy, several international treaties protect women's rights, and should be applied to remedy these concerns where applicable. That is, treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights should be enlisted to protect women's rights to a family, adequate healthcare, and reproductive autonomy.<sup>76</sup>

b. *Exploitation of Economically Vulnerable Racial Minorities through the Proliferation and Expansion of Racial Stigmas Associated with Race and Childrearing*

Professor Khiara Bridges succinctly describes the views of commentators in the 1980s and 1990s who anticipated not only the international popularity of surrogacy, but also the social and racial inequality that would accompany the industry:

[S]urrogacy does not simply involve the commoditization of aspects of life that never ought to be commoditized, but rather involves the commoditization of *bodies of color* for *white benefit*. It is not simply a means by which the wealthy can exploit the poor, but rather is a means by which wealthy *white people* can exploit *poor people of color*. It is not simply a practice in which women figure as commoditized vessels through which men could propagate their genes, but rather is a practice in which *women of color* figure as commoditized vessels through which *white men* could propagate their genes.<sup>77</sup>

The international commercial surrogacy industry has unfortunately met these expectations, providing primarily black and brown women's reproductive abilities for the benefit of wealthier white women.<sup>78</sup> "Nevertheless, even in the gestational surrogacy market, the demand is for women with light skin, hair, eye color and other attributes of racial superiority."<sup>79</sup> While most international surrogates are not white women, a function primarily of cost and time

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<sup>75</sup> *Id.* at 267-68.

<sup>76</sup> See generally Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671, 673 (2013) ("In countries where commercial surrogacy is allowed, these basic fundamental rights, as enshrined in multiple international treaties and conventions, should be protected by domestic law and regulations.").

<sup>77</sup> Khiara M. Bridges, Windsor, *Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1134 (2014).

<sup>78</sup> See Cherry, *supra* note 15, at 270 (stating that because "neither the race/ethnicity nor the social and physical location of the birth mother is important to the process[,] . . . black and brown women (and their reproductive capacities) from developing nations can be used for the benefit of others (primarily white, European, American, and wealthy)").

<sup>79</sup> *Id.*

efficiency, this preference for white surrogate mothers reinforces the racial stereotype that white women are superior mothers.<sup>80</sup> Overall, the exploitation of often impoverished racial minorities by wealthier white intended parents likely contributes to the lower price associated with international surrogacy arrangements than with those in the United States, while simultaneously prompting the need for international regulation of this troubled industry.

B. *Resulting Child and Children Already Up for Adoption*

The resulting child's interests, though arguably the most important, are most often overlooked in commercial surrogacy policy debates as these children do not yet have a voice of their own.<sup>81</sup> Custody determination and the legal difficulties surrounding this topic can be seen as the root of the issue. As previously mentioned, custody regimes in surrogacy arrangements vary by jurisdiction with an emphasis placed recently on benefiting the intended parents.<sup>82</sup> The true focus, however, should be placed on protecting the best interests of the child through a regime that avoids "prolonged custody battles, as well as minimiz[es] the movement of children between homes."<sup>83</sup> The best interests of the child come further into question in considering the often lax, or nonexistent, inquiry into intended parents' backgrounds. Commercial surrogacy elicited outrage from the global community when surrogates, completely unaware of the intended parents' backgrounds, provided children in 2013 to two separate Australian men, one a pedophile and the other dying of cancer.<sup>84</sup> Both of these conditions may be directly adverse to the well-being of a child, albeit for very different reasons, when there is no other caregiver in the family picture. This lax approach to parental background checks contrasts sharply with the thorough checks conducted by adoption agencies across the globe, raising the question of why the resulting child of a surrogacy arrangement is entitled to any less protection than that of an adoption

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<sup>80</sup> *Id.*

<sup>81</sup> See Ryznar, *supra* note 19, at 1031.

<sup>82</sup> See *supra* Section II.A (comparing policy in uterocentric countries where the surrogate mother has legal custody at birth to popular commercial surrogacy destinations where there is automatic recognition of intended parents' rights to legal custody of the child).

<sup>83</sup> Ryznar, *supra* note 19, at 1033.

<sup>84</sup> See Lindsay Murdoch, *Australian Couples Caught in Thailand's Surrogacy Crackdown*, SYDNEY MORNING HERALD (Sept. 14, 2014), <http://www.smh.com.au/business/world-business/australian-couples-caught-in-thailands-surrogacy-crackdown-20140913-10gess.html> [<http://perma.cc/PRR9-UH9Z>]; Hilary Whiteman, *Anxious Parents Fear for Babies as Thai Military Tightens Surrogacy Laws*, CNN (Aug. 19, 2014, 9:27 PM), <http://www.cnn.com/2014/08/19/world/asia/thailand-surrogacy-laws-change/> [<http://perma.cc/5XAU-6B4L>] (referring to David Farnell, the father of Baby Gammy, and how the revelation that he is a convicted pedophile occurred only *after* he brought his surrogate daughter home).

arrangement.<sup>85</sup> The answer garnering increasing support seems to be that the children should be treated equally, suggesting the implementation of mandatory criminal background checks on intended parents worldwide.<sup>86</sup>

An additional disparity in the treatment of adoptive children versus children born through surrogacy is the requisite recordkeeping in adoption that allows for “legal openness” should the adopted child wish to find his or her biological parents in later life.<sup>87</sup> As surrogacy is so unregulated, there are no mandatory recordkeeping requirements that afford resulting surrogate children this same access to their past biological history for medical or psychological purposes. Accordingly, policymakers have begun a push for universal recordkeeping requirements for the benefit of the resulting children.<sup>88</sup>

Finally, the resulting child’s interests are also implicated in the matter of statelessness (discussed below in Section II.C) because a lack of citizenship may result in the child’s inability to receive state medical care or other public service benefits from any jurisdiction.<sup>89</sup> Further, a stateless child may be unable to obtain a passport necessary for traveling back to one’s receiving country with the intended parents.<sup>90</sup> On a more abstract level, statelessness results in a heightened risk of the resulting child’s basic human rights being violated, because one is vulnerable to abuse in the international sphere when lacking a recognized nationality from which to derive protected rights.<sup>91</sup> Thus,

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<sup>85</sup> See, e.g., Yariv Yogev et al., *Attitudes of Israeli Gynecologists Regarding Candidate Screening and Personal Responsibility in Assisted Reproductive Technologies Versus Adoption in Israel*, 110 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 55, 55 (2003) (discussing the contrast between “meticulous” mandatory background checks for adoptive parents in Israel with nonexistent background checks for intended parents in ART arrangements); Bureau of Consular Affairs, U.S. Dep’t of State, *Eligibility to Adopt, INTERCOUNTRY ADOPTION*, <http://travel.state.gov/content/adoptionsabroad/en/adoption-process/who-can-adopt/eligibility-to-adopt.html> [<http://perma.cc/FJ73-GYQZ>] (last visited Nov. 18, 2015) (describing requisite forms regarding adoptive parents’ personal background and fingerprinting to conduct criminal background checks required for American adoptions with both Hague and Non-Hague Convention countries).

<sup>86</sup> See, e.g., Whiteman, *supra* note 84 (quoting Sam Everingham, the founder of Families Through Surrogacy, describing mandatory criminal background checks as “the least that can be done by clinics to protect their reputation, as well as protect the babies who’ll be born”).

<sup>87</sup> Marcy Darnovsky, *Forum on Cross-Border Surrogacy, Adoption Attracts Scholars, Human Rights Activists and Policymakers*, OUR BODIES OUR SELVES (Sept. 18, 2014), <http://www.ourbodiesourselves.org/2014/09/international-forum-cross-border-surrogacy/> [<http://perma.cc/5L4H-STWL>] (“[T]his raises the question of whether children born in surrogacy arrangements should also be granted access to information about their genetic and gestational origins.”).

<sup>88</sup> See *id.*

<sup>89</sup> See Lin, *supra* note 10, at 559 (“Domestically, stateless persons may be denied access to education, health care, legal employment, and political participation.”).

<sup>90</sup> See *id.* at 558-59.

<sup>91</sup> See *id.* at 559.

there are pressing concerns for the implementation of uniform policies that protect the best interests of the child beginning from the inception of the surrogacy arrangement—accomplished by preliminary background checks—through delivery—accomplished by automatic procedures for obtaining citizenship and its inherent benefits.<sup>92</sup>

The resulting surrogate child is not the only child whose interests are at stake in burgeoning international commercial surrogacy arrangements; the indirect consequences for children who are candidates for adoption should also be considered. The threat to these children is grounded in the “primary opportunity cost to growing the international commercial surrogacy business[:] . . . the reduction of international adoption.”<sup>93</sup> The fact that intended parents can only support a certain number of children, whether from surrogacy or adoption, automatically places a limiting principle on one class of children as the other expands.<sup>94</sup> Policymakers should therefore consider international adoption when drafting surrogacy legislation to promote not only the best interests of resulting children from surrogacy, but also to allow the international adoption market to remain a competitive and viable option for intended parents.

C. *The Birth Country Versus the Receiving Country: To Whom Does the Child Belong?*

State sovereignty underlies the issue of statelessness, a lack of citizenship that often injures resulting children of surrogacy arrangements.<sup>95</sup> Statelessness arises from varying eligibility characteristics for citizenship among the birth and receiving countries, creating a legal limbo for both the intended parents and resulting child in surrogacy arrangements.<sup>96</sup> This complexity surrounding citizenship may serve as an impetus for receiving countries to ban resident intended parents from arranging for commercial surrogacy in certain birth countries that have contradictory regimes, as has been the case between Israel (receiving) and Thailand (birth) since November 2014.<sup>97</sup> Prior to November 2014, the Israeli government recognized resulting children as citizens of Thailand, and Thai surrogates as having full parental rights because of the birth

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<sup>92</sup> See *id.* at 560 (“Set against this backdrop of an internationally recognized deficiency in human rights, the appropriate response of nations should be to engage in cooperative efforts to eradicate statelessness.”).

<sup>93</sup> Ryznar, *supra* note 19, at 1038.

<sup>94</sup> See *id.* at 1035-36.

<sup>95</sup> See Lin, *supra* note 10, at 556.

<sup>96</sup> See *id.* (“The state’s sovereign autonomy and authority over these [citizenship] matters is often a point of contention and concern in the ongoing dialogue concerning stateless individuals.”).

<sup>97</sup> See Wolf, *supra* note 29, at 487.

country's utero-centric motherhood regime.<sup>98</sup> Accordingly, a growing number of Israeli intended parents ultimately found themselves in a legal limbo until Thai courts officially recognized their parental rights, allowing for return to Israel.<sup>99</sup> Israel's initial denial of citizenship effectively punishes an innocent resulting child for the misdeed of his or her parents in obtaining surrogacy services in an unfavorable jurisdiction, as the child is often without proper healthcare and insurance in the interim.<sup>100</sup> The inequity of this treatment is evident, prompting the proposition that these matters be resolved in the best interests of the child with an unwavering focus on protecting the child's rights and the new family's physical unity.<sup>101</sup>

### III. THE RISE OF ART AND INTERNATIONAL COMMERCIAL SURROGACY IN THAILAND

#### A. *The Introduction of ART and Surrogacy in Thailand: Social and Legal Implications*

ART has seen rapid growth throughout Thailand since the first baby was born there through in vitro fertilization ("IVF") in 1987.<sup>102</sup> This expansion is evidenced not only by the availability of ART at all major public tertiary hospitals, but also at private hospitals and the thirty licensed ART clinics in Thailand.<sup>103</sup> The first surrogacy service in Thailand, however, was not reported until 1994, and took place at the same hospital where IVF was introduced to the country seven years earlier.<sup>104</sup> Rather than experiencing *widespread* growth in ART service availability, seventy-five percent of the clinics, where a majority of services are performed, are clustered in Bangkok, with outlying

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<sup>98</sup> See *id.* at 486-87 ("[I]n January 2014, sixty-five babies born to Israeli couples who had entered into surrogacy agreements in Thailand were stuck in Thailand because the Israeli government considered the babies to be Thai citizens and surrogates to have full parental rights.").

<sup>99</sup> See Fiske, *supra* note 41 (discussing the legal issues faced by the intended parents of at least sixty-five surrogate babies born in Thailand for intended gay Israeli parents who do not have access to surrogacy within Israel as a result of their sexual orientation).

<sup>100</sup> See Lin, *supra* note 10, at 587; Fiske, *supra* note 41.

<sup>101</sup> See Lin, *supra* note 10, at 587 (explaining that the initial efforts should be made by the receiving country to achieve these protections for the child, but even if denied by the receiving country, still ensured by the birth country).

<sup>102</sup> Whittaker, *supra* note 52, at 15 (discussing expansion from the birth of the first IVF baby at Chulalongkorn Hospital in 1987 to "2010 [when] there were 30 clinics licensed to provide assisted reproductive treatments in Thailand, evidence of the rapid global penetration of new reproductive technologies into Thailand").

<sup>103</sup> *Id.* (explaining that while services are offered in all of the public hospitals, a majority of services are still performed at either private hospitals or licensed clinics).

<sup>104</sup> See Whittaker, *supra* note 34, at 105-06.

clinics situated only in major regional towns.<sup>105</sup> This physical centralization of facilities within cities indicates the primary focus of the ART and surrogacy industry in Thailand as a service for foreigners, rather than local Thai residents in rural villages.<sup>106</sup>

Intended parents in the Thai surrogacy industry are at an inherent disadvantage, however, because traditional Thai law recognizes the woman who gives birth to a child as the child's legal mother, regardless of how conception occurred.<sup>107</sup> As a result of this utero-centric view of motherhood, intended parents have always had to adopt their child if born through surrogacy in Thailand.<sup>108</sup> The timely and expensive legal transfer of parental rights once discouraged growth of the commercial surrogacy industry in Thailand, though its expansion eventually occurred as a result of necessity following implementation of heightened regulations in leading birth countries across the globe.<sup>109</sup>

B. *Culture and Religion as a Framework for Thailand's Liberal Approach to ART*

Overriding cultural norms in Asian societies regarding the stigma of infertility and the value of children likely influence liberal access to ART and gestational surrogacy in Thailand.<sup>110</sup> Women are often blamed for infertility in

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<sup>105</sup> Whittaker, *supra* note 52, at 15. This is not to say that women from rural villages do not serve as surrogate mothers in Thailand, though the process is much more arduous considering the required travel, often to Bangkok, for surveillance by a fertility doctor. *See* Fuller, *supra* note 3 (discussing the prevalence of surrogacy in Pak Ok, Thailand, a farming community six hours driving distance from Bangkok, where at least twenty-four women of the town's total population of 13,000 people have become surrogate mothers).

<sup>106</sup> *See infra* Section III.C (explaining that the low rate of Thai couples taking advantage of IVF cycles suggests that foreigners are primarily responsible for the large IVF market).

<sup>107</sup> Whittaker, *supra* note 34, at 107 (referencing language from Section 1546 of the Thai Civil and Commercial Code regarding a birthmother's rights regarding the child). Moreover, if the surrogate is married, her husband is listed as the legal father of the child produced through surrogacy. *See* Wolf, *supra* note 29, at 486.

<sup>108</sup> Whittaker, *supra* note 34, at 107. In order for intended parents to be able to adopt their child, the legal parent(s), whether just the surrogate or the surrogate and her husband, must first relinquish their legal rights to the child. *See* Wolf, *supra* note 29, at 486. Only then can a Thai court appoint the intended parent(s) as the child's legal guardian(s). *Id.*

<sup>109</sup> *See infra* notes 131-32 and accompanying text (observing that increased regulation on surrogacy in India resulted in a large portion of the market turning to Thailand, which was comparatively less stringently regulated).

<sup>110</sup> *See* Whittaker, *supra* note 52, at 10 ("Infertility threatens gendered identities for women and men, more so in Asian societies, which place high values upon reproduction, and where motherhood and fatherhood are considered fundamental to full adult femininity and masculinity."); *see also id.* at 16 (mentioning couples' descriptions of having children as making their lives "perfect, complete, and whole," as well as describing children as "important sources of companionship and economic support").

Asian culture and face social ramifications, including exclusion from ceremonies and events, and even complete ostracism.<sup>111</sup> Likewise, infertile men face a threat of questioned masculinity in Asian culture, ultimately experiencing the social stigma associated with impotence.<sup>112</sup> Moreover, ninety-eight percent of the Thai population claims to practice Theravada Buddhism, which teaches that an individual's actions can have a karmic impact.<sup>113</sup> Buddhist thought regarding merit-making and its positive impact on karma further justify liberal access to gestational surrogacy in Thailand.<sup>114</sup>

C. *Infertile Thai Couples Left Without Children, While Foreigners Reap the Benefits of the "Womb of Asia"*

By one estimate, "10 to 15 percent of Thai couples in the reproductive age range have infertility problems, and . . . there are around 10 million infertile couples in the country," which would require approximately 97,605 IVF cycles annually.<sup>115</sup> In reality, less than five percent of these cycles were undertaken by Thai couples in 2007.<sup>116</sup> Thus, it is not infertile Thai couples who have benefitted from the services offered in Thailand, but rather, foreigners looking to utilize medical procedures not afforded to them in their own home countries.<sup>117</sup> Foreigners also value Thailand's surrogacy industry in particular

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<sup>111</sup> See *id.* at 10; see also *id.* at 17 ("When a woman fails to conceive, she faces accusations of being a sinful person with poor karma, of not trying or wanting a child hard enough, and fears of desertion by her husband.").

<sup>112</sup> *Id.* at 10.

<sup>113</sup> See Whittaker, *supra* note 34, at 111 ("Generally speaking, acts are defined in Theravada Buddhism as either 'bun' (meritorious) or 'bap' (unmeritorious), both of which have karmic consequences for the self and others.").

<sup>114</sup> See Whittaker, *supra* note 34, at 111 ("The Buddhist notion of pregnancy as a meritorious act by women that allows the rebirth of another life provides a moral framing for the surrogacy relationship." (citation omitted)); James Hookway, *Thailand Targets Surrogacy Practices amid Scandals*, WALL STREET J. ONLINE (Aug. 27, 2014, 9:27 AM), <http://online.wsj.com/articles/thailand-targets-surrogacy-practices-1409146050> [https://perma.cc/CNF4-MVM2] (opining that many individuals have sought out surrogacy in Thailand because they thought "they wouldn't run into any problems" in "tolerant, Buddhist Thailand"); see also Hibino & Shimazono, *supra* note 61, at 64-65 (mentioning "tan-bun," or merit-making, as a general motivator for surrogacy in Thailand, citing a specific example of a Buddhist woman's choice to be a surrogate to "earn merit as compensation for [an] abortion" she had earlier in life).

<sup>115</sup> Whittaker, *supra* note 52, at 16.

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Wolf, *supra* note 29, at 485-86 (claiming that Japanese couples have sought surrogates in Thailand since 2008 because commercial surrogacy was made illegal in Japan); Amy Corderoy, *More Parents Defy Law with Overseas Surrogacy*, SYDNEY MORNING HERALD (Sept. 14, 2013), <http://www.smh.com.au/national/more-parents-defy-law-with-overseas-surrogacy-20130913-2tq94.html> [https://perma.cc/LC9V-LC66] (positing that the fifty-four percent increase of Australian citizenship requests for children

because they are able to exert more control over the process by using internet chat-rooms and message boards to more actively select their surrogates, as opposed to the typical system in which intended parents rely blindly on an agency to match them with an available surrogate.<sup>118</sup> Beyond agency control, this also allows foreign intended parents to save money that would otherwise be spent physically traveling to the country in which their child will be born. While some praise this modern internet-based method for providing benefits to both the intended parent(s) and the Thai surrogate mother,<sup>119</sup> others criticize this more informal method for providing less protection and information to all parties involved.<sup>120</sup> It seems the critics should prevail—as international surrogacy is already impersonal and commoditizes women and children, this technological innovation seems to only further promote the concept of ordering a child by allowing for online shopping.

D. *Thailand's Surrogacy Surge: A Wealth of Low-Cost Surrogates with Few Regulatory Roadblocks*

Dr. Amrita Pande once described the “*perfect* surrogate [as] cheap, docile, selfless, and nurturing . . . .”<sup>121</sup> Many Thai surrogates justify their decision based on “deep compassion for infertile couples” and “financial needs of

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born in Thailand between 2008 and 2012 is attributable to Australian couples participating in reproductive tourism because the practice of commercial surrogacy was outlawed in Australia); Fiske, *supra* note 41 (“Israel does not permit homosexual couples to initiate the surrogacy procedure in the country, forcing many who wish to have children to seek a solution abroad.”).

<sup>118</sup> See, e.g., Cherry, *supra* note 15, at 264 (“The [intended parents] travel to the providing clinic or increasingly[,] using Internet technology such as Skype, look over the available women, to select one to gestate an embryo/fetus for [the] intended parents.” (footnote omitted)); Hibino & Shimazono, *supra* note 61, at 57 (“Message boards or internet forums found on websites such as *weneedbaby.com*, *clinicrak.com*, or *Dr. Seri's Clinic*, have become a platform for arranging surrogacy and egg donation.”); Whittaker, *supra* note 34, at 104.

<sup>119</sup> See Hibino & Shimazono, *supra* note 61, at 69 (suggesting that surrogates benefit because they can now “choose for whom they provide gestational services and with whom they actively negotiate the arrangement rather than passively accept an intended parent and a fixed price”).

<sup>120</sup> See *id.* at 70 (describing “medical and psychological risks” associated with message-board surrogacy, including surrogate mothers’ unawareness of the medical risks associated with pregnancy, and a lack of psychological support to deal with issues arising during pregnancy); J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL’Y 241, 242-43 (2011) (“We contend that while the Internet increased the availability of, and the market for, human embryos and surrogacy services to a larger audience than ever envisioned, it also created significant and unimagined legal concerns for embryo donors, suppliers, surrogates and surrogate providers.” (footnotes omitted)).

<sup>121</sup> Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 970 (2010) (emphasis added).

parents,” evidence of both a selfless and nurturing demeanor.<sup>122</sup> Further, Thai surrogates are relatively affordable compared to commercial gestational surrogates in other locations.<sup>123</sup> Surrogacy in Thailand is estimated to cost between \$38,000 and \$50,000,<sup>124</sup> whereas the cost in the United States is between \$110,000 and \$150,000.<sup>125</sup> Further, scholars have described the *typical* surrogate as “young, already a parent, and poor.”<sup>126</sup> While many “typical” surrogate mothers are uneducated and illiterate, Thai surrogates are often relatively more educated.<sup>127</sup>

Finally, until 2015, the commercial surrogacy industry in Thailand was not subjected to any serious legal regulation, ultimately attracting many intended parents from across the globe with the combination of under-regulation and seemingly ideal surrogate mothers.<sup>128</sup> While the industry in Thailand has been technically regulated by Announcement nos. 1/2540 and 21/2545 issued by the Medical Council of Thailand in 1997 and 2001 respectively, these Announcements have had only illusory regulatory impacts, at best, discussed in Section IV.C.<sup>129</sup> Despite Thai Cabinet approval in 2010 of the ARTs Bill, the National Assembly subsequently failed to ratify the Bill, leaving the industry unregulated until 2015.<sup>130</sup> More recently, commercial surrogacy in

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<sup>122</sup> See Hibino & Shimazono, *supra* note 61, at 63.

<sup>123</sup> See Wolf, *supra* note 29, at 486.

<sup>124</sup> *Id.*

<sup>125</sup> See Cherry, *supra* note 15, at 260.

<sup>126</sup> Ryznar, *supra* note 19, at 1028.

<sup>127</sup> Compare Cherry, *supra* note 15, at 264 (describing traditionally high rates of poverty and illiteracy among surrogate mothers) with Hibino & Shimazono, *supra* note 61, at 68 (“However, as more than half the participants were college or junior college graduates (eight of 15), not all prospective surrogate mothers interviewed belonged to a lower social stratum.”) and Wolf, *supra* note 29, at 487 (“[S]urrogates in Thailand are likely to be more educated and in a higher social strata than surrogates in India . . .”).

<sup>128</sup> See Hibino & Shimazono, *supra* note 61, at 57 (“However, ARTs in Thailand remain in legal limbo under the current conditions. Consequently, commercialisation of third-party reproduction has been occurring.”).

<sup>129</sup> *Id.* (“The practice of third-party reproduction is currently ‘regulated’ by guidelines issued by the Medical Council of Thailand in 1997 and 2001 (Announcement nos. 1/2540 and 21/2545).”); see also Allison M. Whelan, *Thailand Bans Foreign Commercial Surrogacy*, HARV. L.: BILL OF HEALTH (Mar. 2, 2015), <http://blogs.law.harvard.edu/billofhealth/2015/03/02/thailand-bans-foreign-commercial-surrogacy/> [<http://perma.cc/2ZV2-CY7C>] (highlighting concern regarding the implementation and enforcement of the commercial surrogacy ban in light of Thailand’s “famously lax” law enforcement).

<sup>130</sup> See Hibino & Shimazono, *supra* note 61, at 57; Wolf, *supra* note 29, at 486; Julie Munro, *Is Commercial Surrogacy Tourism So Bad?*, MED. TRAVEL QUALITY ALLIANCE (Sept. 29, 2014), <http://www.mtqua.org/2014/09/29/commercial-surrogacy-tourism-bad/> [<http://perma.cc/MGX3-X6S8>] (“In Thailand, some ten years ago, a law had been proposed to parliament to ban commercial surrogacy, but it was not enacted.”). This Note will discuss in detail the approval of this Bill, formally referred to as the Law to Protect Children Born via Assisted Reproductive Technology, in Section IV.C.

Thailand experienced growth in response to heightened regulation of commercial surrogacy in India, a former hub of international surrogacy.<sup>131</sup> As a result of these favorably unregulated conditions and changes in the global industry, Thailand was transformed into the “womb of Asia,”<sup>132</sup> likely a reflection of the 1,000 babies born annually on average to Thai surrogates on behalf of foreign intended parents.<sup>133</sup>

#### IV. WHERE IS THAILAND NOW? RECENT SCANDALS AND THE GOVERNMENTAL BAN ON INTERNATIONAL COMMERCIAL SURROGACY

##### A. *Recent Surrogacy Scandals in Thailand*

Recent scandals in Thailand spurred global outcry, and a subsequent internal investigation and prohibition of the country’s grossly unregulated international commercial surrogacy industry.<sup>134</sup> The first of these scandals was the “Baby Gammy” case detailed below.<sup>135</sup> The second was the Mitsutoki Shigeta case.<sup>136</sup>

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<sup>131</sup> See Adams, *supra* note 39 (“Thailand has become an increasingly popular destination for Australians since Indian authorities tightened regulations in 2012.”); Ritchie, *supra* note 41 (“The swing towards Thailand is the direct result of a decision by India to only grant medical visas for surrogacy to heterosexual couples who have been married for at least two years.”). Similar regulations barring gay individuals’ access to commercial surrogacy exist in other countries, including Israel, further incentivizing travel to liberal Thailand. See Fiske, *supra* note 41. *But see* Rebecca Carr, *Israeli Surrogacy Crisis Moves to Resolution While Health Ministry Supports Law Change for Gay Couples*, BIONEWS (Feb. 3, 2014), [http://www.bionews.org.uk/page\\_392661.asp](http://www.bionews.org.uk/page_392661.asp) [<http://perma.cc/GWU5-FRV2>] (claiming that if Thai uterocentric law does not change, Israeli couples will no longer be able to use Thai surrogates after November 2014 because of resulting Israeli citizenship disputes).

<sup>132</sup> See *supra* note 2 and accompanying text.

<sup>133</sup> See Julie Munro, *With Thailand Shut Down, is Commercial Surrogacy Tourism Dead?*, MED. TRAVEL QUALITY ALLIANCE (Sept. 29, 2014), <http://www.mtqua.org/2014/09/29/thailand-commercial-surrogacy-tourism/> [<http://perma.cc/EH36-Y6N2>]. These 1,000 births account for approximately one-sixth of the total number of babies born last year through international commercial surrogacy. See *id.*

<sup>134</sup> Fuller, *supra* note 3 (“[A] pair of recent scandals have focused scrutiny on the largely unregulated industry, raising ethical questions and prompting the government’s crackdown.”).

<sup>135</sup> *Id.*; see *infra* Section IV.B.

<sup>136</sup> See Fuller, *supra* note 3 (“More recently, police raids on surrogacy clinics in Bangkok uncovered the case of a Japanese man who had fathered around a dozen babies through surrogates . . .”). The government crackdown on commercial surrogacy and concerns of human trafficking led neighbors to inform police of a flat in Bangkok constantly emanating the sound of crying babies. See Jessica Ware, *Man Accused of Fathering 12 Surrogate Babies in Thailand*, BIONEWS (Aug. 26, 2014), [http://www.bionews.org.uk/page\\_448177.asp](http://www.bionews.org.uk/page_448177.asp) [<http://perma.cc/KVH2-YPTC>]. However, the police found no evidence to suggest Shigeta intended to place the babies into the human trafficking system. *Id.* (claiming initial inspections of the children did not indicate abuse or involvement in unlawful activities).

In 2014, a police raid revealed a “baby factory” flat, in which a twenty-year-old pregnant woman and nine babies between the ages of one month and two years old were found.<sup>137</sup> Further investigation showed that Mitsutoki Shigeta, a very wealthy twenty-four-year-old Japanese businessman, used Thai surrogates to father at least fifteen children.<sup>138</sup> While his primary motive could not be definitively ascertained, his reasoning included wanting “a big family”<sup>139</sup> and having “more than 20 babies to take care of his many family businesses.”<sup>140</sup> Agencies told Shigeta’s Thai surrogates they were helping an infertile couple, and many surrogates expressed grave concern upon discovering the truth.<sup>141</sup> Following the government shutdown spurred by these two scandals, Shigeta fled Thailand, ultimately abandoning nine of his babies to be cared for by nannies.<sup>142</sup> Shigeta is named as the father of each of these babies on their birth certificates,<sup>143</sup> and must appear before Thai family court to obtain parental rights over each of the children.<sup>144</sup>

B. *Baby Gammy: A Case Study (Or, “I don’t think any parent wants a son with a disability”)*<sup>145</sup>

In July 2014, international newsreaders were introduced to Baby Gammy, his abandonment, and the lack of legal and humane protections afforded to children resulting from international commercial surrogacy agreements.<sup>146</sup> Gammy was then a seven-month-old boy, born to a Thai surrogate with intended parents residing in Australia.<sup>147</sup> Gammy’s intended parents were David and Wendy Farnell, a couple who used a Bangkok-based agency to match them with their international commercial surrogate, Pattaramon

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<sup>137</sup> Ware, *supra* note 136. There were also a number of nannies tending to the babies at Shigeta’s Bangkok flat. See *Surrogate Dad Faces Trafficking Probe: Japanese Suspect Flees, DNA Tests Under Way*, BANGKOK POST (Aug. 9, 2014), <http://www.bangkokpost.com/print/425774/> [<https://perma.cc/4XH3-DXKM>].

<sup>138</sup> Murdoch, *supra* note 84.

<sup>139</sup> Whiteman, *supra* note 84.

<sup>140</sup> Murdoch, *supra* note 84.

<sup>141</sup> See Hookway, *supra* note 114.

<sup>142</sup> Munro, *supra* note 133.

<sup>143</sup> Hookway, *supra* note 114.

<sup>144</sup> See *Surrogate Dad Faces Trafficking Probe*, *supra* note 137.

<sup>145</sup> See *60 Minutes: Baby Gammy* (CBS News television broadcast Aug. 10, 2014), [https://www.youtube.com/watch?v=fv\\_sQouMcpk](https://www.youtube.com/watch?v=fv_sQouMcpk) [<https://perma.cc/G46Y-AYD5>] (quoting David Farnell, Gammy’s intended father).

<sup>146</sup> See Fuller, *supra* note 3 (“In late July, the Thai news media reported that an Australian couple who had paid a woman to carry twins returned home with only one of their children, leaving behind the other, who had Down syndrome.”).

<sup>147</sup> Whiteman, *supra* note 84.

Chanbua.<sup>148</sup> The timeline is relatively straightforward: the couple found out early in the pregnancy that Chanbua was pregnant with twins; at four months the couple found out that one of the twins had Down syndrome; and at seven months the agency requested that Chanbua abort the twin with Down syndrome.<sup>149</sup> Despite the agency's request, Chanbua refused to have an abortion.<sup>150</sup> Chanbua delivered the twins, one male and one female, two months premature, requiring an additional month of observation at a Thai hospital.<sup>151</sup> The male twin, Gammy, was born with congenital heart and lung defects in addition to the predetermined Down syndrome.<sup>152</sup> David and Wendy Farnell ultimately returned home to Australia with only the female twin, leaving Gammy in Thailand.<sup>153</sup>

The Farnells initially claimed they never knew about Gammy, saying that the agency hid his existence and had since closed.<sup>154</sup> However, the couple ultimately conceded awareness of Gammy's existence from a very early point in the surrogate pregnancy.<sup>155</sup> The Farnells later claimed that they only left Gammy in Thailand because they wanted to get his sister back to Australia, rather than risk losing both of their children—Gammy to poor health and his sister to strict exit restrictions imposed following the Thai military coup.<sup>156</sup> David Farnell, however, has since indicated outright rejection of Gammy because of his Down syndrome, stating: "I don't think any parent wants a son

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<sup>148</sup> See Adams, *supra* note 39 (identifying the intended parents as David and Wendy Farnell, the surrogate mother as Pattaramon Chanbua, and the agency as Bangkok-based IVF Parenting).

<sup>149</sup> See Adams, *supra* note 39. While the parents were informed at the four-month mark of Gammy's Down syndrome, Chanbua was not informed until later in the pregnancy. See *id.*

<sup>150</sup> Alexandra Topping & Brendan Foster, *International Surrogacy Laws in the Spotlight Amid Row Over Baby Gammy*, GUARDIAN (Aug. 4, 2014, 3:26 PM), <http://www.theguardian.com/world/2014/aug/04/global-surrogacy-laws-debate-baby-gammy-thailand> [<http://perma.cc/6DRC-AYFL>].

<sup>151</sup> Adams, *supra* note 39.

<sup>152</sup> See Antony Blackburn-Starza, *Surrogacy: Confusion Amid Reports of Boy 'Abandoned' by Intended Parents*, BIONEWS (Aug. 4, 2014), [http://www.bionews.org.uk/page\\_442973.asp](http://www.bionews.org.uk/page_442973.asp) [<http://perma.cc/2WJT-VR2P>] (discussing Gammy's health complications and need for surgery in the future).

<sup>153</sup> *Id.*; Whiteman, *supra* note 84.

<sup>154</sup> Blackburn-Starza, *supra* note 152.

<sup>155</sup> See *60 Minutes*, *supra* note 145. Friends of the Farnells claimed the intended parents knew of both Gammy and his health status, but were under the impression the child was very ill and would not survive for more than a day. See Adams, *supra* note 39.

<sup>156</sup> See Adams, *supra* note 39. While the couple insists the plan was to return for Gammy once his sister was safely determined an Australian citizen, no attempts have been made to return to Thailand. See *60 Minutes*, *supra* note 145.

with a disability.”<sup>157</sup> Chanbua, Gammy’s twenty-one-year-old surrogate mother, eventually volunteered to raise Gammy as one of her own, alongside her six-year-old son and three-year-old daughter in the local town of Sri Racha.<sup>158</sup> Although financially unable to support Gammy on her own, an internet donation campaign raised over \$220,000 in just thirteen days to support Gammy’s long-term care.<sup>159</sup> Chanbua also claimed that she did not receive her full surrogate fee,<sup>160</sup> while the Farnells demanded a refund from the agency for not testing for Down syndrome early enough in Chanbua’s pregnancy.<sup>161</sup>

National outcry over the callous abandonment of Baby Gammy prompted an investigation into the intended parents,<sup>162</sup> ultimately revealing that the parents met through a mail-order bride service and that David Farnell was convicted and imprisoned in the 1990s for over twenty counts of child sexual abuse. Farnell pled guilty to molesting four young girls between the ages of five and ten over a span of ten years.<sup>163</sup> At the time he committed these acts, Farnell was a father with three young children of his own from a prior marriage.<sup>164</sup> Reporters summarized the impact of the Baby Gammy case by highlighting the conflicting rights and interests at play in international commercial surrogacy, as well as Gammy’s role in triggering the governmental crackdown on the industry:

This week little Gammy became the heart-wrenching symbol of a burgeoning rent-a-womb trade that cashes in on the most vulnerable. For some desperate wannabe parents, commercial surrogacy delivers the

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<sup>157</sup> *60 Minutes*, *supra* note 145. The intended parents allegedly also told their agent they were leaving Gammy in Thailand because they “were too old to look after twins.” Adams, *supra* note 39.

<sup>158</sup> Adams, *supra* note 39 (explaining Chanbua’s voluntary acceptance of Gammy because she “love[s] him like [her] own”); Topping & Foster, *supra* note 150 (providing details on Chanbua’s family at home).

<sup>159</sup> Blackburn-Starza, *supra* note 152. Hands Across the Water, a charity, will hold the funds in trust to be used only for Gammy’s health and care. *Id.*

<sup>160</sup> See Adams, *supra* note 39 (“Pattaramon claims she has yet to receive all of the 500,000 baht (\$18,350) fee, but [the agent] insists the full amount was paid in instalments [sic].”).

<sup>161</sup> See *60 Minutes*, *supra* note 145.

<sup>162</sup> See Fuller, *supra* note 3 (“Pleas for assistance by the surrogate mother helped produce a sustained national outcry that was further stoked by comments by the boy’s biological father that were deemed insensitive at best.”).

<sup>163</sup> Adams, *supra* note 39 (detailing the progression of David Farnell and Wendy Li’s relationship from meeting on ChnLove.com in early 2004, to being introduced by the Zhanjiang Happy Marriage Agency, which markets mail-order brides, and finally to being married in China in October 2004). David Farnell pled guilty to eighteen charges of child sexual abuse and was tried and convicted on an additional four. See *60 Minutes*, *supra* note 145.

<sup>164</sup> *60 Minutes*, *supra* note 145.

previously inconceivable. For a poverty-stricken host, the nine-month gig can generate life-changing bounty. But the disabled infant's plight has highlighted the dark side of so-called fertility tourism in developing countries where a lack of regulation provides fertile ground for emotional, ethical and legal turmoil. In Thailand, Gammy's case appears to have hardened the stance of authorities now cracking down on a growing number of IVF clinics and agencies offering commercial surrogacy and gender selection services.<sup>165</sup>

The Baby Gammy case illustrates a wide array of concerns, ranging from contractual enforcement to protecting surrogate mothers and resulting children by inquiring into the stability of intended homes.<sup>166</sup> Thus, this case likely prompted Thailand's military government to fast-track the ARTs Bill that wholly outlawed commercial surrogacy in Thailand as of July 2015.<sup>167</sup>

### C. *Current Legal Status of International Commercial Surrogacy in Thailand*

The extent of surrogacy regulation in Thailand prior to the recent 2015 enactment of the ARTs Bill was limited to professional guidelines issued by the Medical Council of Thailand in 1997 and 2001.<sup>168</sup> These guidelines prohibited medical practitioners' involvement in surrogacy, banned commercial transactions, and provided restrictions for "proper" intended parents and surrogates.<sup>169</sup> Specifically, only married couples could serve as intended parents and only a biological relative of the intended parents could serve as their surrogate.<sup>170</sup> As professional guidelines, these had no legislative force, resulting in hospitals' and clinics' discretionary—and generally nonexistent—enforcement.<sup>171</sup> Parties in commercial surrogacy arrangements in Thailand have completely ignored these guidelines, evidenced by the involvement of certified doctors, a gamut of intended parents ranging from single mothers to gay couples, and surrogate mothers with no relation at all to the intended parents.

Following the recent Baby Gammy scandal, however, the Thai National Council for Peace and Order ("NCPO") approved the first reading of the ARTs Bill in August 2014.<sup>172</sup> Thailand's interim parliament, the National Legislative

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<sup>165</sup> Adams, *supra* note 39.

<sup>166</sup> See *infra* Part V.

<sup>167</sup> See *infra* Section IV.C; *supra* note 134 and accompanying text.

<sup>168</sup> See Hibino & Shimazono, *supra* note 61, at 57.

<sup>169</sup> See *id.*; Whittaker, *supra* note 34, at 107.

<sup>170</sup> Whittaker, *supra* note 34, at 107.

<sup>171</sup> *Id.* ("However, these guidelines have no legislative force, and all clinics and hospitals were granted discretion with regard to surrogacy arrangements. It is clear that a variety of surrogacy arrangements are being undertaken and various forms of compensation exchanged.").

<sup>172</sup> *Commercial Surrogacy Bill Passes First Reading with 177 to 2 Votes*, NATION (Nov. 28, 2014, 1:00 AM), <http://www.nationmultimedia.com/national/Commercial-surrogacy->

Assembly (“NLA”), then approved the first reading of the ARTs Bill in late November 2014.<sup>173</sup> While six NLA members abstained, the draft bill passed with overwhelming support in a 177 to 2 vote.<sup>174</sup> This was not the first time, however, that the ARTs Bill was considered by the Thai government. The Thai cabinet first approved it in May 2010, though the NLA never ratified the bill into law.<sup>175</sup> Considering the previous breakdown between the approval and ratification stages, the NLA announced that they expected the government to produce the full version of the ARTs Bill within thirty days of its initial passing, then requiring the King’s approval.<sup>176</sup> Reports further expected the ARTs Bill to be ratified and in full legal effect within six months from its initial passing.<sup>177</sup> Subsequently, the ARTs Bill passed a third and final reading in February 2015, and was officially ratified as the Bill of Protection of Children Born from Assisted Reproductive Technologies.<sup>178</sup> Surrogacy contracts established before the February 2015 ratification were purportedly allowed to be performed; however, the chief of the military junta declared that arrangements would be handled on a case-by-case basis during the transitional period.<sup>179</sup> The ARTs Bill finally took full legal effect as of July 30, 2015.<sup>180</sup>

The stated purpose underlying the enactment of the Bill is summarized in its title: protecting children born via assisted reproductive technology.<sup>181</sup> When asked to elaborate on the Bill’s stated purpose, the Social Development and Human Security Minister claimed that the Bill is “aimed at protecting surrogate babies and suppressing human trafficking.”<sup>182</sup> The Minister further identified preventing abuse of newly improved ART procedures and specifying the legal status of the intended parents as some of the primary measures through which the drafters sought to accomplish the goal of protecting the

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bill-passes-first-reading-wit-30248734.html [http://perma.cc/3SYB-4LYH] (“The bill was approved by the National Council for Peace and Order in late August after it was reported that an Australian couple had left a Down syndrome baby with his Thai surrogate mother.”).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Whittaker, *supra* note 52, at 15.

<sup>176</sup> Rebecca Carr, *Thai Prime Minister Promises ‘Leniency’ and ‘Case-by-Case’ Approach in Surrogacy Crackdown*, BIONEWS (Sept. 1, 2014), [http://www.bionews.org.uk/page\\_449133.asp](http://www.bionews.org.uk/page_449133.asp) [http://perma.cc/GCB4-L4BD].

<sup>177</sup> Munro, *supra* note 130.

<sup>178</sup> *Law Takes Effect*, *supra* note 6.

<sup>179</sup> See Carr, *supra* note 176 (referring to General Prayut Chan-Ocha’s statement on his weekly television program granting case-by-case review for already established surrogacy arrangements before the ARTs Bill is officially implemented).

<sup>180</sup> *Law Takes Effect*, *supra* note 6 (explaining that the new law took effect “even as controversy continues to swirl around children born before the law was passed this winter”).

<sup>181</sup> Bill of Protection of Children Born from Assisted Reproductive Technologies Act, B.E., Subject No. 167/2553, trans. Chaninat & Leeds Co., Ltd. (2014), available at <http://www.thailawforum.com/thailand-draft-surrogacy-law/> [http://perma.cc/C6ZZ-8TJH].

<sup>182</sup> *Commercial Surrogacy Bill Passes First Reading*, *supra* note 172.

surrogate children.<sup>183</sup> The ARTs Bill contains numerous restrictive limitations on access to surrogacy in Thailand to prevent abuse of the once-lax surrogacy industry. First and foremost, Section 23 of the ARTs Bill prohibits commercial surrogacy outright, in any capacity.<sup>184</sup> Sections 25 and 26 explicitly prohibit the existence and usage of agencies or brokers in surrogacy agreements, as well as advertisements soliciting surrogate mothers' willingness to serve interested intended parents, respectively.<sup>185</sup>

Further, Section 21 establishes specific criteria for intended parents and surrogate mothers. Intended parents must be lawfully wed husband and wife unable to beget children otherwise, who are mentally and physically prepared to be parents to the resulting child.<sup>186</sup> Though not on its face, this language "specifically denies surrogacy services to same sex couples and to single individuals," as can be inferred from the reference to terms like "lawful spouse" being explained as lawful husband and wife throughout the ARTs Bill.<sup>187</sup> Further, surrogate mothers can be neither the biological mother nor daughter of either of the intended parents.<sup>188</sup> Surrogates must have also already birthed children in the past, and, if she is married, the surrogate mother's husband must consent to her involvement in surrogacy.<sup>189</sup> This "prior child" provision is justified as "clearly important in reducing the likelihood that the surrogate and her family will claim any rights over the child when it is born."<sup>190</sup> Moreover, the "prior child" restriction is rationalized as a means of ensuring the surrogate mother, like the intended parents, is mentally and physically prepared to bear a child for the purpose of surrogacy.

As a means of protecting resulting children in surrogacy arrangements, Section 27 establishes the legitimacy of intended parents as legal parents upon the child's birth, to prevent the legal limbo that has occurred in traditionally uterocentric Thailand.<sup>191</sup> This provision eliminates the issue of statelessness during the three to four month adoption process that historically needed to

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<sup>183</sup> *Id.*

<sup>184</sup> Bill of Protection of Children Born from Assisted Reproductive Technologies Act. B.E., Subject No. 167/2553, trans. Chaninat & Leeds Co., Ltd. (2014), available at <http://www.thailawforum.com/thailand-draft-surrogacy-law/> [<http://perma.cc/C6ZZ-8TJH>].

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Munro, *supra* note 130.

<sup>188</sup> Bill of Protection of Children Born from Assisted Reproductive Technologies Act. B.E., Subject No. 167/2553, trans. Chaninat & Leeds Co., Ltd. (2014), available at <http://www.thailawforum.com/thailand-draft-surrogacy-law/> [<http://perma.cc/C6ZZ-8TJH>].

<sup>189</sup> *Id.*

<sup>190</sup> Melanie Adams, *New Draft Law to Regulate Surrogacy in Thailand*, THAI LAW FORUM (June 24, 2010), <http://www.thailawforum.com/new-draft-surrogacy-law-thailand.html> [<http://perma.cc/5STK-5WAL>].

<sup>191</sup> *See* Bill of Protection of Children Born from Assisted Reproductive Technologies Act. B.E., Subject No. 167/2553, trans. Chaninat & Leeds Co., Ltd. (2014), available at <http://www.thailawforum.com/thailand-draft-surrogacy-law/> [<http://perma.cc/C6ZZ-8TJH>].

occur, when the birthing mother (surrogate) was recognized as the child's legal parent. Additionally, Section 29 establishes that the family and inheritance provisions of the Thai Municipal and Business Code shall apply to children born through surrogacy and their legal, intended parents.<sup>192</sup>

The ARTs Bill also establishes separate and distinct violation penalties ascribed to the parties involved in a surrogacy arrangement. Section 41 assigns penalties to doctors who perform commercial surrogacy services as imprisonment not over one year, fines not over 20,000 baht, or both.<sup>193</sup> Section 42 then assigns penalties to surrogate mothers or intended parents for their participation in commercial surrogacy as imprisonment not over ten years, fines not over 200,000 baht, or both.<sup>194</sup> Finally, Section 43 explains penalties assigned to agencies or brokers who facilitate commercial surrogacy agreements as imprisonment not over five years, fines not over 100,000 baht, or both.<sup>195</sup> "NLA member Wallop Tangkhananurak said he disagreed with the penalties specified in the bill because clinics and doctors would receive less severe punishments than surrogate mothers in cases of commercial surrogacy."<sup>196</sup> Despite these harsh penalties, the founder of Families Through Surrogacy, an organization devoted to running best-practice conferences focused on bringing together well-informed intended parents, reported that the Thai government will not impose "penalties for those in current arrangements, whether they be surrogates or intend[ed] parents. (But) there will be a new process for exit from the country."<sup>197</sup>

#### V. HOW TO "FIX" THE PROBLEM: REGULATION, NOT PROHIBITION, IS THE "RIGHT" ANSWER

Regulation of international commercial surrogacy is the necessary solution to avoid the exploitation and child abduction that established human rights instruments have sought to foreclose.<sup>198</sup> Perhaps the most persuasive evidence

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<sup>192</sup> *See id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Commercial Surrogacy Bill Passes First Reading*, *supra* note 172.

<sup>197</sup> Whiteman, *supra* note 84; *see also* FAMILIES THROUGH SURROGACY, <http://www.familiesthrusurrogacy.com/> [<https://perma.cc/Q2DS-4DY4>].

<sup>198</sup> *See, e.g.*, Cara Luckey, *Commercial Surrogacy: Is Regulation Necessary to Manage the Industry?*, 26 WIS. J.L. GENDER & SOC'Y 213, 235 (2011) (discussing The Hague Convention's goal to address international adoption through the elimination of child trafficking and abduction). In the international adoption context, the Hague Convention serves to protect adopted children who are similarly situated in context and interest to the resulting children of surrogacy, providing support for a similar regulatory approach. *See id.* at 236. ("With adoption, the UN found that the only way to adequately protect the parties was to legalize international adoption and then define its scope. A similar approach would be beneficial to protect international surrogacy relationships." (footnote omitted)).

of a need to regulate, rather than prohibit, surrogacy is provided by the establishment of the Hague Convention to regulate international adoption following scandals in the 1990s. The establishment of the Convention implicitly acknowledged that the demand for adoptive children would not cease, necessitating means to safely regulate the method by which individuals access these children. While some commentators nonetheless support outright prohibition of surrogacy as the superior alternative, prohibition raises a legitimate concern that a black market for commercial surrogacy will emerge to the detriment of all parties involved in surrogacy arrangements.<sup>199</sup> Critics of Thailand's enacted ban on commercial surrogacy, for example, state that "[p]eople will carry it out illegally and out of sight—and may resort to human trafficking or kidnapping to get children out of the country . . . ."<sup>200</sup> The overriding policy concerns of "plac[ing] women and children at the heart of a competitive market" would therefore only be exacerbated when this international black market inevitably expands.<sup>201</sup> Thus, the foreboding consequences of continued participation in international commercial surrogacy absent legalization and regulation are too grave to ignore, prompting consideration of existing regulatory frameworks that could serve as a remedial starting point.

A. *International Trade and Labor Laws as Preliminary Regulatory Approaches*

The highly regarded and observed international trade and labor laws likely present a practicable starting point for the introduction of commercial surrogacy regulation on an international scale.<sup>202</sup> Generally, the World Trade Organization ("WTO") is procedurally attractive because its members must accept *all* WTO-covered agreements.<sup>203</sup> Accordingly, if the WTO were to establish an agreement regulating international commercial surrogacy, there would be an automatic constituent of followers—at least 161 countries that constitute the members of the WTO as of November 2015.<sup>204</sup>

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<sup>199</sup> *See id.* ("Critics point out that without protection, surrogate mothers will be vulnerable to exploitation and the children will be in danger of being sold as a commodity on the international market.")

<sup>200</sup> Fuller, *supra* note 3.

<sup>201</sup> Ryznar, *supra* note 19, at 1010.

<sup>202</sup> *See, e.g.,* Brugger, *supra* note 51, at 666.

<sup>203</sup> *Marrakesh Agreement Establishing the World Trade Organization*, WORLD TRADE ORG., [https://www.wto.org/ENGLISH/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_01\\_e.htm#articleIIA2](https://www.wto.org/ENGLISH/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#articleIIA2) [<https://perma.cc/8QEL-B7XC>] (describing the interpretation of Article II:2 of the WTO as establishing that all WTO agreements are "part of a single undertaking," by which all members are bound by all rights and obligations addressed throughout).

<sup>204</sup> *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) [<https://perma.cc/AS34-84A7>].

Regulation via the WTO is likewise appealing because the WTO has an impressive complaint and binding dispute resolution process to effectuate compliance among member countries. The dispute settlement process begins with a mandatory consultation and mediation period between the disputing countries.<sup>205</sup> If unsettled, a dispute panel of experts is created, comprised of members of the WTO responsible for preparing and administering a dispute report to all WTO members.<sup>206</sup> If no appeal is filed, the Dispute Settlement Body, composed of representatives of all WTO member countries, adopts the panel's final report and deems the matter settled.<sup>207</sup> Should an appeal be filed, the panel creates an appeals report that is then adopted by the Dispute Settlement Body.<sup>208</sup> The target country of the complaint, if found in violation of the WTO, must then implement the Body's recommendations as soon as practically possible.<sup>209</sup> The Dispute Settlement Body monitors implementation of panels' recommendations and decisions, and has the authority to retaliate against non-compliant countries.<sup>210</sup>

In total, a dispute without appeal is settled in approximately three months, while a dispute with a corresponding appeal is generally settled within fifteen months.<sup>211</sup> Furthermore, if the underlying matter in dispute is time-sensitive or urgent, WTO members can work to process the dispute in an accelerated fashion.<sup>212</sup> This accelerated dispute resolution for urgent matters is particularly relevant to international surrogacy as a remedy for establishing statehood and healthcare for a newborn child. Since the WTO is a rules-based system with explicitly negotiated agreements, the dispute enforcement process is often lauded for its predictability and efficiency.<sup>213</sup>

Further, even absent the establishment of a new agreement, surrogacy is conceivably covered under the existing WTO General Agreement on Trade in Services ("GATS") if it is considered a "service."<sup>214</sup> Thailand, India, Mexico, Nepal, and the United States are among the WTO members that have, or once had, thriving commercial surrogacy industries that would benefit from the

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<sup>205</sup> *Understanding the WTO: Settling Disputes, A Unique Contribution*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) [https://perma.cc/YE5H-RMWN].

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* ("The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable.").

<sup>214</sup> See Brugger, *supra* note 51, at 689 ("In fact, at least one commentator has argued that commercial gestational surrogacy may be seen as a 'service' such that the GATS could be applied to it in instances of 'cross-border surrogacy agreements.'").

binding predictability of the incorporation of international commercial surrogacy arrangements into the WTO.<sup>215</sup>

The WTO may not, however, be the best preliminary regulatory approach considering that WTO member countries are generally non-democratic, resulting in decisions reflecting a greater contemplation of economic market considerations than human rights-based considerations.<sup>216</sup> Ultimately, this may indicate a lack of political will necessary for creation of sweeping international surrogacy regulation.

Beyond being literally synonymous with “paid labor,” commercial surrogacy arrangements can benefit greatly from regulation under the International Labour Organization (“ILO”), primarily because of its tripartite structure. The ILO’s structure allows representative bodies from the government, employers, and employees to express each party’s individual interests and concerns.<sup>217</sup> Further, unlike the WTO, some of the guiding principles of the ILO are largely human rights-based, including to “promote rights at work, encourage decent employment opportunities, [and] enhance social protection . . . .”<sup>218</sup> The tripartism of the ILO should be mirrored in any solution for commercial surrogacy as there is the similar underlying concern to strike a balance in protecting all major parties involved in this form of labor: the states; the intended and surrogate parent(s); and the resulting surrogate child. This would allow advocates for women’s rights, domestic law, and child protection to voice their concerns and ideally negotiate an agreement that justly balances interests, relative to inherent risks involved for each party.

While not all agreements are binding upon the members of the ILO, the constituents currently consist of 186 countries, including the five aforementioned current and past leaders in commercial surrogacy, providing a broad platform from which to promote the protection of essential human rights in international commercial surrogacy arrangements.<sup>219</sup> However, logistical concerns exist regarding unionizing surrogates in these nations, considering

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<sup>215</sup> *Members and Observers*, *supra* note 204.

<sup>216</sup> *See* Brugger, *supra* note 51, at 691-92 (detailing commentators’ skepticism regarding the likelihood that member countries would respect esoteric, non-trade-related rules that are grounded in human rights, rather than commercial, incentives).

<sup>217</sup> *See id.* at 694. Namely, the separate bodies through which these parties are represented are the International Labour Conference, the Governing Body, and the International Labour Office. *How the ILO Works*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> [<http://perma.cc/3FYD-55G8>] (“The very structure of the ILO, where workers and employers together have an equal voice with governments in its deliberations, shows social dialogue in action.”).

<sup>218</sup> *Mission and Objectives*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> [<http://perma.cc/BB2H-9GHU>]; *see* Brugger, *supra* note 51, at 696 (referring to the ILO’s “commitment to fundamental human rights”).

<sup>219</sup> *Official Relations Branch*, INT’L LABOUR ORG., <http://www.ilo.org/public/english/standards/reim/country.htm> [<http://perma.cc/TQ7H-DH6G>].

their varying geographic, economic, racial, and motivational factors, as well as their lack of medical expertise to properly voice their concerns.<sup>220</sup> Nonetheless, this situation is highly analogous to initial concerns regarding class action plaintiffs that have since been dispelled through the involvement of expert witnesses and seasoned attorneys.

An overriding weakness in this otherwise appealing structure is the absence of any enforcement mechanism, ultimately providing no remedy to parties whose interests are violated under the agreement.<sup>221</sup> Nonetheless, a sort of “ILO plus” plan could be devised that incorporates an enforcement structure similar to the WTO while also enhancing protection afforded to children.<sup>222</sup>

#### B. *International Adoption and the Hague Convention of 1993*

International adoption is an arrangement analogous to international commercial surrogacy. Adoptive parents take custody of a child born to a birth mother in the same way intended parents take custody of a child born to a surrogate mother. Despite this striking similarity, these arrangements are driven by two very different factors. The typical adoption agency matches a birth mother with the parents who are best suited to care for the adoptive child; commercial surrogacy brokers (or surrogates themselves) generally match the surrogate mother with the intended parents willing to pay the most for the resulting child, without any regard for their background or suitability.<sup>223</sup>

International adoption, like international commercial surrogacy, entered the regulatory spotlight following a series of sensational media stories that exposed the threats posed by unregulated international adoption.<sup>224</sup> The most precarious of these threats were the commodification of children “sold to the highest bidder,” and the creation of a ripe market of international child abduction and trafficking.<sup>225</sup> Consequently, the Hague Adoption Convention

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<sup>220</sup> See Brugger, *supra* note 51, at 695.

<sup>221</sup> See *id.*

<sup>222</sup> See *id.* at 688-97 (“[I]t remains possible that some of the children’s interests could be protected by minor changes to existing instruments. Should a global consensus be reached about the substantive boundaries of ethical international surrogacy, such an ‘ILO plus’ plan may be a feasible solution.”); see also Vincent & Aftandilian, *supra* note 76, at 672 (“Women in countries with limited regulations . . . will enter into commercial surrogacy arrangements that often violate their rights as women and workers as recognized under international treaties and norms. These international treaties should serve as a framework in evaluating the rights and treatment of these women . . .”).

<sup>223</sup> See Luckey, *supra* note 198, at 217.

<sup>224</sup> See Erica Briscoe, *The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption: Are Its Benefits Overshadowed by Its Shortcomings?*, 22 J. AM. ACAD. MATRIM. LAW. 437, 437 (2009) (“For the most part, international adoptions were unregulated until the 1980’s and 1990’s when several disturbing child trafficking stories made headlines in the international media, generating a political response.”).

<sup>225</sup> *Id.* at 438.

was implemented to address these concerns and provide protections to the parties in international adoption arrangements:<sup>226</sup>

Safeguards are provided by the Hague Convention to help ensure that free and informed consent is sought from, and given by, the birth parents and the child, if practical; that consent is not induced by bribery; that the views of the child, where viable, have been sought; and that the adoptive parents have received such counseling as necessary and are suitable persons to adopt.<sup>227</sup>

Further, the Hague Convention is grounded in a “best interests of the child” standard. Accordingly, the Convention names placement of the child into a “family environment” as the paramount goal, diverging from past rigid preference for domestic solutions even when foreign parents were the child’s best option.<sup>228</sup>

The “best interests of the child” standard should be a cornerstone of any international surrogacy regulation because, like adoption, the primary policy concern should be protecting the most vulnerable (and often overlooked) party in the surrogacy arrangement—the resulting surrogate child.<sup>229</sup> It is worth noting, however, that these safeguards and principles apply only to signatory countries that have ratified The Hague Adoption Convention,<sup>230</sup> of which there are currently ninety-five.<sup>231</sup> As such, a weakness of the Hague Convention is potential non-violative non-compliance when either the birth or receiving country has not ratified the Convention, and is therefore not legally bound by its principles.<sup>232</sup>

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<sup>226</sup> *Id.* at 440-41. The Hague Convention was adopted in 1993, and subsequently acquired legal force in 1995. *Id.* at 438.

<sup>227</sup> *Id.* at 441.

<sup>228</sup> *Id.* at 439 (“[T]he Hague Convention, in keeping with the ‘best interests of the child’ standard, maintains that placing the child in a ‘family environment’ is the ultimate objective, which may be better served by a foreign adoptive family than by a domestic orphanage.”). The domestic solution preference was established in the 1989 Convention on the Rights of the Child (“CRC”). *See id.* at 438.

<sup>229</sup> *See* Grammaticaki-Alexiou, *supra* note 16, at 1119 (“In all instances, however, when the choice of the applicable law in incidental questions or in the characterization of the issues affects the life of a child, it is preferable to allow the court to exercise its discretion in each individual case and to adopt flexible approaches, which usually serve better the interests of the child.”).

<sup>230</sup> *See* Briscoe, *supra* note 224, at 440.

<sup>231</sup> *Status Table: 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIV. INT’L LAW, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) [<http://perma.cc/WH6D-5PWJ>].

<sup>232</sup> *See* Briscoe, *supra* note 224, at 440 (“Lack of applicability of the Hague Convention in non-member states leaves only a small number of options for the child’s return [if abducted].”).

Conversely, a strength of the Hague Convention is its domestic enforcement mechanism. The Convention requires that each signatory country establish a domestic Central Authority responsible for monitoring adoption and compliance with the Convention in that specific country.<sup>233</sup> This would provide the necessary, and essentially non-existent, hands-on enforcement of national regulations on surrogacy in those countries with booming commercial surrogacy industries. Beyond this, however, the Convention neither establishes general consequences for provision violations nor a general enforcement agency for punishment of non-compliant member countries.<sup>234</sup>

Scholars, including members of the Hague Conference on International Private Law, have considered the Hague Convention as a solution to the issues posed by surrogacy in two contexts: (1) the direct application of the Hague Convention's ambiguous terminology to international commercial surrogacy, or (2) the establishment of a separate analogous convention more tailored to the concerns unique to commercial surrogacy.<sup>235</sup> The latter of these is the better option, because the Hague Convention deficiently addresses two particularly relevant aspects of international surrogacy: commerciality and statelessness.<sup>236</sup> A strict interpretation of the Hague Convention forbids payment for adoption services, possibly invalidating commercial agreements, and requires transfer of parental rights *post-delivery*.<sup>237</sup> These inadequacies have drastic effects in the context of international commercial surrogacy,

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<sup>233</sup> *Id.* at 442 (“Through the Central Authority, parties are held accountable for their actions which effectually could reduce the risk of bribery and baby selling in intercountry adoptions.”).

<sup>234</sup> *Id.* at 448-49 (“However this does not create any uniformity in the way compliance is enforced. The Hague Convention needs to establish a technique to assess whether procedures of the Central Authority of each country are consistent with the treaty’s safeguarding objective.”).

<sup>235</sup> See Grammaticaki-Alexiou, *supra* note 16, at 1117 (positing that international surrogacy presents a particular threat of child abduction should the surrogate mother flee to another country with the resulting child to avoid relinquishing her rights to the intended parents); Lin, *supra* note 10, at 566 (“While the Hague Convention’s efforts are still in their infancy, scholars have proposed that an international convention be modeled after the [Hague Adoption Convention].”). The Hague Conference on International Private Law began considering internal regulation of international surrogacy under standards similar to international adoption in 2011, but chose to defer any decisions. See Eric Blyth, *Baby Gammy: The Responsibilities of ART Professionals in International Surrogacy*, BIONEWS (Aug. 18, 2014), [http://www.bionews.org.uk/page\\_446406.asp](http://www.bionews.org.uk/page_446406.asp) [<http://perma.cc/VN5U-7YE3>].

<sup>236</sup> See Mortazavi, *supra* note 36, at 2256.

<sup>237</sup> See *id.* (discussing the existing Hague Convention’s ability to invalidate agreements found to be commercial in nature, as well as its inability to remedy the issue of statelessness that occurs when parental rights are severed prior to birth, bringing a child into the world with no legal mother or father).

leaving parties vulnerable to risks of unenforceable contracts and stateless children.

The desirability of modeling after the Hague Convention, however, is found less in the substantive framework than in the administrative framework it provides. Namely, the establishment of the primary level of enforcement (each country's Central Authority) provides for the oversight of fertility clinics and the assistance in remedying nationality issues necessary for eradication of the human rights violations common in international commercial surrogacy arrangements.<sup>238</sup> That being said, the model could diverge from the existing Hague Convention by establishing a board to serve as a secondary level of enforcement responsible for global oversight, modification, and imposition of sanctions for non-compliance.

#### CONCLUSION

Thailand's recent experience as the hub of reproductive tourism epitomizes the dangers of an under-regulated international commercial surrogacy industry. Its subsequent legislative response likewise represents the global trend toward outright prohibition of international surrogacy in the absence of swiftly implemented regulation. After Thailand banned commercial surrogacy in July 2015, Nepal, once expected to replace Thailand as the international surrogacy hub, has temporarily banned commercial surrogacy within its borders.<sup>239</sup> This temporary ban echoes the initial regulatory steps taken in Thailand before the formal prohibition was enacted. Likewise, India, the international surrogacy hub prior to Thailand, though already subject to expansive regulation, is now debating an outright prohibition of commercial surrogacy as well.<sup>240</sup> This trend toward global prohibition in the absence of comprehensive regulation presents the greatest evidence of the dire need to make reform a priority in the domestic and global legal communities. Those empowered to bring justice to all can no longer stand idly by as the men (as intended parents), women (as intended parents and surrogate mothers), and children (both resulting and adoptive) impacted by unregulated international commercial surrogacy suffer.

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<sup>238</sup> See Lin, *supra* note 10, at 566-67 (describing potential administrative roles for Central Authorities adapted to the surrogacy context).

<sup>239</sup> Grimm, *supra* note 38 (discussing problems Australian couples face finding surrogates abroad in the wake of India, Thailand, and Nepal outlawing commercial surrogacy).

<sup>240</sup> See Amrit Anand Choudhary, *SC Suggests Ban on Commercial Surrogacy*, TIMES OF INDIA (Oct. 15, 2015, 2:55 AM), <http://timesofindia.indiatimes.com/india/SC-suggests-ban-on-commercial-surrogacy/articleshow/49365734.cms> [<http://perma.cc/85SD-CFDT>] ("The Law Commission in its 228th report suggested that surrogacy should not be allowed for commercial purposes.").