

COMMENT

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Wombs to Rent: Examining the Jurisdiction of International Surrogacy

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Imagine that a Holland-based couple wants to have a child. Unable to carry a child, they look into a surrogate. Unfortunately for the Dutch couple, surrogacy in Holland is illegal, but their gynecologist has a solution: find a surrogate from England, where surrogacy is legal. At the doctor's suggestion, the couple flies to England and meets with an agency, where they are told that a surrogate is prepared to carry their baby. The surrogate, a married mother of two living in Britain, meets the couple and all three come to a mutual agreement regarding the gestational surrogacy. The couple agrees to pay the surrogate thirteen thousand pounds. Four days after meeting the couple in London, the surrogate is inseminated with the Dutch man's sperm. After discovering that the insemination failed, the surrogate flies to Holland to try again. When the surrogate returns to England from Amsterdam a week later—and after four failed inseminations attempts—she is beginning to have doubts about the couple's ability to pay. She soon receives what should be good news: one of the inseminations worked and she is pregnant. Only, she is not happy. Twelve weeks into the pregnancy she informs the couple that she is going to have an abortion. They are shocked. After trying to plead with her to no avail, the couple gives up hope that she will carry their baby. The Dutch husband and wife are devastated, but this isn't the end of their devastation. At the same time that the surrogate tells the couple she is aborting their baby, she agrees to let a British couple adopt the baby, for twelve thousand pounds with a three thousand pound down payment. The Dutch husband and wife are shocked to learn that not only has their baby not been aborted, but that the surrogate agreed to give it to another couple. In the end, after receiving the down payment from the British couple, arrangements between the two fell through, and the surrogate decided to keep the baby.¹

If this story sounds fictional, it is not. This is the real-life story of Clemens and Sonja Peeters from Holland, and their British surrogate, Karen Roche. Would it have been legal for Karen to decide to abort the baby? Yes. Was Karen's decision to keep the baby also legal? Yes. While this story may sound like something only a Hollywood writer could come up with, it is all too often the story, in the United Kingdom and throughout the rest of the world, of childless parents who have chosen to pursue surrogacy. How is a story like the Peeters'

¹ Transcript: Martin Bashir, *Panorama: The Surrogate*, BBC (Mar. 11, 1997), http://news.bbc.co.uk/1/hi/english/static/audio_video/programmes/panorama/transcripts/transcript_03_11_97.txt.

possible? Surrogacy is still a very new issue; at least, according to the law. In the United States, there is no federal law regarding surrogacy; whether or not surrogacy is legal varies from state to state. In the United Kingdom, surrogacy is legal (as demonstrated by the Peeters' story), however, it cannot be legally enforced,² and there are many rules regarding surrogacy arrangements (especially if you are a British citizen using a surrogate outside of the United Kingdom). While surrogacy is still a developing issue globally, some second and third world countries, Ukraine and India, respectively, have much more straightforward and uniform surrogacy laws.³ But these surrogacy laws are not without their own problems. Before entering into a surrogacy arrangement with a surrogate from another country, the intended parents ("IPs") should understand surrogacy laws in their own jurisdiction, as well as the surrogate's jurisdiction (and the jurisdiction in the baby's place of birth, if it differs from the IP's and surrogates').

This paper will examine surrogacy laws and issues arising from international surrogacy arrangements in the United States, the United Kingdom, India, and the Ukraine. Part I addresses why a person chooses surrogacy and gives a brief description of the different types of surrogacy. Part II addresses current surrogacy laws in the United States. I will discuss the benefits and consequences of choosing a surrogate living in the United States, and the legal—especially jurisdictional—outcomes of an American couple using a surrogate outside of the United States. Part III addresses current surrogacy laws in the United Kingdom. I will discuss the benefits and consequences of choosing a surrogate living in the United Kingdom, and the legal—in particular jurisdictional—outcomes of a British couple using a surrogate outside of the United Kingdom. Part IV addresses current surrogacy laws in India. I will discuss the benefits and consequences, as well as the legal—particularly jurisdictional—outcomes of choosing a surrogate living in India. Part V addresses current surrogacy laws in the Ukraine. I will discuss the benefits and consequences, as well as the legal—specifically jurisdictional—outcomes of choosing a surrogate living in the Ukraine. Finally, Part

² Human Fertilisation and Embryology Act 1990, c. 2737, SIF 83:1, § 36(1) (UK).

³ ONE WORLD NATIONS ONLINE, *First, Second and Third World*, http://www.nationsonline.org/oneworld/third_world_countries.htm (last visited Mar. 16, 2014).

VI offers recommendations and solutions for the “new”⁴ issue of surrogacy.

I CHOOSING SURROGACY

*“Being a mother is an attitude, not a biological relation.”*⁵

When a couple is faced with the news that they are unable to have children naturally, there are options.⁶ Although infertility is on the decline (thanks to advances in medicine and technology), the number of women that are unable to have children has risen in the last thirty years due to impaired fecundity.⁷ Faced with a barrage of ways to expand a family, couples most often chosen options are adoption and surrogacy.⁸ Adoption has been around much longer than surrogacy⁹ and is regulated by federal legislation;¹⁰ however, surrogacy is quickly surpassing adoption as the most common way for a childless couple to expand their family.¹¹ Although there is currently no federal legislation regarding surrogacy, The Hague Convention—which already has strict rules regarding adoption—is in the process of regulating (or trying to regulate) international surrogacy. First, I will present concrete data indicating an increase in the number of women who are unable to have children, along with a brief overview of the options that childless couples have for expanding their family. Second, I will discuss how and why surrogacy is becoming a popular choice among childless couples, define different types of surrogacy,

⁴ MODERN FAMILY SURROGACY CENTER, *The History of Surrogacy*, http://www.modernfamilysurrogacy.com/page/surrogacy_history (The first recorded surrogacy occurred in the mid-1970s with “Baby M.”).

⁵ ROBERT A. HEINLIN, *HAVE A SPACE SUIT—WILL TRAVEL* 97 (1958).

⁶ MODERN FAMILY SURROGACY CENTER, *Is Surrogacy More Expensive Than Adoption?*, http://www.modernfamilysurrogacy.com/page/surrogacy_more_expensive_adoption?

⁷ See Anjani Chandra, Casey E. Copen & Elizabeth Hervey Stephen, *Infertility and Impaired Fecundity in the U.S. 1982-2010*, THE CENTER FOR DISEASE CONTROL, 1 (2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr067.pdf>.

⁸ *Id.*

⁹ *History of Adoption Practices in the United States*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/adoption/history.cfm>.

¹⁰ *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFORMATION GATEWAY (2012), <https://www.childwelfare.gov/adoption/history.cfm>.

¹¹ See Kingsley Napley & Claire Wood, *Routes to Parenthood: Are More Families Choosing International Surrogacy Over Adoption?*, ASSOCIATION OF CORPORATE COUNSEL (Jan. 9, 2013), <http://www.lexology.com/library/detail.aspx?g=066ce73c-ae7a-4d1b-974e-76bacb7250e3>.

and introduce international surrogacy and why it may be an attractive option for some families. Finally, I will explain the Hague Convention, the steps it is taking to regulate international surrogacy, and the issues the convention faces in trying to regulate this “new” issue.¹²

A. Facing the Problem and Weighing the Options

In the United States, infertility is less of a problem for women now than it used to be; yet more women are having trouble conceiving or bringing a child to term.¹³ Between 2002 and 2010, infertility among married women aged 15–44 declined.¹⁴ In 1982, “[t]he percentage of married women aged 15–44 who were infertile” was 8.5% (2.4 million women).¹⁵ In 2010, the percentage of women in this same age group who were infertile was 6.0% (1.5 million).¹⁶ This decrease may be due to the increased use of fertility treatments like medications, in vitro fertilization (IVF), and surgery to correct physical problems.¹⁷ While the decreasing fertility is a positive, another issue that affects a woman’s ability to have children, impaired fecundity, has been on the rise in recent years.¹⁸ Infertility means not being able to get pregnant despite having frequent unprotected sex for at least a year.¹⁹ Impaired fecundity means difficulty conceiving or carrying a child to term.²⁰ In 1982, the percentage of married women aged 15–44 with impaired fecundity was 11%, rising as high as 15% in 2002, and now sitting at 12% as of 2010.²¹ Among all women, 11% had impaired fecundity as of 2010.²² This increase could be attributed to the later age at which women are choosing to marry and/or conceive children.²³

¹² MODERN FAMILY SURROGACY CENTER, *supra* note 4.

¹³ See Chandra, Copen & Stephen, *supra* note 7, at 2.

¹⁴ See Chandra, Copen & Stephen, *supra* note 7, at 5.

¹⁵ See Chandra, Copen & Stephen, *supra* note 7, at 1.

¹⁶ See Chandra, Copen & Stephen, *supra* note 7, at 5–6.

¹⁷ Ryan Jaslow, *U.S. infertility rates falling, says CDC*, CBS NEWS (Aug. 14, 2013, 5:51 PM), <http://www.cbsnews.com/news/us-infertility-rates-falling-says-cdc/>.

¹⁸ Chandra, Copen & Stephen, *supra* note 7, at 2.

¹⁹ *Definition of Infertility*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/infertility/basics/definition/con-20034770>.

²⁰ *Definition of Impaired Fecundity*, FERTILITYCOMMUNITY.COM, <http://www.fertilitycommunity.com/fertility/infertility-impaired-fecundity.html>.

²¹ Chandra, Copen & Stephen, *supra* note 7, at 5.

²² Chandra, Copen & Stephen, *supra* note 7, at 5.

²³ Chandra, Copen & Stephen, *supra* note 7, at 4.

While infertility among women has decreased since 1982, and the impaired fecundity of women has increased, the percentage of infertile men aged 15–44 (9.4%), and men aged 24–44 (12%) has stayed roughly the same since 2002.²⁴

Many infertility problems can be treated with IVF, an industry that has increased rapidly since the Center for Disease Control began tracking it in 1998.²⁵ Over the next ten years, the number of IVF births doubled, and by 2007 over 57,000 couples chose IVF.²⁶ IVF is not the only option available to couples that are unable to conceive. Other options include egg and sperm donation, hormonal therapy, artificial insemination, gamete intrafallopian transfer, and zygote intrafallopian transfer.²⁷ While there is controversy regarding Assisted Reproductive Technologies (ART), another controversial option available to infertile women, the frequency of surrogacy use, is growing at a much greater rate than all other ART options.²⁸

B. A Booming Industry

An early story of surrogacy comes from the Bible²⁹ involving Abraham, his wife, Sarai, and her handmaiden, Hagar.³⁰ In the United States, the first modern-day surrogacy agreement involving a married couple was in 1976 in Dearborn, Michigan.³¹ Since 1976, the number of surrogate births in the United States has increased: in 2002, there were approximately 550 surrogate births, and 25,000 between 1976 and 2013.³² These numbers will continue to rise.³³ However, these numbers are not indicative of the number of U.S. couples who actually use surrogates because many surrogates live outside of the United States, and their surrogacy agreements cross international borders. Even the number of surrogate births that occur in the United

²⁴ Chandra, Copen & Stephen, *supra* note 7, at 2, 10.

²⁵ *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevj0a1m.pdf>, 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Maria Trimarchi, *Surrogacy Overview*, DISCOVERY FIT & HEALTH (Mar. 24, 2008), <http://health.howstuffworks.com/pregnancy-and-parenting/pregnancy.fertility/surrogacy.htm>.

³⁰ *Genesis* 16:1–4 (New International Version).

³¹ Trimarchi, *Surrogacy Overview*, *supra* note 29.

³² *Id.*

³³ *Surrogacy in America*, *supra* note 25, at 4.

States cannot be stated with certainty because surrogacy is a new industry that has not been well documented.³⁴

Surrogacy is a booming industry, and there are two different types: traditional surrogacy and gestational surrogacy. In traditional surrogacy, the surrogate is artificially inseminated with the father's sperm.³⁵ A traditional surrogate then carries the baby for the IPs, but she is the baby's biological mother because it was her egg that was inseminated.³⁶ In gestational surrogacy, which is much more common, IVF is used to harvest the egg and sperm of the IPs—or a donor's egg or sperm—and place it into the uterus of the surrogate.³⁷ The gestational surrogate then carries the baby for the IPs and is known as the "birth mother," because unlike a traditional surrogate, she has no genetic ties to the baby.³⁸ A gestational surrogate would be a good option for a lesbian couple because one of the woman's eggs would be implanted in the surrogate, making her the baby's biological mother, and making the surrogate the "birth mother."³⁹ Gay men might choose traditional surrogacy because one parent's sperm could be used to fertilize the surrogate's egg, making him the baby's biological father.⁴⁰

Just as there are different types of surrogacy, there are also different types of surrogacy arrangements. The arrangements will be detailed further in the sections that follow; however, a brief explanation here will be helpful. There are two types of surrogacy arrangements: commercial and altruistic. In a commercial surrogacy arrangement, the parents pay a surrogate fee, as well as any expenses related to the pregnancy and birth, which could include: medical expenses, compensation for any time taken off of work, and travel expenses (so long as those expenses are related to the pregnancy and/or birth of the IPs baby).⁴¹ In this type of arrangement the

³⁴ *Id.*

³⁵ *Using a Surrogate Mother: What You Need to Know*, WEBMD (Sept. 9, 2013), <http://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> (a donor's sperm can also be used).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ A lesbian couple could also use traditional surrogacy, but they would not be biologically related to the resulting baby.

⁴⁰ *Using a Surrogate Mother: What You Need to Know*, *supra* note 36 (a gay couple could also use gestational surrogacy in order to achieve a biological tie to the resulting baby, however, they would need to find an egg donor).

⁴¹ *See* Trimarchi, *supra* note 29.

surrogate and the IPs usually do not know each other.⁴² In an altruistic surrogacy arrangement, the surrogate is not compensated financially beyond medical expenses related to the pregnancy and birth. The surrogate is usually a family member or friend of the IPs.⁴³

It is important to note that international surrogacy, like surrogacy in the United States—as you will soon see—can be heavily regulated, and just as some states in the United States have made surrogacy illegal some countries have done the same. Sweden, Spain, France, and Germany—to name a few—have banned surrogacy.⁴⁴ Most of the countries that have legalized surrogacy have committees that evaluate surrogacy on a case-by-case basis, making it difficult for couples choosing this option.⁴⁵ There is no way for these couples to know the outcome of their case unless, and until, they submit their particular case for evaluation. However, in a few countries, commercial surrogacy is permitted with little or no internal regulation. While the absence of regulation may sound like a good thing for couples who have tried and failed to have a baby, or can't afford a surrogate living in their own country, the nonexistence of any harmonized set of rules regarding international surrogacy can often lead to years of legal problems for the IPs.

When the United States first permitted commercial surrogacy in the 1980s, the country stood virtually alone in its decision.⁴⁶ To this day, not much has changed: many countries still do not allow for commercial surrogacy. However, because the United States is one of the few countries to have legalized commercial surrogacy—at least in some states⁴⁷—and because of its advancements in medical technology, choosing a surrogate in the United States is incredibly expensive. Because of the cost, a couple living in a country where commercial surrogacy is legal—like the United States—might choose international surrogacy. Choosing a surrogate mother that lives in a country where surrogacy is unregulated, or illegal—like Canada—is a far less expensive option than choosing a surrogate that lives in the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Surrogate Motherhood in India: Understanding and Evaluating the Effects of Gestational Surrogacy on Women's Health and Rights*, STANFORD UNIV., https://web.stanford.edu/group/womenscourage/Surrogacy/surrogacy_contracts.html.

⁴⁵ *Id.*

⁴⁶ See Debora Spar, *For Love and Money: The Political Economy of Commercial Surrogacy*, 12 REV. INT'L POL. ECON. No. 2 (2005).

⁴⁷ *Surrogate Motherhood in India: Understanding and Evaluating the Effects of Gestational Surrogacy on Women's Health and Rights*, *supra* note 44.

United States. For example, because surrogacy is illegal in Canada a woman cannot request payment for acting as a surrogate mother for another couple; however, they often accept monetary “gifts.”⁴⁸ While more couples—including couples living in the United States—are choosing to go abroad to find a more affordable surrogate, the absence of any international body regulating the industry makes it a risky option for couples who are unable to have children on their own.⁴⁹

C. *The Hague*

Since the late nineteenth century, The Hague Conference on Private International Law has developed Conventions that respond to global needs like the international protection of children, which includes inter-country adoption and, now, international surrogacy.⁵⁰ The Hague Conference has seventy-five members (consisting of seventy-four states and one regional economic integration organization).

International surrogacy is a growing—but very new—industry, so The Hague is still in the process of developing rules and regulations for its member countries. The debate in The Hague regarding the need for a convention governing international surrogacy is much like the debate over the need for a convention governing Inter-country Adoption (which convened in 1993).⁵¹ The Hague gives two reasons for the influx in international surrogacy: the rising cost of choosing a surrogate at home, and the common belief that an international surrogate is less likely to renege on the surrogacy agreement.⁵² In 2010, The Hague councilmembers addressed international surrogacy arrangements and decided that a permanent bureau should review private international law questions relating to international

⁴⁸ Janna Heron, *Adoption vs. Surrogacy Costs*, ABC NEWS, <http://abcnews.go.com/Business/cost-comparisons-international-domestic-adoption-surrogacy-foster-adoption/story?id=19962169#1>, 2.

⁴⁹ Claire Wood, *International surrogacy laws are not keeping up with changing social patterns* (Nov. 14, 2013), <http://www.kingsleynapley.co.uk/news-and-events/blogs/family-law-blog/international-surrogacy-laws-are-not-keeping-up-with-changing-social-patterns>.

⁵⁰ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=1, (last visited Mar. 1, 2015).

⁵¹ Anne-Marie Hutchinson, *The Hague Convention on Surrogacy: Should we agree to disagree?*, ABA SECTION OF FAMILY LAW 2012 FALL CLE CONFERENCE, 2 (2012), http://dawsoncornwell.com/en/documents/ABA_AMH.pdf.

⁵² Prel. Doc. No 11 of March 2011 (*op. cit.* note 3) para. 12.

surrogacy.⁵³ This bureau noted that the number of international surrogacy arrangements is increasing rapidly. It expressed concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements noting that when a child is left without a legal parent⁵⁴ as a result of a surrogacy arrangement gone wrong, the child's fundamental right not to suffer discrimination on the basis of birth or parental status is violated.⁵⁵

On March 10, 2011, the Hague Conference on Private International Law published a note titled '*Private International Law Issues surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements.*' The standards promulgated in this note "require the Permanent Bureau to gather information on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach to addressing international surrogacy issues."⁵⁶

In April 2011, the Council on General Affairs and Policy of the Conference accepted a report from the Permanent Bureau on the '*Private International Law Issues Surrounding the Status of Children, Including Issues arising from International Surrogacy*

⁵³ HccH Prel. Doc. No 11, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, document drawn up by the Permanent Bureau, (Mar. 2011), <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>.

⁵⁴ *See id.*, a child left without a legal parent as the result of a surrogacy gone wrong can mean a few different things depending on the IPs country/state of origin, the surrogate's country/state of origin and the type of surrogacy that is used. For example: (1) the IPs may be unable to take the child back to their home country due to their inability to secure a passport for the child, leaving the IPs and the child stranded in the surrogate's home country where they cannot remain indefinitely; (2) the IPs are able to take the child back to their home country/state, but their home country/state refuses to recognize the IPs as legal parents of the child; or, similarly, (3) the IPs are able to take the child back to their home country/state, but their home country/state refuses to recognize the birth certificate granted to the IPs. In the first example, where the child is left stateless and without definite parentage, the governments of the IPs country/state of origin or the surrogate's country/state of origin, or both, have negotiated on behalf of the child to either issue a visa for the child to travel to the IPs country/state of origin or the IPs country/state of origin has relaxed its immigration procedures in this instance. While it is a good thing that government(s) step in when they are needed, this retroactive approach can take years to negotiate and future legal issues can still arise for the IPs and the child.

⁵⁵ Drawn up by the Permanent Bureau, Prel. Report on the Issues arising from International Surrogacy Arrangements, HccH (Mar. 2012), <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>.

⁵⁶ Hutchinson, *supra* note 51, at 2.

Arrangements.⁵⁷ This report highlighted the seriousness of international problems that arise as a result of the increasing use of international surrogacy, especially the uncertainty regarding parental rights and the nationality of the child.⁵⁸ The Council also feared the exploitation and trafficking of surrogate mothers.⁵⁹

The Hague is still in the preliminary stages of setting up laws to regulate international surrogacy.⁶⁰

II THE UNITED STATES

*“Biology is the least of what makes someone a mother.”*⁶¹

“My baby was born by surrogacy in India and is now caught in legal limbo.”⁶² These are the words of Mrs. Smith,⁶³ a married New Jersey woman who reached out to an IVF facility in India to implant her embryos in a gestational surrogate.⁶⁴ Once the baby was born Mrs. Smith planned to take her newborn back to the United States, but she soon learned that doing so would be illegal.⁶⁵ After the birth, Mrs.

⁵⁷ Prel. Doc. No 11 of March 2011 for the attention of the Council of April 2011 on Federal Affairs and Policy of the conference (available on the Hague Conference website at www.hcch.net under “Work in Progress” then “General Affairs”). See pp. 3–4 of Prel. Doc No 11 for detailed background of work in this field.

⁵⁸ A *Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 4 (2012), <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>.

⁵⁹ See, e.g., “Model Law against Trafficking in Persons,” (available at http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf) (document developed by the United Nations Office on Drugs and Crime (“UNODC”) to assist States with the implementation of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (entry into force December 25, 2003) which specifically mentions “forced pregnancy” and the “use of women as surrogate mothers” as, in certain circumstances, possible examples of “exploitation” which States may wish to consider when legislating to criminalized trafficking).

⁶⁰ Hutchinson, *supra* note 51.

⁶¹ BRAINYQUOTE, <http://www.brainyquote.com>.

⁶² *Surrogacy Horror Stories: Legal Limbo for Baby Stuck in Another Country While Mom in USA*, THE BUSINESS JOURNALS (Jan. 28, 2013), http://www.bizjournals.com/prnewswire/press_releases/2013/01/28/LA48974.

⁶³ Not her real name.

⁶⁴ Andrew Vorzimer, *Horrific New Allegations About Surrogacy in India: Child Not Genetically Related to American Couple*, THE SPIN DOCTOR (Jan. 28, 2013), <http://www.eggdonor.com/blog/2013/01/28/horrific-allegations-surrogacy-india-child-genetically-related-american-couple/>.

⁶⁵ *Id.*

Smith learned the facility in India did not use her husband's sperm to artificially inseminate the surrogate. As a result, neither Mrs. Smith nor her husband are genetically related to the child.⁶⁶ India's surrogacy laws—which will be discussed further in a later section of this paper—dictate that in order to obtain a Visa the baby must have the DNA of at least one of the IPs.⁶⁷ One option was that the baby should be placed in an orphanage, however, Mrs. Smith was able to sneak the baby out of India and into Africa, where the baby remains while Mrs. Smith and her husband continue to fight to adopt the baby so they can bring her home.⁶⁸

Mrs. Smith is not the only one with a tragic story about an international surrogacy arrangement gone wrong. This paper will highlight other shocking stories of international surrogacy. In the United States, surrogacy laws vary from state to state. Some states have outlawed surrogacy, while others are more lenient. As discussed, because commercial surrogacy is legal in some states and because of the country's high-tech hospitals, a foreign couple from a country where surrogacy is illegal might find a surrogate living in the United States to be an attractive option. Conversely, because commercial surrogacy is legal in some states and the U.S. hospitals are technologically advanced, commercial surrogacy is expensive; it is for these reasons that many American couples find a surrogate in another country.

First, I will briefly explain the *Baby M* case and its effect on surrogacy laws in the United States. Second, I will discuss how the surrogacy laws vary from state to state and the jurisdictional implications that these variances have on international surrogacy arrangements. Finally, I will discuss the effect that these jurisdictional implications have on a foreign couple that has an arrangement with an American surrogate.

A. Baby M

In New Jersey in 1985, William and Elizabeth Stern entered into a contract stating that Mary Beth Whitehead, wife of Richard Whitehead and mother of two, would be artificially inseminated with Mr. Stern's sperm.⁶⁹ The contract stated that Mrs. Whitehead, the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Transcript of Proceedings, *Baby M Case: The Complete Trial Transcripts*, N.J. Super. Ct. Ch. Div. (1988).

biological mother of the Stern's future child, would relinquish the baby to the Stern's and terminate her parenting rights immediately after the birth in exchange for ten thousand dollars plus birthing expenses.⁷⁰ On March 27, 1986, Mrs. Whitehead gave birth to a baby girl and—following the contract—she gave the baby to the Sterns on March 30, 1986.⁷¹ Shortly thereafter Mrs. Whitehead became overcome with grief over parting with the little girl.⁷² The Sterns worried that Mrs. Whitehead was becoming unstable so they agreed to give her temporary custody as long as she returned the baby within a specified timeframe.⁷³ When Mrs. Whitehead refused to return the baby, the Sterns turned to the courts to enforce the contract and award them custody of the baby.⁷⁴ The trial court issued a temporary restraining order, requiring Mrs. Whitehead to give the baby to the Sterns.⁷⁵ Mrs. Whitehead once again refused and this time took the baby to Florida, where law enforcement caught up with her and returned the baby to New Jersey and the Sterns.⁷⁶ The case proceeded to trial, and the trial judge declared the contract valid and enforceable and terminated Mrs. Whitehead's parental rights.⁷⁷ The New Jersey Supreme Court reversed the trial court's ruling that the contract was valid and enforceable, stating that the contract conflicted with current New Jersey statutes and violated public policy.⁷⁸ Although the contract was invalid, the New Jersey Supreme Court determined custody based on the best interests of the child, and ordered that custody be given to the Sterns.⁷⁹

Although the *Baby M* case had the same result that the contract intended, it is important to note that the contract was held to be invalid and unenforceable. This was the first case where a court of final jurisdiction had to determine the lawfulness of a surrogacy contract.⁸⁰ After this case, other states enacted their own surrogacy

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ In *Re Baby M*, THEFREEDICTIONARY, <http://legal-dictionary.thefreedictionary.com/Baby+M,+in+Re>.

legislation, which fell into four categories.⁸¹ The states that fall within the first category of legislation proclaim all surrogacy agreements void and/or unenforceable in that jurisdiction.⁸² The states that fall within the second category of legislation outlaw surrogacy agreements if the surrogate is compensated beyond the expenses incurred as a result of the pregnancy.⁸³ The states that fall within the third category of legislation make it a crime to “sell babies.”⁸⁴ Finally, the states that fall within the fourth category provide for the enforceability of surrogacy contracts, but employ safeguards for those entering into these contracts (i.e. the IPs must provide proof that they are medically unable to bear children; the parties must obtain judicial preauthorization to enter the agreement).⁸⁵

B. The Four Categories and Jurisdictional Implications

Surrogacy agreements vary from state to state—as outlined in the preceding section—but they can also vary depending on the individual (i.e., IPs relationship status or sexual orientation).⁸⁶ Some states have laws that clearly state that the IPs are a “heterosexual couple,” or a “married couple.”⁸⁷ Because each state varies in their stance on surrogacy, it is very important that both the surrogate mother and the IPs obtain separate legal counsel. Attorneys can help the parties through the two-step process of establishing a surrogacy arrangement: first, the parties must come up with a written agreement; second, there must be a Judgment of Parentage.⁸⁸

In the first step of the process, drawing up a surrogacy agreement, the parties agree to the purpose of the surrogacy arrangement, the responsibilities of the parties, the laws implicated by the state(s) where the parties reside, and issues related to payment and the gametes to be used.⁸⁹ In the second step of the process, the IPs must file a pre-birth order, which allows the IPs of babies born through gestational surrogacy to have their own names put on the birth

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *U.S. Surrogacy Laws by State*, THE SURROGACY EXPERIENCE, <http://www.the-surrogacyexperience.com/surrogates.cfm?sc=23&p=99>.

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ *Surrogacy Laws in the USA*, SURROGACY ONE, <http://www.surrogacyone.com/surrogacy-laws-in-the-usa/>.

certificate.⁹⁰ The pre-birth order gives the IPs full parental rights. This step in the process takes place before the baby is born—but like surrogacy agreements, the time when the court will accept the order varies from state to state. The surrogate mother must also agree to cooperate with the IPs issuance of a pre-birth order, otherwise the surrogate and/or her spouse will still be viewed as the baby’s mother and/or father.⁹¹

Because there is no federal law governing surrogacy in the United States, the IPs must understand the surrogacy laws in their own state, as well as the surrogacy laws in the surrogate’s state. If the IPs and the surrogate live in two different states—both of which have laws legalizing, but differing on, surrogacy—it is important to find out which state’s jurisdiction will apply. Will it be the jurisdiction of the IPs’s state, the jurisdiction of the surrogate’s state, or the jurisdiction of the state where the baby is born? Without a uniform law governing the fifty states it is easy for the surrogacy agreement to be declared unenforceable.⁹² This is why the initial step in a surrogacy arrangement should be for the IPs to familiarize themselves with the surrogacy laws of their own state and that of the surrogate. Likewise, it is equally important for American IPs using a surrogate in another country to understand the laws within their own state and the laws in the surrogate’s country. For example, under the Immigration and Nationality Act (INA) § 301 and § 309, if the IPs are U.S. citizens then they must have a biological connection to the baby in order to transmit citizenship upon birth of the child.⁹³ If the IPs are not biologically related to the baby, then they will have to provide medical and documentary evidence of the child’s conception at birth.⁹⁴ If the IPs are citizens of the United States and are not biologically related to the child, i.e., they used a traditional surrogate, then they should make sure to choose a surrogate living in a country that will provide well documented proof of any medical procedures and paperwork, otherwise the baby might end up in legal limbo—

⁹⁰ THE SURROGACY EXPERIENCE, *supra* note 86.

⁹¹ See THE SURROGACY EXPERIENCE, *supra* note 86 (if there is an issue of parentage, the hospital would most likely put the surrogate mother’s name on the baby’s birth certificate).

⁹² This could occur when the IPs and/or surrogate were unaware that surrogacy agreements were declared unenforceable in their state.

⁹³ *Surrogacy Laws in the USA*, *supra* note 89.

⁹⁴ *Id.*

placed in an orphanage in the United States or the surrogate's country while the IPs battle for custody in court.

C. Foreign Couple Seeking Surrogate in the United States and the Jurisdictional Implications

For reasons previously stated, the United States is quickly becoming a popular choice amongst foreign IPs looking for surrogates. Just as the American IPs using a foreign surrogate must understand the surrogacy laws in their own state as well as the laws in the surrogate's country, so, too, must foreign IPs understand their own surrogacy laws as well as the laws of the state where the American surrogate is domiciled. It is important for foreign IPs using an American surrogate to note that unlike countries like India and Ukraine—both of which will be discussed in more detail in later sections of this paper—the IPs are not immediately deemed the legal parents at birth.⁹⁵ In this case, the foreign IPs must make sure that they are ready to jump through the procedural hoops to get a Judgment of Parentage, and whatever other documents their home country requires in order for the IPs to be deemed the legal parents and to take their baby back to their home country.

One issue that has arisen in recent years—in response to the United States' relaxed laws on surrogacy and China's increasing infertility rates⁹⁶—is an influx of wealthy IPs from China making traditional surrogacy arrangements with American surrogates.⁹⁷ Some Chinese IPs are willing to pay \$200,000–\$300,000 in order to have their child born in the United States.⁹⁸ Why are the Chinese IPs willing to pay such a high price? Because in a traditional surrogacy arrangement in the United States—where the surrogate is genetically connected to the baby—the surrogate is considered the legal mother,⁹⁹ meaning the baby is an American citizen. For some Chinese IPs, the high price tag

⁹⁵ *Id.*

⁹⁶ Alexandra Harney, *Wealthy Chinese seek U.S. surrogates for second child, green card*, REUTERS (Sept. 22, 2013, 5:10 PM), http://www.reuters.com/article/2013/09/22/us-china-surrogates-idUSBRE98L0JD20130922?utm_source=The%20Sinocism%20China%20Newsletter&utm_campaign=41326a98ed-Sinocism09_23_13&utm_medium=email&utm_term=0_171f237867-41326a98ed-29620417.

⁹⁷ Michelle FlorCruz, *Rich Chinese Couples Turning to American Surrogates For Easier Immigration and 'Designer Babies.'* INTERNATIONAL BUSINESS TIMES, <http://www.ibtimes.com/rich-chinese-couples-turning-american-surrogates-easier-immigration-designer-babies-1458938>.

⁹⁸ *Wealthy Chinese seek U.S. surrogates for second child, green card, supra* note 96.

⁹⁹ Unless and until the intended mother adopts the child, assuming her husband's sperm was used and he was deemed the baby's legal father.

is more than worth it for a child and American citizenship for that child. Also, having a child born via surrogate is a much cheaper way for a Chinese family to emigrate to the United States; their other option is to apply for an EB visa, which carries with it a \$500,000 price tag.¹⁰⁰

While most Chinese IPs seeking American surrogates wish to use their own gametes, there is a growing trend among these IPs to use egg and sperm donors. Using donors allows the Chinese IPs both the luxury of American citizenship for the child with expedited and cheaper immigration for their family, and the ability to design their own baby. These “designer babies”¹⁰¹ allow Chinese IPs create what they believe is their perfect baby; often times opting for donors who are tall and blonde, and even requesting male babies.¹⁰² Although surrogacy is illegal in China, seeking a surrogate abroad is not per se illegal because there is not yet a cohesive way for China to track the surrogate industry.¹⁰³ However, China’s strict one-child policy¹⁰⁴ can lead to many issues for Chinese IPs that choose to have children via surrogate, especially second children born via surrogate.¹⁰⁵ Couples who violate China’s one-child policy (with or without a surrogate) can be subjected to forced abortions, sterilizations and fines, and even losing their employment;¹⁰⁶ Chinese IPs who violate the one-child policy by having a child via surrogate cannot fair any better. It is for these reasons that Chinese IPs using an American surrogate choose to immigrate to the United States after their child is born via surrogate.¹⁰⁷

¹⁰⁰ *Rich Chinese Couples Turning to American Surrogates For Easier Immigration and ‘Designer Babies,’* *supra* note 97, the EB visa requires the Chinese to make a minimum investment of \$500,000 in a “job-creating business.”

¹⁰¹ *Wealthy Chinese seek U.S. surrogates for second child, green card,* *supra* note 96.

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ Dan Levin, *Many in China Can Now Have a Second Child, but Say No*, N.Y. TIMES, Feb. 25, 2014, http://www.nytimes.com/2014/02/26/world/asia/many-couples-in-china-will-pass-on-a-new-chance-for-a-second-child.html?_r=0. (Thanks to the adoption of a new family planning policy, married couples can have two children if one of the parents is an only child.)

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

III THE UNITED KINGDOM

*“Change is the law of life. And those who look only to the past or present are certain to miss the future.”*¹⁰⁸

Unlike the United States, surrogacy laws in the United Kingdom are clearly defined and strict by comparison. Also unlike the United States, the United Kingdom has a consensus in regard to laws governing surrogacy arrangements. Surrogacy is legal in the United Kingdom, but there are rigid rules with respect to the parties that can be involved, the amount of money that can be exchanged, and the paperwork that needs to be filled out pre- and post- birth. What led the United Kingdom to decide that it needed unambiguous and unified laws on surrogacy? Like the United States, there was a case that precipitated the push for the United Kingdom to get surrogacy laws on the books. However, at the close of the case, instead of letting each state—or each region, in the United Kingdom’s case—decide surrogacy for itself, Parliament established a unified set of rules for all citizens to follow. First, I will discuss the case that prompted Parliament to implement the Surrogacy Arrangements Act of 1985. Second, I will discuss current surrogacy laws in the United Kingdom and their benefits and consequences. Finally, I will discuss the legal and jurisdictional implications for a British couple using a surrogate abroad.

A. Baby Cotton and Her Effect on Parliament

In 1985, Scotland Yard began its investigation into a surrogate mother from London who allegedly was paid six thousand five hundred pounds by a childless couple in exchange for her baby.¹⁰⁹ The agreement between the IPs and the surrogate was arranged by an American-based agency in Surrey,¹¹⁰ but the parties never met.¹¹¹ After giving birth, the surrogate, Kim Cotton,¹¹² was forced to leave

¹⁰⁸ John Fitzgerald Kennedy, JFK EXPERIENCE, <http://www.jfkexperience.com/jfk-resources/favorite-jfk-quotes/> (last visited Mar. 3, 2015).

¹⁰⁹ 1985: *Inquiry over ‘baby-for-cash’ deal*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm.

¹¹⁰ *Id.*

¹¹¹ *Now I realize how hopelessly naïve I was to become Britain’s first surrogate mother, admits Kim Cotton*, MAIL ONLINE, <http://www.dailymail.co.uk/femail/article-514230/Now-I-realise-hopelessly-naive-I-Britains-surrogate-mother-admits-Kim-Cotton.html>.

¹¹² Following the outcome of this case, Kim Cotton founded COTS, a nonprofit agency that helps British couples through the surrogacy process, <http://www.surrogacy.org.uk>.

the baby at the hospital while the Yard investigated and the court contemplated what to do with the baby.¹¹³ Baby Cotton—as she came to be known—became a ward of the state for seven days until a court decided that she could be adopted by the IPs that paid for her.¹¹⁴

When the Baby Cotton case was decided, paying money for surrogacy was permitted in the United Kingdom, much to the chagrin—apparently—of members of Parliament.¹¹⁵ Like Parliament, the public was also outraged by this case.¹¹⁶ In response to this outrage, Parliament enacted the 1985 Surrogacy Arrangements Act, which banned commercial surrogacy (beyond the payment of ‘reasonable’ expenses) and advertising for surrogates.¹¹⁷ ‘Reasonable expenses’ was determined in the 1980s to be ten thousand pounds; this number has remained unchanged.¹¹⁸

B. Clearly Defined Laws and Their Benefits and Consequences

The 1985 Surrogacy Arrangements Act states—in part—that “No surrogacy arrangement is enforceable by or against any of the persons making it,” and also defines the way that the courts should determine whether an arrangement has been made.¹¹⁹ The Act also made it illegal to advertise that you are looking for a surrogate mother, would like to be a surrogate mother, or are a third party trying to facilitate a surrogacy arrangement.¹²⁰ For this reason, surrogacy agencies in the UK cannot accept any money, and IPs and surrogates should be mindful of the ten thousand pound limit. Another thing that the parties involved should be mindful of is the fact that no surrogacy arrangement is enforceable by law, meaning that any contract that is drafted can be reneged by either party at any time.

The 1985 Act has been amended only once, and not since 1990. The Human Fertilisation and Embryology Act 1990 made two important amendments to the 1985 Act: it ensured that a surrogate can change her mind about giving up the baby, and a child resulting from

¹¹³ 1985: *Inquiry over ‘baby-for-cash’ deal*, *supra* note 109.

¹¹⁴ *Now I realize how hopelessly naïve I was to become Britain’s first surrogate mother, admits Kim Cotton*, *supra* note 111.

¹¹⁵ *See 1985: Inquiry over ‘baby-for-cash’ deal*, *supra* note 109.

¹¹⁶ *See 1985: Inquiry over ‘baby-for-cash’ deal*, *supra* note 109.

¹¹⁷ *Thirteen years of controversy*, BBC News (Oct. 14, 1997), http://news.bbc.co.uk/2/hi/uk_news/193076.stm.

¹¹⁸ *Id.*

¹¹⁹ Surrogacy Arrangements Act 1985, Ch. 49.

¹²⁰ *See id.*

a surrogacy arrangement can be treated in law as the child of the IPs, so long as they are married and that other conditions are met.¹²¹ The 1990 Act also established parenthood rules and Parental Orders.¹²² A Parental Order extinguishes the parental status of the surrogate parents and establishes parenthood in the IPs.¹²³ Some important notes about English law: the surrogate will be the legal mother—no matter the child’s genetic link to the IPs—unless and until parenthood is established through a Parental Order or adoption following the baby’s birth, and the surrogate’s husband or partner will be the baby’s father unless and until parenthood is established.¹²⁴ The 1990 Act is certainly beneficial to the surrogate, but assuming the married IPs meet certain conditions—and get a Parental Order—the Act is also beneficial to them, and can help offset the consequences of the 1985 Act (i.e. that the surrogate can renege on the contract at any time).

Is it better to have a set of strict, unified laws? For one thing, it makes things easier for the courts, which surely have no problem knowing when a surrogacy arrangement has been made. But are strict and unified laws beneficial to the parties involved? A benefit of having unified surrogacy laws is that citizens of the United Kingdom—unlike American citizens—only need to concern themselves with one set of laws when both the IPs and the surrogate are citizens of the United Kingdom. But, is having strict laws a good thing for IPs from the United Kingdom using a surrogate abroad? Maybe not.

C. British Couple Seeking Surrogate Abroad

The United Kingdom’s strict surrogacy laws leave no question about what British citizens can and cannot do. This is a good thing for some IPs, but it also leaves no wiggle room for those IPs that do not fit clearly within the rules; this lack of leniency is exacerbated when British IPs decide to find a surrogate abroad. The British IPs—like the American IPs in the previous section—should familiarize themselves with the laws of the country where their surrogate is domiciled, as well as their own. However, it may be even more difficult for British

¹²¹ *Considering fertility treatment abroad: issues and risks*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/fertility-clinics-treatment-abroad.html>.

¹²² *Surrogacy Laws in the UK*, SURROGACY ONE, <http://www.surrogacyone.com/surrogacy-laws-in-the-uk/>.

¹²³ *Immigration UK*, *id.*

¹²⁴ *Id.*

IPs than their American counterparts when trying to get their baby—born abroad—back into their own country. Under section 3(1) of the British Nationality Act of 1981, children not automatically entitled to British citizenship can be registered as Citizens if the Home Secretary is satisfied that certain conditions are met.¹²⁵ These conditions include: at least one of the IPs is a British citizen, the surrogate parents' consent, the IPs have received a parental order, had the child been the legitimate child of the IPs s/he would be entitled to citizenship automatically.¹²⁶

An issue that may arise more often for British IPs using a foreign surrogate rather than a surrogate in their own country: the United Kingdom's rule that a couple can only apply for a parental order if they are domiciled in the United Kingdom.¹²⁷ If the IPs plan to be present in the surrogate's country for the birth of the child, they should make sure to have the Parental Order set up before they leave the United Kingdom. While the Parental Order is being processed—and because according to British Law the status of the child depends on the marital status of the surrogate—the British IPs can apply for a visa for the baby. The visa is valid for twelve months, and while it can be made prior to filing for a Parental Order, it will only be granted on the basis that a Parental Order will likely be filed.¹²⁸ The only way that British IPs can bypass the need to file for a visa and/or parental order is if the foreign surrogate is unmarried. In that case, British law will consider the intended father to be the baby's legal father, therefore passing on his British citizenship to the baby automatically.¹²⁹ Also, if you are a British Citizen wishing to file for a Parental Order, but are not currently domiciled in the United Kingdom, you will need to establish that you intend for the baby to live in the United Kingdom.¹³⁰ With laws this stringent, it is important that IPs living in the United Kingdom or IPs using a surrogate living in the United Kingdom be well apprised of the rules that must be followed; otherwise, the baby might not be able to return to the United Kingdom or receive proper citizenship.

¹²⁵ British Nationality Act 1981, Ch. 61 (U.K.).

¹²⁶ *Surrogacy Laws in the UK*, *supra* note 122.

¹²⁷ *Considering fertility treatment abroad: issues and risks*, *supra* note 121.

¹²⁸ *Surrogacy Laws in the UK*, *supra* note 122.

¹²⁹ *Surrogacy Laws in the UK*, *supra* note 122, (however, if the British intended father is only a British citizen "by descent," his citizenship will not automatically pass to the baby).

¹³⁰ *Id.*

IV INDIA

*“These wom[en] are doing a job . . . they know there is no gain without pain.”*¹³¹

As a member of The Hague Convention, India opened its doors to commercial surrogacy in 2002. It is among a handful of countries—including Georgia, Russia, Thailand, Ukraine, and a few states in the United States—where a surrogate can legally accept payment.¹³² India has fertility banks, many of which have a high percentage of clientele from overseas. For example, one Mumbai-based fertility bank has produced 295 surrogate babies since it opened its doors in 2007, and ninety percent of those babies were for overseas clients.¹³³ Forty percent of those overseas clients are same-sex couples, who find the unregulated surrogate industry to be much easier to deal with than a surrogate from their home country.¹³⁴ However, with this high production of surrogate births comes a high degree of exploitation. Indian fertility clinics have been accused of being “baby factories”¹³⁵ that do very little to protect the surrogate’s health after the birth. First, I will explain India’s current surrogacy laws and its jurisdictional implications for foreign IPs. Second, I will discuss why India has become a popular destination for foreign IPs in search of a surrogate and the hardship this places on the Indian surrogates.

A. The Law and Its Jurisdictional Implications for Foreign IPs

In India, a baby born through a surrogate is the legitimate child of the IPs, regardless of the baby’s genetic ties to either the surrogate or the IPs.¹³⁶ Indian law holds surrogacy agreements to be enforceable, and in 2008 the Supreme Court of India held that commercial surrogacy is permitted, and the Court directed the Legislature to pass

¹³¹ *The baby factory: in a huge clinic in India, hundreds of women are paid £5,000 each to have a Western couples’ babies*, DAILY MAIL REPORTER (Oct. 1, 2013, 7:09 EST), <http://www.dailymail.co.uk/news/article-2439977/The-baby-factory-In-huge-clinic-India-hundreds-women-paid-5-000-Western-couples-babies.html> [hereinafter *The baby factory*] (Dr. Nayna Patel commenting on the surrogate mothers who work and live in her clinic).

¹³² Nita Bhalla & Mansi Thapliyal, *India seeks to Regulate its Booming ‘Rent-a-womb’ Industry*, REUTERS (Sept. 30, 2013, 1:01 PM), <http://www.reuters.com/article/2013/09/30/us-india-surrogates-idUSBRE98T07F20130930>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Bhalla & Thapliyal, *supra* note 132.

a law to govern surrogacy in India.¹³⁷ Prior to this decision, the Indian Council for Medical Research produced guidelines to regulate Assisted Reproductive Technology procedures, and these guidelines are still the guiding force in Indian surrogacy law today. In comparison to the United Kingdom's clearly defined surrogacy laws—and even the United States with its varying, but numerous, sets of laws—Indian surrogacy is not very regulated. However, one aspect of surrogacy that India is in the process of regulating is a ban on gay couples and single men and women from using Indian surrogates.¹³⁸ For any IPs who fit within one of the banned categories and are thinking about using an Indian surrogate regardless, think again. While Indian surrogacy is largely unregulated, it appears that the government is serious about these regulations.¹³⁹ Following implementation of this ban, any child born by an Indian surrogate for IPs in one of the banned categories will be a child caught in legal limbo—either placed in an orphanage in India while the IPs try (most likely unsuccessfully) to gain citizenship for the child, or the IPs try to smuggle the child out of the country—because India will consider neither the surrogate nor the gay or single IPs to be the baby's parent.

While some surrogacy laws in the United States—as detailed previously—consider the surrogate mother to be the baby's biological mother in certain circumstances, India's decision to make the IPs the legitimate parents may sound like a good thing for American IPs; but that's all: it only sounds like a good thing. India's decision to make the IPs the legal parents carries no legal weight according to United States jurisdiction, because the United States does not automatically deem the IPs to be the legal parents. In a case such as this, where the laws of the United States and India conflict, the American IPs will need to make sure that they have complied with all immigration requirements in order to immigrate their child back to the United States.¹⁴⁰ Assuming that these requirements are met and considering that India's laws generally favor the foreign IPs (most likely because they do not want their own country or their citizens liable for the child) immigration is an achievable, but lengthy, process. Acquiring

¹³⁷ SURROGACY LAWS INDIA, <http://www.surrogacylawsindia.com> (last visited Mar. 2, 2014).

¹³⁸ Nilanja Bhowmick, *Why People are Angry About India's New Surrogacy Rules*, TIME (Feb. 15, 2013), <http://world.time.com/2013/02/15/why-people-are-angry-about-indias-new-surrogacy-laws/>.

¹³⁹ *Id.* (homosexuality was only just decriminalized in 2011).

¹⁴⁰ Bhalla & Thapliyal, *supra* note 132.

parenthood status in the United States may be a quicker and easier option, especially if the foreign IPs are residents of California; if the IPs meet all of the preliminary requirements and have their contracts and paperwork—including the surrogate’s proof of medical expenses and procedures—getting parenthood status is a much more streamlined process than going through immigration.

B. Baby Factories

With very few regulations for surrogacy arrangements, India has become a popular choice for foreign IPs trying to escape their own countries strict laws or prohibitions on surrogacy. Of the few regulations that India does have, it is no surprise that the cost of a surrogate is not among them. In India, the average cost of a surrogate ranges from \$25,000 to \$35,000, which is just a fraction of the cost in the United States.¹⁴¹ Although surrogacy laws are beneficial to foreign IPs in search of a surrogate, the same cannot be said for Indian surrogates. In fact, the lack of much regulation has a negative effect on the surrogates.

There are over three thousand surrogacy clinics in India, and the industry brings in around four hundred million dollars a year. As concerned as India is with increasing its economy—which may be why India’s Legislature has been slow to adopt any new regulations—it is as equally unconcerned with the affect that surrogacy arrangements have on Indian surrogates.¹⁴² While India is made rich by the influx of foreign IPs, the surrogates see very little of this money. The low cost of an Indian surrogate is even lower by the time it reaches the surrogate mother; the surrogates themselves are only paid around \$6,500—the remaining \$20,000–\$25,000 goes to the clinic that made the surrogacy arrangement.¹⁴³

Also, India does not have any laws regulating the medical care that a surrogate receives after the baby is born; when a surrogate gives birth she is neither India’s nor the IPs responsibility.¹⁴⁴ In May of 2012, one surrogate mother died just days after delivering a child for IPs.¹⁴⁵ Considering India’s advanced medical technology, if there

¹⁴¹ *Id.*

¹⁴² See *The baby factory*, *supra* note 131 (some citizens fear that the lack of regulations is exploiting poor Indian surrogates, damaging their health, and giving India a bad reputation as a baby factory).

¹⁴³ *Id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

were regulations in place then this death most likely could have been prevented.¹⁴⁶ It is for reasons such as this that a new law, the Assisted Reproductive Technologies Bill (ART) is set to come before parliament this year; if passed, the Bill requires that surrogates be between twenty-one and thirty-five years old, they will be provided with insurance and contracts must be signed by all parties involved.¹⁴⁷ This Bill is long overdue, but it will grant some much-needed protection to the surrogate mothers. This Bill would make it much harder for foreign couples seeking a surrogate mother in India to “rent a womb,”¹⁴⁸ which may not be such a bad thing.

Still, in the absence of these regulations to protect the surrogate, why would an Indian woman subject herself to this lifestyle? Although \$6,500 might not seem like a lot of money to Westerners, in India it is enough to buy a house, pay for food, and even have money left over to pass along to a family member. Most Indian women choose this lifestyle because they have no other alternative if they want to put food on the table and a roof over their head. Considering how many Indian women consider surrogacy their only chance for survival, the ART Bill cannot be passed soon enough.

V UKRAINE

Surrogacy is legal in Ukraine, and like India, it is a popular choice for foreign IPs. The laws governing surrogacy are straightforward (especially in comparison to some of the countries discussed previously) and the jurisdictional issues that may arise with foreign IPs are similar to those in India; therefore, this section of the paper will be concise. Surrogacy in Ukraine is governed by the Family Code of Ukraine,¹⁴⁹ and like India, the IPs are considered the legal parents of the baby.¹⁵⁰ This means that the surrogate has no legal claim over the child, and unlike the United Kingdom, a Ukrainian surrogate cannot renege on a contract.¹⁵¹ An important difference between

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Family Code of Ukr. (2007).

¹⁵⁰ *Id.* (assuming the IPs provided their own genetic material for the child); see *Surrogacy in Ukraine*, UKRAINIAN FAMILY LAW, http://familylaw.com.ua/index.php?option=com_content&view=article&id=58&Itemid=73 (last visited Feb. 8, 2015).

¹⁵¹ See *Surrogacy in Ukraine*, *supra* note 150. (this outcome might differ if a traditional surrogacy was used because the surrogate may have some legal claim to the child).

Ukraine's surrogacy laws and those found in India is that the former has laws in place that regulate the medical procedures to be used: artificial insemination must be carried out in an accredited medical institution in accordance with methods approved by Ukraine's Ministry of Health Care, and the information that the doctor can and must pass along to the IPs is clearly outlined.

Surrogacy contracts are strongly encouraged in Ukraine, which is good news for American IPs, and bad news for British IPs (contracts are unenforceable in the United Kingdom and if entered into with a third party they can make the whole arrangement void). While surrogacy laws in Ukraine are more regulated than in India, which could make them a more attractive option for foreign IPs, the fact that Ukraine considers the IPs the legal parents at birth poses the same problems for American and British IPs as the problems discussed in the previous section on India. Once again, American IPs would need to go through the immigration process or—preferably—go through the necessary steps to acquire parenthood status.

VI THE SOLUTION

*“Our problems are man-made. Therefore, they can be solved by man.”*¹⁵²

When the laws regarding international surrogacy are so varied from country to country—and uncertain and unregulated at the international level—why do couples still choose this option? This is a question to which there may not be a clear answer, but what is clear is that uniform laws should be put in place that would govern all international surrogacy arrangements and bind all countries that have legalized surrogacy. These uniform laws could ensure that there would be no question of paternity, parental rights, or citizenry of the baby at the time of birth. This may sound like a far cry from what we have now: a lack of a worldwide consensus regarding international surrogacy; but a consensus is possible.

The Hague has the power to enforce laws on international surrogacy that would be binding on all of its members. Currently, the closest thing to a convention on international surrogacy is the Hague Conference on Private International Law, which has developed

¹⁵² John Fitzgerald Kennedy, Commencement Address at American University (June 10, 1963), http://content.time.com/time/specials/packages/article/0,28804,1898670_1898671_1898662,00.html.

Conventions that cover Inter-country Adoption, and is considering a “parentage/Surrogacy Project.”¹⁵³ There are seventy-five members of the Hague Conference on Private International Law (seventy-four states and one regional economic integration organization). Member states have accepted the Conference’s statute, and accept the laws that the Conference imposes upon them. Although the countries that I highlighted in this paper are members of The Hague Convention—without a convention on international surrogacy—their membership in this Conference means very little unless and until a convention is put in place. The Hague is taking steps towards establishing uniform laws on international surrogacy arrangements—which is more than can be said for the United States—but if the Permanent Bureau’s Preliminary Report is our only indicator of a solution then we may be waiting years to get one.¹⁵⁴

While a change at the international level might take some time in order to come to a consensus, in the meantime each individual country should reexamine their surrogacy laws and update them or amend them if necessary. For example, the United Kingdom’s surrogacy laws have not been updated since 1990. Since that time, advancements in technology and medicine have made the British laws nearly obsolete. While the United Kingdom’s laws are uniform—which leads to less confusion—they are too strict. While I am not advocating that the United Kingdom create less stringent laws, I am advocating that they allow for some flexibility when it will serve the best interest of the child.

If a country refuses to reexamine its surrogacy laws or if The Hague cannot come to a consensus in creating a convention on international surrogacy, then the least that the lawmakers can do—but also the most important thing they can do—is to keep the baby’s best interests at the forefronts of their mind. If a law is unclear, or the IPs do not fit within a country’s regulations, many of the problems discussed earlier—both in actual cases and in the hypothetical jurisdiction situations—could easily be solved. The Hague should execute laws that will help countries avoid leaving a child in legal limbo. A law such as this could require that the governments of both countries (not just one country) work together: the surrogate’s country could issue the child a visa to travel to the IPs country, and the IPs

¹⁵³ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 51.

¹⁵⁴ See *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, *supra* note 58.

country could agree to acknowledge the IPs on the child's birth certificate and their legal parentage. The Hague should also work towards establishing health and safety laws regarding the proper care and treatment afforded to surrogate mothers. Uniform laws regarding medical care for surrogates living in countries where surrogacy is legal should require that the surrogates have access to proper hospitals and medical equipment, and receive regular check-ups from licensed physicians. Doctors strongly recommend that pregnant females receive regular exams when they are pregnant to ensure that the mother—surrogate, in this case—and the baby are healthy.¹⁵⁵ As mentioned briefly earlier in the section on India, creating uniform laws establishing standard medical care for surrogates would lessen a surrogates' risk of severe illness or death after the baby is born.

Without a uniform set of surrogacy laws—or even guidelines—the burden is on those thinking about entering into surrogacy arrangements to understand the laws that will apply. While we wait for The Hague to hold a convention on surrogacy, attorneys, surrogacy agencies, IPs and surrogates should make sure that they are well apprised of the surrogacy laws in their own country/state and in the country/state (if it differs from their own) where the other party in the arrangement resides. Paramount to entering into a surrogacy arrangement, the parties should know the laws that they will be dealing with before they enter into the arrangement. As we have seen from some of the case studies outlined above, taking a retroactive approach when problems arise can lead to protracted litigation and uncertain nationality and legal parentage for the child.

One thing about international surrogacy is clear: more rules are necessary than those that exist right now. In order for a change to be made lawmakers need to start thinking with an eye towards the future rather than the past. With clear surrogacy laws in place no child would be left asking, “Are you my mother?”¹⁵⁶

¹⁵⁵ *Pregnancy: Prenatal Exam Schedule-Topic Overview*, WEBMD, <http://www.webmd.com/baby/tc/pregnancy-prenatal-exam-schedule-topic-overview> (last updated July 23, 2012).

¹⁵⁶ P.D. EASTMAN, *ARE YOU MY MOTHER?* (Random House 1960).