

## NOTES

### REGULATING INTERNATIONAL SURROGACY ARRANGEMENTS WITHIN THE UNITED STATES: IS THERE A CONCEIVABLE SOLUTION?

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## I. INTRODUCTION

After the successful surrogacy arrangement and the birth of their son Alvaro in 2013, using a surrogacy agency in India, same-sex and legally married couple Gordon Lake and Manuel Santos were ready for another addition to their happy family.<sup>1</sup> Two years later, the couple entered into a second surrogacy arrangement through an agency in Thailand, this time with Gordon—an American citizen—as the biological father.<sup>2</sup> As the couple awaited the addition of their soon-to-be daughter, Carmen, their world suddenly came crashing down.<sup>3</sup>

When it was time to complete the paperwork allowing the couple to bring Carmen home, they were unable to reach the Thai surrogate mother. Instead, they were met by an unexpected media announcement by the surrogate mother: “they are not natural parents in Thai society...they are same-sex, not like male and female that can take care of babies.”<sup>4</sup> What followed for Gordon and Manuel was an extensive legal battle, which continued for over a year.<sup>5</sup> Unfortunately, this is just one example of the many legal nightmares that often follow a cross-border surrogacy arrangement.<sup>6</sup>

Surrogacy, “the process of carrying and delivering a child for another person,”<sup>7</sup> has become an increasingly popular and frequently used option for couples or individuals wanting to have a child but who are unable to conceive or adopt.<sup>8</sup> Although the demand for surrogacy continues to grow, the law remains outdated and unable to match the advancements in reproductive technology, hindering the use of these new reproductive technologies.<sup>9</sup> This ongoing controversy is met by further legal, social, and ethical implications

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<sup>1</sup> John A. Torres, *Gay Couple Wins International Fight for Their Baby*, FLORIDA TODAY (May 5, 2016), <http://www.floridatoday.com/story/news/local/john-a-torres/2016/05/05/gay-couple-wins-international-fight-their-baby/83913622/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Gay Couple Wins in Lawsuit Against Thai Surrogate*, CONCEIVEABILITIES: ALL THINGS CONCEIVABLE BLOG (May 2, 2016), <https://www.conceiveabilities.com/about/blog/gay-couple-wins-in-lawsuit-against-thai-surrogate>.

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

<sup>6</sup> *See id.* For example, the widely publicized and criticized case of Baby Gammy involved an Australian couple who commissioned twins from a Thai surrogate mother. One of the twins was born with Down syndrome, and the couple took the healthy baby home, leaving the child with down syndrome behind with the surrogate mother.

<sup>7</sup> *Surrogacy*, BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>8</sup> Victoria R. Guzman, Article, *A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy?*, 38 HOUS. J. INT’L L. 619, 621–22 (2016) (noting the increasing rates of infertility and potential prejudices and issues faced by those attempting to adopt).

<sup>9</sup> *Id.* at 621.

when those seeking surrogacy arrangements choose to use a surrogate mother outside of their own country's borders.<sup>10</sup>

In an era of globalization and increased access to travel, the rising demand for alternative methods of reproduction has led to the growth of international surrogacy arrangements, where aspiring parents in one country can pay a surrogate mother abroad to birth their child.<sup>11</sup> Although these cross-border arrangements have continued to grow in popularity, a binding international agreement has yet to be created, thus leaving surrogacy law and policy in the hands of individual countries.<sup>12</sup> This lack of international regulation, paired with the vastly differing and constantly changing laws of each individual country, has ultimately led to legal challenges for all parties involved.

This Note argues that the issue of international surrogacy is of great importance to the United States, given that the United States has interests on both sides of the arrangement—foreign citizens come to the United States for surrogacy and U.S. citizens go abroad. Moreover, recent legal changes regarding both immigration and familial rights call for the United States to act in protecting those entering into international surrogacy arrangements. Part II of this Note will provide a background on surrogacy, Assisted Reproductive Technology (“ART”), the rise of cross-border surrogacy arrangements, and an overview of the potential legal implications stemming from these international arrangements.

Part III of this Note will focus on the role of the United States in these international agreements, both as an international surrogacy hub and a country with citizens who arrange surrogacy elsewhere. Part IV will suggest that it is necessary for the United States to determine a uniform regulatory policy regarding international surrogacy agreements and suggest potential regulatory solutions. Part V of this Note will ultimately conclude that, because a binding international treaty or creation of a convention is not necessarily feasible, the United States must take its own measures to protect both its citizens and those entering the United States for a surrogacy arrangement. To do so, the United States should use a combination of communicative approaches together with a new interpretation of the Immigration and Nationality Act to better fit the rights and needs of those entering into international surrogacy arrangements.

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<sup>10</sup> *The Parentage/Surrogacy Project*, HCCH, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Nov. 6, 2017).

<sup>11</sup> Jessica M. Caamano, Note, *International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention*, 96 B.U. L. REV. 571, 572 (2016).

<sup>12</sup> HCCH, *supra* note 10.

## II. INTERNATIONAL SURROGACY ARRANGEMENTS AND REPRODUCTIVE TECHNOLOGIES: A GLOBAL AND LEGAL PHENOMENON ON THE RISE

While the use of surrogate mothers for reproduction remains controversial today, the practice of surrogacy dates back to biblical times, when infertile women gave their handmaids to their husbands to provide their spouses with offspring.<sup>13</sup> Although the traditional understanding of surrogacy has always been widely accepted, the meaning of surrogacy has expanded with the availability of new reproductive technologies that make it possible for the surrogate mother to lack any genetic ties to the child.<sup>14</sup> Additionally, the use of surrogacy is no longer only utilized by a husband and an infertile wife, but also has expanded to frequent use by single individuals and same-sex couples.<sup>15</sup>

Developments in society, the legal landscape, and reproductive sciences thus ultimately led to the evolution of the “worldwide phenomenon” of cross-border surrogacy agreements.<sup>16</sup> Cross-border surrogacy agreements, also labeled as international surrogacy arrangements (“ISAs”), are those in which the surrogacy arrangement is entered into by an intending parent (or parents) who is a resident of one country and a surrogate who resides or is present in a different country.<sup>17</sup> The international surrogacy market has become a booming industry and continues to grow rapidly worldwide.<sup>18</sup> The use of an international surrogate has been attributed to inconsistencies in the availability of surrogacy, differing surrogacy laws across countries, and varying costs within countries.<sup>19</sup>

As evidenced by the story of Gordon Lake and Manuel Santos, there is inconsistency across countries in the laws and outcomes of ISAs, often leaving at least one party involved with legal chaos.<sup>20</sup> The recurrence of legal hurdles for families that have entered ISAs can be attributed to the absence of binding international law regarding these arrangements. The absence of an international regulatory scheme has left courts to resolve these difficult legal

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<sup>13</sup> Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 509–10 (2010).

<sup>14</sup> Caamano, *supra* note 11 at 574–75.

<sup>15</sup> Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW PREL. DOC. NO 10, 6–7 (Mar. 2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *As Demand for Surrogacy Soars, More Countries Are Trying to Ban It*, THE ECONOMIST (May 13, 2017), <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it>.

<sup>19</sup> Permanent Bureau, *supra* note 15, at 9.

<sup>20</sup> See discussion *supra* Part I.

issues, balancing multiple interests, including the interests of the countries involved, the surrogate mother, the intended parents, and the child.<sup>21</sup> The uncertainty stemming from ISAs has thus led to long and controversial adjudications, leaving the rights of the parties involved in a legal limbo.<sup>22</sup>

*A. Background: Surrogacy and ART*

Advances in reproductive technology have led to numerous new options for surrogacy arrangements, thus expanding surrogacy's traditional definition. The traditional surrogacy arrangement, also known as partial surrogacy, is an arrangement where the surrogate mother<sup>23</sup> provides her own genetic material to conceive the child, and the child born is therefore genetically related to the surrogate.<sup>24</sup> As previously noted, traditional surrogacy agreements have a longstanding history and are even traceable to biblical times.<sup>25</sup>

With the creation of in vitro fertilization ("IVF") in 1981, meaning the genetic material is combined and fertilized in a laboratory dish, the definition of traditional surrogacy expanded further, allowing conception both naturally and artificially.<sup>26</sup> Since the first IVF baby was born, more than 8 million babies have been born worldwide through the use of reproductive technologies.<sup>27</sup> Additionally, the number of clinics offering ISAs and ART is rapidly growing, with some countries offering over 400 clinics just within their state's borders.<sup>28</sup>

The growth of ART eventually led to the availability of gestational surrogacy arrangements, in which the surrogate mother does not provide her own genetic material, meaning the child born is not genetically related to the

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<sup>21</sup> Guzman, *supra* note 8, at 624–26.

<sup>22</sup> See, e.g., *Gay Couple Wins in Lawsuit Against Thai Surrogate*, *supra* note 4. In the story of Gordon Lake and Manuel Santos, the court did not rule in their favor until a year and a half after their daughter's birth.

<sup>23</sup> Alex Finklestein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. 4 (2016), [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf). Surrogate mother refers to the woman agreeing to become pregnant and carry the child as part of a surrogacy arrangement.

<sup>24</sup> Permanent Bureau, *supra* note 15, at annex.

<sup>25</sup> Permanent Bureau, *supra* note 15, at 6.

<sup>26</sup> Melissa Conrad Stöppler, *In Vitro Fertilization*, EMEDICINEHEALTH, [https://www.emedicinehealth.com/in\\_vitro\\_fertilization/article\\_em.htm](https://www.emedicinehealth.com/in_vitro_fertilization/article_em.htm) (last visited Nov. 7, 2017).

<sup>27</sup> Susan Scutti, *At least 8 million IVF babies born in 40 years since historic first*, CNN (July 3, 2018), <https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html>.

<sup>28</sup> Permanent Bureau, *supra* note 15, at 8.

surrogate.<sup>29</sup> These agreements typically allow the intended parents, the individuals planning to raise the child after the surrogate mother gives birth, to provide all of the genetic material for the child.<sup>30</sup> These options have made surrogacy a far more attractive possibility in recent years, given that these developments have enabled the genetic link between the surrogate mother and child to be severed.

In addition, the rise of surrogacy and ART further expanded the possible scope of surrogacy contracts. Thought of as the most controversial type of surrogacy arrangement, commercial surrogacy arrangements are those in which the surrogate is paid a fee above and beyond reimbursement for expenses.<sup>31</sup> More widely accepted is the altruistic surrogacy arrangement, where the surrogate volunteers to perform the service without being paid, except potentially for reasonable expenses, such as going to the doctor.<sup>32</sup> Notably, attempting to differentiate between the meaning of a “payment of reasonable expenses” and a “payment for services” remains extremely difficult.<sup>33</sup>

The growth of infertility worldwide together with advances in fertility treatment options have caused the demand for surrogacy arrangements to consistently flourish.<sup>34</sup> While those unable to conceive a baby may have considered adoption in the past, today, fewer babies are put up for adoption.<sup>35</sup> However, infertility is no longer the primary motivator for choosing gestational surrogacy.<sup>36</sup> Rather, many couples opt for surrogacy for personal reasons, such as avoidance of pregnancy for career-oriented developments.<sup>37</sup>

Additionally, increasingly diverse family arrangements have required the scope of legal parentage to become broader.<sup>38</sup> For example, gay couples, who can now marry in a growing number of countries, are increasingly turning to surrogacy to start a family.<sup>39</sup> Single men and women have also sought access to reproductive technology when deciding to reproduce without a partner.<sup>40</sup> Surrogacy has become appealing for diverse family arrangements because it

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<sup>29</sup> Permanent Bureau, *supra* note 15, at 7 n.51.

<sup>30</sup> Finklestein et al., *supra* note 23, at 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Permanent Bureau, *supra* note 15, at 6–7.

<sup>35</sup> THE ECONOMIST, *supra* note 18.

<sup>36</sup> Margaret Ryznar, Article, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1023–24 (2014).

<sup>37</sup> *Id.*

<sup>38</sup> THE ECONOMIST, *supra* note 18.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

allows the intended parent or parents to cut all genetic ties from the surrogate mother, allowing IVF to be completed with donated eggs instead.<sup>41</sup>

*B. The Globalization of Surrogacy Arrangements: An Industry on the Rise*

Surrogacy arrangements have become increasingly internationalized as those seeking surrogacy are motivated to look abroad by a variety of incentives, such as cost and availability. The advances of ART and the ability to enter into a gestational surrogacy arrangement have played a large role in the growth of cross-border surrogacy arrangements. Today, international surrogacy is considered “a phenomenon which is truly global in its reach.”<sup>42</sup>

Research indicates that intended parents who have entered into ISAs live in a variety of regions scattered across the globe, and the places in which they seek these agreements are just as diverse.<sup>43</sup> While the lack of international oversight makes calculating the actual number of ISAs entered into virtually impossible, various agencies specializing in ISAs have reported a percentage increase of nearly 1,000% over the span of four years.<sup>44</sup> In 2014, about 2,200 children were born through surrogacy in the United States alone.<sup>45</sup>

The increasing demand for surrogacy arrangements, the use of the internet and modern means of communication, and the increased ease of international travel has made international surrogacy a more viable possibility. This practice is sometimes called surrogacy tourism or fertility tourism.<sup>46</sup> Today, a quick search of “surrogacy” on the internet uncovers hundreds of websites offering IVF and ART services. Individuals and couples can easily locate a surrogacy clinic anywhere in the world that meets their legal and financial needs.

In seeking a surrogate, cost often plays a role for prospective parents. Exceedingly high prices in some countries has fostered the international ART market because of the cheaper prices available in other countries.<sup>47</sup> The medical expenses from one country to another may also vary greatly, such as in Italy, where the cost of the same necessary medicine for birth is thousands of dollars cheaper than it is in the United States.<sup>48</sup> Some couples living in a

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<sup>41</sup> *Id.*

<sup>42</sup> Permanent Bureau, *supra* note 15, at 8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> THE ECONOMIST, *supra* note 18.

<sup>46</sup> Permanent Bureau, *supra* note 15, at 7.

<sup>47</sup> Brittany M. Nichol, Article, *A Child Without a Country: Dissolving the Statelessness of Children Born Through Surrogacy*, 2016 MICH. ST. L. REV. 907, 910 (2016).

<sup>48</sup> Felicia R. Lee, *Driven by Costs, Fertility Clients Head Overseas*, N.Y. TIMES (Jan. 25, 2005), <http://www.nytimes.com/2005/01/25/us/driven-by-costs-fertility-clients-head-overseas.html>.



country where commercial surrogacy is legal have chosen to use a surrogate mother in a different country that only allows altruistic surrogacy, thus cutting the cost to only “reasonable expenses,” rather than paying expenses plus compensation.

Non-economic motivations for choosing ISAs can be summarized into one simple term: unavailability. Unavailability varies and carries different meanings in different countries, depending on cultural, social, and medical standards. Unavailability includes situations where the intended parents belong to a category of citizens that are ineligible for surrogacy in their home country, or their country may completely ban the treatment by law.<sup>49</sup> Prospective parents desiring surrogacy arrangements, but living in countries that prohibit surrogacy, began to acknowledge their ability to seek surrogacy arrangements elsewhere, rather than giving up their dreams of starting families.<sup>50</sup> Additionally, some prospective parents have been motivated to enter into cross-border surrogacy agreements to achieve a more favorable medical or legal agreement.<sup>51</sup>

Another reason for the rapid growth of ISAs can be attributed to the intended parents’ desire for a specific gene pool. Some intended parents choose their surrogate mother based on her genetic makeup and her genetic tie to her country of nationality. For example, many Chinese citizens seek surrogacy in the United States because they are drawn to the “...picture of blond[e] surrogates who look like movie stars carrying the baby with their traditional families.”<sup>52</sup> With this picture in mind, they often request certain dietary and age requirements for the surrogate mother.<sup>53</sup> These couples also enjoy the fact that their child has U.S. citizenship, allowing them to go back and forth between countries and giving their child the opportunity to enjoy the perks of United States citizenship.<sup>54</sup>

Ultimately, the global availability of ISAs became a solution for those individuals seeking surrogacy arrangements who were constrained, for one reason or another, from doing so in their home country. Today, ISAs are a well-established practice and are thought of as an integral part of our globalized world. However, there is currently no general consensus on an

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<sup>49</sup> Caamano, *supra* note 11, at 577.

<sup>50</sup> Permanent Bureau, *supra* note 15, at 8.

<sup>51</sup> *Id.* at 7 n.7 (explaining how U.S. citizens that are residents of a state where surrogacy is legal have chosen to travel to India for surrogacy, since India’s costs are significantly lower, and the surrogate mother is less likely to renege on the agreement).

<sup>52</sup> Kalee Thompson, *Whoa, Baby! Why American Surrogates Are in Demand for Chinese Families*, THE HOLLYWOOD REPORTER (Nov. 4, 2016), <http://www.hollywoodreporter.com/features/whoa-baby-why-american-surrogates-are-demand-chinese-families-942832>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

international standard regarding the ethics of surrogacy and what forms of it are acceptable, if any.<sup>55</sup>

Given the inherent complexity of ISAs, things become even further complicated when the child is born via a surrogate mother living in a country that is not where either of the intended parents reside. The country of the surrogate mother may have a completely different regulatory scheme than that of the intended parents, often causing confusion and lack of protection for everyone involved.<sup>56</sup> These differing legal landscapes ultimately put the child at risk when attempting to move the child from the surrogate mother's country to the home of the intended parents.<sup>57</sup> Each country regulates immigration differently, with specific procedures for allowing individuals into and out of the country.<sup>58</sup>

In addition to potential legal hurdles, there are also social risks. These risks include the potential for trafficking of surrogate mothers in countries allowing surrogacy, as well as the risk to children born via a surrogate who are often left without any legal rights.<sup>59</sup> "For example, children may not be legally registered, may not have a nationality (and therefore will be unable to travel due to their lack of travel documentation as children require a nationality to be able to acquire a passport), and may have no future access to information about their genetic identity."<sup>60</sup> All of these issues will be discussed in greater detail in the following section.

### *C. So, What's the Worst that Can Happen?*

What may at first seem to be a solution for prospective parents who cannot conceive or seek a surrogacy arrangement in their home country has the potential to spiral into legal chaos for all parties involved. The often-lengthy legal disputes that arise out of ISAs typically involve a "complex set of legal, emotional, and social circumstances, including human rights and the [legality] of artificial fertility and surrogacy."<sup>61</sup> The intricacies of ISAs raise a variety of difficult legal questions:

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<sup>55</sup> Kristiana Brugger, Note, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L.J.* 665, 678–86 (2012).

<sup>56</sup> *Information Fact Sheet: International Surrogacy*, NEW ZEALAND, <https://www.mvcot.govt.nz/assets/Uploads/Documents/information-sheet-international-surrogacy.pdf> (last updated Dec. 2016).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Andrea Mitchell, *Court Orders Safety Plan for Surrogate Child*, GOVERNMENT OF WESTERN AUSTRALIA (April 14, 2016), <https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/04/Court-orders-safety-plan-for-surrogate-child.aspx>.

Should a sperm donor be considered the legal parent? How does the law regard a mother who gives birth to a child who is genetically unrelated to her? Can a contract require a surrogate mother to submit to an abortion if the intending couple wishes? Is the child a citizen of the country where he or she was born or where the intending parents — the industry name for parents who seek a surrogate — reside? <sup>62</sup>

These inquiries represent the legal chaos that plagues international surrogacy. This chaos is due in large part because of the inconsistency in legal frameworks from country to country.<sup>63</sup>

The complexities of ISAs have led to a variety of implications for the surrogate mother and their dealings with the intended parents. Ethical concerns have been raised regarding the surrogate mother, including the surrogate mother's rights over her body, compensation disputes, and possible exploitation of indigent surrogates.<sup>64</sup> Take, for example, the extremely emotional and highly publicized case of Baby Gammy. In 2014, an Australian couple, entered into a commercial surrogacy agreement with a Thai surrogate who became pregnant with the couple's twins, using the husband's sperm and donated eggs.<sup>65</sup> It was later discovered that one of the twin babies had Down syndrome and the surrogate was told to abort the affected twin, however the surrogate refused on religious grounds.<sup>66</sup>

The child, Baby Gammy, was left with the surrogate mother while the intended parents left Thailand with only the healthy baby sister.<sup>67</sup> The surrogate mother claimed the intended parents abandoned Baby Gammy, while the parents claimed they never knew of his existence.<sup>68</sup> Although struggling financially, the surrogate mother welcomed Baby Gammy into her home and brought legal action against the Australian couple in an attempt to get Baby Gammy's sister returned to her custody.<sup>69</sup> The legal battle ended in

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<sup>62</sup> Amel Ahmen, *Offshore Babies: The Murky World of Transnational Surrogacy*, ALJAZEERA AMERICA (Nov. 8, 2017), <http://america.aljazeera.com/articles/2014/8/11/offshore-babies-thebusinessoftransnationalsurrogacy.html>.

<sup>63</sup> *Id.*

<sup>64</sup> Tina Lin, Note, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT'L & COMP. L. 545, 551–52 (2013).

<sup>65</sup> Sonia Allen, *Baby Gammy Case Reveals Murky Side of Commercial Surrogacy*, THE CONVERSATION, <http://theconversation.com/baby-gammy-case-reveals-murky-side-of-commercial-surrogacy-30081> (last visited Nov. 8, 2017).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Baby Gammy: Surrogacy Row Family Cleared of Abandoning Child with Down Syndrome in Thailand*, ABC NEWS (Apr. 13, 2016, 10:17 PM), <http://www.abc.net.au/news/2016-04-14/baby-gammy-twin-must-remain-with-family-wa-court-rules/7326196>.

2016, with the court finding that the Australian couple did not abandon Baby Gammy and allowing them to keep his baby sister in their custody.<sup>70</sup>

Another frequent issue leading to the distaste for, or prohibition of, surrogacy in many countries is the potential for exploitation of the surrogate mother or the children born under these agreements. For example, a group of reproductive rights scholars and attorneys were part of an international baby-selling scheme, and later fined and sentenced to prison.<sup>71</sup> Those involved in the scheme recruited women to travel to Ukraine to be implanted with sperm and eggs, under Ukraine's relaxed surrogacy laws, and then were brought back to the United States.<sup>72</sup> Towards the end of each pregnancy, false paperwork was filed claiming the surrogate parents backed out of the arrangement, allowing the children to be put up for adoption.<sup>73</sup> The baby-selling ring placed a dozen babies in homes, who will ultimately remain with those families.<sup>74</sup>

One of the most concerning issues faced by those who enter into ISAs is the often-uncertain legal parentage and nationality of the children born in these arrangements.<sup>75</sup> Children may be "marooned, stateless and parentless" in the country of their birth, causing their families to resort to desperate measures to take them home.<sup>76</sup> While the intended parents are left facing a long and expensive legal battle, the child's fundamental rights—such as the right to avoid discrimination on the basis of birth or parental status, the right to have his or her best interests regarded as a primary concern, and the right to obtain a nationality—remain impaired.<sup>77</sup>

A child is considered "stateless" when the child is not recognized as having any nationality.<sup>78</sup> A child may be left stateless when there is a conflict between the nationality laws of the surrogate mother's country and the

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<sup>70</sup> *Id.*

<sup>71</sup> 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>.

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

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

<sup>74</sup> *Id.*

<sup>75</sup> Permanent Bureau, *supra* note 15, at 4.

<sup>76</sup> Permanent Bureau, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW PREL. DOC. NO 11, at 8 n.29 (Mar. 2011), <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf>.

<sup>77</sup> *Id.* at 25.

<sup>78</sup> Sanoj Rajan, *International Surrogacy Arrangements and Statelessness*, INSTITUTE ON STATELESSNESS AND INCLUSION (Oct. 11, 2015, 3:43 PM), <http://children.worldsstateless.org/3/safeguarding-against-childhood-statelessness/international-surrogacy-arrangements-and-statelessness.html>.

nationality laws of the home state of the intended parents.<sup>79</sup> While legal issues involving statelessness can arise in many contexts, an analysis of cases from various jurisdictions reveals a specific subset of legal issues that frequently arise with ISA arrangements.<sup>80</sup>

Traditionally, the legal implications of cross-border surrogacy agreements hinged on each individual state's internal laws, policies, and trends.<sup>81</sup> Nationality laws are often interpreted as disallowing the intended parents from becoming the legal parent of the child born in a foreign country via a surrogate mother.<sup>82</sup> Thus, while essentially every country's internal surrogacy laws are different, there are three broad categories that state surrogacy regimes fall into: commercial surrogacy is legally permitted, commercial surrogacy is restricted but altruistic surrogacy is usually allowed, or surrogacy is entirely prohibited.<sup>83</sup>

In countries where commercial surrogacy is legally permitted, the state typically has laws enabling a child born to a surrogate mother to get citizenship from the intended parents.<sup>84</sup> Since these countries allow the child's citizenship to attach to the intended parents, the surrogate-born child does not automatically become a citizen of the country where he was born.<sup>85</sup> Cases have arisen where the country of the intended parents denied to recognize children born to surrogate mothers abroad as citizens of their parents' country, thus causing issues of statelessness for some of the children.<sup>86</sup>

In countries where commercial surrogacy is restricted but altruistic surrogacy is allowed, a large variety of internal regulations are applied by the different countries.<sup>87</sup> Many of these countries prohibit or regulate surrogacy based on residency type of surrogacy arrangement, and cost of the arrangement.<sup>88</sup> For example, in Israel, surrogacy law is controlled by a Board

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

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

<sup>81</sup> Permanent Bureau, *The Parentage / Surrogacy Project: An Updating Note*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW PREL. DOC. NO 3A (Feb. 2015), <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>.

<sup>82</sup> Rajan, *supra* note 78.

<sup>83</sup> *Id.* ("In altruistic surrogacy, the surrogate receives no financial reward for her pregnancy except the medical and nutritional expenses incurred during the pregnancy. In commercial surrogacy there is a financial reward paid to the surrogate in addition to the regular expenses.").

<sup>84</sup> *Id.* ("For example, India and Ukraine issue birth certificates in the commissioning parents' names bestowing parentage on the commissioning couple and severing the claims of the surrogate mother and her husband to parentage.").

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

of Approval for Surrogacy Agreements and each surrogacy arrangement requires board approval.<sup>89</sup>

In countries where anti-surrogacy laws have been passed, typically based on “moral and policy grounds,” surrogate-born children are unable to obtain nationality within that country.<sup>90</sup> These anti-surrogacy laws are even applicable when the child is genetically related to someone with the nationality of that country.<sup>91</sup> It should be noted, however, that some countries with prohibitive surrogacy regimes have provided means for children to avoid statelessness.<sup>92</sup> Many countries “have provided parentage certificates or nationality to surrogate children on an ad hoc basis on the principle that it is in the child’s best interest.”<sup>93</sup>

The potential horrors that may derive from statelessness caused by the absence of clear regulatory regimes are illustrated by the case of Baby Manji. In November 2007, the Yamadas, a Japanese couple, used an infertility clinic located in Northwestern India.<sup>94</sup> The couple hired an Indian surrogate mother to birth their child, using Mr. Yamada’s sperm and an anonymously donated egg from an Indian woman.<sup>95</sup> The contract entered into by the Yamadas and the surrogate mother maintained that Mr. Yamada would retain sole custody of child in the event of a separation. A month before the birth of the child, the Yamadas divorced.<sup>96</sup> At the time of birth, Mrs. Yamada refused to travel with her ex-husband, so Mr. Yamada traveled to India alone and as a result was the only parent listed on Manji’s birth certificate.<sup>97</sup>

When Mr. Yamada tried to obtain travel documents for Manji at the Japanese Embassy in India, they refused to issue Manji a Japanese passport or visa.<sup>98</sup> The Japanese Civil Code only legally recognizes the woman who gave birth as the mother of the child. Manji’s mother was Indian and therefore could not qualify him for citizenship.<sup>99</sup> Additionally, Mr. Yamada could not apply for citizenship for Manji on his own because Japan does not consider a

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<sup>89</sup> *Id.* (“Same sex commissioning arrangements are not allowed in Israel, and there is no mention in the Israeli law regarding international surrogacy arrangements.”).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (“For example, in France, surrogacy is illegal [ ], and France refuses to recognize parentage or to give nationality to around 400 children born each year as a result of French nationals entering surrogacy arrangements with surrogate mothers in [other countries].”)

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY 2 (2009), <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 4–5.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

child “born out of wedlock” to a foreign mother as a Japanese citizen, even if the father is Japanese.<sup>100</sup> After the denial from the Japanese Embassy, Mr. Yamada attempted to apply for an Indian passport for Manji, which requires a birth certificate that lists the names of the child’s mother and father, one of which must be Indian.<sup>101</sup> Although Mr. Yamada was listed as Manji’s biological father, the clinic and the Indian government could not determine who to list as Manji’s mother: Mrs. Yamada, the surrogate mother, or the anonymous egg donor.<sup>102</sup>

The egg donor could not be identified, and both the surrogate mother and Mrs. Yamada did not want custody, leaving Manji without the necessary maternal ties to be granted an Indian passport.<sup>103</sup> Even adoption was not a possible solution because in India, single males cannot adopt a female child.<sup>104</sup> Mr. Yamada and his daughter were ultimately caught between two inconsistent two legal regimes, both unequipped to handle their situation. Multiple legal proceedings ensued, and baby Manji’s nationality remained in limbo for years to follow.<sup>105</sup>

Multiple cases involving ISAs have gone up to the highest court of the involved country.<sup>106</sup> These countries have repeatedly denied recognizing the parentage of the intending parents, even when documented as the legal parents in the state where the surrogacy arrangement occurred. This is due to the requirement of a genetic relation between the parents and the surrogate-born child.<sup>107</sup> Some countries’ decisions involving ISAs have hinged on public policy, deciding cases before the court on a case-by-case basis depending on what is best for the parents, the child, and whether it would be contrary to the state’s cultural attitudes and morals.<sup>108</sup> However, it is often unclear which route a court will take, given the absence of law to follow.

Lack of concrete transnational guidance has recently led many countries to reform internal surrogacy legislation. A notable trend is that several countries have restricted access to ISAs depending on certain characteristics

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<sup>100</sup> *Id.*; see also Lin, *supra* note 64, at 557–58.

<sup>101</sup> Points, *supra* note 95, at 5.

<sup>102</sup> *Id.*

<sup>103</sup> Lin, *supra* note 64, at 557–58.

<sup>104</sup> *Id.*

<sup>105</sup> Points, *supra* note 95, at 6–7.

<sup>106</sup> Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MANAGEMENT AND HEALTHCARE POLICY 116–17 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544809/pdf/rmhp-8-111.pdf>.

<sup>107</sup> Permanent Bureau, *supra* note 81, at 9–10. For example, in Italy, the court found that a Ukrainian birth certificate that named an Italian couple as the surrogate born child’s parents could not be accepted to establish legal parentage. As a result, the court determined that a guardian was to be appointed and the child was deemed to be adoptable.

<sup>108</sup> *Id.* Such as in Canada, where the Quebec Court of Appeals recognized parentage by permitting the child’s best interests to overcome the invalidity of surrogacy agreements.

of the parties, frequently requiring that at least one parent is a citizen of the country.<sup>109</sup> For example, in Thailand, the use of surrogacy is prohibited by same-sex and foreign couples, and heterosexual couples entering into surrogacy agreements must be married for a minimum of three years, with at least one spouse holding Thai citizenship.<sup>110</sup> Furthermore, the surrogate mother must be over the age of 25, and related to one of the intending parents.<sup>111</sup>

While some countries are moving toward reform, the lack of legal guidelines and quick, dramatic regulatory changes have led to frightening outcomes. For example, Australian couple Stephen and Michael heard that Nepal was a “safe and easy” option for surrogacy. Therefore, the couple decided to contract with an Israeli agency to impregnate a surrogate mother in Nepal.<sup>112</sup> The surrogate mother was impregnated with Stephen’s sperm and a South African donor’s egg, later giving birth to twins.<sup>113</sup>

The delight the couple felt following the birth of their new babies was brief: four days before the birth, Nepal’s Supreme Court placed a temporary ban on surrogacy.<sup>114</sup> Thus, in September 2015, when Michael and Stephen attempted to return home with their newborn twins, they were met by a new prohibition on surrogacy put in place by the Government of Nepal.<sup>115</sup> This decision by the government, without any explanation regarding the prohibition’s effect on children already born or conceived, left the twins and many other surrogate-born children “in a legal black hole.”<sup>116</sup>

While the twins had already been deemed to have Australian citizenship and had been issued Australian passports, they were born after the ban was instituted in Nepal.<sup>117</sup> Since their birth was now considered illegal, the twins were unable to retrieve exit permits from the Department of Immigration in Nepal.<sup>118</sup> By banning surrogacy without giving any guidance on how the law applies to children who were already on the way, “nobody knew what to do

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<sup>109</sup> *Id.*

<sup>110</sup> Sayuri Umeda, *Thailand: New Surrogacy Law*, GLOBAL LEGAL MONITOR (Apr. 6, 2015), <http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/>.

<sup>111</sup> Australian Associated Press, *Thailand Bans Commercial Surrogacy*, THE GUARDIAN (Feb 20, 2015), <https://www.theguardian.com/world/2015/feb/20/thailand-bans-commercial-surrogacy>.

<sup>112</sup> Danielle Preiss & Pragati Shahi, *The Dwindling Options for Surrogacy Abroad*, THE ATLANTIC (May 31, 2016), <https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*



with [Stephen and Michael's babies]—or with the dozens of other babies born into the same situation.”<sup>119</sup>

The continuing stream of cases, regulatory reforms, and convention reports concerning legal parentage supports the conclusion that the popularity of ISAs is continuing to grow, along with the legal issues that arise as a result.<sup>120</sup> In reviewing these outcomes, it is evident that the potential recognition of legal status lawfully acquired abroad continues to progress, moving towards recognition of legal parentage in ISA cases and recommendations or proposals for new legislation in others.<sup>121</sup> However, as of yet, the majority of countries have not yet drafted any rules or guidelines regarding legal status in the context of ISAs, and they are instead forced to apply their domestic surrogacy laws.<sup>122</sup>

Thus, after a child is born to a foreign surrogate mother, intended parents are frequently met by a legal battle when they bring the child home and attempt to establish themselves as the legal parents.<sup>123</sup> Courts have been forced to try and reconcile their domestic surrogacy law with the foreign nature of ISAs to tackle these legal parentage claims.<sup>124</sup> The lack of clarity provided by domestic laws regarding ISAs and the continued growth of these arrangements highlights the need for further legal and regulatory developments in this area of law.

### III. INSIGHT INTO THE ROLE OF THE UNITED STATES IN INTERNATIONAL SURROGACY

The United States' role in surrogacy first sparked international headlines back in the 1980s, when U.S. courts were faced with determining the validity of surrogacy for the first time in the case of Baby M.<sup>125</sup> In New Jersey in 1985, Mary Beth Whitehead entered into a surrogacy arrangement with the Sterns, where she agreed to be inseminated with Mr. Stern's sperm and birth a child in exchange for compensation.<sup>126</sup> Chaos ensued when the baby was born, with Ms. Whitehead deciding she was going to deny the payment so that

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<sup>119</sup> *Id.*

<sup>120</sup> Permanent Bureau, *supra* note 81, at 7.

<sup>121</sup> *Id.* at 7–8.

<sup>122</sup> Permanent Bureau, *Background Note for The Meeting of The Experts' Group on The Parentage / Surrogacy Project*, PARENTAGE / SURROGACY PROJECT 15 (2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf>.

<sup>123</sup> *Id.* at 15–16.

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

<sup>125</sup> Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>.

<sup>126</sup> *Id.*

she could keep the baby girl.<sup>127</sup> A vicious legal battle followed over the next three years, and the New Jersey Supreme Court found that the surrogacy contract violated public policy and therefore was invalid.<sup>128</sup> However, the Court ultimately decided in favor of the Sterns and granted them custody of Baby M.<sup>129</sup>

Over a quarter of a century has passed, but the U.S. Federal Government has still chosen to leave questions of surrogacy unanswered and in the hands of the individual states.<sup>130</sup> The United States is one of the only countries with no national law specifically addressing surrogacy.<sup>131</sup> This has led to a variety of surrogacy laws and regulations across states, with a growing number of states permitting surrogacy for all parents and recognition of both parents on the child's birth certificate.<sup>132</sup> Other states have specific procedural requirements and other legal hurdles associated with surrogacy, and some outright prohibit surrogacy agreements.<sup>133</sup> The inconsistency across states regarding surrogacy laws together with other factors, such as cost and availability, have led American couples to look abroad for solutions.<sup>134</sup>

The absence of uniform regulation within the United States has led to Americans seeking surrogacy elsewhere, while also luring foreigners in to use American surrogacy services.<sup>135</sup> The widespread understanding that many states contain state-of-the-art fertility clinics with a variety of ART options has drawn foreign couples to seek surrogacy in the United States.<sup>136</sup> Many countries abroad either forbid domestic surrogacy or are continuing to further restrict their surrogacy laws, causing international surrogacy traffic to continue to flow into the United States.<sup>137</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 25–27 (2008).

<sup>132</sup> *Gestational Surrogacy Law Across the United States*, CREATIVE FAMILY CONNECTIONS <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Nov. 7, 2017).

<sup>133</sup> *Id.*

<sup>134</sup> Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>.

<sup>135</sup> Haberman, *supra* note 125.

<sup>136</sup> Lewin, *supra* note 133.

<sup>137</sup> *Id.*

*A. The United States: An International Surrogacy Hub*

The growing availability of different surrogacy options within the United States has not only led to an increased use by U.S. citizens, but has also attracted intended parents from around the globe. For those intended parents living in a country that prohibits or restricts surrogacy, they may find that their only option is to travel to a country which allows surrogacy.<sup>138</sup> While some other countries do permit surrogacy, most of those countries have less surrogate mothers available and more restrictive laws than the United States.<sup>139</sup> Some of these limitations include only allowing surrogacy for citizens and strict regulation over the terms of surrogacy agreements.<sup>140</sup> As of 2014, besides the United States, only India, Thailand, Ukraine, and Mexico allowed paid surrogacy.<sup>141</sup> However, even these countries are moving towards different bans on ISAs – Thailand has barred paid surrogacy by foreigners, and India has barred foreign clients completely.<sup>142</sup>

Given that the United States is one of the few countries that has legalized surrogacy, it has become an extremely attractive location for intended parents.<sup>143</sup> The medical technology and legal protection that surrogacy clinics within the United States afford to customers have also played a role in attracting foreigners.<sup>144</sup> In addition, the use of surrogacy by high-profile individuals and celebrities has further increased the desire for surrogacy in the United States.<sup>145</sup> In fact, many large surrogacy agencies in the United States acquire a majority of their business from international clients.<sup>146</sup> “This traffic highlights a divide between the United States and much of the world over fundamental questions about what constitutes a family, who is considered a

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<sup>138</sup> THE ECONOMIST, *supra* note 18.

<sup>139</sup> *Id.*

<sup>140</sup> *See* Lewin, *supra* note 134.

<sup>141</sup> *Id.*

<sup>142</sup> *See* THE ECONOMIST, *supra* note 18.

<sup>143</sup> *See* Nicholas W. Smith, *Landscape Shifts for Surrogate Motherhood*, OSV NEWSWEEKLY (April 19, 2017), <https://www.osv.com/OSVNewsweekly/Story/TabId/2672/ArtMID/13567/ArticleID/22131/Landscape-shifts-for-surrogate-motherhood.aspx>

(“[T]he closure of other countries to international surrogacy has ‘most certainly’ led to an increase of the industry in the United States because [the U.S.] ha[s] very favorable and friendly laws [.]”).

<sup>144</sup> *Intended Parents: Why You Should Choose the U.S. for International Surrogacy*, SURROGATE.COM <https://surrogate.com/intended-parents/international-surrogacy/international-surrogacy-in-the-us/> (last visited Nov. 7, 2017); *see also* Lewin, *supra* note 134 (“For overseas couples, the big draw is the knowledge that many states have sophisticated fertility clinics, experienced lawyers, a large pool of egg donors and surrogates, and, especially, established legal precedent.”).

<sup>145</sup> Smith, *supra* note 143.

<sup>146</sup> Lewin, *supra* note 134.

legal parent, who is eligible for citizenship and whether paid childbirth is a service or exploitation.”<sup>147</sup>

While prices in the United States remain high, it has been suggested that “anyone who can afford it chooses the United States [for surrogacy].”<sup>148</sup> As of Winter 2018, a foreign couple who travels to the United States and enters into a surrogacy arrangement may end up spending over \$100,000, with prices varying depending on the couple’s plan.<sup>149</sup> In addition to the high price of the ART procedure and the surrogate mother’s medical care, some surrogacy agencies tack on additional costs for consultation, surrogate matching, and even legal fees.<sup>150</sup> Intended parents may also have to compensate the surrogate mother for health insurance, living, travel, and clothing. In addition, the intended parents pay for insurance, fertility medication, and incidentals like the surrogate’s travel and maternity clothes.<sup>151</sup>

A common source of intended parents seeking surrogacy in the United States are Chinese couples because in China infertility levels are known to be high, and the legality of surrogacy remains extremely murky.<sup>152</sup> One benefit of surrogacy within the United States is that it has allowed Chinese couples to avoid their country’s strict one-child policy.<sup>153</sup> Additionally, the American surrogacy regime provides documentation that automatically establishes the Chinese intended parents as the child’s legal parents, unlike the lack of clarity given by neighboring countries.<sup>154</sup> Chinese couples have also sought surrogacy in the United States because the child becomes eligible for U.S. Citizenship and can eventually sponsor their parents for Green Cards.<sup>155</sup>

However, it is important to note that American surrogacy arrangements may still bring legal challenges and immigration problems for the intended parents. Some countries have strict entrance requirements that must be followed, or the child will not be allowed into the country.<sup>156</sup> The

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Surrogacy Cost Guide: North American Programs*, SENSIBLE SURROGACY (2018), <https://www.sensible-surrogacy.com/wp-content/uploads/2018/03/Surrogacy-Cost-2018-USA-MEX-EN.pdf>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; see also Lewin, *supra* note 134.

<sup>152</sup> Ivan Watson & Connie Young, *California mom, Chinese dads: The story of an American surrogate*, CNN MONEY (Aug. 24, 2015), <https://money.cnn.com/2015/08/24/news/surrogacy-china-american-mom/>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Lewin, *supra* note 134.

requirements can differ from country to country, with different expectations for the type of documentation provided and the contents of the documents.<sup>157</sup>

*B. International Surrogacy Implications for United States Citizens Crossing Borders*

As the market for surrogacy continues to cross national borders, many U.S. citizens have decided to branch out and seek surrogacy options abroad. With the growing expense of surrogacy arrangements within the United States., ISAs have been a popular choice for American couples seeking a cheaper alternative.<sup>158</sup> By entering into ISAs, these American couples have the opportunity to cut their costs by a third, or even more.<sup>159</sup>

Additionally, U.S. citizens have begun to seek surrogacy elsewhere because of the lack of a uniform federal policy in the United States.<sup>160</sup> Since states have the authority to determine the legality of surrogacy within their borders, many intended parents happen to live in a state where surrogacy is either prohibited or the state has strict application requirements the parents do not meet.<sup>161</sup> As of 2018, only ten states within the United States permit surrogacy for all parents and allow both parents to be named on the child's birth certificate.<sup>162</sup> This has allowed those few states with the most desirable surrogacy options to limit availability and hike up prices.<sup>163</sup>

There are four states that prohibit all or certain types of surrogacy arrangements by either precedent or statute.<sup>164</sup> For example, in Michigan all types of surrogacy arrangements are unenforceable and can lead to criminal penalties.<sup>165</sup> Similarly, while not a complete ban on surrogacy, Louisiana limits the right to surrogacy to heterosexual married couples that use their own genetic material, thus not allowing unmarried or homosexual couples to use a surrogate.<sup>166</sup> The remaining states either have applied their law in an inconsistent fashion or require additional post-birth legal procedures.<sup>167</sup> How the law will apply to a particular situation may differ depending on marital

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<sup>157</sup> *Id.* (“Some countries require a new birth certificate, a parental order or an adoption. Some will not accept an American birth certificate with two fathers listed as the parents.”).

<sup>158</sup> Smith, *supra* note 142.

<sup>159</sup> *Id.*

<sup>160</sup> SURROGATE.COM, *supra* note 143.

<sup>161</sup> *Id.*

<sup>162</sup> CREATIVE FAMILY CONNECTIONS, *supra* note 132.

<sup>163</sup> Preiss & Shahi, *supra* note 112.

<sup>164</sup> CREATIVE FAMILY CONNECTIONS, *supra* note 132. In 2019, surrogacy will be legalized in Washington, dropping the number of states that prohibit surrogacy down to 3.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

status, sexuality, and other similar characteristics.<sup>168</sup> This may be problematic given that the state where the baby is born must have a procedure to allow both parents to be named on the birth certificate without action in another state or else the child might be left stateless.<sup>169</sup>

For those U.S. citizens considering ISAs, the U.S. Department of State sets forth the pertinent U.S. law and policy determining the citizenship of the child. A child that is born abroad may acquire U.S. citizenship at birth if either or both of the parents of the child meet the requirements set forth by the Immigration and Nationality Act (“INA”).<sup>170</sup> A child born aboard can acquire U.S. citizenship at birth if the child has a genetic tie to a U.S. citizen that meets the prerequisites set forth in either INA § 301 or § 309.<sup>171</sup> The U.S. Department of State acknowledges the possibility that a child born to a foreign surrogate may be left unable to obtain a passport or any travel documents; yet, rather than provide a solution or recourse, intended parents are left to do their due diligence by researching clinics and consulting with immigration attorneys on their own.<sup>172</sup>

Although the U.S. Department of State website contains a warning about international surrogacy,<sup>173</sup> many couples lack knowledge of these hazards, and unfortunately do not find out until it is too late. Take, for example, Andrew Dvash-Banks and Elad Dvash-Banks, who have sued the United States and are now fighting for U.S. citizenship for one of their twin sons.<sup>174</sup> The boys were delivered by the same surrogate mother in Toronto and were both conceived with a donor egg and a different father’s sperm.<sup>175</sup> When the couple brought the twins to the American consulate in Toronto a few months after their birth to apply for citizenship, the consulate required the couple to submit DNA tests for both of the twins before granting citizenship.<sup>176</sup> After submitting the DNA tests results, the child conceived with his American father’s sperm was granted citizenship and the child conceived with his Israeli father’s sperm was denied.<sup>177</sup> The family was able to move back to Los

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, U.S. DEPARTMENT OF STATE, <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html> (last visited Nov. 7, 2017).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

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

<sup>174</sup> Associated Press & Brooke Sopelsa, *Gay Couple Sues U.S. After Twin Son’s Citizenship is Denied*, NBC NEWS (Jan. 24, 2018, 12:33 PM), <https://www.nbcnews.com/feature/nbc-out/gay-couple-sues-state-dept-after-one-twin-s-u-n840661>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

Angeles with a tourist visa for their non-citizen child, a visa which has now expired, while they await litigation against the U.S. State Department.<sup>178</sup>

*C. The United States' Current Regulatory Approach*

Under the United States' current approach, to establish citizenship of a child born abroad, the child can qualify through their mother, father, or gestational carrier.<sup>179</sup> To qualify for citizenship through the child's father or mother, the parent must be a U.S. citizen and the child must have a genetic relationship to that parent.<sup>180</sup> Citizenship can also be established by the gestational carrier, if the gestational carrier is a U.S. citizen and the legal mother of the child.<sup>181</sup> Thus, even if the local law of the birth country recognizes the surrogacy agreement, that fact alone will not allow the foreign-born child to establish U.S. citizenship.<sup>182</sup> In addition to a genetic relationship to the child, the parents must meet other statutory requirements, "such as having had certain periods of physical presence or residence in the United States prior to the birth of the child."<sup>183</sup>

Given the rising popularity of surrogacy within the United States, as well as the increasing frequency of U.S. citizens entering into surrogacy agreements elsewhere, it is imperative that the United States reforms the country's regulation of ISAs as a matter of law and policy. However, the domestic fertility market of the United States lacks oversight, remains almost unregulated by the federal government, and has inconsistent laws from state to state.<sup>184</sup> The United States has long placed an extremely high value on the right to privacy in raising a family, a right that is possibly impaired on account of a lack of regulation.

As a member of The Hague Convention and other international human rights conventions protecting families and children, the United States owes a duty to take further strides in reform. Given that sweeping international regulations or new conventions are not feasible, the United States must honor its values and come up with a regulatory scheme of its own. The United States has acknowledged the importance of creating a regulatory scheme regarding surrogacy, requesting reports from legal scholars regarding surrogacy and

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<sup>178</sup> *Id.*

<sup>179</sup> U.S. DEPARTMENT OF STATE, *supra* note 170.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

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

<sup>184</sup> Smith, *supra* note 142.

making some statutory changes to begin to recognize surrogacy in the last 5 years.<sup>185</sup>

In 2014, the United States began to work towards reforming certain immigration laws that have left children born abroad stateless, even though they have U.S. citizen parents.<sup>186</sup> U.S. Citizenship and Immigration Services (“USCIS”) expanded the definition of mother and parent “to include gestational mothers using ART, regardless of whether they are the genetic mother.”<sup>187</sup> This means that the words mother and parent now also include anyone who qualified as “the child’s legal mother at the time of birth under the law of the relevant jurisdiction” and also the individual that “gave birth to the child.”<sup>188</sup>

Under this new policy, a mother who meets this definition but does not have a genetic relationship with her child [ ] will: be able to petition for her child based on their relationship, be eligible to have her child petition for her based on their relationship, or be able to transmit U.S. citizenship to her child, if she is a U.S. citizen and all other pertinent citizenship requirements are met.<sup>189</sup>

As stated previously, this policy change was put into effect to help cure the statelessness problem that arises when a child with American intended parents is born via a surrogate mother.<sup>190</sup> Under the old rules, children were left ineligible for citizenship in circumstances where they were born with a genetic tie to an egg donor rather than their surrogate mother.<sup>191</sup> Unfortunately, this new rule does not solve all of a surrogate child’s immigration problems: to establish U.S. citizenship through the surrogate mother, she has to be the child’s legal mother at the time of birth, and some jurisdictions do not allow the surrogate mother to qualify as the child’s legal

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<sup>185</sup> BILLinBCN, *New US Policy Opens Surrogacy-Immigration Loophole*, SENSIBLE SURROGACY (Oct. 30, 2014), <http://www.sensible-surrogacy.com/new-us-policy-lets-opens-surrogacy-immigration-loophole/>.

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

<sup>187</sup> See USCIS *Expands the Definition of “Mother” and “Parent” to Include Gestational Mothers Using Assisted Reproductive Technology (ART)*, U.S. CITIZENSHIP & IMMIGRATION SERVICES (last visited Oct. 28, 2014), <https://www.uscis.gov/news/uscis-expands-definition-mother-and-parent-include-gestational-mothers-using-assisted-reproductive-technology-art>; see also U.S. Citizen and Immigration Services, *Policy Alert*, U.S. DEPT. OF HOMELAND SEC. (Oct. 28, 2014), <https://www.uscis.gov/policymanual/Updates/20141028-ART.pdf>.

<sup>188</sup> *Id.*

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

<sup>190</sup> BILLinBCN, *supra* note 185.

<sup>191</sup> *Id.*



parent.<sup>192</sup> This is especially true in the United States, where many states require that the surrogate mother “waive her legal status as mother [ ] and [make] the commissioning couple...the legal parents at the time of the birth.”<sup>193</sup> While potentially harming U.S. citizen parents, this new policy has led to an increase in foreign couples seeking surrogacy in the United States to reap the benefits of their surrogate-born child’s U.S. citizenship.<sup>194</sup>

In 2016, the American Bar Association (“ABA”) adopted the ABA Model Act Governing Assisted Reproductive Technology Agencies (“Model Act”) and recommended consideration and adoption of the Act by the U.S. government.<sup>195</sup> In attempting to take a step in the right direction, the Model Act proposes a licensing structure for states, with a hope that it will promote the predictability and accountability of ART agencies and their outcomes.<sup>196</sup> The ABA believes that this licensing structure can help maintain the ethics of ART while also providing a process for dealing with disputes.<sup>197</sup> In addition to the proposed internal regulation of ART, the ABA adopted an additional resolution concerning international surrogacy law.<sup>198</sup> This resolution suggests that the U.S. Department of State “seek [specific] negotiations concerning a possible Hague Conference on private international law concerning children, including international surrogacy arrangements,” taking yet another stride toward a better regulatory scheme for ISAs.<sup>199</sup>

In 2017, the National Conference on Uniform State Laws amended the Uniform Parentage Act (“UPA”).<sup>200</sup> As of 2017, 11 states have adopted the UPA and it has continued to be updated and amended since its adoption by the Uniform Laws Commission in 2000.<sup>201</sup> These updates and amendments were made to adapt to the new types of familial relationships and the updated ART.<sup>202</sup> “The UPA covers a number of topics, including: the parent-child relationship, voluntary acknowledgements of paternity, a registry of paternity, genetic testing, proceedings to adjudicate parentage, and children of assisted reproduction.”<sup>203</sup> As a result of the U.S. Supreme Court decision in *Obergefell v. Hodges*, entitling same sex couples to civil marriage on the same terms and

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<sup>192</sup> *Id.*

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

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

<sup>195</sup> MODEL ACT GOVERNING ASSISTED REPROD. TECH. AGENCIES 112A (AM. BAR ASS’N 2016).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> RESOLUTION 112B (AM. BAR ASS’N 2016).

<sup>199</sup> *Id.*

<sup>200</sup> UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

conditions as heterosexual couples,<sup>204</sup> as well as the U.S. Supreme Court decision in *Pavan v. Smith*, disallowing states from denying recognition of married same-sex couples on their children's state granted birth certificates,<sup>205</sup> the UPA (2017) was amended. Specifically, the Act was amended to apply equally to same-sex and heterosexual couples.<sup>206</sup> It also "includes a provision for the establishment of a de facto parent as a legal parent of a child" and "updates the surrogacy provision to reflect developments in that area, making them more consistent with current surrogacy practice[s]."<sup>207</sup> Lastly, the UPA (2017) added an additional article "that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers."<sup>208</sup>

While U.S. policy and legislation are making strides towards surrogacy and immigration reform, there is still much more to be done. There are still many gaps within the regulatory regime, leaving surrogate mothers, intended parents, and children born through surrogacy susceptible to harm. Because the United States is one of the few countries that allows surrogacy and places value on the right to privacy and the ability to create a family within the United States, it is imperative that the United States creates an internal uniform regulatory scheme governing ISAs.

#### IV. ANALYSIS: POTENTIAL REGULATORY SOLUTIONS

This Part will explore possible regulatory solutions for the United States to properly address ISAs. The analysis will begin with an overview of different regulatory regimes employed in other countries regarding ISAs and discuss the possibility of the United States adopting one of those successful regimes, concluding, however, that those schemes are either too restrictive or unsuitable for adoption by the United States. Next, this Part will discuss the possibility of The Hague Conference on Private International Law regulating international surrogacy using the same model as its International Adoption Convention, as proposed by The Hague Conference's Parentage/Surrogacy legislative project.<sup>209</sup> However, this Note will argue that The Hague Conference's model is not the proper channel for regulation of ISAs because views on surrogacy differ vastly from country to country and it would be difficult to come to an agreement on one transnational regulatory scheme for surrogacy. Lastly, this Part will ultimately suggest that a combination of better communicative approaches and a more flexible interpretation of the

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<sup>204</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>205</sup> *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

<sup>206</sup> UNIF. PARENTAGE ACT, *supra* note 200.

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

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

<sup>209</sup> *See* HCCH, *supra* note 10.

INA will help the United States take a much larger step towards successful internal regulation of ISAs.

*A. A Global Take: Should the U.S. Adopt a New International Regulatory Scheme?*

The growth of ISAs has ultimately led to recent internal regulatory reform within many countries. Some countries that used to be popular ISA destinations have introduced legislation to completely ban ISAs within their countries, allowing surrogacy only for citizens.<sup>210</sup> Another approach has been to set specific requirements for those seeking surrogacy, such as being a heterosexual and legally married couple.<sup>211</sup> The benefits and drawbacks of these new approaches, and their appropriateness as applied to the United States, will be discussed in further detail below.

*i. Banning International Surrogacy: India, Thailand, and Nepal*

India, Thailand, and Nepal, all once known as ISA hubs, have decided to deal with the regulation of ISAs by essentially not dealing with it, but rather outright banning foreign citizens from entering surrogacy agreements within their countries.<sup>212</sup> To avoid the continued controversy and legal battles surrounding ISAs, in 2015, Thailand barred payment for surrogacy for foreigners within their countries, and Nepal followed soon after with an outright foreign surrogacy ban.<sup>213</sup> What was thought of as a solution by the governments in Thailand and Nepal, in reality, led to legal dilemmas for many. With the sudden banning of ISAs, many intended parents who already had a surrogate mother at the time of the ban could not take their babies home.<sup>214</sup>

Take, for example, the 65 surrogate-born babies who were unable to leave Thailand because their Israeli intended parents were homosexual.<sup>215</sup> Under Thai law, the babies are automatically Thai citizens, and the surrogate mothers get all custodial rights over the children.<sup>216</sup> Because Israel does not allow surrogacy for same-sex couples, Israel will not recognize these couples as the

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<sup>210</sup> THE ECONOMIST, *supra* note 18.

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

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

<sup>213</sup> *Id.*

<sup>214</sup> Gavriel Fiske, *65 Surrogate Babies Born to Israeli Gay Couples Stuck in Thailand*, THE TIMES OF ISRAEL (Jan. 19, 2014), <https://www.timesofisrael.com/65-surrogate-babies-born-to-israeli-gay-couples-stuck-in-thailand/>.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

legal parents either, thus leaving these children with Thai citizenship and a parental relationship only with their surrogate mother.<sup>217</sup>

India introduced the Surrogacy Bill in 2016, in an attempt to limit surrogacy availability for citizens and ban surrogacy for foreigners.<sup>218</sup> However, this bill has been greatly criticized and has still not been adopted into law.<sup>219</sup> The Surrogacy Bill seeks to continue to allow altruistic surrogacy while completely banning commercial surrogacy.<sup>220</sup> The Bill, however, imposes multiple restrictions on altruistic surrogacy: “first, it outlaws altruistic surrogacy for unmarried couples, foreigners, single parents, live-in partners, and homosexuals; and second, only Indian couples who have been legally married for a minimum of five years can avail [themselves of] its benefits.”<sup>221</sup> Although part of the purpose of the Bill is to curb the potential exploitation of women, an outright ban is likely to just “push the surrogacy market underground” and continue to indirectly foster exploitation.<sup>222</sup> Additionally, the Bill is arguably an infringement of international covenants and obligations, and is even contrary to the Indian Constitution.<sup>223</sup> Ultimately, it seems unlikely this Bill will pass, and if so, it will be met with much opposition.

ii. *Setting Standards: Ukraine*

Unlike those countries attempting to better regulate surrogacy by simply banning it for foreigners, Ukraine has taken a different approach to allow commercial surrogacy and surrogacy for foreigners, making it one of the most ISA-friendly countries.<sup>224</sup> In Ukraine, surrogacy is legal as long as the intended parents are a married heterosexual couple proven by a marriage certificate.<sup>225</sup> To qualify for surrogacy, a doctor must provide proof of the

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<sup>217</sup> *Id.*

<sup>218</sup> *The Surrogacy (Regulation) Bill, 2016*, PRS LEGISLATIVE RESEARCH, <http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/> (last visited Nov. 15, 2017).

<sup>219</sup> Simran Aggarwal & Lovish Garg, *The New Surrogacy Law in India Fails to Balance Regulation and Rights*, LSE HUMAN RIGHTS (Nov. 23, 2016), <http://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Surrogacy in Ukraine*, SENSIBLE SURROGACY, <http://www.sensible-surrogacy.com/surrogacy-in-ukraine/> (last visited Nov. 19, 2017).

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

intended mother's inability to conceive.<sup>226</sup> This poses challenges for many looking for a surrogate mother, disqualifying single individuals, unmarried couples, or same-sex couples seeking ISAs in Ukraine. Additionally, in Ukraine, the surrogate mother has no legal right or parentage: this threatens to leave children stateless when those who enter into a surrogacy arrangement in Ukraine are from a country that will not recognize the child as the intended parents' child or as a citizen of the intended parents' country.<sup>227</sup>

*iii. Are These Regulatory Regimes Fitting for the United States?*

While each of these regulatory regimes may prove to be beneficial for these countries in the future, they also come with drawbacks and ultimately would not be suited for adoption by the United States. A complete ban on surrogacy in the United States would leave many couples without the ability to start a family, which seems to contradict many rights afforded to U.S. citizens, such as familial rights. Although banning access to surrogacy for foreigners seeking ISAs in the United States might help prevent controversy in the long run, it could pose threats to those intended parents whose children are conceived, but not yet born at the time of enactment, similar to what has happened to many intended parents with surrogate mothers at the time of a new ban.

Additionally, adopting a regulatory regime, similar to that of Ukraine, by setting stringent requirements for those entering into surrogacy arrangements within the United States would be contrary to U.S. law and policy. Only allowing heterosexual married couples with specific nationalities and long enough marriages to enter into ISAs would discriminate against many individuals in ways that conflict with U.S. fundamental rights and laws.<sup>228</sup> Because these two approaches seem to be of different extremes, both being contrary to the goals of the United States, it would be more beneficial for the United States to make the necessary changes to its current regulation of ISAs rather than to adopt a completely new and contrary regime.

*B. The Hague Conference as a Regulator*

The Hague Conference ("HC") is a global intergovernmental organization with 83 members, including the United States. Its work involves 150 countries around the world.<sup>229</sup> The HC creates international legal instruments

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<sup>226</sup> *Id.*

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

<sup>228</sup> See discussion *infra* Part III.C.

<sup>229</sup> *About HCCH*, HCCH, <https://www.hcch.net/en/about> (last visited on Nov. 19, 2017).

responding to the ongoing needs of private international law.<sup>230</sup> In 2010, the HC recognized the impact and growth of international surrogacy cases.<sup>231</sup> The HC continued to research and report on ISAs until 2015 when the HC's Council on General Affairs and Policy created an Experts' Group, with the purpose of "explor[ing] the feasibility of advancing work in this area."<sup>232</sup>

It has been suggested that the best route for the regulation of ISAs would be to create a convention modeled after the HC's Convention on Adoption, which regulates the adoption industry.<sup>233</sup> However, given the legal, social, and moral differences between adoption and surrogacy, it is unlikely that all HC countries will be able to come to an agreement. Additionally, the regulatory goals of adoption and surrogacy are distinct and sometimes even inconsistent, making the Convention on Adoption an ill-suited model for surrogacy.<sup>234</sup> If a surrogacy convention is created, and an international legal instrument is formed, it will likely just waste time and money.<sup>235</sup> Ultimately, it seems that more harm than good will result from regulating the international surrogacy industry in the same way that the international adoption industry is currently regulated by the HC.

The legal issues surrounding surrogacy do not exist because of an inability to regulate surrogacy arrangements or the ethical use of reproductive technology.<sup>236</sup> Instead, the areas of law that are really at issue here are "conflicts of family and immigration law ... surrounding parentage, family structure, nationality, and immigration."<sup>237</sup> Thus, rather than creating a Convention which regulates surrogacy in a manner similar to HC's Convention on Adoption, HC involvement with international surrogacy "should be limited to a framework for open dialogue between nations about the reconciliation of these conflicts," and countries should continue to regulate surrogacy internally.<sup>238</sup>

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<sup>230</sup> *Id.*

<sup>231</sup> *Surrogacy – 2010 and Prior*, HCCH, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior> (last visited on Nov. 19, 2017).

<sup>232</sup> HCCH, *supra* note 10.

<sup>233</sup> Yehezkel Margalit, Article, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL'Y 41, 70 (2015).

<sup>234</sup> Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO L.J. 2249, 2256 (2012) ("The...inadequacy of the Adoption Convention [is illustrated] when confronted with two major surrogacy-related issues: commercial surrogacy and statelessness."); *see also* Greg Ortiz, Report to the House of Delegates 112B, ABA SECTION OF FAMILY LAW (2016), [https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague\\_Consideration.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

### C. Flexible Interpretation and Communication

Given that neither of the above approaches are fitting, the United States should instead utilize new interpretive methods for current law and better communicate the meaning of the law to U.S. citizens traveling abroad.<sup>239</sup> By changing the way immigration and parentage laws are interpreted within the United States, the United States can ensure that no child is left without citizenship. Additionally, if the U.S. State Department better communicates with those traveling abroad about issues relating to international surrogacy, couples considering entering into an ISA can make a well-informed decision about their surrogacy arrangement.

The United States must reform its regulation of ISAs by utilizing a more flexible interpretation of the INA and U.S. parentage laws. The majority of legal issues stemming from ISAs have arisen because of a lack of a genetic tie to a U.S. citizen parent, even though one of the child's parents is in fact a U.S. citizen.<sup>240</sup> However, neither INA § 301 nor INA § 309 expressly require this biological connection.<sup>241</sup> U.S. courts have recognized this fact, and have allowed children to acquire citizenship at birth without a genetic tie to their U.S. citizen parent.<sup>242</sup> If the U.S. Department of State mandates this type of interpretation of the INA throughout the United States, parents will have better guidance and children born via ISA will not be faced with statelessness or an inability to return home with their parents.<sup>243</sup>

One way to implement this type of change is to expand the traditional application of parentage laws and the INA as suggested by the ABA.<sup>244</sup> The first proposed step is to expand the meaning of parentage to look for parental intent, allowing intended parents to show that the parent-child relationship is legally recognized by either the child's country of birth or an intended parents' domicile.<sup>245</sup> By focusing on intent rather than biology, couples will not have to worry about the genetic material being used when entering into an ISA.

The second suggested step after expanding parentage is to recognize all surrogate-born children under INA § 301, rather than INA § 309.<sup>246</sup> Currently, most surrogate born children are categorized as born out of wedlock and fall

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<sup>239</sup> Mary Vidas, *Report to the House of Delegates*, ABA SECTION OF FAMILY LAW (2017), [https://www.americanbar.org/content/dam/aba/administrative/family\\_law/committees/art-resolution-113.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/art-resolution-113.authcheckdam.pdf).

<sup>240</sup> *Id.*; see also Associated Press & Sopelsa, *supra* note 174.

<sup>241</sup> 8 U.S.C.S. § 1401 (2018); 8 U.S.C.S. § 1407 (2018); see also discussion *infra* Part III.C.

<sup>242</sup> Vidas, *supra* note 239; see also Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1093-94 (9th Cir. 2005).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

under INA § 309, making it much more difficult to establish the child's citizenship.<sup>247</sup> The ABA suggests that the United States adopt "a policy that considers children born to intended parents who are legally bound to each other and legally responsible for the child under INA § 301...including same-sex spouses or registered partners under the same INA § 301 analyses because their children are not born 'out of wedlock.'" Abandoning the common recognition of surrogate-born children as born out of wedlock is more consistent with today's U.S. law and policy.

By implementing a policy change similar to the ABA's recommendation and communicating these guidelines to potential intended parents, couples seeking ISAs will better understand the possible consequences and be prepared to establish parentage by whatever means necessary.<sup>248</sup> It would be very simple for the United States to better communicate its internal surrogacy, parentage, and immigration laws. As of now, the only notice regarding the potential citizenship issues for children born out of ISAs in the United States is posted on the USCIS website, and surrogacy clinics are not required to check the nationality of the intended parents or inform foreign parents about the potential legal problems they might face when bringing their child back to their home country.<sup>249</sup> There would likely be much less legal controversy if USCIS better explained its interpretation of the INA and parentage laws and required that intended parents be provided notice of possible legal hurdles.

"Requiring a biological connection between both parents and a child...for purposes of citizenship acquisition is out of step with judicial interpretations of the INA, advances in modern technology, and parents' constitutionally protected choices for reproduction."<sup>250</sup> The current policies in place are clearly inconsistent with global legal developments and the purpose behind ART.<sup>251</sup> If no changes are made to the current approach taken by the United States, many children will continue to be left stateless, despite having a U.S. citizen parent. By giving more notice to intended parents of current immigration and parentage laws and by adopting a new understanding of the INA, intended parents will have the tools to deal with citizenship problems that will continue to surround ISAs and ART in the future.

## V. CONCLUSION

While the global phenomenon of ISAs continues to grow in demand, the inconsistency in its regulation transnationally remains controversial, leaving

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> U.S. DEPARTMENT OF STATE, *supra* note 170.

<sup>250</sup> *Id.*

<sup>251</sup> Vidas, *supra* note 239.



future surrogate mothers, intended parents, and children born through ART and surrogacy, in harm's way and subject to potential legal consequences. The growing availability of reproductive technologies and access to travel, together with the changing internal laws and lack of international regulation of ISAs, will continue to support the use of ISAs by those unable to conceive a child on their own and unable to access surrogacy in their country. Given that the United States remains one of the few countries which allows both commercial and altruistic surrogacy arrangements, and given the values, laws, and policies important to U.S. citizens, it is imperative that the United States better regulate ISAs internally. By adopting a more flexible approach to interpreting U.S. immigration law and implementing better communication standards, ISAs can be used by couples without fear of falling victim to an international surrogacy legal loophole. If these changes are implemented, using the ABA's approach or something similar, the United States will be better equipped to handle citizens that attempt to bring their surrogate-born child back home and foreigners that enter into ISAs within the United States.