Note

"Lost Identities": Surrogacy and the Rights of the Child in the United States and the Netherlands

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I. INTRODUCTION

In February 2014, an Australian couple took home their newborn baby daughter Pipah from the Thai surrogate mother who had carried her.[1] The couple left Pipah's critically ill twin brother Gammy with the surrogate mother.[2] The couple allegedly abandoned Gammy because of

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[1] *See, e.g.*, *Australian Couple 'Did Not Reject Down's Baby' Gammy,* BBC NEWS (Apr. 14, 2016), https://www.bbc.com/news/world-australia-36012320 [https://perma.cc/YL3R-85LT] (noting that "[i]n December 2013, surrogate Pattaramon Chanbua gave birth to a boy, Gammy, and a girl, Pipah, conceived with Mr Farnell's sperm and donor eggs," and that "[t]he Farnells returned to Australia with Pipah in February 2014[.]"); *see also* Samantha Hawley, *Baby Gammy: Surrogate Mum Says Australian Parents Saw Baby in Hospital, Disputes Claim They Didn't Know He Existed*, ABC NEWS (Aug. 5, 2014), https://www.abc.net.au/news/2014-08-04/baby-gammy-surrogate-mum-says-parents-saw-baby-in-hospital/5647440 [https://perma.cc/E3F2-GA63] (noting that "[t]he Thai surrogate mother of a baby boy born with Down syndrome and a hole in his heart says his Australian biological parents saw him in hospital" and that "Ms. Chanbua has told the ABC she gave birth to twins after agreeing to be a surrogate for the Australian couple, with a promised payment of about $16,000. She claims the couple, who have not been identified, rejected Gammy and returned to Australia with his healthy sister").

[2] Jonathan Pearlman, *'Baby Gammy' was not abandoned in Thailand, court rules*, TELEGRAPH (U.K.) (Apr. 14, 2016), https://www.telegraph.co.uk/news/2016/04/14/baby-gammy-was-not-abandoned-in-thailand-court-rules/ [https://perma.cc/777H-8G6C] (noting that a "court in Australia has ruled that the biological parents of baby Gammy—the boy at the centre of an international surrogacy dispute—did not abandon him in Thailand and that they should be allowed to keep his twin sister Pipah" and that "[t]he case follows a harrowing feud between the parents, who live in Bunbury, south of Perth, and the surrogate mother, Pattaramon Chanbua, who claimed the Australian couple abandoned Gammy when they learnt that he had Down's syndrome and took only his sister. It subsequently emerged that David Farnell, 58, the father, had been imprisoned in the 1990s for child sex offences—a revelation which prompted Ms. Chanbua to apply for custody of Pipah.").

his heart disease and Down syndrome condition.[3] Due to this abandonment, and after certain information came to light about the past of the biological father, the surrogate mother sought an Australian court order for custody of Pipah.[4] Unsurprisingly, this controversial case regarding the ethics of gestational surrogacy[5] caused considerable commotion in media all over the world[6] and demonstrates the many issues and interests at stake in surrogacy arrangements, such as protection against discrimination, violence, child trafficking, and exploitation of women. This note, however, exclusively addresses developments in surrogacy arrangements from the perspective of children's rights to know their identities and origins; these other issues are beyond the scope of this note but are serious concerns that demand proactive and sensible policymaking.

This note focuses on children born to surrogates and their rights to know their identities and origins. It compares those rights as they exist in the Netherlands, which is known for its particularly restrictive surrogacy laws,[7] and the United States, which permits the degree of surrogacy regulation to vary among each of its states arguably as a result of being the only United Nations member country that has not ratified[8] the United Nation's Convention on the Rights of the Child,[9] hereinafter at times referred to simply as the Convention. This comparison will produce useful insights on the obstacles children born to surrogates face around the globe and aims to encourage a more sensible and child-centered approach to future legal developments in the area. Because international

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[3] *Id.*

[4] *See, e.g., Australian Couple 'Did Not Reject Down's Baby' Gammy,* BBC NEWS (Apr. 14, 2016), https://www.bbc.com/news/world-australia-36012320 [https://perma.cc/YL3R-85LT].

[5] *Frequently Asked Questions About our Gestational Carrier Program,* UNIV. IOWA HOSP. & CLINICS (2019), https://uihc.org/gestational-carrier-program [https://perma.cc/4SFW-FGYX] (noting gestational surrogacy involves implanting an embryo created through in vitro fertilization (IVF) technology in a gestational carrier, who is genetically unrelated to the resulting child).

[6] *See, e.g.*, Richard Blauwhoff & Lisette Frohn, *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law, in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 211, 212 n.1 (Christophe Paulussen et al. eds., 2016) ("In 2014 the case of Baby Gammy caused a considerable outcry in the international media, when it emerged that the commissioning Australian parents, who after having negotiated a surrogacy arrangement with a Thai surrogate mother, who subsequently gave birth to twins, left Gammy, a baby with Down's syndrome and a heart disease, in Thailand while taking the 'healthy' twin sister back to Australia.").

[7] *Infra* section entitled "Surrogacy in the Netherlands."

[8] Karen Attiah, *Why won't the U.S. ratify the U.N.'s child rights treaty?,* WASH. POST (Nov. 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/ [https://perma.cc/FK5E-CVWH] ("Only three U.N. countries have not ratified the CRC: Somalia, South Sudan, and . . . the United States."); Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US,* ACLU (Nov. 20, 2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/A2HM-4K99] ("Until this year, the United States was one of three countries—the other two being Somalia and South Sudan—that had failed to ratify the CRC. And while it was embarrassing enough to be in this limited company, this year, our fellow outliers ratified the convention.").

[9] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (Nov. 20, 1989), 1577 U.N.T.S. 3 (entered into force Sept. 20, 1990) [hereinafter Convention], *available at* https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf [https://perma.cc/5WWT-SLHC].

surrogacy is today so prevalent, this note also discusses the effects of conflicts of law between the surrogate's country and the intended parents' country on children's rights internationally.

A. Surrogacy and Contemporary Society

The LGBT rights movement,[10] perhaps the most recent equal-rights campaign in modern times, has advanced the rights of same-sex couples around the world. The Netherlands in 2001 became the first country to legalize same-sex marriage.[11] As of March 2019, twenty-six countries around the world allow same-sex marriages.[12] This relatively recent development has dramatically changed society's views on traditional families and opened up a realm of legal possibilities, particularly in socially progressive countries, through which couples may produce offspring or arrange their families. Furthermore, an increase in the number of so-called fertility tourists has been observed; these fertility tourists seek reproductive treatments abroad due to differences in regulation, medical availability, and costs of reproductive treatments among jurisdictions.[13]

The urge to have children is one of the most—if not the very most—vital of human desires.[14] For those unable to bear a child, tradi-

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[10] *See generally* BEFORE STONEWALL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT (John Dececco & Vern L. Bullough eds., 2002) (discussing the lives of individuals involved early in the campaign for gay and lesbian civil rights in the United States).

[11] Reuters, *World's first legal gay weddings*, TVNZ (Apr. 1, 2001), https://web.archive.org/web/20100205115951/http://tvnz.co.nz/view/news_world_story_skin/34978 ("Two lesbian brides and six gay grooms became the world's first homosexuals to wed legally, tying the knot on Sunday in a colourful communal ceremony. They married minutes after a Dutch law allowing same-sex matrimony came into effect."); *see also* Associated Press, *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES (Sept. 13, 2000), https://www.nytimes.com/2000/09/13/world/dutch-legislators-approve-full-marriage-rights-for-gays.html [https://perma.cc/S3MX-9DF3] (noting on September 13, 2000, that "[l]awmakers in the Netherlands, long among the gay-rights vanguard, approved a bill today to convert the country's registered same-sex partnerships into full-fledged marriages, complete with divorce guidelines and wider adoption rights for gays").

[12] Claire Felter and Danielle Renwick, COUNCIL ON FOREIGN RELATIONS, *Same-Sex Marriage: Global Comparisons*, https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons [https://perma.cc/7Y9U-RVWC] (last updated Mar. 8, 2019) ("Same-sex marriage has been legalized in twenty-six countries, including the United States, and civil unions are recognized in many Western democracies.").

[13] Marcia C. Inhorn & Pasquale Patrizio, *Rethinking Reproductive "Tourism" As Reproductive "Exile"*, 92 FERTILITY & STERILITY 3, 904 (2009), *available at* https://www.fertstert.org/article/S0015-0282(09)00046-6/pdf [https://perma.cc/6XL3-WZZL] ("Seven discrete, but often interrelated, factors promoting reproductive tourism have been cited in the existing literature: [1] individual countries may prohibit a specific service for religious or ethical reasons; [2] a specific service may be unavailable because of lack of expertise, equipment, or donor technologies; [3] a service may be unavailable because it is not considered sufficiently safe or its risks are unknown; [4] certain categories of individuals may not receive a service, especially at public expense, on the basis of age, marital status, or sexual orientation; [5] services may be unavailable because demand outstrips supply, leading to shortages and waiting lists; [6] services may be cheaper in other countries; and [7] finally, individuals may have personal wishes to preserve their privacy.").

[14] *See* Paula Gerber & Katie O'Byrne, *Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy*, *in* SURROGACY, LAW AND HUMAN RIGHTS 82 (Paula Gerber & Katie O'Byrne

tional surrogacy—as opposed to gestational surrogacy—is a common solution that traces back to biblical times.[15] Biomedical developments, the limited global market for adoption, and the ease of access to information over the internet have led to media and scientific interest[16] that may have sparked of new forms of legally and medically complex surrogacy arrangements, including gestational surrogacy. Although the child born to a surrogate mother is "typically longed-for and deeply loved" by their parents, the child born out of a surrogacy arrangement is also an "object or product of the transaction."[17] Surrogacy is becoming much more common,[18] perhaps in part due to wider acceptance of same-sex couples' desire to have families and the rise of fertility tourism.

B. Surrogacy and the Rights of the Child

Michael Freeman[19] suggests that children's rights correspond to certain responsibilities resting on the shoulders of parents and the community, particularly when it comes to novel areas of law and medical ethics.[20] He argues that the debate on how to advocate for children's rights should be about establishing structures to protect their integrity.[21]

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eds., 2015) ("The urge to have children is, of course, the most vital of human desires.").

[15] *See Genesis* 16:1–16 (noting an example of traditional surrogacy and stating that "Sarai, Abram's wife, bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her").

[16] Blauwhoff & Frohn, *supra* note 6, at 213 ("Cross-border surrogacy arrangements have been exposed to increased public and media attention since the mid-1980s. Although surrogate motherhood itself is not a new phenomenon, biomedical developments have led to new forms of surrogacy. Moreover, the limited global market for adoption has meant that surrogacy has contributed to its significant cross-border expansion of the phenomenon in recent years. Another key factor that has enabled the current surge of media and scientific interest in the cross-border surrogacy market is the ease of access to information via the Internet.").

[17] Gerber & O'Byrne, *supra* note 14, at 82 ("Surrogacy sees this desire manifested in a complex web of science, ethics, human rights and law. The resulting child, while typically long-for and deeply loved, is also the object or product of the transaction.").

[18] *ART and Gestational Carriers*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 5, 2016), https://www.cdc.gov/art/key-findings/gestational-carriers.html [https://perma.cc/3DPS-B8B3]_(illustrating the number of gestational carrier cycles have more than quadrupled between 1999 and 2013 in the United States alone, from 727 to 3,432).

[19] Michael Freeman is a widely-publicized children's rights and medical ethics scholar, emeritus professor at University College London Faculty of Laws, and founding editor of the *International Journal of Children's Rights*. *UCL Faculty of Laws Prof Michael Freeman*, UNIV. COLLEGE LONDON, https://www.ucl.ac.uk/laws/people/prof-michael-freeman [https://perma.cc/6FZE-6N4M] (last visited May 5, 2019).

[20] MICHAEL FREEMAN, THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD 185 (1997) (noting that there is a "gap" when it comes to "match[ing] the emergent recognition of children's rights to the responsibilities incumbent on parents and society and science in particular to the children produced by our new knowledge, as well as to the concept of childhood itself").

[21] *Id.* at 188 ("Children's rights have often been characterized in terms of protecting the individual child, rather than in terms of liberating children as such, or even protecting their rights as a group. It is in part because of this that concern for children is still often rooted in the individual child, rather than children in general. But when the debates moves to how best to advocate children's rights, to further the cause of children, it is not a question of protecting a particular child against an abusive or

The question is how this method of advocacy applies to surrogacy.

Growing demand for gestational surrogacy through artificial reproductive technology—one such example being in vitro fertilization (IVF)—has led to new issues concerning human rights. The great disparity between regulation among jurisdictions regarding the legality of surrogacy has led to a vast array of surrogacy arrangements, some which may be considered in direct violation of the best interests of the child.[22] Surrogacy arrangements particularly prompt the question of how a child's rights to life and identity are safeguarded by the underlying arrangements. The rights to life and identity should include the rights of the child to know their origins and receive care by their parents—whether biological, gestational, or legal.

The undeniable moral right to know one's origins is said to derive primarily from the child's interest in understanding their own identity,[23] though other motivations such as health concerns or property interests have also been raised.[24] Children conceived through gestational surrogacy have often indicated psychological damage and loss of agency as a result of the withholding of their genetic origins.[25]

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uncaring adult, so much as establishing structures to protect children's rights, preserving their integrity, recognizing their personality.").

[22] Martín Hevia, *Surrogacy, Privacy, and the American Convention on Human Rights*, 5 J. L. & BIOSCIENCES 375, 376 (2018) ("The legal status of surrogacy varies across countries and regions. Some countries completely ban it; others only allow for altruistic surrogacy—sometimes accompanied by payment of 'reasonable expenses' to the surrogate. 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."); *id.* at 393 (noting that "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").

[23] *See* Katherine O'Donovan, *A Right to Know One's Parentage?*, 2 INT'L J. L., POL'Y & FAM. 27, 37 (1998) ("The desire for secrecy on the part of parents of a child, partially or wholly a genetic stranger, has to be balanced against possible harm to the child. This is not merely an issue of the welfare of the child. What is being suggested is that a deeper moral right is under discussion. In terms of welfare the question of whether it is in a child's best interests to be informed is contentious. It might be argued that the short-term interests of children require security and that secrecy will ensure this. Contemporary writing on the best interests of the child supports the view that account can only be taken of the short term. But if the right to be informed is taken as a deeper right then welfare arguments about time and security are difficult to sustain." (internal citations omitted)).

[24] *Id.* at 30 (noting a suggestion that "it is a simple matter to safeguard the interest in information about the genetic health of the biological parents of children produced by artificial insemination or by egg donation. This can be done through the use of a 'donor profile' from which the prospective parents would choose the genetic donor. Legislation giving a right of access to this information by the child on reaching the age of eighteen is proposed." (internal citations omitted)).

[25] John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived through Assisted Reproduction* 44 (U. Melbourne Legal Studs. Res. Paper No. 541, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1852928 [https://perma.cc/D6RW-XREJ] ("Further research indicates that non disclosure and secrecy can cause psychological damage, undermine self esteem and weaken principles of trust and honesty held by persons conceived as a result of an assisted reproductive procedure.144 Donor conceived people have consistently, although not universally, reported a need to know their genetic origins, an urge to search for their donors and a concomitant loss of agency because of the obstruction faced in trying to obtain identifying information about their donor.").

C. Definition of Surrogacy

Traditional surrogacy involves natural or artificial insemination of a person resulting in a child genetically related to the mother carrying the embryo.[26] This is distinct from gestational surrogacy, which involves implanting an embryo created through IVF in a gestational carrier.[27] When referring to surrogacy, this note means generally to refer to gestational surrogacy rather than traditional surrogacy, unless otherwise stated or apparent from the context.

II. THE CONVENTION ON THE RIGHTS OF THE CHILD

It is important to differentiate between countries that are beholden to universally ratified human rights document and countries that are not. The United Nations' Convention on the Rights of the Child[28] is the most universally influential and recognized human rights document with regard to the rights of children.[29] The Convention gives children equal status with adults as rights-bearing persons,[30] though as discussed below the rights accorded to children under the Convention may differ from those accorded to adults. The Convention binds ratifying nations to protect a wide range of civil, political, economic, social, and cultural rights of children.[31] The United States is the only United Nations member country

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[26] *See, e.g.*, *About Surrogacy: What is Traditional Surrogacy*, SURROGATE.COM, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/ [https://perma.cc/DPG7-FN6E] (last visited May 5, 2019) ("In traditional surrogacy, the surrogate mother uses her own egg and is artificially inseminated using sperm from the intended father or a donor.").

[27] *Id.* ("The traditional surrogacy process differs from the gestational surrogacy process in a few key ways. [One of those ways is that] the intended parents will not need to identify an egg donor because the surrogate's eggs will be used instead. This means the family only needs to be matched to a surrogate who is willing to complete a traditional surrogacy. . . . While gestational surrogacy uses in vitro fertilization (IVF) to create an embryo that is then transferred to the surrogate, traditional surrogacy uses intrauterine insemination (IUI) to artificially inseminate the surrogate mother using the intended father's sperm.").

[28] Convention, *supra* note 9.

[29] *See* U.N. Committee on the Rights of the Child, *General Comment No. 5 (2003)*: General measures of implementation of the Convention on the Rights of the Child, ¶ 9, UN Doc. CRC/GC/2003/5 (Nov. 27, 2003), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf [https://perma.cc/DKF6-JUGW] [*hereinafter Convention General Comment No. 5 2003*] (discussing implementation measures for ratifying member nations and noting "almost universal ratification of the Convention").

[30] Convention, *supra* note 9, Preamble (noting the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"); *Convention General Comment No. 5 2003*, *supra* note 29, at ¶ 21 (describing "the key message of the Convention - that children alongside adults are holders of human rights").

[31] Abhinaya Ramesh, *UN Convention on Rights of the Child: Inherent Weaknesses*, 36 ECON, &

that has not ratified the treaty.[32] As the Convention affects the rights of children and the regulation of surrogacy arrangements in jurisdictions around the world, there follows an unresolved discrepancy between surrogacy policies within the United States and within countries that ratified the Convention.

Several decades after the second World War, countries found it difficult to effectively protect children's rights without laws to comprehensively provide for that protection.[33] To draw attention to problems affecting children throughout the world, including malnutrition and lack of access to education, the United Nations proclaimed 1979 as the International Year of the Child.[34] This proclamation in part led the United Nations in 1989 to adopt the Convention on the Rights of the Child.[35] The Convention requires ratifying countries to act in the best interests of the child[36] and to fully implement into their laws every child's right to life,[37] to identity,[38] to a nationality,[39] to family relations,[40] to know and be cared for by their parents,[41] and to be penalized through a separate juvenile justice system.[42] It acknowledges that children have a right to education,[43] to express their opinions and to have those opinions given due weight,[44]

POL. WKLY. 1948, 1948 (2001) (noting how the Convention "exhibits an innovative and integrationist approach to a Child's rights, as it combines economic, social, cultural, and civil and political rights in a single human rights instrument").

[32] Attiah, *supra* note 8.

[33] *See, e.g.*, *The Beginnings of the Convention on the Rights of the Child*, HUMANIUM, https://www.humanium.org/en/convention/beginnings/ [https://perma.cc/U4PC-R485] (last visited May 6, 2019) ("In the absence of any legally binding text, it seemed difficult to effectively protect children's rights. Thus, in 1978, Poland proposed the idea of a Convention on the Rights of the Child that would be legally binding for all nations.").

[34] International Year of the Child, G.A. Res. 31/169, Preamble (Dec. 21, 1976), *available at* https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/31/169 [https://perma.cc/C78C-V5F9] (noting when proclaiming 1979 the International Year of the Child the concern that "far too many children, especially in developing countries, are undernourished, are without access to adequate health services, are missing the basic educational preparation for their future and are deprived of the elementary amenities of life").

[35] Convention, *supra* note 9.

[36] *Id.* art. 3, sub. 1 ("In 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.").

[37] *Id.* art. 6, sub. 1 ("States Parties recognize that every child has the inherent right to life.").

[38] *Id.* art. 8, sub. 1 ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.").

[39] *Id.* art. 7, sub. 1 ("The child shall be registered immediately after birth and shall have . . . the right to acquire a nationality[.]"); *id.* art. 8, sub. 1 ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality[.]").

[40] *Id.* art. 8, sub. 1 ("States Parties undertake to respect the right of the child to preserve his or her identity, including . . . name and family relations as recognized by law without unlawful interference.").

[41] *Id.* art. 7, sub. 1 ("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.").

[42] *See generally id.* art. 40 (discussing special treatment within the justice system for children).

[43] *Id.* art. 28, sub. 1 ("States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity[.]").

[44] *Id.* art. 12, ¶ 1 ("States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the

to be protected from abuse or exploitation,[45] and to have their privacy protected.[46] It also forbids capital punishment for children.[47] The Convention is, therefore, one of the most comprehensive human rights treaties and is, with the exception of the United States, universally ratified.

A. The United States and the Convention

The United States has a somewhat inconsistent relationship with the Convention. The United States delegates played an active role in drafting it[48] and signed the Convention on February 16, 1995.[49] Despite this active involvement and status as a signer, the United States itself has yet to ratify the Convention so that it has an effect on domestic law.[50] Besides practical requirements for ratification under the Constitution,[51] a vocal opposition has been successful at stopping any progress toward ratification. Many organizations support ratification in light of the advances it could deliver to children's rights in the United States.[52] The prospect of ratification, however, has reckoned strong opposition of predominantly religious and politically conservative groups.[53] These groups variously claim that the Convention conflicts with the United States Constitution because it interferes with domestic policies. *Parental Rights*, an organization that has been actively campaigning against ratification, is described as fearing the Convention would allow children to "choose their own religion" and "have a legally enforceable right to leisure," require

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child being given due weight in accordance with the age and maturity of the child.").

[45] *Id.* art. 32–36 (protecting against economic exploitation, drug use, sexual exploitation and sexual abuse, child trafficking, and "all other forms of exploitation").

[46] *Id.* art. 16, ¶ 1 ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.").

[47] *Id.* art. 37, ¶ (a) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age[.]").

[48] Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/ [https://perma.cc/66AU-S46E] ("United States delegates played an active role in drafting the convention in the late 1980s.").

[49] *UNTC Status: Convention on the Rights of the Child*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en [https://perma.cc/9V5H-7DTX] (last visited May 5, 2019).

[50] *Id.*

[51] U.S. CONST. art. II, § 2, cl. 2 (noting that "the President shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur").

[52] *See e.g., Convention on the Rights of the Child*, NAT'L EDUC. ASS'N, http://www.nea.org/home/36924.htm [https://perma.cc/N7A4-ACVL] (last visited May 21, 2019) (arguing the convention protects children's rights to quality education; freedom of expression, association and assembly; protection from abuse; and the right to a family).

[53] David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 82, 83 (2006) ("Because active opposition to the CRC has been concentrated in politically conservative—or at least neoconservative—groups, the key religious opposition to the CRC has come from those who are both politically and religiously conservative.").

"that nations would have to spend more on children's welfare than national defense," and potentially "trigger a governmental review of any decision a parent made that a child didn't like" as a result of "a child's 'right to be heard.'" [54]

Another source of opposition stems from discordant views of acceptable disciplinary measures for children. The Convention requires governments to protect children from all forms of mental and physical violence.[55] Based on the analysis of the U.N. Committee on the Rights of the Child, this includes all forms of physically violent discipline.[56] Protection against all physically violent discipline is likely to be incompatible with socially and legally accepted forms of reasonable discipline in the United States.[57]

1. Children's Rights in the United States

The protection of the rights of children in the United States, to the extent it exists, stems from its Constitution rather than the Convention. Despite the authoritative nature of the Convention, without ratification there is little worry about possible effect on United States domestic law. Even though the American government has often held itself up as a strong supporter of international human rights, it seems clear that "for the United States government, human rights are an international, rather than domestic phenomenon and represent more of a choice than an obligation."[58] Because the United States has not ratified the Convention and does not otherwise recognize an obligatory bearing on its domestic laws, the question arises whether the rights of children are effectively protected

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[54] Attiah, *supra* note 8.

[55] Convention, *supra* note 9, art. 19, ¶ 1 ("States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent (s), legal guardian (s) or any other person who has the care of the child.").

[56] *See* U.N. Committee on the Rights of the Child, *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence*, ¶ 22(a), ¶ 24, UN Doc. CRC/C/GC/13 (Apr. 18, 2011), *available at* https://undocs.org/CRC/C/GC/13 [https://perma.cc/98HN-495G] (noting that, in the view of the U.N. Committee on the Rights of the Child, the protections against physical violence in Convention, *supra* note 9, art. 19, ¶ 1 includes "[a]ll corporal punishment" and further noting that "[i]n the view of the Committee, corporal punishment is invariably degrading").

[57] *See, e.g.*, Andrew Rowland et al., *Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia*, 25 INT'L J. CHILDREN'S RIGHTS 165, 183–84 (2017) ("In the USA nearly two thirds of parents of very young children reported using physical punishment and in schools many children continue to receive physical punishment in the form of paddling (up to three strikes on the buttocks by a wooden paddle.").

[58] Christopher N.J. Roberts, *William H. Fitzpatrick's Editorials on Human Rights (1949)*, QUELLEN ZUR GESCHICHTE DER MENSCHENRECHTE, https://www.geschichte-menschenrechte.de/schluesseltexte/william-h-fitzpatricks-editorials-on-human-rights-1949 [https://perma.cc/54JF-QEA6] (last visited May 19, 2019) (describing a series of editorials by William H. Fitzpatrick published in small newspaper in New Orleans in 1949 that accord with position that for the United States international human rights law is more of a choice rather than an obligation).

in the United States in accord with universally identified and acknowledged principles. There has been some jurisprudential development from the U.S. Supreme Court in accordance with some rights enshrined in the Convention. Indeed, the U.S. Supreme Court has recognized that children are protected by the Constitution, stating that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights, is for adults alone."[59] According to the Court, minors are protected by the Constitution and possess constitutional rights.[60]

One such jurisdictional development has been in the area of criminal punishment. The Convention requires ratifying states to forbear from subjecting children to torture or other cruel, inhumane, or degrading treatment or punishment, and prohibits imposing capital punishment or life imprisonment without the possibility of release.[61] Before 2005, the United States Constitution did not forbid the execution and life imprisonment of juvenile offenders, a practice which would be in contravention of this provision if the Convention had been ratified. United States law has since developed. In 2005, the U.S. Supreme Court interpreted the Constitution to hold that standards of decency had evolved so that executing minors is "cruel and unusual punishment," prohibited by the Eighth Amendment.[62] Justice Kennedy, writing for the majority, pointed to "overwhelming" international opinion against the juvenile death penalty, citing the Convention and its nearly universal adoption.[63] Case law developed further in 2012 when the Court held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders, again because of the ban on "cruel and unusual punishment" in the Eighth Amendment.[64]

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[59] In re Gault, 387 U.S. 1, 13 (1967).

[60] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

[61] Convention, *supra* note 9, art. 37, ¶ (a) ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age[.]").

[62] Roper v. Simmons, 543 U.S. 551, 578–79 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.").

[63] *Id.* at 578 ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." (internal citations omitted)); *id.* at 576 ("As respondent and a number of amici emphasize, the [Convention, *supra* note 9, art. 37], which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.").

[64] Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

Courts have also applied the Constitution to other areas of children's rights. With regard to the rights of children under the Constitution that can most readily impact child-protection cases, case law in lower courts has established the right to effective assistance of counsel,[65] and the right to bodily integrity.[66] The U.S. Supreme Court has also noted a right of foster children to protection and proper care while in state custody.[67]

On the other hand, the U.S. Supreme Court has "not yet addressed whether . . . any child has a constitutional right to maintain family relationships."[68] In a dissenting opinion, however, Justice Stevens commented on the existence of this right, stating that to him it was "extremely likely" that children have fundamental interests akin to those of parents and families and thus their interests should be "balanced in the equation."[69] Although there has been a significant development in children's rights through case law, at times conceivably in line with the Convention, Congress has shown no ambition to dramatically advance the rights of children.

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[65] *See* Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (holding "it is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake"); In the Matter of Jamie TT., 191 A.D.2d 132 (N.Y. 1993) ("Thus, Jamie had a constitutional as well as a statutory right to legal representation of her interests in the proceedings on the abuse petition. Her constitutional and statutory rights to be represented by counsel were not satisfied merely by the State's supplying a lawyer's physical presence in the courtroom; Jamie was entitled to 'adequate' or 'effective' legal assistance. No less than an accused in a criminal case, Jamie was entitled to 'meaningful representation.' Effective representation for Jamie included assistance by an attorney who had taken the time to prepare presentation of the law and the facts, and employed basic advocacy skills in support of her interests in the case.'" (internal citations omitted)).

[66] *See also* Doe v. Taylor I.S.D., 15 F.3d 443, 450 (5th Cir. 1994) (en banc) ("Jane Doe's substantive due process claim is grounded upon the premise that schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and upon the premise that physical sexual abuse by a school employee violates that right. This circuit held as early as 1981 that the right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." (internal citations and quotations omitted)).

[67] *Cf.* DeShaney v. Winnebago Cty. Dept. of Social Servs., 489 U.S. 189, 199–201 (1989) ("Taken together, [the previously cited cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . [But this] analysis simply has no applicability in the present case. Petitioners concede that the harms [the child] suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor.").

[68] Barbara J. Elias-Perciful, *Constitutional Rights of Children*, *in* 36TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 51 p. 4 (State Bar of Texas, 2010), *available at* http://www.texasbarcle.com/Materials/Events/9198/125664_01.pdf [https://perma.cc/AL5J-WWET].

[69] Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." (internal citations omitted)).

B. The Netherlands and the Convention

The aforementioned practice of protecting children's rights through the United States Constitution is in remarkably stark contrast to the practice in the Netherlands. Under Dutch law, the rights in the Convention can, in some circumstances, directly be invoked in court, and in addition the Dutch legislature has built its laws around the principles enshrined in the document.[70] For a better understanding of the incorporation of the Convention in Dutch law, it is necessary to briefly set out the constitutional framework through which Dutch citizens and residents can challenge violations of the rights, human or otherwise, protected thereunder.

1. Judicial Review

The Netherlands does not allow judicial review to determine the constitutionality of laws.[71] The framers of the 1848 Dutch Constitution, from which the current version originates, maintained that the final say in constitutional interpretation was with the democratically elected States-General, the Dutch parliament.[72] Consequently, no person can invoke one of the enumerated subjective rights merely because they were written down in the Dutch Constitution. But there is a loophole; the Dutch Con-

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[70] Manuela Limbeek & Mariëlle Bruning, *The Netherlands*, *in* LITIGATING THE RIGHTS OF THE CHILD: THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL JURISPRUDENCE 89, 91 (Ton Liefaard & Jaap E. Doek eds. 2015) ("After ratification, the CRC took immediate domestic effect in the Netherlands; no further legal action was required to incorporate it into national law, and the Dutch legislature, executive and judiciary have been bound by its provisions since the time of its ratification. This automatic domestic effect does not imply that all CRC provisions can successfully be invoked before a Dutch court. Doing so depends on the *direct effect* of a CRC provision, which is determined by national courts. However, the Dutch government was of the opinion that articles 7(1), 9(2), 9(3), 9(4), 10(1), 12(2), 13, 14, 15, 16, 30, 37 and 40(2) of the CRC should have direct effect, either for reasons to do with the wording of the articles or because the articles include rights distilled from the wording of the articles or because the articles include rights distilled from existing human rights treaties of which the direct effect had been already recognized. In addition, the government emphasised that articles 5, 8 and 12(1) would possibly have direct effect. It did not examine the horizontal effects of the treaty, as this was—and is still—a topic 'in development.' Furthermore, the government did not make any observations or suggestions about those provisions which, so it held, would not have direct effect." (internal citations omitted) (emphasis in original)).

[71] GW. [CONSTITUTION] art. 120 [hereinafter DUTCH CONSTITUTION], *available at* https://www.government.nl/binaries/government/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf [https://perma.cc/ZY88-AF6E] ("The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts." (original in Dutch)).

[72] *See* Memorie van Toelichting, IIIde Hoofstuk Ontwerpen van Wet tot Herziening der Grondwet [Explanatory Memorandum to Chapter 3 of the Proposed Constitutional Revision] (1847–48), XLIX, no. 7, at 345, *available at* https://resolver.kb.nl/resolve?urn=sgd%3Ampeg21%3A18471848%3A0000296 [https://perma.cc/MNE6-WMWR] ("The inviolability of the laws has triple meaning. It puts the law above all consideration; it guarantees it against all assaults from both the executive and the judicial authority, as well as the local authorities, to whom, subject to the law alone, the establishment of local regulations has been assigned.").

stitution itself states that international treaties of a generally binding nature, ratified by Parliament, have priority over Dutch domestic law[73] and are, in principle, self-executing.[74] The courts must, therefore, test laws or actions against norms and obligations under international law and apply international law, even if it is not in conformity with Dutch law.[75] It is up to the judge to determine whether an invoked international norm has direct effect such that it is self-executing.[76]

2. *Children's Rights in the Netherlands*

Two of the guiding principles of the Convention are defined in its third article, which states that the best interests of the child must be a primary concern in all decisions that affect them,[77] and its twelfth article, which contains a child's right to be heard.[78] Several Dutch laws are designed specifically with these and other provisions of the Convention in mind. For example, children over the age of twelve can take legal action with regard to parental-access arrangements and parental authority[79] and have to be heard in almost all matters affecting them.[80]

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[73] GW., *supra* note 9, art. 94 ("Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." (original in Dutch)).

[74] *See* PIETER KOOIJMANS, INTERNATIONAAL PUBLIEKRECHT IN VOGELVLUCHT [PUBLIC INTERNATIONAL LAW IN A NUTSHELL] 87 (10th ed. 1994) (noting in another context that "[t]he court will then first determine whether this is a directly applicable [self-executive] treaty provision (i.e. a provision that lends itself for direct application in the domestic legal system and can therefore be invoked by citizens)" (original in Dutch)).

[75] ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 17 (1986) ("[W]hen someone in Holland feels his human rights are being violated he can to a Dutch judge and the judge must apply the law of the convention. He must apply international law even if it is not in conformity with Dutch law.").

[76] Dutch Parliamentary Records of the Tweede Kamer,73STE VERGADERING, Acts II, 4429, at 4441 (1980), *available at* https://www.denederlandsegrondwet.nl/9353000/1/j4nvgs5kjg27kof_j9vvkl1oucfq6v2/vk11bo9slvzv/f=/230480%202%203.pdf [https://perma.cc/XK65-XEQL] (quoting Foreign Affairs Minister Christoph van der Klaauw as saying that "[t]he sometimes inevitable vagueness of treaty provisions can lead to the Government implementing law, precisely to clarify the treaty provisions. In addition, it remains that in our constitutional judicial system which part of a treaty provision has a direct effect" (original in Dutch)); *see also* J. FLEUREN, EEN IEDER VERBINDENDE BEPALINGEN VAN VERDRAGEN [EACH AND EVERY BINDING PROVISION OF TREATIES] 326 (Den Haag: Boom Juridische Uitgevers, 2004) (discussing the binding effect of another treaty).

[77] Convention, *supra* note 9, art. 3, § 1 ("In 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.").

[78] *Id.* art. 12, § 1 ("States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.").

[79] Art. 1:377g para. 1 BW (Neth.) ("The court may, if it turns out that the minor of twelve years of age or more appreciates this, give a decision *ex officio* on the basis of [preceding articles regarding parental access], or amend such a decision on the basis of [a preceding article dealing with a change of circumstances of parents]. The same applies if the minor has not yet reached the age of twelve, but can deemed capable of a reasonable evaluation of his interests." (original in Dutch)).

[80] Art. 809 para. 1 Rv (Neth.) ("In cases concerning minors, with the exception of those concerning the subsistence of a minor who has not yet reached the age of sixteen, the judge will only decide

C. Surrogacy Under the Convention

There is no legal mechanism specifically tailored to determine the enforceability of surrogacy arrangements. Decisions on surrogacy arrangements are instead based on existing parentage law and the Convention. The Convention requires that drafting of laws be consistent with treating the best interests of children as a primary concern. The Convention does not make specific reference to children born via surrogacy, or to any form of assisted reproductive technology, but several provisions are relevant for the rights of these children. Particularly important for the child's identity are the obligations of governments to (1) register all births, (2) respect a child's right to a nationality, (3) recognize a child's right to know and be cared for by parents, and (4) support a child's right to identity and family relations.[81]

The right to know one's parents may be particularly important to identity. Michael Freeman asserts that "there can be few more basic rights than a right to one's identity," shaped in arguably significant part by a right to know one's parents.[82] "Claims that children have a right to accurate information about their biological origins are substantially reinforced by international human rights law."[83] The primary provisions of the Convention normally quoted to support a right to know one's biological or genetic origins do not directly substantiate it.[84] Article seven is in part intended to redress only children's statelessness,[85] while article eight addresses only concerns over forced, illegal separation of children from their parents.[86] Neither of these provisions specifically promotes a child's right to knowledge of genetic parentage or origin. The U.N. Committee on the Rights of the Child, however, has explicitly interpreted article seven in this manner. The committee in a report evaluating compliance with the Convention criticized a government that withheld information

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after giving the minor of twelve or older the opportunity to express his opinion, unless, in the opinion of the court, it concerns a matter of apparent secondary importance." (original in Dutch)).

[81] *Supra* notes 37–41 and accompanying text and parentheticals.

[82] *See* FREEMAN, *supra* note 20, at 196–97 (noting that "[t]here can be few more basic rights than a right to one's identity" and that "[t]he Convention does not address these questions with the artificially procreated child in mind, nor are such children anywhere the focus of the Convention").

[83] JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW 470 (3rd ed., 2009); *see also* Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J. L., POL'Y & FAM. 137, 141 (2007) ("The present article concentrates on biological membership and the right to know one's genetic parentage. Different guarantees of that right may be found in international human rights instruments.").

[84] FORTIN, *supra* note 83, at 470.

[85] Convention, *supra* note 9, art. 7.

[86] Working Group, *Report of the Working Group on a Draft Convention on the Rights of the Child*, ¶ 33, E/CN.4/1986/39 (Mar. 31, 1986), *available at* http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-1986-39.pdf [https://perma.cc/DB63-8ZAL] ("In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a review to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood relations to be brought up.").

on genetic parentage from children born by donor conception[87] and those that allow mothers to give birth anonymously and to keep their identity secret from their offspring.[88] Despite the absence of any unambiguous provision in the Convention on the matter, it is in the best interest of the child that these be authoritative.

The right to know one's origins is best made clear by considering the broader right to identity in its entirety. This right consists of three separate aspects, namely: the right to birth registration, the acquisition and preservation of nationality, and the right to parental relations.

1. Birth Registration

Birth registration is the process of the state recording the details of the child's birth. Article seven of the Convention provides that "every child shall be registered immediately after birth and shall have a name."[89] Because registration is "a first step in ensuring the rights to survival, development and access to quality services for all children," the U.N. Committee on the Rights of the Child "recommends that States parties take all necessary measures to ensure that all children are registered at birth."[90] In the separation of rights under article seven—rights to registration, name, and citizenship—registration effectively acts as a minimum guarantee of rights.[91] It should therefore be regarded as a fundamental

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[87] *See* U.N. Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, ¶ 31–32, U.N. Doc. CRC/C/15/Add.188 (Oct. 9, 2002), *available at* https://undocs.org/CRC/C/15/Add.188 [https://perma.cc/K8Z5-SGTG] ("While noting the recent Adoption and Children Bill (2002) [by the United Kingdom], the Committee is concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents. In light of articles 3 and 7 of the Convention, the Committee recommends that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.").

[88] *See* U.N. Committee on the Rights of the Child, *Concluding observations: Luxembourg*, ¶ 28–29, U.N. Doc. CRC/C/15/Add.188 (Oct. 9, 2002), *available at* https://undocs.org/CRC/C/15/Add.250 [https://perma.cc/C5CB-5DLK] ("The Committee remains concerned about the fact that the children born anonymously ('under x') are denied the right to know, as far as possible, their parents, and notes with interest the proposal of the National Consultative Commission on Life Sciences and Health Ethics (CNE) which seems to allow for significant improvements in this regard. The Committee urges the State party to take all necessary measures to prevent and eliminate the practice of the so-called anonymous birth. In case anonymous births continue to take place, the State party should take the necessary measures so that all information about the parent(s) are registered and filed in order to allow the child to know - as far as possible and at the appropriate time - his/her parent(s).").

[89] Convention, *supra* note 9, art. 7.

[90] U.N. Committee on the Rights of the Child, *General Comment no. 7: Implementing child rights in early childhood*, ¶ 25, U.N. Doc. CRC/C/GC/7/Rev.1 (Nov. 1, 2005), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/448/29/pdf/G0544829.pdf [https://perma.cc/URE6-LRH2].

[91] Ineta Ziemele, *Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents, in* A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 23 (A. Alen et al eds, Leiden: Martinus Nijhoff Publishers, 2007) ("Registration of children who are illegal residents with some kind of status (*e.g.* as temporary or permanent residents or some other recognition allowing for the exercise of human rights) is therefore

process separate to further determination of legal parentage and nationality in cases where the child is not born of the intended parent, e.g. through a validated surrogacy arrangement.

2. *Acquisition and Preservation of Nationality*

Every child has a right to acquire a nationality under article seven of the Convention and a right to preserve that nationality under article eight.[92] For children born to intended parents via cross-border surrogacy arrangements—later analyzed in this note—the issue of nationality is particularly critical.

3. *Parental Relations and Knowledge of Legal Parentage*

The child's right to "family relations without unlawful interference"[93] and particularly the right "to know and be cared for by one's parents"[94] raise the question as to the identity of the child's parents in the context of surrogacy arrangements. The right to be cared for by one's parents, in the surrogacy context, might refer to the surrogacy-commissioning parents who have undertaken parental responsibility for raising the child after the completion of the surrogate's services. This potential reference is in contrast with the right "to know" one's parents that, in line with adoption practice, has been interpreted by the U.N. Committee on the Rights of the Child to include both biological and gestational parents.[95] In the latter case of gestational parents, if the child is born of genetic material in whole or in part from persons other than the intended parents, the child in the view of the U.N. committee must be made aware of the existence and identity of the persons who contributed to their making.[96] It should be possible for the child to know—absent the ability to obtain a personal relationship—about the *identity* of his or her parents. It would not be unreasonable for a state to insist that any organization seeking to facilitate surrogacy arrangements should maintain records of the

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the minimum obligation under the CRC so as to provide them with minimum rights within a particular legal system.").

[92] Convention, *supra* note 9, art. 7–8.

[93] *Id.* art. 8, sub 1.

[94] *Id.* art. 7, sub 1.

[95] Ziemele, *supra* note 91, at 26–27 ("[T]he secrecy of adoption still dominates domestic approaches, although experts have come to the conclusions that it is most likely not in the best interests of the child. . . . The adoptive parents could be and normally are parents to the child. Some exchanges between the CRC Committee and States in the framework of the State reports suggests that the CRC Committee takes the view that the term 'parents' in the context of Article 7 and the aims of the CRC includes biological parents and that the child has the right to k now, as far as possible, who they are.").

[96] *Id.*

individuals involved.[97]

III. SURROGACY IN THE UNITED STATES AND THE NETHERLANDS

Legislation regulating surrogacy varies widely between countries, ranging from prohibition in its entirety to allowing almost any kind of legal arrangement.[98] In those countries where it is legal, a distinction can be made between "altruistic surrogacy," in which the surrogate mother might only receive reimbursement for reasonable expenses, and "commercial surrogacy," in which a substantially larger compensation might be offered.[99] Whereas in modern history the United States is generally considered to be morally and socially conservative,[100] the Netherlands has a "long tradition of social tolerance"[101] and egalitarianism.[102] However, these generalizations are not easily, if at all, applicable to surrogacy practices and regulations in either country.

A. Surrogacy in the United States

In the United States, surrogacy and its related legal issues fall under

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[97] *See* 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. 317, 327 (2014) ("It would, however, be *possible* for the child to know of, if not know personally, the identity of his or her parents. This possibility exists because it would be possible and not unreasonable for a State to insist that any organization seeking to facilitate surrogacy arrangements maintain records of the individuals involved." (emphasis in original)).

[98] Hevia, *supra* note 22, at 376.

[99] *Id.*

[100] *See generally* Lisa McGirr, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001) (referencing the long-standing conservative lean of the U.S. government, particularly in the civil rights era, countered by populist grassroots movements).

[101] *See, e.g.*, BINDESHWAR PATHAK & SHIVA PRATAP SINGH, GLIMPSES OF EUROPE: A CRUCIBLE OF WINNING IDEAS, GREAT CIVILIZATIONS AND BLOODIEST WARS 579 (2010) ("In the 18th century, while the Dutch Reformed Church was the state religion, Catholicism and Judaism were tolerated. In the late 19th century this Dutch tradition of religious tolerance transformed into a system of pillarisation, in which religious groups coexisted separately and only interacted at the level of government. This tradition of tolerance is linked to the Dutch policies on recreational drugs, prostitution, LGBT rights, euthanasia, and abortion which are among the most liberal in the world.").

[102] MINISTRY OF SOCIAL AFFAIRS AND EMPLOYMENT, CORE VALUES OF DUTCH SOCIETY 9 (2014), *available at* https://www.prodemos.nl/wp-content/uploads/2016/04/KERNWAARDEN-ENGELS-S73-623800.pdf [https://perma.cc/74QV-XHVU] ("In the Netherlands, people in the same situations are treated equally. This is known as the right to equal treatment."); Rob Van Ginkel, *Foreigners' Views of the Dutch: Past and Present*, 20 DUTCH CROSSING: J. LOW COUNTRIES STUDS. 117, 119 (1996) (noting, *inter alia*, famous French philosophers who "admired the Dutch republic for its tolerance, sense of liberty, relatively egalitarian conditions, quasi-democracy, cleanliness, the simplicity and purity of its mores, and so on"); Lei Delsen, *The Realisation of the Participation Society. Welfare State Reform in the Netherlands: 2010-2015* 8 (Inst. for Mgmt. Res., Radboud Univ., Working Paper No. 16-02, 2016), *available at* https://www.ru.nl/publish/pages/516298/nice_16-02.pdf [https://perma.cc/6MFV-7LVE] ("Dutch culture is characterised by solidarity and equality.").

the jurisdiction of each of its states, with a great variety among states regarding the legality of surrogacy. Some states have written legislation, while others have developed common law regimes for dealing with surrogacy issues.[103] Some states facilitate surrogacy and surrogacy contracts,[104] others simply refuse to enforce them,[105] and some penalize commercial surrogacy.[106] Surrogacy-friendly states tend to enforce both commercial and altruistic surrogacy contracts and facilitate straightforward ways for the intended parents to be recognized as the child's legal parents. Some relatively surrogacy-friendly states only offer support for married heterosexual couples.[107]

1. Notable Surrogacy Cases

Although the U.S. Supreme Court has consistently denied requests to hear surrogacy cases, there have been several landmark state-court decisions. The first notable decision came out of New Jersey in the case *In re Baby M*,[108] which revolved around baby Melissa who was the subject of a custody battle between the Stern family and Mary Beth Whitehead.[109] Whitehead had responded to a newspaper advertisement seeking women willing to help infertile couples have children.[110] She matched with the Sterns, signed a surrogacy contract, agreed to be inseminated with William Stern's sperm, and carried the pregnancy to term.[111] After giving birth to the baby, however, she refused to give the child to the Sterns.[112] Although upon suit the New Jersey Superior Court formally approved of the surrogacy agreement and awarded custody of Melissa to the Sterns under a "best interests of the child" analysis,[113] the New Jersey

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[103] *See U.S. Surrogacy Law by State*, SURROGACY EXPERIENCE, https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html [https://perma.cc/JR87-LUDD] (last visited May 6, 2019) (noting that courts are generally favorable to surrogacy in Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Vermont, West Virginia and Wisconsin).

[104] *Id.* (noting surrogacy is facilitated in California, Connecticut, Delaware, Maine, New Hampshire, New Jersey, Nevada, Rhode Island, Texas and the District of Columbia).

[105] *Id.* (asserting surrogate contracts are void and unenforceable in Arizona and Indiana).

[106] *Id.* (claiming compensated surrogacy is currently prohibited under Louisiana, Michigan and New York legislation).

[107] *Id.* (noting, for example, Louisiana).

[108] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[109] Jennifer Weiss, *Now It's Melissa's Time*, N.J. MONTHLY MAG., Mar. 3, 2007, *reprinted in* REPRODUCTIVE POSSIBILITIES (Mar. 19, 2007), https://reproductivepossibilities.com/2007/03/19/now-its-melissas-time/ [https://perma.cc/GQV3-7MRT].

[110] *Id.*

[111] *Id.*

[112] *Id.* ("Instead, after delivering the baby, Whitehead named her Sara and refused to relinquish her.").

[113] *In re* Baby M, 537 A.2d at 1239 (discussing *In re* Baby M., 525 A.2d 1128 (N.J. Super. 1987) and remarking that, "[h]aving concluded that the best interests of the child called for custody in the

Supreme Court ultimately invalidated it and all surrogacy contracts, or at least those where the surrogate is not "given the right to change her mind and to assert her parental rights" to keep the child.[114] The Court would not enforce a contract that ordered a fit and loving mother to give away her child.[115] In contrast with this sentiment, however, the intended parents ultimately were given *custody* of the child because the Court thought they would provide a better home for the baby than the surrogate mother, who—though designated the child's legal mother—was instead given mere visitation rights.[116]

A few years later, the California Supreme Court decided *Johnson v. Calvert* with a holding in strong contrast to that of the New Jersey Supreme Court in *In re Baby M.* The Court ruled that the surrogate mother had no parental rights to the child because the child was genetically unrelated to her,[117] marking the first time a state supreme court enforced a surrogacy contract. Writing the majority opinion, Justice Edward Panelli stated "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the legislature has not seen fit to do so."[118]

In another extraordinary case in California, a married couple "agreed to have an embryo genetically unrelated to either of them implanted in a [surrogate mother]."[119] After the fertilization, implantation, and pregnancy, the couple split up and the question of legal parentage came before the trial court.[120] Though the intended mother claimed legal parenthood for herself and her husband from whom she had separate, both the initially intended father and the surrogate mother disclaimed any responsibility.[121] The trial court came to the astonishing conclusion that the newborn child had no lawful parents.[122] The appellate court, however, ruled that the commissioning parents are still the lawful parents given their initiating role in the conception and birth of the child.[123] When a

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Sterns, the trial court enforced the operative provisions of the surrogacy contract, terminated Mrs. Whitehead's parental rights, and granted an adoption to Mrs. Stern").

[114] *Id.* at 1264 ("We have found that our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights. Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints.").

[115] *Cf. id.* at 1242 ("In order to terminate parental rights under the private placement adoption statute, there must be a finding of "intentional abandonment or a very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future.").

[116] Weiss, *supra* note 109 ("[T]he New Jersey Supreme Court voided the contract and adoption and restored Whitehead's parental rights. The Sterns' Tenafly residence remained Melissa's home, but Whitehead won broad visitation rights and legal status as Melissa's mother.").

[117] Johnson v. Calvert, 851 P.2d 776, 777–78 (Cal. 1993).

[118] *Id.* at 787.

[119] *In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1412 (Cal. Ct. App. 1998).

[120] *Id.* at 1413.

[121] *Id.*

[122] *Id.* at 1412.

[123] *Id.* at 1428 ("If the man who engaged in an act which merely opened the possibility of the procreation of a child was held responsible for the consequences in Stephen K., how much more so should a man be held responsible for giving his express consent to a medical procedure that was intended to result in the procreation of a child. Thus, it makes no difference that John's wife Luanne

married couple consents to in vitro fertilization by unknown donors and subsequent implantation into a surrogate, the court ruled that the couple becomes the legal parents of the offspring.[124] The Court at the time acknowledged that statutory law did not cover surrogacy, but it determined that the legislative intent would be to assign legal parenthood to the commissioning couple.[125]

These cases demonstrate the various courts' struggle to strike a balance between the interests of prospective parents and future children, and reveal the discrepancy between state jurisdictions. California is now perhaps known to be the most surrogacy-friendly state. Commercial surrogacy is permitted and gestational surrogacy contracts are regularly enforced.[126] It is possible there for all intended parents, regardless of marital status or sexual orientation, to establish their legal parentage prior to the birth of the child and without adoption proceedings[127] through so-called pre-birth orders. Whereas perhaps most states have left it up to the courts, California is one of a handful of states where surrogacy has been addressed and is facilitated by law.

2. *Surrogacy in Texas*

Despite its conservative-leaning politics, Texas is another state known for its favorable attitude toward surrogacy arrangements. For its heavy reliance on court approval and its lack of a "best interests" approach discussed below, Texas is indicative of mainstream surrogacy practices in the United States and therefore suits the comparative purpose of this note well.

Texas was one of the first states to enact a body of laws governing the surrogacy process. Gestational surrogacy agreements are regulated by a specific portion of the Texas Family Code.[128] Traditional surrogacy on

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did not become pregnant. John still engaged in 'procreative conduct.' In plainer language, a deliberate procreator is as responsible as a casual inseminator.").

[124] *In re* Marriage of Buzzanca, 61 Cal.App.4th, at 1418 ("If a husband who consents to artificial insemination under [codified California family law] is 'treated in law' as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them. The statute is, after all, the clearest expression of past legislative intent when the Legislature did contemplate a situation where a person who caused a child to come into being had no biological relationship to the child.").

[125] *Id.*

[126] *See, e.g., California Surrogacy Laws*, FERTILITY SOURCE COMPANIES, https://www.fertilitysourcecompanies.com/ca-surrogacy-laws/ [https://perma.cc/CV3U-YXQW] (last visited May 6, 2019) ("The state of California is very accepting of surrogacy agreements. In fact, it is commonly referred to as a 'surrogacy friendly' state. California is one of a few states that currently allow intended parents to establish legal parentage rights before the birth of their child (or children) without having to go through adoption proceedings as is necessary in most states. California law allows this regardless of whether the intended parents are married or if they are members of the LGBT community.").

[127] *Id.*

[128] *See generally* TEX. FAM. CODE §§ 160.751–160.763 (West 2003).

the other hand is not permitted in Texas because a married surrogate's husband is by law presumed to be the father of the child; an alternative arrangement could cloud the child's legal parentage.[129] A prospective gestational mother, her husband, any sperm or egg donors, and each intended parent may under Texas law enter into a written surrogacy agreement that provides:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her husband if she is married, and each donor other than the intended parents, if applicable, relinquish all parental rights and duties with respect to a child conceived through assisted reproduction;

(3) the intended parents will be the parents of the child; and

(4) the gestational mother and each intended parent agree to exchange throughout the period covered by the agreement all relevant information regarding the health of the gestational mother and each intended parent.[130]

The Texas Family Code also requires that the intended parents be married, that the gestational mother's eggs not be used in the pregnancy, and that the child not be conceived by means of sexual intercourse.[131] The provisions contain strict guidelines regarding what information the physician performing the procedure must provide to everyone involved in the agreement, including outcome statistics, potential risks, related expenses, and foreseeable psychological effects.[132] Furthermore, the agreement "may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo."[133] If drafted accordingly, the intended parents and gestational mother may petition the court to validate the gestational agreement.[134] Upon the birth of the child to a gestational mother under a validated agreement, the intended parents shall file a notice of the birth with the court.[135] The court will then order the issue of a birth certificate naming the intended parents as the child's legal parents, and can even order the gestational mother to surrender the child, if necessary.[136]

Although these provisions intend to promote the health of the surrogate mother and the embryo, they also offer strong protection to the intended parents and are certainly egalitarian and non-discriminatory, only

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[129] Elizabeth Feeney, *Oh, baby! Surrogacy Laws in Texas*, VanSickle Fam. L. Clinic (Nov. 20, 2017), https://blog.smu.edu/vansicklefamilylawclinic/2017/11/20/oh-baby-surrogacy-laws-texas/ [https://perma.cc/6T5W-S3LP] ("In Texas, only gestational surrogacy is covered by the Texas Family Code. This is due to the fact that if the surrogate mother is married, her husband is presumed as the father of the child. This causes clear issues in determining the legal parentage of the child.").

[130] TEX. FAM. CODE § 160.754(a) (West 2003).

[131] *Id.* § 160.754(b)–(c), (f).

[132] *Id.* § 160.754(d).

[133] *Id.* § 160.754(g).

[134] *Id.* §§ 160.755, 160.756.

[135] *Id.*

[136] *Id.* § 160.760.

excluding unmarried persons. Importantly, intended parents can be same-sex parents as long as they are married.[137] The prospective gestational mother has an ability to terminate a gestational agreement *before* she becomes pregnant, though notice to the prospective mother or father is required, even if the agreement has already been validated by the court.[138] In spite of these limitations to prospective parents, the Texas surrogacy provisions lack any emanation of "traditional" values.[139] Concerning the position of future children, however, there is no mention of any contractual limitation on the basis of the best interests of the child or any right belonging to them. In other cases concerning children, the Texas Family Code is strewn with provisions identifying the best interest of the child as one of the central principles of decision-making. Regarding claims over the parent-child relationship, for example, "the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[140] It is noteworthy that this is not the case for surrogacy.

3. *Best Interests of the Child*

The New Jersey Supreme Court voided almost all surrogacy agreements in the case of Melissa,[141] basing its decision primarily on the fact that the agreement disregarded the best interests of the child.[142] Since then, however, there has been an increase[143] in state court rulings around the country in favor of surrogacy agreements, and by extension, in favor

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[137] *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (granting same-sex couples the right to marry); CHUCK SMITH & DENISE BROGAN-KATOR, FAMILY EQUALITY COUNCIL, TEXAS LGBTQ FAMILY LAW: A RESOURCE GUIDE FOR LGBTQ-HEADED FAMILIES IN THE LONE-STAR STATE 10 (2016), https://www.familyequality.org/wp-content/uploads/2018/06/Texas-LGBTQ-Family-Law-Guide-Web.pdf [https://perma.cc/F75D-JX7H] ("Texas law has a separate section of its adoption code related to surrogacy and allows only married couples to be 'intended parents.' After Obergefell, married same-sex couples may enter into an enforceable surrogacy contract under the law.").

[138] TEX. FAM. CODE § 160.759 (West 2003).

[139] *See* Michelangelo Signorile, *Jason Hanna and Joe Riggs, Texas Gay Fathers, Denied Legal Parenthood of Twin Sons*, HUFFINGTON POST (Jun. 18, 2014), https://www.huffpost.com/entry/jason-hanna-and-joe-riggs_n_5506720 [https://perma.cc/K99Z-6Y9V] (noting an example where, before the landmark Supreme Court decision of *Obergefell* legalized same-sex marriage in all fifty states, the marriage provision of the Texas Family Code for gestational surrogacy effectively banned same-sex couples from entering an enforceable surrogacy agreement).

[140] TEX. FAM. CODE § 153.002 (West 2003).

[141] *Supra* note 114 and accompanying text.

[142] *See generally In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988) ("Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother. This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here." (internal citations omitted)).

[143] *Supra* notes 103–07 and accompanying text.

of intended parents. These courts may make no mention of the best interests of the future child, instead extending other rights recognized by the U.S. Supreme Court—and lower courts—in other contexts, including the rights of people to privacy,[144] and the right to bodily autonomy,[145] and the freedom to contract.[146]

A famous case for the Inter-American Court of Human Rights concerned the kidnapping of Maria Gelman; while the kidnapping itself was a gross violation of law, the Court noted that removal from her parents also prevented her from developing relationships with her biological parents, therefore concealing part of her identity from her.[147] The Convention, as noted above, stresses the value and importance of a child's identity.[148] It covers the state's duty to protect the child's identity in relation to their nationality, name, and family relations.[149] The Court noted in dicta that the violation of Maria's rights was also in contravention of the protections included in the Convention.[150]

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[144] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (stating that the marriage "relationship l[ies] within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarilynbroadly and thereby invade the area of protected freedoms.' Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

[145] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother. Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those 'procured or attempted by medical advice for the purpose of saving the life of the mother,' sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, 'saving' the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here." (internal citations omitted)).

[146] *Cf.* Chi., B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567 (1911) ("But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.").

[147] *See* Gelman v. Uruguay, Inter-Am. Ct. H.R. (ser. C) No. 221, P 43, (Feb. 24, 2011), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf [https://perma.cc/W6ZV-XSFZ] ("The foregoing reveals that the abduction of children by State agents in order for them to be illegitimately delivered and raised by another family, modifying their identity and without informing their biological family about their whereabouts, as demonstrated in the case, constitutes a complex act that involves a series of illegal actions and violations of rights to conceal the facts and impede the restoration of the relationship of the minors of age and their family members.").

[148] *Supra* notes 37–41 and accompanying text and parentheticals.

[149] *Id.*

[150] *Id.* at P 44 ("In this manner, the referred situation affected what has been named the right to identity, although it is right that is not found expressly established in the [American Convention of Human Rights], it is possible to determine it on the basis of that provided in Article 8 of the Convention on the Rights of the Child, which established that said right encompasses the right to nationality, to a name, and to family relationships. Likewise, it can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that

In sum, identity is considered at base to even be within people's genes. This consideration is evidenced in part by debates concerning anonymity for gamete donation.[151] In the United States, however, there appears to be no statutory or case law specifically providing for or regulating a right to identity through knowing one's genetic origin. The current surrogacy practice in the United States arguably violates this right.

Rather than addressing the interests of *children*, the United States Supreme Court has stated that "the interest of parents in the care, custody and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court."[152] Considering non-parent visitation petitions, courts are therefore required to give "special weight" to a fit parent's decision to deny a non-parent visitation, as well as other decisions made by a parent regarding the care and custody of their children.[153] This American focus on the interests of parents is in tension with the rights enshrined within the Convention, since it urges ratifying nations to focus on the interests of the child, particularly the child's right to elect a relationship with their parents. As discussed above, the definition of parent may for purposes of a child's identity include legal, biological, and gestational parents. A practice of permitting intended parents to ban surrogate mothers from visitation, implicitly upheld by the U.S. Supreme Court's focus on the interests of only one kind of parent, is detrimental to a child's right to elect a parental relationship.

B. Surrogacy in the Netherlands

The surrogacy practice in the Netherlands is strikingly different to that in the United States. Surrogacy agreements are restrictively regulated in the Netherlands; commercial surrogacy is entirely prohibited, and placing an advertisement calling for a surrogate mother is punishable by law.[154] Consequently, only altruistic surrogacy performed by a woman

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sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case.").

[151] *See* T. Hampton, *Anonymity of Gamete Donations Debated*, 294 J. AM. MED. ASS'N 2681, 2683 (2005), *available at* https://jamanetwork.com/journals/jama/articlepdf/1731785/jmn1207-2-1.pdf [https://perma.cc/8U7A-DHE5] ("But for now, parents are not obligated to inform their children how they were conceived, and no countries have instituted measures to ensure that parents of children conceived through gamete donation reveal this information. Many argue such measures are needed, because while individuals have a right to privacy about personal matters such as infertility, ultimately it is the offspring whose identity and health are most affected.").

[152] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[153] *Id.* at 69–70 ("The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. . . . [I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.").

[154] *See* Artikel 151b lid 1, 3 SR (Neth.) ("A person who, in the course of a profession or business, deliberately triggers or encourages a surrogate mother or a woman wishing to become a surrogate mother to negotiate directly or indirectly with another person or to make an appointment in order to implement the intention [to be a surrogate in a putative surrogate mother as defined within the code] shall be punished with imprisonment of not more than one year or a fine of the fourth category."

reached through the intimate circle of the intended parents is allowed. This restriction actually represented a loosening of Dutch law; prior to 1994, even altruistic surrogacy was forbidden.[155] But because of the restrictions on solicitation and advertisement, these penal provisions still have the effect of discouraging all types of surrogacy. According to the Minister of Justice at the time of enactment, these provisions were created "to counteract commercial surrogacy, which is the toughest manifestation of a commercialized motherhood, reducing women to a womb."[156] A total prohibition of surrogacy and of any related mediation was not considered feasible, as "it is often impossible to prove an intention to renounce the child existed prior to pregnancy."[157] A prohibition also leads to a criminal investigation, deeply intervening in the privacy of the woman concerned.[158]

The arguments the Dutch government brought forward are of a highly normative and practical kind. The fear of "commercialized motherhood" not only perpetuates the stereotype of child-bearing women becoming primary caregivers, but also takes away the right of personal privacy—recognized internationally, for example, in the European Convention for the Protection of Human Rights and Fundamental Freedoms[159]—that women should have with regard to their own bodies. Interestingly, a similar concept of liberty of bodily autonomy had already

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(original in Dutch)); Artikel 151c SR (Neth.) ("A person who, in the course of a profession or business [other than certain exceptions in relation to the Child Protection Board], deliberately triggers or encourages a woman to negotiate directly or indirectly with another person, or to make an appointment in connection with that woman's desire to permanently leave the care and upbringing of her child to someone else, is punished with imprisonment of up to six months or a fine of the third category." (original in Dutch)).

[155] Sylvia Dermout et al., *Non-Commercial Surrogacy: An Account of Patient Management in the First Dutch Centre for IVF Surrogacy, from 1997 to 2004*, 25 HUMAN REPRODUCTION 443, 443–44 (2010), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2806181/pdf/dep410.pdf [https://perma.cc/U8FU-6YN5] ("Surrogacy was prohibited by law in the Netherlands until 1994. In 1986, a nationwide gynaecological cancer patient organization raised the question as to whether it would be possible for patients to have their own genetic offspring after undergoing surgical treatment for gynaecological cancer (Olijf Foundation). A campaign was initiated by some of the gynaecologists involved to bring this subject to the attention of the Dutch gynaecological field and the Dutch government. Finally, in 1994, the law was changed from a general prohibition of surrogacy to a prohibition of commercial surrogacy. This paved the way for non-commercial IVF surrogacy, which then became possible, under strict circumstances.").

[156] Dutch Parliamentary Records of the Tweede Kamer, 50STE VERGADERING, Acts II, 3675, at 3700 (1993) (Neth.), *available at* https://resolver.kb.nl/resolve?urn=sgd%3Ampeg21%3A19921993%3A0000851 [https://perma.cc/BM6U-6HBB] (original in Dutch) (quoting Minister of Justice Ernst Hirsch Ballin).

[157] Memorie van Toelichting, Aanvulling van het Wetboek van Strafrecht met enige bepalingen strekkende tot het tegengaan van commercieel draagmoederschap [Explanatory Memorandum to Supplement to the Penal Code with Some Provisions to Prevent Commercial Surrogacy] (1990–91), 21-968, no. 3, at 2 (Neth.), *available at* https://resolver.kb.nl/resolve?urn=sgd%3Ampeg21%3A19901991%3A0006773 [https://perma.cc/U6X8-KUT9] (original in Dutch).

[158] *Id.* ("[T]he pursuit of such a prohibition would lead to criminal investigations that would affect the privacy of the woman concerned." (original in Dutch)).

[159] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 8, sub 1, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953) ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

been established in the United States in *Roe* two decades prior to the enactment of the penal provisions permitting only altruistic surrogacy in the Netherlands.[160]

1. Surrogacy Cases in the Netherlands

The woman giving birth to a child is the first legal mother of that child under Dutch law.[161] While this may be a later benefit to a child born to a surrogate who seeks to inform his or her identity, this requirement has also been an obstacle to identity in surrogacy cases, as officials may sometimes refuse entering a birth certificate into the civil registry or issuing other documents if it is in their view contrary to public policy. In one illustrative case, a Dutch court permitted officials to refuse to domestically register a French birth certificate for a child born to a traditional surrogate.[162] The intended parents, a Dutch gay couple, specifically sought to avoid the Dutch requirement to list the surrogate mother by arranging for the surrogate to birth in a country without the requirement.[163] The Dutch court permitted the refusal because the surrogate mother was not listed, and noted that it would be against public policy to not allow the child to form their identity by being able to uncover the identity of the surrogate mother.[164] In a separate case, Dutch officials had refused to issue even an emergency passport for a child born to a gestational surrogate, apparently commercially solicited, in Ukraine because the birth certificate stated the Dutch commissioning parents as legal mother and father.[165] The Dutch court ultimately reversed that refusal.[166]

Dutch law gives significant weight to the birth mother's will with regard to the child. Courts heavily base their decisions to allow a change in parental authority on the birth mother's comprehension of the consequence, and emphasize the importance of the child's knowledge of his

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[160] Roe v. Wade, 410 U.S. 113, 164 (1973); *see also* Dermout, *supra* note 155, at 443.

[161] Art. 1:198 para. 1 BW (Neth.) ("The mother of a child is the woman . . . from whom the child was born; [who is in a registered partnership with the woman who gives birth and who meets certain other criteria and follows certain legal procedures]; who acknowledged the child; whose parenting has been legally established; *or* who adopted the child." (emphasis added) (original in Dutch)).

[162] Rb.'s-Gravenhage, 14 september 2009, RFR 2010, 26 m.nt. I. Curry-Sumner (*In re* [A]) (Neth.), *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2009:BK1197 [https://perma.cc/4SQZ-BR72].

[163] *Id.*

[164] *Id.* (noting, when addressing a birth certificate that did not identify the surrogate mother, that "the child should be granted the choice to be able at a later age to give form to his or her identity. In doing so, he or she needs, as far as possible, full access to details of his or her parentage. Registration of the French birth certificate [without the surrogate mother's name] therefore contravenes Dutch public policy." (original in Dutch)).

[165] Rb.'s-Gravenhage, 9 november 2010, RFR 2011, 63 m.nt JHHM Dorscheidt (Gedaagde/Staat der Nederlanden) (Neth.), *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2010:BP3764 [https://perma.cc/AAG6-8KM9].

[166] *Id.*

origins, and future contact between the birth mother and the child.[167] In another case where officials recommended the continuation of the de facto parental authority of the commissioning parents, the court still ordered the surrender of the child to the birth mother based on her right to reconsider her decision and a child's right to be cared for by his or her parents under article seven of the Convention.[168] With regard to the child's right to family relations, the Dutch Supreme Court has ruled that providing a child with knowledge of his or her origins and legal status is part of the care for his or her mental wellbeing and personal development.[169] This includes knowledge of the existence of the persons who contributed to the making of the child.[170]

2. *Future of Surrogacy in the Netherlands*

The Dutch surrogacy practice involves serious hurdles for commissioning parents, in particular for same-sex couples. Studies show that children of same-sex parents benefit from being raised by those parents within a family that is stable,[171] and such stability is certainly improved

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[167] Rb.'s-Gravenhage, 1 december 2010, JPF 2011, 33 P 2, 11–12 m.nt I. Curry-Sumner (Verzoekers/Draagmoeder) (Neth.), *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2010:BO7387 [https://perma.cc/NJD3-HQHB] (noting the surrogate mother understands the consequences of renunciation, the child is informed of status as a child born to surrogate, and that there is room for contact between the child and the surrogate mother in the future).

[168] HoF's-Arnhem-Leeuwarden, 6 oktober 2004, RFR 2004, 18 P 16 (Wensouders/Biologische Ouders) (Neth.), *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHLEE:2004:AR3391 [https://perma.cc/WFS8-95DD].

[169] HR 25 september 1998, NJ 1999, 379 m.nt SFM Wortmann (Neth.), *reference available at* https://www.recht.nl/rechtspraak/uitspraak/?ecli=ECLI:NL:HR:1998:ZC2714 (discussing the Convention, *supra* note 9); *see also* HR 18 maart 2016, NJ 2016, 210 P 5.1.4 m.nt S.F.M. Wortmann (Neth.) (citing *id.* and stating that "[t]he care and responsibility for the mental well-being and personal development of the child includes the provision of information about his or her descent ('status education'). It is therefore up to the parent who exercises the authority to provide the child with that information. In principle, it is reserved for this parent to determine the appropriate moment. In this, however, the best interests of the child must be paramount. Parental authority is, after all, a 'right' vested in the parents, but this right is given in the best interests of the child and cannot therefore be seen in isolation from the obligation to serve that interest." (original in Dutch)).

[170] *Accord* DUTCH GOV. COMM. ON REASSESSMENT OF PARENTHOOD [STAATSCOMMISSIE HERIJKING OUDERSCHAP], CHILD AND PARENTS IN THE 21ST CENTURY 18 (2016), *available at* https://www.government.nl/binaries/government/documents/reports/2016/12/07/child-and-parent-in-the-21ste-century/Child+and+parents+in+the+21st+century+ENG.PDF [https://perma.cc/44CQ-ZL34] [hereinafter DUTCH REASSESSMENT] ("The Government Committee is of the opinion that the birth certificate is not suitable to ensure knowledge of parentage. The child must, therefore, be informed in another way of its own parentage, or in the broader sense: its own origin story. The Government Committee agrees with the Dutch Supreme Court that providing a child with 'status information' (statusvoorlichting) is a component of the obligation to provide care and assume the responsibility for the mental welfare and the development of the child's identity. Provision of status information is also included in one of the seven core elements of good parenting. The right to knowledge of one's origins is also included in Articles 7 and 8 UNCRC, and Article 8 ECHR.").

[171] *See, e.g.*, J.G. Pawelski et al, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 359–60 (2006) ("These findings are consistent with general knowledge among students of child development, namely that great-

when the marital union is recognized by law and supported by societal institutions. On this point, while the union itself is now recognized by law, these couples are currently not sufficiently protected if they engage in a surrogacy arrangement. Increasingly, same-sex couples who face restrictions using IVF and other surrogacy procedures in their home countries, like those in the Netherlands, have traveled to other countries for the procedures.[172] These commercial, compulsory surrogacy arrangements are void in the Netherlands and the resulting birth certificates are often not eligible for registration.[173] The ongoing practice, therefore, leads to arduous, lengthy, and costly litigation. Whether this difficult process is in the best interest of that child is highly debatable.

Furthermore, there is the issue of whether these surrogacy arrangements should be enforceable. In other words, there is the issue of whether the intended parents should be able to force the surrogate mother to relinquish the child, and conversely whether intended parents should be forced to take on the child, if they agreed to do so prior to birth. An agreement of that nature would currently not be enforced under Dutch law, and the surrogate mother would remain the legal mother until she requests termination of her parental rights and surrenders the child for adoption by the intended parents.[174]

Things may be changing. The Dutch Committee on the Reassessment of Legal Parentage recently published its recommendations for more progressive legislation on surrogacy.[175] In short, they recommend that the surrogate mother should be permitted to live in the Netherlands with expanded reimbursement of reasonable expenses as well as a general payment of €500 per month for a period before and after pregnancy.[176] This general payment, according to the Committee, is "not for a

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er stability and nurturance within a family system predicts greater security and fewer behavioral problems among children.").

[172] *See* Marcy Darnovsky & Diane Beeson, *Global Surrogacy Practices* 17 (Int'l Institute for Social Studies, Working Paper No. 601, 2014) ("One surrogacy agency head explained that his company was formed in response to discrimination against same-sex and single commissioning parents. When India introduced regulations discriminating against gay couples, this agency started sending Indian women working as surrogates to Nepal to give birth. Some of these women were impregnated with eggs from young Ukrainian or South African women that had been fertilised with sperm frozen in Israel. Israeli agencies also work in other countries including Thailand and Mexico. One strategy to recruit young women to provide eggs is to offer them a beach holiday to India or Thailand, in the course of which they undergo egg harvesting. Israeli gays who can afford the higher costs go to the US for surrogacy because there they can meet the surrogate and know the identity of the egg donor.").

[173] *Supra* notes 161–66 and accompanying text.

[174] Ian Curry-Sumner & Machteld Volk, *Surrogacy In The Netherlands*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATIONS AT THE INTERNATIONAL LEVEL 275 (K. Trimmings & P. Beaumont eds., 2013) ("Whereas not all authors agree on the validity of the subsidiary clauses and the possibility for damages if the surrogate mother does not fulfil her obligations, they all agree that the main clause is void and cannot be enforced. Under Dutch law, juridical acts (including agreements) that violate mandatory statutory provisions or are contrary to good morals will result in the agreement being regarded null and void, which means that it is treated as if it had never came into being and thus cannot be enforced. Contracts concerning the surrender of children after birth are considered to be a breach of good morals." (internal citations omitted)).

[175] DUTCH REASSESSMENT, *supra* note 170.

[176] *Id.* at 99 ("The Government Committee is of the opinion that alongside the aforementioned

service provided," but for "the inconvenience, the pain and effort during and after the pregnancy."[177] In addition, the Dutch Federation of Institutions for the Unmarried Mother and her Child (FIOM) along with a reproductive health specialist "advocate for a 'surrogate mother' bank," which if implemented would allow intended parents to be coupled with women willing to carry a child for someone else.[178]

In addition, alternatives may be available to reduce reliance on the birth certificate and other traditional documents to track surrogacy information. The Committee has—after several years of research—recommended installing an "Origin Story Register" from the point of view that the right to know one's origins is fundamental.[179] Information on the origins of the child, whether genetic, practical, or legal, can be stored in this register to help "form the safeguard for the availability of this information for the child."[180] Another potential advantage to following the Committee's advice is the decrease in international surrogacy arrangements involving Dutch people, for there will be less of an incentive for them to resort to more surrogacy-friendly jurisdictions.

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specific expenses, room must be provided for limited compensation by the intended parents for the surrogate having carried the child and/or the compensation for the inconvenience, the pain and effort during and after the pregnancy. Such compensation is not intended as payment for a service provided and may not be so high that an improper pressure is exerted on the surrogate mother. . . . For the determination of reasonable compensation, the Government Committee has examined the amount that is paid for egg donation, which is paid in addition to the travel expenses (i.e., €900). The effort of the surrogate mother is both more profound, as well as lengthier than the egg donor. The Government Committee therefore regards a fixed payment of €500 per month reasonable for the period of the pregnancy, as well as a short period before and after the pregnancy. The compensation would need to be paid beforehand or every month to prevent that this could be regarded as a reward for handing over the child.").

[177] *Id.* at 99 ("The Government Committee is of the opinion that alongside the aforementioned specific expenses, room must be provided for limited compensation by the intended parents for the surrogate having carried the child and/or the compensation for the inconvenience, the pain and effort during and after the pregnancy. Such compensation is not intended as payment for a service provided and may not be so high that an improper pressure is exerted on the surrogate mother. . . . For the determination of reasonable compensation, the Government Committee has examined the amount that is paid for egg donation, which is paid in addition to the travel expenses (i.e., €900). The effort of the surrogate mother is both more profound, as well as lengthier than the egg donor. The Government Committee therefore regards a fixed payment of €500 per month reasonable for the period of the pregnancy, as well as a short period before and after the pregnancy.").

[178] Anneke Stoffelen, *Specialisten bepleiten draagmoederbank om wensouders te helpen* [*Specialists advocate surrogate bank to help prospective parents*], DE VOLKSKRANT (Nov. 28, 2017), https://www.volkskrant.nl/mensen/specialisten-bepleiten-draagmoederbank-om-wensouders-te-helpen~b9d67fb2/ [https://perma.cc/6QMH-3ST5] (original in Dutch).

[179] DUTCH REASSESSMENT, *supra* note 170, at 22, 24 (recommending that the Dutch government "[c]reate a Origin Story Register (in Dutch: *register ontstaansgeschiedenis, ROG*) in which alongside the donor information already included, also other information regarding the creation story can be included, whether or not compulsory. The ROG, and not the details on the birth certificate, should form the safeguard for the availability of this information for the child. The possibility to register details with evidence and correct the information should also be possible").

[180] *Id.* ("The ROG, and not the details on the birth certificate, should form the safeguard for the availability of this information for the child. The possibility to register details with evidence and correct the information should also be possible").

IV. INTERNATIONAL SURROGACY

International surrogacy—here meaning surrogacy arrangements involving more than one jurisdiction, either cross-border or even between administrative divisions within a country—may offer a more accessible opportunity of parenthood to those otherwise unable to bear a child and restricted from surrogacy domestically. Arranging a surrogacy internationally, however, poses many legal, ethical, and practical challenges as compared to domestic arrangements. As mentioned, there is no uniformity in legislation and regulation of surrogacy between jurisdictions around the world,[181] or even between state jurisdictions within the United States.[182] The United States Constitution, however, requires states to respect many of the judgments of other of its states,[183] arguably including judicially confirmed surrogacy arrangements.[184] The remainder of this note will therefore only focus on international surrogacy arrangements, rather than those between administrative divisions within a country. International surrogacy arrangements occur most often when the intended parents come from a country where surrogacy is strictly regulated or prohibited, and as a result the intended parents commission a surrogate mother in a country with a wider variety of legally permissible arrangements.

A. International Surrogacy and the Convention

The international nature of international surrogacy complicates the protection of the child's right to know their origins. These rights again include the right to be registered at birth, the right to a nationality, and the right to know and be cared for by one's parents, and the right to identity and family relations are also at play in international surrogacy arrangements.[185] For a child born in a country different than that of their intended parents, registration will depend on the national laws in the country of birth.[186]

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[181] Hevia, *supra* note 22, at 376.

[182] *Supra* notes 103–07 and accompanying text.

[183] U.S. CONST. art. IV, § 1 (noting that full faith and credit is granted from one state's proceedings to another).

[184] Martha Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1177 (2014) (arguing that "[a] uniform rule concerning gay marriage is necessary because states need not recognize marriages that are inconsistent with state public policy. The same need for uniformity does not exist in relation to surrogacy, because a parent-child relationship established and recognized in one state must be respected in other states under the U.S. Constitution's Full Faith and Credit Clause. In that way, uniformity of recognition of parent-child relationships is assured even while states pursue different surrogacy policies.").

[185] *Supra* notes 37–41 and accompanying text.

[186] *See* Convention, *supra* note 9, art. 2, sub. 1 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction[.]").

Problems arise both when the officials in the country of birth do not record on the birth certificate the intended parents or, even if the intended parents are on the foreign birth certificate, when the officials in the intended parents' home country do not then recognize the foreign birth certificate.[187] It is risky when a surrogate-born child cannot legally acquire their intended parents' nationality.[188] Reforming domestic laws may deal with this uncertainty but of course cannot result in mutual recognition of birth certificates between countries. To universally safeguard the right to identity of children born abroad through a surrogacy arrangement, all sovereign countries have to act. One way a country might act is to adopt an international convention that more clearly provides for this recognition, such as one that may be drafted in the future by the Hague Conference on Private International Law (HCCH).[189]

Special efforts must be made with respect to nationality if children will otherwise be left stateless. These kinds of special efforts were made in Britain in the case of *Re X & Y (Foreign Surrogacy)*.[190] In this case, twins born in Ukraine via surrogacy to intended parents from Britain were considered children of the intended British parents under Ukrainian law, while considered children of the Ukrainian surrogate parents under British law.[191] The children, therefore, ended up being stateless.[192] Richard Storrow[193] argues that denying citizenship to children of parents who

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[187] Gerber & O'Byrne, *supra* note 14, at 92 (noting that "[p]roblems arise where the birth certificate does not record the intended parents, or where the authorities in the intended parents' home country do not recognise the foreign birth certificate. For example, in 2010, a Spanish court refused to recognise Californian birth certificates of twins born in San Diego via surrogacy which recorded a Spanish gay couple as the children's parents," referring to Juz. Prim. n. 15 de Valencia, Sep. 15, 2010 (R.J., No. 193) (Spain), *available at* http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=5805831&links=&optimize=20101223&publicinterface=true [https://perma.cc/FK95-PA8Z]).

[188] Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 386 (2011) ('There are two difficulties with this [article seven in the Convention, *supra* note 9], both grounded in its presumptive incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation.").

[189] The HCCH is currently researching the issues of international private law concerning legal parentage, in particular with regards to assisted reproductive strategies and international surrogacy arrangements. *Parentage / Surrogacy Project*, HAGUE CONF. ON PRIVATE INT'L LAW, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy [https://perma.cc/S2NP-9LNG] (last visited May 7, 2019)

[190] Re X & Y (Foreign Surrogacy) [2008] EWHC (Fam) 3030 (Eng.).

[191] *See id.* at [9] ("However, the children under English domestic law (if the guardian's analysis is correct) had no English parents or, at best, a putative father with no parental responsibility. Under Ukrainian law, however, the surrogate mother and her husband were not only relieved of but deprived of all rights, duties and status of parents, the applicants alone had them. Their legal position was the graver because under the law of the United Kingdom (and I had uncontroversial expert evidence in relation to this) not only did these children have no right of entry of their own to the United Kingdom, for the applicants could not confer nationality on them, but the applicants had no right to bring them in; or at best the male applicant may have obtained leave to do so as a putative father or relative.").

[192] *Id.* at [10] ("The effect was that the children were marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home.").

[193] Richard Storrow is a former member of the *Columbia Human Rights Law Review* and has published several scholarly works on assisted reproductive technology, cross-border care, and human

traveled abroad to have children is a disproportionate response to potential problems arising from the violation of surrogacy bans.[194] He suggests that applying the doctrine of comity[195] to surrogacy provides the best solution, since it would require countries to recognize foreign judgments and legislation.[196] Under the doctrine of comity as expanded to surrogacy, courts would recognize parentage and afford citizenship to children born via surrogacy in countries where surrogacy is legal, not unlike the doctrine arguably already in place among states within the United States.[197] This application of comity would be consistent with the Convention on the Rights of the Child and its goal of preventing statelessness. The application would also be an improvement from the apparent approach of some countries to use the denial of citizenship and parentage recognition as instruments in a battle against international surrogacy, despite undermining the deterrant effect of these denials.

B. International Surrogacy and the European Court of Human Rights

Besides the Convention, the European Court of Human Rights (ECHR) is another authoritative source of international law. Its decisions are incorporated into the Dutch legal system through the treaties[198] it interprets. The jurisprudence of the ECHR on article eight of the European Convention on Human Rights, establishing the right to respect for private life, supports the child's right to know their origins.[199] In *Gaskin v. Unit-*

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rights. Storrow is a tenured Professor of Law at the City University of New York School of Law. *Richard Storrow*, CITY OF N.Y. LAW SCH., https://www.law.cuny.edu/faculty/directory/storrow/ [https://perma.cc/22BH-FDPB] (last visited May 7, 2019).

[194] Richard F. Storrow, *"The Phantom Children of the Republic": International Surrogacy and the New Illegitimacy*, 20 AM. U.J. GENDER SOC. POL'Y & L. 561, 602 (2012) ("Denying children citizenship and legal recognition of the parentage of the individuals who have travelled abroad to have these children with the intent of raising them seems a particularly draconian and disproportionate response to the problems a country fears may arise from the violation of its surrogacy proscriptions abroad. The response does not appear to be well geared to discouraging international surrogacy, nor does it entail any mechanism by which a nation might express more than a mere symbolic concern for the welfare of children and surrogate mothers.").

[195] *Comity*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Comity is a practice among different political entities (as countries, states, or courts of different jurisdictions) involving the mutual recognition of legislative, executive, and judicial acts.").

[196] *Id.* ("By contrast, the doctrine of comity seems well designed to afford states some latitude in evaluating whether the transaction abroad has proceeded in a fashion that does not give rise to anxiety about overreaching, exploitation and abuse.").

[197] *See supra* notes 182–83 and accompanying text and parentheticals.

[198] *See, e.g.*, Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 204 (2008) (noting "the Netherlands Constitution of 1983 places international treaties above the Constitution, and explicitly states that statutes that conflict with international law are void").

[199] J. Fortin, *Children's Right to Know Their Origins—Too Far, Too Fast?*, 21 CHILD & FAM. L. Q. 336, 345 (2009) ("The right to respect for private life has been widely interpreted. The early decision reached by the European Court of Human Rights (ECtHR) in *Gaskin v United Kingdom* secured for children the right to obtain information about themselves held by public agencies on their childhood and early development.").

ed Kingdom, the European Court secured the right for children to obtain information about themselves held by public agencies on their childhood and early development.[200] This interpretation of article eight was later taken further when the Court stated in *Mikulić v. Croatia* that there is no reason why the notion of "private life" should exclude the legal relationship between a child born out of wedlock and the natural father.[201] In the *Mennesson* case, the Court expressed that in its view, the child's best interests are served by having a legal relationship with a genetic parent recognized, and this surpasses the public interest in prohibiting surrogacy.[202]

The ECHR case law shows that article eight imposes positive duties on ratifying states "to prevent inter-individual restrictions of the [child's] right to know,"[203] but nonetheless also shows that there are some permissible restrictions on that right. There must be a "fair balance" between a child's right to know his or her origins, on the one hand, and the surrogate's right to privacy, on the other.[204]

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[200] Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A) at para. 49 (1989), *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57491%22]} [https://perma.cc/769Q-T8YV] ("The Court considers . . . that under [a system where information contributed to child care case records sometimes requires consent of the contributor before disclosure] the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case. Accordingly, the procedures followed failed to secure respect for Mr Gaskin's private and family life as required by Article 8 (art. 8) of the Convention. There has therefore been a breach of that provision.").

[201] Mikulic v. Croatia, App. No. 53176/99 para. 54–55 (Eur. Ct. H.R. Feb. 7, 2002), *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60035%22]} [https://perma.cc/BX9B-QAC4] ("The Court has held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. In the instant case the applicant is a child born out of wedlock who is seeking, by means of judicial proceedings, to establish who her natural father is. The paternity proceedings which she has instituted are intended to determine her legal relationship with H.P. through the establishment of the biological truth. Consequently, there is a direct link between the establishment of paternity and the applicant's private life." (internal citations omitted)).

[202] *See* Mennesson v. France, App. No. 65192/11 para. 100 (Eur. Ct. H.R. June 26, 2014), *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145389%22]} [https://perma.cc/2CK5-CVV8] ("This analysis takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent. Having regard to the importance of biological parentage as a component of identity, it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof." (internal citations omitted)); Andrea Mulligan, *Identity Rights and Ethical Questions: The ECHR and the Regulation of Surrogacy Arrangements*, 26 MED. L. REV. 449, 461 (2018) ("The child's interest in having this relationship recognised is the same, regardless of whether or not the arrangement involves a cross-border element. And fundamentally, this is the core of Mennesson: in the Court's view the child's best interests are served by having a legal relationship with a genetic parent recognised, and this aspect of the child's best interests trumps the *public interest* in prohibiting surrogacy." (emphasis added)).

[203] Besson, *supra* note 83, at 145.

[204] *See* FORTIN, *supra* note 83, at 68; *see also* Jevremović v. Serbia, App. No. 3150/05 para. 99 (Eur. Ct. H.R. July 17, 2007), *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-81688%22]} [https://perma.cc/8E8N-DW4S] ("Finally, the Court reiterates that the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, but that the applicable principles are similar. In determining whether or not such an obli-

C. *Merits of the Child's Right to Know its Origins*

Children born from a worldwide exchange of sperm, eggs, and embryos have little to no prospect of fully identifying their origins. This practice is, therefore, inconsistent with article seven of the Convention. In the context of surrogacy, the right to "know" one's parents would mean that any child born via surrogacy has a right to know the identity of the surrogate, egg donor, and sperm donor, if any. To protect this right, countries should require these records be kept in a register and made available to the child at an appropriate age should they desire access to such information. The right of the child to be cared for by their parents means that states ratifying the Convention should recognize this relationship between the child and their commissioning parents.

International surrogacy arrangements, which by definition involve children's removal from their country of birth, threaten children's capacity to develop heritage-related connections and understand their cultural origins.[205] In contrast to intercountry adoption, children born via international surrogacy arrangements are knowingly created with the expectation that they will never live in their countries of birth. This threat could be a reason for countries to restrict international surrogacy.

V. CONCLUDING REMARKS

There seems to be no theoretical basis for an outright prohibition on surrogacy itself so long as there is due concern for the identity rights of the child and the interests of the parties involved. As a core principle, the right of children to know their origins needs to be protected. In the absence of an alternative method of tracking information to enable this knowledge at the option of the child, birth certificates should not be structured solely based on parent-oriented needs and wants, nor altered such that they no longer reflect reality for the child.

In the context of surrogacy, the question of parentage should not be interpreted as a biologically proven fact, but as an existing social construct based on considerations in the best interests of the child. Especially in the United States, there is a need for appropriate legislation and regulation, with states having to move away from the unconditional serving of parents-focused interests. In more "child-oriented," strictly regulated countries like the Netherlands, parents resort to cross-border surrogacy

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gation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual. In both contexts the State enjoys a certain margin of appreciation.").

[205] Tobin, *supra* note 97, at 331 ("International surrogacy arrangements, which by definition involve children's removal from their countries of birth, threaten children's capacity to develop such relationships and understand their cultural origins.").

arrangements, causing problems with respect to registration, international recognition, and the acquisition of citizenship. In spite of differences in medical-ethical views between countries, and given the willingness of people to go out of their way to have a child, there is a much stronger need for international agreements; hence, the mandate given to the HCCH to study the issue.[206]

National governments and legislatures must develop evidence-based policies and laws that are informed by and comply with international human rights standards, in particular those enshrined in the Convention.[207] Through a more comprehensive and detailed registration of prospective parents, biological parents, and surrogates, states will be able to effectively protect the rights of children to their origins, and therefore to their identity. Commissioning parents should, for instance, be required to present extensive evidence about their surrogacy agreement. While this creates a hurdle for the recognition of parentage, justification is found in ensuring that a genuine parent-child relationship exists and that the child can know its biological origins consistent with the Convention.

The urge to have children is one of the most essential desires to mankind,[208] but this urge never abrogates a child's fundamental right to identity. Knowing one's origins, no matter how complex the arrangement through which one came into existence, is an important part of that right to identity. If there is a will to get involved in the making of a child—something of such intrinsic value—anonymity cannot ever be demanded or ordered.

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[206] *Parentage / Surrogacy Project, supra* note 189 ("Pursuant to a mandate from its Members, the Permanent Bureau of the Hague Conference on Private International Law is currently studying the private international law issues being encountered in relation to the legal parentage of children, as well as in relation to international surrogacy arrangements more specifically.").

[207] Gerber & O'Byrne, *supra* note 14, at 111 ("There is, however, an urgent need for appropriate regulation of compensated surrogacy practices, based on international human rights standards. We must move away from the highly emotive language and dialogue that dominates discussion regarding surrogacy, and instead develop evidence-based policies and laws that are informed by and comply with international human rights norms, particularly the CRC.").

[208] *Id.* at 82 ("The urge to have children is, of course, the most vital of human desires.").