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Surrogacy, privacy, and the American Convention on Human Rights

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ABSTRACT

Under the Inter-American Human Rights System, individuals have a right to access reproductive technologies. However, the legal status of surrogacy agreements in State Parties to the American Convention on Human Rights (ACHR) is mostly uncertain. The article discusses whether a complete ban on surrogacy is compatible with the ACHR. It considers potential objections to surrogacy agreements: ‘corruption objections’—surrogacy denies the nature of what is being exchanged—, the potential exploitation of surrogates and welfare concerns of children born from surrogacy. The article concludes that States Parties to the ACHR should allow both altruistic and commercial surrogacy, but that regulatory schemes for appropriate protection of the rights of surrogates, intending parents, and children resulting from surrogacy ought to be secured.

KEYWORDS: Best interests, Exploitation, Human rights, Motherhood, Privacy, Surrogacy

INTRODUCTION

Surrogacy is a contentious yet widely used technology for reproduction. It is a practice through which a woman, by prior agreement with the intended parent(s), intentionally becomes pregnant, carries, and gives birth to a child that she does not pretend to parent. In ‘traditional surrogacy’, the surrogate contributes with her own egg. In turn, in ‘gestational surrogacy’, a fertilized egg is implanted in the surrogate. In addition, surrogacy

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may be altruistic or commercial, depending on whether the surrogate gets paid for her labor.¹

Surrogacy requires changes in the legal regulation of parentage and challenges traditional accounts of motherhood, parenthood, pregnancy, and the family. Traditionally, the law recognized natural parentage and adoption as the two models of a parent–child legal relationship. The legal recognition of surrogacy entails that the model of parenthood by intent is a possible basis of a parent–child legal relationship.² Thus, parenthood need no longer be only a biological fact, but a socially constructed status derived from the consent and the intention to become a parent.

The legal status of surrogacy varies across countries and regions. Some countries completely ban it³; others only allow for altruistic surrogacy—sometimes accompanied by payment of ‘reasonable expenses’ to the surrogate.⁴ In turn, a few countries allow for both altruistic and commercial surrogacy. Finally, in many countries, the legal status of surrogacy is uncertain: it is not expressly prohibited nor permitted.

In Latin America, the legal regulation of surrogacy is not uniform. Some states in Mexico allow for both commercial and altruistic surrogacy.⁵ Brazil has two resolutions allowing for altruistic surrogacy.⁶ In most of the rest of the region, however, the legal status of surrogacy agreements is uncertain: it is neither expressly prohibited nor permitted.⁷ Thus, legal uncertainty is the rule in Latin America. This means that, where surrogacy agreements are celebrated, its validity is left to judicial discretion. On the one hand,

¹ It has been argued that, in fact, surrogacy is not a new technology, but a social arrangement with ancient origins: biblical examples are those of Abraham and Sarah, and Rachel and Jacob. See Sharyn L. Roach Anleu, *Reinforcing Gender Norms: Commercial and Altruistic Surrogacy*, 33 ACTA SOCIOLOGICA 63 (1990). At the very beginning of this paper, it is important to note that, legally, the surrogate need not be a woman. Take the case of Argentina, where Law 26743 on gender identity, passed in May 2012, establishes a right to decide one’s gender identity, regardless of whether the chosen gender is or is not the same as that assigned at birth. Among other provisions, Article 3 of this law recognizes a right to have one’s name rectified in all documents that certify identity. In light of this, I will use the term ‘surrogate’ rather than ‘surrogate woman’. Where needed, I will use heteronormative terminology only for the sake of clarity and brevity.

² According to the Permanent Bureau of the Hague Conference on Private International Law, an intending parent is ‘the person(s) who request another to carry a child for them with the intention that they will take custody of the child following the birth and parent the child as their own. Such persons may or may not be genetically related to the child born as a result of the arrangement.’ See Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues From International Surrogacy Arrangements*, Preliminary Document No. 10 (Mar. 2012), quoted in John Tobin, *To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?*, 63 INT’L & COMP. L. Q. 2 (2014).

³ For instance, France, Germany, Italy, Spain, and Switzerland.

⁴ For instance, Australia, Canada, and the United Kingdom.

⁵ See eg Civil Code of the State of Coahuila; Civil Code of the State of Queretaro; Civil Code of the State of Tabasco (amended in Jan. 2016 by Decree 233, Government of Tabasco); Family Code of the State of Sinaloa, Articles 282 – 297.

⁶ See Conselho Federal de Medicina, *Resolution No. 1957/2010* (Dec. 15, 2010); Conselho Federal de Medicina, *Brasil. Resolução CFM n° 2.121, de 16 de julho de 2015*.

⁷ See eg ‘C., F. A. y otro v. R. S., M. L. s/impugnación de maternidad’, Juzgado Nacional de Primera Instancia en lo Civil N° 102, June 18, 2015 18/5/2015 (Arg.), www.colectivoderechofamilia.com/categoria/jurisprudencia/jurisprudencia-nacional/ (last visited Jan. 16, 2018); “NN O, s/inscripción de nacimiento”, Juzg. Nac. Civ. N° 83, July 30, 2015 (Arg.) www.colectivoderechofamilia.com/categoria/jurisprudencia/jurisprudencia-nacional/ (last visited Jan. 16, 2018); Corte Constitucional, Nov. 12, 2015, Sentencia SU-696/15 (Colom.); Corte Superior de Justicia de Lima, Quinto Juzgado Especializado en lo Constitucional, 21/02/2017, ruling confirmed by Corte Superior de Justicia de Lima, Tercera Sala Civil, Resolución N° 3 (Ref. Expte. Sala N° 01071-2017-0), del 28/06/2017.

judges may consider surrogacy agreements void because of lack of contractual object or its illegality: body parts and humans cannot be traded. In contrast, on the other hand, in the absence of an express prohibition, other courts allow for intentional parenthood. In fact, for example, in Argentina and Colombia judges have recognized the validity of the agreements, sometimes by making reference to the best interests of the child principle.⁸ In addition, in the middle of these two extremes, many courts would deny parenthood to the intending parents by invoking the *mater certa semper est* principle—law recognizes motherhood on the basis of the biological fact of pregnancy that leads to a presumption *lege et de lege* that the mother of a child is the woman who gave birth.⁹ This denial would not mean that the intending parents cannot eventually be recognized as the legal parents of the child: in some countries, adoption is used to establish legal parentage of the intending parents. To do so, they would have to go through a complex legal process involving several steps. If the surrogate woman is married, family law usually assumes that her husband is the father of the child. The surrogate's husband is to contest his paternity invoking lack of biological link or of consent to insemination. If that proceeds, the intending father could recognize the child—the same would apply if the surrogate were single. Finally, his partner should go for spousal adoption. If surrogacy was gestational and the intending mother contributed with her genetic material, she would be adopting her own biological child, which would entail a violation of adoption rules.¹⁰ Finally, because of this uncertainty, sometimes the intending mother is directly registered as the one that gave birth to the child—but criminal codes consider this behavior a crime.¹¹

Traditionally, in Latin America, following the continental tradition, this uncertainty about the legal status of surrogacy would have been treated as any other issue involving parentage, that is, as a family law matter that ought to be regulated mainly by Civil Codes. In the last years, however, it has been argued that private law has been constitutionalized, which means that private law matters ought to be analysed and regulated under the framework of constitutional fundamental rights.¹² Moreover, most countries have even incorporated human rights treaties to their constitutions, which means that they are binding law for local courts.¹³ In light of this and of the uncertainty about the legal status of surrogacy, and given that most countries in Latin America are parties to the American Convention on Human Rights (ACHR),¹⁴ in this article I

⁸ *Id.* See also 'Defensor del Pueblo de la Ciudad Autónoma de Buenos Aires y Otros c. GCBA y Otros s/amparo', Cámara de Apelaciones en lo Contencioso Administrativo y Tributario, Sala I, Aug. 4, 2017 (Arg.). In Argentina, as of May 2018, there are up to 26 judicial decisions on surrogacy.

⁹ See Eleonora Lamm, *Argentina* in INTERNATIONAL SURROGACY ARRANGEMENTS. LEGAL REGULATION AT THE INTERNATIONAL LEVEL 5 (Katarina Trimmings & Paul Beaumont, eds., 2013) [hereinafter Trimmings & Beaumont]; Jaime Tecú & E. Lamm, *Guatemala* in Trimmings & Beaumont, at 167; E. Lamm, *Venezuela* in Trimmings & Beaumont, at 397.

¹⁰ *Id.*

¹¹ Lamm, *Venezuela*, *supra* note 9.

¹² See notably, Art. 1 Cod. Civ. Y Com. (Arg.) (establishing that cases should be solved in conformity with the Argentine National Constitution and the international human rights treaties to which the Argentine State is a party).

¹³ See eg Art. 75.22 of the Argentine National Constitution; Art. 1 of the Political Constitution of the United Mexican States; Art. 93 of the Colombian Constitution of 1991; Art. 7 of the Constitution of Costa Rica.

¹⁴ For a list of States parties, see https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos_firmas.htm (last visited Jan. 16, 2018).

discuss whether a complete ban on surrogacy is compatible with the Inter-American Human Rights System. Surrogacy has not yet been discussed by the Inter-American Court of Human Rights (IACtHR). Thus, I examine this question under the framework of the 2012 IACtHR reproductive rights landmark decision in *Artavia Murillo v. Costa Rica*, where the Court held that a complete ban on assisted reproductive technologies interferes with the right to a private and family life, which comprises the decision to become a parent, as well as access to the means to materialize that private decision.¹⁵ The article will proceed as follows. In Section I, I will argue that surrogacy agreements can be seen as an exercise of the right to privacy recognized by the ACHR. Nevertheless, I shall explain that, given that there are no absolute rights under the ACHR, this right may (or may not) be restricted in the name of other values. In Section II, I will consider three potential objections to surrogacy agreements, which I call ‘corruption objections’—surrogacy denigrates the nature of what is being exchanged: essentialism, perfectionism, and commodification of children. In Section III, I discuss whether surrogacy may be restricted because of the potential exploitation of gestational women. Section IV discusses the case law of the European Court of Human Rights regarding welfare concerns of children born from surrogacy. In each section, I will engage with existing doctrine, different philosophical approaches, and case law. Furthermore, when discussing these points, I will lay out the principles that ought to guide the regulation of surrogacy under the ACHR. In Section V, my conclusion will be that none of these justify a complete ban on surrogacy—but may justify regulations consistent with the ACHR.

Before starting my discussion, let me mention that, of course, in many other jurisdictions—notably, the United States and Canada—the discussion about surrogacy is about its commercialization. In Canada, for example, the ban on commercial surrogacy is seen as an expression of communal social values and a concern for the commodification of human gametes and embryos. Thus, the discussion there is whether restrictions are compatible with the Canadian Charter of Rights and Freedom. In contrast, in the USA, a market approach to surrogacy seems to be the rule.¹⁶ Now, given

¹⁵ *Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica*, Inter-Am. Ct. H. R. (ser. C) No. 257 (Nov. 28, 2012) [hereinafter *Artavia Murillo*]. Although the Court has not dealt directly with surrogacy, in a case related to *Artavia Murillo*, the Court emphasized the need to regulate surrogacy. See *Gómez Murillo et al. v. Costa Rica*, Inter-Am. Ct. H. R. (Nov. 29, 2016) ¶ 55-56. In *Artavia Murillo*, the Court also held that banning access to assisted reproductive technologies discriminates against infertile couples who cannot afford to travel abroad to get treatment. I will not discuss the implications of this argument for the surrogacy debate because I take the privacy argument to be the main one in the current state of the discussion in the region. Elsewhere, I argue that a complete ban on surrogacy would discriminate against infertile individuals and the LGBTQI community who cannot afford to travel abroad to get surrogacy services. For equality reasons, a complete ban would be inconsistent with the ACHR. It is a well-known fact that reproductive tourism is practiced by those who can afford to pay for surrogacy services abroad. For a discussion of medical tourism and the creation of life, see I. GLENN COHEN, *PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS* 371-420 (2014) [hereinafter COHEN 2014]. As Cohen explains, medical tourism has become an important global industry. In addition, I argue that, although there is clear textual support for founding an argument on discrimination to infertile couples, the problem with the Court's focus on infertility is that basing the right to health claim on the stigma created by infertility actually reinforces stereotypes about the role of men and, specially, women in society and the assumption that their life is incomplete unless they become parents. See Martín Hevia, *Surrogacy and Discrimination* [unpublished manuscript, on file with author].

¹⁶ For the discussion in the Canadian context and comparisons with the United States, see TRUDO LEMMENS ET AL. (EDS.), *REGULATING CREATION: THE LAW, ETHICS, AND POLICY OF ASSISTED REPRODUCTION* (2017).

that the discussion in most State parties to the American Convention is at a different, earlier stage, the focus of this paper will be the more basic question of whether surrogacy can or should be allowed at all. Nevertheless, when discussing different regulatory approaches to surrogacy, I will engage in the commercialization debate.

In addition, surrogacy is a transnational social and legal challenge because people from countries where the practice is not allowed travel to other jurisdictions in search of surrogates and intermediary agencies, provided that they have the economic resources to do so. Thus, surrogacy is one of the main services involved in what is now known as ‘reproductive tourism’. Furthermore, the international regulation of surrogacy poses important private and public international law issues. Several approaches have been adopted in domestic laws.¹⁷ In this paper, given the focus in the legal regulation of surrogacy within State parties to the ACHR, I will not be discussing these complex international and transnational legal issues.

ARTAVIA MURILLO, PRIVACY, AND SURROGACY

In *Artavia Murillo*, the IACtHR discussed reproductive decision-making under the lens of the right to privacy, recognized in article 11 of the ACHR. First, Article 11(1) establishes that each person has a right to respect for his/her honor and recognition of his/her dignity. In addition, article 11(2) states that ‘[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.’ Article 11(3), in turn, establishes that this right must be protected by law. In that vein, in *Artavia Murillo*, the IACtHR has established that,

The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the future course of relevant events for a person’s quality of life. Private life includes the way in which individual views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality.¹⁸

For the court, private choices belong to the important sphere of individual existence and identity in which state discretion should be curtailed.¹⁹ Reproductive choices are private choices. This is why the Court held that that the

decision of the couples [...] to have biological children is within the most intimate sphere of their private and family life. Furthermore, the way in which couples arrive at that decision is part of a person’s autonomy and identity, both as an individual and as a partner. It is therefore protected under Article 11 of the American Convention.²⁰

¹⁷ See COHEN 2014. For a proposal, see Sharon Bassan, *Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions*, 37 MICH. J. INT’L L. 299 (2016).

¹⁸ *Artavia Murillo*, ¶ 143.

¹⁹ *Dickson v. The United Kingdom*, 2006 Eur. Ct. H. R. 430, ¶ 78, in *Artavia Murillo*, ¶ 74.

²⁰ *Artavia Murillo*, ¶ 76. Accordingly, the European Court of Human Rights has recognized that protecting human life entails respecting the decision to become a father or mother, including the right to become genetic parents. The ECtHR has decided two cases that strengthen the right to become parents on the basis of the right to privacy and autonomy. In “Costa and Pavan vs. Italy” the petitioners argued, because Italy

This means that, *prima facie*, from the perspective of the ACHR, people have a right to reproductive autonomy inasmuch as neither the State nor third parties have the right to interfere in their reproductive decisions. Among the various reproductive decisions we may make is to make use of alternative methods of procreation, such as surrogacy.

Having explained this, it must be borne in mind that there are no absolute rights under the ACHR. Indeed, Article 16(2) of the Convention establishes that the exercise of rights granted under the Convention is 'subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security,²¹ public safety or public order, or to protect public health or morals or the rights and freedoms of others.'²² The IACtHR has stated that, for a restriction of a right to be legitimate, it (i) must be made in response to 'an urgent social need' and directed towards 'satisfying an imperative public interest', (ii) must employ the least restrictive alternative, i.e., the available means which least jeopardize the protected right; and (iii) must be 'proportional to the interest [that it seeks to protect] and must adjust itself to the achievement of this legitimate objective'.²³

In order to analyse whether arguments posed against surrogacy would justify its restriction under Article 16.2 of ACHR, in the next sections, I will discuss potential objection to surrogacy, starting with corruption objections.

CORRUPTION OBJECTIONS

Essentialism

The first potential objection is what Debra Satz describes as the 'essentialist thesis', that is, the idea that there is something essential about reproductive work that makes it

permits abortion on the basis of a right for privacy and family life, it must allow GDP (pre-implantation diagnosis). Otherwise, Italy would infringe the right to privacy of the parents. The decision is available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3086590-3416338> (last visited Jan. 16, 2018). In the 2011 ruling in "S.H. vs Austria," the Court applied the same argument to IVF procedures. Austria permitted IVF procedures that did not involve using donor sperm. The petitioners argued that the state breached the fundamental right to privacy. For the Court, there is no consensus in Europe on issues of gamete donation in IVF and, therefore, no violation of the European Convention of Human Rights. The decision is available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3086590-3416338> (last visited Jan. 16, 2018).

²¹ "Necessary in a democratic society" was incorporated into the Inter-American system of human rights by the 1985 Advisory Opinion of the IACtHR (OC-5/85). See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 4 ¶ 46 (Nov. 13, 1985). On this point, see C. M. QUIROGA AND C. N. ROJAS, *SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: INTRODUCCIÓN A SUS MECANISMOS DE PROTECCIÓN* 34, 35 (Centro de Derechos Humanos, 2007).

²² For an analysis of an example of the restriction of one right in order to protect another, see Analía Banfi Vique, Oscar A. Cabrera, Fanny Gómez Lugo and Martín Hevia, *The Politics of Reproductive Health Rights in Uruguay: Why the Presidential Veto to the Right to Abortion is Illegitimate*, 12 J. OF HEALTH LAW 192 (2011) (In a democratic society, freedom of press and association may be limited in order to protect the right to health).

²³ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *supra* note 21. See, also, "Palamara Iribarne v. Chile" (judgment of 22 November 2005); "Kimel v. Argentina" (judgment of 2 May 2008); "Usón Ramírez v. Venezuela" (judgment of 20 November 2009); and "Fontvecchia and D'Amico v. Argentina" (judgment of 20 November 2011). For a theoretical discussion of the proportionality argument, see Carlos Bernal Pulido, *El Principio de Proporcionalidad y los Derechos Fundamentales* (2003).

different from other jobs, that is, that should make it not subject to trading.²⁴ Reproductive work involves restrictions on the behavior of women over the 9 months of pregnancy. These restrictions are not present in other jobs. Moreover, in gestational surrogacy, given that the woman donates her egg, there's a genetic component lacking in other kind of works. In this vein, Carole Pateman states that women's reproductive work is more 'comprehensive' of their identity than other productive capacities that women and men have.²⁵

These arguments may be challenged for a number of reasons. For instance, as Debra Satz explains, 'how do we decide which features or skills of women are essential to their identity and which are not? In other words, why should we consider sexuality to be more binding to the self than friendship, family, religion, nationality or work?'²⁶ Furthermore, other jobs may also involve significant restrictions, such as the prohibition to work for other people when the employment contract has an exclusivity clause. Lastly, as Satz also explains, perhaps the view that selling one's reproductive capacity is degrading could reflect an attempt by society to control female sexuality.²⁷

From the perspective of Article 16 (2) of the Convention, this objection to surrogacy seems to appeal to public order or morality as a reason to restrict access to surrogacy. Nonetheless, the reference to morality or common good should not necessarily be linked with the values of the majority, namely with positive morality (the fact that certain values are shared by the majority does not say anything on whether the law should enforce them); nor can 'public order' mean just 'order'. The Court's interpretation of article 11 of the ACHR dictates that the State should not interfere with the individual choice of life plan or ideals of human excellence; it should instead limit to the design of institutions that facilitate people's pursuit of their own plans and the fulfillment of their virtue's ideals, such as different life plans, even when those plans may seem irrational or reckless to a majority of us.²⁸ The limit is, thus, the infringement of third parties' rights. Therefore, to dismiss the essentialist thesis, and even granting the existence of a tight connection between sexuality and a person's identity, it may suffice to appeal to the prohibition to impose values on other people. Accordingly, it follows from the foregoing that the—popular—belief that the sale of reproductive services is immoral does not, in itself, justify its prohibition. In any event, it would be necessary to demonstrate that surrogacy causes damage to third parties—such as the resulting child or the gestational women.

²⁴ Debra Satz, *Por Qué Ciertas Cosas No Deberían Estar a la Venta. Los Límites Morales de los Mercados: Los Mercados en la Reproducción Femenina*, 13 REVISTA ARGENTINA DE TEORÍA JURÍDICA, http://www.utdt.edu/download.php?fname=_135092683913866300.pdf (last visited Jan. 16, 2018).

²⁵ *Id.* This position is reflected in the Warnock report, which establishes that 'it is inconsistent with human dignity that a woman uses her uterus to earn a benefit.' See M. WARNOCK ET AL., REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRIOLOGY. (London. Her Majesty's Stationery Office, 1984).

²⁶ Satz, *supra* note 24, at 4.

²⁷ *Id.*

²⁸ *Escher et al. v. Brazil*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. C.H.R. (ser. C) No. 200, 113 (Jul. 6, 2009); *Case of the Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. C.H.R. (ser. C) No. 148, 194 (Jul. 1, 2006); *Escú Zapata v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. C.H.R. (ser. C) No. 165, 95; *Tristin Donoso v. Panama*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. C.H.R. (ser. C) No. 193, 55 (Jan. 27, 2009).

Perfectionism

A second argument against both altruistic and commercial surrogacy claims that it corrupts maternity, that is, the relationship between mothers and children.²⁹ This is a perfectionist argument because, in this view, the maternal bond reflects an important social value that our legal and political institutions ought to promote. In its best light, this objection could be founded in a form of communitarianism. Communitarians criticize the universalist and 'atomist' pretensions of liberalism. They contend that liberalism deprives us of contextual ties, such as our families or religions that define our identity as people.³⁰ Therefore, political and legal institutions must promote social and communal values, which build our identity. Respect for autonomy is important, but it cannot be everything for life in society.³¹

Now, the problem with this argument is that it seems to imply that the life plan to carry a pregnancy to term, give birth, and then raise a child is more valuable than the life plan of women who become pregnant but do not share the entirety of that plan. For instance, women may decide to have an abortion, or, alternatively, they may not want to raise a child.

The perfectionist may still object that that liberal anti-perfectionism is suspicious: it claims neutrality toward different conceptions of the good but, by not supporting valuable practices, liberals impose their own ideal of the good life. Thus, they fail to be neutral.³² This objection is unfair because liberals do not deny the importance of constitutive values and communal attachments. For instance, John Rawls, a liberal political theorist, agrees with one of his critics, Michael Sandel, in that such values flourish in the context of different sorts of associations, family life, churches, and so on.³³ Allowing surrogacy does not denigrate the relationship between mother and children. In fact, intentional mothers (and intentional parents, more generally) can develop deep personal attachments just as biological parents do.

Commodification

A third 'corruption' argument refers to the commodification of children, which is morally unacceptable and further unlawful. This concern is only present in commercial surrogacy. International law clearly prohibits the sale of children. Article 35 of the Convention on the Rights of the Child (CRC) provides that 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.'³⁴ Moreover, Article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child prostitution and child pornography states that: 'Sale of children means

²⁹ Satz, *supra* note 24.

³⁰ This idea is taken from Michael Trebilcock, *Paternalism in THE LIMITS OF FREEDOM OF CONTRACT* 155 (1993).

³¹ Daniel Bell, *Communitarianism* in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edgar N. Zalta, ed), <http://plato.stanford.edu/entries/communitarianism/> (last visited Jan. 15, 2018).

³² R. A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHILOS. 345, 381 (1993).

³³ JOHN RAWLS, *POLITICAL LIBERALISM* 139–40, 217 (1993). For a discussion of this point, see Stephen Mulhall & Adam Swift, *Rawls and Communitarianism* in THE CAMBRIDGE COMPANION TO RAWLS 466 (Samuel Freeman, ed., 2003).

³⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 35; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 1, U.N. General Assembly Resolution 54/263 (May 25, 2000) quoted in Tobin, *supra* note 2.

any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.’³⁵ According to these rules, if commercial surrogacy entails selling children, then it should be banned. Nevertheless, as Tobin explains, this provision is subject to interpretation and, ultimately, interpretation is an imprecise task that rests on the persuasiveness of the interpretation offered.³⁶ One way of interpreting these provisions is by making reference to Article 3 of the Optional Protocol on the Sale of Children, Child Prostitution, and Child pornography, which provides that 1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

- (a) In the context of sale of children as defined in article 2:
- (1) Offering, delivering or accepting, by whatever means, a child for the purpose of:
 - b. Sexual exploitation of the child;
 - c. Transfer of organs of the child for profit;
 - d. Engagement of the child in forced labor;

Tobin argues that, given that all these activities contemplate the exploitation of children, commercial surrogacy may not be banned because its purpose is non-exploitative; rather, the intending parents are supposed to provide appropriate care and support to the child.³⁷ However, Tobin claims that, given that article 2 does not refer to ‘exploitative acts’ but to ‘any act’, it follows that the purpose of the transfer is irrelevant.³⁸ Any act of transfer would entail a violation of children’s rights.

Now, as Satz explains, the surrogacy agreement does not make intended parents owners of the resulting children. Children born from surrogacy are not expendable objects. Parents cannot do whatever they want with their children. They cannot sell them, nor destroy them as they may do with other objects.³⁹ Children do not become slaves of their intended parents. Intended parents are subject to the same laws and human rights responsibilities than the ones binding to a biological or adoptive parent.⁴⁰

Summing this section up, I have argued that, under the rights approach of the ACHR, corruption objections fail to justify a complete ban to surrogacy. First, with

³⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of children, child prostitution and child pornography, *supra* note 34, art. 2 (a).

³⁶ Tobin, *supra* note 2, at 18.

³⁷ *Id.*, at 19.

³⁸ *Id.*

³⁹ See Satz, *supra* note 24. For a discussion on what does it entail that an embryo is a ‘thing’ and not a ‘person’, see Martín Hevia & Carlos Herrera Vacaflor, *From Recognition to Regulation: The Legal Status of In Vitro Fertilization and the American Convention on Human Rights*, 25 FLA. J. INT’L L. 453 (2013).

⁴⁰ Satz, *supra* note 24. Kant’s views may be illuminating on this point. He explains that the interaction between parents and their children is an interdependent and non-consensual fiduciary interaction that gives rise to rights ‘akin’ to rights to things: children are factually unable to consent to the way they are treated by their parents. In the absence of consent, the fiduciary should not benefit from her position *vis à vis* the beneficiary: she has to promote the interests of the latter. Thus, when parents do not fulfill their duties, children are entitled to be put back in the situation where, even though they cannot yet be masters of themselves, they are not used as mere means to their parents’ ends. For a discussion, see Arthur Ripstein, *Kant on Law and Justice* in THE BLACKWELL GUIDE TO KANT’S ETHICS 161 (T. E. Hill, ed, 2009). In addition, philosophically, it may be objected there are no relevant differences between commercial surrogacy and directly buying and selling children: presumably, the buyer would also be subject to the same laws and human rights responsibilities than intended parents in

regard to the essentialist objection, the—popular—belief that the sale of reproductive services is immoral does not, in itself, justify its prohibition. Second, the perfectionist argument fails because it assumes that the life plan of raising children is more valuable than others—an assumption incompatible with the liberal foundation of the ACHR. Furthermore, it's not true that surrogacy corrupts maternal and paternal bonds—obviously, intentional parents can develop deep personal attachments to their children just as biological parents do. Finally, I have argued that, given that surrogacy does not entail per se exploitation of children, it is compatible with human rights law. In fact, intentional parents owe the same type of duties that biological parents owe to their children. In the next section, I discuss the objection raised by the potential exploitation of surrogate women.

EXPLOITATION⁴¹

Since Marx, 'exploitation' has been a contested concept. There are many accounts of its meaning. One of them is associated with advantage-taking. However, in fact, every contractual arrangement entails advantage-taking: each of the parties to a contract obtains something from the counter-party. The issue, in any case, is which types of advantage-taking are acceptable.⁴²

Under international law, the Convention on the Elimination of All Forms of Discrimination Against Women does not specifically ban the exploitation of women.⁴³ Article 6 provides that 'State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and *exploitation of prostitution of women*.' As Tobin explains, in contrast, Article 34 of the CRC explicitly imposes an obligation to prohibit 'all forms of exploitation of children'. Nevertheless, it may be possible to construe Article 6 of the CEDAW broadly as banning exploitation of women more generally by interpreting it in accordance with the object and purpose of the Convention.⁴⁴ That would mean that, given that the aim of CEDAW is to protect women from all forms of discrimination, exploitation in general would be against its purpose.⁴⁵ An important

surrogacy agreements. One possible answer to this objection is that there is a conceptual distinction between surrogacy and buying and selling children. In surrogacy, the object of the agreement is not children per se, but the provision of a certain service, to wit, surrogacy. In contrast, in a buying and selling contract, the object of the agreement is the thing to be delivered to the buyer.

⁴¹ Another objection that may be considered here is that of unduly inducing a woman to enter a surrogacy agreement. In that scenario, the surrogate woman would be receiving such a good offer that it would make it very difficult for her to reject it. It's difficult to see how this offer would make the woman worse-off. Thus, I will not be discussing it here in detail. See Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J. L. MED. & ETHICS 269 (2013).

⁴² For the discussion on exploitation, see generally ALAN WERTHEIMER, *EXPLOITATION* (Princeton University Press, 1999). The idea that contracts are about advantage-taking was developed in Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980). For a discussion of Kronman's thesis, see, e.g., Martín Hevia, *The Distributive Understanding of Contract Law: Kronman on Contract Law and Distributive Justice in Reasonableness and Responsibility: A Theory of Contract Law* 19 (Springer, 2012).

⁴³ Tobin, *supra* note 2, at 27.

⁴⁴ See Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31(1).

⁴⁵ Article 11.2 sets out the measures to be taken by states to 'prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women's] effective right to work.' These measures include the prohibition of dismissal for pregnancy or maternity leave, maternity leave with pay or 'comparable social benefits', and the 'necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment . . . of childcare facilities.'

consideration is that of the health of the gestational woman. The health of the surrogate ought to be protected throughout the entire process. This duty is reflected in the CEDAW. Indeed, its article 12 requires States Parties to ‘ensure [...] access to health-care services, including those related to family planning’ and to ‘ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.’⁴⁶ As Stark elucidates, provided the health of the surrogate is protected, objections to the practice are reduced. Thus, neither commercial nor altruistic surrogacy is inconsistent with CEDAW.⁴⁷ Of course, in countries where abortion is not illegal, gestational women should be entitled to a right to get an abortion regardless of the content of the agreement.

The exploitation objection may take two forms. The first one focuses on the exploitation of poor women, who may be taken advantage because of their vulnerability. The second one focuses on gender inequality: in societies where gender has effects on the opportunities that people may have in their lives, commodifying women’s reproductive capacity is objectionable: women may be seen as mere reproductive tools, therefore perpetuating gender stereotypes. This is the ‘structural exploitation’ objection.

As for the exploitation of women in vulnerable situations, mainly living in poverty, in many cases, the consent of the surrogate is not marked by her extreme need to get money; in those cases, there is no ‘state of necessity’. Hence, the context in which the surrogacy takes place is critical. Thus, for example, as Pamela Laufer-Ukeles describes, in the United States the structural factors that lead to the suspicion of exploitation of a woman are not typically present.⁴⁸ In developing countries these factors may be present, but not in each and every transaction. Furthermore, in exercising their autonomy, many women may especially value the opportunity of entering into these agreements—for instance, because they are committed to helping other people. A universal prohibition based on reasons of principle would not be sensitive to the different realities of each country—all the more, it would not be sensitive to the context in which each transaction takes place. In addition, it has been suggested that surrogates will unlikely be poor. This is because, given structural inequality in access to health services and the social determinant of health, poor women are more likely to have a poor health

In turn, Article 12 requires the state to ‘ensure access to healthcare services, including those related to family planning’ and, more specifically, to ‘ensure to women appropriate services in connection with pregnancy, confinement in the postnatal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.’ Article 14 reiterates the right to family planning services for rural women in particular. Finally, Article 16 requires states to ‘take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.’

⁴⁶ Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13, art. 12. The Committee’s General Recommendation No. 24 elaborates on Article 12.1, addressing women’s access to health care, including family planning services. The Committee recommends that “[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.” All quoted in Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INTL & COMP. LAW 369, 379 (2011–2012).

⁴⁷ Stark, *supra* note 46, at 380. Nevertheless, as CEDAW also speaks of maternity as a ‘social function’, it may mean that forms of commercial surrogacy where intending parents and the surrogate remain strangers are inconsistent with CEDAW.

⁴⁸ See Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L. J. 1123, 1245–47 (2013).

condition in comparison to middle class women.⁴⁹ On this basis, an absolute prohibition of commercial surrogacy appears to be incompatible with the ACHR. Nevertheless, of course, law can take measures to prevent exploitation of vulnerable women. As I shall mention later in the paper, the legal regulation of surrogacy may include 'exploitation-avoiding' measures—other than those usually available for contracts more generally, such as unconscionability.

As for the structural exploitation objection, a potential problem is that banning surrogacy may, in fact, reinforce—rather than combat—social norms about the role of women in society: it may reinforce the 'Good Mother/Bad Mother' stigma.⁵⁰ The good mother would be a woman who embraces the role that society expects of her: she accepts the biological and genetic link between conception, gestation, and maternal bonds. She puts her maternal role over other personal choices such as professional realization. In contrast, the bad mother rejects the inevitability of biological maternal bonds. By so doing, she rejects her children and abandons them. For her, personal concerns are more important than motherhood. In this view, the 'bad mother' is socially disapproved, thus leading to stigma and social stereotyping.⁵¹ Stigma may impact personal relationships and as shown in greater depth below, affect health.⁵² Indeed, surrogates have often reported lack of social support from their partners and families.⁵³ 'Pro natalist' and 'sexist' societies—such as Latin American societies—socially disapprove bad mothers.⁵⁴ Again, this concern need not imply a market approach to surrogacy, but it means that completely banning surrogacy would not contribute to fostering gender equality.

In order to address the issue of potential exploitation, let me consider three regulatory approaches: the 'contractual-economic' view; the 'anti-stigmatization' approach; and the 'expectations' perspective. I will address each of these three in turn. Working under the assumption that surrogacy is compatible with the ACHR, during my exposition, I will explain how each of these approaches can help us think of how regulation should or should not look like.

The 'contractual-economic' view

Under this view, surrogacy should be considered a contract and, hence, usual defenses, such as unconscionability, threat, and fraud would apply. Thus, for instance, the unconscionability doctrine would prevent one of the parties to the contract from taking an excessively disproportionate advantage from its counterpart. Now, in the absence of a contractual defense, in this view, as Posner has argued, surrogacy contracts should be

⁴⁹ ALFREDO BULLARD GONZÁLEZ, *DERECHO Y ECONOMÍA. EL ANÁLISIS ECONÓMICO DE LAS INSTITUCIONES LEGALES* 302 (Palestra Editores, 2006).

⁵⁰ Paula Abrams, *The Bad Mother: Stigma, Abortion and Surrogacy*, 43 J. L. MED. & ETHICS 179, 180 (2015).

⁵¹ Abrams quotes a recent study of British women's attitudes that suggests that stigma is associated with surrogacy, consistent with the results in the United States and Canada. See A. E. Poote & O. B. A. van den Akker, *British Women's Attitudes to Surrogacy*, 24 HUM. REPROD. 139 (2009), cited in Abrams, *supra* note 50, at 182.

⁵² See *infra* Part II.

⁵³ Abrams, *supra* note 50, at 182.

⁵⁴ Abrams makes the same point on abortion: women who abort suffer from social stigma associated with the abortion; they are 'bad mothers'. Surrogacy in which the woman does not provide her eggs is less socially rejected due to the fact that it may be associated as a contribution to solve the social problem of infertility. Abrams, *Id.* at 183.

strictly enforceable.⁵⁵ This view is not unanimous in the economic analysis of law.⁵⁶ For instance, Michael Trebilcock explains that surrogacy presents special challenges, such as the situation of the children born through surrogacy. These challenges involve risks that would be better to avoid through specific regulation. For instance, when cases become notorious, such as the 'Baby M' case, which caused a wide-ranging public debate at the national level on surrogacy in the United States, the born through surrogacy unintentionally turn into famous people, which may result in mental damage.⁵⁷ To avoid these risks, from an economic perspective, Trebilcock proposes a regulation that grants the surrogate the right to decide on whether she would like to keep the child until up to 1 month after the delivery. To be sure, this would increase the costs of the agreement for the contracting parties. Indeed, for the first month of the child, the intended parents would lose their right to demand the handing over of the child. In commercial surrogacy, this risk would be discounted from the price that the intended parents would pay. Furthermore, the contracting parties could negotiate when the payment would take place: probably, for the intended parents, the best moment would be at the handing over of the child in order to avoid opportunistic behavior of the surrogate.⁵⁸

To protect the surrogate once she is already pregnant, Trebilcock suggests that the law should not give the intended parents the option to repent and get out of the contractual relationship, whether free of charge or not. To illustrate this point, imagine the case of a couple who underwent surrogacy and a few months after they had entered into an agreement with a gestational mother, the woman became pregnant and, thus, the couple would like to get out of the surrogacy agreement. According to Trebilcock, the couple should not be allowed to escape from the contractual relationship, even in the case in which they are willing to pay compensation for the breach of contract.⁵⁹ This is an important point because, as I will later in my discussion of the European caselaw, not allowing for the intended parents repentance and ensuring parentage before pregnancy are also ways of protecting the best interests of the child.

In addition, the right to a cooling-off period after birth may also be founded in the libertarian-paternalistic nudge literature.⁶⁰ This literature holds that the assumption

⁵⁵ See Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989). See also Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995); Joseph Pelzman, 'Womb for Rent': Gestational Surrogacy Contracts – A New Path for Outsourcing Service Contracts, https://www2.gwu.edu/~iiep/assets/docs/papers/Pelzman_IIEPWP2010-30.pdf (last visited Jan. 16, 2018).

⁵⁶ For a law and economics argument against Posner and Epstein's arguments for specific performance, see Margaret Friedlander Brining, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377 (1995). Posner's views have been controversial. For instance, in response to Posner and from a civil liberties perspective, Larry Gostin has argued that a contract cannot require a gestational mother to waive her parental rights. In this view, custody should be decided on the basis of the best interests of the child standard. Lawrence O. Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. CONTEMP. HEALTH L. & POL. 429, 430 (2001). I will come back to this issue later on when discussing the case law of the ECHR.

⁵⁷ *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988); see TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 54 (1993).

⁵⁸ TREBILCOCK, *supra* note 57, at 54.

⁵⁹ *Id.*

⁶⁰ The most famous text is RICHARD H. THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008). See also Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). For a discussion of the rationality assumption, see Cass

made by economists that human are rational individuals is wrong. We are humans, not econs. That means that, based on biases of different sorts, we usually make wrong decisions. Thus, some forms of paternalism are justified to induce us to make better ones. In surrogacy agreements, providing the gestational woman a period to rethink about her decision of committing to give up the resulting child may lead her to undo a mistake. As we shall see in the next section, this argument for cooling-off periods is problematic because it assumes that gestational women are irrational in their decision to become surrogates.

The anti-stigmatization approach

Another route to regulating the potential exploitation is through what I call the ‘anti-stigmatization approach’ to surrogacy: when analysing surrogacy cases, courts should bear in mind the stigma and gender stereotyping dimension of surrogacy regulation. As Paula Abrams explains, ‘[t]he State should not be a participant in the process of shaming women for their reproductive decisions; such actions deny women moral agency. Law instead should be a means for contesting stigma associated with gendered stereotypes, particularly those stereotypes that undermine reproductive decision making.’⁶¹ Now, against this view, according to Abrams, the legal regulation of surrogacy may contribute to gender stereotyping in several ways. First, although informed consent is a capacity credited to adults, the law is suspicious of the value of consent in the decision to become a surrogate. Abrams explains that the underlying rationale for that rule is the assumption that ‘a rational woman would not voluntarily disrupt the connection between pregnancy and maternity’.⁶² Second, by establishing a post-birth limbo allowing the surrogate to change her mind, the law may reinforce the expectation that surrogates are irrational and, thus, likely to experience regret.⁶³ Third, the law assumes that the decision not to become a mother is the result of duress and that women should be protected from exploitation.⁶⁴ Abrams argues that these types of regulations may reinforce gendered stereotypes of motherhood.

Therefore, under a gender-based approach, regulation should be based on equality and non-discrimination, and may only serve the purpose of setting out rules for the full enjoyment of women’s rights. It may be objected, however, that the reason why law may allow surrogate women to change their minds and keep the child is not connected to a desire to stigmatize women. That right can be founded in the recognition that the experience of pregnancy is unique. It may be true that some surrogates find it easy to distance from the child and hand her over. But that doesn’t mean that women that experience that type of special connection are irrational. In the following section, I discuss the ‘expectation approach,’ which aims to take into account both perspectives.

R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

⁶¹ Abrams, *supra* note 50, at 188.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

The 'expectations' perspective

One could also potentially justify regulation from what I call an 'expectations' perspective. As Laufer-Ukeles explains, neither those in favor nor those against surrogacy have enough empirical information because none of them agree on what 'exploitation' means⁶⁵ or what the object of surrogacy is. Furthermore, the benefits of surrogacy depend on the context in which it is conducted. On the one hand, one may argue that the best scenario for the child that is born through surrogacy is to be raised by their intended parents—the ones who have invested economic and emotional resources to obtain the 'status' of parents. However, on the other hand, one might object that the surrogate did not have any other way to earn money but by selling her reproductive services. In that case, the benefits of surrogacy are, at the very least, controversial. Laufer-Ukeles submits that, provided that we have information about what the effects of surrogacy actually are, then the supporters of any position may be more inclined to be flexible about their principles. In this way, she hopes to promote a constructive dialogue on how to approach to surrogacy.⁶⁶ To that end, Laufer-Ukeles proposes a surrogacy regulation whose aim is to satisfy the concerns of each party in the discussion. She has in mind a regulation that is respectful of the intimacy among the parties to the surrogacy agreement. This type of intimacy not only exists between the surrogate and the child, but also between the intended parents and the surrogate. According to Laufer-Ukeles, surrogates have the expectation that the birth of the child will not mean that all these intimate connections will end. Her theoretical framework is that of relational autonomy. In this view, autonomy is not merely about independence, individual rights, boundaries between individuals and control. Rather, it is about a capacity that can be fostered or undermined through personal relationships and societal structures.⁶⁷ Regulation should then protect surrogates from emotional harm, support the other participants in the transaction, and take into account the popular concern that surrogacy threatens human dignity.⁶⁸ Laufer-Ukeles distinguishes between 'autonomy-promoting' and 'exploitation-avoiding' measures. This distinction is very helpful in thinking how regulation would ideally look like. As we shall see, however, her examples of these measures are problematic.

First, autonomy-preserving measures may include a right of the gestational woman to demand after birth infrequent but potentially ongoing visitations in the event she has difficulty in separating from the child. Thus, as mentioned, the parties will not see the agreement as one that ends with birth.⁶⁹ If this were to dissuade couples unwilling to accept visitation rights from pursuing surrogacy couples, the outcome would be fine as those couples would probably not be willing to commit to the intimacy of surrogacy agreements. Now, recognizing a right to ongoing visitation would be too much of an intrusion in the intending parents privacy. The expectations perspective on this point

⁶⁵ Laufer-Ukeles, *supra* note 48.

⁶⁶ *Id.* at 1247.

⁶⁷ For a general theory of relational autonomy, see JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (Oxford University Press, 2011). Laufer-Ukeles has applied a relational-autonomy account to several issues. See, for instance, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J. L. & MED 567 (2011); *The Relational Rights of Children*, 48 CONN. L. REV. 741 (2016).

⁶⁸ Laufer-Ukeles, *supra* note 48, at 1283.

⁶⁹ *Id.* at 1254–1255.

is perfectionist because it seems to assume that only surrogate agreements that create intimate bonds between the parties are valuable. This view would be inconsistent with the commitment to privacy of the ACHR.

Another autonomy-promoting measure would be allowing only for gestational surrogacy, so that gestational women would find it easier to separate from the child.⁷⁰ This measure is based on the empirical assumption that, because of their genetic link to the child, traditional surrogates find difficulties in separating from the child. Legislation in many jurisdictions is based on this view.

Second, 'exploitation-avoiding' measures would include psychological evaluations and informative counseling before entering a surrogacy agreement. Depending on how this is put into practice, it may or may not be acceptable as an exploitation avoiding measure. It may, for example, stigmatize women that decide to become surrogates against what psychological advice, who may be taken to be irrational women. Exploitation-avoiding measures may also demand a requirement that gestational women have been pregnant before.⁷¹ Many women would find this unacceptable because they may want to help others by becoming surrogates even before raising their own child. Finally, in commercial surrogacy, regulating the price paid may also prevent exploitation. It may be suggested that there should be a 'fair price'. However, as Sharon Bassan explains,

It is hard to determine what is considered a fair price. A minimum price might reduce exploitive conditions towards the supplier by giving them better payment for their work. However, it might raise objections on the part of infertile patients incapable of paying higher amounts. These people would not be able to recourse to the market to fulfill their right to reproduce. A possible suggestion may be to set a minimum price, or to determine that suppliers get no less than 50% of the value of the transaction⁷².

This suggestion is unconvincing given the evidence about the economic effects of caps such as shortages. Moreover, one should be careful that regulation may entail forms of paternalism incompatible with the ACHR.

Let me finish this section by summarizing the discussion and make proposals on how should surrogacy be regulated in States Parties to the ACHR. First, given the effects for resulting children, the surrogacy agreement is not an ordinary contract. Thus, it calls for special regulation. This regulation may include both autonomy-preserving and exploitation-avoiding measures. As I have argued, the distinction between these types of measures is not clear-cut, but it's helpful to think of how regulation would ideally look like. For example, both to avoid unfair advantage-taking of the surrogate and to verify her informed consent, the law can require *ex ante* judicial intervention to authorize the surrogacy agreement. This is an important distinction between surrogacy agreements and ordinary contracts which are usually seen as private and where courts have no role to play unless there is disagreement between the parties. It's true that in unconscionable contracts, courts intervene by either nullifying agreements or by requiring

⁷⁰ Including: Australia, Belarus, Canada, Bulgaria, Greece, Hungary, Latvia, some Mexican states, Netherlands, New Zealand, Peru, South Africa, south Korea, and the United Kingdom. See TRIMMINGS & BEAUMONT, *supra* note 9.

⁷¹ Laufer-Ukeles, *supra* note 48, at 1259–65.

⁷² *Id.* See Sharon Bassan, *Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions*, 37 MICH. J. INT'L L. 299, 342 (2016).

the advantage-taking party to change the contracting conditions. This type of intervention, however, is always *ex post*, that is, it only takes place once the parties enforce the agreement. It is also that, in many jurisdictions, the content of form contracts or contracts of adhesion ought to be approved by an administrative body before they can be used. But this type of *ex ante* intervention is not for each and every signed agreement, but a general *ex ante* control to avoid the use of exploitative terms. That makes sense because, otherwise, the social cost of signing consumer contracts would be prohibitive. In contrast, in order to be binding, each and every signed surrogacy agreements should go for *ex ante* judicial revision and authorization. The number of surrogacy agreements per jurisdiction is not massive (at least, not as massive as consumer contracts) and the legal stakes of the agreement are so important that *ex ante* intervention would be justified.

Some regulations include a duty to go through psychological counseling before committing to become surrogates. Now, we should be careful about psychological counseling because of its potential stigmatization effects. For sure, just as under the law of the State of California in the United States, it should be mandatory for surrogates and intending parents to have independent legal counseling about the legal implications of the agreement. This would avoid conflicts of interests between the interests of surrogates and intentional parents.

Price-wise, because of the economic effects of maximum prices, the idea of a 'fair price' for commercial surrogacy agreements would be problematic. In ordinary contracts, the unconscionability doctrine works an exploitation-avoiding measure. Surrogacy agreements would be different in that there ought to be judicial *ex ante* control of the price and of other terms. But the outcome is the same: free and informed parties may agree on certain terms, but those are always subject to judicial review or, in the case of surrogacy agreements, *ex ante* authorization.

Finally, given that women who do not have children or have not been pregnant before may want to become surrogates, the requirement that surrogates must have children in order to become surrogates is not justified. It may be objected that the probability that women who already are legal parents may want to keep the resulting child is much lower than the probability of women who are not parents willing to do so. However, this is a contingent, empirical argument based on a probabilistic generalization. The requirement of *ex ante* authorization would tackle this possibility in that, in order to recognize the legal parentage of the intending parents, judges will have to assess the conditions under which the surrogacy agreement is celebrated and the odds that the surrogate will want to keep the resulting child. Judges, of course, may end up making a mistake about this, but one cannot say that only because a woman is already a parent she will not be willing to keep the child, not can the opposite be assured, that is, that women who do not have children will want to keep her.

So far, my discussion has focused in the situation of surrogates and intentional parents. The next section will focus on surrogacy and the best interests of the child.

CHILD WELFARE CONCERNS: PARENTHOOD, MATER CERTA EST, AND THE BEST INTERESTS OF THE CHILD

One concern that may justify a restriction on surrogacy in light of Article 16.2 of the ACHR is based on the effect that surrogacy may have on children born as a consequence of assisted reproduction techniques. This concern applies to both altruistic and

commercial surrogacy. Moller Okin, for instance, argues that surrogacy arrangements do not take into account the best interests of the child.⁷³ The 'best interests of the child principle' is one of the organizing principles in family law.

This concern is not exclusive to surrogacy, but is common to various areas of law. Thereby, the CRC, in its preamble, provides that 'childhood is entitled to special care and assistance.' In its Article 3, it recognizes that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'⁷⁴ In the Inter-American system, the IACtHR Advisory Opinion 17/2002 on the Juridical Condition and Human Rights of the Child expressed that the best interest of the child shall be understood

'as the premise for interpretation, integration and application of laws pertaining to childhood and adolescence [it] is based on the very dignity of human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child [and it is] a reference point to ensure effective realization of all rights contained in that instrument. Their observance will allow the subject to fully develop his or her potential.'⁷⁵

It is important to distinguish between two applications of the best interests principle. On the one hand, it is invoked as a reason against allowing surrogacy. The argument is that, given the potential personal costs for children born from surrogacy, it should be banned. On the other hand, the second application of the principle is for scenarios where surrogacy is forbidden, a child is born from surrogacy and the issue faced by legislators or by Courts is whether the resulting child should remain with her intentional parents, with the surrogate, or with anyone else. I will discuss these arguments in turn.

First, as Glenn Cohen has explained, the transposition of the best interests of the child reasoning to regulations of reproduction that alter when, whether, or with whom individuals reproduce 'is rhetorically attractive but deeply intellectually problematic for reasons associated with Derek Parfit's Non-Identity Problem':⁷⁶

So long as a child will not be provided a 'life not worth living,' the child cannot be said to be harmed when its counterfactual was not existing, or by having a different child (genetically speaking) substituted for it. Thus, any intervention that will alter whether, with whom, or even when individuals reproduce cannot be justified by concern for protecting the resulting child's welfare unless the child would have a life not worth living absent the intervention.⁷⁷

⁷³ Satz, *supra* note 24.

⁷⁴ Convention on the Rights of the Child, *supra* note 34, art. 3.

⁷⁵ 'Juridical Condition and Human Rights of the Child', Advisory Opinion OC-17/2002, Inter-Am. C.H.R. (Aug. 28, 2002).

⁷⁶ Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 435 (2012). Cohen makes this point in various papers. See also *Beyond Best Interests*, 96 MINN. L. REV. 1187 (2012); *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011); *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L. J. 347 (2008). Parfit famously presented the non-identity problem in DEREK PARFIT, REASONS AND PERSONS 359 (1987).

⁷⁷ *Id.*

The argument is that, had the surrogacy not taken place, the resulting child would not have existed. Thus, departing from the reasonable assumption that living is better than not living at all, forbidding surrogacy would actually not be in her best interests.

Let us now discuss the application of the best interests principle to an already existing child born from surrogacy. Now, as Rojo and Spector explain, the expression 'best interests of the child' can be interpreted in several ways.⁷⁸ To begin with, it is not evident that it is always better for the children to be under the care of their biological parents or the pregnant woman. One obvious way to see this is in cases in which biological parents treat their children violently.

Given the interdependence of human rights, the CRC should be specially taken into account. Its Article 7 states that 'the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.' If included in national law, this provision poses challenges. If the law follows the *mater certa est principle*, the status of a child born by surrogacy will be unclear.⁷⁹ If national law determined that a child born of surrogacy cannot get the nationality of her intended parents, then the child would be in uncertain legal status.⁸⁰ To address these concerns, domestic laws should be reformed.⁸¹

While the Inter-American system has not addressed the surrogacy issue yet, it has been discussed by the European Court of Human Rights (ECtHR). The ECtHR did not address the merits on the legality of surrogacy; nonetheless, it has discussed the juridical condition of the children born through surrogacy. In 2014, the Court decided the *Mennesson* (application no. 65,192/11) and *Labassee* (application no. 65,941/11) cases, both against France. In both cases, the Court arrived to the same decision, namely ordering France to recognize parentage to two girls born through surrogacy. In order to discourage the French from traveling abroad to make use of reproductive services prohibited in France, France did not recognize the parentage of the children born through surrogacy outside the country. On many occasions, the Court has invoked the 'margin of appreciation' doctrine to enable States to legislate on certain topics as they deem appropriate. However, in the case of parentage, since it is an essential aspect of the identity of individuals, the margin is reduced. Hence, 'States could prohibit surrogacy, but they cannot ignore the children's parentage because it would put them in a situation of great uncertainty about their identity'. The Court held that identity is required for the respect for the privacy of individuals. In addition, the Court mentioned that, if the parentage were not recognized, the girls could not inherit, which would deprive them of an

⁷⁸ Facundo Rojo and Ezequiel Spector, *Los Derechos del Niño: Un Enfoque Filosófico* in FABRA ZAMORA & SPECTOR (EDS.), 3 ENCICLOPEDIA DE FILOSOFÍA Y TEORÍA DEL DERECHO 2715-2732, (Universidad Nacional Autónoma de México, 2015).

⁷⁹ Stark, *supra* note 46, at 386.

⁸⁰ *Id.*

⁸¹ Alternatively, when entering a surrogacy agreement abroad, the intending parents may be asked to prove both that the resulting child would be granted citizenship and that the intending parents will be recognized as such in their residence state. See Stark, *supra* note 46.

additional component of their identity (unless Mr. and Mrs. Mennesson wrote a will to favor them).⁸²

It is notable that the ECtHR emphasized the need for a genetic or biological connection of the intended parents with the child. In contrast, the most recent caselaw of the ECtHR does not focus on the genetic or biological connection. In 2015, the ECtHR issued its decision on the case *Paradiso and Campanelli v Italy* (Paradiso I).⁸³ The case dealt with an agreement between an Italian couple and a Russian company, Rosjurconsulting. According to the agreement, neither the intended parents nor the surrogate mother would provide genetic material. The child was delivered by a Russian surrogate mother in Russia. The birth certificate was issued on behalf of the intended parents. The Italian consulate in Russia handed over the documents that allowed the child to be taken to Italy. Once in Italy, Paradiso and Campanelli tried to have the certificate recognized, but it was denied since the documentation was false. Both were accused of misrepresenting their marital status and violating adoption laws by bringing the child without authorization. A juvenile court declared the child's abandonment and adoptability because his biological parents were unknown. The Court of Appeals upheld this decision and the child was turned over to social services and any contact with the couple was prohibited. The ECtHR held that the couple did not have standing to act on behalf of the child. However, it argued that this situation entailed a violation of Article 8 of the European Convention on Human Rights since there was an interference with the couple's family life. The Court claimed that 'the State should take into account the best interest of the child over any other consideration such as genetic ties'. Although Ms. Paradiso and Mr. Campanelli had only shared 6 months with the baby, it was enough for them to have built family ties and the State should do everything possible to rebuild them.

In 2017, the Grand Chamber of the ECtHR delivered a new judgment on the Paradiso case (Paradiso II) in which it analysed whether Article 8 of the ECHR was applicable to the case and whether the urgent measures ordered by the Minors Court, which resulted in the child's removal, amounted to an interference in the applicant's right to respect for their family life and/or their private life. In the first place, the Court focused on the existence of a 'family life' under the terms of Article 8 of the ECHR and accepted that 'the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognized legal tie, provided that there are genuine personal ties.' Therefore, the Court found it necessary to consider the quality of the ties in order to decide whether the 'genuine personal tie' requirement was fulfilled in the case. In so doing, the Court relied on the duration of the cohabitation between the applicants and the child as a key factor in the recognition of the existence of a family life. After a thorough analysis, the Court concluded that no family life existed in the case. Nonetheless, the Court held that the case fall within the applicants' right to a 'private life'. The Court noted that the applicants 'had a genuine intention to become parents' and that a 'major part of their lives was focused on realizing their plan to become parents'. Taking into account the emotional bonds created and developed between an adult and a child, the

⁸² Eleonora Lamm & Nieve Rubaja, *Parámetros Jurisprudenciales en los Casos de Gestación por Sustitución Internacional. Los Lineamientos del Tribunal Europeo de Derechos Humanos y sus Repercusiones en el Contexto Global*, 37 REV. BIOÉTICA. DERECHO 149, 156 (2016).

⁸³ *Paradiso and Campanelli v. Italy*, App. No. 25358/12, 2005 Eur. C.H.R. (Jan. 27).

Court considered that the lack of biological or legal ties was not relevant to conclude if the facts fall within the scope of 'private life', in the sense of the applicants' right for respect of its decision to become parents.

Having determined the applicability of Article 8 to the case, the Court examined whether the measures taken in respect of the child—removal, placement in a home without contact with the applicants, being placed under guardianship—amounted to an interference with the applicants' private life. The Court noted that such interference would be in breach of Article 8, unless it could be justified as being 'in accordance with the law', pursuing one or more of the legitimate aims listed in paragraph 2 of Article 8, and being 'necessary in a democratic society' in order to achieve an aim concerned. After evaluating each of these elements, the Court concluded that the interference was in accordance with all of them and therefore ruled that there was no violation of Article 8 of the Convention due to the fact that the 'public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child.'⁸⁴

It is worth comparing the reasoning and the outcomes in *Paradiso I* and *Paradiso II*. In *Paradiso I*, the Court saw the case as involving an interference with family life; in contrast, in *Paradiso II*, the Court argued that no family life but private life was at stake. In *Paradiso I*, the focus ended up being the best interest of the child. In *Paradiso II*, the focus is not the child, but the fact that factors other than the private life of the couple are more important in the case. *Paradiso I* is clearly compatible with intentional parenthood because it is compatible with the best interests of the child. Thus, *mater semper certa est* should not always be the guiding principle. *Paradiso II* may be also compatible because it recognizes that individuals can have parenthood as a life plan and that the lack of biological or legal ties with the resulting children was not an obstacle for recognizing parenthood. The caselaw of European countries is also instructive. For instance, in Germany, the Federal Court ruled that Germany must comply with a Californian judgment that recognized legal parenthood over a child born through surrogacy to a homosexual couple.⁸⁵ In turn, in Spain, the Civil Chamber of the Supreme Court confirmed a 2010 decision in which the birth registration of two minors on behalf of a homosexual marriage was canceled. The Civil Chamber held that neither the rights of minors to family life nor the rights of the couple to equality were violated since, in line with the ECtHR jurisprudence, the biological father can claim paternity as established in Article 10 of the Law of Assisted Reproduction Techniques: in order to regularize parentage, an adoption process can be opened.⁸⁶

This *ex post* parentage via adoption is followed even in countries where surrogacy is allowed. In fact, in comparative law, countries allowing surrogacy have adopted two different strategies for filing cases of surrogacy. On the one hand, a first group of countries, such as the United Kingdom, regulate parentage in favor of the intended parents

⁸⁴ *Paradiso and Campanelli v. Italy*, App. No. 25358/12, 2017 Eur. C.H.R., Grand Chamber (Jan. 24).

⁸⁵ See Bundesgerichtshof Beschluss XII ZB 463/13 [Supreme Court of Germany decision No. XII ZB 463/13] (Dec. 10, 2014).

⁸⁶ Tribunal Supremo de España, Sala de lo Civil [Civil Chamber of the Spanish Supreme Court], Judgment No. 835/2013, Feb. 6, 2014, <http://www.poderjudicial.es/stfls/PODERJUDICIAL/JURISPRUDENCIA/FICHERO/20140206%20TS%20Civil%20REC%20245.2012.pdf> (last visited Jan. 16, 2018). For a discussion and criticism of the role of the genetic tie in Israel, see Doron Dorfman, *Surrogate Parenthood: Between Genetics and Intent*, 3 J. L. & BIOSCI. 404 (2016).

through a procedure after childbirth. In these countries, the *mater semper certa est* is the rule and the surrogate is recognized a right to change her mind.⁸⁷

On the other hand, a second group of countries, such as Greece, Israel, and South Africa, regulate parentage of the intended parents through a pre-approval procedure before a governmental body –judicial, administrative, or notary, depending on the country– in order for the surrogacy to be approved before conducting the relevant medical treatment. This second system leaves out the *mater semper certa est* rule and protects the intended parents from potential reconsiderations of the surrogate.⁸⁸

From a human rights' perspective, the ex post approach this generates various difficulties. Lamm explains that:

Adoption implies a post-partum judicialization, and all this situation of judicialization without a legal framework to provide legal security, and the fact of doing so after the birth of the child, which implies that a period necessarily elapses until the parentage in favor of the intended parents is determined, gives rise to a series of violations of different rights of children born through this technique. What happens if, after the children are born, the intended parents repent? What happens if a child is born with malformations or diseases? What happens if the intended parents die or divorce or separate? What happens if the one who does not have a legal link dies, leaving the child deprived of, for example, the ability to inherit? Or if the one who dies is the one who did have a legal bond and the child is left without emplacement? The casuistry is immense, being impossible to predict all the possible violations.⁸⁹

Lamm claims that judicial intervention should take place before the gestational mother gets pregnant so as to ensure the parentage of those who caused the pregnancy, excluding potential abuses and legal uncertainty.⁹⁰

What can the Interamerican System of Human Rights learn from the European caselaw and legislation on surrogacy? First, in the light of the uncertainty caused by parentage ex post and the potential damage to children, a surrogacy regulation

⁸⁷ I will address this issue below.

⁸⁸ In this point, I will follow Eleonora Lamm, *Una vez más sobre gestación por sustitución, porque sin marco legal se siguen sumando violaciones a derechos humanos*, 4 *ARS IUS SALMANTICENSIS* 61, 93–95. Lamm, citing Gamble, claims that it is important to change our minds on surrogacy and to start thinking that those arrangements are more likely to have happy outcomes than problematic ones. In the United Kingdom, in a recent case (*In re H v. S* (Surrogacy Agreement), EWFC 36 [2015]), a judge decided that it was for the best interest of a 15-month-girl to live with her biological father and his partner, instead of with her gestational mother. The couple claimed that the surrogate was a friend of the biological father and that they had agreed that they will be the parents. On its part, the surrogate claimed that she acceded to deliver the children but that the agreement was with her friend and not with her friend's partner. The court held that the surrogate had deceived the couple in order to have children of her own. The case is relevant to see that it is necessary to have a procedure that ensures the rights of the parties involved in a surrogacy agreement. See Lamm, *Id.* at 97. There are already proposals in the UK to abandon the rule of *mater semper certa est* and to join the group of countries that regulate parentage ex ante. See KIRSTY HORSEY, *SURROGACY IN THE UNITED KINGDOM: MYTH BUSTING AND REFORM*. REPORT OF THE SURROGACY UK WORKING GROUP ON SURROGACY LAW REFORM (Surrogacy UK, 2015), cited in Lamm, *Id.* at 97.

⁸⁹ Lamm, *supra* note 88, at 93.

⁹⁰ *Id.* Lamm also held that ex ante judicial intervention is useful to verify the free and informed consent of the surrogate and to take into account the best interests of the child to be. Furthermore, she defends the judicial intervention over notary intervention because “the figure of a judge offers much more guarantees, it ensures with a higher degree of certainty the compliance with the requirements and has the authority and impartiality to authorize the gestation”.

compatible with the ACHR should adopt the *ex ante* approach. Having said so, it's important to keep in mind that argued that, in the end, in case of conflict, custody should be decided on the basis of the best interests of the child standard.⁹¹ A second important lesson is that, regardless of the absence of genetic ties, the human right to a private family life and private life is compatible with a concern for the best interests of the child.⁹²

CONCLUSION

As I mentioned at the beginning of this article, in most of the Americas, the legal status of surrogacy is uncertain: it is not expressly prohibited nor permitted. Some jurisdictions are already discussing several regulations.⁹³ Given the controversial status of surrogacy and reproductive technologies in the region, legislators and policy makers will face a unique challenge. I hope that the discussions raised in this article have a significant contribution for advancing the realization of surrogacy legislation that upholds the human rights principles of the ACHR. I have focused on the right to enter into surrogacy agreements as an exercise of personal autonomy and in particular of the right to privacy under the framework of the ACHR. Following the IACtHR recent decision in *Artavia Murillo v Costa Rica*, I have suggested that, under the Inter-American system of Human Rights, States Parties to the American Convention should allow for both altruistic and commercial surrogacy. Nevertheless, I have claimed that the ACHR requires States to ensure regulatory structures that assure appropriate protection of the rights of both surrogates and children resulting from surrogacy.⁹⁴

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⁹¹ See Gostin, *supra* note 56.

⁹² For a discussion of the European case law, see Lamm & Rubaja, *supra* note 82, at 155–70. For a discussion and criticism of the role of the genetic tie in Israel, see Dorfman, *supra* note 86.

⁹³ See expedientes. 5759-D-2016 (Dip. Rach Quiroga), 5700-D-2016 (Dip. Araceli Ferreyra y otros) y 3202-D-2017 (Dip. Lipovetsky). See, also, expediente 3765-D-2017, a project authored by Diputada Carla Carrizo, in which I worked, reflecting the points raised in this paper.

⁹⁴ In fact, in *Gómez Murillo*, the Court made a call for stated to regulate surrogacy. See *Gómez Murillo*, *supra* note 16.