Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem

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ABSTRACT

People around the world are turning to surrogacy when they are unable to conceive by traditional means. When surrogacy turns traditional notions of parentage upside down, however, countries struggle to find efficient regulations that protect their own citizens, while still recognizing the increasingly global nature of modern society. Children born through surrogacy arrangements between Thai surrogate mothers and Australian intended parents have been confronted with the consequences of inadequate regulation. This note argues that in addition to revising surrogacy legislation to reflect the increasingly transient nature of society, countries must make mirror citizenship reform so children born through surrogacy are able to easily become citizens of their intended parents' home country.

INTRODUCTION

As surrogacy becomes increasingly popular, the insufficiency of surrogacy laws, or altogether lack of regulation, has created international confusion.[1] Take, for example, the recent baby Gammy

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1. Although it is difficult to determine the exact numbers of surrogate children born, due to the lack of formal registration procedures, it is estimated that by 2005, at least 10,000 children were born by surrogacy across the globe. KELLY D. WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL 3 (2005). As same-sex parenting becomes more commonly accepted around the world, the prevalence of surrogacy will only increase. Same-sex couples represent one of the major forces behind the development of the surrogacy industry. *See* Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29, 29 (2009); Scott Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 53 (2010). Conflicts

controversy. A Thai surrogate mother gestated twins for an Australian couple. During the pregnancy, it became known that one of the twins, Gammy, had Down syndrome.[2] The surrogate mother refused to abort the child due to her Buddhist beliefs, and the Australian couple refused to take Gammy back to Australia once he was born. Since Thai law had no formal provisions regarding surrogacy, the Australian parents had no legal obligation to care for Gammy.[3] The Thai surrogate mother, who expected the intended parents to take both children back to Australia, did not have the funds to care for a special needs child.[4] Furthermore, the surrogate was legally Gammy's mother and Gammy was a Thai citizen, so no action could be taken against the Australian parents.[5]

The baby Gammy controversy highlights a unique problem in the surrogacy market.[6] Due to several factors,[7] countries have adopted a wide array of regulatory approaches toward surrogacy, from criminalization, to strict prohibition, to leniency. Citizenship is required for surrogate-born children to have full rights in their intended parents'

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over the parentage and citizenship of children have arisen in many different countries. *See, e.g.*, Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 122 (2013) (German couple unable to bring surrogate children home from India); Eryk Bagshaw, *Australian Couple Abandons Surrogate Baby in India*, SYDNEY MORNING HERALD (Oct. 8, 2014), http://www.smh.com.au/national/australian-couple-abandons-surrogate-baby-in-india-20141008-113cmk.html (Australian couple abandons baby in India).

2. Michael Sullivan, *Surrogacy Storm in Thailand: A Rejected Baby, a Busy Babymaker*, NPR (Oct. 22, 2014, 4:31 PM), http://www.npr.org/blogs/goatsandsoda/2014/10/22/357870757/surrogacy-storm-in-thailand-a-rejected-baby-a-busy-babymaker [hereinafter *Surrogacy Storm in Thailand*].

3. *See* Jonathan Pearlman, *Australian Couple Abandon Surrogate Twin with Down's Syndrome*, TELEGRAPH (Aug. 1, 2014, 10:28 AM), http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11005285/Australian-couple-abandon-surrogate-twin-with-Downs-syndrome-but-keep-his-sister.html.

4. In an interview, baby Gammy's surrogate mother stated that although she agreed to the arrangement mostly due to the monetary benefits, she also felt it was good to help others. *Surrogacy Storm in Thailand*, *supra* note 2. She was paid 12,000 Australian dollars by the Australian couple. *Id.*

5. *See* Pearlman, *supra* note 3.

6. According to Dr. Katrina Trimmings and Professor Paul Beaumont, "highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the question of legal parenthood and the nationality of the child." Bruce Hale, *Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?*, 36 SUFFOLK TRANSNAT'L L. REV. 501, 507 (2013).

7. Cultural norms are one example of a factor that impacts the general approach and attitudes of a society toward surrogacy. *See id.* at 504.

home country.[8] Due to the theoretical bases used to determine citizenship in most countries, however, citizenship is highly dependent on parentage.[9] When surrogacy turns traditional notions of parentage upside down, countries struggle to find efficient regulations that protect their own citizens, while still recognizing the increasingly global nature of modern society.[10]

For increasingly global it is. In a 2013 study conducted by the Hague Conference on Private International Law, lawyers and agencies in responding states reported assisting parents with international surrogacy arrangements in sixty-eight countries around the world.[11] Furthermore, data from five agencies that specialize in international surrogacy showed that the international surrogacy market grew nearly 1,000 percent between 2006 and 2010.[12] As the surrogacy business continues to boom, countries are beginning to consider reform. The Hague convention found that "[r]esponses to surrogacy are . . . in a state of flux: several States have introduced legislation recently and several others have bills currently under consideration."[13]

The baby Gammy controversy is one of the events that spurred such recent reform and is particularly informative to study because Thailand and Australia illustrate the difficulties in effectively regulating surrogacy from two different points of view. Australia is home to many couples who wish to have children through surrogacy, but who are constrained by the country's strict regulations. Commercial surrogacy—

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8. An intended parent is "the person who intends to be the legal and functional parent of the child gestated by the surrogate carrier." Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 530 n.2 (2013).

9. A country's ability to effectively regulate surrogacy is "a function of the frameworks regulating filiation that operate both at the national and international level." Ergas, *supra* note 1, at 139.

10. Scholars have commented that the inequities between different countries' laws are "doomed to repeat the history of all autarky: regulator failure, soaring transaction costs and externalities associated with growing illegality, and, ultimately, combined international and internal pressure for rule revision." *Id.* at 135.

11. Hague Conference on Private International Law, PERMANENT BUREAU, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Prel. Doc. No. 3 C*, at 58 (Mar. 2014) [hereinafter *Study of Legal Parentage*], available at https://assets.hcch.net/upload/wop/gap2014pd03c_en.pdf.

12. Hague Conference on Private International Law, PERMANENT BUREAU, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, Prel. Doc. No. 10*, at 8 (Mar. 2012) [hereinafter *Preliminary Report*], available at https://assets.hcch.net/upload/wop/gap2012pd10en.pdf.

13. *Id.* at 9. As of 2014, some of the countries that had recently considered reform were: Argentina, Belgium, Bulgaria, Finland, Iceland, Ireland, Mexico, the Netherlands, and Sweden.

both domestic and international—is banned in most Australian states.[14] Several jurisdictions even make international surrogacy a punishable offense[15] of up to two years imprisonment.[16] Thailand, on the other hand, had a thriving population of surrogate mothers until the baby Gammy controversy spurred new policies.[17] Thailand recently has enacted new surrogacy laws that more closely resemble the strict regulation that is common in Australia.[18]

This Note proposes a solution to this global problem through reforming domestic policies on surrogacy and citizenship. Because parentage determines citizenship at birth, and parentage is determined by surrogacy regulations, only a combination of surrogacy regulation and citizenship reform can fix problems caused by inconsistencies in surrogacy laws around the world, as in the baby Gammy case. Regardless of whether a country is most commonly home to surrogate mothers or intended parents, strict prohibitions and domestic regulations that ignore the international climate are inherently flawed. In Part I, this Note reviews surrogacy and outlines parentage and citizenship issues that arise due to surrogacy.[19] It then discusses the approaches that two countries, Thailand and Australia, have taken to regulate surrogacy in Part II.[20] Finally, in Part III, this Note proposes a solution through dual reforms of both surrogacy and citizenship laws that will benefit countries who have citizens on either side of a surrogacy arrangement.[21]

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14. *Fact Sheet: International Surrogacy Arrangements*, AUSTL. GOV'T, DEP'T OF IMMIGRATION AND BORDER PROTECTION, https://www.border.gov.au/about/corporate/information/fact-sheets/36a-surrogacy (last visited Apr. 30, 2016).

15. Ergas, *supra* note 1, at 135. International surrogacy is a punishable offense in New South Wales, Australian Capital Territory, and Queensland. *Fact Sheet: International Surrogacy Arrangements*, *supra* note 14.

16. *See, e.g.*, *Surrogacy Act 2010* (Qld) (Austl.); *Surrogacy Bill 2010* (NSW) (Austl.).

17. *See A New Baby*, U.S. EMBASSY BANGKOK, http://bangkok.usembassy.gov/service/birth-of-a-u.s.-citizen-in-thailand.html; *Draft Law on Surrogacy Ready to Be Submitted for NLA Review*, PHUKET GAZETTE (Aug. 6, 2014, 8:26 AM), http://www.phuketgazette.net/thailand-news/Draft-law-surrogacy-ready-be-submitted-NLA/32444.

18. According to Wallop Tungkananurak, a member of the National Legislative Assembly, "Thailand and its women's uteruses will no longer be a hub [for surrogacy]." *NLA Bans Surrogacy for Foreigners After Scandals*, PHUCKET NEWS (Feb. 22, 2015, 10:34 AM), http://www.thephuketnews.com/phuket-nla-bans-surrogacy-for-foreigners-after-scandals-51121.php.

19. *See infra* Part I.

20. *See infra* Part II.

21. *See infra* Part III.

I. OVERVIEW OF SURROGACY: PARENTAGE AND CITIZENSHIP LAWS

A. What Is Surrogacy?

It is first necessary to describe different types of surrogacy arrangements. There are two types of surrogacy. In traditional surrogacy, the surrogate mother is also the genetic mother; she provides the ovum and gestates the child. Traditional surrogacy can be performed through either intrauterine insemination or through *in vitro* fertilization (IVF). Gestational surrogacy was also made possible by IVF. In gestational surrogacy arrangements, the surrogate mother gestates the child, but both the ovum and sperm are obtained from either the intended parents or third-party donors, so she is not genetically related to the child. IVF and surrogacy are assisted reproductive technologies (ART) that couples can use when they are unable to conceive by traditional means.[22]

Furthermore, there are two categories of surrogacy arrangements: altruistic and commercial. Often, these two types are treated differently for legal purposes. One type may be legally acceptable, while the other is prohibited or even criminalized.[23] Altruistic surrogacy arrangements, where surrogates receive compensation for reasonable medical and legal expenses but no extra compensation, are permissible in a number of jurisdictions because the surrogate does not profit from her gestational services.[24] Some view this type of arrangement as less coercive.[25]

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22. Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240, 241–42 (2013).

23. *See* Amy Corderoy, *More Parents Defy Law with Overseas Surrogacy*, SYDNEY MORNING HERALD (Sep. 14, 2013), http://www.smh.com.au/national/more-parents-defy-law-with-overseas-surrogacy-20130913-2tq94.html; *see, e.g.*, *Parentage Act 2004* (ACT) s 41 (Austl.).

24. *Fact Sheet: International Surrogacy Arrangements*, *supra* note 14. In altruistic arrangements, the surrogate mother is reimbursed for reasonable medical and legal expenses related to the pregnancy, but she does not earn any profit above this base-level compensation. *Id.* Reasonable medical costs can include the costs of becoming pregnant; medical costs during pregnancy; premium payments for health, disability, or life insurance; costs for counseling; and the value of the surrogate mother's lost earnings. Legal costs include "fees for obtaining legal advice and legal representation, court fees, and registry fees associated with registration of a birth and transfer of parentage." *Surrogacy Act 2010*, *supra* note 15, § 11(3).

25. Although not the topic of this Note, there has been much discussion regarding the exploitation of women engaged in surrogacy contracts. Some have criticized surrogacy for reducing women to their reproductive capabilities and expressed concern that women of a lower socioeconomic status will be taken advantage of by the wealthy elite. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J. L. & GENDER 391, 405–07 (2012) (discussing ethical use of surrogacy contracts).

Conversely, in commercial arrangements a surrogate mother is paid compensation above and beyond legal and medical expenses.[26] The potential for exploitation in this type of arrangement makes it less favored.[27]

There are four predominant regulatory approaches that state actors take to surrogacy regulation.[28] Thailand previously exemplified the first type; the law was completely silent on surrogacy and its legality was undetermined.[29] In the second approach, both forms of surrogacy, commercial and altruistic, are prohibited. Switzerland, Germany, Spain, France, Greece, and Norway are all countries that completely ban both types of surrogacy.[30] Only altruistic surrogacy is permitted in the third type of approach. This is the approach of the new Thai system.[31] In the fourth type, all forms of surrogacy are explicitly permitted.[32]

The laws in the home country of the intended parents can cause them to seek surrogacy arrangements in another country where surrogacy is legally permitted or where a contract can be enforced.[33] Different approaches to parentage law impact which country a couple

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26. *See Fact Sheet: International Surrogacy Arrangements*, *supra* note 14.

27. *See generally* London, *supra* note 25 ("The social, ethical, and legal concerns surrounding commercial surrogacy have centered around the potential exploitation of gestational surrogates. These concerns are premised on the relative vulnerability of women in the context of surrogacy agreements and the inequitable bargaining power between contracting parties.").

28. Tina Lin, Note, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT'L & COMP. L. 545, 552 (2013).

29. There are a number of other countries that also take this type of approach and remain silent on issues of legality. One such example is India, which has no laws regulating assisted reproductive technologies such as surrogacy. There is a set of guidelines, the National Guidelines for Accreditation, Supervision & Regulation of A.R.T. Clinics in India, which was passed in 2005 but is nonbinding. Consequently, India has a booming surrogacy market, but has also faced issues due to the uncertainty of what occurs when a surrogacy contract is not fulfilled according to plan. Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 35 (2009). Since Thailand has transitioned from this type of approach to stricter regulation, countries like India can learn from the triumphs and tribulations of the new Thai law.

30. Complete bans are difficult to enforce and it is common for couples to travel to other, less regulated countries, to have children via surrogacy. Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 523 (2010).

31. *Thailand Bans Commercial Surrogacy*, GUARDIAN (Feb. 20, 2015, 2:54 AM), http://www.theguardian.com/world/2015/feb/20/thailand-bans-commercial-surrogacy.

32. Lin, *supra* note 27, at 552; *Preliminary Report*, *supra* note 12, at 16. Some examples of countries that take this approach are Georgia, Russia, Uganda, and Ukraine. *Id*. at 16 n.94.

33. *See* Hale, *supra* note 6, at 503.

selects.[34] Price is also a significant factor, and countries with lax regulations and low-cost health care, like Thailand,[35] have become popular "destination spots" for couples looking to make surrogacy arrangements.[36]

B. How Are Parentage and Citizenship Determined?

An examination of the frameworks for determining parentage and citizenship illustrates their insufficiency in the surrogacy context. Though legal parentage and citizenship may appear to be similar, there are important distinctions between the two terms.

In the past, it was easy to determine genetic and legal parentage by asking "who is the mother?"[37] Now, technology and assisted reproduction make parentage more difficult to determine.[38] There are several methods for determining parentage based on marital, genetic, functional, and intentional relationships.[39] Each state develops its own formal definition of parenthood through legislation.[40] A state's family, immigration, and citizenship laws are affected by its approach to parentage. Issues arise when surrogacy arrangements involve more than one state whose laws conflict.[41] The historical importance of parentage law stemmed from its relationship to property interests, but

34. Nelson, *supra* note 22, at 241.

35. In Thailand, the average amount paid to a surrogate mother is approximately $52,000 (in U.S. currency). Compare this figure with that of approximately $100,000 in the United States and $47,000 in India. Helier Cheung, *Surrogate Babies: Where Can You Have Them, and Is It Legal?*, BBC (Aug. 6, 2014, 4:52 PM), http://www.bbc.com/news/world-28679020.

36. Nelson, *supra* note 22, at 241.

37. Historically, parentage was easily discernable because a mother could not give birth without having a genetic relationship to the child. *See* Anderson, *supra* note 1, at 34.

38. *See* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 631 (2014).

39. *See id.* Functional parents do not have the formal legal status as parents but "take on the role of traditional formal parents by caring for children, living with children, and/or providing for their necessities." Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 422–23 (2013). Intentional parents have a tie to the child because they intend to care for and parent the child before his birth. *Id.* at 437. Adoption is an example of an intent connection between adult and child. *See* Anderson, *supra* note 1, at 32. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (1990), for advocacy of intent as the best method for determining parentage.

40. *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 39, at 435.

41. *See* Abrams & Piacenti, *supra* note 38, at 631–32.

today these laws have broad-reaching implications for government services provided based on citizenship.[42]

At times, countries' immigration interests lead to policies that are incompatible with the surrogacy context. Citizenship is acquired under two principles.[43] The first is *jus soli*, or "the right of the soil." It extends citizenship to people born within the borders of a country.[44] The second principal of citizenship acquisition is *jus sanguinis*, or "right of the blood."[45] Under this principle, citizenship is gained by descent and is determined by the nationality[46] of one or both parents.[47] According to a report prepared by the European Union Democracy Observatory, surrogacy "force[s] states to redefine the notion of descent and to determine the extent to which citizenship can be transmitted along 'artificial' blood lines."[48]

A number of underlying values impact which principle countries use to structure their citizenship laws. Although a summary of these values is useful to see what factors have traditionally impacted citizenship, one may notice that an in-depth examination or definition of parentage is often absent from consideration.[49] Optimal immigration is important to governments' legitimate interest in achieving ideal numbers of

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42. *See id.* at 636.

43. *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17, 17 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

44. RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 31 (2d ed. 1994) ("By operation of law a person born within the territory of a State could acquire its nationality *jure soli*. This was the territorial connection, the child being born within the territorial jurisdiction of the State.").

45. *Id.* at 32 ("Another mode of acquiring nationality at birth by direct operation of law was descent, according to nationality of one, or both, of the parents . . . This was the patrilinear or matrilinear connection, known as *jus sanguinis*.").

46. For the purposes of this Note, nationality and citizenship are treated interchangeably. The discussion of citizenship above can be compared with the definition of nationality as the "traditional international legal term that refers to the link between an individual and a state" and is determined through each country's own legislation that regulates the acquisition of nationality. Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT'L L. 330, 342 (2006).

47. DONNER, *supra* note 44, at 32.

48. *Study of Legal Parentage*, *supra* note 11, at 22. The issues raised by the impact of surrogacy on descent can be examined by examining two questions: When there is a different legal parent and genetic parent, which classification determines nationality? If the identity of the legal parents is needed to determine nationality, how are legal parents determined? *Id.*

49. *See id.* at 23. One commonality between states whose citizens become involved in surrogacy failures is that their nationality legislation does not explicitly consider whether the term "parent" refers to genetic or legal parents. *See id.*

immigrants moving to the country and possibly gaining citizenship.[50] Nationality is an important public policy consideration, in that it supports a person's allegiance to his country.[51] The interest in family reunification is also important. Since each person has a personal interest in living with his family, the state has an interest in keeping families together. The Convention on the Rights of the Child, an international treaty that grants each child the right to parental care, supports the claim that family unification is an inalienable right under international human rights law.[52]

States must balance these values against their competing interest in preventing fraud. Immigration fraud is a significant concern because it only takes a short time for a person to apply for and receive a visa or citizenship, and then he has access to a country's laws, rights, and resources.[53] As medically assisted reproductive techniques continue to develop and challenge traditional notions of parentage, state's citizenship regulations could be similarly improved by taking into account these recent advancements.[54] Part III of this note will further discuss possible improvements.

C. Parentage and Citizenship Issues Raised by Surrogacy

Surrogacy highlights a number of issues that arise when countries use diverse mechanisms to determine the status of children in citizenship and parentage law.[55] These problems range from mere inconveniences (e.g., paperwork takes longer to process) to nightmares (e.g., intended parents are not able to transport their child home), but all are nonetheless failures of the law to regulate effectively.

The most serious issue is statelessness, which occurs when the intended parents' domestic parentage and citizenship requirements are

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50. Abrams & Piacenti, *supra* note 38, at 675. When an intended parent obtains citizenship for her surrogate child born abroad, this impacts the state's ability to distribute financial benefits and enforce parental rights. Each person who becomes a citizen is eligible to receive the country's resources such as habitation, education decisions, and distribution of medical and public services; so countries have a strong interest in denying dishonest applicants. *See* Ergas, *supra* note 1, at 134, 139.

51. *See* Weil, *supra* note 43, at 18.

52. *See* Abrams & Piacenti, *supra* note 38, at 683.

53. *Id.* at 681. The concern about immigration fraud is particularly great where laws define parentage based on intent or function because the use of state of mind to determine these constructs makes them susceptible to misrepresentation. *Id.*

54. *See generally Study of Legal Parentage*, *supra* note 11, at 34 (providing an analysis of private international laws and current co-operation rules regarding legal parentage).

55. *See* Hale, *supra* note 6, at 508 (discussing problems in surrogacy arrangements created by conflicts of laws).

incompatible with the laws of the surrogate's country.[56] The child is not a citizen of the intended parents' home country, because its laws prohibit surrogacy, nor is he a citizen in the surrogate's country because parentage is genetically determined and the surrogate mother is not genetically related to the child.[57] If a person is stateless, he cannot gain citizenship and cannot obtain a passport from either country.[58] Consequently, the child is stranded, parentless, and rightless.[59]

The story of baby Manji illustrates this situation. In 2007, a Japanese couple contracted with an Indian surrogate to carry a child born of the intended father's sperm and a donor egg. Baby Manji was born in July of 2008, but the intended parents had divorced.[60] The surrogacy contract specified that if the intended parents were to separate, the father would care for the child. Since neither the surrogate mother nor egg donor had any parental rights, baby Manji had no legal mother. Japanese law determines citizenship based solely on the birth mother's nationality, so the father could not gain Japanese citizenship for baby Manji.[61] India also refused to give baby Manji citizenship because she had no legal mother listed on her birth certificate.[62] Ultimately the regional passport office in India issued an identity certificate that allowed baby Manji to travel to Japan. Japanese authorities stated that baby Manji could become a citizen once the genetic relation to her father was proven, or her father could adopt her.[63]

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56. *Id.* at 507 (explaining how incompatibility of laws results in a conflict when parties make private contracts that go against the laws of their home countries). This problem is not limited to opposite-sex couples. Since only one parent in a same-sex relationship can be genetically related to the child, it could be difficult for the non-genetically-related intended parent to gain parental rights if the genetically related parent passes away. Kerri Ritchie, *Concern as Australians Turn to Thailand for Surrogates*, ABC NEWS (Apr. 13, 2013, 4:14 PM), http://www.abc.net.au/news/2013-04-13/thai-surrogacy-concerns/4624388.

57. *See* Kindregan & White, *supra* note 8, at 546. This problem is not necessarily common, but has severe effects when it arises.

58. *See* Kindregan & White, *supra* note 8, at 532.

59. Ergas, *supra* note 1, at 187. Rightlessness results from the inability to gain citizenship because citizenship and nationality are the means through which people's rights are enumerated and protected. *Id.*

60. KARI POINTS, KENAN INST. FOR ETHICS AT DUKE UNIV., COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI, 1(2009).

61. Kindregan & White, *supra* note 8, at 548. Since there were no Indian laws regarding commercial surrogacy, the only recourse through Indian law was adoption; but Indian law prohibited a single male parent from adopting baby girls, so that option was similarly precluded. *Id.*

62. *Id.* at 549.

63. *Id.* at 550. Although this scenario caused India to reexamine its surrogacy laws, there is still a stark lack of guidance regarding the legality surrogacy arrangements in India. *Id.* The problem is compounded by a lack of alternative avenues to fix problems

Besides statelessness, there are also a number of less serious situations that illustrate the insufficiency of surrogacy and citizenship laws. A child's right to be with his family is jeopardized when an intended parents' home state refuses to recognize a surrogate child's birth certificate because it lists the intended parents instead of the surrogate mother.[64] Intended parents can also have problems obtaining visas to travel to the surrogate mother's country and pick up the child. In one scenario, a Norwegian couple attempted to travel to India, but their visas were denied because surrogacy is illegal in Norway.[65] In a bizarre turn of events, the princess of Norway traveled to India and posed as the intended parents' nanny; she took care of the children until a relative of the father could travel to New Delhi. Eventually the intended parents obtained travel visas and were able to bring the surrogate children back to Norway.[66] Furthermore, if intended parents use traditional surrogacy to have a child in another country, the lack of any genetic relation to the intended parents can prevent the child from gaining citizenship by descent.[67]

II. SURROGACY AND CITIZENSHIP IN THAILAND AND AUSTRALIA

Thai and Australian attempts to regulate surrogacy illustrate the difficulties that countries on both ends of the spectrum encounter, whether they are home to surrogate mothers or intended parents. Each country's laws demonstrate the problems caused by regulations that ignore the increasingly global nature of surrogacy arrangements. A complicating factor is that citizenship is normally a matter of domestic

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through citizenship law. *Id.* The identity certificate issued to baby Manji was the first of its kind issued by the Indian government to a surrogate child born in India. *Id.*

64. Anika Keys Boyce, *Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements*, 36 SUFFOLK TRANSNAT'L L. REV. 649, 667 (2013). Some countries allow intended parents to be listed on the birth certificate, which automatically gives them parental rights in the surrogate's country, but this action can be problematic if the intended parents' home country does not accept this representation as truthful or valid. *Id.*

65. Mark Lewis, *The Nanny Who Was a Princess: How a Kindness Turned Controversial*, TIME (Dec. 5, 2012), http://world.time.com/2012/12/05/the-nanny-who-was-a-princess-how-a-kindness-turned-controversial/. Surrogacy is prohibited in Norway. *Id.* Legislation intended to regulate the field of biotechnology, passed in 2002, also bans Norwegians from participating in international surrogacy agreements, but the ban has never been enforced directly. *Id.*

66. Balazs Koranyi, *Norway Princess in Secret India Trip to Play Nanny*, REUTERS (Dec. 3, 2012, 10:44 AM), http://www.reuters.com/article/2012/12/03/us-norway-princess-surrogacy-idUSBRE8B20RG20121203.

67. Abrams & Piacenti, *supra* note 38, at 700. This is true in countries that base citizenship by descent on a genetic connection (as opposed to an intent connection). *Id.*

law, but in surrogacy, citizenship determinations are affected by international factors and other states' citizenship policies.[68] This insight is useful not only for the development of Thai and Australian law but also for other countries trying to determine the best surrogacy regulations.

A. Thailand: The Evolving Frontier

Thailand has become known as a global marketplace for intended parents to find surrogate mothers. Because the cost of living is extremely low and medical costs are less expensive than in Western countries, Thailand is a popular surrogacy destination.[69] Thailand's popularity increased in the mid-2000s after India became slightly less open to surrogacy arrangements. This shows that India's domestic changes to surrogacy laws, or those of any other popular surrogacy destination, can impact surrogacy markets worldwide.[70]

It is worthwhile to briefly summarize the events that directly led to the call for surrogacy reform in Thailand. The baby Gammy controversy spurred international outrage and cast both Australia and Thailand in a negative light.[71] Baby Gammy stayed in his surrogate mother's care even after the Australian intended parents stated they would be willing to take him to Australia. A few months after Gammy was born, news spread that the father had been convicted of twenty-two child sex offenses. This surrogacy failure resonated around the world.[72]

The negative press was compounded by the news of a second sensational case: a Japanese businessman, twenty-four-year-old

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68. Hartnell, *supra* note 46, at 344.

69. Philip Brasor & Masako Tsubuku, *Childless Japanese Couples Look for Bargains in Asia*, JAPAN TIMES (Mar. 8, 2011), http://blog.japantimes.co.jp/yen-for-living/childless-japanese-couples-look-for-bargains-in-asia/. This popularity is not only for Australian intended parents; there has also been an influx of Japanese couples that travel to Thailand to find a surrogate. *Id.* Over sixty same-sex Israeli couples have also had difficulty bringing their children home from Thailand since January 2014. Gavriel Fiske, *65 Surrogate Babies Born to Israeli Gay Couples Stuck in Thailand*, TIMES OF ISR. (Jan. 19, 2014, 2:55 PM), http://www.timesofisrael.com/65-surrogate-babies-born-to-israeli-gay-couples-stuck-in-thailand/.

70. *See* Ritchie, *supra* note 56.

71. *See supra* Introduction.

72. *See* Nelson Groom & Sally Lee, *The Twin Sister of Down Syndrome Baby Gammy, Who Was Abandoned in Thailand, Can Live with Her Sex Offender Father*, DAILY MAIL AUSTL. (Nov. 7, 2014, 10:16 AM), http://www.dailymail.co.uk/news/article-2793262/gammy-s-father-convicted-sex-offender-david-farnell-victim-mother-didn-t-pursue-avoid-daughter-going-court.html.

Mitsutoki Shigeta, fathered sixteen surrogate children in Thailand.[73] When police raided a Bangkok home, they found nine of Shigeta's children living there, each with his or her own nanny. Acting as an alleged "baby factory," Shigeta stated that he wanted to win elections and could use his big family to gain votes.[74] Although there was no law prohibiting the number of surrogate children that a person can have, hiring surrogates without any intent to personally care for the children is unethical at best.[75] This practice also led to calls for reform from people both within the industry, such as Mariam Kukunashvili, cofounder of Global Life IVF Clinics, as well as from citizens and legislators.[76]

The initial response of the Thai government was to raid surrogacy clinics.[77] Thai immigration officials also stopped couples from attempting to leave the country with surrogate children until they obtained a court order acknowledging the birth mother's consent.[78] The

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73. Kevin Rawlinson, *Interpol Investigates 'Baby Factory' As Man Fathers 16 Surrogate Children*, GUARDIAN (Aug. 23, 2014, 8:49 PM), http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children.

74. This statement was made to the cofounder of one of the clinics that Shigeta used to find Thai surrogate mothers. *Id.* Although likely a joke, the comment caused the clinic's founder to refuse to match Shigeta with any more potential surrogates. Michael Sullivan, *Outside the Womb*, LIFE OF THE LAW (July 14, 2015), http://www.lifeofthelaw.org/2015/07/outside-the-womb/ [hereinafter *Outside the Womb*] (referring to Shigeta as "Japanese Johnny Appleseed").

75. *See* Kaweewit Kaewjinda & Pracha Hariraksapitak, *Japanese Businessman Fathered 13 Surrogate Babies in Thailand: Police*, REUTERS (Aug. 8, 2014, 7:21 AM), http://www.reuters.com/article/us-thailand-surrogacy-raid-idUSKBN0G815E20140808. Thai police, who are investigating, have not found any evidence of human trafficking or child exploitation. *See Story of Mitsutoki Shigeta's First Thai Surrogate Offers Clues into Mystery of 16 Babies*, JAPAN TIMES (Sep. 2, 2014), http://www.japantimes.co.jp/news/2014/09/02/national/surrogate-offers-clues-into-japanese-with-16-babies/#.VsfODjY-C8V.

76. *See Surrogacy Storm in Thailand*, *supra* note 2; *Gammy Sparks Call for Surrogacy Reform*, AUSTRALIAN (Aug. 4, 2014, 12:00 AM), http://www.theaustralian.com.au/national-affairs/gammy-sparks-call-for-surrogacy-reform/story-fn59niix-1227012195526?sv=69a55390830b58c2b1b40d385ae845ee.

77. *See* Hilary Whiteman, *Anxious Parents Fear for Babies as Thai Military Tightens Surrogacy Laws*, CNN (Aug. 19, 2014, 9:27 PM), http://www.cnn.com/2014/08/19/world/asia/thailand-surrogacy-laws-change/. At the time, it was estimated that 400 couples had either a pregnant surrogate mother in Thailand or frozen embryos stored in the country. Half of those couples are reported to be from Australia. Other couples were from around the world, including the United States and Israel. *See id.*

78. *See* Todd Connaughton, *Gammy Surrogacy Fallout: Kempsey Couple and Their Baby Girls Stranded in Thailand*, SYDNEY MORNING HERALD (Aug. 19, 2014), http://www.smh.com.au/nsw/gammy-surrogacy-fallout-kempsey-couple-and-their-baby-girls-stranded-in-thailand-20140819-105p5p.html. This unexpected setback was difficult for intended parents who already spent large sums of money on surrogacy and then were forced to find extra money to fund a longer stay in Thailand. *Id.*

legality of surrogacy arrangements, current and future, became very uncertain.[79] Furthermore, the Thai government began contemplating the enactment of formal surrogacy regulations, which were eventually passed through the National Legislative Assembly in February 2015.[80]

1. Thai Law Regulating Surrogacy and Parentage

Before February 2015, there was no Thai law formally regulating surrogacy. The Medical Council of Thailand had some authority over surrogacy in that it regulated doctors and therefore their ability to perform surrogacy procedures such as IVF: a doctor who performed IVF for compensation faced the loss of his medical license.[81] However, this regulation was rarely enforced, which effectively left surrogacy unregulated.[82]

Without any formal surrogacy law to determine parentage of surrogate children, the parental rights of intended parents were also extremely uncertain.[83] Thai birth certificates recognized the surrogate mother as the legal mother of the child, whether she was genetically related to the child or not.[84] At times, the genetic father would be listed as the legal father on the birth certificate, but if the surrogate mother was married, her husband was often listed instead. Furthermore, Thai law gives the mother sole custody of children born out of wedlock, so even if the genetic father was listed on the birth certificate, he would not have any automatic parental rights.[85]

After the baby Gammy and Shigeta controversies, the Thai government began working on new surrogacy legislation that was passed in February 2015.[86] Although the new law mitigates some of the

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79. *See A New Baby*, *supra* note 17. This uncertainty was in part due to the instability of the political climate in Thailand. In May 2014, the democratically elected government was overthrown by a military coup. The military suspended the constitution in order to "restore order and enact political reforms." *Why Is Thailand Under Military Rule?*, BBC (May 22, 2014, 10:37 AM), http://www.bbc.com/news/world-asia-25149484.

80. *See Draft Law on Surrogacy Ready to Be Submitted for NLA Review*, *supra* note 17.

81. *See* Jocelyn Gecker, *Thailand's Surrogacy Scandals and Laws*, ASSOCIATED PRESS (Sep. 3, 2014, 2:06 AM), http://bigstory.ap.org/article/news-guide-thailands-surrogacy-scandals-and-laws. The regulation did not address surrogacy agencies or surrogate mothers, which "le[ft] room for commercial surrogacy to occur without oversight." *Id*.

82. *See* Whiteman, *supra* note 77. Raids performed in July 2014 found that many surrogacy clinics were not abiding by the council's code of conduct. *Id.*

83. *See Draft Law on Surrogacy Ready to Be Submitted for NLA Review*, *supra* note 17.

84. *See A New Baby*, *supra* note 17.

85. *See id*. The surrogate mother has full and parental rights under Thai law. *See* Fiske, *supra* note 69.

86. *See Draft Law on Surrogacy Ready to Be Submitted for NLA Review*, *supra* note 17. The law, which was written by the Social Development and Human Security Ministry,

uncertainty, it does not address the statelessness issues stemming from a lack of mirror citizenship reform. Furthermore, it falls prey to the downsides of strict regulation.

The 2015 Thai Surrogacy Law bans commercial surrogacy[87] and tightly restricts both who may act as a surrogate and who will be recognized as legitimate, legal intended parents.[88] The intended parents must be a married couple that is unable to get pregnant.[89] Furthermore, the law prohibits international surrogacy arrangements by restricting valid arrangements to those where both intended parents are Thai citizens, or if only one parent is a Thai citizen, the couple must be married for at least three years.[90] Potential surrogate mothers must also meet a number of qualifications. A surrogate mother must have already given birth to at least one child of her own.[91] If she is married, she must obtain the consent of her husband to enter into the agreement.[92] The default provision is that a surrogate mother must be a relative of the intended parents; however, a nonrelative may serve as the surrogate if the commission approves the arrangement.[93]

The law makes strides in establishing who will be recognized as the surrogate child's parents. The intended parents are recognized as the legal parents under the law.[94] If the intended parents die before the child is born, the surrogate mother will be the guardian of the child until a new guardian can be appointed. [95] Conversely, if the intended

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was reviewed by legal experts on the Council of State. *Id.* It has already been approved by the interim Thai cabinet. *See* Whiteman, *supra* note 77; *Thailand Bans Commercial Surrogacy*, *supra* note 31.

87. *See Draft Law on Surrogacy Ready to Be Submitted for NLA Review*, *supra* note 17. The prohibition on surrogacy for commercial gain would be policed partially by prohibiting medical professionals from carrying out ART procedures when they have reason to believe that the woman could be acting on a commercial arrangement. *See id.*

88. Many thanks to Chawin Ounpat for his help translating the Thai statue into English.

89. BILL OF PROTECTION OF CHILDREN BORN FROM ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) ACT (2015) § 21 (Thai.); *Thailand Draft Surrogacy Law*, THAI LAW FORUM (Aug. 19, 2014), http://www.thailawforum.com/thailand-draft-surrogacy-law/; *see* Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBRARY OF CONGRESS (Apr. 6, 2015), http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/ (describing Thailand's ART Act, which "significantly protects children born through Assisted Reproductive Technologies (ART) and sets the legal procedures the spouses (referred as "applicants") must follow in order to have such children.").

90. ART ACT, *supra* note 89, § 21.

91. ART ACT, *supra* note 89, § 21.

92. ART ACT, *supra* note 89, § 21.

93. ART ACT, *supra* note 89, §§ 21, 23; *Thailand Draft Surrogacy Law*, *supra* note 89; *see* Umeda, *supra* note 89 (describing ART Act § 21).

94. ART ACT, *supra* note 89, § 29.

95. ART ACT, *supra* note 89, § 29; *Thailand Draft Surrogacy Law*, *supra* note 89.

parents are alive at the time of the child's birth, they are required to accept the child or children who were born through the surrogacy arrangement.[96] The law allows for the surrogate mother to withdraw her consent to the arrangement and terminate the agreement; however, it is unclear how this provision will operate in practice because the law defers to the Medical Council to determine an appropriate time period wherein withdrawal is acceptable.[97]

There are also clearly delineated penalties for violations of the surrogacy law. Surrogacy agencies and recruiters can be subject to up to five years in jail and penalties of up to 100,000 baht for soliciting women to become surrogate mothers.[98] Any person who performs commercial surrogacy could be subject to imprisonment of up to ten years and a fine of 200,000 baht.[99] Furthermore, the law establishes a committee to examine ART and give recommendations about how policy should evolve to best address changing technology.[100] The Juvenile and Family Courts have jurisdiction to decide cases related to parentage of ART children.[101]

Although the 2015 Thai Surrogacy Law more clearly delineates parentage for surrogate children, the situations where surrogacy is legal are now very narrowly defined, which could lead to a whole new range of problems for Thai surrogate mothers and foreign intended parents.[102]

2. Thai Law Regulating Citizenship

The issue of gaining Thai citizenship has not traditionally been a concern because the great majority of arrangements involved a Thai

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96. ART ACT, *supra* note 89, § 33; *Thailand Draft Surrogacy Law*, *supra* note 89; *see* Umeda, *supra* note 89 (describing ART Act § 33). The provision was not present in the original draft law that was submitted for comments. *Thailand Draft Surrogacy Law*, *supra* note 89. It seems to be a direct reaction to the public outrage due to the baby Gammy controversy.

97. ART ACT, *supra* note 89, § 26; *Thailand Draft Surrogacy Law*, *supra* note 89.

98. ART ACT, *supra* note 89, § 49; *Thailand Draft Surrogacy Law*, *supra* note 89; *see* Umeda, *supra* note 89 (describing ART Act § 49). 100,000 Thai baht is the equivalent of approximately 3,000 U.S. dollars. *See* Gecker, *supra* note 80.

99. ART ACT, *supra* note 89, § 48; *Thailand Draft Surrogacy Law*, *supra* note 89; *see* Umeda, *supra* note 89 (describing ART Act § 48).

100. ART ACT, *supra* note 89, §§ 6, 7.

101. *New Thailand Surrogacy Draft Law Passed*, THAILAND LAW FORUM (May 12, 2010), http://www.thailawforum.com/news/2010/news-May-10-2.html.

102. When the Thai government began contemplating surrogacy reform, many Thai surrogates who had not yet given birth went into hiding and forewent prenatal doctor's visits out of fear that they could be breaking a new draft law. *See* Gecker, *supra* note 80. This may foreshadow the degradation of health care if commercial surrogacy is outlawed. *See id.*

surrogate mother and foreign intended parents. The 2015 Thai Surrogacy Law now requires that at least one of the intended parents be a Thai citizen. Under the Thai Nationality Act, a child can gain Thai citizenship through descent when he has either a Thai mother or Thai father, so children born through legal surrogacy arrangements will be Thai citizens.[103] But what if a child is born through a type of arrangement not contemplated by the new law? The next section of this Note discusses the problems raised by this new regulatory scheme.

3. Issues Raised by the Thai Approach

Neither Thailand's historical lack of regulation nor the new strict regulatory scheme that imposes penalties is the best solution to the issues highlighted by the baby Gammy and Shigeta controversies. Although formally addressing surrogacy decreases confusion about how the law treats the parentage and citizenship of surrogate children, such a strict regulatory system merely raises different issues instead of solving the problems entirely.[104] The unfortunate reality is that people do not always comply with the law. This statement has been proven to apply in the Thai surrogacy context. One should not forget that the Medical Council of Thailand formally prohibited doctors from performing IVF in 1997; but while this prohibition was in place, Thailand became one of the most popular surrogacy destinations worldwide.[105] According to Dr. Somsak Lolekha of the Thai Medical Council, law enforcement is extremely lacking and is "a weak point of Thailand." Lolekha has stated: "Just like drinking and driving. We have the law. But they never enforce it."[106]

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103. *See* NATIONALITY ACT, B.E 2508 § 7 (as amended by Acts B.E. 2535 No. 2 & 3) (1992) (Thai.).

104. *See* Michael Sullivan, *A Thai Surrogacy Case, with a 6-Month-Old Girl Caught in the Middle*, NPR (July 21, 2015, 3:06 PM), http://www.npr.org/sections/parallels/2015/07/15/423188769/a-thai-surrogacy-case-with-a-6-month-old-girl-caught-in-the-middle [hereinafter *A Thai Surrogacy Case*]. The new law has already caused problems for intended parents that were involved in surrogacy arrangements with Thai surrogate mothers when the new regulations were passed through the legislative assembly. *See id.* Although the law contained a grace period for surrogacy arrangements already in progress, the law only recognizes opposite-sex couples as valid intended parents, so a same-sex American couple has not been able to bring their daughter home. *See id.* One of the intended fathers is related to the child biologically, but the nonbiological surrogate mother withdrew her consent for the arrangement and has parental rights to the child, who is considered a Thai citizen. *See id.*

105. *See Thailand Bans Commercial Surrogacy for Foreigners*, BBC (Feb. 20, 2015), http://www.bbc.com/news/world-asia-31546717.

106. Jonathan Head, *Thailand's Crackdown on 'Wombs for Rent*,' BBC (Feb. 20, 2015) http://www.bbc.com/news/world-asia-31556597.

Although the country's style of regulating surrogacy has changed, many of the factors that led it to become a popular surrogacy destination are still at play. In general, the Hague Conference has found that "intended parents habitually resident in other states are not travelling to the states which expressly permit and regulate surrogacy to enter into surrogacy arrangements."[107] Intended parents often perceive there to be less risk of the surrogate mother reneging on the agreement if the arrangement occurs abroad where there is a large population of poor women who would benefit financially from a surrogacy arrangement.[108] Furthermore, the cost of medical care in Thailand is still very low. Industry insiders predict that price-conscious intended parents will continue to turn to Thai surrogate mothers, but the strict regulations will force the industry underground.[109] When surrogacy services are traded on the black market, it is even more difficult to protect the basic rights and well-being of the surrogate mothers.[110]

Surrogacy is a unique context because a child is not a simple commodity that can be traded back and forth or left behind in a country due to regulatory roadblocks. Surrogacy laws need to acknowledge the possibility that people will not follow the letter of the law and address how to proceed while still protecting the rights of the child, surrogate mother, and intended parents.

B. Australia: An Established System of Strict Regulation

International surrogacy is very common among Australians.[111] According to Surrogacy Australia founder Sam Everingham, Australia "has become one of the largest surrogacy markets internationally because of the perfect storm created by the lack of access to international adoption, women leaving childbirth [for] later on and the

107. *Preliminary Report*, *supra* note 12, at 10.

108. *Id.* at 7.

109. The formation of a booming underground surrogacy market has been observed in other countries that have a combination of strict surrogacy regulation and vulnerable populations in need of an income source. Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Surrogate Motherhood*, N.Y. TIMES (Aug. 2, 2014), http://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html?_r=0.

110. *Preliminary* Report, supra note 12, at 26–27.

111. *See* Corderoy, *supra* note 23. Australia has one of the largest surrogacy markets internationally. *Id.* Australians are one of the highest per capita users of commercial surrogacy in the world. *Id.* From 2008 to 2012, the use of Thai surrogates by Australians increased by 54%, or from 297 applications to 459 applications. *Id.*

fact we are a wealthy country and women can afford it."[112] Commercial surrogacy is outright banned in most Australian states, so much of this activity is occurring in the international market.[113] In a study conducted by the Hague Conference on Private International Law, Australian authorities reported 430 cases of children born through international surrogacy arrangements from 2009 to 2012. The exact number of arrangements is difficult to know precisely, however (in part due to the illegality in some states), and an academic approached by the Hague Conference suggested the number of international surrogacy arrangements may be significantly higher.[114]

1. Australian Law Regarding Surrogacy and Parentage

Due to the federal structure of Australia's government, there is no single, overarching approach to surrogacy.[115] However, many states take similar approaches. International surrogacy is banned and carries criminal penalties in New South Wales, Queensland, and the Australian Capital Territory (ACT).[116] Consequently, surrogacy contracts are not enforceable,[117] and intended mothers are not recognized as the legal parents of surrogate children.[118] This strict policy stems from a concern that surrogates will be exploited and the belief that strict regulation is the only way to prevent harm to surrogate mothers, surrogate children, and intended parents.[119]

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112. *Id.*

113. *See* Ergas, *supra* note 1, at 135. This ban on the use of surrogates usually applies to both domestic and international surrogacy agreements. *See id.* On the other hand, surrogacy for altruistic purposes often is allowed. *See* Nelson, *supra* note 22, at 244.

114. *See Study of Legal Parentage*, *supra* note 11 at 56 ("[I]n just *one* year (2011), 394 applications for Australian citizenship following an overseas birth were made in India alone.").

115. Laws regulating surrogacy do not fall under the purview of the Australian Parliament because it is not one of the enumerated legislative powers granted to the federal legislature under Section 51 (concurrent state and federal jurisdiction) or Section 52 (exclusive federal jurisdiction) of the Australian Constitution. *See* AUSTRALIAN CONSTITUTIONS 51. *See also* Karin Hammarberg et al., *Gamete and Embryo Donation and Surrogacy in Australia: The Social Context and Regulatory Framework*, 4 INT'L J. FERTILITY & STERILITY 176, 177 (2011).

116. In New South Wales, there is a maximum penalty of imprisonment for two years. *Surrogacy Bill 2010*, *supra* note 15 at div 2, s 8. In Queensland, the maximum penalty is two years as well. *Surrogacy Act 2010*, *supra* note 15 at s 53(2). In ACT the maximum penalty is one-year of imprisonment. *Parentage Act 2004*, *supra* note 22.

117. *See* Nelson, *supra* note 22, at 244.

118. *See* Ritchie, *supra* note 56.

119. *See* Nelson, *supra* note 22, at 248. The stated "aim of surrogacy laws in Australia has been, and remains, to prevent the exploitation of vulnerable adults, to avoid the commerciali[z]ation of reproduction and to protect the best interests of children." Jenni

Australia is not immune to waves of reform and uncertainty about how best to regulate surrogacy. The most recent wave of surrogacy and parentage reforms were made in the mid-2000s.[120] In these reforms, Australian states adopted a new formulation of parentage: parentage is now postbirth, consent-based, and subject to some preconditions and court oversight.[121]

Each state has, at a minimum, slightly different regulations. According to the Australian Department of Immigration and Border Protection, "transfer of legal parentage to the intended parents may not be available under Australian law."[122] Although most states use descent-based parentage, they have different regulations regarding transfer of parentage after birth, which gives rise to uncertainty.

The ACT's Parentage Act of 2004 exemplifies the type of parentage regulation that Australian states have recently adopted.[123] Although the act does not specifically mention international surrogacy arrangements, it states that when either donor ovum or donor sperm is used in ART,[124] the birth mother is "conclusively presumed to be the mother of any child born as the result of the pregnancy."[125] Commercial surrogacy is prohibited,[126] and there are strict regulations on parentage following altruistic surrogacy.[127] Since legal surrogacy is limited to procedures

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Millbank, *The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?,* 35 MELB. U. L. REV. 165, 167 (2011).

120. *See* Millbank, *supra* note 119, at 175. "Prior to the second wave reforms, state and territory law vested parentage of children born through surrogacy in the birth mother and her male partner, regardless of genetic connection, with limited or no ability to transfer legal parentage to the intended parents." *Id*. at 173–74.

121. *See id*. at 177–78. This system is modeled after that used in the United Kingdom since 1994. *See id*. at 178.

122. *Fact Sheet: International Surrogacy Arrangements*, *supra* note 14.

123. *See Parentage Act 2004*, *supra* note 22.

124. Procedure is defined as "(a) artificial insemination; or (b) the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilized outside her body; or (c) any other way (whether medically assisted or not) by which a woman can become pregnant other than by having sexual intercourse with a man." *Id*. at div 2.2, s 11.

125. *Id*. at div 2.2, s 11(4). Furthermore, just because an Australian is recognized on the birth certificate does not necessarily mean that he will be recognized as a legal parent in Australia. A foreign birth certificate is evidence of parentage but is not determinative, so parents can also be subject to DNA testing. Millbank, *supra* note 112, at 187.

126. Not only is commercial surrogacy prohibited, but even publishing an advertisement "with the intent of inducing someone to enter into a substitute parent agreement" is a punishable offense. *Parentage Act*, *supra* note 22, at div 2.6, s 43(1)(a).

127. Altruistic surrogacy arrangements are limited to situations in which the child was conceived via IVF, the procedure occurred within the ACT, it was a gestational surrogacy arrangement, there was a substitute parent agreement, at least one of the substitute parents is genetically related to the child, and the substitute parents live in the ACT. STANDING COMM. OF ATTORNEYS-GENERAL AUSTL. HEALTH MINISTERS' CONFERENCE

occurring within ACT borders, the act's provisions for transfer of parentage through parentage orders are not applicable to international surrogacy arrangements.[128] This is an example of a scheme where the transfer of parentage may not be possible following international surrogacy.

Western Australia, on the other hand, merely prohibits commercial surrogacy, instead of criminalizing it like the ACT, and parentage orders can be used to transfer parental rights to intended parents involved in international surrogacy arrangements. Under the Western Australia Surrogacy Act of 2008, intended parents can apply for parentage if they are residents of Western Australia, and at least one of them is over age twenty-five.[129] They also must be an "eligible couple," or one of the parents must be an "eligible person" at the time they entered into the surrogacy arrangement.[130] Eligibility is based on being married, or in a de facto relationship, and being unable to conceive a child due to medical reasons or likely to conceive a child affected by genetic abnormality.[131] Although this law does not restrict the application for parentage orders when a child is born outside the state, these requirements do enact strict requirements on what intended parents are "eligible" to participate in surrogacy and therefore who can gain parentage after a surrogacy arrangement.[132]

These contradictory provisions can lead to the birth of surrogate children who are genetically related to their intended parents but whose parental relationship is not recognized under state or federal law, and

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CMTY. AND DISABILITY SERVS. MINISTERS' CONFERENCE, JOINT WORKING GROUP, A PROPOSAL FOR A NATIONAL MODEL TO HARMONISE REGULATION OF SURROGACY 25 (2009).

128. *Parentage Act 2004*, *supra* note 22, at div 2.5, s 24(a). The Supreme Court of the territory takes a number of factors into consideration when deciding whether the transfer of parental responsibility through a parentage order is in the best interest of the child, such as whether the child is living with the intended parents at the time the order is requested, whether there was payment (other than reasonable expenses), and whether the birth and substitute parents received counseling prior to agreeing to the substitute parent agreement. *Id.* at div 2.5, s 26(3)(a-e).

129. *Surrogacy Act 2008* (WA) s 19(1)(a) (Austl.)

130. *Surrogacy Act 2008, supra* note 129 at s 19(2).

131. An eligible couple is "[two] people of opposite sexes who are married to, or in a de facto relationship with, each other and who, as a couple are unable to conceive a child due to medical reasons not excluded by subsection (3) or although able to conceive a child, would be likely to conceive a child affected by genetic abnormality or a disease . . . " *Surrogacy Act 2008*, *supra* note 129 at s 19(2)(a)–(b).

132. It is of note that the provision only provides for opposite-sex couples to be eligible under this provision. *Id.* See generally Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy Custody Disputes*, 18 CARDOZO J.L. & GEN. 199 (2011), for a discussion on same-sex couples and the evolving surrogacy landscape.

the child is consequently family-less.133 In cases where Australian parents have not been able to establish parentage for their Thai-born children under Australian law, they are forced to gain Thai passports and travel visas. Once back in Australia, they can then apply for parenting orders through the Family Court system.134

2. Australian Law Regarding Citizenship of Foreign-Born Surrogate Children

The surrogate children of Australian intended parents are not automatically granted Australian citizenship at birth, but there are alternative means for acquiring citizenship. The Australian Citizenship Act of 2007 ("Citizenship Act") outlines the procedure for acquiring citizenship by descent.[135] According to the Australian Citizenship Instructions, which provide information on the implementation and policy behind the Citizenship Act, the commercial surrogacy ban does not prohibit the "relationship between the commissioning parent/s and the child being recognised" for purposes of granting citizenship.[136] However, whether or not this relationship will be recognized in practice is unclear.

The Citizenship Act of 2007 addresses surrogacy in Section 8, although not in detail. In order to gain citizenship the child must, at the time of birth, have a *parent* that is an Australian citizen by birth or citizen by descent that has been present in Australia for at least two years prior to the birth.[137] This use of "parent" has proven to be problematic because intended parents cannot formally assert their parentage rights over their surrogate children in some jurisdictions.[138] The Citizenship Act defines parentage per the definitions of "parent" under Sections 60H and 60HB of the Family Law Act of 1975. Those sections, in turn, define "parent" through the state's surrogacy

133. *See* Ergas, *supra* note 1, at 187.

134. Millbank, *supra* note 119, at 203. Parenting orders do not offer the intended parents per se parental status but can be used for them to obtain "parental responsibility" for the child. *Id.* Consequently, parenting orders are not an optimal solution. See *Family Law Act 1975* (Cth) s 64(B) (Austl.).

135. *See Fact Sheet: International Surrogacy Arrangements*, *supra* note 14.

136. *Australian Citizenship Instructions 2013* (Cth) s 19.7.6.

137. *See Fact Sheet: International Surrogacy Arrangements*, *supra* note 14. Citizenship by descent can be denied when the decision-maker is not convinced of the identity of the child, the applicant is found to not be of good character, or the applicant does not meet the national security requirements. *Id.*

138. *See* Millbank, *supra* note 119, at 201.

regulations regarding parentage.[139] This circular definition only compounds the inefficient legal doctrine regarding surrogacy.[140]

Consequently, in the Australian Citizenship Instructions, the Department of Immigration and Citizenship explains that Section 8 should not be applied to international surrogacy arrangements, and "parent" should be interpreted under its ordinary meaning, not under the standards set under the Family Law Act of 1975.[141] This interpretation is what allows surrogate children to gain citizenship by descent under section sixteen of the Citizenship Act.[142]

In most surrogacy arrangements, at least one of the intended parents is biologically related to the child, so the parents claim citizenship by biological descent for their child (as opposed to an adoption scenario where they would be claiming a nonbiological link).[143] Consequently, DNA tests are used to determine the genetic link between the intended parent and surrogate child before the child leaves the surrogate's country.[144]

3. Issues Raised by the Australian Approach

The strict provisions of Australian surrogacy law are beneficial in that they provide some certainty in how surrogate arrangements will be

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139. *Australian Citizenship Act 2007* (Cth) s 8. *See Family Law Act of 1975*, *supra* note 125 at ss 60H, 60HB.

140. *See* Millbank, *supra* note 112, at 201 ("In short, citizenship law reflects family law, which in turn reflects the state parentage laws including the surrogacy transfer regimes—but state-based surrogacy transfers cannot be accessed prior to entering Australia, and, moreover, they exclude arrangements in which payment has been made to the birth mother.").

141. *Australian Citizenship Instructions 2013*, *supra* note 127 at s 19.7.5. The definition of parent, in this ordinary usage, was recognized in *H v Minister for Immigration and Citizenship* 2010 FCR 393 (Austl.). Due to the Full Federal Court's decision, citizenship by descent can be gained by children of both Australian citizen biological parents and Australian citizen non-biological parents. *Id.* at s 19.2.1.

142. "A person born outside Australia on or after 26 January 1949 is eligible to become an Australian citizen if: (a) a parent of the person was an Australian citizen at the time of the birth; and (b) if the parent was an Australian citizen . . . at the time of the birth . . . " *Australian Citizenship Act 2007*, *supra* note 130 at s 16(2).

143. *See Fact Sheet: International Surrogacy Arrangements*, *supra* note 14. If neither parent has a biological link to the child, citizenship can still be granted but it takes more evidence, and therefore time, to establish. Treating the child as one's own "from some point in time after birth would not by itself be evidence that the Australian citizen was the child's parent at the time of birth." *Id.* Instead, proof must be shown through other means, such as a formal surrogacy agreement or proof of providing financial support for the surrogate mother during pregnancy. *See id.*

144. *Countries Allowing Surrogacy*, FAMILIES THROUGH SURROGACY (2015), http://familiesthrusurrogacy.com/conference-faq.

addressed; however, they could be improved. Because each state follows its own approach, there is a lack of national uniformity. Questions arise if a couple wants a surrogate from a different state to carry their child. The restriction of legal surrogacy to altruistic agreements is very limiting, particularly in conjunction with the "eligibility" criteria in states such as Western Australia. Since it can be extremely difficult to find a surrogate who will agree to carry a child without compensation, and the "eligibility" criteria preclude many couples that are interested in surrogacy from making agreements within Australia, the current restrictions push people to find surrogates internationally.

The manner in which citizenship law addresses surrogate children is also insufficient. It does not support the established state interest in keeping families together. By allowing the Family Act's definition of "parent" to rely on individual states' definitions, national policy is undermined by inconsistent and inadequate state regulations. The difficulties in establishing which rules govern are exacerbated. Furthermore, although at least one surrogate parent is usually related to the child, the law makes it very difficult for children who are not genetically related to their parents to gain citizenship. Australian law compounds the confusion surrounding surrogacy by primarily relying on genetic-based parentage, instead of intent-based parentage.

III. A COMBINATION OF SURROGACY LAW AND CITIZENSHIP LAW REFORM WOULD BE THE MOST EFFECTIVE SOLUTION

The inconsistency caused by ineffective surrogacy laws is not hopeless, but does require careful attention.[145] The best solution to this pervasive problem requires beginning at the source of the chain reaction, in which inconsistent regulation of surrogacy and parentage causes an inability to gain citizenship, and fixing the problems that occur along the way.[146] This is true for countries on each side of the surrogacy equation. Whether a country has traditionally been home to surrogate mothers or intended parents, domestic parentage determinations, which are promulgated through surrogacy laws, need to be addressed as well as citizenship laws.

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145. "[T]he uncertainty with these arrangements is a symptom of a more general problem of irreconcilable family and citizenship laws at the international level. It is important to note that these legal issues may arise in cases that do not involve surrogacy." Hale, *supra* note 6, at 510.

146. Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL'Y 279, 312–13 (2011).

A cursory review may suggest solving an international problem with an international solution; however, scholars have acknowledged that "the best approach to this international problem may rest largely with domestic regulation."[147] Problems such as statelessness are at times compatible with international treaties because they implicate the interactions of two countries' laws. However, because surrogacy is not an action that people take on a whim, and instead is usually planned out well in advance, when intended parents seek out international surrogacy arrangements despite home-state prohibitions, they are already skirting the law and are more likely to ignore regulations imposed by the state where the surrogacy arrangement occurs.[148] Consequently, international regulation would not have the deterrent effect that makes it useful in other contexts. International agreements encounter difficulties when countries are unwilling to sign agreements that take away some of their autonomy. Whether a signed agreement would be enforced is also unclear.[149] In order for an international solution to be effective, a regulatory agency would need to be established to oversee compliance, which raises issues of finding financing when budgets are already tight.[150]

Furthermore, "one need only look at the wide variety of regulatory approaches taken to ARTs in general and surrogacy in particular to appreciate that international consensus will be impossible to achieve."[151] In order for an agreement to be effective, it would need to definitively regulate surrogacy, but when regulations are too strict, countries will refuse to sign the agreement and couples will travel to whatever countries did not sign the convention.[152]

A private international law treaty is another option for international regulation and the Hague Conference on Private International Law is currently[153] studying law issues raised by filiation, particularly in regards to surrogacy.[154] In the future, the group could develop a standard set of rules to govern what substantive law applies

147. Nelson, *supra* note 22, at 248.

148. *See* Hale, *supra* note 6, at 508.

149. *See* Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665, 684 (2012).

150. Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120, 143 (2012).

151. Nelson, *supra* note 22, at 248.

152. *See* Hale, *supra* note 6, at 509.

153. As of January 2016.

154. *The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements,* HAGUE CONFERENCE ON PRIVATE INT'L LAW (HCCH) (last visited Jan. 4, 2016), https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

when there is a gap between two country's laws, as in the baby Gammy controversy.[155] Although this solution could help solve problems when laws conflict, it will not solve the underlying issue that state's substantive laws do not fully address the surrogacy context effectively.

For these reasons, an international agreement will not be an effective solution, and therefore reform should be focused on individual countries' laws. As countries reform their laws to address the evolution of ART, they should take lessons from the problems encountered by their peers and enact reforms that are designed specifically for surrogacy.

In terms of surrogacy law reform, some level of regulation is helpful, because it prevents confusion like that of the baby Gammy controversy. However, the extremely strict regulation that Australia and Thailand have adopted is counterproductive. Banning surrogacy pushes the market underground or out to foreign countries. Australian intended parents do not have access to surrogacy in their own states, so they turn to other countries, like Thailand, to find surrogate mothers. Strict regulation is likely to have a parallel impact in Thailand, as the surrogacy market goes underground to meet the demand of foreign intended parents. The best option is for states to find middle ground. Professor Millbank has commented that legalizing commercial surrogacy in Australia, while imposing some restraints, would allow Australian families to find surrogates within the country and avoid parental and citizenship issues associated with international surrogacy.[156]

Furthermore, surrogacy law should be reformed to address the international context, and definitions of "parent" should be improved accordingly. For example, in the ACT, there are already provisions of the Parentage Act of 2004 that specifically address pregnancy arising from procedures, such as ART; however, the presumption that the birth mother is the parent of the child, regardless of whether the egg was hers, is not rebuttable.[157] By adding provisions to address surrogacy abroad and making the presumption of parentage rebuttable, it would be easier for intended parents to obtain legal parentage.[158] Thailand would also benefit from acknowledging the increasingly global nature of the world today. By recognizing the specific issues that are associated

155. *See* Peter H. Pfund, *The Developing Jurisprudence of the Rights of the Child—Contributions of the Hague Conference on Private International Law*, 3 ILSA J. INT'L & COMP. L. 665, 665–66 (1997).

156. Ritchie, *supra* note 56.

157. *Parentage Act 2004*, *supra* note 23, at divs 2.3.

158. *Parentage Act 2004*, *supra* note 23, at divs 2.2–2.3.

with international surrogacy agreements,[159] instead of prohibiting commercial surrogacy across the board, the country could prevent potential conflicts before they occur.

This solution will only be comprehensive if countries also address the effect of parentage laws: the ability to gain citizenship. Although citizenship law reform needs to be completed carefully, because it can have far-reaching effects on immigration,[160] countries can serve broader immigration concerns by being more inclusive of family relationships formed through nontraditional means like surrogacy.[161] Citizenship laws should be amended to more fully consider the surrogacy context. Explicitly addressing parentage in the act, instead of just making uncertain assertions like Australia does in the Citizenship Instructions, would clarify surrogate-born children's ability to gain citizenship.

Other solutions to surrogacy inequities, like adoption, would not solve this problem as effectively. Some have suggested that intended parents could use adoption to gain parental rights over surrogate children.[162] Adoption is legal in more than eighty countries around the world, so there is a framework in place; however, adoption laws vary by jurisdiction. Using adoption as a means around surrogacy law would not solve the problem of inequities between different countries' laws; it would just raise more unexpected issues.[163] For example, in Western Australia there is no direct or private adoption. All children must be registered with a state agency, which then assigns placement.[164] Thus, the surrogate mother would not have control over whether the child would be adopted by the intended parents.[165] Reforming surrogacy and

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159. *See supra* Part I(B).

160. *See* Hale, *supra* note 6, at 510.

161. *See* Abrams & Piacenti, *supra* note 38, at 676 ("Children, who learn languages quickly and are in a formative time of their lives, are more likely than adults to integrate quickly and likely to bring this integration home to their families.").

162. *See* Marcelo de Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417, 424 (2010).

163. *See* Kindregan & White, *supra* note 8, at 623–24.

164. *See, e.g.*, *Adoption Act 1994* (WA) (Austl.); *Thinking About Adoption? Finding Out What It Means to Be an Adoptive Parent and How to Apply*, GOV'T OF WESTERN AUSTRALIA, DEP'T FOR CHILD PROT. AND FAMILY SUPPORT (Mar. 1, 2016), https://www.dcp.wa.gov.au/FosteringandAdoption/AdoptionAndHomeForLife/Pages/AllAboutAdoption.aspx ("In Western Australia, the Department for Child Protection, through its Adoption Service, is the only agency allowed to arrange adoptions.").

165. Another example of the unavailability of adoption as a solution to the problems implicated by surrogacy law occurred in the baby Manji case. Indian law prohibited single males from adopting baby girls. Even though the intended father was genetically related to baby Manji, he could not formally adopt her. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 419 (2012).

citizenship laws would be a much more effective solution than trying to skirt around the numerous laws already in place.

CONCLUSION

Thailand and Australia exemplify the issues faced by countries attempting to address surrogacy in the global marketplace. Thailand has recently moved from a complete lack of surrogacy regulation to a regime that prohibits commercial, as well as many potential altruistic, surrogacy arrangements. The new law resembles the manner in which Australian states commonly address surrogacy. Australia is usually home to intended parents and Thai citizens are more commonly surrogate mothers, but strict prohibition is not a good solution in either context. As technology continues to develop and alternative family formation becomes increasingly common, the inadequacy of current law will only become more apparent. Reforms to domestic legislation must find a middle ground in which countries address the impacts of new technology without being so restrictive that they force the market out of the country or into the black market. Conjunctively, citizenship laws must be amended to specifically contemplate the surrogacy context so children that are born abroad will be able to gain citizenship and travel home with their intended parents. Conflicts between countries' laws will never disappear in this global age, but by being conscious of the issues that they spawn, we can minimize the negative impacts.