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NOTE

"CAN I TAKE THE NORMAL ONE?" UNREGULATED COMMERCIAL SURROGACY AND CHILD ABANDONMENT

I. INTRODUCTION

*Our bodies were married in a glass dish, and our boy was carried by another woman for nine months. He is our most vivid dream realized—the embodiment of the most blindly powerful force in the universe, brought to life the only way he could be. With a little help.*¹

– Alex Kuczynski, *Her Body, My Baby*

In the United States, one out of every twelve heterosexual couples is involuntarily infertile, causing devastating emotional and physical impacts on their personal and familial goals.² One woman described the inability to have a child as leaving her “barren, decrepit, desexualized, as if [she] were branded with a scarlet ‘I’ for ‘Infertile.’”³ An infertile couple’s quest for children is normal and natural, and luckily, there are many medical options, referred to as Assisted Reproductive Technology (“ART”), to help these couples create a family.⁴ For many of them,

1. Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES MAG., Nov. 30, 2008, at 42, 78.

2. GEOFFREY SHER ET AL., IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES (ASSISTED REPRODUCTIVE TECHNOLOGY) 24 (4th ed. 2013). Infertile couples “often experience guilt, low-self esteem, disappointment or depression, and have higher rates of marital conflict and sexual dysfunction.” JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM OF THE NEW REPRODUCTIVE TECHNOLOGIES 98 (1994).

3. Kuczynski, *supra* note 1, at 74.

4. ROBERTSON, *supra* note 2, at 98; John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 915 (1996). Becoming a parent is also a natural desire for homosexual couples and single individuals, and surrogacy is an option that allows them to have at least one biological connection to the child. *Helping Gay Men Have Babies*, GAY IVF, <http://www.gayivf.com/family-building-for-gay-men/index.cfm> (last visited Nov. 22, 2015); *Surrogacy Options for Gay Couples: In Search of a Womb of One’s Own*, IT’S CONCEIVABLE, <http://itsconceivablenow.com/surrogacy> (last visited Nov. 22, 2015). However, because this Note discusses surrogacy in India, where gay couples and single individuals cannot use surrogacy, the focus will be primarily on heterosexual couples. See *infra* notes 87-89 and accompanying text.

gestational surrogacy⁵ is a last resort after many failed attempts at pregnancy through other ART procedures.⁶

Although reproductive technology exists to give couples what they have often struggled for so long to create, they must go to great lengths to contract a surrogacy arrangement.⁷ Complex, inconsistent surrogacy laws in the United States,⁸ combined with costs up to \$150,000 per child, causes many infertile couples to look overseas, particularly to India, for a gestational surrogate.⁹ India legalized commercial surrogacy in 2002, eliminating most of the domestic legal struggles involved in a surrogacy arrangement, and for a fraction of the cost.¹⁰ If seeking a gestational surrogate in a foreign country is an extreme last resort to fulfill what most humans strongly desire, situations like Baby Gammy's or Baby Manji's, as discussed below, should not occur.¹¹

Baby Gammy and his twin sister were born in December 2013 to a gestational surrogate in Thailand.¹² Nine months earlier, the surrogate had been implanted with an embryo created with the genetic material of the twins' intended parents,¹³ an Australian couple.¹⁴ When the gestational surrogate was seven months pregnant, she found out that one of the twins, Baby Gammy, had Down syndrome.¹⁵ After the twins were born, the intended parents took the healthy baby girl back to Australia and left Baby Gammy with his impoverished surrogate mother in Thailand.¹⁶

5. Gestational surrogacy occurs when a woman is implanted with an embryo created through an in vitro fertilization ("IVF") procedure and carries the baby to term, but has no genetic tie to the child. *See infra* notes 58-68 and accompanying text.

6. ROBERTSON, *supra* note 2, at 119; Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 636 (2005). Some other types of ART procedures that a couple may try before surrogacy could be intrauterine insemination or intravaginal insemination. SHER ET AL., *supra* note 2, at 255-64. Intrauterine insemination involves injecting sperm into the uterus, by means of a catheter, directed through the uterus, allowing the sperm to reach the eggs more easily. *Id.* at 256. In contrast, the other technique, intravaginal insemination, injects the semen in close proximity to the cervix, but not directly into the uterus. *Id.* at 262. The two procedures are used based on what the couples' infertility problem may be. *Id.* at 258, 262.

7. *See infra* Part II.B.

8. *See infra* Part III.A.

9. *See infra* Part II.B.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. Hilary Whiteman, *Surrogate Mom Vows to Take Care of Ill Twin 'Abandoned' by Parents*, CNN (Aug. 7, 2014, 12:29 AM), <http://www.cnn.com/2014/08/04/world/asia/thailand-australia-surrogacy>.

13. *See infra* Part II.A.

14. *See infra* Part II.C.1.

15. *See infra* Part II.C.1.

16. *See infra* Part II.C.1.

Sadly, intended parents may similarly decide to "change their minds" in a surrogacy arrangement if there is a dissolution of marriage.¹⁷ In 2007, Baby Manji was almost abandoned in India after her intended parents divorced.¹⁸ A Japanese couple traveled to India and entered into a gestational surrogacy arrangement.¹⁹ One month prior to their baby's birth, the couple divorced, and Baby Manji's mother no longer wanted to be a part of her life.²⁰ Because India's adoption law prohibits a single male from adopting a female child, Baby Manji was stuck in India for several months with her surrogate mother as her father tried to bring her back to Japan.²¹

Unfortunately, these incidents of child abandonment are not isolated.²² International gestational surrogacy is a growing industry, valued at more than \$450 million a year in India,²³ yet the industry has hardly any regulation.²⁴ This Note proposes that, despite the lack of general regulation, preventative and consequential measures must be put in place to hold intended parents accountable for their actions.²⁵ However, there is debate over how to establish parentage in ART situations.²⁶ The framework of parentage by assisted reproduction "creates the possibility that a child conceived by this means could have as many as eight parents: the egg donor, the sperm donor, their spouses, the surrogate and her husband, and the intending mother and father."²⁷ This Note argues that the intended parents should be considered the legal parents of the child from the moment there is successful implantation.²⁸

17. See *infra* Part II.C.2; see also *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005) (establishing that a former lesbian partner was obligated to pay child support for a child she and her partner created through surrogacy); *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (discussing whether a father owed child support for a child born through a surrogacy arrangement).

18. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 418-20 (2012).

19. See *infra* Part II.C.2.

20. See *infra* Part II.C.2.

21. See *infra* Part II.C.2.

22. Whiteman, *supra* note 12; Claire Achmad, *How the Rise of Commercial Surrogacy Is Turning Babies into Commodities*, WASH. POST (Dec. 31, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/12/31/how-the-rise-of-commercial-surrogacy-is-turning-babies-into-commodities>.

23. Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 24 (2008).

24. Achmad, *supra* note 22; see Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2256 (2012).

25. See *infra* Part IV.

26. See *infra* Part III.A.

27. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002).

28. See *infra* Part III.

Unlike sexual intercourse, which can be a non-reproductive act, assisted reproduction's sole purpose is to create a child.²⁹ Therefore, parentage should vest in those who intended to raise the child because that child would not have been born but for the efforts of the intended parents.³⁰

Part II of this Note defines scientific terms used in ART, and explains in greater detail the ART industry in India.³¹ It also elaborates on the illustrative stories of Baby Gammy and Baby Manji to better understand the situations that caused their intended parents to "change their minds."³² Part III demonstrates the legal problem created by the limited international and domestic laws on surrogacy.³³ Certain state laws help establish that the intended parents are undoubtedly the legal parents and are, therefore, responsible for the child created through surrogacy.³⁴ State law also provides adequate consequences and solutions for when a child is abandoned.³⁵ However, there is no federal or international law in place that attempts to adopt similar measures.³⁶

Part IV proposes a solution to this legal problem—mandating surrogacy clinics to implement different procedures in an attempt to prevent intended parents from abandoning their children.³⁷ Before eggs and sperm are even harvested, parents must be properly informed about the possibility of birth defects, and they should discuss a plan for what to do in the event that the possibility becomes a reality.³⁸ Clinics should also make intended parents aware of the many support groups and agencies willing to help parents prepare for a special needs child.³⁹ Next, clinics should implement mandatory genetic testing, paid for by the intended parents.⁴⁰ Making parents aware that this may not be the parenthood they were expecting well before the child is born would allow them more time to prepare themselves, both emotionally and financially.⁴¹ The most drastic preventative measure would be abortion—a decision that should ultimately be left to the surrogate.⁴²

29. ROBERTSON, *supra* note 2, at 119.

30. Storrow, *supra* note 27, at 641; *see infra* Part III.A.

31. *See infra* Part II.A–B.

32. *See infra* Part II.C.

33. *See infra* Part III.

34. *See infra* Part III.A.

35. *See infra* Part III.A.

36. *See infra* Part III.B.

37. *See infra* Part IV.A.

38. *See infra* Part IV.A.1.

39. *See infra* Part IV.A.1.

40. *See infra* Part IV.A.2.

41. *See infra* Part IV.A.2.

42. *See infra* note 260.

Consequences must also be put in place in the event that the preventative measures fail.⁴³ Unfortunately, as state law demonstrates,⁴⁴ a person cannot be forced to be a parent. The consequences for intended American parents who abandon their child created through a commercial gestational surrogacy arrangement will only be able to extend as far as current state law, which terminates the parents' rights and frees the child up for adoption.⁴⁵ These intended parents should be placed on some type of international registry, though, so they are prevented from using a gestational surrogate again.⁴⁶ Finally, Part V briefly concludes this Note with the hope that preventative measures will be adopted, so children like Baby Gammy and Baby Manji are not left without a family.⁴⁷

II. UNDERSTANDING ASSISTED REPRODUCTIVE TECHNOLOGY, INTERNATIONAL SURROGACY ARRANGEMENTS, AND THE STORIES OF TWO VICTIMS

In 1934, in vitro fertilization ("IVF") was a scientific fantasy central to Aldous Huxley's novel, *Brave New World*.⁴⁸ On July 25, 1978, the concept of creating a child in a Petri dish became reality with the birth of Louise Brown—the first IVF baby.⁴⁹ The years following Louise's birth have brought rapid progress and new ART techniques that allow more infertile couples to have their own genetic babies.⁵⁰ The first gestational surrogacy took place in 1985.⁵¹ Since then, ART techniques, particularly surrogacy and IVF treatments, have become commonplace with a record of more than three million births worldwide.⁵² Countries, such as India, are capitalizing on this growing industry by encouraging medical tourism for couples seeking to use a gestational surrogate.⁵³ However, although the science and economy of ART is growing, the laws regulating commercial surrogacy are almost nonexistent, to the

43. See *infra* Part IV.B.

44. See *infra* Part IV.B.

45. See *infra* Part IV.B.1.

46. See *infra* Part IV.B.2.

47. See *infra* Part V.

48. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1934); Remah Moustafa Kamel, *Assisted Reproductive Technology After the Birth of Louise Brown*, 14 J. REPROD. & INFERTILITY 96, 97 (2013).

49. Kamel, *supra* note 48, at 97.

50. *Id.* at 104; Lulu Al-Nuaim & Julian Jenkins, *A Brief Historical Overview of Assisted Reproduction*, 13 SO. AFRICAN J. OBSTETRICS & GYNECOLOGY 38, 38 (2007).

51. *History of Surrogacy—When and Where Did it All Begin!*, SURROGATE MOTHERS, <http://www.surrogatemothers.org/history-of-surrogacy-when-and-where-did-it-all-begin> (last visited Nov. 22, 2015).

52. Al-Nuaim & Jenkins, *supra* note 50, at 38.

53. See *infra* Part II.B.

detriment of not only the surrogates and parents, but also, most importantly, the children created through the process.⁵⁴

To better understand ART, this Part lays out important terms to understand gestational surrogacy and some of the science behind it.⁵⁵ Next, this Part explains why couples in the United States turn to India for surrogates, and gives a general overview of how a surrogacy arrangement works.⁵⁶ Finally, this Part tells the illustrative stories of Baby Gammy and Baby Manji—two innocent victims of the unregulated commercial surrogacy industry.⁵⁷

A. Surrogacy 101

Surrogacy refers to the process in which a woman becomes pregnant through ART and does not intend to keep the baby.⁵⁸ Instead, the surrogate is carrying the baby for the “intended parents” because they are unable to conceive a child or carry a pregnancy to term on their own.⁵⁹ The intended parents are usually either a heterosexual couple suffering from infertility issues⁶⁰ or a homosexual couple.⁶¹ They seek out a surrogacy arrangement with the intent to raise the resulting child.⁶² This Note argues that individuals become intended parents from the moment there is successful implantation and that they should have full parental rights and responsibilities from that moment.⁶³

There are two different types of surrogates—a gestational surrogate and a traditional surrogate.⁶⁴ A gestational surrogate, also called the birth

54. See *infra* Parts II.C, III.

55. See *infra* Part II.A.

56. See *infra* Part II.B.

57. See *infra* Part II.C.

58. *In re Baby M*, 537 A.2d 1227, 1234-35 (N.J. 1988); Mortazavi, *supra* note 24, at 2253; ROBERTSON, *supra* note 2, at 130.

59. ROBERTSON, *supra* note 2, at 130.

60. Infertility is defined as “the inability to conceive after one full year of normal, regular heterosexual intercourse without the use of any contraception.” ROBERTSON, *supra* note 2, at 97; SHER ET AL., *supra* note 2, at 24. According to nationwide surveys, about five million heterosexual couples in the United States suffer from some type of infertility issue. SHER ET AL., *supra* note 2, at 24. Experts believe that there are several different causes for the high infertility rate, such as the increase in venereal diseases in the United States, medical and recreational drug use, and women waiting until later in their reproductive lives to start having children. *Id.* at 26-28. The rate of infertility also varies with age and socioeconomic class. ROBERTSON, *supra* note 2, at 97. For example, older women have higher rates of infertility than younger women. *Id.* Black and poorer women have higher rates of infertility than white, middle class women due to poorer nutrition, inadequate health care, and a higher rate of sexually transmitted diseases. *Id.*

61. *Surrogacy Options for Gay Couples*, *supra* note 4.

62. Mortazavi, *supra* note 24, at 2253.

63. See *infra* Part III.A.

64. Mortazavi, *supra* note 24, at 2253-54.

mother or gestational carrier, is implanted with an embryo created through IVF where the ovum, or egg, does not belong to that surrogate.⁶⁵ The embryo can come from either the intended parents, donor eggs and sperm, or a combination of the two.⁶⁶ IVF is a process in which an egg is fertilized with sperm outside of the body, and then placed in the body of the surrogate.⁶⁷ Regardless of the genetic material used to create the embryo that is implanted, a gestational surrogate has no genetic connection to the baby.⁶⁸ On the other hand, a traditional surrogacy is one where the birth mother's own egg is artificially inseminated with the intended father's sperm, or a donor's sperm, through a relatively inexpensive process *in vivo* (within the body).⁶⁹

The biological connection between the child and the surrogate created from traditional surrogacy has its own set of legal issues.⁷⁰ Therefore, U.S. state laws seem to prefer gestational surrogacy arrangements to traditional ones.⁷¹ Infertility specialists believe that gestational surrogacy is legally safer and less complicated than traditional surrogacy.⁷² This concern stems from the increased likelihood

65. ROBERTSON, *supra* note 2, at 130; Mortazavi, *supra* note 24, at 2253.

66. Mortazavi, *supra* note 24, at 2254.

67. *Id.* at 2253. IVF is like an extension of the human reproductive system, bypassing many of the anatomical and physical causes of infertility. SHER ET AL., *supra* note 2, at 29. IVF is composed of several different steps. *Id.* at 71. First the woman is given fertility drugs, which stimulate her ovaries to produce as many mature eggs as possible. *Id.* at 91. Next, the eggs are retrieved by aspiration through a needle that is inserted into her vagina and then into the ovarian follicles. *Id.* at 122. These eggs are placed in a Petri dish in a laboratory with the appropriate sperm. *Id.* at 127. Once the sperm has fertilized the eggs, creating an embryo, they are placed into the woman, who will carry the baby to term, with a catheter through the woman's cervix into her uterus. *Id.* at 141-42.

68. J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M*, 39 CAP. U. L. REV. 345, 355 (2011).

69. ROBERTSON, *supra* note 2, at 130; Mortazavi, *supra* note 24, at 2253.

70. See *In re of Baby M*, 537 A.2d 1227 (N.J. 1988) for an example of the legal issues stemming from a traditional surrogacy arrangement. In this landmark case from New Jersey, a woman agreed to be a traditional surrogate for a couple, but became suicidal at the thought of giving up the baby and fled to Florida. *Id.* at 1235-37. The trial court enforced the surrogacy contract and made the surrogate give Baby M to the intended parents. *Id.* at 1237-38. However, the New Jersey Supreme Court reversed the trial court, declaring that enforcement of the surrogacy contract was against public policy and in conflict with existing New Jersey statutes. *Id.* at 1234. The court held that the arrangement was similar to "baby buying." *Id.* at 1242, 1248-49. This case had an immediate impact across the globe, causing states and countries to rethink their surrogacy laws. Mortazavi, *supra* note 24, at 2264.

71. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 311-12 (2013). Of the fifteen states that permit surrogacy, only four allow for gestational and traditional surrogacy. *Id.* The other eleven states only allow gestational surrogacy or "show a clear preference for it by granting it increased legal certainty." *Id.* at 312. This legal preference for gestational surrogacy is also prevalent in the medical community. *Id.* at 316.

72. *Id.* at 316-17.

that the traditional surrogate will have an emotional attachment to the genetically linked child and, thus, may refuse to give the baby to the intended parents.⁷³ A study reviewing case law and empirical evidence concluded that “traditional surrogates are more likely to refuse to deliver the born child to the intended parents than gestational surrogates.”⁷⁴ Therefore, today, ninety-five percent of surrogates carry fetuses created with genetic materials other than their own.⁷⁵ Most surrogacy agreements actually stipulate that the surrogate cannot be the one who donates the egg.⁷⁶ This Note only focuses on gestational surrogacy, since it is the method almost exclusively used in international commercial surrogacy.⁷⁷

Surrogacy arrangements are created using a “surrogacy facilitator,” or intermediary, which includes agencies that connect surrogates with intended parents, lawyers who provide counsel for such arrangements, and doctors who perform the IVF procedures, pregnancy checkups, and delivery.⁷⁸ A surrogacy arrangement can be categorized as altruistic or commercial.⁷⁹ In a commercial arrangement, the gestational surrogate is not only reimbursed for surrogacy-related expenses, but also compensated for her surrogacy services.⁸⁰ This Note only focuses on the commercial gestational surrogacy arrangement.

B. Americans Look to India for Surrogacy Arrangements

Many intended parents in the United States seek international surrogacy arrangements largely for legal and financial reasons.⁸¹ The laws on surrogacy vary widely in the United States—a few states ban commercial surrogacy altogether, others refuse to enforce commercial surrogacy contracts, and only some states, like California and Illinois, are receptive of commercial surrogacy and have regulations in place to

73. *Id.* at 317.

74. *Id.*

75. DiFonzo & Stern, *supra* note 68, at 355.

76. *Id.*

77. KARI POINTS, THE KENAN INST. FOR ETHICS, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 2-3.

78. Mortazavi, *supra* note 24, at 2253.

79. *Id.* at 2254. In an altruistic arrangement, the gestational surrogate is only compensated for medical and psychological expenses related to the surrogacy, such as rent, lost wages, and life insurance, but does not accept any compensation that exceeds these out of pocket expenses. *Id.*

80. *Id.*

81. Smerdon, *supra* note 23, at 22; Grant Peck & Kristen Gellneau, *Case of Baby with Down Syndrome Left Behind Shows 'Dark Side' of International Surrogacy*, TODAY (Aug. 7, 2014, 11:55 AM), <http://www.today.com/parents/down-syndrome-baby-left-behind-dark-side-surrogacy-1D80024922>.

help enforce agreements.⁸² Not only is the legal landscape of surrogacy inconsistent, the cost of surrogacy in the United States is often too expensive for most infertile couples—it is estimated that a surrogacy arrangement for one child costs around \$100,000 to \$150,000.⁸³ These prohibitive costs and inconsistent laws cause couples to turn to less developed countries emerging as international “supply hubs,” such as India.⁸⁴

India legalized gestational surrogacy in 2002, and since then, more than one thousand clinics have opened.⁸⁵ Fertility tourism is a \$2.5 billion industry in India.⁸⁶ Dr. Sudhir Ajja, co-founder of a surrogacy clinic, said about ninety-five percent of his clients are international, and thirty to forty percent are Americans.⁸⁷ India has taken some steps to regulate this business, such as banning same-sex couples, single parents, non-married couples, and couples from countries where surrogacy is illegal from using a surrogate in India.⁸⁸ According to the current rule, intended parents will be granted medical visas for commissioning surrogacy only if “[t]he foreign man and woman are duly married and the marriage should have sustained for at least two years.”⁸⁹

82. Peck & Gellneau, *supra* note 81.

83. Susan Donaldson James, *Infertile Americans Go to India for Gestational Surrogates*, ABC NEWS (Nov. 7, 2013), <http://abcnews.go.com/Health/infertile-americans-india-gestational-surrogates/story?id=20808125>.

84. Claire Achmad, *Surrogacy Industry: When Baby Comes Last*, DOMINION POST (Aug. 11, 2014).

85. James, *supra* note 83.

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

87. James, *supra* note 83. Many American citizens are led to surrogacy options in India through the media and Internet. Smerdon, *supra* note 23, at 30-31. English-speaking doctors are able to communicate with patients through the press, glorifying their success stories and available technology. *Id.* Surrogacy clinics create websites attempting to attract patients from around the world to their clinic. *Id.*

88. Bhowmick, *supra* note 86; Kevin Voigt et al., *Wombs for Rent: India's Surrogate Mother Boomtown*, CNN (Nov. 3, 2013, 8:00 PM), <http://www.cnn.com/2013/11/03/world/asia/india-surrogate-mother-industry>.

89. Letter from G.V.V. Sarma, Joint Sec., Foreigners, to Shri Amarendra Khatua, Additional Sec., Ministry of External Affairs (July 9, 2012), <http://www.surrogacyindia.com/Single-Parents.html> (notification from the Ministry of Home Affairs to be circulated to all the Missions for strict compliance). This new rule sparked controversy in India. Bhowmick, *supra* note 86. Some felt it was an “uncharacteristically moralistic stand on the government’s part.” *Id.* Although marriage is a sacrosanct institution in India, many citizens recognize that this is not so in many Western countries, and therefore, this new regulation affects the prestige of India as an open society. *Id.* However, others feel that this new regulation better protects the best interest of the child. *Id.* Experts say that the new rules will help ensure the babies are placed in stable homes because couples who have made a commitment for a few years, tend to stay together. *Id.*

Couples unable to benefit from surrogacy service in India have turned to Thailand, where no such restrictions are in place.⁹⁰

India has emerged as a major center for low-cost surrogacy because of its skilled doctors, medical infrastructure, and vast population of women willing to be surrogates.⁹¹ In India, clinics are set up to regulate and oversee the process between the surrogates and the intended parents.⁹² The reputable clinics screen the potential surrogates for women who are mentally and physically healthy and who already had children, proving they are able to gestate a baby.⁹³ The surrogacy clinics report that, through this screening process, they reject more than one-third of the women who apply to be surrogates.⁹⁴ The surrogates who are selected sign a contract in which they agree to not have sex, to take vitamins, and to eat healthy.⁹⁵ They also receive free medical care, food, and housing close to the clinic so they can be monitored by medical professionals and attend their regular doctor appointments in the third trimester.⁹⁶ The fee paid by the intended parents for this service costs between \$18,000 and \$30,000.⁹⁷ The surrogates earn around \$5000 to \$8000 for their service, which is a substantial amount of money in their country, and allows them to buy homes for their families or educate their children.⁹⁸

C. “Changing Their Minds”: *The Dark Realities of International Surrogacy*

Two stories illustrate the dilemma of parents “changing their minds” in international commercial surrogacy.⁹⁹ Unfortunately, the case of an Australian couple accused of leaving a baby with Down syndrome with his Thai surrogate and taking home his healthy twin sister “has cast unfavorable light on the largely unregulated business of commercial

90. Peck & Gellneau, *supra* note 81.

91. *Id.*

92. Smerdon, *supra* note 23, at 44-50. The clinics provide a variety of services such as financial negotiations between the intended parents and the surrogate, matching the two parties together, screening both parties, dormitories for surrogates, and medical treatments. *Id.*

93. *Id.* at 46-47; James, *supra* note 83.

94. James, *supra* note 83.

95. *Id.*

96. *Id.*

97. Peck & Gellneau, *supra* note 81. The fee paid by the intended parents covers “surrogacy fees, IVF, medical testing, legal documents and passport assistance.” James, *supra* note 83.

98. Smerdon, *supra* note 23, at 54; James, *supra* note 83; Voigt et al., *supra* note 88.

99. See *infra* notes 103-37 and accompanying text.

surrogacy."¹⁰⁰ The case of Baby Gammy, is explained below.¹⁰¹ Additionally, the similar case of Baby Manji, is also summarized.¹⁰²

1. The Case of Baby Gammy

Wendy and David Farnell sought out a surrogate in Thailand after several years of failing to conceive a child.¹⁰³ Through a surrogacy agency, the couple hired Pattaramon Chanbua, a twenty-one-year-old food vendor with two young children of her own.¹⁰⁴ Chanbua has no genetic ties to the children she gestated for the Farnells.¹⁰⁵ After learning that one of the babies had Down syndrome, Chanuba claimed that she was told she needed to "get rid" of the baby through abortion and there would be some way to save the other twin.¹⁰⁶ However, she refused to do so because she believed abortion to be a sin.¹⁰⁷ The Farnells stated in an interview with *60 Minutes* that if genetic testing were done earlier, they would have asked the agency to terminate the pregnancy.¹⁰⁸

Baby Gammy and his twin sister were born in December 2013.¹⁰⁹ When it came time to take the twins home, the Farnells took only the healthy baby girl back to Australia.¹¹⁰ Chanbua did not have the financial resources to care for the child with special needs that was left in her care.¹¹¹ In addition to having Down syndrome, Baby Gammy also had a congenital heart defect that could require surgery.¹¹² An online funding campaign raised \$215,000 in just twelve days to help Chanbua care for Gammy.¹¹³ An Australian-based charity, Hands Across the Water, has taken over and is planning to fund Baby Gammy's long-term needs.¹¹⁴

100. Peck & Gellneau, *supra* note 81.

101. *See infra* notes 103-19 and accompanying text.

102. *See infra* notes 120-37 and accompanying text.

103. Abby Ohlheiser, *Australian Mother, Father in Down Syndrome Surrogate Case Defend Themselves in TV Interview*, WASH. POST (Aug. 11, 2014), <http://www.washingtonpost.com/news/world/wp/2014/08/11/australian-mother-father-in-down-syndrome-surrogate-case-defend-themselves-in-tv-interview>.

104. Peck & Gellneau, *supra* note 81.

105. *Id.*

106. Ohlheiser, *supra* note 103; Whiteman, *supra* note 12.

107. Whiteman, *supra* note 12.

108. Ohlheiser, *supra* note 103.

109. Whiteman, *supra* note 12.

110. *Id.*

111. *Id.*

112. *Id.*; *Thai Surrogate Baby Gammy: Australian Parents Contacted*, BBC (Aug. 7, 2014), <http://www.bbc.com/news/world-asia-28686114>.

113. Whiteman, *supra* note 12.

114. *Id.*

Since the story hit the news headlines, various allegations have appeared about Baby Gammy's intended parents.¹¹⁵ David Farnell, the intended father, has been accused of making statements such as, "[t]here is a normal one, can I take the normal one?" and "[c]an you leave the abnormal one at the temple? Can you leave him in Bangkok? Nobody will know about this, something like that."¹¹⁶ The Farnells have not checked in on Baby Gammy's welfare since leaving, nor have they contacted Australian authorities about getting Baby Gammy back.¹¹⁷ Unfortunately, this is not the first time a baby with a genetic disorder has been abandoned.¹¹⁸ Families Through Surrogacy, an organization that helps guide intending parents through the process, has said, "abandonment of disabled children by foreigners was one of the issues [with commercial surrogacy] identified by Thai authorities."¹¹⁹

2. The Case of Baby Manji

In 2007, Baby Manji's intended parents, Ikufumi and Yuki Yamada, travelled from their home in Japan to a fertility clinic in India to arrange for a gestational surrogate.¹²⁰ The couple was paired with a surrogate that was implanted with an anonymous donor egg fertilized by Ikufumi's sperm.¹²¹ The surrogate would carry the baby to term, and then relinquish all of her rights and responsibilities to the Yamadas.¹²² However, one month prior to Baby Manji's birth, the Yamadas divorced.¹²³ Ikufumi, the intended father, still wanted to raise Baby Manji, but Yuki, the intended mother, no longer wanted the baby.¹²⁴ The way Yuki saw it, she was not related to the baby biologically or legally,

115. Tammy Mills, *Explosive Allegations in Baby Gammy Saga*, SYDNEY MORNING HERALD (Sept. 17, 2014, 10:56 PM), <http://www.smh.com.au/national/explosive-allegations-in-baby-gammy-saga-20140917-10ievn.html>. After the story about Baby Gammy hit the news, the media also caught wind that David Farnell, the intended father, is a convicted sex offender. Ohlheiser, *supra* note 103. He was convicted for twenty-two sex offenses involving minors in 1990. *Id.* In an interview, Farnell stated, "I don't have any thoughts about this at all. That is 100% the truth. I cannot do this again. I can't do this. I know that I do not have any urges at all of this nature. For [thirty] years I've known this. I don't have any urges." *Id.* The fact that a sex offender could easily become a parent through gestational surrogacy shows the serious need for some type of regulation for this industry. *Why It's Time to Talk About Surrogacy*, MARIE CLAIRE (Nov. 7, 2014, 3:30 PM), <https://au.lifestyle.yahoo.com/marie-claire/news-and-views/women-we-love/a/25458124/why-its-time-to-talk-about-surrogacy>.

116. Mills, *supra* note 115.

117. Ohlheiser, *supra* note 103.

118. Whiteman, *supra* note 12.

119. *Id.*

120. Mohapatra, *supra* note 18, at 418.

121. *Id.*

122. *Id.*

123. POINTS, *supra* note 77, at 5.

124. Mohapatra, *supra* note 18, at 418.

so she changed her mind about caring for the baby that she contracted to create.¹²⁵ On July 25, 2008, when the baby was born, she refused to travel with her ex-husband to take possession of the baby.¹²⁶

Yuki's decision to change her mind left Baby Manji without a mother to care for her.¹²⁷ The egg donor did not have any rights or responsibilities towards the baby and the surrogate's responsibility ended when Baby Manji was born.¹²⁸ An Indian friend of the Yamada family, who had just given birth to her own baby, had to step in to breastfeed Baby Manji while she was in the hospital.¹²⁹

To make matters worse, even though Ikufumi was Baby Manji's biological father, he could not obtain a passport from India or Japan for his baby.¹³⁰ The Japanese government would not issue the baby a Japanese passport because of Japan's requirement of birth citizenship.¹³¹ India would not issue a passport because a 120-year-old Indian law did not recognize Ikufumi's status as a single adoptive father since single men could not adopt baby girls.¹³² While trying to find a way to take his daughter home, Ikufumi's temporary visa expired and he had to return to Japan, leaving Baby Manji alone in India.¹³³ His mother then traveled to India to care for the baby.¹³⁴

Eventually after much legal wrangling, Ikufumi was able to obtain a certificate of identity.¹³⁵ This enabled Ikufumi to obtain a Japanese visa and bring Baby Manji home.¹³⁶ In the beginning of November, more than three months after her birth, Baby Manji was finally brought to Japan by her grandmother to live with her father.¹³⁷

125. POINTS, *supra* note 77, at 2.

126. *Id.* at 5.

127. *Id.*

128. *Id.*

129. *Id.* Baby Manji actually had to be moved to a different hospital after her birth because of the political turmoil and bombings in the town in which she was born. Mohapatra, *supra* note 18, at 419. At the same time, she was suffering from a variety of hospital-borne illnesses. *Id.*

130. Mohapatra, *supra* note 18, at 418-19.

131. *Id.* at 419.

132. *Id.*; POINTS, *supra* note 77, at 5.

133. POINTS, *supra* note 77, at 6.

134. Mohapatra, *supra* note 18, at 419-20. Emiko Yamada, Baby Manji's grandmother, petitioned the Supreme Court of India under Article 32 of its Constitution to allow her to take the child back to Japan once the necessary identification could be granted. *See Baby Manji Yamada v. Union of India & Anr.*, (2008) S.C.R. 516 (India). The grandmother stated: "From deep inside my heart, I want to return immediately to my own country with my grandchild." POINTS, *supra* note 77, at 6.

135. Mohapatra, *supra* note 18, at 420.

136. *Id.*

137. *Surrogate Baby Born in India Arrives in Japan*, HINDUSTAN TIMES (Nov. 3, 2008), <http://www.hindustantimes.com/world-news/surrogate-baby-born-in-india-arrives-in-japan/article1-348858.aspx>.

III. INTERNATIONAL AND DOMESTIC LAWS LACK PREVENTATIVE MEASURES TO PROTECT CHILDREN BORN THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY

The stories of Baby Gammy and Baby Manji illustrate the dangers children face in the present, unregulated commercial surrogacy industry.¹³⁸ Individuals must be held accountable for the innocent children born through ART.¹³⁹ There are currently several different views on who can be established to be the parent of a child born through ART.¹⁴⁰ This Note argues that parentage should be established using the California intent-based test because it provides clarity from the moment of conception.¹⁴¹

If parentage is established based on who intended to bring the child into the world and raise it, then surrogacy clinics are in the best position to enact procedures and regulations to prevent intended parents from “changing their mind” after the pregnancy because they are communicating with the intended parents before an embryo is even created.¹⁴² However, because international and domestic surrogacy laws are inconsistent, there are currently very few mandatory procedures and regulations in place, even in countries where commercial surrogacy has been legalized.¹⁴³

A. Establishing Parentage

The fragmentation of parentage by assisted reproduction creates the possibility that up to eight people could be the parents of a child conceived by this means; however, the law does not simultaneously recognize more than two individuals as the parents of a single child.¹⁴⁴ As a result, conflict about how to allocate parental rights and duties often arises in commercial surrogacy arrangements.¹⁴⁵ Some legislatures have promulgated guidelines to determine legal parentage, but for the most part, courts have been left to make this determination based on existing parentage precedents and parallels drawn from artificial

138. *See supra* Part II.C.

139. *See infra* Part IV.

140. Mortazavi, *supra* note 24, at 2254.

141. *See infra* Part III.A.

142. *See infra* Parts III.B, IV.

143. *See infra* Part III.B.

144. Storrow, *supra* note 27, at 602.

145. ROBERTSON, *supra* note 2, at 119-20.

insemination legislation.¹⁴⁶ This Note argues that parentage should be determined by the intent-based test used in California.¹⁴⁷

In the landmark case *Johnson v. Calvert*, Mark and Crispina Calvert were a married couple who desired to have a child, but Crispina was forced to undergo a hysterectomy in 1984.¹⁴⁸ Anna Johnson, Crispina's coworker, heard of the Calverts' situation and offered to serve as a surrogate.¹⁴⁹ An embryo was created with Mark's sperm and Crispina's egg and, then, was implanted into Anna.¹⁵⁰ However, relations between the parties deteriorated in the seventh month of pregnancy, and Anna demanded compensation immediately, threatening that she would otherwise refuse to give up the child.¹⁵¹ The Calverts filed a lawsuit to establish their rights to the child.¹⁵²

The court stated: "[W]e do not believe that this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement."¹⁵³ The Calverts desired to have a child with their own genetic material, but were unable to do so without the help of ART.¹⁵⁴ The court went on to say that the Calverts "affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist."¹⁵⁵ The Uniform Parentage Act ("the Act")¹⁵⁶ was adopted by

146. Storrow, *supra* note 27, at 602-03.

147. See *infra* notes 148-78. California is the capital of commercial surrogacy in the United States because of favorable laws for the intended parents and surrogates. Mohapatra, *supra* note 18, at 426-27. Commercial surrogacy agreements are valid and enforceable; parents can be placed on the birth certificate without adoption, and intended parents are not required to be married. *Id.* at 428. For purposes of this Note, the case law establishing the intent-based test to determine parentage is most important. See *infra* text accompanying notes 148-78.

148. 851 P.2d 776, 778 (Cal. 1993).

149. *Id.*; Storrow, *supra* note 27, at 605 (discussing the facts of *Johnson*).

150. *Johnson*, 851 P.2d at 778; Seth Mydans, *Surrogate Denied Custody of Child*, N.Y. TIMES, Oct. 22, 1990, at A14.

151. *Johnson*, 851 P.2d at 778; Storrow, *supra* note 27, at 605.

152. Storrow, *supra* note 27, at 605.

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

154. *Id.*

155. *Id.* The court further supported their position that intention determines parentage by citing several legal commentators. *Id.* at 782-83. For example, the court quotes Professor Hill stating that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but for the efforts of the intended parents." John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991).

156. Uniform Parentage Act, S. 347, 108th Cong. (2013). The Act was adopted in 1975 in the wake of Supreme Court decisions mandating the equal treatment of legitimate and illegitimate children. *Id.*; *Johnson*, 851 P.2d at 778-79. The Uniform Parentage Act bases parent and child rights on the existence of a parent and child relationship, rather than on the marital status of the parents. S. 347; *Johnson*, 851 P.2d at 778-79. At the time it was enacted, it was not intended to apply to surrogacy arrangements, but was considered to apply to any parentage determination. Marcy

California law, and the court chose to analyze the parties' contentions within the Act's framework.¹⁵⁷ The court concluded:

[A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.¹⁵⁸

The *Johnson* holding was extended in *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*,¹⁵⁹ where the California Court of Appeals “again scrutinized parentage in the context of gestational surrogacy.”¹⁶⁰ In this case, the baby was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted into a gestational surrogate.¹⁶¹ However, after the surrogate became pregnant, Luanne and John separated.¹⁶² John disclaimed *any* responsibility, financial or otherwise, for the child.¹⁶³ The court held that the decision in *Johnson* was not limited to disputes between women who gave birth and women who contributed ova, “but [extends] to any situation where a child would not have been born ‘but for the efforts of the intended parents.’”¹⁶⁴ Even though neither of the parents were biologically related to the baby, they are the lawful parents because of their initiating role as intended parents in her conception and birth.¹⁶⁵

The intent of the parents was the ultimate basis for the decisions in *Johnson* and *Buzzanca*.¹⁶⁶ Since these decisions, a number of other jurisdictions have followed the intent-based test to determine the parentage of a child born through ART.¹⁶⁷ This test is best suited to

Darnovsky & Diane Beeson, *Global Surrogacy Practices* 10 n.7 (Int'l Inst. of Soc. Studies, Working Paper No. 601, 2014).

157. *Johnson*, 851 P.2d at 779.

158. *Id.* at 782. *But see In re Moschetta*, 30 Cal. Rptr. 2d 893, 894-96 (Ct. App. 1994) (declining to enforce a traditional surrogacy contract, deeming it incompatible with parentage and adoption principles).

159. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

160. Storrow, *supra* note 27, at 607.

161. *Buzzanca*, 72 Cal. Rptr. 2d at 282; Storrow, *supra* note 27, at 607 (discussing the facts of *Buzzanca*).

162. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

163. Greg Hernandez & David Maharaj, *Couple Who Used Surrogate Ruled Parents*, L.A. TIMES (Mar. 11, 1998), <http://articles.latimes.com/1998/mar/11/news/mn-27701>.

164. *Buzzanca*, 72 Cal. Rptr. 2d at 291 (quoting *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

165. Hernandez & Maharaj, *supra* note 163.

166. *Buzzanca*, 72 Cal. Rptr. 2d at 293; Storrow, *supra* note 27, at 606.

167. *Elisa B. v. Superior Court*, 117 P.3d 660, 662-64, 670 (Cal. 2005) (holding that a lesbian woman was the mother of her ex-partner's twins, even though there was no biological connection or adoption); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 478, 480 (App. Div. 1994) (deciding that a

determine the parentage of children in international commercial surrogacy arrangements because it correlates significantly with the child's best interests.¹⁶⁸ As quoted by the court in *Johnson*: "The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers."¹⁶⁹ The mental concept must be recognized as independently valuable because it "creates expectations in society for adequate performance on the part of the initiators as parents of the child."¹⁷⁰ *Johnson* also spoke directly to the issue of an abandoned child created through ART by stating:

In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child.¹⁷¹

Therefore, parentage should vest in those who intended to raise the child as their own.¹⁷² Intention can be defined as planning to have the child before the conception of the child, which recognizes individual efforts to project intentions into the future.¹⁷³ As the court in *Johnson*

woman was the mother of the child even though a surrogate and a donor egg were used). *But see* Oleski v. Hynes, No. KNLFA084008415, 2008 WL 2930518, at *2, *11-12 (Conn. Super. Ct. 2008) (differing in that the biological partner could be placed on the birth certificate, but the other male partner was not entitled to be listed as the child's parent on the birth certificate).

In India, a similar policy is followed. Darnovsky & Beeson, *supra* note 156, at 12. Couples must be married for two years and have a letter from the embassy of their home country that the child would be accepted as their biological child. *Id.* The intended parents' names are placed directly on the child's birth certificate without any adoption proceedings necessary, and the surrogate's name is not recorded. *Id.*; *Instructions Relating to Foreign Nationals Intending to Visit India for Commissioning Surrogacy*, MINISTRY HOME AFF. (2012), <http://mha1.nic.in/pdfs/Surrogacy-111013.pdf>.

168. *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993); *Buzanca*, 72 Cal. Rptr. 2d at 293; Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 342-44 (1990).

169. Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986).

170. *Id.*

171. *Johnson*, 851 P.2d at 783.

172. Storrow, *supra* note 27, at 641. Countries and states differ on how marital status, gestation, and genetics relate to parental rights and children's legal parentage. Darnovsky & Beeson, *supra* note 156, at 7. In some areas, a gestational surrogate, even without a genetic connection, is considered the legal mother, and this is often not contestable. Permanent Bureau, Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from Int'l Surrogacy Arrangements*, 9-10, PRELIMINARY DOC. NO. 10 (March 2012). If the surrogate is married, regardless of genetics, her husband will be presumed to be the father, however it is possible to contest this presumption. *Id.* at 10. Yet, in other areas, intended parents are not automatically placed on the birth certificates of the child, but must go through an adoption process even if they are genetically related. *See, e.g.*, ROBERTSON, *supra* note 2, at 131-32.

173. Hill, *supra* note 155, at 414; Schultz, *supra* note 168, at 324.

noted, if genetics or the act of giving birth, rather than intent, controlled parentage, a woman who agreed to gestate a fetus for intending parents would be held the natural mother, contrary to her expectations.¹⁷⁴ She would be held to all the responsibilities that such a ruling would mandate if the intending mother declined to accept the child after its birth.¹⁷⁵ Surrogates need assurance that they will not acquire unwanted child-rearing duties.¹⁷⁶ What is essential to parenthood is not the biological tie, but rather the preconception intention to have a child; the undertaking of action to bring the child into the world; the preconception commitment of others not to claim parental rights; and the need for certainty of parentage from the moment the child is conceived.¹⁷⁷ Holding the parties—surrogates and intended parents—to the promises on which the other parties relied is a fair solution to the issue of establishing parentage in ART.¹⁷⁸

B. *Regulations and Procedures for Surrogacy Clinics*

Legal parentage is the gateway through which many obligations adults owe to children flow.¹⁷⁹ Establishing parentage through the intent-based test clearly defines for surrogacy clinics which individuals in the arrangement will be legally responsible for the resulting child, which, in turn, allows them to better guide the intended parents and surrogates through the pregnancy.¹⁸⁰ International surrogacy arrangements are usually coordinated by medical tourism companies, fertility clinics, specialized surrogacy agencies, or brokers, which range from small businesses to large transnational companies.¹⁸¹ Although current laws regulating the actual surrogacy arrangements and their moral implications vary greatly on a statewide and international level,¹⁸² few differences exist for surrogacy clinic regulations and procedures.¹⁸³ Generally, regulations and procedures for surrogacy clinics in most countries have a mix of self-regulatory mechanisms and few laws

174. *Johnson*, 851 P.2d at 783.

175. *Id.*

176. ROBERTSON, *supra* note 2, at 125-26.

177. Hill, *supra* note 155, at 414; Storrow, *supra* note 27, at 642-43.

178. ROBERTSON, *supra* note 2, at 125-26.

179. Darnovsky & Beeson, *supra* note 156, at 7.

180. *See supra* Part III.A; *infra* Part IV.

181. Darnovsky & Beeson, *supra* note 156, at 18. For purposes of this Note, the term “surrogacy clinics” will be used to encompass all the above intermediaries that may play a role in a surrogacy arrangement.

182. *See infra* note 188 and accompanying text.

183. Achmad, *supra* note 84 (noting that clinics mainly operate unregulated).

governing the clinics.¹⁸⁴ The regulation that does exist addresses the accreditation of clinics, sex selection, cloning, and the use of stem cells.¹⁸⁵ However, most decision-making with regard to ART is at the discretion of the physician and patient, with minimal government oversight.¹⁸⁶ The lack of regulation by state actors for surrogacy clinics results in a lack of protection of the child's rights.¹⁸⁷

Both in the United States, particularly within those states which expressly permit commercial surrogacy,¹⁸⁸ and India, surrogacy clinics are almost entirely self-regulating businesses.¹⁸⁹ This Note will first examine the laissez-faire attitude that California takes towards regulating surrogacy clinics.¹⁹⁰ Then, this Note will examine the attempts that India has made to implement regulations for the surrogacy clinics.¹⁹¹ Absent from both of these approaches are any type of preventative measures or consequences for intended parents who abandon their child.¹⁹²

1. Regulations in the United States

In states like California, where commercial surrogacy is expressly authorized, there have been very few laws passed regulating the industry.¹⁹³ Instead, issues of contract disputes, parentage, and gestational matters are left to the courts to decide.¹⁹⁴ California's laissez-faire attitude has allowed the commercial surrogacy industry to thrive, attracting international patients and patients from other states prohibiting

184. Andrea Whittaker, *Challenges of Medical Travel to Global Regulation: A Case Study of Reproductive Travel in Asia*, 10 GLOBAL SOC. POL'Y 396, 400 (2010). This Article notes that laws and regulations in EU countries regarding surrogacy focus particularly on the restriction of commercial surrogacy, and are, therefore, not useful in the analysis for this Note. *Id.*

185. *Id.* For example, the International Federation of Fertility Societies ("IFFS") lists differences between ART practices in different jurisdictions such as: marital status for eligibility for treatment; number of embryos transferred; cryopreservation; posthumous insemination; and IVF surrogacy. *Id.* Protecting children is not considered. *Id.*

186. *Id.*

187. *Id.* at 408.

188. Although many countries have official policies regarding commercial surrogacy, the United States does not have any federal regulations or policy, and has left the issue of commercial surrogacy to the states. Cara Luckey, *Commercial Surrogacy: Is Regulation Necessary to Manage the Industry?*, 26 WIS. J.L. GENDER & SOC'Y 213, 229 (2011). The states' regulations can be divided into four categories: (1) prohibition; (2) status regulation; (3) inaction; and (4) contractual ordering. *Id.* These four different ways to deal with commercial surrogacy have created inconsistent regulation in the states. *Id.*

189. Darnovsky & Beeson, *supra* note 156, at 18; Whittaker, *supra* note 184, at 400.

190. *See infra* Part III.B.1.

191. *See infra* Part III.B.2.

192. *See infra* Part III.B.1-2.

193. Darnovsky & Beeson, *supra* note 156, at 11.

194. Kerry Peterson, *Cross Border Commercial Surrogacy*, in 16 LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES 209, 216 (Michael Freeman et. al. eds. 2014).

surrogacy; yet, the lack of regulation means that there are no proactive steps to prevent parents from refusing to accept responsibility for their child created through ART.¹⁹⁵ In the years following *Johnson*, many bills on surrogacy have been introduced in California, but very few have ever made it to a vote.¹⁹⁶

California's legislature has enacted statutes regulating surrogacy clinics on only two occasions.¹⁹⁷ In 2010, following an agency scheme to defraud intended parents, surrogates, and financial institutions,¹⁹⁸ the state legislature enacted a law requiring surrogacy clinics to establish bonded escrow accounts for their surrogacy arrangements.¹⁹⁹ Then, in 2011, an FBI investigation uncovered a "baby-selling ring,"²⁰⁰ subsequently leading to the passage of the "surrogacy friendly law," which affirms the right of intended parents to be the legal parents established in *Johnson*, and required intended parents and surrogates to be represented by independent legal counsel.²⁰¹ This law also requires surrogacy arrangements to be notarized *before* any medical procedure takes place.²⁰² In addition to these two laws, surrogacy clinics are also subject to the American Society for Reproductive Medicine ("ASRM") guidelines.²⁰³ While these ASRM guidelines claim to be adequate self-regulation for the clinics, they are often ignored by surrogacy clinics.²⁰⁴ Both the laws and ASRM guidelines relating to surrogacy clinics lack any protection for the fundamental rights of the children created through ART.²⁰⁵

In instances where parents have separated or divorced, like in the case of Baby Manji, courts seem to treat the issue no differently than

195. *Id.* at 216-17.

196. Darnovsky & Beeson, *supra* note 156, at 11.

197. *Id.*

198. SurroGenesis claimed to be a surrogacy clinic, which assisted individuals in having a child through surrogacy. Stephanie Saul, *Would-Be Parents Find Surrogate Agency Closed*, N.Y. TIMES, Mar. 20, 2009, at A14. They told clients to put their money in an independent escrow account for the arrangement. *Id.* However, the clinic abruptly shut its doors after embezzling \$2 million dollars from intended parents and leaving surrogates mid-pregnancy. *Id.*

199. Darnovsky & Beeson, *supra* note 156, at 11.

200. *Baby-Selling Ring Busted*, FBI (Aug. 9, 2011), <http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted>. A prominent California attorney specializing in reproductive law and operator of a surrogacy clinic, was found to be deceiving intended parents about prospective unborn babies. *Id.*

201. Darnovsky & Beeson, *supra* note 156, at 11.

202. *Id.*

203. *Id.* *Practice Committee Documents*, AM. SOC'Y REPROD. MED. (2015), <http://www.asrm.org/Guidelines>.

204. Darnovsky & Beeson, *supra* note 156, at 11. A recent study of risk disclosure in the recruitment of oocyte providers revealed that clinics subject to ARSM guidelines were not following them. *Id.*

205. *Practice Committee Documents*, *supra* note 203.

when a child is conceived naturally. For example, in *Elisa B. v. Superior Court*, a lesbian couple had three children born through artificial insemination.²⁰⁶ One child was born to one of the women, Elisa, and the other woman had twins.²⁰⁷ The couple used the same sperm donor so the children would be half-siblings.²⁰⁸ Almost two years after the twins were born, the couple, which never officially married, separated.²⁰⁹ Elisa refused to support the twins because she was not biologically related to them, never officially adopted them, and therefore, she claimed she was not their parent.²¹⁰ However, the court disagreed and held that Elisa actively assisted in the other woman's pregnancy with the expressed intention of enjoying the rights and accepting the responsibilities of parenting the resulting children.²¹¹ Thus, her "present unwillingness to accept her parental obligations [did] not affect her status as the children's mother based upon her conduct during the first years of their lives."²¹² Elisa was responsible to pay child support for the twins.²¹³

2. Regulations in India

Unlike the United States, in 2002, India legalized the commercial surrogacy industry for the whole country to promote medical tourism.²¹⁴ However, India has failed to enact any laws regulating the practice for the surrogacy clinics that would protect the fundamental rights of the children.²¹⁵ The Indian government encourages surrogacy with concessions and tax breaks for hospitals that treat international patients and have world-class medical facilities with low costs for fertility

206. 117 P.3d 660, 663 (Cal. 2005).

207. *Id.* Kenneth Ofgang, *Supreme Court Says Mother's Lesbian Partner Is Child's Other Parent*, METROPOLITAN NEWS ENTERPRISE (Aug. 23, 2005), <http://www.metnews.com/articles/2005/kris082305.htm>.

208. *Elisa B.*, 117 P.3d at 663; Ofgang, *supra* note 207.

209. Arthur S. Leonard, *Big Victory for Gay Parents*, GAYCITYNEWS.COM (Aug. 25, 2005), http://gaycitynews.nyc/gcn_434/bigvictoryforgay.html. At first when the couple separated, Elisa promised to take care of the twins. *Id.* However, when her financial circumstances changed, Elisa changed her mind, leaving her partner unemployed and supporting the children alone. *Id.* A California welfare agency had to pay for the childcare expenses, including extra medical expenses for the twin with Down syndrome, so they sued Elisa for the child support. *Id.*

210. *Elisa B.*, 117 P.3d at 670-71.

211. *Id.* at 270. In fact, Elisa even picked up additional sperm from the sperm bank and inseminated her partner at home to make sure she got pregnant. *Id.* at 663.

212. *Id.* at 669.

213. Leonard, *supra* note 209.

214. Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671, 676 (2013); Mohapatra, *supra* note 18, at 432-33.

215. See Vincent & Aftandilian, *supra* note 214, at 676-79 (outlining India's proposed legislation in which protection for children is not even mentioned). Peterson puts, as follows: "In India, commercial surrogacy is lawful and unregulated." Peterson, *supra* note 194, at 216.

tourists.²¹⁶ India published the non-binding *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics* (“Guidelines”) in 2005.²¹⁷ The Guidelines established a procedure for state governmental bodies to oversee setting up and regulating ART clinics.²¹⁸ However, the Guidelines included only some provisions specific to surrogacy and intended parents.²¹⁹ In fact, the Guidelines are not legally enforceable, and they are only designed to protect the interests of the intended parents rather than surrogate mothers.²²⁰ Many press articles and popular surrogacy websites suggest that the clinics do not strictly adhere to the Guidelines.²²¹ None of the Guidelines address preventative measures or remedies for children who are no longer wanted by their intended parents.²²²

In 2010, India’s Ministry of Health and Family Welfare, along with the Indian Council of Medical Research, proposed the *Assisted Reproductive Technologies Bill*.²²³ The purpose of this bill is to “provide for a national framework for the accreditations, regulations and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto.”²²⁴ Most of the bill deals with surrogacy clinics and how they should be regulated.²²⁵ One of the nine chapters addresses surrogates and intended parents who use ART; however, it does not provide any guidance for a situation such as Baby Gammy’s.²²⁶

IV. MANDATORY BEST PRACTICES FOR SURROGACY CLINICS AND PROTECTING CHILDREN IN THE EVENT OF THE UNTHINKABLE

The practice of international commercial surrogacy is growing rapidly,²²⁷ yet, as the discussion in Part III demonstrates, there continues

216. Peterson, *supra* note 194, at 216.

217. Smerdon, *supra* note 23, at 35.

218. *Id.*

219. Damovsky & Beeson, *supra* note 156, at 12.

220. Peterson, *supra* note 194, at 216.

221. *Id.*

222. See MINISTRY OF HEALTH AND FAMILY WELFARE, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA (2005), <http://indiansurrogacylaw.com/images/Downloads/Indian%20Council%20for%20Medical%20Research%20Guidelines%20on%20Surrogacy%202008.pdf>; Smerdon, *supra* note 23, at 43.

223. Vincent & Aftandilian, *supra* note 214, at 676-77.

224. *Id.* at 677 (quoting The Assisted Reproductive Technologies (Regulation) Bill. (Indian Council of Medical Research, Proposed Draft 2008)).

225. *Id.* at 678.

226. *Id.*

227. Damovsky & Beeson, *supra* note 156, at 33. In 2013, the IFFS indicated an increase of

to be a lack of regulation to protect children like Baby Gammy and Baby Manji.²²⁸ In August 2014, The International Forum on Intercountry Adoption and Global Surrogacy ("Forum")²²⁹ recognized that children born through international surrogacy have been left with unresolved legal parentage and statelessness, causing their fundamental rights to be at risk.²³⁰ The participants at the Forum "were in general agreement that commercial dynamics combined with lack of regulation and oversight provide great leeway for corrupt practices that may leave many victims in their wake."²³¹ The current state of international surrogacy is failing to ensure children are able to acquire a nationality, ensure their right to know their identity, and put in place procedures to protect them from harm.²³² Although international compromise is clearly necessary to bridge the gap between differing legal systems, there has been no such global effort to date.²³³

This Note proposes that the surrogacy clinics, which facilitate the transactions between intended parents and surrogate mothers, are in the best position to effectively minimize or eliminate the problematic aspects of international surrogacy—particularly those problems related to protecting the children's interests.²³⁴ As the liaison between the

nearly 1000% in the number of international surrogacy arrangements between 2006 and 2010. *Id.* at 18.

228. *See supra* Part III.

229. The Forum took place at the International Institute of Social Studies in The Hague, Netherlands from August 11 to August 13, 2014, in the wake of the disturbing headlines about Baby Gammy. Darnovsky & Beeson, *supra* note 156, at 1. The Forum afforded an unparalleled opportunity for twenty-five participants to share their work and thinking on the many issues related to inter-country surrogacy arrangements. *Id.* Baby Gammy's case underlined already strong concerns among the women's health and human rights advocates, scholars, and policy experts in attendance. *Id.*

230. *Id.* at 7.

231. *Id.* at 18.

232. Permanent Bureau, Hague Conference on Private International Law, *supra* note 172, at 26.

233. Darnovsky & Beeson, *supra* note 156, at 7; *see* Permanent Bureau, Hague Conference on Private International Law, *supra* note 172, at 25-30 (proposing multilateral cooperation and regulations between States to address the transnational nature of the problems arising as a result of international surrogacy arrangements).

234. Whittaker, *supra* note 184, at 407. One commenter has noted: "Private organizations such as the medical facilitation company organizations have for the most part been involved in the promotion of the trade but are increasingly heeding calls for greater involvement in the registration, self-regulation and monitoring activities of their members . . ." *Id.* It has also been said that "[i]n the United States, India, and elsewhere, intermediaries in commercial surrogacy arrangements, including those that take place transnationally, operate with little regulation or oversight, and within a patchwork of inconsistent laws from country to country." Darnovsky & Beeson, *supra* note 156, at 36. The Forum also discussed intermediaries' responsibility in international surrogacy, such as having requirements about the status or conduct of intermediaries, and criminal or civil sanctions for violations of surrogacy arrangements. *Id.* at 37.

intended parents and the surrogates, these clinics can create and implement procedures to ensure that intended parents are held accountable for the children they create.²³⁵ This Note specifically proposes two approaches: (1) preventative procedures; and (2) consequential measures.²³⁶ Below, this Part examines two different preventative measures.²³⁷ However, this Note also recognizes that forcing legal parentage on intended parents, who no longer want the child, is not an adequate solution, and would certainly not be in the best interest of the child.²³⁸ Therefore, this Note asserts that U.S. law can be applied as a consequential measure to terminate parental rights, free the child up for adoption, and create a registry to ban the intended parents from using a surrogate again.²³⁹

A. Preventative Procedures Must Be Implemented

When deciding to make the lifetime commitment to have a child, intended parents must be confronted with all the possibilities from the very beginning, just as an obstetrician would for a “natural” pregnancy.²⁴⁰ Below, this Note details surrogacy clinics discussing the possibilities for genetic disorders during the initial consultation, before any medical procedures take place.²⁴¹ Next, this Note proposes that after the initial consultation phase, surrogacy clinics should require intended parents to have the various diagnostic tests on the embryo or fetus—particularly pre-implantation genetic diagnosis (“PGD”).²⁴²

1. Counseling Intended Parents

Intended parents should be provided with education on issues they are about to face as new parents in general, such as the care of infants and the health risks of depriving a child of breastfeeding, as well as education on issues specific to surrogacy arrangements.²⁴³ These issues

However, participants at the Forum questioned if for-profit agencies in international surrogacy are even appropriate. *Id.* at 36. Fearing that surrogacy agencies and brokers’ financial motivations may tempt them to engage in unethical practices, some felt that state agencies or licensing non-profit organizations might be a better alternative to carry out the functions currently served by the intermediaries. *Id.* at 19, 36.

235. *See infra* Part IV.A–B.

236. *See infra* Part IV.A–B.

237. *See infra* Part IV.A.

238. Darnovsky & Beeson, *supra* note 156, at 21.

239. *See infra* Part IV.B.

240. *See infra* Part IV.A.1.

241. *See infra* Part IV.A.1.

242. *See infra* Part IV.A.2.

243. Darnovsky & Beeson, *supra* note 156, at 31; *see Classes & Support Groups at Newborn Connections*, SUTTER HEALTH CPMC (2014), <http://www.cpmc.org/services/newbornconnections/>

can include: a child's right to know their origins; the potential psychological consequences of revealing or concealing this knowledge; the reality of the motivations and circumstances under which women agree to serve as surrogates; and finally, their responsibilities if the child does not meet their expectations, like Baby Gammy.²⁴⁴ Because the latter of these issues may deter couples from using a surrogate if clinics make them aware from the start, intended parents are often left ignorant of inevitable complications that may arise.²⁴⁵ Surrogacy clinics must put in place mandatory procedures during the consultation phase of the arrangement discussions with intended parents about these difficult issues, particularly their responsibility for the child regardless of any abnormalities.²⁴⁶

Whether a couple has a child through natural means or surrogacy, discussing the possibility of their future child having incurable genetic diseases can cause fear and indecision about whether to continue with the pregnancy.²⁴⁷ In a natural pregnancy, the obstetrician discusses options for genetic testing and the possibility of birth defects during the initial pregnancy visit, which occurs during the first ten to twelve weeks.²⁴⁸ Baby Gammy's story illustrates that in an international surrogacy arrangement, this conversation must happen with the intended parents *before* eggs and sperm are even harvested.²⁴⁹ Transparency about this unfortunate reality from the very beginning of the

classes (offering examples of different classes and support groups for expecting parents).

244. Damovsky & Beeson, *supra* note 156, at 31.

245. *Id.* The Forum participants agreed that surrogacy agencies and fertility clinics often seek to persuade people that commercial surrogacy is a desirable and unproblematic way to have children, leaving them ignorant of the inevitable complications, and other problems that may arise. *Id.*

246. It has been said that "[u]ntil regulatory legislation is passed, surrogate brokers have special duties to make sure that the women they recruit are well informed and counseled about the risks they face." ROBERTSON, *supra* note 2, at 139. If surrogacy clinics have a duty to protect the surrogates, they must have a similar responsibility and procedures to protect the intended parents and children. Damovsky & Beeson, *supra* note 156, at 18-19. Any additional burden that such procedures create are justified to protect the parties, including the child, in surrogate reproduction. ROBERTSON, *supra* note 2, at 139.

247. Alison Piepmeier, *The Inadequacy of "Choice": Disability and What's Wrong with Feminist Framings of Reproduction*, 39 FEMINIST STUD. 159, 163 (2013).

248. *Initial Pregnancy Visit*, NOVANT HEALTH PROVIDENCE OB/GYN, <http://www.nhprovidenceobgyn.org/having-a-baby/initial-pregnancy-visit.aspx> (last visited Nov. 22, 2015); *Your Prenatal Test Checklist*, PARENTS, <http://www.parents.com/pregnancy/stages/1st-trimester-tests/prenatal-test-checklist> (last visited Nov. 22, 2015); *Your Pregnancy*, GENERATIONS OBSTETRICIANS & GYNECOLOGY, http://www.generations-obgyn.com/your_pregnancy (last visited Oct. 3, 2015); *Prenatal Services in the Division of Genetics*, MOUNT SINAI ST. LUKE'S, <http://www.nywomenshealth.com/genetics-prenatal-services-st-lukes-hospital-new-york.htm> (last visited Nov. 22, 2015).

249. Damovsky & Beeson, *supra* note 156, at 1.

surrogacy arrangement will help intended parents prepare emotionally and financially for the possibility of their child having an illness or disability.²⁵⁰

An overview of several different surrogacy clinics shows that most surrogacy arrangements begin with an initial consultation between the intended parents and the clinicians.²⁵¹ At these initial consultations, clinics may also have an attorney or mental health professional present to assist in answering questions.²⁵² During the initial consultation, the clinicians, mental health professionals, and attorneys discuss the different ART options available to the intended parents, the detailed process of matching them with a surrogate, legal implications, insurance details, surrogacy costs, and basic medical information.²⁵³ This first meeting usually lasts between two and four hours.²⁵⁴ After the initial consultation, clinics often pair intended parents with a mental health professional who will be with them for the entire process via telephone, office visits, or Skype.²⁵⁵

Clinics should be required to discuss the possibility of birth defects and genetic disorders during these initial consultations, just as an obstetrician would during the initial visit in a natural pregnancy.²⁵⁶ Despite the wealth of information provided by the clinics to intended parents about what they can expect during a surrogacy arrangement, the possibility of having an unhealthy baby is missing.²⁵⁷ Confronting parents with this reality before any medical procedure takes place will

250. *Id.* at 36.

251. *Become a Parent-Your Journey Begins*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/parents/process> (last visited Nov. 22, 2015); *Choosing the Right Agency*, EXTRAORDINARY CONCEPTIONS, <http://www.extraconceptions.com/future-parents-overview/choosing-an-agency> (last visited Nov. 22, 2015); *Frequently Asked Questions for Parents Interested in Surrogacy*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/parents/faq> (last visited Nov. 22, 2015); *Program Information*, NORTHEAST SURROGACY PARTNERSHIPS, LLC, http://www.nespartnerships.com/intended_parents.php (last visited Nov. 22, 2015).

252. *Become a Parent-Your Journey Begins*, *supra* note 251; *Choosing the Right Agency*, *supra* note 251; *Program Information*, *supra* note 251.

253. *Become a Parent-Your Journey Begins*, *supra* note 251.

254. *Id.*; *Program Information*, *supra* note 251.

255. *Become a Parent-Your Journey Begins*, *supra* note 251; *Choosing the Right Agency*, *supra* note 251.

256. Compare the first consultations with obstetricians, as discussed in *Initial Pregnancy Visit*, *supra* note 248, *Your Prenatal Test Checklist*, *supra* note 248, and *Your Pregnancy*, *supra* note 248, with the initial surrogacy arrangement meetings discussed in *Become a Parent-Your Journey Begins*, *supra* note 251, *Choosing the Right Agency*, *supra* note 251, and *Program Information*, *supra* note 251.

257. Nothing on the surrogacy clinic websites discussed provides any type of information about the realities of having a child with genetic abnormalities. See *Become a Parent-Your Journey Begins*, *supra* note 251; *Frequently Asked Questions for Parents Interested in Surrogacy*, *supra* note 251; *Program Information*, *supra* note 251; *Choosing an Agency*, *supra* note 251.

allow them to make an informed decision about proceeding with their surrogacy arrangement.²⁵⁸ Conversations about these issues will allow intended parents to tailor their surrogacy agreement to incorporate PGD testing into their surrogacy contracts,²⁵⁹ discuss the other genetic screening and diagnostic tests after implantation, prepare themselves for a child with special needs, and discuss abortion options with the clinic.²⁶⁰

2. Pre-Implantation Genetic Diagnosis

After the initial consultation, if the parents wish to proceed with the surrogacy arrangement, clinics should require the embryos that will be implanted in the surrogate undergo PGD and other prenatal diagnostic testing.²⁶¹ PGD is done before the embryo is implanted into the surrogate to test the embryo for a variety of genetic disorders, such as Down syndrome, Tay-Sach's Disease, Fragile X Syndrome, and many more.²⁶² If any of the embryos are affected by a genetic disorder, only the embryos *without* the genetic abnormality are implanted into the surrogate.²⁶³ While PGD is a diagnostic test, which means it can tell with certainty if a genetic disorder is present, the test is based on a single cell from the embryo.²⁶⁴ Therefore, prenatal testing, such as chorionic villus sampling and amniocentesis, are still recommended, and the standard of

258. See Darnovsky & Beeson, *supra* note 156, at 31, 36 (noting the lack of sufficient information provided to intended parents causing them to face serious, unplanned practical difficulties).

259. See *infra* Part IV.A.2.

260. Cari Nierneberg, *Prenatal Genetic Screening Tests: Benefits and Risks*, LIVESCIENCE.COM (Dec. 18, 2014), <http://www.livescience.com/45949-prenatal-genetic-testing.html>. On the issue of abortion within the context of surrogacy a "surrogate herself cannot be deprived of her right to obtain an abortion, even if she is a gestational surrogate and has contributed no genetic material to the developing fetus." Storrow, *supra* note 27, at 615. Purely by virtue of her gestative role, the genetic parents have no right to demand she abort or not abort the fetus. *Id.* at 615-16. Both India and the United States provide protection to the surrogate's right to abortion. Smerdon, *supra* note 23, at 34. For more information on this topic, see Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 *FORDHAM L. REV.* 93 (2001).

261. See *supra* notes 247-60 and accompanying text.

262. *Preimplantation Genetic Diagnosis (PGD) Explained*, CTR. SURROGATE PARENTING, INC., <http://www.creatingfamilies.com/gay-intended-parents/?Id=187#.VMskwN5CeRs> (last visited Nov. 22, 2015). When the embryo grows to between four and twelve cells, one or two of the cells is removed through a procedure called embryo biopsy. *Id.* The cells are then analyzed to determine which, if any, embryos have genetic abnormalities. *Id.* The healthy embryos are then implanted into the surrogate. *Id.*

263. *Id.*

264. Nierneberg, *supra* note 260; *Preimplantation Genetic Diagnosis (Embryo Screening)*, PENN MED., <http://www.pennmedicine.org/fertility/patient/clinical-services/pgd-preimplantation-genetic-diagnosis> (last visited Nov. 22, 2015).

care for other abnormalities that can develop during the pregnancy should still be followed, especially during the first trimester.²⁶⁵

These diagnostic tests should be mandated in surrogacy arrangements, especially PGD, as it prevents implanting an embryo with a genetic abnormality into the surrogate.²⁶⁶ Many surrogacy arrangements already require some level of genetic testing; however, the PGD test nearly eliminates the possibility that the intended parents would have a child with a genetic defect—thus preventing children like Baby Gammy from being abandoned.²⁶⁷ Desiring not to have a child “with severe defects is not itself immoral, and actions to avoid such a reproductive outcome should be respected as an important aspect of procreative liberty.”²⁶⁸ These tests will further provide intended parents with the information necessary to properly prepare themselves, their home, and their finances for a newborn.²⁶⁹ Similar to the guidance clinics offer during the initial consultation and throughout the surrogacy process, they should also have procedures and support groups in place to prepare intended parents for taking home a special needs child.²⁷⁰ This type of support is extremely common in natural pregnancies, and therefore, should be made available through the clinic.²⁷¹

265. *Id.*

266. *Preimplantation Genetic Diagnosis (PGD) Explained*, *supra* note 262. Instances where the parties contract to receive a prenatal diagnosis of disability have led to conflict and media attention. Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1099 (2014). Fetuses or newborn babies born with disabilities challenge the parameters of the surrogacy agreement, but their rights are not at the forefront of the surrogacy debate. *Id.* at 1098. Some believe ART deeply affects people with disabilities’ right to be valued as full human beings, while others equate giving birth to a child with disabilities as a crime, a drain on society, and cruelty. *Id.* at 1099-1100. Although genetic testing is a viable procedure to prevent intended parents from having a child with disabilities, they are subject to much critique for furthering discrimination against people with disabilities, equating disability with reduced human value and opening the door to “designer babies.” *Id.* at 1099; *Preimplantation Genetic Diagnosis (PGD) Explained*, *supra* note 262. For a more in-depth analysis of this debate, see *PRENATAL TESTING AND DISABILITY RIGHTS* 13 (Erik Parens & Adrienne Asch eds., 2000).

One of the major concerns with PGD is the ability for sex selection. Whittaker, *supra* note 184, at 402. It is currently banned or heavily restricted in many countries, and most countries specifically ban its use for non-medical sex selection. *Id.* However, PGD for sex selection purposes is popular among ethnic Vietnamese, Indian, and Chinese couples. *Id.* at 402-03.

267. Darnovsky & Beeson, *supra* note 156, at 32; *Preimplantation Genetic Diagnosis (PGD) Explained*, *supra* note 262; see Peck & Gellneau, *supra* note 81 (explaining how the intended parents of Baby Gammy abandoned him because he had Down Syndrome).

268. ROBERTSON, *supra* note 2, at 154.

269. Darnovsky & Beeson, *supra* note 156, at 36.

270. *Where Should I Go From Here?*, NAT’L DOWN SYNDROME SOC’Y, <http://www.ndss.org/Resources/New-Expectant-Parents/Where-Should-I-Go-From-Here> (last visited Nov. 22, 2015).

271. *Id.*; see also Child Welfare Information Gateway, “Special Needs” Adoption: What Does It Mean?, U.S. DEP’T HEALTH & HUM. SERV. (July 2010), <http://www.childwelfare.gov/>

B. Consequential Measures

Unfortunately, despite careful planning and preparation, situations in which children may be abandoned can arise during the pregnancy, such as the breakdown of relationships, other changes in circumstances of contracting couples, death, or unwanted medical conditions.²⁷² Rejected children of surrogacy may be forced to stay in orphanages, or surrogate mothers may feel obligated to care for children that they never intended to raise.²⁷³ However, legal parentage cannot be forced upon the intended parents if they do not want the child.²⁷⁴ To protect the children's fundamental rights, human dignity, and well-being, authorities should try to reunite the child with the intended parents, but if reunification is impossible, the child must be freed up for adoption.²⁷⁵ This Note proposes that since most surrogacy clinics require lawyers to be involved throughout the surrogacy arrangement, a lawyer should be appointed to the child to represent its rights if the surrogacy arrangement goes awry.²⁷⁶ If the child is abandoned by the intended parents, this Note suggests applying U.S. Termination of Parental Right Proceedings, or the birth country's equivalent, should one exist, so the child can be available for adoption.²⁷⁷ Below, this Note demonstrates the typical measures and procedures one would take to terminate a parent's right.²⁷⁸ Finally, this Note posits creating an international registry of intended parents who reject their children.²⁷⁹ This registry would be available to all surrogacy clinics so they would be aware of the intended parents' past behavior, and refuse to help them with a surrogacy arrangement.²⁸⁰

1. Terminating Parental Rights

Although this Note is focused on international surrogacy, international law on adoption inadequately addresses this situation of abandonment.²⁸¹ Much of international adoption law has not caught up

pubs/factsheets/specialneeds (showing that even adopting a child with special needs has many different support systems).

272. Darnovsky & Beeson, *supra* note 156, at 21.

273. *Id.* Surrogates need assurance that they will not acquire child-rearing duties that they never wanted. ROBERTSON, *supra* note 2, at 126.

274. Darnovsky & Beeson, *supra* note 156, at 21.

275. *See infra* Part IV.B.1.

276. *See infra* Part IV.B.1. In TPR proceedings, a guardian *ad litem* is appointed to represent the child. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 246 (2002).

277. *See infra* Part IV.B.1.

278. *See infra* Part IV.B.1.

279. *See infra* Part IV.B.2.

280. *See infra* Part IV.B.2.

281. "The Hague 1993 Convention on Protection of Children and Co-operation in Respect of

to the many ways science can now help conceive a child.²⁸² Therefore, for purposes of this Note, it is necessary to analyze U.S. termination-of-parental-rights law and how it has been applied to parents voluntarily relinquishing the rights to their children.²⁸³ If parents do not want their child, the best solution is for the child to be freed up for the possibility of adoption.²⁸⁴

Many states have statutes providing for the termination of the parental rights for a parent who has abandoned his child.²⁸⁵ A parent is considered to have abandoned his child when his conduct demonstrates “a settled purpose to renounce his rights in and responsibilities over the child.”²⁸⁶ Case law often establishes that the conduct must “unequivocally and absolutely show complete and permanent abandonment.”²⁸⁷ In California, several different types of abandonment are laid out by statute, which allow the state to petition and begin a proceeding to free the child from the parents’ custody and control, so the child can be available for adoption.²⁸⁸

Intercountry Adoption (Adoption Convention) is . . . the closest international [law] that is relevant to surrogacy,” and could provide guidance in the issue of child abandonment or parents changing their minds. Mortazavi, *supra* note 24, at 2254 (footnote call numbers omitted). Over eighty countries have ratified or accepted the Adoption Convention, including the United States and India. *Id.* at 2254-55. However, at the June 2010 meeting of a Hague Special Commission on surrogacy, this Convention was rejected as an appropriate regulatory instrument for international surrogacy. *Id.* The Adoption Convention was not drafted with surrogacy in mind, and it is far too removed from the Convention’s original intent. *Id.* The Adoption Convention is especially inappropriate to regulate commercial surrogacy because it strongly discourages payment for adoption, which is at the heart of a commercial surrogacy deal. *Id.* at 2256.

Commercial surrogacy could also be regulated by The Convention of the Rights of the Child itself or its Optional Protocol. Luckey, *supra* note 188, at 236. The Convention of the Rights of the Child was the “first legally binding instrument to incorporate the full range of human rights—civil, cultural, economic, political, and social rights.” *Id.* One commenter has said: “The rights of children are specifically: the right to survival; to develop to the fullest; the protection from harmful influences, abuse and exploitation; and, to participate fully in family, cultural and social life.” *Id.* However, commercial surrogacy under this convention has never been explicitly addressed. *Id.* at 237.

282. See *supra* Part II.B.

283. See *supra* note 281.

284. See *infra* notes 285-301 and accompanying text.

285. Hiram D. Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 ST. JOHN’S L. REV. 215, 222 (1971).

286. *Id.* at 224.

287. *Id.*; see, e.g., *In re Cordy*, 146 P. 532, 533 (Cal. Dist. Ct. App. 1914) (finding that the acts of a parent in relation to the child must be done with the intention to abandon); *In re Bistany*, 239 N.Y. 19, 23 (1924) (holding that the parents behavior needed to so decisively point to abandonment that no other inference could be drawn to support terminating the parental rights).

288. CAL. FAM. CODE § 7822 (West 2013). First, there is a determination of abandonment, and then if abandonment is found, there is a hearing to determine the termination of all parental rights. Gordon, *supra* note 285, at 222.

Proceedings for the termination of parental rights ("TPR") generally follow the same procedure.²⁸⁹ The process is initiated by the filing of a petition in family court by an interested party requesting an adjudication of neglect or abandonment.²⁹⁰ The parent receives notice of the hearing and the option of state-appointed counsel if they are unable to afford an attorney.²⁹¹ From there, the hearing is broken down into two phases—a fact-finding stage, which determines whether the statutory grounds for termination have been established, and a dispositional hearing where the court determines the placement of the child.²⁹²

The Adoption and Safe Families Act of 1997 mandates that reasonable efforts be taken during a TPR hearing to keep a family together and, if they fail, a permanent home for the child should be found quickly (most likely through adoption.)²⁹³ However, this Note deals with parents who voluntarily want to relinquish the rights to their child.²⁹⁴ The Adoption and Safe Families Act of 1997 allows for "reasonable efforts" at reunification to stop if they are considered inconsistent with the child's permanency plan and gives states discretion to determine when efforts to reunite the family should not be made.²⁹⁵

Once the parental rights are terminated, the child can be adopted.²⁹⁶ Children, like Baby Gammy, who have genetic disorders or special needs are considered more difficult to place in permanent homes; however, it is not impossible.²⁹⁷ In the United States, there are currently waiting lists to adopt children with Down syndrome or other special needs.²⁹⁸ A California-based organization called "Adopt a Special Kid"

289. Deborah Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1069 (1981).

290. *Id.*

291. *Id.*

292. *Id.* at 1070.

293. Pub. L. No. 105-89, 111 Stat. 2115 (1997); Baldwin, *supra* note 276, at 255-57.

294. See *supra* notes 127-45, 163-225, 245-70.

295. Baldwin, *supra* note 293, at 261.

296. *Id.* at 262. Although adoption is a better option for an abandoned child, there are still negative psychological consequences for the child. Mathew B. Johnson, *Examining Risks to Children in the Context of Paternal Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 408 (1996). Evidence suggests that these children may have an inability to form close meaningful relationships because of the initial failure to establish a parent relationship. *Id.* at 406. It has been said that "the child's desire for parental love demonstrates the continuing connection to the biological family. No one else's love will be what the child imagines a parent to be. Even the most caring foster or adoptive parents will not fully compensate for what was lost earlier in childhood." Margaret Beyer & Wallace J. Mylniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 238 (1986).

297. Jill Sheldon, Note, *50,000 Children Are Waiting: Permanency, Planning, and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 94 (1997).

298. *Id.*; *Our Mission is to Ensure that Every Child Born With Down Syndrome Has the*

receives over 1500 inquiries each year from families who are interested in adopting children with disabilities.²⁹⁹ Congress has also recognized that adopting a child with special needs requires additional expenses and can be very costly for the adoptive parents.³⁰⁰ Therefore, they have created adoption subsidies to financially assist parents who decide to adopt a child with special needs to help give the child everything they need.³⁰¹

2. Banning Individuals from Surrogacy Arrangements

Once the intended parents' rights have been terminated, the last step this Note proposes to protect the fundamental rights of children is for the agency to establish lists of individuals who have abandoned their children and prevent them from entering into future surrogacy arrangements.³⁰² The Forum recognized that adequate record-keeping by surrogacy clinics would help protect the rights of children.³⁰³ Although this would interfere with the intended parent's fundamental liberty to procreative autonomy, the danger to children born to parents who abandoned a child after so much preparation outweighs this liberty.³⁰⁴ The intended parents' unwillingness to take responsibility for their children, regardless of the reason, endangers the welfare of the child, causes lasting psychological effects on the child, and burdens the state with paying for the children.³⁰⁵

These lists banning parents from entering into surrogacy arrangements are analogous to the "Do-Not-Call" Registries that prohibit telemarketers from initiating outbound telephone calls to a person on the

Opportunity to Grow Up in a Loving Family, NAT'L DOWN SYNDROME ADOPTION NETWORK, <http://www.ndsan.org> (last visited Nov. 22, 2015).

299. Sheldon, *supra* note 297, at 94; *Welcome to AASK (Adopt a Special Kid) in California*, AASK, <http://www.aask.org> (last visited Nov. 22, 2015).

300. Sheldon, *supra* note 297, at 83.

301. 42 U.S.C.A. § 601 (2014). This money comes from the state. *Id.* Because of the nature of international surrogacy arrangements, it is unclear which state would be left with the financial burden of supporting a child, whether they are placed in an adoptive home or not. Darnovsky & Beeson, *supra* note 156, at 20 (noting the unclear statelessness of children born through surrogacy arrangements). Back in 1967, the Child Welfare Statistics from the United States showed that foster care payments of public funds by state and local public welfare agencies amounted to nearly \$313.5 million, and this was long before the invention of ART. Gordon, *supra* note 285, at 220.

302. See *supra* notes 272-301 and accompanying text.

303. Darnovsky & Beeson, *supra* note 156, at 37. Although much of the "record keeping" is focused on ensuring children of surrogacy have access to information regarding their origins, there was also much concern among participants that the lack of records allow pedophiles and intending parents with criminal records or mental illness unlimited access to children. *Id.* at 21, 37. Participants were in agreement that records among the agencies must be better maintained in order to understand how to come up with a solution to international surrogacy's many problems. *Id.*

304. See ROBERTSON, *supra* note 2, at 125.

305. See *supra* note 296 and accompanying text.

list—persons who do not wish to receive calls that induce the purchase of goods or services.³⁰⁶ Telemarketers have a First Amendment right to free speech, but the Supreme Court has held that the consumers' right to privacy in their home, and their right to stop unwanted calls, outweighed the telemarketers' right.³⁰⁷ The Court did, however, distinguish between commercial speech and non-commercial speech, stating that the "Do-Not-Call" Registries can only be for commercial calls.³⁰⁸ This analysis can be applied to intended parents who have abandoned a child they created through ART by placing their names on lists, which will be distributed to all surrogacy clinics. Like the distinction between commercial and non-commercial calls, if the intended parents had to abandon their child because of unforeseen dire circumstances, such as the sudden death of one of the parents or complete bankruptcy, perhaps these intended parents can be excluded from the lists.³⁰⁹ Although the right of procreative autonomy is fundamental to intended parents, the fundamental rights of the children are equally, if not more, important.³¹⁰

V. CONCLUSION

Many international surrogacy arrangements proceed without drama; there is no disability, divorce, or sudden death, resulting in much-wanted children who will be loved and well cared for by their intended parents.³¹¹ Today, science is able to create life for those who desire a family, but are restricted by uncontrollable forces of nature.³¹² While this practice allows for families to achieve a sense of completion, the potential dangers surrounding the practice should not be underestimated.³¹³ In particular, "it is the risks to the child's rights that present the great irony of international commercial surrogacy."³¹⁴ It is a practice which is wholly geared towards producing a child, yet because

306. James Sweet, *Opting-Out of Commercial Telemarketing: The Constitutionality of the National Do-Not-Call Registry*, 70 TENN. L. REV. 921, 924 (2003).

307. Edward J. Schoen & Joseph S. Falchek, *Do-Not-Call Registry Trumps Commercial Speech*, 2005 MICH. ST. L. REV. 483, 499-500 (2005); Sweet, *supra* note 306, at 966.

308. See Schoen & Falchek, *supra* note 308, at 502.

309. *Id.*

310. *Id.*

311. Achmad, *supra* note 84.

312. See *supra* Part II.A.

313. See *supra* Part II.C. Since Baby Gammy's story hit headlines, reports of another couple abandoning one of their twins in India has surfaced. Smriti Kak Ramachandran, *Australian Couple Abandoning Surrogate Child Highlights Need for Strict Laws*, HINDU (Oct. 10, 2014), <http://www.thehindu.com/news/national/australian-couple-abandons-child-from-indian-surrogate-mother-bolsters-campaign-for-strict-laws/article6487751.ece>. The couple based their decision on a preference for a specific gender. *Id.*

314. Achmad, *supra* note 84.

of the technology, anonymity, and great distance separating intended parents and their child, all of which surround the creation of this life, it often ends up making the child extremely vulnerable.³¹⁵ Specifically, the children “are vulnerable to being rejected and abandoned if it turns out they are not born the way their commissioning parents hope they will be.”³¹⁶

International commercial surrogacy functions largely in an unregulated manner.³¹⁷ The few regulations that do exist protect the financial dealings of the agreement and some rights of the surrogates and intended parents.³¹⁸ Moreover, these regulations are merely considered guidelines, often ignored in India and the United States.³¹⁹ Absent from these guidelines are any protections for the life resulting from this complex, international dealing—that is, the life of the child.³²⁰ Domestic and international law disagree over who has legal parentage, types of surrogacy that are legal, and whether surrogacy should be prohibited altogether, equating this scientific practice with baby-selling and commodification of women and children.³²¹ This complex, disjointed mix of law makes international agreements near impossible.³²²

Despite the inconsistencies in surrogacy laws across borders, the surrogacy business is a growing industry driven by significant profits to surrogacy clinics.³²³ With a 1000% increase in the number of surrogacy arrangements in just four years, this is an area of global concern that will affect a significant number of children.³²⁴ Therefore, there is no time to wait for an international agreement to be reached on the many different controversial issues surrounding surrogacy.³²⁵ The most practical way to protect the fundamental rights of the children is to create mandatory preventative and consequential procedures for the surrogacy clinics to carry out.³²⁶ As the liaison between surrogates, intended parents, and doctors, the clinics are in the best position to carry out these procedures and, in fact, advertise their devotion to being there every step of the way and providing any information in relation to the surrogate pregnancy.³²⁷

315. *Id.*

316. *Id.*

317. *See supra* Part III.B.

318. *See supra* Parts II.B, III.B.

319. *See supra* Part III.B.

320. *See supra* Part III.B.

321. *See supra* Part III.

322. *See supra* Part III.B.

323. Darnovsky & Beeson, *supra* note 156, at 33.

324. *Id.* at 18.

325. *See Ramachandran, supra* note 313; *supra* Part II.C.

326. *See supra* Part IV.

327. *See supra* Part IV.A.1.

As long as clinics can clearly establish parentage through the intent-based test used in California, they will be able to tailor their services to the intended parents' needs and concerns.³²⁸

Baby Gammy and Baby Manji are glaring examples of the extremely real vulnerability of children born through international surrogacy, and their stories have exposed the "frequently uncomfortable aspects of the practice, and its potential to render a child's rights precarious."³²⁹ This Note hopes to provide some insight on how to have these difficult conversations in order to best prepare intended parents for the incredible journey of raising the family they have desired for so long.³³⁰ Even early, careful planning can fall short of success due to those life-changing situations that are never planned or the unpredictable change of heart, to which this Note provides possibilities focused on protecting the fundamental rights of the child.³³¹ Baby Gammy and children like him are emblematic of a generation of children being born through international commercial surrogacy, voiceless in the face of the wishes of their creators.³³²

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328. See *supra* Part III.A.

329. Achmad, *supra* note 84.

330. See *supra* Part IV.A.

331. See *supra* Part IV.B.

332. Achmad, *supra* note 84.

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