VIEWING SURROGACY THROUGH THE LENS OF THE BEST INTERESTS PRINCIPLE OF THE CONVENTION ON THE RIGHTS OF THE CHILD

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INTRODUCTION

"Baby-Selling Ring Busted" reads the press release circulated by the Federal Bureau of Investigation.[1] Theresa Erickson, one of the most prominent fertility lawyers in the world,[2] admitted before the U.S. District Court for the Southern District of California that she and her business partners used gestational surrogates "to create an inventory of unborn babies that they would sell for over $100,000 each."[3] Erickson and her co-conspirators, also well-known American fertility lawyers, would arrange for women overseas to become pregnant, then, after the pregnancy progressed into the second trimester, would begin the search for prospective parents in the United States ("U.S.").[4] For her actions, Erickson was sentenced to five months in prison, nine months house confinement, and fined $70,000.[5] Her accomplices also were given one-year prison sentences.[6] The revelation that Erickson and her associates were operating a baby-selling ring rocked the Artificial Reproductive Technology ("ART") community, and starkly exposed the lack of sufficient regulation of surrogacy both domestically and abroad.

The practice of surrogacy[7] is rapidly expanding. In the U.S., estimates suggest the number of surrogate agreements rose 89% from

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[1] Press Release, US Attorney's Office, S. Dist. Cal., Baby-Selling Ring Busted (Aug. 9, 2011), *available at* http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted [hereinafter FBI press release].

[2] Pam Madsen, *Made to Order Babies: When Reproductive Medicine Breaks the Law*, THE FERTILITY ADVOCATE, (Aug. 10, 2011), http://www.thefertilityadvocate.com/cross-border-fertility-treatment/made-to-order-babies-when-reproductive-medicine-is-breaks-the-law/.

[3] FBI press release, *supra* note 1.

[4] *Id.*

[5] Alyssa Newcomb, *Two San Diego Women Sentenced in Baby Selling Case*, ABC NEWS (Feb. 24, 2012), http://abcnews.go.com/US/san-diego-women-sentenced-baby-selling-case/story?id=15785854#.T2NclWCWQzY.

[6] *Id.*

[7] There are two types of surrogacy. In *traditional surrogacy*, "the surrogate's own eggs are used and are inseminated with the intended father's sperm. *Gestational surrogacy* occurs when the surrogate is implanted with an embryo created with the intended parents' genetic material or with donor eggs or

2004 to 2008,[8] and one source claims that the number of surrogacy arrangements increases by 1,300 a year in the U.S. alone.[9] The numbers are growing worldwide as well. While surrogacy is banned in several developed countries,[10] regulation is lax in developing nations where surrogacy has become a booming market.[11] The rise of surrogacy in developing nations is fueled largely by the increasing number of infertile couples who are crossing borders to obtain fertility treatments overseas, particularly surrogacy arrangements, which are either too expensive or prohibited by law in their home countries.[12] One of the most popular destinations for such "fertility tourism," is India, where surrogacy services can be arranged for about $22,000 or less, as compared with costs of up to $100,000 or more in the U.S.[13]

Such rapid expansion of surrogacy and the recent conviction of Theresa Erickson raise questions as to what extent surrogacy should be regulated, how it should be regulated, and by whom. Inconsistent regulation across the globe has given rise to fertility tourism and growing concerns about the exploitation of women and children. Referring to the patchwork of state laws governing surrogacy in the U.S., one journalist commented that the "lax atmosphere means that it is now essentially possible to order up a baby, creating an emerging commercial market for surrogate babies that raises vexing ethical questions."[14] While surrogacy "implicates some of our most

sperm." BRETTE MCWHORTER SEMBER, THE COMPLETE ADOPTION AND FERTILITY LEGAL GUIDE 197 (2004).

[8] Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 3 (2010), http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVE J0A1M.pdf.

[9] Luchina Fisher, *Surrogate Surge: Now Nicole Kidman and Keith Urban Welcome New Baby*, ABC NEWS (Jan. 18, 2011), http://abcnews.go.com/Entertainment/nicole-kidman-keith-urban-baby-daughter-surrogate/story?id=12635485#.Tzcc3mAlbUQ.

[10] Susan Markens, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 23 (2007).

[11] Divya Gupta, *Inside India's Surrogacy Industry*, THE GUARDIAN (Dec. 6, 2011, 9:00pm), http://www.guardian.co. uk/world/2011/dec/06/surrogate-mothers-india.

[12] *See Fertility Tourism/Going Abroad for Infertility Treatment,* CREATING A FAMILY, http://www.creatingafamily.org/infertility-resources/fertility-tourism.html.

[13] Amana Fontanella-Khan, *India: the Rent-a-Womb Capital of the World,* SLATE (Aug. 23, 2010), http://www.slate.com/articles/double_x/doublex/2010/08/india_the_rentawomb_capital_of_the_world.html

[14] Stephanie Saul, *Building a Baby, With Few Ground Rules,* N.Y. TIMES, Dec. 12, 2009, http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all. (Though spoken in reference to the diversity of legislative approaches in the U.S., this statement is readily extrapolated to the international scene).

fundamental concerns, including procreation rights, family values, and class relationships,"[15] there is a noticeable lack of regulation of its practice, particularly in the international context.[16]

In response to the rapid proliferation of surrogacy agreements, this article argues that surrogacy be regulated in accordance with the principles of the Convention on the Rights of the Child ("CRC"), and concludes that this will lead lawmakers to ultimately ban surrogacy. Part I will begin the discussion by arguing that such regulation is best carried out by domestic legislatures. Part II will follow with the development of an appropriate analytical framework for addressing the issue, drawing upon the articles of the CRC. The CRC, ratified by every nation state, save Somalia and the U.S., requires states in Article 3(1) to make the best interests of the child a primary consideration in all matters, including legislative action that affects children.[17] The language of the CRC will be explored for the purpose of generating a rubric for determining the best interests of the child. Next, in Part III, this best interests rubric will be applied to the issue of surrogacy, with a survey conducted using social science research regarding the effects of ART and surrogacy on children; this leads to the conclusion that it is in the best interests of the child that surrogacy be banned.

PART I
LEGISLATURES ARE THE PROPER FORA FOR FORMULATING SURROGACY REGULATIONS

The first question in regard to the development of surrogacy regulation is determining which organizational body is best suited to promulgate such guidelines. Some argue that regulation is best handled by the medical community. In this way, ethicist George Annas suggests that while differing laws will lead people to cross borders to contract for a surrogate, "[o]nly the development of international norms, adopted and followed by the medical profession

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[15] David Orentlicher, *Book Review: Does Mother Know Best?*, 40 HASTINGS L.J. 1111 (reviewing MARTHA A. FIELD, SURROGATE MOTHERHOOD (1988)).

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

[17] Convention on the Rights of the Child, G.A. Res. 44/25 art. 3(1) (Nov. 20, 1989), http://www2.ohchr.org/english/law/pdf/crc.pdf [hereinafter CRC].

itself, is likely to ever produce uniformity in global practices."[18] Yet, though Annas favors the use of professional standards over legal mechanisms to regulate surrogacy and ART, he recognizes that currently "international ethical norms are inadequate to set practice standards for reproductive tourism or to keep pace with the reach of modern communications."[19] Further, as another commentator points out, there is a "growing tribe of experts within the medical market who see profits in this procedure," which presents a possible conflict of interest when formulating regulations.[20]

For many years, doctors and patients were the sole decision makers in regard to ART and surrogacy, as assisted reproduction has been relegated largely to the private sphere. However, as "the advent of high-tech and highly publicized procedures, such as *in vitro* fertilization (IVF), [has] generated increasing unease in the wider community," nation states have sought to develop regulatory schemes to address the rapidly advancing science of ART.[21] The expanding use and development of artificial reproductive sciences has led to a growing sense that "the physician should not be left to make decisions of an ethical nature by himself."[22] Which has prompted many states and international bodies to establish ethics committees to investigate these complex issues.[23] Rather than rely on the ART industry to self-regulate, these nations have turned to ethics committees to make recommendations for taking adequate and appropriate legislative action.[24]

This movement towards legislative control over surrogacy in particular, and ART in general, is mirrored in statements by American judges in numerous court decisions on surrogacy contracts.

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[18] George J. Annas, *Assisted Reproduction—Canada's Supreme Court and the Global Baby,* 5 N. ENG. J. MED. 365, 463 (2011), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMhle1101361?ssource=hcrc&.

[19] *Id.*

[20] Imrana Qadeer, *Social and Ethical Basis of Legislation on Surrogacy: Need for Debate*, 6 INDIAN J. MED. ETHICS 1, 28 (2009), *available at* http://www.ijme.in/pdfs/171co28.pdf.

[21] Ken R. Daniels et al., *The Best Interests of the Child in Assisted Human Reproduction: The Interplay between the State, Professionals, and Parents*, 19 POLITICS AND THE LIFE SCIENCES 1, 34 (2000).

[22] Vered H. Eisenberg & Joseph G. Schenker, *News and Views: Reproductive Health Care Policies Around the World: The Duties of Ethical Committees Applied to Human Reproduction*, 13 J. ASSISTED REPROD. AND GENETICS 9, 689 (1996).

[23] *Id.*

[24] Daniels et al., *supra* note 21, at 33.

Currently, the U.S. lacks a nation-wide law regarding surrogacy,[25] and individual state laws on surrogacy "tend to be all over the board."[26] In states where there is no law, judges have called upon the legislature to deal with the complicated issue of surrogacy. Faced with contested surrogacy contracts, many judges have little or no guidance as to how to rule, and many petition the legislature to take action.

For example, the New Jersey Supreme Court, in the case *In re Conroy*, reflected on the legislature's resources and ability to "synthesize vast quantities of data and opinions from a variety of fields and to formulate general guidelines that may be applicable to a broad range of situations"[27] in concluding that "[a]s an elected body, the Legislature is better able than any other single institution to reflect the social values at stake."[28] Similarly, the Florida Supreme Court stated in regard to sensitive social issues:

> [b]ecause the issue with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all institutions and individuals be properly accommodated.[29]

Nevertheless, some judges have chosen to legislate from the bench,[30] leading Justice Arabian in his concurrence in *Johnson v. Calvert* to caution, "[t]o date, the legislative process has failed to

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[25] DEOBRA L. SPAR, THE BABY BUSINESSS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 84 (2006).

[26] SEMBER, *supra* note 7, at 197.

[27] *In re* Conroy, 486 A.2d 1209, 1221 (N.J. 1985).

[28] *Id.* at 1220.

[29] Saltz v. Perlmutter, 379 So.2d 359, 360 (Fla. 1980).

[30] *See, e.g., J.F. v. D.B.*, 879 N.E.2d 740, 744 (Ohio 2007), (determining that because Ohio did not have a public policy specifically banning surrogacy contracts, the contract at issue was valid. In his dissent, Judge Cupp vigorously contested the majority's conclusion, recognizing that it was a controversial area of law and required guidance from the legislature. He warned, "[w]ithout comprehensive rules of engagement for such activity [surrogacy contracts], preferably prescribed by the legislature, it is not difficult to imagine a developing 'marketplace' for multiparty, multistate child-production contracts").

produce a satisfactory answer. This court should be chastened and not emboldened by that failure."[31] Thus, in light of the foregoing, it is evident that "[l]egislatures are the appropriate forums to deal with these issues and to determine public policy."[32]

PART II
THE "BEST INTERESTS OF THE CHILD" IS THE APPROPRIATE ANALYTICAL FRAMEWORK FOR ADDRESSING SURROGACY

Once it is established that legislatures are the proper venue for addressing the issue of surrogacy, the question arises as to *how* legislatures are to assess this complex issue. What principles ought to guide lawmakers in their decision-making? There are various interests involved in a surrogacy arrangement. The primary interests are those of the commissioning parents, the surrogate mother, and those of the child. Though the interests of the commissioning parents and the surrogate[33] are not insignificant, and the commissioning parents' infertile condition evokes heartfelt sympathy, ultimately, the interests of the children must prevail, in accordance with the CRC.

A. *The Convention on the Rights of the Child Establishes the "Best Interests of the Child" as the Appropriate Framework for Evaluating Surrogacy*

The CRC, the "most highly ratified instrument in international law,"[34] is of great utility in approaching the issue of surrogacy. Though the CRC does not directly address the issue of surrogacy arrangements, its principles are readily applied to this developing issue.

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[31] Johnson v. Calvert, 851 P.2d 776, 788 (Cal. 1993).

[32] Michelle Pierce-Gealy, *Are You My Mother?: Ohio's Crazy-Making Baby-Making Produces a New Definition of 'Mother,'* 28 AKRON L. REV. 535, 562 (1994–1995).

[33] It is argued that the term "surrogate," used to refer to the woman who carries a child for the commissioning parents, is a misnomer. "Surrogate" denotes a substitute mother, yet a child developing in the womb "does not view the surrogate mother as a surrogate for anything." Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under CA Law*, 1 UCLA Women's L.J. 89, 90 n. 5 (1991).

[34] Ursula Kilkelly, *The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, 23 HUM. RTS. Q. 2, 310 (2001). 193 states have ratified the treaty, with the exception of the U.S. and Somalia. Luisa Blanchfield, CONG. RESEARCH SERV., R40484, UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 1 (2010), http://fpc.state.gov/documents/organization/153279.pdf.

To begin, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (hereinafter "Optional Protocol"), which has been adopted by over 100 countries, provides a clear prohibition against the sale of children.[35] Article 2 defines the sale of children as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."[36] This definition likely applies to surrogacy contracts in which a child is transferred from the gestator to the intended parents in consideration of monetary compensation and reimbursement.

However, should states reject the application of the Optional Protocol to surrogacy agreements, the text of the CRC provides further guidance to legislatures, in that it urges states to consider the interests of the child in all its actions.[37] The Preamble to the CRC recalls and emphasizes the words of the Declaration of the Rights of the Child (1959), stating, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[38] To provide such legal protection, Article 3(1) of the CRC provides, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[39] Providing further explication of Article 3(1), the United Nations Committee on the Rights of the Child states, "[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions," whether those decisions are directly related to the child or not.[40]

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[35] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, A/RES/54/263 art. 1 (May 25, 2000).

[36] *Id.* art. 2.

[37] CRC, *supra* note 17, art. 3.

[38] *Id.* at preamble.

[39] CRC, *supra* note 17, art. 3.

[40] Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement [hereinafter General Comment 5].

Emily Logan, an internationally recognized children's rights expert, notes that the best interests principle was not a novel concept when written into the 1989 CRC, as it was included in previous human rights instruments such as the 1959 Declaration on the Rights of the Child.[41] In fact, some argue that the principle of the best interests of the child is "now crystallized into customary international law."[42] However, what is unique about the best interests principle contained in the CRC is that, for the first time, it places an obligation on states "to ensure that children's interests are placed at the heart of government and all decision-making which impacts on children."[43]

In addition to the best interests principle, the CRC promotes three other primary principles: the principle of non-discrimination in Article 2; the right of children to express their views on matters affecting them in Article 12; and the child's right to survival and development in Article 6.[44] These principles are intended as more than mere ideals, but rather as influences on policy. The Committee reminds states that ratification of the CRC involves the obligation under international law to implement the treaty.[45] Such implementation denotes a process whereby States Parties take action to ensure the realization of all rights recognized in the CRC by all children in their jurisdiction.[46] This process takes one of two forms: either the transformation approach or the incorporation approach.[47] A state following a transformation approach will use treaty provisions as the basis for enacting legislative rules in accordance with the treaty, while in the incorporation approach the treaty itself becomes part of national law.[48] Whether achieved through the transformation or the incorporation approach, states are under an obligation to

[41] Emily Logan, Ombudsman for Children, Ir. & Chairperson of the European Network for Ombudsmen for Children, Janusz Korczak Lecture given in Stockholm, Sweden: The Child's Best Interest: A Generally Applicable Principle (Sept. 9, 2008), https://wcd.coe.int/ViewDoc.jsp?id=1341155.

[42] RHONA K. M. SMITH, TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 454 (2d. ed. 2010).

[43] Logan, *supra* note 41.

[44] CRC, *supra* note 17.

[45] General Comment 5, *supra* note 40, at 7.

[46] *Id.*

[47] GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 380 (1998).

[48] *Id.*

implement the provisions of the CRC.[49] Many states have taken such action under the CRC, including references to the best interests of the child in national laws that impact children.[50]

Furthermore, various regional organizations have also adopted the principles of the CRC, particularly the best interests principle, in seeking to implement the international rights of the child in their regions.[51] In an approach that "represents a significant step forward that shows a common legal framework in international human rights law applicable to children,"[52] the Inter-American Court of Human Rights stated, in accordance with the CRC, that the best interests of the child is a "regulating principle regarding children's rights based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development."[53] In Europe, the European Union Agency for Fundamental Rights has adopted the CRC as its normative framework for monitoring and developing children's rights in European Union member states.[54] Similarly, the European Court of Justice in the case *European Parliament v. Council of the European Union*[55] stated that the Court takes account of the CRC "in applying the general principle of Community law."[56] In Africa, the Organization of African Unity adopted its own treaty on children's rights in 1990, the African Charter on the Rights and Welfare of the Child, which provides in Article 4(1), "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."[57]

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[49] *See* CRC, *supra* note 17, art. 4 (providing that parties to the treaty are required to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention").

[50] SMITH, *supra* note 42, at 456.

[51] VAN BUEREN, *supra* note 47, at 401.

[52] INTER-AMERICAN COMM'N ON HUMAN RIGHTS, THE RIGHTS OF THE CHILD IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: CH. 1: GENERAL INFO. ¶ 45 (2d. ed.) *available at* http://www.cidh.oas.org/countryrep/Infancia2eng/Infancia2Cap1.eng.htm.

[53] Juridical Condition and Human Rights of the Child Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) ¶ 56 (Aug. 28, 2002).

[54] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, DEVELOPING INDICATORS FOR THE PROTECTION, RESPECT AND PROMOTION OF THE RIGHTS OF THE CHILD IN THE EUROPEAN UNION (Nov. 2010), *available at* http://fra.europa.eu/fraWebsite/attachments/FRA-report-rights-child-conference2010_EN.pdf.

[55] Case C-540/03, European Parliament v. Council of the European Union, 2006 E.C.R. I-05769.

[56] *Id.*

[57] African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49 (Nov. 28, 1990).

This treaty, considered "the most progressive of the treaties on the rights of the child,"[58] echoed the sentiment of the CRC, but goes a step further to provide even more protection for children by making the best interests of the child *the* primary consideration.

A common criticism of the application of the best interests standard is that the text of CRC Article 3(1) suggests that the best interests of the child is "a" primary consideration, not "the" primary consideration. [59] According to Geraldine Bueren, a leading international human rights lawyer, there was debate during drafting of the CRC as to whether the best interests of the child should be only a primary rather than the paramount consideration.[60] The first draft, adopted in 1980, referred to the best interests principle as "the paramount consideration."[61] However, in a "regrettable weakening of the primacy of the best interests of the child in the United Nations Convention, which was never adequately explained," Article 3(1) of the final instrument refers to it as "a primary consideration." [62] Nevertheless, provisions tailored to specific situations such as Article 21, which deals with adoption, refer to the best interests as the paramount consideration.[63] A reading of the *travaux preparatoires* generated during negotiations of the Convention reveal that several delegates believed that the use of the phrase "the paramount consideration" was broader and "better protected the child," but in the interest of compromise, the Working Group agreed to adopt the term "a primary consideration" in recognition of various delegates' concerns that the child's interest is not overriding in every case.[64] Despite this weakening of the standard, Bueren notes, it is clear from documents generated during treaty negotiations that "it is only in certain situations that the child's best interests would not prevail," such as medical emergencies.[65] She goes on to suggest, "in states which have incorporated the Convention into their domestic laws the

[58] VAN BUEREN, *supra* note 47, at 402.

[59] *Id.* at 48-9.

[60] *Id.*

[61] *Id.*

[62] VAN BUEREN, *supra* note 47, at 46; CRC, *supra* note 17, art. 3(1).

[63] *Id.* at art. 21.

[64] Working Group to the Commission on Human Rights, U.N. Doc. E/CN.4/L.1575, 22–24 (1981).

[65] VAN BUEREN, *supra* note 47, at 48-49; *Id.* at 24.

burden of proof would be on those who seek to argue that other interests prevail."[66]

B. *The U.S. and the CRC*

A special note on the U.S.' relationship with the CRC is appropriate at this juncture. Although "[i]t is indisputable that the U.S. played a pivotal role in the drafting of the Convention,"[67] the U.S. has not ratified the treaty as of the writing of this article. Resistance to ratification arises largely out of concerns that the CRC undermines national sovereignty and interferes with parental rights.[68] It is beyond the scope of this article to explore the debate within the U.S. regarding ratification. Nevertheless, the best interests principle remains relevant to American policy formation because while the U.S. has not ratified the CRC, it has signed the treaty.[69] Although signing a treaty does not bind a state under international law, Article 18 of the Vienna Convention on the Law of Treaties, to which the U.S. is a party, obliges states "to refrain from acts which would defeat the object and purpose of the treaty."[70] Thus, the U.S. has a duty to refrain from frustrating the provisions of the CRC and its four principles, and therefore, must act in a way that does not undermine the best interests of the child.

Further, while the U.S. has not ratified the CRC, it is party to the two optional protocols to the Convention, regarding children in armed conflict,[71] and the sale of children, child prostitution, and child pornography.[72] In addition, it is party to the International Covenant on Civil and Political Rights, which contains provisions guaranteeing various rights to children including the right to protection and the right to acquire a nationality.[73] In this way, the U.S. has manifested its

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[66] *Id.* at 49.

[67] Cynthia Price Cohen, *Special Spring 2006 Symposium: The Role of the U.S. in the Drafting of the Convention of the Rights of the Child,* 20 EMORY INT'L L. REV. 185 (2006).

[68] *Id.* at 195.

[69] *Convention on the Rights of the Child*, UN.Org (Nov. 20, 1989), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

[70] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 18 (May 23, 1969).

[71] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, A/RES/54/263 (2000) (ratified by the U.S. Dec. 23, 2002).

[72] *See generally Id.*

[73] International Covenant on Civil and Political Rights, 2200A (XXI), art. 24 (1966).

willingness on the international stage to protect the interests of children.

Moreover, the principles of the CRC parallel American law in numerous ways, as seen in the opinion of Supreme Court Justice Frankfurter who stated, "[c]hildren have a very special place in life which law should reflect."[74] For example, just as Article 3 of the CRC promotes the best interests of the child as an important principle, so do the statutes and case law of the U.S.[75] In light of American involvement in the drafting of the CRC, the decision of the American delegation to sign the treaty, and ratify the optional protocols to it, as well as the presence of comparable legal principles in American law, there is a strong argument that the U.S. is inclined to assimilate the best interests principle into the decision-making calculus of its legislatures.

C. *Developing a Best Interests Rubric Under the CRC*

Despite widespread agreement that the best interests principle applies to all decision-making that affects children, pinpointing a definition of "best interests" is difficult, leading one commentator to state that it poses a question "no less ultimate than the purpose of life itself."[76] Though the "list of factors competing for the core of best interests is almost endless," the CRC provides much needed guidance, insofar as "the rights in the Convention may be used as signposts by which the best interests of the child may be identified."[77]

This article will focus on three articles of the CRC in developing a possible rubric with which legislatures may evaluate surrogacy. First, Article 6(2) provides, "States Parties shall ensure to the maximum extent possible the survival and development of the child."[78] Next, under Article 8(1), "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[79] Lastly, Article 7 asserts that a child, "as far as possible

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[74] May v. Anderson, 345 U.S. 528, 536 (1953).

[75] John Quigley, *U.S. and Its Participation in the Convention on the Rights of the Child: U.S. Ratification of the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 401, 405 (2003).

[76] VAN BUEREN, *supra* note 47, at 47.

[77] *Id. at* 48.

[78] CRC, *supra* note 17, art. 6(2).

[79] *Id.* art. 8(1).

[has] the right to know and be cared for by his or her parents."[80] Articles 7 and 8, which are closely linked to the child's right to psychological health and development recognized in Article 6, will be discussed in further detail later in this article.

In regard to Article 6, the Committee on the Rights of the Child ("Committee"), which is tasked with the implementation of the CRC, urges states to ensure the survival and development of all children to the maximum extent possible, yet development and survival are not limited to mere physical health.[81] Rather, "the Committee expects States to interpret 'development' in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development."[82]

Recognizing the special needs of very young children, including infants, the Committee released special guidelines specifically geared towards implementation of the CRC for young children.[83] In light of the importance of the first years of a child's life, the Committee urges states "to take all possible measures to … create conditions that promote the well-being of all young children during this critical phase of their lives."[84] Moreover, while "[e]nsuring survival and physical health are priorities,"[85] the Committee notes that Article 6 "encompasses all aspects of development, and that a young child's health and psychological well-being are in many respects interdependent." Therefore, the Committee concludes that the "right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention."[86] For example, the implementation of Articles 7 and 8, which charge states with the responsibility to protect a child's right to identity and right to know his or her parents, furthers the goal of Article 6, such that the preservation of a child's identity and familial relations is a vital component of his or her psychological health. Thus, the implementation of these and all the provisions of the CRC

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[80] *Id.* art. 7.

[81] General Comment 5, *supra* note 40.

[82] *Id.*

[83] Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood Sept. 12, 2005 - Sept. 30, 2005, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006) [hereinafter General Comment 7].

[84] *Id.* at 10.

[85] *Id.*

[86] *Id.*

promote the developmental rights of the child and further his or her best interests.

PART III
APPLYING THE BEST INTEREST STANDARD TO THE SURROGACY DEBATE

Much of the literature on surrogacy contracts focuses only on the interests of the surrogate mother and/or the commissioning parents.[87] Given the State's responsibility to protect the interests of the vulnerable child, the debate must give more attention to the effects of surrogacy on the resulting child. This section examines the physical, psychological, and emotional effects of surrogacy arrangements on the children whose existence is contracted for in the agreement.

A. *Threats to Physical Health and Development*

In gestational surrogacy, the most common form of surrogacy, a woman agrees to carry a child that was conceived using either a donor egg or the commissioning mother's egg and sperm from a donor or the commissioning father.[88] Thus, gestational surrogacy arrangements require the use of assisted reproductive technology including IVF[89] to create the embryo(s) that are implanted in the surrogate.[90] This differs from traditional surrogacy agreements, which are infrequently arranged, in which the carrier's own eggs are fertilized and implanted using either artificial insemination or IVF.[91] Therefore, IVF and other forms of ART are an integral component of

[87] For example, many scholarly articles and books rightly discuss the negative impact of surrogacy on the surrogate mother, not only in terms of her health, but also with respect to the negative impact of surrogacy on her dignity and on her family's well-being. But there remains a dearth of literature on the effect of surrogacy on the child.

[88] *Gestational Surrogacy*, N.Y. FERTILITY INSTITUTE (2011), http://www.nyfertility.org/gestational-surrogacy-surrogate-mother.html.

[89] The Center for Disease Control defines *in vitro* fertilization as "fertilization outside of the body." In IVF, "[d]octors treat the woman with a drug that causes the ovaries to produce multiple eggs. Once mature, the eggs are removed from the woman. They are put in a dish in the lab along with the man's sperm for fertilization. After 3 to 5 days, healthy embryos are implanted in the woman's uterus." *Reproductive Health: Infertility FAQs*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/reproductivehealth/Infertility/ (last updated April 19, 2012).

[90] *Id.*

[91] *Surrogacy*, IVF-INFERTILITY, http://www.ivf-infertility.com/surrogacy/index.php (last updated Sept. 4, 2012, 10:18 AM).

surrogacy. For this reason, policy-makers addressing the issue of surrogacy are prudent to heed studies that have been released in recent years regarding the effects of ART on children. Though most studies do not address surrogacy in particular, revealing the lack of scientific inquiry into surrogacy, studies on ART in general are instructive in this debate.

B. *Risks of ART*[92]

A "growing consensus in the clinical community" suggests that there are risks in IVF.[93] There is significant evidence that children born through ART are at higher risk for birth defects, low birth weight, and even genetic disorders.[94] A meta-analysis conducted in 2005 suggests that there "is a statistically significant increased risk of birth defects in infants conceived using ART in the order of 30-40%."[95] Similarly, in a study conducted by the U.S. government in 2009, researchers found that "some birth defects occur more often among infants conceived with ART."[96]

Another study found that ART infants, even singleton[97] infants, were "more than twice as likely as naturally conceived infants to have major birth defects diagnosed during the first year of life and were also more likely to have multiple major defects."[98] Looking at the

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[92] In discussing the negative impact of ART on children, the author wishes to make clear at the outset that children with disabilities are deserving of the utmost respect on account of their dignity as human persons. In this way, the author affirms the dignity of these children and does not suggest that they are any less deserving of respect when arguing that the adverse consequences of ART are not in the best interests of the child. Children have a right to health and development under Article 6 of the CRC, and when the use of ART interferes with this right, one can argue that the use of ART is not in the best interest of the child.

[93] Sarah Guy, *New Study on Genetic Risks of IVF*, BIONEWS (Feb. 23, 2009), http://www.bionews.org.uk/page_13682.asp.

[94] Gina Kolata, *Picture Emerging on Genetic Risks of IVF*, N.Y. TIMES, Feb. 16, 2009, http://www.nytimes.com/2009/02/17/health/17ivf.html?pagewanted=all.

[95] Michèle Hansen, Carol Bower, Elizabeth Milne, Nicholas de Klerk & Jennifer J. Kurinczuk, *Assisted Reproductive Technologies and the Risk of Birth Defects—a Systematic Review*, 20 HUM. REPROD. 328-38 (2005).

[96] J. Reefhuis, M.A. Honein, L.A. Schieve, A. Correa, C.A. Hobbs & S.A. Rasmussen, *Assisted Reproductive Technology and Major Structural Birth Defects in the U.S.*, 24 HUM. REPROD. 360 (2009).

[97] "Singleton" refers to an infant that does not have a twin or multiple. A singleton pregnancy involves only one fetus. *See infra* note 95.

[98] Michèle Hansen, Jennifer Kurinczuk, Carol Bower & Sandra Webb, *The Risk of Major Birth Defects After Intracytoplasmic Sperm Injection and In Vitro Fertilization*, 346 N. ENG. J. MED 729 (2002).

medical records of over 15,000 ART children, geneticists in France found "a major congenital malformation in 4.24% of the [IVF] children," as compared with 2-3% in the general population.[99] In light of that study, the lead scientist urged, "[i]t is important that all doctors and also politicians are informed about this."[100]

In addition to birth defects, children born through ART are at risk for premature birth and low birth weight. Powerful financial incentives lead many fertility doctors to disregard industry guidelines that encourage the transfer of only one embryo in IVF, in favor of implanting multiple embryos in hopes that at least one will "take."[101] When a multiple pregnancy results, the risk of premature birth and other birth complications increases. With 50% of IVF pregnancies resulting in multiple births, the rate of twins, triplets, and higher order births is increasing.[102] As one study confirms, "high rates of multiple births, with attendant complications of prematurity and low birth weight, are well documented."[103] As a result, a 2009 study, from the March of Dimes, listed fertility treatments as one of the primary causes for a 36% increase in infant prematurity in the preceding twenty-five years.[104] In this way, the ART industry "creates preterm infants with *in vitro* and other fertility treatments even as the government and nonprofit groups work to fight the nation's 12.7% rate of prematurity, regarded as a major national health care problem."[105]

Of particular concern for researchers is the possible link between IVF and genomic imprinting disorders. A team of researchers in Australia found that "children conceived by IVF are significantly more likely to have BWS [Beckwith-Wiedemann Syndrome],

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[99] Sarah Boseley, *Doctors Should Warn of IVF Defect Risk, Says Report,* THE GUARDIAN (June 13, 2010), http://www.guardian.co.uk/lifeandstyle/2010/jun/13/ivf-malformation-risk-doctors-warn.

[100] *Id.*

[101] Stephanie Saul, *21st Century Babies: The Gift of Life and Its Price*, N.Y. TIMES, Oct 10, 2009, http://www.nytimes.com/2009/10/11/health/11fertility.html?pagewanted=all.

[102] Jane Squires & Paul Kaplan, *Developmental Outcomes of Children Born After Assisted Reproductive Technologies*, 20 INFANTS AND YOUNG CHILDREN 5 (2007).

[103] Nancy S. Green, *Risks of Birth Defects and Other Adverse Outcomes Associated with Assisted Reprod. Tech.*, 114 PEDIATRICS 256 (2004). In response to the risks that accompany multiple births, such as the risks of developmental delay or cerebral palsy, several European countries have outlawed the transfer of more than one embryo in a given IVF cycle. *See* SAUL, *supra* note 101.

[104] *Id.*

[105] *Id.*

compared with children conceived naturally."[106] Beckwith-Wiedemann Syndrome ("BWS") is a disorder that is "characterized by prenatal and/or postnatal overgrowth, macroglossia, abdominal-wall defects, neonatal hypoglycemia, hemihypertrophy, ear abnormalities, and an increased risk of embryonal tumors."[107] Though researchers are unsure as to the precise mechanisms underlying the increased risk for BWS, the results of this and previous studies suggest that the genetic make-up of the embryo is altered and adversely affected by the culture used in the petri dish.[108] For years, scientists have recognized the potential for the *in vitro* culture to affect the activity of genes, thus influencing the embryo's development.[109] One team of researchers found that "the culture medium used for IVF treatment has a significant effect not only on early embryonic development, but also on subsequent fetal development and the newborn child."[110] Similar concerns have been raised about the long-term effects of pre-implantation genetic diagnosis, a procedure in which one or two cells are removed from a three-day-old embryo for analysis.[111] There is also growing evidence that the patterns of genetic abnormalities present in ART children with Down's Syndrome are different and more complex than those present in the naturally occurring condition. This has led researchers to suggest that "a lot of the chromosomal abnormalities are not those that are conventionally age-related[]" and they "raise[d] the concern that some of the abnormalities might be treatment-related."[112]

These and many other reports represent the nascent study of the long-term effects of ART on children. Although an estimated 3.75 million babies have been born since the advent of IVF,[113] "few follow-

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[106] Jane Halliday, Kay Oke, Sue Breheny, Elizabeth Algar, & David J. Amor, *Beckwith-Wiedemann Syndrome and IVF: A Case-Control Study*, Letters to the Editor, 114 PEDIATRICS 526, 528 (2004).

[107] *Id.* at 526-27.

[108] *Id.* at 528.

[109] Sarah Guy, *New Study on Genetic Risks of IVF*, BIONEWS (Feb 23, 2009), http://www.bionews.org.uk/page_13682.asp.

[110] John C. Dmoulin et al., *Effect of In Vitro Culture of Human Embryos on Birthweight of Newborns*, 25 HUM. REPROD. 609 (2010).

[111] Squires, *supra* note 102, at 2–10.

[112] Michelle Roberts, *IVF Procedure 'May Increase Risk of Down's Syndrome,'* BBC (Jul. 3, 2011), http://www.bbc.co.uk/news/health-13992232.

[113] EUROPEAN SOCIETY OF HUMAN REPRODUCTION AND EMBRYOLOGY, *ESHRE Position Paper: Birth Defects in IVF Children* (Apr. 7, 2009), *available at*

up studies of children conceived through ART have been performed."[114] Despite the challenges of IVF studies, such as the near impossibility of identifying a perfect control group,[115] far more research is needed to understand fully the implications of this rapidly developing science. As one scientist stated, "[i]t is imperative that we ensure that the demand for these services and the rapid technological advances in this field do not exceed our ability to understand the potential long-term effects of these procedures on children."[116] The most vulnerable party involved, the child, must be protected and his or her best interests promoted.

C. *The Impact of the Uterine Environment on the Child In Utero*

Once the child has been implanted in the surrogate mother, he or she faces further potential challenges to his or her development. The uterine environment has an extensive influence on the health and development of the fetus, a reality that more and more scientists are acknowledging and studying.[117] The rapidly developing field of prenatal study has even attracted the attention of Nobel Prize winning economist Amartya Sen, who has undertaken a study of how prenatal experience impacts the health and productivity of a population.[118] It is commonly understood that what a pregnant woman is exposed to, "the air she breathes, the food and drink she consumes, the chemicals she's exposed to, even the emotions she

http://www.eshre.eu/binarydata.aspx?type=doc&sessionId=msi25j3olja0qnynetwovd45/Birth_defects_position_papers.pdf.

[114] George Kovalevsky, Paolo Rinaudo & Christos Coutifaris, *Do Assisted Reproductive Technologies Cause Adverse Fetal Outcomes?*, 79 FERTILITY AND STERILITY 1270 (2003).

[115] "[Y]et as every researcher acknowledges, infertility outcome studies themselves suffer from unusual limitations. For one thing, it's impossible to get a perfect control group. When you compare children of infertile women with children of fertile ones, you cannot know whether any problems in IVF children are due to the procedure itself, the drugs the women take, or the underlying condition—including, simply, age—that created the infertility in the first place." Liza Mundy, *How Do IVF Babies Turn Out? Fertility Specialists Confront Disturbing Evidence*, SLATE (Nov. 3, 2004), http://www.slate.com/articles/health_and_science/medical_examiner/2004/11/how_do_ivf_babies_turn_out.html.

[116] *See* Squires, *supra* note 102.

[117] Annie Murphy Paul, *How the First Nine Months Shape the Rest of Your Life*, TIME (Sept. 22, 2010), http://www.time.com/time/magazine/article/0,9171,2021065,00.html.

[118] Siddiq Osmani & Amartya Sen, *The Hidden Penalties of Gender Inequality: Fetal Origins of Ill-Health*, ECON. HUM. BIO. 1, 105-21 (2003), http://regional.bvsalud.org/bvs/equidad/HiddenPenaltiesofGenderInequality.pdf.

feels, is shared in some fashion with her fetus."[119] For example, ground-breaking research in the 1980s revealed that poor prenatal nutrition was a factor in high rates of heart disease in the United Kingdom.[120] Further, the Journal of American Medical Association reported that children born in China during the terrible famines that occurred during the Great Leap Forward were twice as likely to develop schizophrenia as those born during other times.[121] Moreover, the sad occurrence of fetal alcohol syndrome and its effects provide additional support for the argument that the uterine environment impacts the child in the womb.[122] In pointing to the prenatal origins of diseases such as diabetes and heart disease, Dr. Peter Nathanielsz put it succinctly, "[h]ow we are ushered into life determines how we leave."[123]

Additionally, there is mounting evidence that maternal stress, through the release of the stress hormone cortisol, can negatively affect the unborn child.[124] For example, researchers have shown that women pregnant during the Arab-Israeli Six-Day War of 1967 gave birth to children who were more likely to be diagnosed with schizophrenia as adults.[125] This information is particularly relevant to the surrogacy debate in light of the stress that drives some women to become surrogates, particularly in developing nations. In India, for example, news reports on fertility clinics in the country reveal that the women hired as surrogates face very stressful situations.[126] In an interview with an American journalist, one Indian surrogate admitted that she became a surrogate because she was desperate for money and had the option of either selling her kidney or becoming a surrogate.[127] Reflecting on her situation and those of her fellow

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[119] Murphy Paul, *supra* note 117.

[120] *Id.*

[121] Nicholas D. Kristof, *At Risk from the Womb*, N.Y. TIMES, Oct. 2, 2010, http://www.nytimes.com/2010/10/03/opinion/03kristof.html.

[122] *Prenatal Alcohol Exposure Variably Affects Children's Attention,* 37 AM. PSYCH. ASSOC. 6 (2006), *available* at http://www.apa.org/monitor/jun06/prenatal.aspx.

[123] Press Release, *How Babies Are Ushered into Life Determines How Healthily They Will Live As Adults, Book by Cornell Pregnancy Researcher Says*, CORNELL NEWS (Jan. 18, 1999), http://www.news.cornell.edu/releases/Jan99/womb.hrs.html.

[124] KRISTOF, *supra* note 121.

[125] *Id.*

[126] Margot Cohen, *A Search for a Surrogate Leads to India*, W.S.J. (Oct. 9, 2009), http://online.wsj.com/article/SB10001424052748704252004574459003279407832.html.

[127] *Id.*

surrogates, another Indian woman bluntly stated, in reference to the common practice of fertility doctors performing caesarian sections on surrogate mothers, "[w]e have to cut our stomachs for money."[128]

Adding to a surrogate's stress, many doctors in clinics overseas separate a surrogate from her own family and house her in a dormitory with other surrogates in order to monitor her nutrition and health.[129] As a result, many women are unable to see and care for their own families during the nine months they work as a surrogate. [130] Desperate for cash, these women endure long separations from their families, the pain of social stigma, and the physical and emotional pain of surrogacy in their bodies. Such stressful conditions harm not only their own health and dignity, but also likely harm the health of the unborn children they carry.

D. *Threats to Psychological Health and Development*

The child of surrogacy may face further stress when she is born and separated from her birth mother. Though some surrogacy agreements may be arranged to allow the surrogate mother and child to stay together for a short period following birth, surrogacy contracts typically require the separation of the child from the birth mother soon after delivery, as the entire process is centered on delivering the baby to the commissioning parents as soon as possible. In India, for example, caesarian sections are scheduled to allow commissioning parents the opportunity to travel to the clinic from abroad for the birth. Despite the fact that caesarean sections "are considered riskier for the baby under normal circumstances and double to quadruple the woman's risk of death during childbirth, the doctors rely on them heavily."[131]

While it may be inconvenient to commissioning parents, separating the child from his or her birth mother soon after birth is not in the child's best interests. Nine months in the womb establishes a "complex link, in nature both psychological and biological, with an epigenetic component, [which] is the foundation for early bonding"

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[128] Divya Gupta, *Inside India's Surrogacy Industry*, THE GUARDIAN (Dec. 6, 2011), http://www.guardian.co.uk/world/2011/dec/06/surrogate-mothers-india.

[129] *Id.*

[130] *Id.*

[131] SHAWN CARNEY, THE RED MARKET (2011).

between mother and child.[132] The first few hours of a baby's life are an important time of bonding with the mother,[133] at which time the child "is driven by instincts to remain connected to her" and "even short term separation from mother leads to elevated cortisol in [the] infant, indicating stress."[134] Newborns know their mothers' voices and their scent, and when kept close to their mother's body, they feel safe, and, "the transition from life in the womb to existence outside the uterus is made much easier for them."[135] This bonding and attachment process is vital to the psychological health of a child, and provides the foundation for a stable emotional life.[136]

Yet, if separated from her mother, a newborn may suffer adverse consequences. In an instructive study of rat pups, scientists discovered that after one full day of separation from their mother, the rat pups showed "altered brain organization of chemical receptors" and suffered double the number of normal brain cell deaths.[137] Within the context of surrogacy, the separation of child from mother could have a negative impact on the child's psychological, not just physical, development. Psychologists, studying maternal separation in adoption, found that "[e]ven infants adopted shortly after birth experience some disruption in the attachment and bonding process, for it has begun in utero" and continued after birth.[138] Reflecting on the powerful maternal-child bond, the National Ethics Committee of France, in its recommendation that gestational surrogacy continue to be banned in France, cautioned that to "ignore or deny the effects of pregnancy and of the mother-child relationship on the child's future could well be damaging for the child."[139]

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[132] NATIONAL CONSULTATIVE ETHICS COMMITTEE FOR HEALTH AND LIFE SCIENCES, *Opinion No. 110: Ethical Issues Raised by Gestational Surrogacy (GS)* 1, 6 (2010), available at http://www.ccne-ethique.fr/docs/Avis_110_Eng.pdf [hereinafter Opinion No. 110].

[133] Diane S. Feinberg, *The Importance of Mother and Child Attachment*, DIANE FEINBERG, M.ED., http://www.dianefeinberg.com/article1.html.

[134] LINDA FOLDEN PALMER, THE BABY BOND: THE NEW SCIENCE BEHIND WHAT'S REALLY IMPORTANT WHEN CARING FOR YOUR BABY 53 (2009).

[135] MARSHAL H. KLAUS & PHYLLIS H. KLAUS, YOUR AMAZING NEWBORN 9 (1998).

[136] PALMER, *supra* note 134, at 22–23.

[137] *Id.* at 53–54.

[138] Diane Feinberg, *Helping Your Adopted Child to Attach*, http://www.dianefeinberg.com/adoption.html (last visited Mar. 21, 2012).

[139] Opinion No. 110, *supra* note 132, at 6.

Inspired by her own experience with adopting a three-day-old infant, psychologist Nancy Newton Verrier undertook research on the effect of early maternal separation on children.[140] She concludes,

> [m]any doctors and psychologists now understand that bonding doesn't begin at birth, but is a continuum of physiological, psychological, and spiritual events which begin in utero and continue throughout the postnatal bonding period. When this natural evolution is interrupted by a postnatal separation from the biological mother, the resultant experience of abandonment and loss is indelibly imprinted upon the unconscious minds of these children, causing that which I call the 'primal wound.[141]

Though adoptive, or in the case of surrogacy, commissioning parents, may still be able to form an attachment with the child, and the child with them, Verrier maintains that the psychological effects of the separation cannot be undone, no matter how loving and warm the caregiver may be.[142] Even if the child is not genetically related to the surrogate, Verrier is convinced that "the profound connection is in the prenatal bonding and that the emotional trauma of separation will occur even when the child is in no way genetically connected to the gestating mother."[143] Children are as genetically related to their fathers as their mothers, yet separation from the father is not traumatic to newborns, supporting the argument that the connection between the newborn and birth mother is unique, strong, and goes beyond a genetic connection. In light of this developing research, it would seem to conceive a child "with the intention of separating [the mother] from that child would be setting the child up for psychological distress."[144] Though infants "are designed to survive in the face of adversity, it may not be wise to intentionally create it."[145]

Certainly, there are circumstances where the separation of mother from child may be in the best interests of the child. For example, a birth mother who does not possess the means to support a child and

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[140] *About Nancy Verrier*, NANCY VERRIER, http://nancyverrier.com/about-the-author-nancy-verrier/ (last visited Oct. 15, 2012).

[141] Nancy Newton Verrier, PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD (10th prtg. 2006).

[142] VERRIER, *supra* note 140, at 19.

[143] *Id.* at 205.

[144] *Id.* at 205.

[145] PALMER, *supra* note 134, at 89.

who makes the difficult decision to give up her child for adoption, may do so because she believes that it is in her child's best interest to be raised by another. In that instance, a child already exists, and the relinquishment is an unfortunate reality, but the best option given the circumstances. On the other hand, in surrogacy, the very essence of the arrangement is the separation of the child from the birth mother; the child is conceived with the express purpose of removing her from her birth mother, and delivering her to the commissioning parents. Whereas in adoption, the aim is to find a family for a baby or child, the opposite is true in surrogacy, where the aim is to obtain a baby for the parent(s).[146] While surrogate mothers and the agencies that employ them make a concerted effort to prevent the surrogate from bonding with the child, there is little they can do to prevent the baby from bonding to her mother.[147]

For these reasons, the debate on surrogacy must be sensitive to the needs of children. The need to bond with the birth mother and to breastfeed, which is extraordinarily important for the psychological and immunological development of the child,[148] are factors that must be considered by legislatures around the globe. Commenting on the legislative debate in India, Imrana Qadeer urges lawmakers to look at the effects of surrogacy on the child, highlighting that:

> [n]urturing and bonding acquired a new meaning with knowledge of genetics and of intrauterine and early development. It was established that for the child's genetic potential to unfold fully, it should be nurtured in a biologically optimum and socially secure environment. For the development of a well adjusted baby, the importance of not separating it from the gestational mother too early was thus laid by modern scientific knowledge.[149]

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[146] Olga B.A. van den Akker, *Psychological Aspects of Surrogate Motherhood*. 13 HUM. REPROD. UPDATE 53, 56 (2007), http://humupd.oxfordjournals.org/cgi/reprint/13/1/53.

[147] For example, surrogacy agencies attempt to prevent the surrogate from bonding with the child by prohibiting the surrogate from providing her own eggs for the pregnancy, and by providing counseling to overcome the cognitive dissonance that results from refusing to bond with and relinquishing a child they have carried in their wombs for nine months. *Id.*; *see also* Elizabeth Marquadt, COMMISSION ON PARENTHOOD'S FUTURE, *One Parent or Five: A Global Look at Today's New Intentional Families* 46 (2011), *available at* http://www.familyscholars.org/assets/One-Parent-or-Five.pdf.

[148] *Position Paper: Breastfeeding is Priceless: No Substitute for Human Milk*, LAMAZE INTERNATIONAL (2009), *available at* http://www.lamazeinternational.org/p/cm/ld/fid=123.

[149] Qadeer, *supra* note 20.

Therefore, in light of the scientific evidence and in accordance with Article 6 of the CRC, states must debate the issue of surrogacy with a close eye to the harmful effects of the practice on children.

E. *Threats to the Child's Right to Presevation of Identity and to Know His or Her Parents*

The Committee on the Rights of the Child urges states to "create conditions that promote the well-being of all young children during this critical phase of their lives."[150] The Committee reminds states, "Article 6 encompasses all aspects of development, and that a young child's health and psychological well-being are in many respects interdependent."[151] Of particular importance to the psychological well-being of a child is the development and preservation of his or her identity, a matter addressed in Articles 7 and 8 of the CRC.

Article 8 states that children have the right to preserve their identity, including nationality, name, and family relations.[152] Similarly, Article 7 provides that all children have a right "as far as possible to know . . . his or her parents."[153] The CRC is the first human rights treaty to explicitly recognize such a right to identity,[154] a right integral to the dignity of the human person. As one scholar writes, "[t]here can be few more basic rights than a right to one's identity."[155] Further, the child's right to know his or her parents is vital to the development of the child as "such social definitions are important to children in terms of their identity."[156]

Though the CRC was not written specifically with ART and surrogate children in mind,[157] the Committee includes ART children within the scope of Articles 7 and 8, as evidenced by the Committee's reaction to the reservations to the CRC submitted by several

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150 General Comment 7, *supra* note 83.

151 *Id.*

152 CRC, *supra* note 17, art. 8.

153 *Id.* art. 7.

154 Michael D.A. Freeman, *The Rights of the Artificially Procreated Child*, *in* THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD 196 (1997).

155 *Id.*

156 RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 106 (3d. ed. 2007), *available at* http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf

157 Freeman, *supra* note 154, at 151.

countries. In these reservations, the states asserted their belief that Article 7 presents no obstacle to their domestic practice of anonymous gamete donation and closed adoptions.[158] In response, the Committee expressed its concern that children born anonymously, such as via anonymous gamete donation, are denied the right to know their parents and urged states "to take all necessary measures to prevent and eliminate the practice of the so-called anonymous birth."[159] Thus, according to the CRC implementation guide published by UNICEF, it is reasonable to assume that in regard to Article 7, "the definition of 'parents' includes the genetic parents (for medical reasons alone this knowledge is of increasing importance to the child) *and* birth parents, that is the mother who gave birth and the father who claimed paternity."[160] Therefore, it is reasonable to conclude that a child born through surrogacy has the right under Article 7 to know the woman who gave birth to him or her.

However, the child's right under Article 7 to know his or her parents is not likely to be enjoyed often, as it may be difficult for a child to re-establish contact with his or her birth mother as the child grows up, provided the child knows the circumstances of his or her birth by surrogate. In the case of fertility tourism, miles and language divide the surrogate mother from the child. Even where the surrogacy contract was executed domestically, the general practice of commissioning parents and surrogates to cut ties after the birth makes it difficult, if not impossible, for children to know their birth mothers. However, in some cases, the surrogate mother does keep in touch with the child, most often when she had a previous relationship with the commissioning parent.

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[158] *See, e.g.*, U.N. Committee on the Rights of the child, *Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child*, U.N. Doc. CRC/C/2/Rev.8 (1999) (in which Luxembourg states in its fourth reservation to the CRC, "[t]he Government of Luxembourg believes that article 7 of the Convention presents no obstacle to the legal process in respect of anonymous births, which is deemed to be in the interest of the child, as provided under article 3 of the Convention." Similarly, in its declarations and statements, the Czech Republic states, "[i]n cases of irrevocable adoptions, which are based on the principle of anonymity of such adoptions, and of artificial fertilization … the non-communication of a natural parent's name or natural parents' names to the child is not in contradiction of this provision").

[159] U.N. Committee on the Rights of the Child, *Concluding Observations: Luxembourg*, ¶ 28–9, U.N. Doc. CRC/C/15/Add.250 (Mar. 31, 2005).

[160] HODGKIN, *supra* note 156, at 105.

F. *Split Motherhood*

A child's rights under Articles 6, 7 and 8 face further challenges from the phenomenon of "split motherhood" in surrogacy. In a natural pregnancy, a woman carries a child that was conceived with her ovum and which she intends to raise. The genetic, biological, and social roles of motherhood are preserved in one person. In surrogacy, however, these roles are divided among up to three women, (an egg donor, a gestator, and a commissioning mother) in a deliberate division that may psychologically harm the child.[161] Concerns over the repercussions of split motherhood led the Austrian government to prohibit ova donation for use in *in vitro* fertilization, which was subsequently upheld by the European Court of Human Rights in *S.H. and Others v. Austria*.[162] Similarly, the German government also banned egg donation for the purpose of protecting the child's welfare by preserving the unambiguous identity of the mother.[163] As an intervener in the *S.H.* case, the German government submitted, "[s]plit motherhood [is] contrary to the child's welfare because the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity."[164] The Italian government intervened, adding that "splitting motherhood would lead to a weakening of the entire structure of society,"[165] which would negatively impact the interests of children as well.

G. *Studies of the Psychological Effects of Surrogacy on Children*

Given that the CRC provides that children have a right to psychological health, preservation of identity, and to know their parents, what does the scientific literature say about the psychological effects of surrogacy on the child? Unfortunately, scientific research on ART offspring in general is limited and very little information is

[161] John A. Robertson, *Surrogate Mothers: Not So Novel After All*, *in* ETHICAL ISSUES IN THE NEW REPRODUCTIVE TECHNOLOGIES 172–73 (2nd ed. 2005).

[162] Case of S.H. and Others v. Austria, App. No. 57813/00, 18 Eur. Ct. H.R., 396 (2008) [hereinafter Case of S.H. and Others].

[163] *Id.* at ¶ 69.

[164] *Id.* at ¶ 70.

[165] *Id.* at ¶ 73.

known about children born through surrogacy.[166] Further, few studies follow ART children beyond adolescence[167] and, according to one source, no data are available regarding surrogate families after the child's preschool years.[168] According to psychologist Susan Golombok, a leading researcher in the field, it is not known how the circumstances of surrogacy impact the child's psychological and identity development.[169] In particular, "[n]either is it known how children will feel about the unique facets of surrogacy such as the fact that they had been conceived in order to be relinquished by their gestational mother."[170]

This paucity of information regarding the impact of surrogacy on children ought not embolden legislatures to legalize surrogacy, but rather give them reason to expand the debate to consider the views of teenage and adult gamete donor-offspring, an ever-growing cohort of individuals whose experiences are analogous to those of surrogate children.[171] It would be "wishful thinking," according to the National Ethics Committee of France, to think that the issue of surrogacy could be clarified by studies that are inherently limited.[172] Yet, in its recent report recommending that France continue its ban on surrogacy, the Committee argued that in light of the experiences and sufferings of donor-offspring adults, the possibility of a negative impact on "the psyche of people born following a GS [gestational surrogacy] procedure cannot be dismissed out of hand."[173] Indeed, the serious possibility of negative consequences on surrogate offspring cannot be overlooked. The views of young adult donor-offspring, particularly those under eighteen years of age, are of particular interest as Article

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[166] Susan Golombok et al., *Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7*, DEVELOPMENT PSYCHOLOGY 303 (2011), *available at* http://donorconception.wikispaces.com/file/view/Children+Conceived+by+Gamete+Donation-+Psychological+Adjustment+and+Mother-Child+Relationships+at+Age+7.pdf.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 311.

[170] *Id.*

[171] The experiences of the two groups are analogous insofar as money has been exchanged in connection with their births. Further, many surrogacy arrangements involve donation of either ova or sperm.

[172] OPINION NO. 110, *supra note* 132, at 16.

[173] *Id.* at 15-16.

12 of the CRC states that children have a right to express their views in all matters affecting them.[174]

It is important to note that it is often not until the teen years and beyond that children of ART begin to question their identity and seek answers regarding their biological or genetic parents.[175] For example, it is at this time that concerns about genetic and health history as well as concerns about avoiding possible incest with donor half-siblings come to the fore.[176] The search for information forces donor offspring to come face to face with the circumstances of their conception, causing some to publicly express their distaste for ART.[177] Yet, some commentators argue that children conceived through ART have no place criticizing their mode of conception, as they would not exist otherwise. Joanna Rose, a donor-offspring and advocate for adults and children like herself, responds to this argument saying, "[i]f I were the result of rape, I would still be glad to be alive, but that doesn't mean I or any one else should approve of rape."[178]

To silence debate on the effect of ART on children by arguing that without ART such children would not exist side-steps the issue and dismisses the experiences and concerns of ART offspring. Such logic would give license to doctors and parties to eschew criticism of their ART methods simply by virtue of the fact that a human child resulted, no matter how the child may be impacted by the

[174] CRC, *supra* note 17, art. 12.

[175] *Baby Business*, SBS Australia (Mar. 22, 2011), *available at* http://www.sbs.com.au/insight/episode/index/id/357/Baby-Business#transcript.

[176] Jacqueline Mroz, *One Donor Sperm, 150 Offspring*, N.Y. TIMES, Sept. 5, 2011, http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all.

[177] *See, e.g.*, *Tangled Webs Statement on Donor Conception*, TANGLEDWEBS, INC., http://117.58.251.10/~myfwalk/tangledwebs/dc.php (stating "No-one has the right to a child. The interests and welfare of potential and actual children born as a result of the use of DC must be the over-riding consideration in all decisions concerning the use of such technologies and in the subsequent lives of the children so created. The interests of such children must override those of gamete donors and of social and genetic parents. Social and psychological research overwhelmingly supports the proposition that it is in the best interests of every child to know and to be raised by his or her genetic parents. The child should only be removed in extreme circumstances as a last resort for their safety. The desire to provide children for infertile couples does not override the child's need for and right to this vital relationship with his or her genetic parents")[hereinafter Tangled webs]. TangledWebs is an organization of individuals, personally and professionally affected by donor conception, which raise awareness about the life-long issues affecting donor offspring.

[178] Margaret Somerville, *Donor Conception and Children's Rights: First, do no harm,* 183 CANADIAN MED. ASSOC. J. 280 (2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3033937/pdf/1830280.pdf.

circumstances of his or her conception as he or she matures.[179] As times passes, the negative impact of ART on offspring is attracting more attention. Yet, as scholar Margaret Somerville notes, "donor-conceived people are challenged to prove 'scientifically' the harm done to them."[180] But sociology is not hard science and the turmoil a donor-gamete child may experience is not quantifiable.[181]

However, a survey of the literature produced by donor-offspring, including websites, news articles, and even testimony provided to legislative bodies regarding donor anonymity statutes, reveals that there is increasing evidence of the negative impact of artificial procreation on the resulting children. For example, a recent study revealed that many donor-offspring experience trouble with the law and substance abuse at rates higher than adopted or natural conception children.[182] Further, donor-offspring express unease concerning the circumstances of their birth, such that 45% of donor-offspring agreed that "[i]t bothers me that money was exchanged in order to conceive me."[183]

This unease, particularly regarding the role of money in their conception, has led some donor-offspring to speak out against the practice of gamete donation and other aspects of ART.[184] One such advocate, Damian Adams, laments the circumstances of his conception saying, "I have been dehumanised by the fact that I have been bought and sold like a piece of commodity."[185] In a debate regarding gestational surrogacy in Australia, he pointed out, "[a]ll the talk about what the adults desire and want but not many people talk

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[179] *See* Philip G. Peters, Jr., *How Safe is Safe Enough?* OBLIGATIONS TO THE CHILDREN OF REPRODUCTIVE TECHNOLOGY 49 (2004) (discussing the argument that the effects of ART can only be considered harmful if the injuries caused are so severe that living with them is worse than never existing at all).

[180] Somerville, *supra* note 178.

[181] *Id.*

[182] ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, *My Daddy's Name Is Donor: A New Study of Young Adults Conceived through Sperm Donation,* INSTITUTE FOR AMERICAN VALUES: THE COMMISSION ON PARENTHOOD'S FUTURE (2010), *available at* http://www.familyscholars.org/assets/Donor_FINAL.pdf [hereinafter *Daddy's Name is Donor*].

[183] *Id.* at 7.

[184] *See, e.g.*, Tangled Webs, *supra* note 177 ("What happens when artificially created bundles of joy begin to speak for themselves? Revolt! I'm a product of an anonymous sperm donor and now that I'm an adult I'm searching for answers and speaking out"); *see also* CONFESSIONS OF A CRYO-KID, http://cryokidconfessions.blogspot.com (last visited Oct. 16, 2012).

[185] *Baby Business*, *supra* note 175.

about the welfare of the child."[186] Yet the interest of the child ought to figure large in the surrogacy debate as "[t]o have been bought and sold may well pose a threat to a child's sense of security."[187]

H. *Threat to the Spiritual and Moral Health and Development of the Child*

Not only does being "bought and sold" pose a threat to the child's sense of security, such commodification of the human person is likely to negatively impact the child's spiritual and moral development. In its implementation guidelines, the Committee on the Rights of the Child explicitly states that the right to health and development under Article 6 is a holistic concept encompassing the physical, psychological, spiritual, and moral aspects of the child.[188]

The introduction of monetary compensation for the relinquishment of a child by his or her birth mother, particularly when the very existence of the child was contemplated and actualized in consideration of financial exchange, introduces the specter of commodification. How does the knowledge of his or her conception affect the child of surrogacy? How is the spiritual and moral development of surrogacy offspring affected by the crass commercialization of children as seen in the recent "Win a Baby Contest" run by an Ottawa radio station?[189] Advertisements for the contest featured pictures of smiling infants with the words underneath, "[s]he could be yours!"[190] a gimmick reminiscent of an advertisement for a new car or pair of shoes. Though widely criticized, the contest reveals a growing attitude of commercialization towards ART and surrogacy, an attitude that logically leads to the commodification of children and fertility, as seen in the shocking baby-selling scheme of Theresa Erickson and her conspirators.[191]

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[186] *Id.*

[187] Freeman, *supra* note 154, at 177.

[188] General Comment 5, *supra* note 40.

[189] Angela Mulholland, *Radio Station Defends Its Win a Baby Contest,* CTV NEWS (Sept. 29, 2011), http://www.ctv.ca/CTVNews/Canada/20110929/win-baby-fertility-radio-station-110929/ (where winners were awarded money for fertility treatments).

[190] *Id.*

[191] Sian Griffiths, *'Win a Baby' Competition Critised by Fertility Groups,* THE GUARDIAN (Oct. 7, 2011), http://www.guardian.co.uk/world/2011/oct/07/win-baby-competition-canada-radio; FBI press release, *supra* note 1.

Yet, even if outright commodification of children is prevented, the attitude of commercialization is likely to remain attached to surrogacy arrangements, with negative consequences on the way surrogacy offspring view themselves and the world. Though researchers acknowledge that there is a dearth of information regarding the effects of surrogacy on children,[192] the statements of gamete-donor offspring, such as Damian Adams[193] and others who express their discomfort and even disgust at the role of money in their existence, [194] give us insight into how children may be negatively impacted by the reality of surrogacy. Such considerations, which get to the heart of the spiritual and moral health and development of the child and maturing adult, cannot be overlooked in the surrogacy debate.

Nevertheless, some commentators suggest that concerns about the negative effects of surrogacy have not materialized and that familiarity with the practice of surrogacy should lead to legalization. [195] Yet, as the literature suggests, little research is conducted on the effect of surrogacy on any of the parties involved, particularly the child,[196] making claims that there are no negative effects premature. Further, research on ART children such as donor-gamete offspring, which show that ART poses serious threats to the interests of the offspring, is instructive and ought to inform legislators in this debate. For this reason, legislatures must investigate the issue thoroughly and maintain focus on the best interests of the child.

I. *A Snapshot of Legislative Reactions Across the Globe*

Legislative responses to surrogacy differ around the world. Commercial surrogacy is banned or greatly restriction in Germany,[197] Austria, [198] Italy, Spain, Great Britain, the Netherlands, Norway,

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[192] Golombok, *supra* note 166, at 311.

[193] *Baby Business*, *supra* note 175.

[194] *Daddy's Name Is Donor*, *supra* note 182, at 7.

[195] Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 138 (2009), *available at* http://scholarship.law.duke.edu.

[196] Freeman, *supra* note 154, at 151.

[197] Federal Foreign Office, *Information on Surrogacy*, http://www.auswaertiges-amt.de/EN/Infoservice/FAQ/GermanFamilyLaw/Leihmutterschaft.html?nn=479790.

[198] The Austrian Foreign Ministry, *Surrogacy*, Austrian Embassy Ireland, http://www.bmeia.gv.at/en/embassy/dublin/practical-advice/your-travel-to-austria/surrogacy.html.

Sweden, Switzerland, Denmark, Canada, and Australia.[199] In Israel, surrogacy is legal and to a large extent, socially accepted.[200] On the other hand, to date, the U.S. has yet to enact a nation-wide law regarding surrogacy.[201] In Asia, surrogacy is not widely accepted due to the strong cultural sense of blood ties in the family.[202] However, in India, one of the most popular fertility tourism destinations in the world, commercial surrogacy was legalized in 2002.[203] In South Africa, altruistic surrogacy is legal[204] while in Latin America, surrogacy is not commonly practiced and is not supported by the public or by medical professionals.[205] In Guatemala, however, foreign surrogacy agencies have recently descended upon the country, taking advantage of the abject poverty of Guatemalan women to arrange inexpensive surrogacy agreements for foreign couples.[206]

The States that have instituted bans or restrictions on surrogacy have done so over concerns of exploitation of surrogates and in the interest of the needs of the child. In Canada, for example, the Standing Committee on Health asserted its unequivocal support for the paramountcy of the child's interests in regard to ART, stating,

> the legislation must protect[] the physical and emotional health as well as the essential dignity of the children who are the intended and desired result of these procedures…our thinking is directed by the feeling that children conceived through assisted human reproduction warrant even greater

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199 Markens, *supra* note 10, at 23.

200 *See* Ruth Landau, *Israel: Every Person Has the Right to Have Children*, *in* THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES 137 (Eric Blyth & Ruth Landau eds., 2004).

201 *Id.*

202 Ernest Ng, Athena Liu, Cecilia Chan & Celia Chan, *Hong Kong: A Social, Legal and Clinical Overview*, *in* THIRD PARTY A SSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES 115 (Eric Blyth & Ruth Landau eds., 2004).

203 Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES, Oct. 4, 2011, http://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html.

204 *See* SURROGACY ADVOCACY GROUP, http://www.surrogacy.co.za/ (last visited Oct. 16, 2012).

205 Luisa Barón, *Argentina: Hopes, Results and Barriers*, *in* ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES 25 (Eric Blyth & Ruth Landau ed., 2004).

206 Karen Smith Rotabi, *(Updated) Human Rights and the Business of Reproduction: Surrogacy Replacing International Adoption from Guatemala*, RH REALITY CHECK (May 20, 2010, 12:08PM), http://www.rhrealitycheck.org/blog/2010/05/20/human-rights-business-reproduction-surrogacy-begins-replace-international-adoption-guatemala%20.

> consideration than the adults seeking to build families or the physicians or researchers seeking new knowledge.[207]

Though the Standing Committee on Health did not recommend an outright ban on surrogacy, it did not mince words in stating that "[c]ommercial surrogacy treats children as objects and the reproductive capacity of women as an economic activity."[208] It went on to suggest that even altruistic, non-commercial, surrogacy arrangements "can also be socially harmful for the resulting child."[209]

Approaching the issue of surrogacy with a similar concern for the interests of children, the German government banned surrogacy agreements considering the separation of the psychosocial relationship between the surrogate and the child "inimical to the welfare of the child."[210] Legislators were concerned about identity problems that may arise in the child as a result of splitting motherhood among up to three women.[211] A similar rationale was adopted by the Austrian government, whose ban on certain forms of ART was upheld in a recent decision of the European Court of Human Rights.[212] In that case, the Court found that Austrian couples' right to family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms was not violated when the government banned the only method of ART that would have allowed them to conceive a child.[213] In this way, the Court upheld a law that banned a form of ART on the grounds that the use of such technology was not in the best interests of the child.[214]

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[207] Jean Haase, *Canada: The Long Road to Regulation*, *in* THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES 66 (Eric Blyth & Ruth Landau eds., 2004).

[208] *Id.* at 68.

[209] *Id.* at 70.

[210] Petra Thorn, *Germany: The Changing Legal and Social Culture*, *in* THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES 97 (Eric Blyth & Ruth Landau eds., 2004).

[211] *Id.* at 97; *see also* Case of S.H. and Others, App. No. 57813/00, *supra* note 162, at ¶ 70.

[212] *Id.*

[213] *Id.*

[214] *See id.* (stating that such laws would only stand as long as there lacked a general consensus in Europe regarding these issues).

RECOMMENDATIONS AND CONCLUSION

In light of the survey of research presented in this article and given ratifying states' obligation to implement the CRC, or in the case of the U.S., the responsibility not to undermine the principles of the CRC, the following are recommendations to legislatures evaluating surrogacy arrangements:

(1) Make the best interests of the child the guiding principle of the debate;
(2) Gather information regarding the impact of surrogacy and other forms of ART on resulting offspring;
(3) Listen to the testimony and opinions of ART offspring, including donor-offspring (donor-offspring insight is valuable as they often face similar circumstances as children of surrogacy); and
(4) Err on the side of protecting children against known and potential threats to their rights under the CRC, including the right to holistic health and development, right to identity, and right to know their parents.

Surrogacy arrangements "touch upon one of the most, if not *the* most, sensitive subjects of human endeavor." [215] Nevertheless, legislatures must engage this issue, and must do so with the best interests of the child in mind. Following an evaluation of the negative impact of surrogacy on the resulting child, including interference with his or her physical, psychological, and identity development, legislatures must ban surrogacy agreements in the best interests of the child.

[215] Johnson v. Calvert, 851 P.2d 776, 788 (Cal. 1993) (Arabian, J., concurring).