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Transnational Surrogacy and International Human Rights Law

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TRANSNATIONAL SURROGACY AND INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

Surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep.[1] Rather, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her.[2] In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor's sperm.[3] In gestational surrogacy, a fertilized egg is implanted in the surrogate.[4] Because the overwhelming majority of surrogates no longer use their own eggs, in this Article, "surrogacy" will refer to gestational surrogacy.[5] Surrogacy may be altruistic, in which the surrogate is not paid for her labor,[6] or commercial, in which she is.[7] Surrogacy may also use

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1. In the Matter of Baby M, 537 N.J. 396, 410 (1988).

2. *Id.*

3. *Id.*

4. JANET L. DOLGIN & LOIS L. SHEPHERD, BIOETHICS AND THE LAW 69 (2nd ed. 2009).

5. J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 355 (2011) (noting that in 2011, "95% of surrogates carry embryos created by genetic materials other than their own."); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 912 (2000) (noting that "there is no sexual analog to this particular form of technological conception.").

6. An altruistic surrogate may be the sister of an intended parent who would otherwise be unable to have a biologically related child, for example. *See, e.g.*, DOLGIN & SHEPHERD, *supra* note 4, at 172.

donor sperm, in which case the intended parents have no biological relationship to the baby or babies.[8] There may be multiple surrogates, fathers, mothers, donors, and babies. It can get very complicated. Surrogacy exposes parenthood, not as a biological fact, but as a legally and socially constructed status with responsibilities and obligations as well as benefits.

As set out in a recent report by the Permanent Bureau at the Hague Conference on Private International Law, commercial surrogacy has been banned in many nation states.[9] In a minority of states, it is allowed and regulated, and in some states, it is completely unregulated. As the *Hague Report* notes, this has produced a booming business in transnational surrogacy.[10] In India alone, reproductive tourism is a $400 to $500 million per year business.[11] In addition to the monetary costs, there are human costs. Transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights.[12]

A similarly unsettled situation exists among the states in the United States (U.S.). While the U.S. Constitution requires states to give full faith and credit to the judgments of sister states, there has always been a public

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7. Medical expenses are generally covered in commercial surrogacy. MAGDALINA GUGUCHEVA, SURROGACY IN AMERICA 3 (Council for Responsible Genetics 2010), *available at* http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf (last visited Mar. 13, 2012) (describing commercial surrogacy arrangements); Melanie Thernstrom, *My Futuristic Insta-Family*, N.Y. TIMES, Jan. 2, 2011, at 34, *available at* http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?pagewanted=all (last visited Mar. 13, 2012) (describing financial arrangements in a commercial surrogacy arrangement). While it seems likely that they are also covered in altruistic surrogacy; only anecdotal evidence is available.

8. For a detailed account of some of the major procedures available, *see* Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 283 (2009).

9. Surrogacy has been banned in much of Europe, for example, usually on the ground that it commodifies women. *See* Arlie Hochschild, *Childbirth at the Global Crossroads*, 20 AMERICAN PROSPECT, Sept. 19, 2009, at 25, 27 (stating that surrogacy is banned in China, New York and much of Europe), *available at* http://prospect.org/article/childbirth-global-crossroads-0 (last visited Mar. 13, 2012); Hague Conference on Private Int'l Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, at 3, Prel. Doc. No. 11 (Mar. 2011), *available at* http://www.hcch.net/upload/wop/genaff2011pd11e.pdf (last visited Mar. 13, 2012) [hereinafter Hague Conf. on Private Int'l Law].

10. Hague Conf. on Private Int'l Law, *supra* note 9, at 6. Transnational surrogacy, as used in this Article, refers to surrogacy arrangements in which one or more of the parties are nationals of different nation states.

11. *Id.*; Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 225 (2009).

12. Hague Conf. on Private Int'l Law, *supra* note 9, at 3–4.

policy exception in family law.[13] That is, states have refused to give full faith and credit to judgments of sister states that offended their own public policy, such as marriage between first cousins. The federal Defense of Marriage Act, along with the similar acts passed in many states, extend this to recognition of same-sex marriages[14].

Like international surrogacy, surrogacy in America encompasses a broad range of approaches, from supportive states, such as California,[15] to states in which all surrogacy contracts are barred and criminal sanctions may be imposed, as in Michigan.[16] Unlike surrogates in much of the rest of the world, surrogates in the United States are unlikely to be trafficked, enslaved, or held to onerous contracts.[17] Indeed, surrogacy in America seems to be increasingly open.[18] Transnational surrogacy, in contrast, seems to be increasingly corporate, drawing on a wide range of domestic laws, including some notably lax domestic laws and dramatically disparate economic circumstances, to create new families.[19]

Part I of this Article introduces the subject and explains why the domestic family laws of the participating states are inadequate to address it. Part II explains how international human rights law provides some useful guidelines, especially three major human rights treaties:[20]

1) The International Covenant on Economic, Social and Cultural Rights;[21]
2) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[22] and

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13. IRA M. ELLMAN & PAUL M. KURTZ, FAMILY LAW: CASES, TEXT, PROBLEMS 175 (5th ed. 2010).

14. Defense of Marriage Act, 28 U.S.C. § 1738C (1996).

15. Johnson v. Calvert, 851 P.2d 776, 778 (1993); CAL. FAM. CODE § 7606 (2012).

16. MICH. COMP. LAWS § 722.857 (1988).

17. This is not to suggest that such practices are unknown in this country. They are not, however, appealing to middle class Americans seeking surrogates. *See, e.g.*, Melanie Thernstrom, *supra* note 7, at 28.

18. *Id.*

19. For an insightful exploration, *see* Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 327 (2005).

20. For some of the reasons for this refusal, *see* Catherine Powell, *Lifting our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 375 (2005); Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 107, 108 (2011).

21. G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976), *available at* http://www1.umn.edu/humanrts/instree/b2esc.htm (last visited Mar. 18, 2012) [hereinafter International Covenant].

22. Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res 34/180, art. 1, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981) [hereinafter CEDAW].

3) The Convention on the Rights of the Child (CRC).[23]

While none of these treaties explicitly address surrogacy, they each address rights crucial in this context, including the right to health,[24] the right to support,[25] the right to know one's origins,[26] and the right to a family.[27] The argument here is that, at the very least, where surrogacy is allowed, the protections of well-established human rights norms should be assured. In some cases, this may be accomplished through regulations[28] or contractual provisions, such as the assurance for the gestational mother of free pre-natal care. In other cases, this may be more difficult, such as treatment for as yet unknown conditions that may result from the hormonal treatments necessary for surrogacy. If, for any reason, such assurances are impossible, surrogacy should be barred as a violation of human rights.

Because there is no human "right to a child,"[29] even those who can *only* have a genetically-related child with the help of a surrogate, including single gay men and gay couples, have no basis for a claim. Once a child has been born, however–assuming the child is not the result of a coerced pregnancy or a similarly egregious violation of human rights–a growing international jurisprudence supports the right of that child's gay father, or fathers, to raise her.[30]

The usefulness of private international law to resolve disputes arising out of surrogacy is similarly problematic. Fundamental considerations of judicial comity, in which the courts of one state defer to the judgment of

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23. *See generally* Convention on the Rights of the Child, G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1980) (entered into force Sept. 2, 1990) [hereinafter CRC].

24. International Covenant, *supra* note 21, art. 12.

25. *Id.* art. 10.

26. CRC, *supra* note 23, art. 7.

27. *Id.*

28. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 146 (2009) (noting that, "well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy.").

29. Those instruments that contemplate parenthood focus instead on limiting state interference with reproductive rights. *See, e.g.*, CEDAW, *supra* note 22, art. 11.2 (measures to be taken by states to "prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women's] effective right to work."); *id.* art. 11(2) (requiring the state to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."); *id.* art. 12 (reiterating the right to family planning services for rural women in particular.). *But see Part II.A. Reproductive Rights* (suggesting support for an argument against state interference with intending parents' efforts to "achieve their reproductive goals.").

30. Barbara Stark, *The Women's Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL'Y 261, 274–78 (2011).

another, are trumped by public policy in this context.[31] Thus, notwithstanding the virtually universal concern for the children produced through surrogacy, some states prohibiting surrogacy refuse to grant such children citizenship, because they fear that doing so would only encourage the prohibited practice.[32] As the Permanent Bureau notes, this plainly calls for further study.[33] While the range of applicable laws regarding surrogacy complicates—and may even preclude—harmonization, it should be noted that the legality of surrogacy does not necessarily correspond to its prevalence in a particular state. Roughly 5% of gestational surrogacy in vitro fertilization (IVF) procedures in the United States take place in New York, for example, where surrogacy contracts are void.[34]

II. WHY SURROGACY IS DIFFERENT

Pre-existing family law is inadequate to address surrogacy, in part because of the multiple parents, and in part because of the breakdown in traditional parenting functions.[35] State laws governing parentage, for example, generally provide that a woman giving birth is the child's legal mother.[36] The birth mother does not lose her status as legal mother until and unless she voluntarily surrenders the baby.[37] As a matter of law, a child cannot be surrendered for adoption before birth.[38] The premise is that a mother cannot be certain that she wants to surrender the baby until he or she

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31. Hague Conf. on Private Int'l Law, *supra* note 9, at 10.

32. *Id.*

33. *Id.* at 22.

34. GUGUCHEVA, *supra* note 7, at 15.

35. *Id.* at 26 (noting that, commercial surrogates are generally paid from $12,000 to $25,000 for their services. This averages out to roughly $.50 per hour). *Fertility Law*, AM. BAR ASSOC., http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/erickson.html (last visited Mar. 18, 2012) (The payment is for the surrogate's services; if it were for the baby it would amount to baby-selling, which is illegal everywhere.).

36. ARK. CODE ANN. § 9-10-201(c)(2)(2008) (West 2011) (stating that the surrogate mother is presumed to be the natural mother of the child and this information is listed on the birth certificate); KAN. STAT. ANN. § 11-38-1113 (West 2011) (stating that the mother of the child is the one who gives birth to the child).

37. Or is determined by an appropriate court to be so unfit, and so incapable of becoming fit that her parental rights are legally terminated. *See, e.g.*, Santosky II v. Kramer, 102 S. Ct. 1388, 1390 (1982) ("[T]he State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is permanently neglected.").

38. Hague Conf. on Private Int'l Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Convention 29, art. 4 (May 1993), *available at* http://www.hcch.net/upload/conventions/txt33en.pdf (last visited Mar. 13, 2012). *See also* MONT. CODE ANN. § 42-2-408 (West 2011) (stating that the relinquishment and the consent to adoption of a child can only occur 72 hours after the child has been born); NEB. REV. STAT. § 127.070 (West 2010) (stating that release and consent for adoption that occur before the birth of a child are invalid).

arrives.[39] For this reason, several states have decided that traditional surrogacy contracts are unenforceable.[40] Rather, the surrogate cannot be required to surrender a baby on the ground that she agreed to do so before it was born.

These laws assume that the woman giving birth is also the baby's biological mother—that is, that the baby developed from her egg.[41] When the baby is not the biological offspring of the surrogate, but rather biologically related to a separate egg donor, the law—and the arguments—change.[42] Legislators have often left these sensitive issues to the courts.

There has been considerable commentary since the *Baby M*[43] case almost twenty-five years ago.[44] Those who have addressed surrogacy have generally focused on the most vulnerable, starting with the infant.[45] While at least one commentator[46] rejects the "best interest of the child test" itself as inapplicable in this context, most raise more concrete, specific questions. Who is legally responsible? What if the intending parents split up? What if

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39. Surrogate Parenting Assoc. v. Commonwealth of KY *ex rel.* Armstrong, 704 S.W.2d 209, 213 (1986) ("The policy . . . is to preserve to the mother her right of choice regardless of decisions made before the birth of the child.").

40. D.C. CODE § 16-402 (West 2011) ("Surrogate parenting contracts are prohibited and rendered unenforceable."); MICH. COMP. LAWS ANN. § 722.855 (West 2011) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); NEB. REV. STAT. § 21.200 (West 2011) ("A surrogate parenthood contract entered into shall be void and unenforceable."); N.D. CENT. CODE ANN. § 14-18-05 (West 2011) ("Any agreement in which a woman agrees to become a surrogate . . . through assisted conception is void.").

41. Adoptive Parents of M.L.V. & A.L.V. v. Wilkens, 598 N.E.2d 1054, 1059 (1992) (stating that "[b]ecause it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth."); A.L.A. v. E.A.G, No. A10-443, 2011 N.W.2d WL 4181449, at *2 (D. Minn. Ct. App. Jan. 18, 2011) ("The parent and child relationship between a child and the child's biological mother 'may be established by proof of her having given birth to the child.'").

42. *Cf.* MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME SEX AND UNWED PARENTS 111 (2001) (assuming traditional surrogacy); DEBORA L. SPAR, THE BABY BUSINESS, HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 85 (2006).

43. In the Matter of Baby M, *supra* note 1.

44. DiFonzo & Stern, *supra* note 5, at 347 (noting "the revolution in reproductive demographics that had occurred since *Baby M.*").

45. Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, *in* THE REPRODUCTIVE RIGHTS READER, LAW MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 299, 302 (Nancy Ehrenreich ed., 2008) (Ertman identifies four negative implications of the alternative insemination (AI) market: eugenics, lack of access for poor women, depriving children of relationship or support from biological father, and treating children like chattel. She defends AI, arguing that these concerns "are not unique to the AI market, or because addressing the concern would itself trigger other negative effects."); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437–42 (2011) (explaining the problem with the best interest test in this context).

46. Cohen, *supra* note 45, at 437.

they change their minds or die? What if the baby is premature or has health problems? What if the baby has health problems resulting from the surrogate's drug use or alcohol intake during pregnancy? How will the child deal with her unusual origins?

Commentators are also concerned about protecting presumably poorer, less educated surrogates from exploitation. Dorothy Roberts has pointed out the risks, especially high once gestational surrogacy allows a black surrogate to carry a white egg, of exploiting women of color.[47] In *Johnson v. Calvert*, the California court held that the black gestational surrogate had no right to the white baby she carried.[48] What about the surrogate mother's reproductive rights? Like Mary Beth Whitehead in *Baby M*, she might not appreciate how attached she is to the baby until it is born. On the other hand, what if the surrogate changes her mind before birth and decides to have an abortion?

Commentators have further noted that surrogates incur even greater risks and burdens than those usually associated with pregnancy and childbirth.[49] A gestational surrogate must have her menstrual cycles precisely matched to that of the egg donor, so that her womb is receptive to the fertilized egg just when it is ready to be implanted.[50] This requires surrogates to ingest large doses of hormones, the long-term effects of which are unknown.[51]

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47. Dorothy Roberts, *Race and the New Reproduction, in* THE REPRODUCTIVE RIGHTS READER, LAW MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 308 (Nancy Ehrenreich, ed., 2008) (while noting that surrogacy is not the same as slavery's "dehumanization," makes a powerful case that "it is the enslavement of Blacks that enables us to imagine the commodification of human beings, and that makes the vision of fungible breeder women so real.").

48. *Johnson*, 851 P.2d at 782.

49. GUGUCHEVA, *supra* note 7, at 21.

50. Amrita Pande, *Not an 'Angel,' not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIA J. GEND. STUD. 141, 147 (2009). As Pande explains:

> Gestational surrogacy is a much more complex medical process than traditional surrogacy, since the surrogate is not genetically related to the baby and her body has to be 'prepared' for artificial pregnancy. The transfer of the embryo itself is not very difficult by the process of getting the surrogate ready for that transfer and the weeks after that require heavy medical intervention. First, birth-control pills and shots of hormones are required to control and suppress the surrogate's own ovulatory cycle and then injections of estrogen are given to build her uterine lining. After the transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation.

Id.; DiFonzo & Stern, *supra* note 5, at 363–64 (noting risks of "hormonally stimulated egg production.").

51. GUGUCHEVA, *supra* note 7, at 21; Pande, *supra* note 50, at 147.

Early empirical studies provide little support for some of these arguments, at least in Canada, the United Kingdom, and the United States. This research suggests that surrogates are not necessarily poor.[52] Nor are they pressured into surrogacy[53] or unable to separate from the babies that they have carried.[54] The surrogates in these studies are white, married, Christian,[55] and not especially poor. They do not feel exploited. They are glad to have the $20,000 to $25,000 average fee,[56] but they are surrogates for other reasons. Many report that they enjoy being pregnant. They are proud of their accomplishment, and glad that they could make such a difference in the lives of otherwise childless couples.[57] Finally, the expense of surrogacy is also a concern. As Professor Roberts asks, "[b]ut can we justify devoting such exorbitant sums to a risky, non-therapeutic procedure

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52. Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 44 (2009) ("Importantly, no empirical study reviewed for this paper indicates that any surrogate mothers become involved with surrogacy because they were experiencing financial distress.").

53. *Id.* at 50 ("One consistent finding in the empirical research is that the idea of becoming a surrogate mother started with the women themselves; there was no evidence in any study indicating that women were being pressured or coerced into becoming surrogate mothers.").

54. *Id.* at 68.

> The empirical research does not support the concerns about pre-natal maternal bonding or emotional instability during pregnancy. Van den Akker's 2007 study of 61 British surrogate mothers reported that anxiety was not high during the pregnancy among surrogate mothers and detachment is reported early and maintained throughout the pregnancy, with little post-variation post-delivery.

Id. at 48.

> This may be due, in part, to agency preferences for women who are already mothers. Clinics and agencies report that they will only agree to work with women who have given birth because this status increases the chances of a successful pregnancy and delivery and means that the women have a more realistic perception of what it would mean for them to surrender a child.

Id. at 48.

55. Busby & Vun, *supra* note 52, at 42 ("[S]tudies on surrogate mothers consistently show that most women who agree to become either gratuitous or commercial surrogates are Caucasian, Christian, and in their late 20—early 30s.").

56. DiFonzo & Stern, *supra* note 5, at 357. *See also* GUGUCHEVA, *supra* note 7, at 26.

57. Busby & Vun, *supra* 52, at 71.

> Other longitudinal studies also showed that positive attitudes remained stable over time. Teman concluded, following a review of the research, that "almost all of the studies . . . find, in the end, that the overwhelming majority of surrogates do not regret their decision and they even express feelings of pride and accomplishment.

Id.

with an 80 percent failure rate when so many basic health needs go unmet?"[58]

As Professor Garrison notes, surrogacy can easily be banned since, in contrast to "ordinary surrogacy, gestational surrogacy invariably involves IVF, which requires the participation of licensed medical personnel who will rarely be willing to risk their licenses by performing illegal procedures."[59]

III. SURROGACY AND HUMAN RIGHTS

A. Reproductive Rights

Reproductive rights are relatively new in international law. The basic concept first appeared in the final document approved by the Teheran Conference on Human Rights in 1968, which recognized the "rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights."[60] It was not until the World Conference on Population in 1994 (Cairo Conference) that reproductive rights were clearly articulated.[61] Although convened to address population issues, the participants in the Cairo Conference recognized that:

1) Family-planning programs should not involve any form of coercion;
2) Governmentally-sponsored economic incentives and disincentives were only marginally effective; and

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58. *See, e.g.*, Roberts, *supra* note 47, at 317.

59. Garrison, *supra* note 5, at 916.

60. Proc. of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, at 3 (1968), *available at* http:// 1.umn.edu/humanrts/instree/l2ptichr.htm (last visited Mar. 13, 2012). *See* Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1158 (1997). Reproductive rights encompass a wide range of activities. These include surrogacy, other forms of assisted conception, female genital surgeries, and the health needs of women with HIV/AIDS. For a comprehensive overview, *see* REBECCA J. COOK, BERNARD M. DICKENS, & MAHMOUD E. FATHALLA, REPRODUCTIVE HEALTH AND HUMAN RIGHTS, INTEGRATING MEDICINE, ETHICS, AND LAW, at v (2003). *See generally* Malcolm L. Goggin, Deborah A. Orth, Ivar Bleiklie, & Christine Rothmayr, *The Comparative Policy Design Perspective, in* COMPARATIVE BIOMEDICAL POLICY 1 (Ivar Bleiklie, Malcolm L. Goggin, & Christine Rothmayr eds., 2004); Protocol to the African charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003 African Charter on Human and Peoples' Rights, art. 66, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf (last visited Mar. 13, 2012). *See* CEDAW, *supra* note 22, arts. 4, 6 (CEDAW does not necessarily include a right to assisted conception, nor does CEDAW necessarily bar surrogacy—on the basis that it perpetuates gender stereotypes, for example).

61. U.N. Population Information Network, *Report of the ICPD*, ¶ 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), *available at* http://www.un.org/popin/icpd/conference/offeng/poa.html (last visited Mar. 13, 2012) [hereinafter *Rep. of the ICPD*].

3) Governmental goals "should be defined in terms of unmet needs for information and services," rather than quotas or targets imposed on service providers.[62]

"The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice."[63] The Cairo Conference recognized that reproductive rights include both "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[64] This broad formulation reflects the participating states' disparate approaches to reproductive rights as well as the failure of many states to address these rights at all.[65]

Reproductive rights are increasingly recognized in international human rights law.[66] These rights, including education about family planning and access to contraception, are now widely recognized throughout the world, often in connection with the right to health. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.[67]

Surrogacy was not on the agenda at Cairo; it was neither supported nor condemned. To the extent surrogacy enables those otherwise unable to "achieve their reproductive goals and . . . have children by choice,"[68] Cairo arguably supports surrogacy. At the very least, it would weigh against an outright government ban of the practice.[69]

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62. *Id.* ¶ 7.12.

63. *Id.* ¶ 7.16 (A number of countries entered reservations, specifically objecting to the word "individuals" in ¶ 7.16).

64. *Id.* ¶ 7.3. These goals were reiterated at the United Nations, Fourth World Conference on Women. As set out in the Beijing Platform, the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Report of the Fourth World Conference on Women, Beijing, China, Sept. 4, 1995, ¶ 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), *available at* http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf (last visited Mar. 13, 2012).

65. D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY 819–20 (2009) (describing the absence of reproductive rights in Lebanon).

66. RUTH DIXON-MUELLER, POPULATION POLICY & WOMEN'S RIGHTS, TRANSFORMING REPRODUCTIVE CHOICE 128 (1993) (describing customs in the Sahel); Abd-el Kader Boye et al., Population Council, *Marriage Law and Practice in the Sahel*, *in* STUDIES IN FAMILY PLANNING 347 (John Bongaarts & Gary Bologh, eds., 1991).

67. *See* BLAIR ET AL., *supra* note 65, at 794.

68. *Rep. of the ICPD*, *supra* note 61, at ¶ 7.16.

69. For a rigorous analysis of the concerns about commodification in this contest, *see* MARGARET J. RADIN, CONTESTED COMMODITIES 140 (1996) (Radin's analysis assumes traditional

The counterweight, of course, would be the impact on the gestational surrogate and the resulting baby. CEDAW assures the rights of pregnant women.[70] Article 11.2, for example, sets out the measures to be taken by states to "prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women's] effective right to work."[71] These measures include the prohibition of dismissal for pregnancy or maternity leave,[72] maternity leave with pay or "comparable social benefits,"[73] and the "necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment . . . of childcare facilities."[74] Article 12 requires the state to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."[75] Article 14 reiterates the right to family planning services for rural women in particular.[76] Finally, Article 16 requires states to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."[77] In addition to these specific guarantees, Article 5 more broadly

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surrogacy. She notes that cases in which both would-be-parents contribute their genetic material [may] become more prevalent in the future.).

70. CEDAW, *supra* note 22, art. 1.

71. *Id.* art. 11.

72. *Id.*

73. *Id.*

74. CEDAW, *supra* note 22, art. 11.

75. General Comment by Convention on the Elimination of All Forms of Discrimination against Women art. 12, Sept. 3, 1981, U.N. A/54/38/Rev.1, ch. I, *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12 (last visited Mar. 13, 2012). The Committee's General Recommendation No. 24 elaborates on Article 12.1, addressing women's access to health care, including family planning services. The Committee recommends that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion." *Id.* at 12(2). For a more detailed formulation of these rights, *see* CTR. FOR REPRODUCTIVE RTS., THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA: AN INSTRUMENT FOR ADVANCING REPRODUCTIVE AND SEXUAL RIGHTS 1 (2003), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf (last visited Mar. 13, 2012).

76. CEDAW, *supra* note 22, art. 14.

77. CEDAW, *supra* note 22, art. 16 (Article 16 has received an unprecedented number of reservations); Luisa Blanchfield, The U.N. Convention on the Elimination of All Forms of Discrimination Against Women: Issues in the U.S. Ratification Debate, Cong. Res. Serv. 7-5700, at 2 (2010) (two States Parties to the Convention—Malta and Monaco—stated in their reservations to CEDAW that they do not interpret Article 16(1)(e) as imposing or forcing the legalization of abortion in their respective countries); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L 643, 702 (1990).

demands recognition of maternity as "a social function," rather than a commercial function.[78]

To the extent CEDAW focuses on the health of the pregnant woman, it is not inconsistent with gestational surrogacy.[79] Rather, it confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. To the extent CEDAW focuses on maternity as a "social function," however, it is difficult to reconcile with commercial surrogacy, or at least those forms of commercial surrogacy in which the intending parents and the surrogate remain strangers.[80]

B. A "Right to Parent" for Gay Men?

For gay men who want to parent a genetically–related child, surrogacy may be their only hope.[81] Just as surrogacy was not on the agenda at Cairo, neither was parenting by same-sex couples or gay or lesbian individuals. But LGBT&Q—Lesbian, Gay, Bisexual, Transsexual and Queer or Lesbian, Gay, Bisexual, Transsexual and Questioning—rights have achieved widespread recognition since 1994. Since reproductive rights, including the right to parent, are human rights, like other human rights, they should be universally assured.[82]

As Justice Albie Sachs explained in *Minister of Home Affairs v. Fourie*, extending the benefits of marriage to same-sex partners is fundamentally a matter of equality:

> [O]ur Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. [. . .] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. [. . .] The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. . . . [A]t issue

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78. CEDAW, *supra* note 22, art. 5.

79. *See, e.g.*, Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9; *See generally* Scott, *supra* note 28.

80. CEDAW, *supra* note 22, art. 5.

81. Anne R. Dana, *The State of Surrogacy Laws: Determining Legal parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 363 (2011).

82. *See, e.g.*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) (stating that,"[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

> is a need to affirm the very character of our society as one based on tolerance and mutual respect.[83]

Like racial discrimination, discrimination on the basis of sexual orientation is grounded in intolerance and exclusion. In validating same-sex marriage, courts and legislatures throughout the world have rejected the notion of a "natural" sexual division of labor requiring marriage to be restricted to a union between a man and a woman. Rather, there is growing recognition that a state committed to democratic values, especially the equality of its citizens, can no longer endorse laws that discriminate against some of those citizens.

The European Union, with its twenty-seven member states, has been a leader in recognizing the equal rights of same-sex couples.[84] The European Court of Human Rights, for example, has interpreted the European Convention on Human Rights to require contracting nations to recognize family rights of same-sex couples.[85] The Court relied on Article 14, which provides that the rights set forth in the Convention are to be secured "without discrimination on any ground" to allow the surviving member of a gay couple to remain in his flat.[86] Under the 1997 Treaty of Amsterdam, similarly, the European Council passed Council Directive 2000/78/EC, which prohibits "any direct or indirect discrimination based on . . . sexual

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83. Minister of Home Affairs v. Fourie, 2005 (1) SA 19 (CC) at 37 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2005/19.html (last visited Mar. 13, 2012) (finding a right to same-sex marriage in the South African Constitution). *See also* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a thoughtful comparison of *Goodridge* and *Fourie*, *see* Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781, 803 (2007). For a discussion of developments in the United States, *see* Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J. L. & POL'Y 79, 83 (2007) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a survey, *see* Harvard Law Review Assoc., *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2087–2091 (2003).

84. Katharina Boel-Woelki, *The Legal recognition of Same-Sex Relationships within the European Union*, 82 TUL. L. REV. 1949, 1951 (2008).

85. *See, e.g.*, Karner v. Austria, App. No. 40016/98, Eur. Ct. H.R. 41 (2003) (while welcoming measures taken by the State party to eliminate gender segregation in the labor market, including through training programs in the area of equal opportunities, the Committee is concerned about the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large . . . [and] recommends that policies be developed and programs implemented to ensure the eradication of traditional sex role stereotypes in the family, labor market, the health sector, academia, politics and society at large).

86. *Id.* at 29 (the *Karner* Court also cited Article 8, which guarantees each individual "the right to respect for his private and family life.").

orientation."[87] In 2008, the European Court of Justice relied on this Directive to hold that the surviving partner of a German same-sex partner might be able to claim a pension.[88] The Treaty of Lisbon,[89] which entered into force on December 1, 2009, assures the right to marriage without any language limiting such right to "men and women" and expressly prohibits discrimination on the basis of sexual orientation.[90]

Same-sex couples in other regions have also drawn on human rights law to challenge discrimination. In South America, for example, same sex-couples have sought assistance from the Inter-American Commission on Human Rights. In the case of *Marta Lucia Alvarez Giraldo*, the Commission reviewed a complaint brought by the applicant against Colombia, alleging that the director of the prison in which the applicant was incarcerated had refused her request for intimate visits from her female life partner on the basis of her sexual orientation.[91] Finding that Colombian law afforded prisoners a right to intimate visits, the Commission determined that the applicant had stated a colorable claim of arbitrary and abusive interference with her private life, in violation of Article 11(2) of the American Convention on Human Rights.[92]

On June 3, 2008, the General Assembly of the Organization of American States (OAS), with the support of thirty-four OAS member countries, adopted the Resolution on Human Rights, Sexual Orientation, and Gender Identity.[93] The resolution takes note of the importance of the adoption of the Yogyakarta Principles and affirms the core principles of non-discrimination and universality in international law.[94] States also agreed to hold a special meeting "to discuss the application of the principles

87. Council Directive 2000/78, art. 16, 2000 O.J. (L 303) 12 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:en:PDF (last visited Mar. 13, 2012) (establishing a general framework for equal treatment in employment and occupation).

88. Case C-267/06, Maruko v. Versorgungsanstal Der Deutschen Buhnen, 2008 E.C.R. 1-1757.

89. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) 1 (the Treaty of Lisbon is also called the "Treaty on the Functioning of the European Union.").

90. *Id.* art. 1.3; Elizabeth F. Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT'L & COMP. L. 413, 419 (2010).

91. Giraldo v. Colombia, Case 11,656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106 Doc. 3 rev., at 211 (1999) (Colom.).

92. *Id.* (following unsuccessful attempts to resolve the matter by friendly settlement, the Commission declared the case admissible, and agreed to publish the decision, to continue analyzing the merits of the case, and to renew its efforts to conclude a friendly settlement).

93. Rex Wockner, *Norway Legalizes Marriage*, BAY TIMES, June 19, 2008, http://www.sfbaytimes.com/index.php?sec=article&article_*Id*=8382 (last visited Mar. 13, 2012).

94. *Id.*

and norms of the Inter-American system on abuses based on sexual orientation and gender identity."[95]

In North America, Canada passed the Civil Marriage Act in 2005, which recognizes same-sex marriage.[96] In the United States, six states currently allow same-sex marriage.[97] Forty-three states have laws explicitly prohibiting such marriages, including twenty-nine with constitutional amendments restricting marriage to one man and one woman.[98] In *Perry v. Schwarzenegger*, Judge Vaughn Walker relied on the Fourteenth Amendment to strike down California's Proposition 8, which barred same-sex marriage.[99] In doing so, Judge Walker raised the question of same-sex marriage in the United States to the constitutional level for the first time.[100]

On the international level, too, the trend is clearly toward the recognition of rights for same-sex couples. In *Toonen v. Australia*, for example, the Human Rights Committee determined that the provisions of the Tasmanian Criminal Code, which criminalized private same-gender sexual conduct between consenting adults, constituted an arbitrary interference with the author's privacy, in violation of Article 17 of the International Covenant on Civil and Political Rights.[101] Nor could the provisions be upheld for the purpose of preventing the spread of AIDS.[102] The Committee also held, however, that the rights of same-sex couples to

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95. *Id.*

96. Civil Marriage Act, 2005, SC, c.33 (Can.); *see generally* Peter Bowal & Carlee Campbell, *The Legalization of Same-Sex Marriage in Canada*, 21 AM. J. FAM. L. 37 (2007).

97. They are: Massachusetts, *see Goodridge*, *supra* note 83; Connecticut, *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Iowa, *see* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Vermont, *see* VT. STAT. ANN. CIVIL MARRIAGE TIT. 15 § 8 (West 2009); New Hampshire, *see* N.H. REV. STATE. ANN. § 45:1 (2010); and New York, *see* N.Y. DOM. REL. Law § 10(a) (McKinney 2011). *See generally* Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005). *See* J. Thomas Oldham, *Developments in the US-The Struggle over the Creation of a Status for Same-Sex Partners, in* THE INT'L SURVEY OF FAMILY LAW 485 (Andrew Bainham ed., 2006).

98. BLAIR ET AL., *supra* note 65, at 234. *See also* Maria Godoy, *State by State: The Legal Battle Over Gay Marriage*, NAT'L PUBLIC RADIO (Feb. 7, 2012, 11:37 AM), http://www.npr.org/2009/12/15/112448663/state-by-state-the-legal-battle-over-gay-marriage (last visited Mar. 18, 2012).

99. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (2010).

100. Editorial, *Marriage is a Constitutional Right*, N.Y TIMES, Aug. 4, 2010, at A26. On February 23, 2011, the Obama Administration advised the Speaker of the House that it would no longer defend the constitutionality of Sec. 3 of DOMA. Marc Ambinder, *Obama Won't Go to Court Over Defense of Marraige Act*, NAT'L J. (Feb. 24, 2011), http://www.nationaljournal.com/obama-won-t-go-to-court-over-defense-of-marriage-act-20110223 (last visited Mar. 18, 2012).

101. Toonen v. Australia, [1994] 6.1 Comm'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Austl.), *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm (last visited Mar. 18, 2012).

102. *Id.* at 6.5.

marry cannot be grounded in the Civil Covenant because of its specific language.[103]

In part because of such limitations in existing human rights law,[104] in 2006, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, convened a meeting in Indonesia to develop a set of international principles regarding sexual orientation and gender identity. Twenty-nine distinguished experts in human rights law from twenty-five countries unanimously adopted the Yogyakarta Principles,[105] which they agreed reflect the existing state of international human rights law in relation to issues of "sexual orientation and gender identity."[106] As set out in the Statute of the International Court of Justice, the views of such experts may be relied upon in determining rules of law.[107] The Yogyakarta Principles, rigorously supported by sixty-six pages of jurisprudential annotations,[108] affirm a broad range of rights, including "the core human rights principles of equality, universality and non-discrimination . . . it is unthinkable to exclude persons from these protections because of their . . . sexual

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103. As the Committee explained in *Joslin v. New Zealand*:

> Article 23, paragraph 2 of the Covenant is the only substantive provision . . . which defines a right by using the term "men and women," rather than "every human being," "everyone" and "all persons." Use of the term "men and women," rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and woman. . . .

Joslin v. New Zealand, [2002] Comm'n No. 902/1999 U.N. Doc. CCPR/C/75/D/902/1999 (N.Z.), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e44ccf85efc1669ac1256c37002b96c9?Opendocument (last visited Mar. 18, 2012) (upholding New Zealand's refusal to permit same-gender couples to marry); Quilter v. Attorney-General, [1998] 1 NZLR 523 (N.Z.). For a provocative discussion, *see generally* Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007).

104. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Priciples*, 8 HUM. RTS. L. REV. 207, 232 (2008) (noting that "[t]he High Commissioner for Human Rights, Louise Arbour, has expressed concern about the inconsistency of approach in law and practice . . . [regarding] . . . sexual orientation and gender identity.").

105. *Id.* at 233.

106. *Id.* at 247.

107. Int'l Court of Justice, *Statute of the International Court of Justice*, art. 38, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (last visited Mar. 18, 2012) ("The court . . . shall apply . . . the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

108. Michael O'Flaherty, Annotation, Jurisprudential Annotations to the Yogyakarta Principles, 8 UNIV. OF NOTTINGHAM HUM. RTS. LAW CTR 1 (2007), *available at* http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf (last visited Mar. 13, 2012).

orientation or gender identity."[109] The Principles also set out concrete measures states must take to assure these rights.[110]

On December 12, 2008, sixty-six nations at the U.N. General Assembly supported a groundbreaking Statement confirming that international human rights protections apply to sexual orientation and gender identity.[111] The Statement was read by Argentina, and a Counterstatement, signed by fifty-nine states, was read by the Syrian Arab Republic.[112] The states opposing human rights for same-sex couples do not seek to ground their arguments in international law, however. Rather, they claim that the Statement endorsing these rights "lack[ed] . . . legal grounds [and] delves into matters which fall essentially within the domestic jurisdiction of States."[113] This is belied by the exhaustive research supporting the Yogyakarta Principles.[114] While there is no state consensus on the issue, there is a clear trend toward recognizing the rights of same-sex couples. Thus, although homosexuality remains a crime in seventy-six countries and is still punishable by death in five, a growing body of international equality jurisprudence increasingly supports these rights.[115]

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109. Michael O'Flaherty & John Fisher, *supra* note 104, at 241.

110. *Id.*

111. U.N. GAOR, 63rd Sess., 70th plen. mtg. at 30, U.N. Doc. A/63/PV.70 (Dec. 18, 2008).

112. *Id.* The Counterstatement, signed by 59 states, condemned the Statement, arguing further that:

> More important, it depends on the ominous usage of two notions. The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory behavior between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including pedophilia. The second notion is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has repeatedly been scientifically rebuffed.

Id. at 31.

113. *Id.; see also* O'Flaherty & Fisher, *supra* note 104, at 238–43 (describing the "Reaction by States and other Actors within United Nations Fora.").

114. *See* O'Flaherty & Fisher, *supra* note 104, at 238.

115. DANIEL OTTOSSON, INT'L LESBIAN & GAY ASSOC., STATE-SPONSORED HOMOPHOBIA, A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 4, 45 (2011), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (last visited Mar. 13, 2012) (This jurisprudence includes the recent decision of the High Court of Delhi, which ruled in 2009 that section 377 of the Indian Penal Code could not be applied to sexual activities between consenting adults. The ruling affects all of India, except Jammu and Kashmir, where a different penal code applies, and affects approximately one sixth of the human population); Anjuli W. McReynolds, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1076 (2006) (the absence of consensus only matters in ascertaining customary international law, which is not in issue. It could be argued, however, that there is *regional* customary international law with respect to same-sex relationships in Europe).

C. The Child's Rights

Surrogacy implicates several rights of the child under the CRC. First, the child's rights are to be "respect[ed] and ensure[d] . . . without discrimination *of any kind* . . . [including] birth or other status."[116] While this provision was originally intended to protect illegitimate children, its inclusiveness suggests a generous and expansive application, including children born of surrogacy[117].

Article 7 is the most problematic here. Article 7.1 provides in pertinent part that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents."[118] There are two difficulties with this provision, both grounded in its presumptive incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation. Either problem can be rectified by reforming domestic law or as proposed in the pending Indian legislation on surrogacy, by requiring the intending parents to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship in the state where her intending parents live, and that they, in fact, will be legally recognized as her parents in that state.[119]

IV. CONCLUSION

This Article has described transnational surrogacy and indicated a few of the many issues the subject raises under international human rights law. It has not addressed many other troublesome issues, including donor anonymity, the right of the child to "social," as opposed to "biological," information, and issues of exploitation, especially when what is contemplated is not rare, altruistic surrogacy, but a $400 to $500 million per year business.[120]

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116. CRC, *supra* note 26, art. 2(1).

117. CRC, *supra* note 26, art. 1.

118. CRC, *supra* note 26, art. 7(1).

119. Courtney G. Joslin, *Protecting Children: Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1228 (2010).

120. Hague Conf. on Private Int'l Law, *supra* note 9, at 6; Krawiec, *supra* note 11, at 225.