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The Transnationalization of Everyday Life: Cross-border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law.

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> "Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable to the maintenance of the public human rights and hence also of the perpetual peace. One cannot flatter oneself into believing one can approach this peace except under the condition outlined here."
>
> Immanuel Kant "Perpetual Peace."[1]

> "On or about December, 1910, human character changed. I am not saying that one went out, as one might into a garden, and there saw that a rose had flowered, or that a hen laid an egg. The change was not sudden and definite like that. But a change there was nevertheless, and since one must be arbitrary, let us date it to about the year 1910.... All human relations have shifted -- those between masters and servants, husbands and wives, parents and children. And when human relations change there is at the same time a change in religion, conduct, politics, and literature. Let us agree to place one of these changes about the year 1910."
>
> Virginia Woolf, "Character in Fiction."[2]

Abstract

This article explores the transnationalization of everyday life through the lens of the rapidly developing market in baby-making. Increasingly, people assemble the components required for medically assisted procreation – the ova, sperm, chemical processing – and mobilize the required competences and services – brokers, medical staff and facilities, gestators – across borders, purchasing and processing the various elements in two or three national jurisdictions. As Jan Balaz and Susan Lohle must have understood all too well as they struggled to engineer the last-minute diplomatic compromise that saved their commissioned twins from becoming wards of the Indian state, when national legislations conflict individuals are often powerless to resolve the quandaries in which they find themselves. It is a lesson that has been learned countless times over the last decades as international markets in education, medical services, retirement communities, marriage or sex and gambling have boomed, as the internet has facilitated the

[1] I. KANT, KANT: ON HISTORY 105 (Lewis White Beck ed., 1963.).

[2] 3 THE ESSAYS OF VIRGINIA WOOLF, 1919-1924, at 421-22 (Andrew McNeillie ed.,1988.)

connection between a potential demand and the purveyors of particular goods and services across boundaries. The solution when filiations and marriages and credentials and living wills and social security claims cannot be recognized lies in state action, and, more specifically, in coordinated action among the states the incompatibilities of whose legal systems are at the root of the crises. Such action is predicated on states reaching agreements with respect to matters that have conventionally been regarded as part of their essential domestic jurisdiction. The multiplication of the arenas of daily life subjected to interstate negotiation, accord and scrutiny cannot but undermine that underlying assumption of the Westphalian paradigm, which Ian Brownlie described as the "basic constitutional doctrine of the law of nations:"[3] the idea that the reserved domain of 'state action' can be cleaved from that of inter-state agreement, and that the former is appropriately left to states' own determination while the latter constitutes the normal arena of international law.

After a brief introduction (Part I), this article reconstructs the vicissitudes of the Balaz twins as an emblematic case regarding the issues of filiation and citizenship that the international market in commercial surrogacy raises (Part II). It then explores whether individual contractual autonomy can provide a solution to the conflicts among legal systems that underlie the Balaz case (Part III). Finding that path blocked by the centrality of status – and states -- in filiation, the article examines the possibility of a treaty-based solution (Part IV). It concludes, in part V, by exploring the implications for international law of the transnationalization of everyday life and the oscillatory movement in which we now seemed to be engaged towards a possible reversal of the assumptions of "Westphalia."

I. Introduction: The transnationalization of everyday life, 'Westphalia' and the denaturalization of the 'reserved domain' of state jurisdiction through the prism of the market in baby-making

There is no date with which we designate when transnationalization became an integral part of contemporary life. Should we identify the year when trade statistics began to record education as a specific line item, marking the economic significance attained by the influx of students from foreign countries and the outflow of national students? Calculate quantum leaps in the consular transcription of marriages celebrated in foreign countries? Or look for a tipping point in the

[3] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291 (7th ed. 2008).

number of *New York Times* pages read in Paris and Al Jazeera webcasts viewed in Los Angeles? However we may choose our measure, the transnationalization of everyday life is rapidly proceeding.

By this, I do not mean migration. International migratory phenomena have also taken on hitherto unprecedented dimensions -- although perhaps this is in part an artifact of the multiplication of states, and hence of the increase in the number of boundaries that people moving from one place to another must cross. What I mean by transnationalization is the growing habit of living moments of everyday life "in" a national jurisdiction other than the one in which one normally resides. ("In" in quotation marks because sometimes the relevant movement is virtual.) International lawyers and other commentators have signaled this process by focusing on various forms of "tourism": health tourism, education tourism, and so on. But the term tourism is misleading. By definition, tourism is a voluptuary act, one that inserts a parenthesis in the tourist's normal routine, removing her or him from quotidian cares. Catered to by the receiving country's "hospitality industry," the tourist brings his cash and no other part of himself on his trip other than, perhaps, a disposition for wonderment at unfamiliar customs and scenes -- in fact, the purpose of the trip is to leave the rest of himself, the essential bits, behind. So the receiving country adds a sector to its economy, and the tourist adds a destination to her time out.

What in fact is happening, however, is quite different. It is that people's strategic choices -- what newspaper shall I read, where shall I give birth, which school shall I send my child to and where will she learn Spanish or Swahili, or where will I have my dentist and retirement home -- are increasingly framed in non-national terms. Although the global may be local, the daily is often not. Perhaps this will change human character; certainly it is a change in how we live, that is, to return to Virginia Woolf, in human relations. As she rightly observes, changes in human relations imply changes in "religion, conduct, politics, and literature."[4] One cannot fault her for not noting that they also imply changes in law.

[4] VIRGINIA WOOLF, Character in Fiction, reprinted in 3 THE ESSAYS OF VIRGINIA WOOLF, 1919-1924, at 421-22 (Andrew McNellie ed. 1988).

Yet changes in law are of the essence. Kant wrote that when an action in one place reverberates globally, the idea of a general order of world citizenship becomes essential to ensuring the well-being of all, and any.[5] That seems all the more urgent when those effects are not transmitted through processes that engage distant institutions and individuals but situated squarely within the experiences of one person who simultaneously, if temporarily, operates in more than one jurisdictional site. Kant outlined his own recipe for the peace that would ensure public human rights in an era in which states can no longer inure those within their own territories from acts beyond their reach. But the "new world order," if there is to be one, has not given signs of an orderly advent; it is unlikely to spring full-grown from the heads of constitutional scholars, like Athena from that of Zeus. To the contrary, whatever new forms of global governance may eventually coalesce into systemic unity will look more like the patchwork of *bricoleurs* than the architectural plan of master carpenters.

To understand current trends therefore requires identifying the sites in which the *bricoleurs* are engaged and the tools they are using, tracing the forms and implications of the legal developments that they are spawning, and inquiring into their possible cumulative effects. Hannah Arendt said of the creation of the modern world that it was preceded by the expansion of the arenas subjected to the surveying capacity of the human mind. "Before we knew how to circle the earth, how to circumscribe the sphere of human habitation in days and hours, we had brought the globe into our living rooms to be touched by our hands and swirled before our eyes."[6] As has been frequently noted, globalization reshapes the force field within which international law operates even as it impacts national legal processes and frameworks: from the law-making capacities embedded in international organizations to the systematic dialogues of internationally-networked public administrators, from the multilayered cross-jurisdictional borrowings and incorporations that characterize transnational law to the implicit agreements on principle of international and domestic courts that prefigure emerging quasi-constitutional doctrines, from the supraordinate claims of human rights institutions to the globalization of the laws of trade and war.[7] The contention of this article is that the surveying capacity of international lawyers should

[5] I. KANT, KANT: ON HISTORY 105 (Lewis White Beck ed., 1963.).
[6] HANNAH ARENDT, THE HUMAN CONDITION 251 (2d ed. 1998).
[7] The literature on globalization, international relations and world governance as well as that on cosmopolitanism is too voluminous to cite specifically. With particular reference to its

be extended to include the present transformations of the quotidian experiences of "ordinary people" and the globes we bring into our classrooms and place on our writing desks be re-sculpted so as to bear the marks, across the ridges constituted by states and the river-ways of dominant international organizations, of the many streams created as the transnationalization of everyday life elicits new modes of social, political, and legal organization.

When individuals living ordinary lives apprehend the stage on which their life-choices can – perhaps must – be made as no longer confined to one or two national states but as a vast chessboard on which local solutions to everyday activities – from having a child to being buried, from reading the news to participating in electoral politics – can be found in multiple sites, under differing rules, sometimes simultaneously, they – often unwittingly and to their own dismay –

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significance for international law and the processes mentioned here, from a burgeoning literature, see JOSE' E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005) [hereinafter Alvarez, IOs as lawmakers]; SEYLA BENHABIB, ANOTHER COSMOPOLITANISM (2006); RAFAEL DOMINGO, THE NEW GLOBAL LAW (2010); KATHRYN SIKKINK, THE JUSTICE CASCADE (2011); BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); RUTI TEITL, HUMANITY LAW, (2011); NICHOLA TSAGOURIAS, TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES (2007); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, The Emergence of Global Administrative Law, 68 Law and Contemporary Problems 15 (2004-2005); Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181 (1996); Harold Hongju Koh, Why Transnational Law Matters, 24 Penn St. Int'l L. Rev. 745 (2005-2006);Charles F. Sabel & Oliver Gerstenberg, Constitutionalising an Overlapping Consensus: The ECJ and the emergence of a coordinate constitutional order, 16 European Law Journal, 511-550 (2010); International Law Commission, Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, Report finalized by Marti Koskiennemi (2006) (available at: http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf). But on the actual scope and implications of such processes, inter alia, see Gunther Teubner, Global Bukowina: Legal Pluralism in World Society, in GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); Jose' E. Alvarez, Three Responses to "Proliferating" Tribunals, 41 N.Y.U. J. INT'L L. & POL. 991 (2008-2009); Jean L. Cohen, Sovereign Equality vs. Imperial Right: The Battle over the "New World Order," 13 Constellations 485-505 (2006); Jean L. Cohen, Whose Sovereignty? Empire Versus International Law, 18 Ethics and International Affairs 1 (2004); Andreas Fischer-Lescano & Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 Mich. J. Int'l L. 999 (2003-2004); Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, 60 ICLQ 57-92 (2011). For a general analysis of the forms and impact of processes of social and political transformation on the globalization of legal structures, see SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

challenge existing law, both national and international. Unprotected by state immunities, economically insignificant (except, at times, in the aggregate), unlikely, in other words, to generate those peak events or "incidents" that "highlight overt conflicts between two or more actors in the state system"[8] that so often draw the attention of international lawyers, ordinary people are daily calling into question the very premise of the Westphalian system, the naturalized distinction between matters that lie within states' "essential domestic jurisdiction" and the ambit of international law. When one state refuses to recognize the birth certificates that another state has issued or to acknowledge the credentials that its own policies have encouraged its citizens to pursue abroad or to honor the living wills of the retirees whose migration it has allowed or even promoted, the rules regulating one society become of concern to the government of another not as an exceptional matter, not, that is, as a result of the public interest awakened by human rights or humanitarian crises that justify scrutiny of foreign states' internal conduct, but as a question of immediate relevance with potential consequences for states' own domestic policies. The regulation of family life, education and retirement, in other words, become objects of exchange among states, and the ensuing agreements (or persistent disagreements) are drawn into the sphere of international law.

And yet the over-all significance of crises that erupt in municipal registries, emergency care units or university offices has been relatively invisible in the pages of international legal scholarship. This is the stuff consular nightmares are made of not the agenda items of the G-20, and for that reason it has garnered little attention. This essay addresses that gap. It centers on the transnationalization of baby-making, that is, on the rapidly expanding international market in commercial reproductive surrogacy.[9] The focus on surrogacy simultaneously reflects a decision to start with the most routine, indeed indispensable, activity of social life, human reproduction; acknowledges that shifting gender relations, economic inequalities and international organization are dynamically interwoven in uneven configurations of power and subordination, agency and

[8] INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W.Michael Riesman & Andrew R. Willard eds., 1988).
[9]On the globalization of reproduction, see generally THE GLOBALIZATION OF MOTHERHOOD (Wendy Chavkin & Jane Maree Maher eds. 2010). On the factors that have favored the emergence of a commercial market in reproductive surrogacy,see Carol Sanger, Developing Markets in Baby-Making: In the matter of Baby M, 30 Harvard J. of Law & Gender 67-97 (2007)

constraint; takes into account the political economy of globalization processes; and pays homage to the ways in which technological innovations are transforming daily experiences.

The means of baby-making have expanded precipitously in the last three decades, developing out of the discoveries that enabled the extraction of female gametes and the progression of modes of embryo formation and implantation from early in vitro fertilization to intracytoplasmic sperm injection (or, ICSI) and new methodologies, which assure even greater success, will likely follow. The availability of assisted reproductive technologies has softened the pressures deriving from infertility, and perhaps lessened its salience among causes of divorce.[10] The very development of these technologies has intersected with, and perhaps been driven by, transformations in social organization. As has been endlessly noted, Western women – through choices that have been taken as signifying growing agency over the definitions of their identities as much as over the control of their bodies -- have increasingly postponed childbearing, therefore encountering greater difficulty in becoming pregnant. In parallel with shifting gender relations, the pluralization of the forms of socially acceptable family organization have led more women and men to seek to have children outside the canonical Western paradigm of coupled life: in other words, individuals without a partner, or without a partner with whom they could or would choose to procreate biologically, have sought to have children. For this, they have often had recourse to assisted reproductive technologies – and that recourse has both rested upon and called forth correlative legal structures, such as those that have enabled the anonymity of sperm donation (itself now cast in doubt in numerous countries) or individuals' property rights in the embryos to which they have contributed gametes.

At the same time, globalization has favored the search for cross-border solutions to the problems associated with reproductive difficulties (or, more simply, with the decision to have children without engaging in their production). The rapid expansion of transnational adoptions that,

[10] According to Marcia Inhorn, in the Muslim world, the "acknowledgement of IVF as a solution for infertility has softened families' patriarchal pressure on sons to divorce their infertile wives. Marcia C. Inhorn, "Loving your Muslim Spouse," in LOVE AND GLOBALIZATION: TRANSFORMATIONS OF INTIMACY IN THE CONTEMPORARY WORLD 144 (Mark B Padilla, Jennifer S.Hirsch et al. eds. 2007).

beginning in the 1970s, highlighted the existence of a growing market for babies in which particular states came to be characterized as exporters and others as importers (and some as both), *de-facto* functioned as a global "learning experience," showing individuals without enormous resources in, say, material means or worldly knowledge, the path to foreign destinations in their quest to reproduce. Born at the same time as the internet, the global market in surrogacy has accelerated as service providers – from individual women offering themselves as gestational carriers to lawyers proffering their counsel, from agencies buying and selling gametes to medical institutions -- have transacted over long-distances, transferring goods (gametes) to bodies (gestational carriers) and then products (children) across jurisdictional lines. The political economy of reproduction that has emerged is fully globalized: analyses of "care chains" have documented the migration of women from the global south to provide nanny and elder-care services in the "north," and the distribution of children available for transnational adoption evinces similar patterns.[11] Analogous trends have emerged with respect to surrogacy. In this perspective, the development of international commercial surrogacy provides a lens onto the interplay of private and public, market and state-based, economically more powerful and weaker actors and their interactions in the transnationalization of everyday life and their implications for international law.

The case of the Balaz twins, commissioned by German citizens in India, described in part II highlights the consequences that ensue when individuals ground a basic activity of life – having children -- simultaneously in multiple legal systems whose rules conflict. Caught between German prohibitions regarding surrogacy and Indian policies seeking to promote the market in baby-making, the Balaz twins appeared destined to become wards of the Indian state; they ran this risk (or, were made to do so) despite the agreement of all the parties ostensibly involved in the transactions surrounding their birth. That agreement, however, was forged exclusively among private actors whereas the regulation of reproduction and familial relations, like that of so many other spheres pertaining to everyday life, bears the imprints of nation-building and welfare policies and falls squarely within the conventionally-understood "essential domestic jurisdiction" of states: as part III of the article argues, filiation entails matters of status rather than contract, and

[11] See CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION (Faye D. Ginsburg & Rayna Rapp eds.,1995); CULTURES OF TRANSNATIONAL ADOPTION, (Toby A. Volkman ed. 2005); THE GLOBALIZATION OF MOTHERHOOD, supra n.n. 9.

is not, therefore, subject to individual negotiation. Rather, resolutions to dramas like that of the Balaz twins require inter-state coordination. Part IV therefore explores the possible characteristics of an agreement on international commercial surrogacy. Such an agreement, like *treaties of everyday life* generally, requires negotiations over deeply-held values that often regard constitutional principles and may have significant distributive consequences for domestic constituencies. A global accord capable of imposing uniform regulations on the transnational market that has emerged is therefore difficult to envisage but a bifurcated regime, based on the reciprocal acknowledgement of a permissive and a prohibitionist "treaty zone" seems more likely. Both states and individuals operating in such a bifurcated regime must be understood as –indeed, can already be seen to be -- apprehending the regime in a unitary manner, deriving advantages from, as well as paying the consequences of, its segmentation. But the possibility of explicit and implicit agreement among states does not *per se* determine the legality of the specific accords or of the overarching regime that therefore emerges. To the contrary, as is now the case with international agreements generally, the constituent accords of the regime governing international commercial surrogacy will be held to the test of international human rights law; whether that test can successfully be met will depend on the specific understandings of surrogacy as well as of human rights norms that legislators, administrators and judiciaries develop in dialogue with political and civil society actors. Having analyzed the complexities entailed by the regulation of international commercial surrogacy raises, in the concluding part (V), the article discusses the significance and implications of the transnationalization of everyday life as it denaturalizes the demarcation between states' essential domestic jurisdiction and the arenas of international law and portends a reversal of the fundamental assumptions of "Westphalia."

I. The stuff consular nightmares are made of: a birth foretold.

A. The Balaz twins: trapped between permissive and prohibitionist jurisdictions

In November 2009, the High Court of Gujarat passed down a judgment that might, at first glance, have seemed unremarkable: a child born on Indian soil of an Indian mother and a foreign father, the Court held, is an Indian national.[12] The decision could be seen as a straightforward application of current law, which, since December 2004, has attributed citizenship to those born in India if both the child's parents are citizens of India or one parent is a citizen and the other is not an illegal immigrant.[13] But in fact the decision portended a radical reordering of the legal status of the children and parents implicated in India's thriving surrogacy industry and, indeed, of the industry itself.

The case was not a straightforward one regarding children born in India of one Indian and one foreign parent. Rather, a German citizen, Jan Balaz, had sought a declaratory judgment of the Gujarat Court that his twin children, born in Anand as a result of surrogacy arrangements, could be considered Indian nationals. Balaz and his wife, Susan Lohle, faced with her infertility, had chosen to have children through reproductive surrogacy. Such a solution would have been impossible in Germany, as in numerous other countries of the European Union, which has banned surrogacy in all its forms, whether "commercial" (i.e. for payment) or "altruistic" (i.e., rendered without explicit financial compensation).[14] The Balazs might have considered other possibilities.

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[12] Jan Balaz Versus Anand Municipality November 11, 2009 Letters Patent Appeal No. 2151 Of 2009 in Special Civil Application No. 3020 Of 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151 Of 2009 with Special Civil Application No. 3020 of 2009, available at http://indiansurrogacylaw.com/jan-balaz-v.-anand-municipality.html

[13] The Citizenship Amendment Act of 2003, s. 3. Citizenship will not be conferred on a child born in India if either parent is a foreign diplomat accredited as such in India, or an enemy alien and the birth takes place in a place under enemy occupation. Citizenship Amendment Act of 2003, s.4. Special rules also apply to the children of Indian citizens living abroad. http://www.helplinelaw.com/docs/THE%20CITIZENSHIP%20%28AMENDMENT%29%20ACT,%202003 accessed 2/10/10

[14] See, ß 7 I Nr. 7 of the German Embryonenschutzgesetz (Embryo Protection Act 1990, which also prohibits egg-donation in ß 1 I Nr. 1) and provides that no medical practitioner should perform artificial insemination or embryo donation on a woman, who is willing to hand the child over to commissioning parents upon birth in accordance with a surrogacy agreement. http://www.surrogacy.com/legals/article/germany.html
http://www.otago.ac.nz/law/oylr/2006/LucyJames_Diss.pdf

They could, for example, have traveled to California, a state in which the surrogacy market is relatively mature, as measured by the existence of a reasonably settled legal framework, a well-oiled system of service providers (mediators, clinics, sellers and buyers) and a steady flow of transactions. They might also have chosen to go to Ukraine, where a permissive governmental attitude and the considerable availability of service providers coupled with a reliable medical system has generated a thriving market in commissioned children. Other possible candidate countries were also available. Nonetheless, without presuming to guess the motivations that led the Balazs to India, theirs was a reasonable choice, one made by growing numbers of people in their position and encouraged by government policies that see reproductive surrogacy as an aspect of an expanding health and medical tourism trade.[15]

The birth of the Balaz twins appears to have proceeded according to plan. The Balazs engaged the services of Dr. Patel, a leading surrogacy entrepreneur who has recently garnered the attention of western media.[16] At the Balazs' behest – and as she appears to have done innumerable times before – Dr. Patel obtained ova from one woman and engaged another to carry the child(ren). Jan Balaz contributed his own sperm. The arrangement reflected the now-canonical paradigm of surrogacy: as technology has advanced, traditional surrogacy in which one woman serves as both

[15]Although it is difficult to find precise figures on the size of the market in reproductive surrogacy, it has been estimated at representing c.US $ 400 million p.a. of India's medical tourism industry, which is estimated to reach US $2.3 billion by 2012. Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, Hague Conference on Private International Law, Preliminary Document no.11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p.6 . For a critical analysis of the implications of this expansion from the perspective of the Indian women who service the industry, see Syantani DasGupta and Shamita Das DasGupta, Motherhood Jeopardized, in THE GLOBALIZATION OF MOTHERHOOD, supra n.n. 9, at 131-147 (concluding that "globalized ART in India has ultimately exacerbated women's 'unfreedoms', and therefore undermined, rather than supported, their agency"); Usha Rengachary Smerdon, Crossing Bodies, Crossing Borders: International surrogacy between the United States and India, 39 Cumberland L. Rev. 15 (2008) (concluding that "abolition of international surrogacy is the only solution that will protect all parties given the ethical concerns involved"); see also, G. Mudur, India plans to expand private sector in healthcare review, 326 British Medical Journal 520 (2003); S. Reddy, I. Qadeer, Medical Tourism in India: Progress or Predicament?, ECONOMIC & POLITICAL WEEKLY, May 15, 2010; Jennifer Rimm, Booming Baby Business: Regulating Commercial Surrogacy in India, 30 U. Pa. J. Int'l L. 1430 (2008-2009).

[16] "Giving birth the latest job outsourced to India" MSNBC http://www.msnbc.msn.com/id/22441355/ns/health-pregnancy/t/giving-birth-latest-job-outsourced-india/.

egg donor and gestator has been superseded. Gestational surrogacy, in which one woman provides ova and another carries the pregnancy, has become the marker of surrogate motherhood. The provider of ova, stripped of maternal reference altogether, is referred to in the sexually neutralized language of genetic donation. As a contributor of "genetic material," the ova provider is now semantically equated to the sperm donor.[17] In fact, the sperm donor is often -- as in this case -- the biological as well as the commissioning father; if he is not a commissioning party, then he is paid for his sperm. In either case, he is not really a "donor" at all.[18] The egg donor is also not a "donor" in any sense that can reasonably be associated with gratuitous gifting. To the contrary, prices for ova range, in the United States, from approximately $8,000 to (reportedly) many multiples of that figure. And the womb provider has been reduced to a figure that alternates between a sherpa and a landlord: some refer to her as the "embryo carrier" or the "gestational carrier;" others prefer to describe her function as that of having rented her womb. Either way, like the ova donor, she is stripped of any reference to maternity; the notion that gestation entails a biologically interactive process, in which a particular woman is actively engaged and by which she not only procreates another but also subjects herself to modification, is elided. Moreover, in the current language of commercial reproduction, the attribute "parent" has been reserved for the commissioning parties, now denominated the "intended parents." These linguistic practices have become so well established that they are routinely reduced to acronyms: GC denotes the "gestational carrier," IPs, the "intended parents." The re-codification entailed is

[17] The language of surrogacy is fraught with ambiguity. Arguably, the surrogate is not a surrogate at all if she is indeed a "mother." Another way of referring to the woman who bears the child would be as a "birth mother," borrowing a term from adoption discourse. But promoters of surrogacy have a strong stake in distinguishing surrogacy from adoption, emphasizing, for instance, the but-for nature of the reproduction at issue (there would have been no child but for the arrangement among the parties), hence clearly differentiating the lexicon of surrogacy from that of adoption. In the words of an employer of surrogate services: "there is no biological mother.» If maternity is radically disjoined from its physical correlate then the so-called "surrogate mother" is neither mother nor surrogate but simply a "womb provider." See, Melanie Thernstrom, Meet the Twiblings, N.Y. TIMES, Dec. 29, 2010, available at http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?_r=1&scp=1&sq=%22meet%20the%20twiblings%22&st=cse. I therefore use the term «womb provider» to highlight the implications of a way of looking at reproduction, not to endorse it.

[18] The legislation of several countries requires that there be a biological nexus between at least one of the commissioning parents and the child in order for the arrangement to constitute legal "surrogacy" (as opposed, say, to a simple – and prohibited -- sale).

normatively freighted, implicitly indicating how one ought to think: it is acceptable for eggs and sperms to be transferred because they are donated, not sold; it is acceptable for the gestational carriers to have contractual rather than parental rights because they are providing a service for third parties; it is acceptable to restrict references to parenthood to the "intended parents" as the other parties involved are only providers of either raw materials or services (in fact, surrogacy is the vehicle whereby the "intended parents" realize their parenthood, which is what is "intended," presumably, by all the parties); finally, it is acceptable for all parties to engage in the transaction because it is not commercial and does not reify the children themselves as transactional objects (they are always-already the children of their intended parents).

The re-codification of the processes involved in reproduction remains intensely contested. Nonetheless, the separation of the two female functions – ova provision and gestation -- has had an important impact on the market for babies. Structurally, the separation of functions is reflected in the segmentation of the market: distinct specialized agencies match egg providers, sperm providers, and gestators with potential clients. Legally, in the United States and numerous other countries in which surrogacy is permitted, gestational surrogacy has emerged as the preferred mode for commissioned births.[19] In the U.S, the advent of gestational surrogacy has also accompanied a lull, if not an actual calming, of polemics against surrogacy, although a recent New Jersey case suggests that the enforceability of surrogacy arrangements, even when non-commercial and solely gestational, is far from settled.[20] Internationally, growing awareness that

[19] Thus, the Prefatory Comment of the U.S. Uniform Parentage Act notes: "The practice of having a woman perform both functions [i.e. genetic and gestational] is generally strongly disfavored by the assisted reproduction community. Experience has shown that the gestational mother's genetic link to the child sometimes creates additional emotional and psychological problems in enforcing a gestational agreement." Uniform Parentage Act 9 (p.84). Israel, Iran, (under new draft guidelines) India, Ukraine are amongst the states that will only recognize gestational surrogacy arrangements.

[20] See generally, Elizabeth S. Scott, Surrogacy and the Politics of Commodification, 72 Law and Contemporary Problems 109-146 (Summer 2009). See also, A.G.R. v. D.R.H. & S.H. (Superior Court of New Jersey, Hudson County, Chancery Division – Family Part Docket #FD 09-001838-07 (decided December 23, 2009) available at: http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf. A panel of the New Jersey Assembly has recently approved a bill that would allow the intended mother's name to be registered on the birth certificate after a 72 hour waiting period. See, Mary Ann Spoto/The Star Ledger, N.J. Assembly panel approves bill allowing women using surrogates to be named

gestational surrogates will not transmit their physical traits to the children they bear has likely facilitated a "cross-racial" market in baby-making, further contributing to the stratification of reproduction that has already been documented in reference to adoption.[21] To put it bluntly, Caucasians wanting Caucasian children can now hire non-Caucasian women to bear them, so long as the "genetic material" is Caucasian. Although empirical studies are scarce, this suggests that the market for ova and that for gestational carriers will evince different dynamics: whereas in the former, "racial" (along with other genetic) characteristics may entail premium prices, in the latter such characteristics may be less important.[22] Moreover, certain countries may find their comparative advantage in exporting eggs, rather than in providing gestators, or vice-versa.[23]

This is not to suggest that there are no contextual conditions that the market for gestational carriers will seek – to date, wombs come in female bodies, and their ability to perform their labor is dependent on a variety of factors, minimally including the general health of the womb-provider, the quality of the physical and social environment in which her gestational functions take place, her abstention from harmful practices and the conditions of delivery. Indeed, recently published research has highlighted the importance of the gestators' physiological (and genetic)

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mother on birth certificate, NJ.COM http://www.nj.com/news/index.ssf/2012/03/nj_assmebly_panel_aprpoves_bil.html

[21] See, CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION (Faye D. Ginsburg & Rayna Rapp eds., 1995), see Brenda S.A. Yeoh & Shirlena Huang, "Mothers on the Move: Migration policies and citizenship among Ecuadorian immigrant women," in Chavkin and Maher, supra n. n. 9, at 31-54.

[22] For examples of ethnically or racially specialized egg donation agencies, see ASIAN EGG DONATION LLC, http://aed-web.com/ (Asian egg donors); NY LIFESPRING LLC, http://www.nylifespring.com/ (Jewish egg donors). An agency that reportedly specializes in African-American egg donors and surrogates may be found at Heart to Heart Egg Donations (HEART TO HEART EGG DONATIONS, http://www.fwdonoreggs.com/index.html). On the specialization of this agency, see Abbie Waters, African-American Egg Donor Program Finds Black Egg Donors, FERTILITY NATION, at http://www.fertilitynation.com/african-american-egg-donor-program-finds-black-egg-donors.

[23] This is especially likely to occur if, as will be discussed further on in this article, particular states privilege egg donation over gestation in the definition of citizenship. It should be noted that analogous market specialization is occurring in respect to sperm donation. One British study reported the emergence of Denmark as a preferred source of sperm for women seeking sperm in the UK. See Paul Henley, Business Booms for Danish Sperm, BBC NEWS EUROPE, 19 May 2011, available at http://www.bbc.co.uk/news/world-europe-13460455.

characteristics on fetal development.[24] Valuation of such factors plays a role in determining demand along with the pricing of the services purchased. A California surrogacy could have cost the Balazs between $80,000 and $120,000; similar services purchased in Gujarat were likely priced between $22,000 and $35,000; and in Ukraine the price tag might have ranged from $30,000 to $45,000.[25] Given the elimination of race as a limiting factor, the widespread availability of the internet and its ability to link potential suppliers of genetic components and gestational functions with demand, and the ease of international travel, the market for baby-making has become global. Reproductive tourism entrepreneurs operating in numerous countries seek to ensure that client demands are met, competing on a combination of quality guarantees, ease of access, and price.[26]

When, as anticipated, the surrogate mother engaged to carry the Balaz children gave birth, the registrar of Gujarat Anand Nagar Palika – following procedures at least implicitly permitted by the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technique Clinics in India that India adopted in 2002 -- issued birth certificates identifying Suzanne Lohle as their mother and Jan Balaz as their father. But here the planned course of events ran aground, for the German consulate refused to honor the birth certificates – or, more precisely, to recognize the Balazs as the parents of the twins. Because surrogacy is illegal in Germany, in the view of the German authorities, the birth certificates neither established the filiation of the twins nor, consequently, provided a basis for the issuance of German passports to the children, which would allow their repatriation to Germany. The children were, in effect, "without papers."

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[24] For a review of research on the effects of nutrition and other factors relating to maternal behavior and health on fetal development, see Douglas Almond and Janet Currie, Killing Me Softly: The Fetal Origins Hypothesis, JOURNAL OF ECONOMIC PERSPECTIVES, April 2011, at 153–72.

[25] MEDICAL TOURISM CORPORATION, http://www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php (India); INTERNATIONAL REPRODUCTIVE TECHNOLOGIES SUPPORT AGENCY, http://www.irtsa.com.ua/en/news/363.html (Ukraine).

[26] Some countries seem to be developing specializations in the global ordering of the "baby-making" market. For example, while India may be emerging as a center for gestation and delivery, Denmark has emerged as a preferred sperm-provider for English clients. See, BBC (May, 2011).

Faced with these difficulties, the Balazs sought Indian passports, turning to judicial procedures to do so.[27] While the lower court refused to recognize the children as Indian for they lacked an Indian parent, the Gujarati Anand Nagar Palika recalled their birth certificates. The birth date, initially erroneously recorded as 14.1.2008 was corrected to 4.1.2008. More significantly, the name of Suzanne Lohle (Jan Balaz' wife), who had originally been identified as the mother, was replaced with that of the gestational carrier. The passport applications identified the children as Balaz Nikolas and Balaz Leonard; Jan Balaz appeared as the father and the gestational carrier as the mother. The Passport Authorities entertained the applications and two Indian passports were issued for the twins. But shortly thereafter Balaz received an intimation-cum-notice issued by the Government of India, Ministry of External Affairs, Regional Passport Office, which requested him to surrender both passports while the matter was pending in the High Court of Gujarat. On appeal, the High Court of Gujarat recognized the nationality right of the children: they were Indian, it held, because they were born on Indian soil *to an Indian mother*. The gestational carrier, in other words, was now the natural (and only) mother. In the Court's words, "the only conclusion that is possible is that a gestational mother who has blood relations with the child is more deserving to be called as the natural mother. She has carried the embryo for full 10 months in her womb, nurtured the babies through the umbilical cord."[28]

The Passport Authority at Ahmadabad nonetheless refused to reissue the passports that the Court's decision would have authorized. The Apex Court – India's highest court -- was seized of the case on December 15, 2009. As a decision was awaited, and deadlines set and reset, negotiations among India, Germany and the Balazs accelerated and a campaign for public opinion was engaged. The Apex Court itself urged the Indian authorities to explore non-judicial avenues. Adoption was touted as a possible pathway to establishing the children's parentage. Press reports indicate that this solution may have been proposed by Germany. But an action which, in a German perspective, could transform illegality into legality by re-construing the illegally-born

[27] The facts of the case are summarized in the proceedings of the High Court of Gujarat at Ahmedabad. See, Jan Balaz v. Anand Municipality (et al.), Letters Patent Appeal No. 2151 Of 2009 in Special Civil Application No. 3020 Of 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151 Of 2009 with Special Civil Application No. 3020 of 2009, available at http://indiansurrogacylaw.com/jan-balaz-v.-anand-municipality.html.

[28] Balaz v. Anand Municipality, para. 16.

twins into legally-adopted children, in an Indian perspective threatened to have the opposite effect. Surrogacy is not banned in India; the births were not *per se* illegal. Adoption, however, is reserved to children who are "orphan, abandoned or surrendered."[29] Such children, whose adoptability is certified by appropriate state authorities, lack a parent (or have a parent who has been adjudged incompetent).[30] Moreover, because India is a party to the Hague Convention on Inter-country Adoptions, all cross-border adoptions must comply with Convention rules that, *inter alia*, include a complementarity requirement -- the adoption agency must certify that no adequate national placement of the child is possible -- and that also ban all pre-adoption contact between the birth mother and the intended adoptive parents.[31] Jan Balaz, as the biological father of the twins whose paternity, in an Indian perspective, appeared uncontested, could only adopt his own children through an infraction of the law.[32] Suzanne Lohle's adoption of them was similarly compromised. Moreover, Indian law allows foreign parents to assume custody of Indian children only in a provisional guardianship arrangement. (The parents must then adopt the children in their own countries within a specified time frame.) Asked to consider the Balaz request for adoption, the Central Adoption Resource Agency (CARA) – established pursuant to India's having become a party to Hague Convention on Inter-country Adoption in 2003 and which exercises exclusive competence in this domain – had therefore declared the situation beyond its jurisdiction, as the Centre is only concerned with issues related to abandoned children. The Apex Court ordered the Centre to reconsider, albeit on the condition that a precedent not be created.[33] The Centre duly did so. But before the requisite procedures could be undertaken -- two years, it should be noted after the children's birth and when the impending expiry of Jan Balaz's own Indian visa raised the

[29] See Guidelines Governing the Adoption of Children, 2011 ("India Adoption Guidelines"), I(4) available at http://adoptionindia.nic.in/guideline-family/Part_I.pdf.
[30] See India Adoption Guidelines, I (2)(c), I(2)(v), I(2)(zd).
[31] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter Hague Convention or Adoption Convention].
[32] But a German court has recently affirmed that paternity in surrogacy cases is attributable in the first instance to the husband of the woman who gives birth and not to the sperm provider or commissioning male. See N. Satkunarajah, Surrogate Child Denied German Passport, BIONEWS, May 9, 2011, http://www.bionews.org.uk/page_94158.asp and Surrogate children have no right to German passport, court rules, THE LOCAL, GERMANY'S NEWS IN ENGLISH, April 29, 2011 at http://www.thelocal.de/society/20110428-34681.html
[33] See SC asks Govt to consider German couple plea for adoption of surrogate kids, HINDUSTAN TIMES, at http://www.hindustantimes.com/News-Feed/newdelhi/SC-asks-Govt-to-consider-German-couple-plea-for-adoption-of-surrogate-kids/Article1-512900.aspx.

possibility that the children would become wards of the state -- the children were provided German visas (and Indian exit documents). In early May 2010, the Balaz twins left India. The parents agreed to adopt them in Germany according to German rules. In the meantime, the Balaz case and others like it seem to have spurred a market for false declarations of motherhood. Commissioning parents seeking Indian passports for their children have apparently been able to engage women willing to declare themselves mothers, thus perhaps eliding the difficulties that would be prompted by gestational carriers making such declarations. [34]

B. International commercial surrogacy: filiation, citizenship and conflicting national legal frameworks

The Balaz case is part of a line of disputes that have embroiled India. In 2008, Baby Manji -- a child commissioned by a Japanese couple who divorced prior to her birth -- had been prevented from being expatriated by the conjoined operation of Japanese rules that prohibit surrogacy and Indian rules that restrict adoption.[35] Ultimately, India agreed to allow the child to be entrusted to her father and paternal grandmother; concomitantly, the Japanese authorities issued a special visa on humanitarian grounds, the implication again being that this decision was not to be regarded as setting precedent.[36] More recently, a Canadian couple failed to obtain travel documents for twins they had commissioned: DNA tests required by the Canadian authorities revealed that neither intended parent was genetically related to one of the children, suggesting a medical error in the Indian fertility lab. Ottawa ultimately issued a citizenship card to the twin who is biologically related to the couple and travel papers to the other child, with the apparent understanding that the family would file an application on humanitarian and compassionate grounds for their non-

[34] Abhilit Sathe, Fake mom of Frenchman's twins nabbed, MUMBAIMIRROR.COM, (August 4, 2011), http://www.mumbaimirror.com/article/15/20110804201108040227076607898df6/Fake-mom-of-frenchman's -twins-nabbed.html.
[35] See Kari Points, Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji, THE KENAN INSTITUTE FOR ETHICS, CASE STUDIES IN ETHICS, Duke University, available at http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf
[36] Surrogate Baby Born in India Arrives in Japan, HINDUSTAN TIMES (November 3, 2008). http://www.hindustantimes.com/Surrogate-baby-born-in-India-arrives-in-Japan/Article1-348858.aspx.

biological child and then a citizenship application.[37] Taken together these cases have highlighted a lack of legal certainty that may ultimately undermine the demand for Indian reproductive surrogacy services while heightening the financial costs associated with the risks of uncertainty. And, they have revealed the human costs of the collisions that can occur when "exporting" and "importing" states pursue conflicting policies.

India is now engaged in a review of the legal framework governing surrogacy clearly designed to encourage international demand.[38] This process is complicated not simply by the federal structure of the state, but also by the role of personal law, for Indian citizens may be subject to the jurisdiction of communal/religious authorities in regard to their domestic relations.[39] Even more, there has been and continues to be substantial debate within India regarding the desirability of legalizing surrogacy itself. Attempts to bring order to surrogacy are therefore caught between two contradictory trends: one favoring India's economic use of the reproductive capacities of women

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[37] After 6 Years and Fertility Mixup, Surrogate Twin Can Come Home, THE TORONTO STAR (May 05, 2011), http://www.thestar.com/news/article/985936--after-6-years-and-fertility-mixup-surrogate-twin-can-come-home.

[38] A law commission report recommending that legislation be established was placed before the Law Ministry, as well as a draft bill (THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL 2010, available at www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf); see also Rakesh Bhatnagar, Govt will enact surrogacy law, says the Solicitor General, DNA, January 21, 2010, available at http://inwww.rediff.com/newshound/searchshowarticle.htm?rediffid=http://www.dnaindia.com/india/report_govt-will-enact-surrogacy-law-says-solicitor-general_1337205; Suchitra, S. Govt will enact surrogacy law, says solicitor general, LAWYERS CLUB INDIA, January 21, 2010, available at http://www.lawyersclubindia.com/news/Govt-will-enact-surrogacy-law-says-solicitor-general/10141/. The bill has been finalized by the Union Health Ministry and sent to the Law Ministry for approval. See http://www.medindia.net/news/view_main_print_new.asp. The Union Cabinet is now in the process of examining a Draft Assisted Reproductive Technology ART (Regulation) Bill, 2010, Apeksha Mehta, Is India Promoting Reproductive Tourism, MIGHTYLAWS.IN, http://www.mightylaws.in/643/india-promoting-reproductive-tourism, and then it will table it in the parliament, Anil Malhotra, Legalising surrogacy — Boon or bane?, LAW RESOURCE INDIA, http://indialawyers.wordpress.com/2010/07/page/2/. For a recent discussion regarding the importance of state-level regulation of surrogacy, see, e.g. K. Srivastava, Surrogacy Mothers Need to be Protected, DAILY NEWS AND ANALYSIS (December 18, 2011) , at http://www.dnaindia.com/mumbai/report_surrogate-mothers-need-to-be-protected_1627181.

[39] See Narendra Subramanian, Making Family and Nation: Hindu Marriage Law in Early Postcolonial India,. J. OF ASIAN STUDIES 771(2010)

in an extension of the health tourism that has been actively fostered; the other highlighting fears of exploitation, in particular in regard to women, and fundamental objections to an industry that can be characterized as the production of children for export.[40] Legislative reform may nonetheless provide the legal certainty necessary for India to maintain or even increase its market share.[41] But, as the experience of Balazs and the other cases referred to above demonstrate, the problem is not solely that of the internal consistency and overall coordination of the Indian legal framework. At issue here is the coherence of the Indian legal system with that of the other market participants.

The difficulties produced by the legal incompatibilities that permeate the international market for surrogacy is not a problem that pertains to India alone. Children whose births have been registered and then de-registered (Spain,[42] France[43], Norway[44]); children for whom domestic courts have compelled their own reluctant consular authorities to issue travel documents (the Netherlands[45]); children denied entry visas into the commissioning parents' home states altogether (Germany); children for whom parliaments have authorized emergency passports as special dispensations given their own prohibitionist national policies (Iceland[46]); children whose filiation

[40] Inter alia, see DasGupta and DasDasGupta n. 15
[41] Although the reform has not yet been passed, it appears that some Indian courts are already applying it, and that at least some key players in the market for surrogacy services are already factoring in the impact of its provisions. See Iain Macintyre, Dutch Consulate overruled in India IVF case, RADIO NEDERLAND WEREDOMROPE, available at http://www.rnw.nl/english/bulletin/dutch-consulate-overruled-india-ivf-case.
[42] See Valencia gay male couple told they cannot register as parents of twins, TYPICALLY SPANISH (September 17, 2010), available at http://www.typicallyspanish.com/news/publish/article_27222.shtml#ixzz1054qdnT8); France rules against children of surrogate mothers, AP PRESS (April 7, 2011), http://www.google.com/hostednews/ap/article/ALeqM5ilY7OuQbxG4KE98LeK0WCnDalDEw?docId=336373a4b23d46f08b5530aa036.
[43]France rules against children of surrogate mothers, supra n.. 42. See Arrêt n° 370 du 6 avril 2011 (10-19.053) - Cour de cassation - Première chambre civile, available at http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html (henceforth the "affaire Mennesson" or the "Mennesson case".)
[44] Authorities deny surrogate children genetic offspring, THE FOREIGNER: NORWEGIAN NEWS IN ENGLISH (July 17, 2011), http://theforeigner.no/pages/news/authorities-deny-surrogate-children-parents-genetic-offspring/.
[45] See France rules against children of surrogate mothers, supra n. 2.
[46] Iceland Accepts Surrogate Baby Born in Thane, HINDUSTAN TIMES (Dec. 21, 2010), HTTP://WWW.HINDUSTANTIMES.COM/INDIA-NEWS/MAHARASHTRA/ICELAND-ACCEPTS-

has been impugned although ultimately vindicated (Italy[47]); children "legalized" by judges in knowing contravention of the objectives of national legislation (UK);[48] children virtually sequestered inside homes unable to obtain basic medical services because they lack a legal identity (Ireland)[49] constitute only a small sample of the difficulties caused by the incompatibility of the different legal orders that criss-cross transnational surrogacy. Such incompatibilities have led to a variety of responses. States have taken emergency measures, stressing that such measures are not intended to set precedents. Domestic courts have compelled their national administrations to resolve individual cases, often stressing that the solutions cannot be considered precedential.[50] And. second-generation legislation has been proposed from France[51] to Uzbekistan, Finland[52] to Kyrgyzstan,[53] Ireland[54] and the Netherlands[55] to address the problems created by current law. Yet

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SURROGATE-BABY-BORN-IN-THANE/ARTICLE1-640934.ASPX
HTTP://WWW.NJ.COM/NEWS/INDEX.SSF/2012/03/NJ_ASSMEBLY_PANEL_APRPOVES_BIL.HTML

[47] Doria Pamhilj,l'ultima dynasty, "il principe, il compagno, e 2 figli," LA REPUBBLICA (13 March 2012), http://roma.repubblica.it/cronaca/2011/01/25/news/la_storia_doria_pamphilj_lultima_dinasty_il_principe_il_compagno_e_2_figli-11657574/.

[48] High Court Justice Hedley declared to the BBC that although "Laws in the UK are designed to try to prevent such [commercial surrogacy] arrangements …he has agreed to give retrospective approval for commercial surrogacy on at least four occasions. 'The statute does give power to the High Court retrospectively to authorize these payments and the reason we do so is not because we want to encourage commercial surrogacy but because of the impossible position which the child born as a result of the arrangement finds themselves in when they're back in this country.'" High Court judge approves commercial surrogacy, BBC News UK (May 19, 2011) http://www.bbc.co.uk/news/uk-13452330.

[49] Surrogacy: The Babies Born into Legal Limbo, THE IRISH TIMES (Nov. 22,2011), http://www.irishtimes.com/newspaper/features/2011/1122/1224307943752.html

[50] For a discussion of such décisions, see Permanent Secretariat of the Hague Conference on Private International Law ,"Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements," Prel. Doc. No 11, March 2011.

[51] Proposition de loi tendant a' autoriser et encadrer la gestation pour autrui,, Senat, Session Ordinaire 2009-2010, available at: ttp://www.senat.fr/leg/ppl09-234.html, A broad-based campaign is underway, however, to maintain the prohibition of surrogacy. See Collectif No Body For Sale, La gestation pour autrui: une extension du domaine de l'alientation, LE MONDE (Feb. 2, 2011) http://www.lemonde.fr/idees/article/2011/02/08/la-gestation-pour-autrui-une-extension-du-domaine-de-l-alienation_1476850_3232.html.

[52] Finland Opens Door to Surrogacy, YLE.FI (Sept. 23, 2011), http://www.yle.fi/uutiset/news/2011/09/finland_opens_door_to_surrogacy_2894510.html.

[53] Kyrgyzstan to legalize commercial surrogate maternity, "24.KG" NEWS AGENCY, http://eng.24.kg/community/2011/04/07/17401.html.

none of the solutions proposed can successfully address the conflicts engendered by the discrepant national frameworks in play.

Surrogacy in one country is the solution some states prefer. A court in South Africa has recently ruled that foreigners wishing to employ a surrogate must intend to live in South Africa on a long-term basis, a decision that coheres with South Africa's tight regulations on foreigners wishing to adopt South African children, who are also required to demonstrate that they will settle in the country.[56] And Australia has developed a model framework that would simultaneously bring order to the internal market and ban international surrogacy.[57] Residents of, say, New South Wales (where commercial surrogacy is banned but altruistic surrogacy has been allowed since 2010[58]) would currently not benefit by going to Tasmania, in which the Surrogacy Bill is pending debate and vote in the Legislative Council**.** According to Tasmanian legislation, it is illegal to draw up surrogacy arrangements, advertise for a surrogate, or access assisted reproductive technology for the purpose of surrogacy[59]). But if the model framework were implemented in both states, surrogacy would be legal, if provided without charge and under specified conditions. However, should an Australian citizen in either state be unable or unwilling to access the services of a nationally-based gestator, recourse to the commercial options available in other countries, such as India, would be prohibited. The dimensions of the baby-market, and its seemingly explosive growth suggest that autarky in surrogacy is doomed to repeat the history of

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[54] Carl O'Brien, Surrogacy Guidelines to be Issued Next Month, THE IRISH TIMES (Nov. 23, 2011), http://www.irishtimes.com/newspaper/ireland/2011/1123/1224308000862.html.
[55] Maike Winters, Commercial Surrogacy: a sign of the times? RADIO NETHERLANDS WORLDWIDE (Feb. 19, 2012) http://www.rnw.nl/english/article/commercial-surrogacy-a-sign-times
[56] See, SA tightens rules for foreigners to make families, THE NEW AGE (Oct. 13, 2011), http://www.thenewage.co.za/31768-1007-53-SA_tightens_rules_for_foreigners_to_make_families. On adoption regulation, see SA child welfare law, 2010.
[57] Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers Conference Joint Working Group, A Proposal for a National Model to Harmonise Regulation of Surrogacy (January 2009).
[58]New South Wales, Surrogacy Regulation 2011 under the Surrogacy Act 2010, Publishes LW 11 February 2011 (2011 no. 54)
[59] Draft Surrogacy Bill 2010 Consultation, TASMANIAN DEPARTMENT OF JUSTICE, http://www.justice.tas.gov.au/legislationreview/reviews/surrogacy_bill_2010_consultation.

all autarky: regulatory failure, soaring transaction costs and externalities associated with growing illegality, and, ultimately, combined international and internal pressure for rule revision.

States opting for national closure are more likely to be child-importers than exporters. Exporters compete along various dimensions, including regulatory support for the industry. An ad for a Ukrainian surrogacy agency noted: *"All the activities of the surrogacy motherhood center are approved by the Ministry of Justice of Ukraine, Administration of Justice in Kharkov Region and State Committee of Ukraine for Regulatory Policy and Entrepreneurship, Ministry of Health of Ukraine*," and provided a detailed list of the Civil Code provisions that would regulate private contractual arrangements.[60] Despite these assurances, a French couple was recently arrested smuggling their commissioned children, hidden under a mattress in a van, from Ukraine to Hungary: the couple declared that they were reacting to France's refusal to recognize the children's filiation and, therefore, to issue identity documents. They have now appealed to "any nation out there [that] can give our little girls citizenship so that we can finally take them home."[61] As with the Balaz twins, such dramas demonstrate that regulatory support in the exporting country alone is not enough.

The new legislation currently debated in India defines the problem quite differently. Rather than seeking to prohibit international exchanges, it is set to impose *compulsory coordination* and to shift part of the cost of ensuring such coordination to its foreign clients.[62] Prior to establishing a legally valid arrangement with a surrogate, foreign commissioning parties would be required to provide documentation attesting to their own national authorities' recognition of the legality of surrogacy and corresponding ability to issue citizenship papers to the children who might be born.[63] This approach aims to avoid the human drama emblematically represented by the Balaz

[60] International Surrogate Motherhood Center "La Vita Felice," http://www.mother-surrogate.net/eng/index.php?section=surrogate_motherhood_center/usa_europe_russia_ukraine.
[61]French couple issues appeal in surrogacy case, SIFY (April 10, 2011) http://www.sify.com/news/french-couple-issues-appeal-in-surrogacy-case-news-offbeat-lekuEddfdjc.html.
[62] The Assisted Reproductive Technologies Bill (Regulation) 2010.
[63]Id S. 34: "[T]he party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b)the child born through surrogacy in India,

twins. It also implicitly fosters the emergence of pressure groups of prospective commissioning parents.[64] Rather than simply accept their own countries' prohibitionist stances, prospective commissioning parents will likely mobilize to promote reform; India's new law will then have elicited the emergence of those "norm entrepreneurs" whom political scientists invoke to explain the genesis of social movements that issue in legal change.[65] Thus, faced with Germany's intransigence, potential clients for Indian surrogate services may join forces with their national peers to lobby for a change in policies, one that would ultimately lead to the issuance of the certification that India may henceforth require. Indeed, in France -- which has also adopted a prohibitionist stance -- a movement seeking reform has gathered strength as a result of the Mennesson case referenced above, which has received widespread media attention. Two proposals are before the French Senate -- one presented by each leading political force -- that would allow for the recognition of the parentage of children born through surrogacy but a forceful movement has also emerged in opposition of any such legalization.[66] But can one exporter's attempts at compulsory coordination succeed? Or will it simply provide the impetus for the development of a more lucrative and more exploitative -- albeit narrower -- clandestine market?

Every request for certification, every increase in regulatory power, simultaneously represents an attempt to bring agreed-upon rules to bear on a transaction and an opportunity for gate-keepers to pervert the exercise of public power into private gain. Markets in people or body parts, like those regarding sex workers, illustrate the risk that prohibition, especially when accompanied by criminal sanctions, may simultaneously enhance the role of entrepreneurs and state functionaries willing to engage in illicit activities and increase the exploitation of the actual service providers

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will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be."

[64]As Theodore Lowi wrote, "policies determine politics." Theodor J. Lowi, Four Systems of Policy, Politics and Choice, 32 PUB. ADMIN. REV. 298, 299 (1972) With respect to the interactive relationship of social mobilization to international law and policy see Beth Simmons, supra n. 7.

[65]The concept of "norm entrepreneurs" has given rise to a vast literature. See Kathryn Sikkink & Martha Finnemore, International Norm Dynamics and Political Change, 54 INTERNATIONAL ORGANIZATION 891 (1998); Margaret E. Keck & Kathryn Sikkink, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

[66] See supra n. 51.

as well as the prices their clients pay.[67] A high-end market is already developing that has factored the risks of sanctions into its activities: an advertisement posted on a blog for surrogate mothers read "CGS, a private surrogate search firm, is actively seeking a qualified Surrogate Mother for an international client in Paris, France," and offered "a comprehensive compensation package of USD $150,000 plus expenses, including medical and travel." The ad then detailed the requirements for the job, which included being a permanent resident and currently living in the US, being a non-smoker, being between 21 and 43 years of age (although for "repeat Surrogate Mothers" the age limit was "flexible') and being able to obtain a valid US passport for international travel.[68] The language of the ad mimicked that of executive search firms; the images with which the agency represented itself to potential clients depicted a Caucasian woman proudly displaying her pregnant belly. It is possible that agencies charge premiums based on the aura associated with being American and on their ability to offer the services of "white" surrogates: the racialization of the market may contribute to the high price being offered. But one blogger noted in response to the ad that couples engaging surrogates in France can be prosecuted and may find themselves unable to import the children foreign surrogates have borne on their behalf, prompting the agency itself to admit in the same blog string, "USD $150,000 plus expenses" has priced in the risks associated with illegality.[69]

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[67] For a useful collection of essays regarding sex work, see Vanessa E. Munro and Marina Della Giusta (eds.), DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION (Aldershot: Ashgate, 2008).

[68] "CGS, a private surrogate search firm, is actively seeking a qualified Surrogate Mother for an international client in Paris, France."
CGSurrogate@aol.com " http://www.surrogatemother.com/forum/topics/surrogate-search-usa-to-paris?page=1&commentId=1955157%3AComment%3A168651&x=1#1955157Comment168651 accessed 062810
An internet search using google found one posting for CGSurrogate representing it as a private surrogate search firm based in Atlanta, Georgia. See http://www.myspace.com/cgsurrogate

[69] The blog string, from which the following is excerpted, is revelatory:
"Permalink Reply by Dawn M. on June 1, 2010 at 11:21pm

> Surrogacy is illegal in France. Couples who do surrogacy there are prosecuted. Some times couples from France who do surrogacy here in the states also run into problems when they travel back to France with child that are born via surrogacy.
>
> Huge on going case in France between the French government and a French couple who had twins via surrogacy in India. You can google it its big news in France.

It is also possible that demands for compulsory coordination from exporting states will catalyze international coalitions of the pressure groups that may emerge in multiple countries. If lobbies in Germany *and* Japan, for example, seek to change their governments' policies, they may join their efforts -- all the more readily if they can find (or found) an international NGO to help support their claims. If such lobbies coordinate among themselves, and with local groups in India, they may then lead to a transnational social movement. They will likely confront equally-organized international opposition: the Catholic Church, for example, which is well-positioned to mobilize across borders and to exert international pressure, has repeatedly issued pronouncements against the legalization of surrogacy and could easily choose to engage against a campaign surrogacy similar to that long undertaken against legalized abortion.[70] International organizations in concert

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Beware.

- ► Reply

Permlink Reply by Kailia on June 17, 2010 at 11:52am

Maybe that's why the compensation offering is so high!

- ► Reply

Permalink Reply by CGSurrogate on June 24, 2010 at 5:13pm

Dear Applicants:

This is exactly why the compensation package is so lucrative; it also includes experienced legal and civil representation for all parties involved.

CGSurrogate Compliance dept. #34838
http://www.surrogatemother.com/forum/topics/surrogate-search-usa-to-paris?page=1&commentId=1955157%3AComment%3A168651&x=1#1955157Comment168651 (accessed 081811) (emphasis added)

Taiwan, where surrogacy is prohibited, recently arrested a Taiwanese businessman and three Uzbek women he had imported to serve as surrogates for himself and his physician . See Central News Agency, Men Probed for importing surrogate moms, Taiwan News, 2010-05-21, available at: http://taiwannews.com.tw/etn/news_content.php?id=1262582&lang=eng_news

[70] See, e.g., Catholics demand ban on ban on Taiwan surrogacy, UCANEWS.COM, http://www.ucanews.com/2010/06/30/catholic-experts-demand-taiwan-surrogacy-ban/ accessed 070110; Kerala Church looks to scupper surrogacy bill, UCANEWS.COM,

with some states are now attempting to address the question of surrogacy.[71] Filiation norms, hitherto largely ensconced within the province of states' domestic jurisdiction, are evermore becoming a matter for a matter for international coordination, and, hence, international law.

http://www.ucanews.com/2010/06/25/kerala-church-looks-to-scupper-surrogacy-bill/ accessed 070110.

[71] See supra section 3.

II. Contract, filiation and the limits of choice.

It may be that dramas like that of the Balaz twins would be avoided if ***all*** states were to recognize private contracts regarding reproduction: states would then accept whatever filiation rules and the corresponding attributions of maternity and paternity private parties negotiated, and apply their citizenship and immigration rules on that basis. Had Germany applied what has been termed an "intent-based" test for the attribution of parental status,[72] it could have accepted the terms of the Balazs' bargain with the gestational carrier and the ova donor, with its indication that the children were children of the Balazs at birth, the twins would have been issued German passports and the near-catastrophe averted from the very beginning. This legal posture would have been acceptable to India; but it contravened Germany's policy on reproduction and filiation, leading to the refusal to recognize a parental nexus between the Balazs and the twins and thus to the rejection of the request for German identity papers on which entry rights into Germany could have been based. Interestingly, it is India – not Germany – that has set on the path of legislative reform.

As the Balaz case illustrates, the incompatibility of filiation norms erects structural blockages in the international surrogacy market: while the market depends on the easy flow of children and parents from the states in which the genetic components are extracted and assembled and in which births take place to those of the newly-constituted family's intended residence, incompatible norms impede that flow by complicating, and at times foreclosing, the recognition of parental statuses on which rights to transmit citizenship – and hence to obtain identity documents and international exit and entry rights – are predicated. In the current legal impasse, it is the issue of filiation and its linkages to the definitions of maternity and paternity that constitute the fundamental stumbling block; the question of commodification – which has often been raised in debates over reproductive surrogacy and the sale of body parts and bodily services -- is an

[72] For a recent argument for the intent-based test of parentage, see Linda S. Anderson, Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families 62 ARK. L. REV.29 (2009). The "intent" based test was first articulated in Johnson v. Calvert (851 P.2d 776 (1993), the Court was required to attribute maternity to one of "conclude[d] that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law." Subsequent decisions have applied the intent test to both parents.

aspect of the broader question of the degree to which private arrangements or state regulation should come into play when the identities, roles, obligations and degrees of freedom associated with reproduction are engaged.[73] While concerns about commodification may underlie filiation laws and policies, it is the rules regarding states' recognition of the nexus between particular children and particular parents that govern the attribution of nationality and citizenship. Thus, the viability of solutions predicated on contractual autonomy with respect to the legal identification of a "mother," "father," or "child" is a function of the frameworks regulating filiation that operate both at the national and international level.

Two normative-legal models can be traced that condition the feasibility of privatized solutions to filiation and the identities with which it correlates: one that revolves around maximum individual choice and the other around the centrality of the public interest. The arguments for these models are briefly sketched below in specific reference to the dilemmas reproductive surrogacy raises and to the roles assigned to international law. This discussion is only intended to render each model in ideal-typical terms: many intermediate positions have been espoused by advocates and policy-makers and no one state's policies conform in every respect to either model. In political and philosophical debates each model is tempered by limiting considerations: contractual autonomy, and the "market liberalism" it recalls, by concerns for the harm of others; collective interest, and the "communitarianism" with which I will associate it here, by concerns for individual liberty. Moreover, the individualism embedded in the contractual autonomy model rests on an implicit theory of community; communitarianism requires the recognition of individual difference, even as it posits the foundational role of community in the constitution of the self.[74] Nonetheless, the discussion of these models allows the identification of the policy

[73] For a review of the debate on commodification, see Martha M. Ertman & Joan C. Williams, RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE, (2005). On the growing role of private actors in international law, see Paul D. Stephan, Privatizing International Law, 97 Va. L. Rev. 1573 (2011).

[74] As Habermas writes: "[T]he understanding of human rights must jettison the metaphysical assumption of an individual who exists prior to all socialization and , as it were, comes into the world already equipped with innate rights. … the dialectical unity of individuation and socialization [implies that]… the integrity of individual persons can be protected only together with the free access to those personal relationships and cultural traditions in which they can maintain their identities. Without this kind of 'communitarianism,' a properly understood

elements, domestically and internationally, that would be required if contractual autonomy were indeed to be promoted as the solution to the dramatic scenarios that the Balaz twins, and many other children caught between borders, emblematically represent.

A. Contractual autonomy

i. Self-determination and the rights of sellers and buyers: what is bought and sold?

Arguments in favor of contractual autonomy have been framed in terms of the rights to self-determination and to freedom of contract of the sellers and buyers of the relevant goods and services, in particular of the women involved.[75] (Fewer polemics and legal strictures have focused on men selling sperm, and, indeed, regulation is differentiated by gender.[76]) If a woman wants to sell her ova or her services as a gestator, why should she not be allowed to do so? Surely, limiting her right to dispose of her own body and its products is at best paternalistic, at worst brutally patriarchal, implying that control over female bodies belongs to a male-dominated political order. Equally, if a buyer is willing to meet the seller's terms, why not allow the transaction to occur? The prohibition of such exchanges does not stop them, it can be argued, but raises their transaction costs and negative externalities. The implicit argument is that a person's right to dispose of herself – and hence of her bodily parts and bodily services -- is neither legitimately nor effectively subject to governmental control.[77]

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individualism remains incomplete." Jurgen Habermas, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 126 (Max Pensky, ed. 2001).

[75] In the words of the Court in Johnson v. Calvert (see n. a above): "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes."

[76] See Rene Almeling, Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation, 72 Law and Contemporary Problems 37, 37-58.

[77] For an argument in favor of a "free market in reproduction," see Carmen Shalev, BIRTH POWER: THE CASE FOR SURROGACY (1989). On intent-based private ordering of parenthood, inter alia, see Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: an opportunity for gender-neutrality, 1990 Wis. L. Rev. 297 (1990).

This argument rests on three premises. First, the objects exchanged are characterized as pertaining directly to the ova (and sperm) provider or to the gestator – their bodily products and her services and/or her rights in the child she will bear – rather than to the child itself. Specifically, the exchange with the gestator is *not* characterized as constituting a market in human beings – "baby selling"-- but as establishing a market in the rights a person has to her body products and labor and to "own" her own rights. Second, and relatedly, this configuration of the exchange between the gestator and the provider of the ova and sperm, on one side, and the commissioning parties on the other situates the transaction squarely within the decision-making ambit of protagonists capable of consent. The child – already elided as an object of the exchange – is also elided as a subject of the exchange. There is, therefore, no need to "represent" the interests of the child either through state regulation (which might, for example, imply a family check analogous to those involved in adoption), or, through the appointment of a figure similar to that of the guardian ad litem. Finally, the timing of all relevant transactions is situated prior to the birth of the child (indeed, prior to conception) such that – once acquired -- the constitutive parts of the embryo, the resulting embryo, and the fetus whose existence is predicated on the embryo and which is, in turn, the predicate of the child, are all *already* property of the commissioning parties.

The future child is postulated as being nothing other than the mechanical result of the transformative processes that are set in motion from the moment that the "genetic material" is acquired to that in which the embryo develops and on through fetal evolution. Relatedly, body parts, pre-embryo, embryo and fetus are endowed with an identity that is separate from that of the gestator and is marked as property of the commissioning parties.[78] The gestator provides

[78] Differently, the commissioning parties would have to be posited as having a property interest in the body of the gestator, which, given the unseverability of the (living) body from the "person", would be contrary to the basic tenets of possessive individualism . See infra n. and accompanying text. It should be noted that the implied theory of surrogacy outlined here runs directly counter to many theories on which the legalization of abortion is premised holding that, at least for a certain period of time, the embryo and developing fetus are a part of the body of the woman and hence cannot be attributed an identity separable from hers on which legal rights – and a state interest in their protection -- can be predicated. See Roe v. Wade, (410 U.S. 113, 314 F. Supp. 1217, 1973), Blackmun J. noting that: "The Constitution does not define "person" in so many words …the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application. [All this … persuades us that the word "person," as

gestation as a service but has no direct ownership or identity interest in the embryo/fetus – which therefore cannot be conceptualized as an element of her body, let alone her self -- nor, hence, can she have the sort of parental/maternal interest in the child that might have resulted from her having had an original interest in the elements and processes through which the child was formed. Rather, from the moment of acquisition of the initial components through implantation and on to delivery, the embryo/fetus/child while "in" the gestator is never "of" the gestator, either as a body part or movable property. To the extent to which the gestator has property rights at all, these are characterized as "immovable": her uterus being equated with any other form of real estate. Consequently, decisions regarding the disposition of the "movable" property constituted by the embryo or fetus (or, eventual child), whether pre- or post-delivery, are simply not hers to make. It is these premises that enable the surrogacy contract to be described as engaging parties able to consent to the goods exchanged and services performed and as revolving around fully alienable goods and services.[79]

The argument for contractual autonomy resonates with the "possessive individualism" that Macpherson attributed to modern political philosophers and that feminist theorists have at times critiqued and at other times endorsed.[80] Indeed, Macpherson's definition of possessive individualism highlights the distinction between the individual's property in "his own person," which he possesses but may not exchange, and his property in his capacity to labor, which he may alienate: a distinction that maps onto the notion that reproductive surrogacy entails the exchange of money (or other benefits) for the *work* of gestation rather than payment for pregnancy, which

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used in the Fourteenth Amendment, does not include the unborn." (Internal references omitted.) In the Court's tripartite scheme, which distinguishes the degree of legitimate state interest on the basis of the phase of pregnancy, in the first period, the decision regarding the continuation of the pregnancy is entirely within the sphere of privacy of the woman (with her physician): the implication being that, at least at this point, the embryo and developing fetus are components of her body. Even in the second phase, where the state may regulate to the extent to which such regulation reasonably relates to the woman's health, the fetus does not have an identity separable from that of the mother. Such an identity only emerges with viability.

[79] These premises constitute the implicit representations of a surrogacy contract. For an in-depth analysis of the contractual issues raised by reproductive surrogacy, see Carol Sanger, (Baby) M Is for the Many Things: Why I Start with Baby M, 44 St. Louis U. L.J. 1443 (2000).

[80] C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke Oxford: Oxford University Press, (1962). For a critical feminist analysis, see CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

could be viewed as a state of being and a moment (if not element) of (female) personhood.[81] Ultimately, this argument for contractual autonomy places the burden of justification on those who seek to maintain or impose regulation rather than on those who press to abolish it.[82] Precisely because its central concept is that of the autonomous evaluation of interests, it tends to view relations among persons through the prism of individual choice. And, through the concept of individual choice, it presents itself as a human rights argument, as a close relation to the argument that individual self-determination as explicated through individual choice is a hallmark of individual autonomy and empowerment and, hence, the keystone of civil and political rights.[83]

At its starkest, this view leads to the conclusion that not only is the assumption of parental roles a matter for individual determination, but the contents of such roles – their correlative behavioral commitments -- are also subject to individual choice.[84] Neither giving birth nor contributing ova

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[81] In his summary of the basic elements of the theory of possessive individualism, Macpherson includes "(iii) The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society" and "(iv) Although the individual cannot alienate the whole of his property in his own person, he may alienate his capacity to labour." Id. at 263-64.

[82] For a paradigmatic statement of this point of view, see Robert Nozick, Anarchy, the State and Utopia. In the terms used by Landes and Posner with respect to governmental regulation of "nonmarket behavior:" "nor is there any basis for the presumption that government does a good job of regulating nonmarket behavior: if anything, the negative presumption created by numerous studies of economic regulation should carry over to the nonmarket sphere." Elisabeth M. Landes and Richard A. Posner, The Economics of the Baby Shortage, in Ertman and Williams, n. 72 at 46 (citations omitted).

[83] On individual self-determination as an emerging norm in international law and central tenet of human rights, see Thomas Franck, The Empowered Self: Law and Society in the Age of Individualism (1999); see also Stefano Rodota', La vita e le regole: Tra diritto e non diritto, (2009).

[84] Although Boudreux and others limit the alienability of parental rights by noting that, in surrogacy, as presumably in any other similar transaction, only that which already pertains to such rights – and not that which is excluded, either by necessary implication or by explicit regulation – may be exchanged. Therefore, gestational carriers may be able to sell their rights to being "mothers" but not the ability to define the rights and obligations associated with being "mother," since such rights and obligations may be separately regulated. See Boudreux at n. x. It is worth noting that Boudreux begins from the assumption that 'mother rights' vest in the woman who will (or has) given birth, and that it is she who contracts them away. In a purely contractarian universe, however, no such default allocation would be assumed: each birth would raise anew the question "who is the mother" (if anyone). From a societal perspective, taking into account both the obligation laid upon states by the Convention on the Rights of the Child that policies center on the best interests of the child and states' interest in ensuring private

or sperm need automatically correlate with maternity or paternity as socially understood and legally prescribed roles. Individual contracts for reproductive services can – indeed must -- include enforceable clauses allocating parental status (one might think of these as "parentality clauses") as well as other conditions directly relating to the constitution of the embryo, its implantation, the conduct of the gestation, and the delivery and transfer of the child and to conflict resolution (including, for example, with respect to jurisdiction and choice of law).[85] Whatever agreement is reached is dispositive; state policies are limited to ensuring the enforcement of the will of the parties.

ii. Translating contractual autonomy into the regulation of filiation

Translated into practice this means that similarly situated parties can engage in domestic or trans-border transactions on vastly differing terms. One contract might specify that the *gestator* is the "mother" at birth, provide for her to relinquish her maternal status within a given period in favor of a commissioning party (with or without the possibility of the gestator changing her mind), and establish that two birth certificates be issued, an "original" and an "amended" one, with the latter being valid for all governmentally-required purposes but the former being preserved in a public register and rendered accessible on the basis of agreed terms (for example, only to the children born of the particular agreement or their legal representatives so as to ensure that such children

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responsibility for children's care and maintenance, such a rule would engender unprecedented uncertainty and risk.

[85] Recognition of parentality clauses could be seen as a further elaboration of the theory of functionally-based parenthood, which is predicated on the consent between an intended (i.e., a person having an "intent to parent," which intention has been reached in, and sanctioned by, agreement with the legal parent) or a "de-facto" functional parent (a person who, with the consent of the legal parent has, for a specified period of time and with an intent to form a parent-child relationship, actually performed care-taking tasks to an extent at least as significant as those performed by the legal parent). For a review of the literature regarding functional parenthood, see Suzanne B. Goldberg Attorney for Amici Curiae in Support of Petitioner-Appellant, in the case of Debra H. v. Janice R., Court of Appeals, State of New York, November 16, 2009, at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=164291, discussing, inter alia, the American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002). For a discussion that situates functional parenthood in the context of international legal norms, see Brief of the Columbia Law School Gender and Sexuality Law Clinic, AAR Amicus Brief, Second Parent Adoption in Puerto Rico, November 9, 2009 at: http://www.law.columbia.edu/sexuality-gender-law-clinic/issues/family.

may know the identities of their biological procreators).[86] Another contract might attribute maternal status to a commissioning party from a particular moment of gestation or delivery while specifying that the gestator is not to be considered the "mother" at all, make provision for only one birth certificate, not allow the gestator to change her mind, and not allow access to any identifying information regarding the gestator or the sperm and ova donors. And a third contract might make provision for two contractually recognized and formally denominated mothers, each with specified rights and obligations: for example, assigning custodial rights and the ability to decide on education to one while granting visitation rights and the ability to claim a child deduction for tax purposes, receive a child allowance or access reserved social services to the other.[87] Similarly, rights and obligations associated with paternity could be distributed, for example between the sperm provider, the partner of the gestator, or one of the commissioning parties. Moreover, attributions of gendered parental roles could be made independently of the sex of the person thus identified, or simply subsumed in the general category of 'parent.' Thus, parental status could be allocated independently of role in the process of reproduction, "fractionalized" or pluralized. Each arrangement would convey particular rights, which could not simply be satisfied by the individual parties to the agreements or by any self-policing parental or other associations they might form. On the contrary, the rights conveyed would impose precise obligations on the state: to inscribe particular individuals on birth certificates, to distribute financial benefits, to enforce decisions made by one person rather than another with respect to habitation, education, medical and public services and religious affiliation, and to recognize applicable *jus sanguinis* rules with respect to nationality and citizenship.

If the parties' states of citizenship (or residency) or if the forum within which the contract were 'performed' (a term that would, itself, be subject to contractual definition) were to recognize individual autonomy in questions relating to the attribution of parental status, all contracts would be equally valid and cognizable by each state's courts and states would be required to act accordingly. This model, then, depends on the state recording and acting upon the parties'

[86] Many different permutations of rights and obligations are possible with respect to access to information, on a spectrum that ranges from full and public access to the specific identities of the biological parents to restricted access to limited information, for example regarding particular genetic diseases.

[87] But many states differentiate between benefits and legal presumptions applicable to mothers and fathers, and hence the attribution of the status of "mother" or "father" continues to matter.

decisions regarding filiation and parental rights and obligations. The state interest is limited to registering private preferences; when transnational arrangements are involved, the role of international law is merely to facilitate the recognition across borders of private preferences.[88] Further, at least for purposes of these agreements, both international and municipal law are required to remain silent as to substantive norms regarding filiation, the assignment of parental identities and their attendant rights and responsibilities, as well as with respect to the conditions directly pertaining to the performance of the reproductive services, and the transfer of the end product, i.e., the child. To the extent to which either national law or international agreements and customary international law detail norms on these issues, such norms are, in effect, suspended. And the specific function of private international law revolves around the application of contractual arrangements. It does not, for example, extend to questioning the constitutional (or other) bases for the exercise of a particular court's jurisdiction, so long as that exercise has been contractually agreed. Analogously, it does not allow for those exceptions motivated by public policy or *bonnes moeurs* that have traditionally been understood as limiting a state's responsibility to recognize acts (including private contracts) of another state.[89] Finally, to the extent to which private international law may be said to embody an over-arching normative framework, that framework must revolve around the value of private contract rather than any alternative substantive values.[90]

B. Communitarian perspectives

At the other end of the spectrum lie theories that assign a central role in the delimitation of individual choices – and, indeed, in the formation of individual identities – to institutions representing a "general good." Such theories may be grounded in differing values – the primacy

[88] This, as Horatia Muir Watt rightly notes, is not what is entailed under the rubric of "private party autonomy," which in fact establishes the ability of a party in one jurisdiction to submit a particular transaction to the rules of another jurisdiction, not to compose her own or avoid state regulation altogether. See, Horatia Muir Watt, "Party Autonomy" in international contracts:from the makings of a myth to the requirements of global governance, available at www.columbia.edu/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf.

[89] For a comparative analysis of the use of international and constitutional law and public policy exceptions to private party contracts, see PARTY AUTONOMY: CONSTITUTIONAL AND INTERNATIONAL LAW LIMITS IN COMPARATIVE PERSPECTIVE (George Bermann ed., 2005.)

[90] For a discussion of the normative convergence of private and public international law, see ALEX MILLS, THE CONFLUENCE OF PRIVATE AND PUBLIC INTERNATIONAL LAW (2009).

of order, for example, or of economic efficiency, or of continuity with the past. Here, I will focus on "communitarian" perspectives, for two reasons. First, communitarian theories seem to me to contrast most sharply with the individualism inscribed in the contractual autonomy model described above. Second, whereas collectivism in the name of order or effective economic organization or tradition has largely lost its legitimacy, appeals to communitarian values mobilize significant interest. They function, in other words, as a source of legitimation of public policy.

The history of political thought is replete with debates regarding communitarianism, which it is beyond the scope of this essay to summarize. For present purposes it is sufficient to distill a few elements that can help delineate an alternative perspective to the model of "maximum contractual autonomy" discussed above. But before proceeding, it is important to reiterate that I am outlining a model, not describing actual historical processes. I am *not* asserting that any given community has articulated a unitary view of the general good, nor that the community as organized and governed by the state does or has represented an uninflected "general good" that effectively equates with a similarly uninflected "collective interest," nor again that such a "general good" must contain any particular values such as justice, liberty and equality. I use "communitarianism" as a generic term to indicate theories that allocate the capacity to elaborate shared values to the community, identify the well-being of the community with an idealized vision of itself that such values are meant to instantiate, and further identify the well-being of the individual with the well-being of the community.

For communitarians thus understood, a discernible vision of the general good aligns the collective interest in the promotion of a particular social order with the individual interest in its realization. That the common vision of the general good represents an alchemical abstraction of particular visions (just as the "collective interest" represents an abstraction of more particular interests) and that interactive processes of definition and transformation link the general and the particular does not undermine this proposition, for at any given moment a communitarian approach will assume that a working definition of the general good can and will emerge from, and be supported by, processes of debate, negotiation and implementation. *Inter alia,* such processes will privilege the fulfillment of specific social functions, such as reproductive activity or industrial production, and

the promotion or protection of specific actors, such as mothers or children or soldiers or workers.[91]

The fundamental interdependence of individuals, the very constitution of individuals as socially situated persons, is taken as legitimating a collective interest in their ways of being, the modalities of their interactions, and the kinds of choices that are available to them.[92] Legal limits on individual choice may therefore constitute legitimate exercises of power to the extent to which they emanate from authoritative decision-making processes that are taken as expressive of the general good. While individual choice operates within societally-defined parameters, private negotiation *rightly* occurs in the "shadow of the law."[93] Consequently, struggles over regulatory authority do not so much regard the legitimacy of regulation *per se* as the legitimacy of the specific normative perspectives that regulation expresses and supports; the burden of justification is shifted from arguments *pro* and *con* state intervention to arguments regarding its qualities: the objectives it pursues, the incentives it creates, the social categories it favors or penalizes, ultimately, the vision of the general good that it promotes.[94]

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[91] See, for a recent argument in favor of the attribution of legal status based on the recognition of the value of particular social functions, the current debate regarding functional parenthood, supra n. 85.

[92] Thus Sandel, critiquing Rawls' view of the self as an "antecedently individuated subject, standing always at a certain distance from the interests [and experiences] it has," notes: "But a self so thoroughly independent as this … rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake." Sandel then explicates his view of inter-subjective and intrasubjective conceptions of the self. M.SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 173 (1998) [hereinafter Sandel, Liberalism] at 62.

[93] The phrase is borrowed from Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1978-1979).

[94] Such arguments may be articulated in a variety of registers, including in terms of the efficiency of market mechanisms. See, for example, Calabresi and Melamed, distinguishing between "moralism" as regulation which "allows the individual to choose what is best in the long run rather than in the short run, although that choice entails giving up some short run freedom of choice," and describing moralism as "a frequent and important ground for inalienability," and "true paternalism," which entails a judgment that a particular actor may not be in a "position to choose best for himself." Calabresi and Melamed characterize "true paternalism" as "also an important economic efficiency reason for inalienability: the most efficient pie is no longer that which costless bargains would achieve, because a person is better off if he is prevented from bargaining." Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1114 (1972).

i. Communitarianism and human dignity: reframing self-determination

Like the contractual autonomy model delineated above, the communitarian model also presents itself as a human rights argument. At one level, the communitarian argument revolves around a version of group rights: the primacy of the general good, as defined through shared normative frameworks, authorizes the community as a collective subject to limit the parameters of individual choices.[95] But the communitarian argument can also be configured in terms more closely resonant with the human rights of individuals, in particular by reference to the notion of human dignity. Dignity figures in the Preambles of the United Nations Charter and the Universal Declaration of Human Rights (as well as several of its articles), is generally ascribed a foundational status in UN human rights treaties, constitutes a central element of European and Latin American human rights law and jurisprudence, and has acquired salience in the United States.[96]

The genealogy of the argument from dignity that was ultimately translated into the Universal Declaration of Human Rights links it, in the first instance, to Christian theological traditions.[97] During and immediately following World War II and in those later periods of the twentieth century in which human rights discourse began to acquire its present salience, Christian theologians and political theorists evoked human dignity as a corollary of the view that "'the rights of men derive directly from their condition as children of God and not of the State,' given

[95] See, e.g., African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 Part I, Ch. II, Duties.
[96] U.N. Charter Preamble; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The first chapter of the Charter of Fundamental Rights of the European Union is titled "Dignity." It opens with Article 1, "Human dignity," which simply states: "Human dignity is inviolable. It must be respected and protected." At http://www.europarl.europa.eu/charter/pdf/text_en.pdf. See also the European Convention on Bioethics, in which the need to ensure respect for human dignity features prominently in the Preamble and again in Article 1. Article 1 posits the Purpose and Object of the Convention as entailing the responsibility of Parties to "protect the dignity and identity of all human beings." It is important to note, however, that earlier international agreements also referenced the concept of dignity. For a review of dignity in contemporary international law, see Christopher M. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 EJIL (2008) 655-724. See also Oscar Schachter, Human Dignity as a Normative Concept, 77 Am. J. Int'l L. 848 (1983).
[97] See generally SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

'the sacredness of the human personality.'" [98] Here, dignity is the moral correlate – and human rights the legal correlate -- of the sacrality with which the human person is imbued. As Pope Pius XI put it: "Christian teaching alone gives full meaning to the demands of human rights and liberty because it alone gives worth and dignity to human personality."[99] And, Jacques Maritain, the prominent French Catholic theologian, warned of the "perilous temptation to "claim human rights and dignity – without God.""[100] The dignity of man descended, therefore, from God's creation but its fulfillment depended on man's regulation – or, perhaps more accurately stated, natural law prescribed regulation to protect human dignity against violations based on contrary creeds, in particular, both liberal individualism and state socialism. That regulation took the moniker of "human rights," and its implementation required a social order predicated on a particular vision of community prefigured through theological discourse.[101]

Although it is primarily through the mobilization of Christian theologians and political figures – and the alliances that they established-- that the concept of human dignity seems to have initially been integrated into the legal instruments that currently form the basis international human rights law,[102] it has a long lineage that can be traced to Roman law, and is not exclusive to any particular religious tradition.[103] In contemporary legal theory, it is generally associated with Immanuel Kant's philosophical analysis of the qualities of the human and today occupies an important position in non-Christian and more generally non-religious discourses regarding human rights. This broader "dignitarian tradition" sees the community as instrumental to the realization of the essential human value of the individual.[104] However, while Kant linked the concept of dignity to

[98] Moyn, at p. 75 quoting George Bell, the Anglican bishop of Chichester.

[100] Moyn, supra n. 97, at 54.
[101] The connection between dignity and rights has taken multiple forms. For the various views on the relationship of the two terms, see McCrudden, supra n. 96.
[102] Moyn, supra n. 97,
[103] See McCrudden, supra note 96.
[104] McCrudden contrasts the "more communitarian" approach of the German Constitutional Court to dignity to the more "individualistic" interpretations of the Hungarian Constitutional Court as well as of the US and Canadian supreme courts. See, McCrudden, supra n. 96, at 699. Some commentators have expressed concern that the U.S. approach to rights could be undermined were the stronger European view of dignity to be adopted. See, e.g., Neomi Rao, On the Use and Abuse of Dignity in Constitutional Law, 14 Colum. J. of European 201 (2007-2008). See also Guy E. Carmi, Dignity -- The Enemy from Within – A Theoretical and Comparative Analysis of

that of autonomy, stronger communitarian arguments endow the community with the right and obligation to intervene to safeguard the dignity of each member independently of the desire of any particular member, such that autonomy may appear to be imperiled.[105] This obligation applies even if the impugned act causes no *manifest* harm to either the actor or another, and even if compliance with the rules of dignity imposes costs on the actor and/or the community itself. Conduct that violates a defined version of human dignity is taken as inherently damaging to the self as well as to the community: once such conduct has occurred, no other consequences need flow to prove harm. Perhaps most significantly, the community is authorized to defend its conception of dignity even as against that of its own member whose conduct is at issue.

A noted Comment of the Human Rights Committee illustrates this perspective. Responding to a complaint against a French ban on dwarf-tossing in which the complainant alleged that the law deprived him of a job whereas "dignity consists in having a job," France argued that the ban on dwarf-tossing contracts constituted "a classic instance in administrative police practice of reconciling the exercise of economic freedoms with the desire to uphold public order, one element of which is public morals ... public order has long incorporated notions of public morals and *it would be shocking were the basic principle of due respect for the individual to be abandoned for the sake of material considerations specific to the author* [who had brought the complaint] *to the detriment of the overall community to which the author belongs."*[106] The

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Human Dignity as a Free Speech Justification, Journal of Constitutional Law, Apr. 2007, at 957-1001.

[105] Exemplifying the uneasy balance between individual liberty and community limit-setting embedded in communitarianism, the Charter of Fundamental Rights specifies in the Preamble that "the Union … places the individual at the heart of its activities," but then girds individual choice within precise parameters, including, under the rubric of the "Right to the Integrity of the Person" (Chapter I, Art. 3): "In the fields of medicine and biology, the following must be respected in particular: … the prohibition on making the human body and its parts as such a source of financial gain." On the risks to individual liberties associated with communitarian approaches to dignity, see Rao, supra n. 104; Carmi, supra n. 104.

[106] Human Rights Committee, Wackenheim v. France, Communication No. 854/1999, 15 July 2002, CCPR/C/75/D/854/1999 par. 4.5 (Emphasis added.) The Committee's decision follows a ruling by the Conseil d'Etat in the same lancer de nain case: Conseil d'Etat, (October 27, 1995) req nos 136-727 (Commune de Morsang-sur- Orge) and 143-578 (Ville d'Aix-en –Provence). For a critical discussion of the concept of human dignity in relation to human rights, see Derek Beyleveld and Roger Brownsword, Human Dignity, Human Rights and Human Genetics, 61 Mod. L. Rev. 661 (1998). For a discussion of Wackenheim and other cases that connects dignity

Committee concluded that "the State party has demonstrated… that *the ban on dwarf tossing …was necessary in order to protect public order, which brings into play considerations of human dignity*…."[107]

In a similar vein, the German Constitutional Court, in the *Lifetime Imprisonment* case, observed: "The free person and his dignity are the highest values of the constitutional order. The state … is obliged to respect and defend it. This is based on the conception of man as a spiritual moral being endowed with the freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated self-regarding individual but rather a person related to and bound by the community. *In light of this community-boundedness, it [i.e., the freedom of the individual to "determine and develop himself"] cannot be "in principle unlimited*." The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected."[108]

The Human Rights Committee's view of human dignity – like that of the German Constitutional Court -- ensconces the individual in the community, and it is in function of that community that the individual's "material considerations" may be limited: certain transactions may not be allowed because they fail to comport with a normative vision of the social order (the "public order, one element of which is public morals") within which freedom of individual choice is, of

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to the concept of rights as responsibilities, see Jeremy Waldron, Dignity, Rights and Responsibilities, ARIZ. ST. L.J. 2012, (Papers, SSRN.com).

The notion that certain goods and services are "res extra commercium," i.e., per se not susceptible to the exercise of private rights and hence outside the reach of commercial transactions is of Roman derivation, and is today applied to such issues as cultural property and the ownership of space as well as to transactions in (some) bodily parts. For a discussion of "morally repugnant" contracts (and an economist's accommodation to that notion), see Alvin E. Roth, Repugnance as a Constraint on Markets, J. OF ECON. PERSPECTIVES XXI-3, at 37-58 (2007). For a general discussion of the normative bases of objections to particular exchanges, see Michael Walzer, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); M.SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998) [hereinafter Sandel, Liberalism].

[107] Wackenheim v. France, par. 7.4 (emphasis added).

[108] McCrudden, supra n. 96, at 700 (CITING D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 32 (2nd ed., 1977)) (emphasis added). It is beyond the scope of this paper to seek a resolution to the tension between "community-boundedness" and "individual autonomy" that has long engaged philosophers. See Habermas, supra n. 74.

necessity, constrained. It is the community, rather than the individual, who is the arbiter of his or her own "human dignity," that is of the acceptable parameters of an individual's ways of being ("the basic principle of due respect for the individual"). From the perspective of the individual, *Wackenheim* teaches, to be "human," in the sense of acting in conformity with one's "human dignity," requires accepting particular behavioral rules (founded in a system of values identifiable as "public morals") with which one may or may not agree but which the community articulates and applies. From the perspective of the community, *Lifetime Imprisonment* indicates, to construct a society of "humans" who realize their "human dignity" requires constraining individual action *and ways of being* so as to conform to the community's definition of such dignity (even while safeguarding individual autonomy, within this "community –boundedness"). In turn, however, that depends on the community's definition of the "human."[109]

"Humans" figure here as simultaneously the result and agents of the social order; agency is not reserved solely to humans as individuals but extends to the institutions through which the community forms, expresses, applies and revises its normative vision. In what might be termed a "strong" communitarian perspective, the community – acting, presumably, through its institutions -- legitimately engages in the formation and application of values with respect to the *nature* of persons and the actions through which they may explicate that nature as well as with respect to the relations among persons and the ways in which any particular person may engage others.[110]

ii. Human dignity and the status of "human"

In the era of human rights, the "human" has attained a new centrality and value, constituting the primary subject of the social vision articulated in the Universal Declaration of Human Rights, and reaffirmed through successive treaties.[111] As has been repeatedly noted, this contrasts with the

[109] See Jeremy Waldron, *supra n.* 106.; Robert C. Post, Three Concepts of Privacy, 89 Geo. L.J. 2087 ("Unlike autonomy, dignity depends upon intersubjective norms of conduct that constitute respect among persons.")

[110] See M.SANDEL, Liberalism 173 ("For a society to be a community in this strong sense, community must be constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants' plans of life." For Sandel, a society that is "strongly" communitarian is one which "community describes its basic structure and not merely the dispositions of persons within the structure.")

[111] This contrasts, as Hannah Arendt noted, with views that revolved around other statuses such that the "human" was a residual category that denoted exclusion from rights-bearing categories.

primary subjects of other orders: in contemporary states, citizens and subjects. And like those of the citizen and the subject, the defining criteria of the "human" remain inherently contestable. Since the mid-twentieth century a complex edifice of international institutions has created deputized sites for such definitional contests to occur: treaty negotiations, treaty bodies, courts, international organizations, like their domestic counterparts, have variously addressed issues such as when a "human" can be said to have come into existence, what features characterize it, what are the minimum conditions required for its subsistence, what is the behavior that comports with being or not being human, and when a human may be said to have ceased to be. Ongoing contestations –for example, regarding fetuses or the identifying criteria of death -- simultaneously denaturalize the vision of the "human" and highlight its political constitution and shifting juridical crystallizations. To be "human" is to occupy a particular position, albeit one whose substantive properties are not only historically mutable but also variable across national and international legal orders.

To be "human," then, is to at least theoretically have particular status, that is, to be in a "legal relation [that connects an] individual to [the] rest of the community" and that fashions the ensemble of "rights, duties, capacities and incapacities which determine a person to a given class" into a more general condition. Although there is a certain ineffability of status, it is nonetheless understandable as a "legal personal relationship, not temporary in nature nor terminable at the mere will of the parties, with which third persons and the state are concerned, [such that] [w]hile [the] term implies relation it is *not a mere relation*."[112] Being "human" is not merely "natural."[113]

Although this essay stresses the legal construction of the human as a status, the naturalization of that construction should also be noted. Joseph Slaughter acutely notes: "A tautologized contemporary human rights law posits the primary existence of what it seeks to articulate, claiming as a a priori what is simultaneously, impossibly and necessarily a posteriori … That is, the human rights personality preexists society and law and comes into being through social interaction and the collective declaration of rights. Ultimately, of course, the personalities are one and the same; underwriting and underwritten by human rights, the human personality is both natural and positive, pre-social and social, premise and promise." Joseph R. Slaughter, Human Rights, Inc.: The World Novel, Narrative Form and International Law 79 (2007).

[112] See Black's Law Dictionary 712 (7th ed. 1999) (emphasis added).

[113] McCrudden notes that whereas in Roman law dignitas was associated with particular statuses, Cicero and others deployed a broader conception of dignity, associating it with "human beings as human beings, not dependent on any particular additional status." McCrudden then observes that "where human beings are regarded as having a certain worth by virtue of being human, the

It is also not merely a matter of individual will or of private agreement: one cannot declare oneself or another to be "human" or suddenly transmogrify into another type of animal or an inert entity for state-defined pathways and their attendant certifications come into play. Just as entry into the status of human requires conformity with legally prescribed criteria (conception/live birth, brain and cardiac function) and state-approved attestation (birth certificate, identity documents), exit is also dependent on legally prescribed criteria and the attendant certifications (lack of discernible brain and/or cardiac function; death certificates). Even suicide marks the legally-cognizable end of a life only when it is appropriately documented and takes a particular physiological form, being denoted by the kinds of events (such as the absence of brain or cardiac function or both) that, in a given legal order, signify death.

Moreover, so long as a human is in existence, her position is marked by a host of rights and (rather less well-defined) obligations that produce a whole that is greater than the sum of the many particular facets of her existence. If to be human, as Hannah Arendt famously noted, is to have the "right to have rights," historicity requires that that description be taken out of its generic form: at any given time and in any given place, to be human is to have the right to *these* rights, as specified in *these* rights-endowing charters and other law-making documents, valid in *this* context.[114] Ultimately, from a legal perspective, to be "human" in this categorical sense is to have the features that mesh with the particular sets of descriptions delineated in applicable rights-defining instruments. To take the texts often referred to as the International Bill of Rights – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights -- as such a template, a human is not only that being who may lay a claim to education or health or freedom from slavery and towards whom an educational or health or judicial system ought to relate in a particular manner (by satisfying the claim), but rather a being who can claim *all* of the rights that

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concept of human dignity raises important questions such as 'What kinds of beings are we? How do we appropriately express the kinds of beings we are?'" McCrudden, supra n. 96, at 657. Waldron relates dignity to roles but more generally to an objective theory of human rights. See, Waldron supra n. 106. In the view articulated in this essay, precisely because "human" is a legal status, however, this inquiry is not purely philosophical but rather bounded by extant legal frameworks – as both McCrudden's and Waldron's inquiries into the jurisprudence of dignity demonstrates.

[114] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1976).

are enumerated in the Covenants and with whom the set of social institutions to which those rights refer – and, generally, the polity to whom such social institutions are answerable and by whom they are sustained -- ought to relate in a particular manner precisely because it is the ensemble of all these rights that are essential to the realization of 'human-ness.' To be "human" is to have, then, a position in respect to the society ideal-typically defined in the human rights instruments as whole and not simply in a miscellany of segmented institutions. In sum, the status of "human" – like status more generally – is both complex and sticky. Once attained, status engenders an ontological transformation that mere contract does not effect; its signification extends beyond any one transaction to color multiple facets of an individual's position in the community. And, it is not easily lost, for its loss does not depend simply on one's inclinations nor on any private bargain one may strike. Rules relating to status and to the behavior with which it must be correlated in order for "dignity" to be ensured thus stand at the antipodes of the view delineated earlier as "maximum contractual autonomy."

The questions of dignity and the status of the human are doubly significant for the international regulation of surrogacy. Dignity, as a grounding principle of bioethics, has been interpreted as entailing a firm prohibition against the commodification of the human body: in the words of the European Convention on Human Rights and Biomedicine (echoing the European Charter of Fundamental Rights): "the human body and its parts shall not, as such, give rise to financial gain."[115] Although the Convention (like the Charter) is only binding on signatory European states, its significance is broader: European states are themselves producers of demand for surrogacy,

[115] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to Biology and Medicine (Oviedo, 1997), art. 21, available at /conventions.coe.int/Treaty/en/Treaties/html/164.htm. See also Charter of Fundamental Rights of the European Union, Official Journal of the EU (2010) C 83/389. See also the Constitutional Court of South Africa, holding in reference to prostitution, that:

> Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that [the provision prohibiting prostitution] can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. Constitutional Court of South Africa, 9 oct. 2002, Case CCT31/01, Jordan v. the State per O'Regan and Sachs JJ. Concurring. As cited by Waldron supra n. 106, 23.

which, on an international scale must be understood as entailing commercial exchanges. Moreover, the rule against non-commodification enunciated in the European legal context may well be interpreted by non-European national courts (as well as by international decision-making bodies) as embodying a general principle of international law. But equally significantly, dignity and status come into play as factors guiding the regulation of filiation.

iii. Filiation as status-attribution

In actual fact, and not only as a matter of normative argument, the legal attribution of parental status -- for example, via inscription on a birth certificate -- declares and constitutes the individual to whom it has been attributed as having the powers associated with, and being subject to the limitations inherent in, a condition whose entry into, exit from, and specific obligations are beyond the exclusive reach of individual negotiation.[116] Of all statuses, maternity may be among the "stickiest," as evidenced by the rules regarding its voluntary rejection or termination and as further manifested in the breadth of policy areas within which it carries significance.[117] Being (or being in the process of becoming) a "mother" in the legal sense entails rights and obligations that cross numerous areas of social organization. In many states pre- and post-partum leave is compulsory or at least permissible, mothers' employment opportunities are limited (e.g. with respect to night work), seniority points – for example with respect to pension rights – may be earned through child-bearing, financial transfers are awarded for the birth of any or a specified number of children, the capacity to transmit nationality and/or citizenship to offspring is recognized, particular provisions are made for post-divorce economic and custody settlements and the ability to make decisions with respect to children and oneself, for example in terms of choice of residency, is either supported or curtailed.[118] At least in some jurisdictions, such limitations (and rights) comport with ideal-typical vision of woman-qua-mother: in the words of the Italian Constitution, "the working woman has the same rights … as the [male] worker. Work

[116] Art. 311-25 of the French Civil Code, for example, specifies that maternity is established by mentioning the name of the mother in the birth certificate.
[117] It is worth noting the pathways into entry into and exit from maternity as a legal status generally differ in significant respects from those entailed by paternity.
[118] The extent to which such provisions are assigned to all parents or are specifically gendered varies significantly between legal orders. On the history of motherhood and its legal status, see STORIA DELLA MATERNITA', Bari-Roma: Editori Laterza, (Marina D'Amelia ed., 1997).

conditions must ensure her fulfillment of her essential family function and provide special adequate protection to the mother and the child." [119] And, in a somewhat similar vein, the Constitution of Ireland recites: "the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home."[120]

Trends towards granting more importance to contractual choice with respect to parental status have gained salience, particularly as a result of the development of assisted reproductive technologies and the recognition of the plurality of family forms. In the context of growing recourse to assisted reproductive technologies, within and without marriage, courts and legislatures have looked to the consent of non-biological, non-marital partners to determine parental status: thus, for example, men or women who had consented to their partner's use of third party sperm or ova in order to bear a child have been found to have consented to assuming the rights and obligations of parenthood for the children thus conceived.[121] Courts have also found in favor of the recognition of "functional" parents: those who have assumed parental responsibilities for children and performed the attendant roles, generally on a basis of consent with the already-recognized legal parents.[122] And, the legalization of surrogacy in some states is a prominent indicator of possible movement in the direction of greater choice with respect to maternity. But these trends point to an expansion of the *regulated* forms of parenthood –

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[119] Constitution of the Italian Republic, art. 37, available at http://web.tiscalinet.it/claufi/costituzione.htm ("La donna lavoratrice ha gli stessi diritti e, a parità di lavoro, le stesse retribuzioni che spettano al lavoratore. Le condizioni di lavoro devono consentire l'adempimento della sua essenziale funzione familiare e assicurare alla madre e al bambino una speciale adeguata protezione.")

[120] Constitution of Ireland, art. 41, available at www.servat.unibe.ch/icl/ei00000_.html.

[121] Trends towards greater private party autonomy and the recognition of individual contractual ability have also been documented with respect marriage, at least in the United States. See Elizabeth S. Scott & Robert E. Scott, Marriage as a Relational Contract, 84 Va. L. Rev. 1225, 1225-1334 (1998). It should be noted, however, that here – as with parental status – although there may now be greater scope for individual choice, as the recent mobilizations in regard to same-sex unions have highlighted, ultimately the recognition of a person as married or not, and the rights and obligations that flow from that recognition, are directly dependent on state sanction and engender a transformation of the status of the persons involved into "spouses" (or, depending on the legal order, "husbands" and "wives").

[122] See supra n. 85 and accompanying text.

including maternity -- rather than to a retreat of regulation in favor of contractual autonomy. There may be more options to choose from, but parentality (whether maternal or paternal) is still a status dependent on state sanction.

iv. "Mother" as status

As a general rule, legal recognition as a "mother" appears to be incident to childbirth; the default position historically being that enunciated in the Roman maxim, *mater certa est*, the certitude being predicated on the act of parturition.[123] There are also, however, other pathways to maternal status that come into play in a variety of contexts, including those of adoption, assisted reproductive technology, and immigration.[124] Such pathways include judicial disposition, administrative procedures, genetic linkage and recognition of the de-facto assumption of maternal responsibilities. Moreover, some states distinguish motherhood and maternity so that legal maternity is only conferred through a positive act of registration rather than by virtue of the physical fact of delivery itself.[125] But no matter how it has been attained, once formalized, maternity is not a condition one can exit "at will."[126] Dereliction of responsibilities can expose the woman who gives birth to charges of abandonment unless the abandonment itself takes place

[123] Roman law, however, did not attribute a legal status with respect to the child to the mother as such, who was juridically invisible for purposes of filiation. See Marina D'Amelia, La presenza delle madri nell'Italia medievale e moderna, in Storia della Maternita' Roma-Bari: Laterza 4-5 (Marina D'Amelia ed., 1997); Yan Thomas, The Division of the Sexes in Roman Law, in V A HISTORY OF WOMEN: FROM ANCIENT GODDESSES TO CHRISTIAN SAINTS 83-137, 95 (Pauline Schmitt Pantel ed., 1992).

[124] For example, US regulatory practice regarding identifies the "mother" as the provider of ova for purposes regarding the recognition of nationality, with consequences that may be unforeseen both by the ova provider herself and by the gestator as well as by the commissioning parent. See note xx and accompanying text.

[125] See supra n. 162 and accompanying text (discussing the U.S definition of "mother" for the purposes of immigration). France attributes legal status to mothers only upon inscription of her name in the child's birth certificate. However, the duty of inscription falls to the officier d'etat civil (the state officer for civil status), who must compile the birth certificate (on the basis of the declaration of anyone who was present at the birth) within three days of the birth itself. A declaration that provides a different name than that of the woman who actually gave birth is a criminal offense. A woman who delivers may choose not to be identified as the mother ("accouchement sous X"): this would leads to no mother being identified it does not enable the substitution of the name of the woman who gave birth with that of another. See also nn.xx and accompanying text.

[126] On maternal separation, see Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375 (1996).

within legally recognized "safe havens" where mothers can leave their children without fear of prosecution or in accordance with other legally-specified procedures.[127]

In some states --France and Austria, for example -- "anonymous maternity," which allows women not to identify themselves as the mothers of the children to whom they have just given birth, is possible; and, the European Court of Human Rights has recognized the legality of such provisions as being encompassed within member states' margin of appreciation.[128] But there does not seem to be a general trend towards the establishment of this institution. Although the relevant French norms are long-standing and the Austrian ones date from 2005, in 1999 -- a few years before the Austrian reform -- the Supreme Court of Spain disallowed pre-existing practices of anonymous birthing.[129] Adoption, which is legal in over 80 states (as indicated by the ratifications of the Hague Convention on Inter-Country Adoption[130]) and barred in others (including states following Shari 'a law[131]), generally predicates the transfer of parental rights on compliance with prescribed modalities for the formal renunciation of such rights by the birth parents.

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[127] The creation of "safe havens" has a long tradition in western Europe, and has recently been resumed in the United States and elsewhere as an attempt to reduce risks of infanticide. For a discussion of maternal abandonment, its historical treatment and the establishment of safe havens see Sanger, supra n. 126. With respect to US policies, see also Kimberly M. Carrubba, A Study of Infant Abandonment Legislation, Legislative Counsel Bureau, State of Nevada, December 2000 at http://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP01-03.pdf. For a comparative analysis of the law in England, France and Germany, see Katherine O'Donovan, "Real" Mothers For Abandoned Children, 36 Law & Soc'y Rev. 347, 347-78 (2002).

[128] See Nadine Lefaucheur, The French "Tradition" of Anonymous Birth: The Lines of Argument18 Int'l J.L. Pol'y & Fam. 319, 319-42 (2004); Odievre v. France, ECHR, 13 February 2003. See also, C.Danner, M. Pacher, E.Ambach, C. Brezinka, Anonyme Geburt und Kindestotung in Tirol, Z. Geburtsh Neonatology 2005: 209: 192-198.

[129] Sentencia del Tribunal Supremo 773/1999 de 21 de Septiembre.

[130] See Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Dec. 15, 2011), http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

[131] Although Shari'a law generally does not allow for adoption as, for example, institutionalized in the Adoption Convention, in some states similar transfers of parental status may be effected through guardianship. Adoption of Children from Countries in which Islamic Shari'a law is observed, U.S. DEPT. OF STATE, http://adoption.state.gov/adoption_process/faqs/adoption_of_children_countries_islamic_sharia_observed.php.

Moreover, neither the institution of anonymous birth nor adoption (in its internationally-sanctioned form) nor surrogacy imports a contract model into filiation: the state remains a crucial player. Although "private" adoption is possible in some jurisdictions, the relinquishment of maternal rights and their transfer are subject to legal norms and, generally, state supervision. And surrogacy, although it often does contain contractual elements, in fact cannot function without state sanction precisely because, as with both anonymous birth and adoption, ultimately the recognition of filiation is determined by the state and not solely by the agreement of the parties. Thus, for example, in those U.S. states in which surrogacy arrangements are legal and enforceable, the attribution of parental status is nonetheless subject to regulation.[132]

In sum, the legal determination of filiation, motherhood and parenthood more generally entail status rather than contract. The French Cour de Cassation recently remarked in reference to France's refusal to legitimate filiation based on surrogacy arrangements that such arrangements are incompatible with the fundamental principle of the "*indisponibilite*"' -- or unavailability -- of status. By virtue of the "*indisponibilite' de l'etat des personnes,*" individuals may not freely

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[132]For instance, under § 160.753 of the Texas Family Code, which establishes the legality of surrogacy arrangements, the commissioning parties acquires their relative parental statuses through a process of adjudication, as follows:

ESTABLISHMENT OF PARENT-CHILD RELATIONSHIP. (a) Notwithstanding any other provision of this chapter or another law, the mother-child relationship exists between a woman and a child by an adjudication confirming the woman as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law, regardless of the fact that the gestational mother gave birth to the child.

(b) The father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law.

Added by Acts 2003, 78th Leg., ch. 457, § 2, eff. Sept. 1, 2003.
The Steering Committee on Bioethics of the Committee of Ministers of the Council of Europe recently reiterated the necessity for states to determine clear rules regarding filiation, in particular in cases involving medically assisted procréation. See Council of Europe Committee of Ministers, 1107 Meeting 2 March 2011, para. 19, available at https://wcd.coe.int/ViewDoc.jsp?id=1735853&Site=CM.

modify their status. And, in a *comunique'* explicating the relevant decision, the Court noted: "In effect, it is a matter of principle in French law, that *the mother of the child is she who gives birth*."[133] Parentage and filiation, in other words, are firmly anchored in law and not subject to individual renegotiation.

v. The implication of states in the production of family status

The implication of states in the definition of individual status, in particular in relation to family arrangements, has deep historical roots.[134] In the modern era, from Greece to India, Italy to the United States, family policies have been intrinsically tied to strategies of nation-building; today, as the European Union struggles to define a common family policy, the importance that states assign to maintaining control over this arena is highlighted.[135] State policies define the

[133]"En effet, il est de principe, en droit français, que la mère de l'enfant est celle qui accouche." Communiqué de la Première présidence relatif aux arrêts 369, 370 et 371 du 6 avril 2011 rendus par la Première chambre civile, at http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/presidence_relatif_19635.html (emphasis added.) The Court's emphasis on this point strongly implies that the institution of "anonymous birth" discussed above should be regarded as an exceptional choice but not the default position of French law.

[134]The French revolution "statalized" individual identity by instituting the "etat civil" thereby shifting responsibility for its documentation from parish registries to the state. In effect, the Law of Germinal …. sought to "nationalize" identity, and as Jane Caplan points out, the current variety of state rules pertaining to naming has continued to reinforce the linkage between individual identity, status, and nationality. The ability of the state to fully "capture" individual identity was subject to resistance, and, practices that distinguish between legal names and names used in familial or other contexts survived the law of Germinal (and survive in many communities today). It is worth noting that international human rights law protects every child's right to a name, a requirement that could also be seen as entailing a correlative of a duty to have a legally cognizable name (i.e, to be identifiable). The history of the documentation of status, and its correlative rights and obligations, is the focus of a growing area of historical research. See DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLDS (Jane Caplan & John Torpey eds., 2001).

[135] For an insightful discussion of the nexus between family law, colonial policies and anti-colonial nation-building policies, see Narendra Subramanian, Making Family and Nation: Hindu Marriage Law in Early Postcolonial India, J. OF ASIAN STUDIES 771(2010). For a discussion of the evolution of family law in particular in the American context, see MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND EUROPE (1989). With respect to Greece, see Philomila Tsoukala, Marrying Family Law to the Nation, 58 Am. J. Comp L. 873 (2010). On Italy, see generally LA FAMIGLIA ITALIANA DALL'OTTOCENTO A OGGI (Piero Melograni ed., 1988). See also Anna Bravo, La Nuova Italia: madri fra oppressione ed emancipazione, in STORIA DELLA MATERNITA' (Marina D'Amelia ed.,

boundaries of family ties, establishing, for example, the degrees of consanguinity within which incest prohibitions will apply and inheritance will be ensured. Analogously, states routinely prescribe rules regarding child and spousal maintenance and generally establish the scope of matrimonial, parental and filial obligations. In fact, European feminists have long argued that laws and policies that explicitly mold family relations and that presume the existence of certain forms of family organization are central to the governance of welfare states.[136] This has consequences for the potential role of international law in the regulation of surrogacy.

v. The implication of states in the production of family status

While in the contractual autonomy model described earlier, the role of both state and international regulation is minimal, in the model that here has been loosely termed "communitarian" and that assigns a central role to politically-defined and legally applied normative visions, conceptions of social identities and definitions of status are the legitimate objects of regulatory action. Historically, the creation and recognition of statuses has been assigned to states. And, that function has been recognized by international law: international private law is replete with

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1997). I have examined the nexus between visions of the nation, gender and the family in the Italian constitutional debate in "The Politics of Moral Reconstruction," paper presented to the Institute for Advanced Study, Princeton, 1988. Janet Halley has recently argued that modern family law and market regulation are co-constitutive. In particular, Halley and her coauthors track modern distinctions between the legal space of "the family" and that of the "market" to German legal theory and debate, notably to the work of Karl von Savigny. It is worth noting that Savigny was in part inspired by the Romantic movement, and that the volkgeist vision of the nation played into his juridical interpretation of the family. See Janet Halley & Kerry Rittich, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, Introduction to the Special Issue on Comparative Family Law, 58 Am. J. Comp. L. 754 (2010). See also Duncan Kennedy, Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought, 56 Am. J. Comp. L. 811 (2010).

[136] A vast literature has developed around this theme. Early contributions include LAURA BALBO, STATO DI FAMIGLIA: BISOGNI, PRIVATO, COLLETTIVO (1976); LAURA BALBO & RENATE SIEBERT, INTERFERENZE: LO STATO, LA VITA FAMILIARE, LA VITA PRIVATA (1979);, HELGA MARIA HERNES, WELFARE STATE AND WOMAN POWER: ESSAYS IN STATE FEMINISM (1987); Symposium, Gender and Public Policies, SOCIAL RESEARCH, (Fall 1991) (Yasmine Ergas & Frances Fox Piven eds.). Jane Lewis, Gender and the Development of Welfare Regimes, J. OF EURO. SOC. POL'Y, August 1992, 159-173, marks a milestone in this analysis, launching a widespread debate including with regard to feminist critiques of Gosta Esping Anderson's signal contribution to the analysis of welfare states, THE THREE WORLDS OF WELFARE CAPITALISM (1990) . For a more recent review of the intersection of gender and welfare regimes in comparative perspective, see Jane Jenson & Mariette Sineau, WHO CARES? WOMEN'S WORK, CHILD CARE AND WELFARE STATE REDESIGN (2001).

examples of conflicts that revolve around marriage, filiation, and kinship;[137] conflicts rules have frequently looked to nationality over domicile as a "connecting factor" in relation to personal status;[138] and, party autonomy is regularly limited by appeals to public policy considerations.[139] Moreover, concepts like "subsidiarity" and "margin of appreciation" that simultaneously imply an oversight function of international law and a potentially significant degree of national autonomy have been applied to personal status issues. But today, international institutions are also seen as producing status. In the words of an authoritative commentator on the Convention of the Rights of the Child: "The CRC creates a new status of the child based on the recognition that s/he is a person and has the right to live a life of dignity and since the promulgation 1989 (sic) the child has been understood to be a *subject of rights.*"[140] The "child" is not the only subject of internationally-defined status. The Convention on the Elimination of All Forms of Discrimination Against Women similarly operates to provide women a "new status;" it is one in which maternity plays a central role. The Convention promotes the "recognition of maternity as a social function" and establishes its protection as a prohibited basis for discrimination: "special measures aimed at protecting maternity… shall not be considered discriminatory."[141] As interpreted by the Cedaw Committee – the treaty body charged with monitoring the implementation of the Convention – "maternity protection" is "proclaimed as [an] essential right[] … incorporated into all areas of the Convention, whether dealing with employment, family law, health care or education." Woman-as-mother (or mother tout court, for the Convention does

[137] For a recent example, see, e.g., Abbott v. Abbott, 130 S. Ct. 1983 (2010). For a discussion of the conflicts issues raised by the case, see Linda J. Silberman, Abbott v. Abbott, 130 S. Ct. 1983, Supreme Court of the United States, May 17, 2010, 105 AM. J. INT'L L. 108 (2011).

[138] As a result of the preference for nationality, forum courts find themselves applying foreign law. Although states' (and courts') preferences for domicile or citizenship as a determining element in private international law relating to personal status now appears to be in flux, throughout the 19th century and until World War II, in Europe, "citizenship played an important role as a connecting factor in the private international law relating to personal status." Jürgen Basedow, "Das Staatsangehörigkeitsprinzip in der Europäischen Union," Praxis des Internationalen Privat- und Verfahrensrechts, 2 (2011).

[139] See Bermann, supra n. 89.

[140] Jean Zermatten, The Best Interests of the Child Principle: Literal Analysis and Function, 18 Int'l J. Of Child. Rts., no. 4, 2010, at 483 (emphasis in the original). Zermatten is the Director of the International Institute for the Rights of the Child and Vice-Chairperson of the United Nations Committee for the Rights of the Child.

[141] Convention for the Elimination of All Forms of Discrimination Against Women, Preamble; S. 5(b), S. 4(b).

not contemplate the possibility that "maternity" could be an attribute of anyone other than a woman) thus emerges from the text as the bearer of a specific array of rights. Other instruments of human rights law also require the recognition of maternity, such as the conventions established under the aegis of the International Labor Organization in regard to the protection of maternity.[142] International status-formation does not imply a retreat from national regulation; if anything, it points to the creation of additional layers of as-yet untidily juxtaposed regulatory arenas.

The legitimacy of the engagement of international institutions in the creation of status is closely related to the concept that such institutions participate in – and instantiate – an "international community" capable of producing normative visions that are sufficiently shared to inform an "international public policy."[143] Although the notion of an international community has a contested – and long -- history in international law, it serves as an authoritative referent for international and domestic legislative action and judicial interpretation.[144] The International Court of Justice drew the distinction between obligations owed by states to each other on a contractual basis and those owed to the "international community as a whole" in *Barcelona Traction* and has

[142] See, e.g., C183 Maternity Protection Convention 2000.

[143] That the international community is riven by normative difference is acknowledged in the many instruments that establish the organizations around which it is presumptively constituted. For example, the Statute of the International Court of Justice requires that electors of the members of the Court bear in mind that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." ICJ Statute, art. 9. But as Jose' Alvarez notes, it is now questionable whether "general principles" of law (implying normative consensus) can still be considered as playing a marginal role as a source of international law. Alvarez, IOs as lawmakers, supra n. 7.Even general concepts whose inherent vagueness seems to qualify them to function as designated sites for the localization of meaning, such that different institutions may give radically different readings of the same terms, have been interpreted as denoting a common core of values. See e.g., McCrudden, supra n. 96 (regarding the idea of "human dignity" as allowing for malleable localizations around a minimum core of shared meanings).

[144] The history of the notion of an "international community" predates the Peace of Westphalia. As Roslyn Higgins remarked in reference to Francisco de Vitoria's contribution to international law, for Vitoria "States, like individuals, need to live in society … [C]onsequently there exists an international community, and an international system of law to govern that community." Address by H.E. Roslyn Higgins, President of the International Court of Justice, on the occasion of the presentation of the Francisco de Vitoria Medal to the International Court of Justice by the City of Vitoria, 5 April 2006. On the continuing ambiguities but increased salience of the concept of an "international community" and the role of international institutions, see Alvarez, IOs as lawmakers, supra n. 7 xv.

subsequently invoked the responsibilities of that community.[145] Under the Vienna Convention on the Law of Treaties, for example, *jus cogens* norms are identified as peremptory norms "accepted and recognized by the international community of States as a whole." That language is echoed in the Draft Articles on State Responsibility for Internationally Wrongful Acts, which defines *erga omnes* obligations as those that are owed to "the international community as a whole."[146] On a domestic level, an Italian Appeals Court, deciding a case in which the incompatibility of Italian and English law in reference to surrogacy was at issue, stressed that the *ordine pubblico internazionale* (international public order) must be seen as "the entire set of principles of civilization that … [constitute] the normative embodiment of the inviolable rights of man."[147] The Appeals Court referred to a decision of the *Corte di Cassazione* specifying that "the concept of public order [ordine pubblico] "is not identified with the so-called *internal* public order … but with that of the *international* public order [that is] solely constituted by the fundamental principles … that characterize the ethical-juridical attitude in a given historical period." These, the Appeals Court expounded, are "values that are shared by the international community…."[148]

In summary, a "communitarian" model loosely defined implies that filiation, maternity and paternity constitute legitimate objects of state regulation, and that, to the extent to which an "international community" is held to exist, such regulation may take place at both the international and national levels. The postulation of "mother" (and "father" and/or "parent") as denoting status rather than as the result of private contract, and thus of filiation as a matter of law rather than individual preference, carries with it the idea that certain behaviors – including the performance of particular paid-for services (like gestation) and the sale of particular goods (such as ova and sperm) -- may be held inherently violative of the "dignity" that accompanies such statuses as well as of the more general status of human beings. This militates against the notion that contractual autonomy is likely to provide a paradigm for the solution to the current dilemmas

[145] See generally Menno T. Kaminga, Final Report on the Impact of International Human Rights Law on General International Law, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 1-36 (2009) (Menno T. Kaminga & Martin Scheinin eds.).
[146] DASR 48 (b).
[147] "[la] visione di ordine pubblico internazionale inteso … come il complesso dei principi di civilta' essenziali ad un dato ordinamento e come la proiezione normative dei diritti inviolabili dell'uomo." Corte d'Appello di Bari, causa in unico grado iscritta nel registro generale dell'anno 2008 con il numero d'ordine 175.
[148] Id. (Emphasis added.)

raised by the international market in reproductive surrogacy. In even the loosest "communitarian" framework neither national nor international law is held to a standard of substantive silence when it comes to parental statuses and to their correlative behaviors as required by the contractual autonomy model described above nor are private agreements regarded as *ipso facto* pre-empting the power of regulation. Solutions to the individual dramas so forcefully highlighted by the Balaz twins and other recent cases will require concerted agreement among states.

IV. Treaty Zones and the Limiting Power of Human Rights Law

A. The necessity of international regulation

If individual solutions are not feasible, an alternative is to approach the problem as one of international coordination to be addressed through a multilateral agreement. Indeed, given that the obstacles to contractual autonomy flow from the role of states in determining the statuses involved in filiation and citizenship, a multilateral agreement would represent the only possible solution, for it would assign the responsibility for preventing the crises that have recently taken place to those very subjects with the power to address them: states. But any agreement would have to be compatible with existing international human rights law.

Whether an agreement on surrogacy will take the form of a treaty or not will depend on multiple factors, but a binding agreement -- as a signal of commitment to implementation -- might provide the most reliable sign that some of the human costs involved in the present situation will be obviated.[149] Optimism on this score may be cautiously warranted, for conventions regarding themes cognate to reproductive surrogacy have been agreed under the aegis of the Hague Conference on Private International Law, including with respect to inter-country adoption, child

[149] That treaties may be signed and even ratified for reasons that are not only not indicative of, but, in fact contradictory with, an intent to comply has been the subject of intense attention among legal scholars and political scientists, in particular in reference to international human rights. See, e.g., Oona Hathaway, Between Power and Principle: An Integrated Theory of International Law, 72 U. CHI. L. REV. 470 (2005); see also Emilie M. Hafner-Burton & James Ron, Seeing Double: human rights impact through qualitative and quantitative eyes, 61 WORLD POLITICS 61, no. 2, 2009 (reviewing the debate). More recently, however, Beth Simmons has found that at least ratification should be interpreted as indicating an intent to comply. See Simmons, supra n.7. Robert Keohane and David Victor have suggested that in particular situations a "regime complex" of "loosely coupled" regimes without a clear hierarchical structure may be more effective than one regime built around a comprehensive treaty framework. However, the crises represented by the Balazs twins derives from the coexistence of incompatible filiation norms, and therefore requires specific agreement on at least that issue. See Robert O. Keohane & David G.Victor, The Regime Complex for Climate Change, Discussion Paper 2010-33, Harvard Project on International Climate Agreements, January 2010.

abduction, parental responsibility and child support.[150] And the Hague Conference has announced its intention to begin work on a convention on cross-frontier surrogacy.[151] Moreover, discussions intended to help inform preparatory work for such a treaty have been launched, *inter alia* thanks to the initiative of scholars at the University of Aberdeen supported by the Nuffield Foundation who are conducting a broad research program and recently convened an international meeting bringing together experts from numerous countries as well as staff of the Hague Conference.[152]

The mobilization of this group of research and policy analysts exemplifies one possible pathway to transnational law-making: a policy network emerges that simultaneously builds on and refashions existing institutional and discursive resources, sometimes forging new organizational structures and new understandings. These understandings may be synthesized in texts that can, but will not necessarily, be subjected to state negotiations so as to issue in a convention that, once appropriately signed and ratified, can lead to implementation.[153] In this case, the building blocks of an embryonic policy network may be found in a legal academy and network of practitioners centered not only on issues of private international but also on public international law addressing family structure, women's rights and children's rights; the Hague Conference on Private International Law with its institutional interest and expertise in themes relating to family structure;[154] other international institutions that have addressed relevant issues, including

[150]For a full list of treaties agreed under the aegis of the Hague Conference , see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.listing.

[151] Gilles Cuniberti, Hague Conference to Work on Surrogacy, CONFLICT OF LAWS.NET (April 11, 2011), http://conflictoflaws.net/2011/hague-conference-to-work-on-surrogacy/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+conflictoflaws%2FRSS+%28Conflict+of+Laws+.net%29.

[152] Katarina Trimmings and Paul Beaumont organized International Surrogacy Arrangements: International Workshop on National Approaches to Surrogacy at the University of Aberdeen on August 30-September1, 2011.

[153] For the "locus classicus" of the literature on transnational law-making, see Harold H. Koh, Transnational Legal Process, 75 NEB. L. REV. 181 (1996)

[154] The Hague Conference on Private International Law describes its work as pertaining to "develop[ing] and service[ing] Conventions which respond to global needs in the … areas [of] International protection of children, family and property relations; International legal cooperation and litigation; [and] International commercial and finance law." HAGUE CONFERENCE ON

committees of experts of the Council of Europe and the International Commission on Civil Status; departments of foreign affairs whose consular officers have found themselves coping with the crises generated by the current coexistence of incompatible legal regimes; and, judges and advocates involved in relevant court proceedings. To the extent that a new policy network focused on international reproductive surrogacy draws on networks constituted around previous Hague Conference conventions, some participants will be conversant in – and able to mobilize – discursive frameworks embedded in those conventions. As Sally Engle Merry pointed out in respect to the CEDAW, participants in international legal processes with the capacity to invoke previously "agreed upon language" and to transpose it into a new context can prove particularly influential in negotiating rooms.[155] As has become increasingly commonplace, this policy network will likely be composed of transnational elites accustomed to listening with two ears: one attuned to the international arenas in which they engage, and the other attentive to their national referents.[156] Their ability to translate from one idiom to the other will influence the outcome of any negotiation whose success ultimately depends on both international agreement and monitoring and domestic ratification, incorporation and implementation.

These transnational elites will operate in a *variable geometry* of engagement, for policy networks are not static – although they have, often largely informal, rules regulating access and decision-making capabilities; at different stages, they involve different participants. Thus, at different points in time, scholars, policy analysts, advocates, government officials, participants in domestic political institutions (from political parties to Parliaments), officials of international organizations, will engage with varying degrees of influence in a surrogacy policy network, each bringing particular perspectives, interests and constraints to bear in the processes leading up to (or

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PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=1. However, a count of the Conventions and Protocols developed by the Hague Conference since the signature of its founding treaty in 1955 shows that almost half (48.7%) have directly concerned family themes.

[155] SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 43 (2006).

[156] As Sally Engle Merry notes "This is a transnational space where actors come together simultaneously as locally embedded people and as participants in a transnational setting that has its own norms, values and cultural practices. …Participants in this transnational society live in two local places at the same time, navigating endlessly between them." Id. at 37.

hindering) the development of a convention and, either alternatively or additionally, a non-binding agreement.[157]

The outcome of the multi-step, multi-vocal and recursive process that now appears to have been set in motion is by no means certain, for treaties and soft law arrangements may fail to be agreed even after notable resources have been invested in (at least ostensibly) promoting them. If an agreement is eventually reached, it will not necessarily entail the consensus of all participants, nor will it have agreed all the terms of the issue (indeed, this essay predicts that it will do neither); to the contrary, agreement is most likely to depend on an explicit 'agreement to disagree' such that a crucial term will remain indeterminate or regulation on a point on which consensus cannot be reached will be foregone.

Traditions of international negotiation and current legal doctrines provide for spaces of non-agreement. The ineluctable premise of most agreements is that disagreement *will* occur, the essence of the agreement being identified with a set of core norms and the creation of a process for dispute resolution. The Vienna Convention on the Law of Treaties implicitly differentiates core from non-core terms, limiting allowable reservations to those that do not undermine the "object and purpose of the treaty," thereby suggesting that carve-outs from some obligations do not do so. [158] Among that of other agreements, the history of the negotiation of the Convention on the Rights of the Child highlights the strategic use of indeterminacy: faced with insurmountable differences of views, the drafters defined only an end-point of childhood (18 years), leaving the question of its beginning – whether at conception, birth, or some other stage – to each signatory's discretion.[159] Nonetheless, for an agreement *that is to be effective in dealing with the current*

[157] On the constitution of such networks around "norm entrepreneurs" see supra n. 65. International government networks of officials invested with decision-making capacity may eventually emerge from variable geometry international policy networks, but that result is not assured. On governmental networks generally, see Anne-Marie Slaughter, supra n. 7.
[158] The distinction between "core" and non-core norms is suggested by the legal rules relating to reservations in multilateral treaties. As the Vienna Convention on the Law of Treaties specifies, and as related jurisprudence has affirmed, unless they are explicitly prohibited by a given treaty text, reservations are allowable so long as they do not undermine the "object and purpose of the treaty." Vienna Convention on the Law of Treaties, art. 19.
[159]See Philip Alston & Bridget Gilmour-Walsh, The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values, INNOCENTI STUDIES (1996).

cross-border crises to be decided a minimum degree of consensus must be found on those terms from which current blockages now derive. Since such blockages are based in norms regarding filiation, these norms will inevitably have to be addressed.

B. Unsettling filiation – and citizenship

i. Surrogacy and the inadequacy of the adoption analogy

Who, then, for purposes of filiation, is a "mother"; who a "father"; who a "child"? What bonds tie the one to the other, and how can such statuses be acquired, lost or modified?[160] In reproductive surrogacy, these questions raise issues that are more complex than those faced by the drafters of the Hague Convention on Inter-Country Adoption (the "Adoption Convention"). Drafters of the Adoption Convention could proceed from several basic assumptions. First, the child had a cognizable identity that preceded the adoption process and that supported the exercise of jurisdiction by the "state of origin" over the child enabling that state to issue appropriate identity documents.[161] Second, the woman who gave birth was the mother.[162] Through a process subject to

[160]Thus, the adoption convention refers to "the child" and "the mother" without providing a definition of either. The current uncertainties regarding the status of the child have recently been broached in a document presented by the Permanent Secretariat of the Hague Conference on Private International Law to its Council on General Affairs and Policy. "Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements," Prel. Doc. No 11, March 2011. They are also being addressed by the Committee of Experts on Family Law of the Council of Europe and by the Council's Steering Committee on Bioethics. For a summary of recent discussions, see Working Party of the Committee of Experts on Family Law, Report of the Third Meeting of the CJ-FA-GT3 (Strasbourg, 6-8 December 2010), Council of Europe, CJ-FA-GT3 (2010) RAP3, Strasbourg, 14 December 2010; Steering Committee on Bioethics, supra n. 132.

[161]Issuance of identity papers may be based on citizenship but presumably need not be, so long as the child's state of origin can, in accordance with its internal laws, provide the certifications of adoptability (including with respect to identity) that the Adoption Convention requires and issue appropriate exit documents. See Hague Convention on Adoption, art. 4. A Hague Convention adoption does not per se confer citizenship; rather it creates a legally cognizable familial status that can form the basis for a petition for citizenship. Children adopted into the United States, for example, must go through an immigration process that is predicated on the adoptive parents having successfully filed a Petition to Classify Convention Adoptee as an Immediate Relative. See Immigrant Visa Process, U.S. DEPARTMENT OF STATE,

http://adoption.state.gov/us_visa_for_your_child/visas.php; Fact Sheet: Hague Adoption Convention, U.S. Citizenship and Immigrations Services, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=7b500c5a5d068110VgnVCM1000004718190aRCRD. With respect to Australia, which also does not confer citizenship ipso facto on adoption, see Application for Australian citizenship for children adopted under full Hague Convention arrangements, http://www.immi.gov.au/allforms/pdf/1272.pdf.

[162]See Hague Convention on Adoption, 4(c)(4): (4) ("the consent of the mother, where required, has been given only after the birth of the child." (emphasis added)). The definite article before "mother" denotes her singularity (there is one precise person to whom the referent mother applies); the lack of definition of the term mother followed immediately by reference to the birth indicates that, without further specification, the mother is the woman to whom the child is connected by birth. Moreover, throughout the Convention, the text counter-poses the child's "prospective adoptive parents" to the child's "mother" or "father," thereby signifying that the latter have the identity of parents until they renounce it or it is otherwise severed by operation of law and the correlative rights and obligations are transferred to the adoptive parents. See Hague Convention on Adoption, in particular, arts. 4, 26, 27.

A notable exception to the rule that the mother is she who gives birth is that adopted by the U.S. State Department in interpreting the Immigration and Nationality Act. S. 301 (8 U.S.C. 1401) that defines "Nationals and Citizens of the United States At Birth. " Referring to children born outside of the United States, at subsections (c), (d) and (g) the Act indicates the conditions under which citizenship and nationality may be recognized to those "born …of parents" where the parents themselves satisfy particular residency and citizenship requirements. The State Department interprets the phrase "born …of" to mean that, in cases entailed assisted reproduction, where the parent providing the required nexus to the United States is the mother, the mother will be understood to be the provider of genetic material rather than the gestational carrier. The State Department has found it necessary to warn U.S. citizens abroad considering the use of Assisted Reproductive Technologies of this interpretation. Thus, the Department's travel website provides the following advice: "Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad: Transmission of U.S. citizenship at birth to a child born abroad is governed by Immigration and Nationality Act (INA) Sections 301 and/or 309. The Department of State interprets the INA to require a U.S. citizen parent to have a biological connection to a child in order to transmit U.S. citizenship to the child at birth. In other words, the U.S. citizen parent must be the sperm or the egg donor in order to transmit U.S. citizenship to a child conceived through ART." See Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad, U.S. DEPARTMENT OF STATE, http://travel.state.gov/law/citizenship/citizenship_5177.html. It is noteworthy, however, that the Supreme Court, in Miller v. Albright, 452 U.S. 420 (1998), a case revolving around determinations of paternity for nationality and citizenship purposes, treated the identity of the mother and her link to the child as self-evident. Writing for the majority, Justice Stevens noted: "The substantive conduct of the unmarried citizen mother that qualifies her child for citizenship is completed at the moment of birth." Id. That grant of citizenship, he stressed "rewards that choice [i.e. the choice "to carry the pregnancy to term and reject the alternative of abortion"] and that labor [i.e. the labor of pregnancy and parturition]." Id. Although there were compelling dissents in Miller, specifically by Justices Ginsburg and Breyer, these revolved around considerations of

certification both in the child's state of origin and in the receiving state, the status of mother could be transferred; but in the first instance, the rights of 'mother' vested in she who bore the child.[163] Finally, adoption could be addressed as a "humanitarian" transaction that matched needy children with desiring parents while the commercial transactions involved could be considered extraneous to the substance of the agreement. *Inter alia,* this cohered with prescriptions already encoded in human rights law through the Convention on the Rights of the Child, which recognized adoption as a potential solution to "children living in exceptionally difficult circumstances" and called for its regulation, including so as to "ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it."[164]

ii. Jus sanguinis: law, blood and the corporeal nexus

Surrogacy unsettles these assumptions and the ensuing uncertainty directly impacts the child's rights to nationality, citizenship and, consequently, migration. In surrogacy, three potential "mothers" are in play: the egg provider; the gestator; and a commissioning party.[165] Analogously,

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gender discrimination but never cast doubt on the identity of the mother as the woman who gave birth. I am grateful to Lisa Vogel for having brought the U.S State Department's interpretation of maternity to my attention.

[163] E.g., "There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin." Hague Convention art 29. See also arts. 17, 26, 27. That these legal aspects could be addressed relatively trenchantly by the Hague Convention does not, of course, imply that the social and emotional ramifications of the transfer of parental status, and the multiplication of parental figures, in adoption is not fraught with complications. On these issues, there is a burgeoning literature. See, e.g., CONCEIVING THE NEW WORLD ORDER, supra n. 11; CULTURES OF TRANSNATIONAL ADOPTION, supra n. 11.

[164] Convention on the Rights of the Child, Preamble & Article 21(d). But see Sara Dillon, Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption, 21 B.U. INT'L L. J. 179 (2003).

[165] Assisted reproductive technologies have pluralized the subjects involved in reproduction, but only surrogacy involves a gestator who is by definition not the intended mother of the child to whom she has given birth. U.S. courts have adopted three different tests of parentage, roughly corresponding to this pluralization of pathways to maternity: the intent, genetic and gestational tests. For a recent discussion, see Linda A. Anderson, n.72. No consensus approach can, however,

two potential fathers are involved: the sperm donor and a commissioning party. How each of these roles is assigned will have profound societal implications. In matrilinear societies, for example, maternal descent determines the assignment of group identity; it is the *sine qua non* of belonging. It is perhaps in response to the pressures engendered by the development of reproductive surrogacy that a significant number of Orthodox Jewish rabbis (who often espouse divergent perspectives but largely seem to accept the legitimacy of assisted reproductive treatments), have shifted their general view of the defining characteristic of maternity. Whereas Jewish law (like the French law cited earlier) once adhered to the principle that the mother is she who gives birth, the view that the mother is the ova-provider now appears to have been endorsed by numerous authorities. A bill recently debated by the Israeli parliament would have incorporated this perspective. As a result, children born of non-Jewish ova-providers to Jewish commissioning parents would have been required to undergo conversion in order to be considered Jewish and acquire the attendant status under Israeli law.[166] However, the law actually approved by the Israeli Parliament, the Egg Donation law of 2010, provides that, at least in domestic cases, it is the *recipient of the donation* who is the mother of the child. Moreover, it is the woman who applies for permission to receive the donation who is viewed as the "recipient" and, in a surrogacy arrangement, that person may be a commissioning party**.** [167]

Israel is far from unique in its recent revisions to rules regarding filiation. At least twelve other countries have amended their legislations since 2005.[168] The unsettling of assumptions about

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be discerned either within the United States, where state policies towards surrogacy are quite varied, or internationally.

[166] See Litzman Supports Bill to Ease Egg Donations But Religion of Donor's to be Stated, VOSIZ NEIAS, http://www.vosizneias.com/49796/2010/02/21/israel-litzman-supports-bill-to-ease-egg-donations-but-religion-of-donors-to-be-stated/.

[167] I am indebted to Rabbi Edward Reichman, MD, for his discussion of the debate among religious authorities at Congregation Shearith Israel, May 7, 2011 and to Celia Wasserstein Fassberg for information regarding Israeli law. Whereas Israeli law does not specifically regulate international surrogacy, up to now the commissioning mother was required to adopt the child in Israel while the commissioning father, as sperm provider, was entitled to the recognition of his paternity on the basis of its inscription on the foreign birth certificate. But a recent judgment by a family court in Tel Aviv has determined that it is sufficient for a commissioning mother to demonstrate a genetic link to the child in order for a foreign birth certificate identifying her as the mother to be recognized as valid in Israel. See Ruth Retassie, Israel: biological mother recognized as parent in landmark surrogacy case, BIONEWS (12 March 2012) at: http://www.bionews.org.uk/page_132763.asp

[168] See Private International Law Issues Surrounding the Status of Children, supra n. 15.

parental identities is particularly salient in legal systems that recognize rules of *jus sanguinis* with respect to nationality and citizenship. Despite the moniker, *jus sanguinis* has not historically depended on blood but on legally cognizable relations. In both the civilian and common law traditions, nationality has until relatively recently passed primarily through the father and the father was not biologically defined. As the Roman maxim had it, *pater est quem nuptiam demonstrant*: the father is he who is evidenced by the nuptial, that is, the husband of the mother. The mother, however, was not the wife of the husband (which would have been tautological) but she who gave birth.[169] Paternity, in this scheme, was the dependent variable -- a function of the legal bond between a particular man and the woman who had gestated. Maternity was corporeal while paternity was not; nationality derived from the husband of the mother, not the male procreator of the child.[170] In the traditional view, "*sanguinis*" stood for "law."[171]

Today, paternity may be one of the most contested areas of law. In the United States as elsewhere, the bases for the recognition of paternal status have been expanded, including through the increasing consideration of corporeal elements (sexual relations, sperm contribution). Paternity, in other words, no longer flows solely from the father's relationship to the mother (or adoption), but may also be based on an autonomous biological and, sometimes, affective, link to the child. In countries that allow for biologically-based paternity without a commitment of the father to the gestating woman, commissioning fathers who are also sperm providers may be able

[169]As noted above, this is the principle that the Cour de Cassation underlined in the Mennesson.
[170]Under Roman law, the concept of the pater familias was substantially broader than ours and incorporated multiple pathways to filiation. See, Thomas, supra n. 123.
[171]It might be objected that the widespread strictures against women's marital infidelity was designed to ensure that the blood of "sanguinis" actually denoted the physical link between the father and the child. But this objection fails to take into account the near-impossibility of either children born outside of marriage or men who had fathered children to women married to other men to bring paternity suits well into the twentieth century. For an emblematic case addressing the relevant issues under U.S. law, see Michael H. v. Gerald D., 491 U.S. 110 (1989). A recent German lower court reiterated the primacy of legal relations with respect to the establishment of paternity at least where surrogacy is involved, even though jus sanguinis rules would normally apply. The court sustained the German Embassy's right to deny nationality to children born of a German father (who would normally be entitled to transmit his citizenship to his offspring) and an Indian gestational carrier. According to press accounts, the Court held that under German law "the legal father of a child born to a surrogate is considered to be the surrogate mother's husband not the biological father…in this case the biological father's German citizenship was legally irrelevant." N. Satkunarajah, Surrogate Child Denied German Passport, BIONEWS, May 9, 2011, http://www.bionews.org.uk/page_94158.asp.

to advance a *jus sanguinis* claim to nationality for their children. But states' receptivity to such claims is not universally assured, as the Balaz case and others attest.[172]

Even as the bases for paternity recognition have been liberalized, laws allowing mothers to transmit nationality have also been promulgated in many -- although certainly not all -- states, thus extending *jus sanguinis* rules to maternal descent.[173] Here the assumption has been that the *jus sanguinis* describes an actual physical link between the mother and the child: the mother and child share a corporeal connection, metonymically described by "blood." As the Israeli case illustrates, however, legal systems now confront the question of deciding *to which* aspect of corporeality they will attach the status of motherhood -- gestation or ova-provision -- *if any*.

The policies towards maternal filiation that states adopt are likely to both reflect and condition their positioning in the surrogacy market. But such policies reverberate with values profoundly held by domestic constituencies as well as with constitutional norms, and these may not easily align with any – even politically dominant – constituencies' perception of state interests in this regard. Nonetheless, within constraints set by municipal law and internal politics, it may be that the most fundamental differences regarding the identification of the aspects of corporeality associated with the status of "mother" will lie between states that choose to be engaged in the

[172] In addition to the Balaz case discussed above at Part I.A, see N. Satkunarajah, Surrogate Child Denied German Passport, BIONEWS, May 9, 2011, http://www.bionews.org.uk/page_94158.asp and Surrogate children have no right to German passport, court rules, THE LOCAL, GERMANY'S NEWS IN ENGLISH, April 29, 2011 at http://www.thelocal.de/society/20110428-34681.html.

[173] For states that either restrict or entirely deny the ability of the mother to transmit her nationality to a child, see the states that have entered reservations to art. 9(2) of the Convention for the Elimination of All Forms of Discrimination Against Women, which provides: "States Parties shall grant women equal rights with men with respect to the nationality of their children." For information on reserving states, see Declarations, Reservations and Objections to CEDAW, UN Division for the Advancement of Women, at http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm.
In the United States, in the early twentieth century unwed mothers of children born overseas were accorded a right to transmit their nationality analogous to that previously reserved to married fathers or fathers who legitimated their illegitimate children. The State Department "reason[ed] that, for the child born out of wedlock, the mother "stands in place of the father."" In 1934, Congress attributed the right to transmit citizenship on a basis of equality with men. See Miller v. Albright, 452 U.S. 420 (1998), (Ginsburg, J., dissenting).

reproductive surrogacy market and those that attempt to limit their participation as much as possible.

Market players, whether importers or exporters, will generally have incentives to privilege the commissioning parties over ova contributors and gestational carriers (although, as noted earlier, the relationship between norming narratives and incentives is circular, such that the perception and legitimation of interest in promoting surrogacy may reflect as well as engender justificatory discourses.) As discussed in reference to the limits of contractual arrangements, maternal rights are sticky, the legal status of "mother" hard to lose – and to acquire.[174] Unlike disembodied eggs and wombs, "mothers" garner negotiating chips vis-à-vis other claimants to parental status as well as with respect to states in which they, their children or such other claimants lives. The attribution of maternal status endows a specific person with the capacity to act as a gate-keeper to the children she has borne, and brings with it potential benefits to herself and detriments to others. In consequence, states engaged in the surrogacy market must seek to enhance the position of commissioning parties, for only then will such parties have sufficient certainty that they will not be subject to hold-ups. The Israeli Egg Donor Law (2010) cited above – which established that the mother is the recipient of the egg donation, and that in surrogacy cases, the recipient is the commissioning party – represents an instance of rule-making that simultaneously bolsters transactional certainty while weakening the negotiating ability of both the ova contributor and the gestational carrier. Analogous concerns are discernible in the impending Indian legislation. Evidence *a contrario* is provided by recent changes in rules regarding sperm donor anonymity: in states in which rules that previously ensured donor anonymity have been changed, the overall effect appears to be a reduction of available sperm.[175]

In keeping with rules designed to foster markets, it would seem that the most coherent way for states engaged in the surrogacy market to address the question of maternal *jus sanguinis* rights is to "legalize" the "blood" of the mother – that is, to substitute a legal bond (as per the Israeli case) for the corporeal bond of mother and child. Motherhood becomes, then, a status whose basis lies in *state* validation of contractual accords between the commissioning parent and – separately --

[174] See III(B)(iv).
[175] Gaia Bernstein, Donor Anonymity and Surrogacy, presentation to the International Bar Association, Fordham Law School, New York October 4, 2011.

the ova provider and the gestational carrier. To the extent to which both surrogacy and adoption rest on an intent based test of parenthood, the gestational carrier is the analog of the mother who adopts "out. But, unlike the "birth mother of adoption, the gestational carrier of surrogacy has never had the status of mother, consequently she has never been bound by any of the obligations nor has she ever had any of the rights normally attendant on giving birth, and she may be compensated at a market rate. In this scenario, two rules are established within one over-arching regulatory framework. Special rules apply to women who give birth to and to those who subsequently gain parental status with respect to children born in surrogacy arrangements; general rules to mothers giving birth outside of such arrangements.[176]

C. One regime, two treaty zones

i. A permissive treaty zone: between maximalist aspirations and minimalist possibilities

If, generally, how states define the nexus between the corporeal and the legal attributes of maternity may be expected to both reflect and determine the position they occupy in the market for reproductive surrogacy, a dual regime seems likely to emerge: one comprised by states whose filiation policies enable them to recognize reproductive surrogacy formally, legalize it, and generally further their market shares, and another by states that adopt more limitative rules designed to suppress commissioned births. The set of states in which surrogacy is legal could then constitute a "permissive treaty zone," within which the issues inherent in the transactions related to surrogacy could be decided. In a maximalist perspective seeking to ensure the highest possible level of market efficiency, agreements in this "permissive treaty zone" would address both contractual issues and state responsibilities. Questions ranging from the specific attribution of parentage to the allocation of decision-making capacity over the continuation or termination of a pregnancy -- including the circumstances (if any) under which commissioning parties could enforce clauses obligating a gestational carrier to abort a fetus – and the scope, structure and timing of allowable compensation – including the rules regarding payment to brokers and providers of medical and custodial services and entitlements to insurance coverage – would be

[176] See, in this perspective, the recommendations of the Steering Committee on Bioethics of the Committee of Ministers of the Council of Europe, supra n. 132.

determined. Moreover, a maximalist permissive agreement would detail state obligations, from ascertaining and certifying the consensual bases and formal validity of transactions to establishing and regulating access to records identifying the "biological contributors" (or their genetic traits) of the children born of surrogacy arrangements; from the implementation of means to obviate coercion of gestational carriers and gamete donors to ensuring their health care and living conditions; from the establishment of international coordination and monitoring systems to the specification of dispute resolution mechanisms for both individuals and states.

But less comprehensive – or "minimalist" – agreements could also be sought.[177] In accordance with respect for state autonomy, doctrines akin to that of the "margin of appreciation" could be invoked to enable states to adopt their own definitions of maternity, contractual requirements, and procedural mechanisms even within a framework accord legalizing surrogacy.[178] Recent debates in the Council of Europe suggest that this is a likely path. With respect to the establishment of parental affiliation, the Council's Committee of Experts on Family Law has recommended that legal motherhood be recognized to the woman who gives birth *ipso jure* and "regardless of genetic connection," but that states be free to "qualify the general rule by having rules on acknowledgement" and that "[s]tates having legislation governing surrogacy arrangements ..[be] free to provide for special rules for such cases."[179] In this framework, a minimalist agreement

[177] This is the direction recently proposed by the organizers of the Aberdeen conference referred to above. See supra n. 152 and accompanying text; Katarina Trimmings & Paul Beaumont, International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level, J. OF PRIVATE INT'L L. 627 (December 2011).

[178] Where there is a notable divergence in views among Member States, the European Court of Human Rights appears to lean towards a permissive view of the "margin of appreciation." Thus, a recent Grand Chamber decision upheld the validity under the "margin of appreciation" of an Austrian statute limiting recourse to in vitro fertilization on the basis of the lack of consensus among member states regarding assisted reproductive technologies and the conformity of the statute with a tripartite test centering on accordance with law, pursuit of a legitimate aim, and being "necessary in a democratic society." See Grand Chamber, Case Of S.H. And Others V. Austria (Application no. 57813/00), Judgment, Strasbourg, 3 November 2011 and for the earlier decision by the First Section, Case of S. H. And Others V. Austria (Application No. 57813/00), Judgment, 1 April 2010.

[179] Council of Europe, Committee of Experts on Family Law, Working Party on the New Legal Instruments on the Rights and Legal Status of Children and Parental Responsibilities, Draft instrument on the rights and legal status of children and parental responsibilities, Strasbourg, 20 April 2010. But the Committee on Bioethics of the Council's Committee of Ministers has questioned the phrase "regardless of genetic connection" and recommended that states' freedom

would largely focus on process issues, in particular with respect to state responsibility for ensuring the legality of transactions. Borrowing from the Adoption Convention, an agreement on surrogacy could require states to establish a "Central Authority" (or to accredit non-state bodies) to perform the monitoring and certification procedures that would ensure a basic set of arrangements: for example, that the treatment of the gestational carrier and genetic contributors be free of coercion, that these parties be ensured health care and the gestational carrier provided adequate living conditions, and that a process for recognition of filiation be established. [180] Again, on the model of the Adoption Convention, even a minimalist agreement might require the Central Authorities to take appropriate action where a breach of the Convention is seriously threatened or actually occurs. [181] Such an agreement would assign a high degree of autonomy to State parties, formally relying on monitoring and reporting mechanisms to ensure enforcement without providing for a mechanism allowing individual complaints to be received, although – on the model of human rights treaties among others – a procedure to hear such complaints might be established through a successive optional protocol. But, in the first instance, the success of the Convention would depend on the state parties' mutual interest in ensuring smoothly flowing transactions rather than on systems imposing quasi (or actual) judicial accountability.[182]

ii. A prohibitionist treaty zone: between criminalization and state cooperation

While states within the "permissive treaty zone" could work, then, towards various types of agreements, those who choose prohibitionist stances would presumably be limited to seeking to control cross-border transactions – or to free ride upon their existence. Attempts at control could take the form of agreements under international law. States in a "prohibitionist treaty zone" might, for instance, pursue a criminalizing convention on the model of the Palermo Protocols

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to provide special arrangements regarding maternal filiation be qualified as follows: "Exceptionally, states where surrogacy is not prohibited may provide…" Steering Committee on Bioethics, supra note 132 at paras. 22, 23 and 24.

[180] Convention of 29 May, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (entered into force 1995), art. 6.

[181] Id. art. 33

[182] Realist legal scholars have argued that state interest – including with respect to the preservation and enhancement of reputational capital -- is, in any case, the most significant factor in determining compliance.

against human trafficking.[183] As an alternative to a criminalizing approach, prohibitionist states could seek agreements (whether multilateral or bilateral) with "permissive" states, requiring that the latter actively seek to prevent transactions involving their citizens. Moreover, prohibitionist states could seek to influence the design of a permissive treaty, negotiating, for example, an agreement designed to ensure that any accord legalizing international surrogacy, whether "maximalist" or "minimalist," assign responsibility for preventively verifying the status of surrogacy in the home states of the commissioning parties to those states in which surrogacy is to be performed. Violations could then be interpreted as breaches under the law of state responsibility rather than (or as well as) individually culpable acts. Thus, the proposal for compulsory coordination set forth in the Indian draft law, which requires preventive documentation by commissioning parties of their own state's willingness to allow the child to be born of the surrogacy arrangement "entry … as a biological child of the commissioning couple/individual," would become an element of international law. [184]

iii. Mutual recognition, implied cooperation, and reciprocal advantage: one regime from two zones

But prohibitionist states could also – either implicitly or explicitly – use permissive states as a "safety valve" for their internal demand, just as permissive states could profit from satisfying that demand, capitalizing on the higher prices associated with a limited supply. Somewhat analogously to the ways in which states strategically deploy arms dealers who operate in flagrant violation of international strictures or preserve repressive abortion legislation while turning a blind eye to women who cross borders to access services, states may decide to maintain prohibitionist stances while not actively or only selectively enforcing them.[185] Thus, for example,

[183] See Protocols to the Convention Against Organized Crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air. The criminal law approach to human trafficking embedded in the Palermo Protocol has been the object of trenchant critiques. See, e.g., Janie A. Chuang, Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking law and policy 158 U. PA. L. REV. 1655 (2010).

[184] Draft Assisted Reproductive Technologies (Regulation) Bill 2010. See also, n. xx above and accompanying text.

[185] For a recent example of states strategic use of arms dealers, see Charles M. Blow, Friend With Benefits, New York Times, 11/12/11 p.A21. It is worth remembering that campaigns for the

the French Court of Cassation in the *Mennesson* case rebutted the plaintiffs' complaint that, under international human rights law, the children's best interest required recognition of their filiation and that, moreover, under the European Convention on Human Rights, their right to their family life, privacy and home demanded respect, by noting that the Court's own annulment of the transcription into the French registries of the children's birth certificates did not deprive them of their maternal and paternal filiation *as recognized under California law* and (hence) also did not deprive them of the possibility of living with the plaintiffs themselves. Therefore, the Cassation's own decision neither interfered unduly with the children's right to a family life nor ran counter to the principle of their best interests.[186] In other words, France's prohibitionist posture was authorized by the U.S.' permissive legislation. Prohibitionist states will surely continue to generate internal demand for surrogacy services that they themselves deem illicit, and permissive states will continue to service that demand, each side negotiating (and acting) in full consciousness of the other's positions.[187] As the Cour de Cassation explained, the regulatory

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legalization of abortion were often prompted by self-denunciations of women who had obtained abortions within their own – repressive – jurisdictions, and were furthered by activists blatantly organizing both the performance of abortions locally and transnational recourse to abortion services in permissive jurisdictions. In other words, states that only episodically enforced repressive measures but maintained clandestine industries – with all the attendant externalities for women's health – were compelled into legislative and judicial debates by the strategic use of illicit behavior on the part of activists. See Yasmine Ergas, 1968-79, Feminism and the Italian Party System : women's politics in a Decade of turmoil, 14 COMP. POL., no. 3 at 253 (1982); NELLE MAGLIE DELLA POLITICA (1986).

[186] « [U]ne telle annulation, qui ne prive pas les enfants de la filiation maternelle et paternelle que le droit californien leur reconnait ni ne les empêche de vivre avec les époux X… en France, ne porte pas atteinte au droit au respect de la vie privée et familiale de ces enfant au sens de l'article 8 de la Convention européenne des droits de l'homme non plus qu'a leur intérêt superior garanti par… la Convention internationale des droits de l'enfant…" Arret Mennesson.

[187] For an example of the ways in which prohibitionist policies on the development of a clandestine markets, see e.g., Fiona Govan, Ban on Surrogacy Creates Trade in 'Wombs for Rent', THE TELEGRAPH, August 1, 2006, available at http://www.telegraph.co.uk/news/1525347/Ban-on-surrogacy-creates-trade-in-wombs-for-rent.html. For a cogent argument favoring a pluralistic approach to regulation which de facto allows individuals in prohibitionist states to access services in permissive ones, see Guido Pennings, Legal Harmonization and Reproductive Tourism in Europe, 13 REPRODUCTIVE HEALTH MATTERS, no. 25, at 120-28 (2005). On the opportunistic behaviour that legal differentiation favors at an individual level, see also Richard F. Storrow, Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory, 57 HASTINGS L.J. 295, 2005-2006. Permissive states also generate prohibited exchanges: a U.S. lawyer, for example, created an inventory of available babies by exporting American gestational carriers to Ukraine, where they

regime is constituted by France *and* the U.S., by a prohibitionist jurisdiction and a permissive jurisdiction functioning together, as an integrated whole.

3. The Test of Human Rights

i. International treaties and the limiting power of human rights

Whatever the ultimate shape of the regime that emerges, whether composed of one or two treaty zones, fundamentally prohibitionist or permissive, maximalist or minimalist, criminalizing individual conduct or assigning responsibility to states, the question of its compatibility with international human rights law will arise. For several years now, courts, treaty bodies and commentators have debated the status of international human rights law in relation to general international law and to special regimes such as those constituted around trade or conflict. Some have seen human rights law as on par with other special regimes and therefore subject to the general principles of international law; others have seen such norms as justifying a claim for exceptional status. The ILC Working Group on the Fragmentation of International Law, for instance, discussing a judgment of the European Court of Human Rights regarding the compatibility of state immunities with the European Convention, noted that the Court made "no *a priori* assumption that the rules of the Convention would override those of general law. On the contrary, the Court assumed the priority of the general law on immunity…."[188] The Working Group further noted that human rights law does not constitute a "self-contained regime in the sense that recourse to general law would have been prevented."[189]

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were impregnated with sperm from anonymous donors. When the pregnancies reached the second trimester, the lawyer offered the future children to clients for $100,000, presenting them as the products of surrogacy contracts that had fallen through. See California Lawyer Ordered to Prison in Baby Scam, THE TENNESSEAN, February 25, 2012, available at: http://www.tennessean.com/article/20120225/NEWS08/302250066/California-lawyer-ordered-prison-baby-selling-scam.

[188]ILC, Fragmentation, supra n. 7, at para. 162. It is worth recalling the text of the EctHR decision to which the ILC Working Group refers: "The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account … ." While the Court concluded that the "Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity," its description of the Convention's "special character" as a human rights treaty suggests that the Convention has a particular status which differentiates it from other kinds of treaties. Fogarty v. the United Kingdom, Judgment of 21 November 2001, ECHR 2001-XI, para. 36. (emphasis added.)

[189] Id. at para. 164.

In contrast, proponents of human rights exceptionalism have highlighted the inapplicability of basic assumptions underlying general international law to human rights law. The Human Rights Committee pointedly noted that human rights treaties:

> [A]re not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41[concerning the capacity of state parties to bring complaints regarding other state parties]….[190]

The distinction between "treaties that are mere exchanges of obligations between States" and "human rights treaties, which are for the benefit of persons within their jurisdiction," the Committee asserted, required a deviation from otherwise applicable rules of general international law, specifically those enshrined in the VCLT in regard to the admissibility of reservations.[191] For, the Committee observed with a significant choice of vocabulary, treaty monitoring and enforcement mechanisms predicated on the mutual interests of states are "inappropriate" when it comes to ensuring compliance with human rights obligations.[192] In context, the term "inappropriate" signaled that more than mere inadequacy (a term the Committee used elsewhere in the Comment) is entailed when conformity to human rights is at issue; it suggested that states own interests might be understood as not necessarily coinciding – indeed, as potentially conflicting – with those of the beneficiaries that the treaties were intended to serve. Further, states' interests in each others' goodwill – or in ensuring non-interference with their own domestic conduct -- could induce them not to exercise the kind of vigilance and eventual censure with respect to each others' behavior that compliance mechanisms based on reciprocity assume.[193] And the possibility that states might not serve as trustworthy arbiters of each others'

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[190] Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) available at www1.umn.edu/humanrts/gencomm/hrcom24.htm#one

[191] Id.

[192] Id.

[193] "The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is

(and their own) compliance with obligations undertaken in regard to the populations within their jurisdictions required that the Committee itself perform a task normally assigned to states *inter se*, that is the evaluation of the compatibility of reservations with the object and purpose of the ICCPR. Finally, undermining one of the foundational principles of positivist international law, the Committee opined that, should it consider a reservation inadmissible, the effect would be to sever the reservation while maintaining the state's obligations under the treaty: a reserving state could find itself bound by terms other than those to which it had specifically consented. In this respect, then, human rights treaties not only warranted special treatment but generated special effects.[194]

Commentators have therefore viewed human rights law as a form of *lex specialis*, which effects a displacement of general rules for the specific purposes of the regime to which it directly refers but does not *per se* function as rules of general applicability.[195] But, increasingly, claims for human rights exceptionalism do not reduce human rights to a special regime like any other. In its advisory opinion on nuclear weapons, the International Court of Justice noted that while humanitarian law does effect a certain displacement of human rights law, human rights law nonetheless must guide the interpretation of humanitarian law: the relationship between the two, in other words, is not binary, Moreover, human rights law does not cease to be applicable in the context of armed conflict, an.[196] And in its subsequent opinion on the Israel/Palestine barrier, the ICJ further noted that – unless they are specifically suspended in accordance with procedures determined by the ICCPR that is, by the applicable – human rights obligations continue in the context of occupation.[197] A decade ago the European Court of Human Rights simultaneously

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made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable." Id.

[194] HRC. The issue of severability in respect to human rights treaties has generated intense debate. For a review of the relevant issues, see Roslyn Maloney, Incompatible Reservations to Human Rights Treaties: Severability and the Problem of state consent, 5 MELB. J. INT'L L. 155 (2004) (concluding in favor of severability).

[195] See Martin Scheinin, Impact on the Law of Treaties, in Kamminga & Scheinin, supra n. x, at 27-29

[196] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J.

[197] Advisory Opinion on theLegal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004 I.C.J.

underscored the "special character" of the European Convention on Human Rights *as a human rights treaty*, thereby suggesting that such treaties could claim a status not afforded to other conventional agreements, and stressed that such "special character" did not afford it primacy over general principles of international law.[198] But more recently the European Court of Justice has found that even European treaty freedoms may be limited by human rights considerations, in particular in relation to human dignity.[199] Moreover, the Court has further found that binding Security Council resolutions are subject to a human rights test: "Fundamental rights form an integral part of the general principles of law whose observance the Court ensures…. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community." The Court, moreover, assigned a power of review to itself, to verify that obligations imposed by international agreements not have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."[200] In this general perspective, international human rights law constitutes a set of *limiting conditions* within which treaties, like other efforts at international coordination, must be situated; it establishes parameters by which both national *and* international policies are to be evaluated.

ii. Does human rights law require either a prohibitionist or a permissive stance? Rereading the Balaz case through the lens of the best interests of the child

Surrogacy raises fundamental issues – the nature of personhood and the attributes of human dignity, individual autonomy and the perimeters of choice, the distinction between what can be

[198] Fogarty v. the United Kingdom, Judgment of 21 November 2001, ECHR 2001-XI, para. 36.
[199] "Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services." Case C-36/02, Omega Spielhallen und Automatenaufstellungs-Gmb Oberbürgermeisterin der Bundesstadt Bonn (Reference for a preliminary ruling from the Bundesverwaltungsgericht) Judgment of the Court, 14 October 2004

made an object of commerce, what must remain in the domain of gift and what ought not to be transferred at all. In the lexicon of human rights law, these issues resonate *inter alia* with norms regarding the commercialization of human bodily products and services;[201] the sale of children;[202] the rights of women to employment[203] and to "liberty and security of person;"[204] the rights of children to grow up in a "family environment " and to see decisions concerning them be guided by their "best interests;"[205] the rights of adults to form a family, protected from unjustified state interference in their privacy and their homes;[206] and the protection of maternity and the promotion of its "proper understanding."[207] Moreover, each step of the way along the path of reproductive surrogacy, risks of abuse loom large: when young women are enticed to "donate" ova without being fully aware of the (largely understudied) risks that may accompany the relevant operations,[208] when women are engaged as gestators, sometimes because they have been trafficked or pressured by relatives or simply by unemployment and poverty to accept contracts that often promise extraordinary financial rewards,[209] when commissioning parties are "held up"

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[201] Charter of Fundamental Rights of the European Union, art. 3.

[202] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 2 (a) of the protocol reads: "Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."

[203] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979).

[204] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 9 [hereinafter ICCPR].

[205] Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S 3 [hereinafter CRC].

[206] ICCPR, supra n. 204, art. 17.

[207] CEDAW, supra n. 203.

[208] For a report of recent research that seems to demonstrate a heightened risk of cancer associated with ovarian stimulation, see Nicholas Bakalar, Risks: IVF Brings a Slightly Higher Cancer Risk, N.Y. TIMES, November 7, 2011, at http://www.nytimes.com/2011/11/08/health/research/ivf-brings-slightly-higher-risk-for-ovarian-cancer.html.

[209] Instances of trafficking for the purpose of surrogacy have been reported in Taiwan and Vietnam. See Weena Kowitjwani, Thai organization involved in trafficking in Vietnamese surrogate mothers uncovered, ASIANEWS.IT, March 2, 2011, at http://www.asianews.it/news-en/Thai-organisation-involved-in-trafficking-in-Vietnamese-surrogate-mothers-uncovered-20916.html, Doctor involved in surrogate mother case gets probation, FOCUS TAIWAN NEWS CHANNEL, February 22, 2011 at http://focustaiwan.tw/ShowNews/WebNews_Detail.aspx?ID=201102220049&Type=aSOC.

because gestational carriers or brokers exact higher prices to "deliver" children than established by previously-negotiated agreements or border guards and consular authorities extort fees for either performing legal duties or ignoring unspoken but recognized illegalities. In these instances, too, human rights norms come into play, either by legitimating individual claims, such as that to the "highest attainable standard of physical and mental health,"[210] or by setting obligations upon states to prevent, prosecute and punish particular behaviors, including human trafficking[211] and corruption.[212]

Can these many norms guide policy-makers in determining the compliance of a particular treaty with human rights? Even more fundamentally, does human rights law *require* either a prohibitionist or a permissive stance? Under general international law, the "principle of harmonization" prescribes that "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of obligations."[213] But this principle is only of limited assistance in regard to reproductive surrogacy, for the panoply of norms potentially implicated does not align in a neat regulatory scheme. Some rights may conflict – those of gestators, for example, to "security of person" and hence to determine the progress, or termination, of their pregnancies themselves with those of commissioning parties to the performance of contractual agreements that may require that the pregnancy be carried to term or, alternatively, ended under particular conditions.[214] Moreover, key terms are often undefined. Sales of children may be prohibited, but what constitutes a sale? Does payment to a gestational carrier of "reasonable expenses" that amount to at least – if not more – than the average income she might earn in other forms of employment represent a wage and, hence, consideration for a

[210] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, at. 12.
[211] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/45/49 (Nov. 15, 2000) [hereinafter Trafficking Protocol].
[212] Convention Against Corruption, G.A. Res. 58/4, arts. 15-16, U.N. Doc. A/58/4 (Oct. 31, 2003), reprinted in 43 I.L.M. 37 (2004) [hereinafter UNCAC].
[213] ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, para. 4.
[214] ICCPR, art.9.

service performed or for the actual goods delivered, i.e. the child itself?[215] If a child has a right to develop in a "family environment," how should that "family environment" be defined and by whom if a gestational carrier and a commissioning party contend for parental rights? If "maternity" is to be protected, and the understanding of its function promoted, of what does it consist – ova provision, gestation, nurturing -- and what would "protection" entail?

By way of example, consider a hypothetical application to the Balaz case[216] of the rule that the "best interests of the child" should guide all decisions regarding children.[217] On the basis of the general international law principles that nationality and filiation are *prima facie* matters for individual states to determine, Germany and India had an equal right to confer or deny the family status and hence citizenship of the twins. But the German rule regarding filiation, barring recognition of the Balazs' parentage of the twins, *ipso facto* prevented conferral of German nationality. From a practical perspective, with expatriation towards Germany of the twins as members of the Balaz family impossible, the children faced a substantial risk of becoming wards of the Indian state.

That risk could have been obviated by the "original" Indian rule in the case, which recognized the parentage of the commissioning parties. Had Germany acquiesced to transcribing the birth certificates as initially issued, which named Ms. Lohle as the mother and Mr. Balaz as the father, the children would immediately have had a legally cognizable family that could have provided the "family environment" required by international human rights law. The Indian rule as first applied would therefore have easily comported with the "best interests" principle. As noted earlier, the Preamble of the Convention of the Rights of the Child provides that a child "should

[215] The Adoption Convention allows for payment of "reasonable expenses," but recent reviews of the implementation of the Convention acknowledge that such payments often function as surreptitious forms of compensation for the transfer of parental rights. The Secretary of the Hague Conference on Private International Law has noted: 'The connection between money and intercountry adoption is a fact of life and it is better to acknowledge that and try to regulate it,' Jennifer Degeling, The Intercountry Adoption to Good Practice Revisited: Good practice and real practice,Hague Conference on Private International Law, Nordic Adoption Council Meeting, 2009, 4-5th November, 2009, Rejkavik, Iceland. .

[216] See s. 2, above.

[217] "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." CRC, art. 3.

grow up in a family environment"[218] and further describes "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children," signaling the fundamental importance assigned to ensuring that children be integrated into family settings.[219] Finally, the Convention closely links participation in a family environment to the best interests of the child. Article 20 of the CRC can be read as embedding a rebuttable presumption that the best interests of the child are to be understood as entailing the integration of the child in his or her own family environment. Thus: "[A] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment …."[220] Here, the withdrawal of the child from his family environment in order to safeguard his best interests is posited as an exception to the general principle that the child will normally be integrated in such an environment. As applied to the Balaz case, then, harmonization of filiation and nationality rules with the best interests principle could be seen as requiring acceptance of the "original" Indian position on filiation, and, hence, a permissive posture with respect to surrogacy.

Faced with actually-existing children at risk of being denied access to family life and status, and, indeed, of being stateless, some courts and policy-makers have, in fact, invoked the "best interests of the child" to legitimate filiations that would otherwise run counter to prohibitionist national public policies.[221] But other courts have adopted a contrasting view. The decision by the French

[218] Preamble, CRC, supra n. 205, .
[219] Id.
[220] Id. art. 20.
[221] Reaching such a conclusion, UK High Court Judge Hedley commented on his own discomfort in making a parental order in the context of an international surrogacy agreement. "What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognized that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. … The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement. It is, of course, not for the court to suggest how (or even whether) action should be

Court of Cassation in regard to the Mennesson case, for instance, explicitly notes that the "best interest" test did *not* require *French* recognition of the children's filiation, which the Cassation viewed as legalizing *ex post-facto* surrogacy practices specifically prohibited by French understandings of the "ordre publique international."[222] Along lines somewhat analogous to those put forth by the Cassation in regard to Californian filiation rules, a court hearing the Balaz case might have considered that – *so long as the children's filiation were recognized in India* – nothing in German law necessarily prevented the Balazs from providing the children with a family environment, in India or elsewhere (including, perhaps, in Germany so long as a way were found to bring them into the country[223]). Such a court might further have considered the particular basis of the filiation irrelevant to determining whether the children's "best interests" were being served (that is, whether under Indian filiation law, parentage were assigned to both commissioning parties or only to the biological father *cum* commissioning party and to the gestational carrier[224]). Alternatively, it might have determined that so long as *a* "family environment" could be ensured, the German state was entitled to balance its interest in determining filiation policy in accordance with particular values against the "best interest" of the children to a family environment specifically constructed around the commissioning parties as their parents in the country of the commissioning parties' citizenship.[225] In short, if the alternative is between children becoming wards of the state and children being integrated into a family environment, the "best interests" principle will require the latter choice. But specifically which family environment, with what parental configuration, living where, will be a fact-specific determination against which courts may choose to balance state interests in pursuing particular

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taken …." Re X and Y (Foreign Surrogacy), [2008] EWHC 3030 (Fam) 2008 WL 5326758.

[222] Thus: "… attendu qu'est justifie' le refus de transcription d'un acte de naissance etabli en execution d'une decision etrangere, fonde' sur la contrariete' a' l'ordre public international francais de cette decision, lorsque celle-ci comporte des dispositions qui heurtent des principes essentiels du droit francais; qu'en l'etat du droit positif, il est contraire … de faire produire effet, au regard de la filiation, a' une convention portant sur la gestation pour le compte d'autrui, qui,fut-elle licite a' l'etranger, est nulle d'une nullite' d'ordre public …." And further: " qu'une telle annulation, qui ne prive pas les enfants de la filiation maternelle et paternelle que le droit californien leur reconnaît ni ne les empêche de vivre avec les époux X... en France, ne porte pas atteinte au droit au respect de la vie privée et familiale de ces enfants …non plus qu'à leur intérêt supérieur garanti par l'article 3 § 1 de la Convention internationale des droits de l'enfant . » Arrêt n° 370 du 6 avril 2011 (10-19.053) Cour de cassation - Première chambre civile.

[223] Id.. ("ni ne les empeche de vivre avec les epoux X….")

[224] As per the decision of the High Court of Gujarat, see supra n. 27 and accompanying text.

[225] See also Re: X and Y, supra n. 28~~221~~.

public policies. As the French Cour de Cassation so vividly demonstrated, at least some judicial authorities will find it possible to reconcile the best interests principle with a prohibitionist surrogacy treaty.

iii. Can a treaty on international commercial surrogacy survive jus cogens scrutiny?

Harmonization would be moot if either permissive or prohibitionist treaties (or both) were viewed as violating *jus cogens* norms, for treaties that contravene such prohibitions, as the Vienna Convention on the Law of Treaties specifies, are void *ab initio*.[226] Such violations could arise in at least three distinct ways: if the object and purpose of the treaty ran counter to *jus cogens*; if particular operational clauses in a permissive treaty did so; and, if the substantive result entailed by the application of a prohibitionist treaty required considering the treaty itself as *de-facto* violative of peremptory norms.

a. Permissive treaties and the problem of the sale of children

Take, in the first instance, a permissive treaty that configures the central transactions involved in reproductive surrogacy as a sale of children, either through an explicit use of terminology associated with a sale ("price," "consideration," "payment") or because it implicitly allows a *do-ut-des* entailing compensation in exchange for the transfer of the child. Would such a treaty run counter to *jus cogens* norms? Issues relating to sales of human beings have been most prominently addressed in the context of slavery and trafficking but they have also arisen in other areas, including with respect to adoption. One element of radical differentiation between slavery, on one hand, and children born of surrogacy arrangements (or adoption), on the other, regards the status of the person who constitutes the object of the exchange. By definition slaves are deprived of liberty, subjected to the coercive dictates of others, in short, humans sold as chattels to be used as chattel.[227] In slavery, the status of the person transferred *and* the mechanics of the transfer are

[226] Vienna Convention on the Law of Treaties, Art. 53.

[227] Slavery is, as the 1926 Convention specified and the subsequent Supplementary Convention reiterated, "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and 'slave' means a person in such condition or status." Slavery Convention (25 September 1926, entered into force 9 March 1927) 212 UNTS 17 and amended by the Protocol amending the slavery convention (7 December 1953, entered into force 7

prohibited, or, to put the matter slightly differently, ownership and the attendant ability to convey it are corollaries of the "thing-ness" attributed to the person being transferred.

Is *any* sale of a human being prohibited by *jus cogens*, no matter what specific status the person being sold may have before or after the sale? Or is the prohibition related to the particular condition into which the human being is transferred *as well as* to the commercial exchange? As noted above, the slave is in part characterized by his or her inability to negotiate the conditions of the transaction by which s/he changes hands. Thus, the Supplementary Convention on Slavery explicitly prohibits, as a practice analogous to slavery, the giving (or promise thereto) of a woman 'without the right to refuse' in marriage in exchange for payment 'of a consideration in money or in kind,'[228] suggesting that both the inability to refuse and the payment must be present for the prohibition to apply. But payment is not always required to connote a practice as analogous to slavery. The Supplementary Convention also proscribes 'Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, *whether for reward or not*, with a view to the exploitation of the child or young person or of his labour.'[229] Here it is the end-goal of the transfer, the 'exploitation of the child,' that leads to the prohibition rather than any compensation, which may or may not be received. Without the risk of exploitation, is the conveyance of a person from one set of hands to another always prohibited, and, more specifically, is the norm by which it is prohibited classifiable as *jus cogens?* Whereas kidnapping violates a peremptory norm, paying to redeem a victim does not; although the receipt of a bride price without the bride's consent is prohibited, payment of a bride-price (or provision of a dowry) backed by consent does not run afoul of the slavery conventions. Can the sale that enabled the conveyance of the person from one site to another in the first place ever survive *jus cogens* scrutiny? At the moment at which it occurred, the sale itself stripped the person of agency and reduced her to an alienable

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December 1953) 182 U.N.T.S. 51 (together, the Slavery Convention); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956, entered into force April 30, 1957) 226 U.N.T.S. 3 (Supplementary Convention on Slavery).

[228] Supplementary Slavery Convention, art. 1(c)(i)

[229] Supplementary Slavery Convention, art. 1(d)

object, one that, having been subject to the possession of one person, by virtue of the exchange became the possession of another.[230]

There is an evident trend in international law towards the prohibition of the sale of persons *no matter what their status either prior or subsequent to the sale itself*. Thus, for instance, all sales of children are explicitly banned by the Convention on the Rights of the Child,[231] the reduction of sales of children figures prominently among the motivations of the Adoption Convention,[232] and

[230] Here there is a distinction to be drawn between transfers of a person from one set of hands into another that nonetheless are conditioned on the consent of the person being exchanged – as might (but need not) be the case with a ransomed captive or a purchased bride – from transactions that are not predicated on such consent. There is no meaningful way to posit a new-born infant capable of expressing consent, although it is possible to construct an institutional representative of the child's interests (as in the case of a guardian ad litem or as implicitly inscribed in legislations that require judicial approval of filiations derived from surrogacy. See, e.g. Australia's model regulation, supra n. 57 s.5, "Parentage Orders.").

[231] "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." CRC, art. 35 (emphasis added). See also Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Preamble of the Optional Protocol expresses the Parties "grave" concern "at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography." This tripartite enumeration -- sale, prostitution and pornography -- indicates a distinct preoccupation with the sale of children in general and not only with sales for the particular purposes of prostitution or pornography. "Sale" is further defined in the Optional Protocol as follows: "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other compensation." Optional Protocol, art. 2(a). National legislations on adoption have reiterated the prohibition against any form of compensation, also incorporating a similar definition of "sale." Thus, in 2001, the French Civil Code was amended to provide that the consent of the legal representative of the child to the adoption must be given freely, and obtained without any consideration ("Le consentement doit etre libre, obtenu sans aucune contrepartie, après la naissance de l'enfant….") (France, Loi n° 2001-111 du 6 février 2001 relative à l'adoption internationale,Code civil, Article 370-3). And the Penal Code of Marocco was amended in 2003 to criminalize all sales of children, the sale of a child being defined as "any act or transaction that produces the transfer of a child from any person or group of persons to another person or group of persons against remuneration or any other advantage." ("tout acte ou toute transaction faisant intervenir le transfert d'un enfant de toute personne ou de tout groupe de personne a' une autre personne ou a' un autre groupe de personne contre remuneration ou tout autre avantage.") Marocco Penal Code art. 467-1, as amended by Act No. 24-03 of 11 November 2003

[232] See, generally, G. Parra-Aranguren, Explanatory Report On The Convention On Protection Of Children And Co-Operation In Respect Of Intercountry Adoption , available at: http://www.hcch.net/upload/expl33e.pdf (citing a Memorandum prepared by the Permanent Bureau of the Hague Conference on Private International Law in the drafting stages of the

human trafficking is subject to international criminal sanction.[233] Arguably, the entire thrust of international human rights law, from its recurrent references to human dignity to the specific claims detailed in the various declarations and conventions, militates against any, no matter how momentary, reduction of a person to a conveyable object of exchange: at issue is the status of human beings *per se*. Nonetheless, it may be possible to critique an overarching prohibition on commercialization of human beings for its radical cleavage of phenomena that are, in fact, enmeshed. Viviana Zelizer has shown that in intimate relations the lines between purchase and gift blur and the neat dichotomy between the one and the other that informs our judgments reveals itself to be morally blunt and sociologically thin.[234] Law-makers have also implicitly acknowledged the difficulty of drawing black-letter lines. Notably, the Convention on the Rights of the Child, enjoins state parties to "take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in *improper* gain for those involved in it" and the Adoption Convention incorporates the same reference to "improper gain," suggesting that some measure of gain may be legitimate.[235] Moreover, attentive observers of adoption markets have remarked on the failure of strategies designed to eradicate commercialization, and, indeed, have argued for its open recognition.[236] Although recognition seems difficult to reconcile with what

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Adoption Convention that included among the requirements the new convention should be designed to meet "a need for a system of supervision in order to ensure that these standards are observed (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward"). For a discussion of the Adoption Convention in the context of norms regarding the prohibition of sales of children, see Holly C. Kennard, Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions, 14 U. PA. J. INT'L BUS. L. 632 1993-1994.

[233] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, at http://www.osce.org/odihr/19223.

[234] In Zelizer's words: "Where relations are narrow and short term, we tend to call them sex work. Where they are broad and long term, we tend to call them households." Viviana A. Zelizer, Money, Power and Sex, Yale J.L. & Feminism, 18 (2006): 303, 308 (citations omitted). See also VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY (2005).

[235] Adoption Convention, Art. 8. It is worth noting that "gain" implies a potential reward that is greater than that implicated in the notion of reimbursement or cost-coverage.

[236] "The connection between money and intercountry adoption is a fact of life and it is better to acknowledge that and try to regulate it," comments the Secretary of the Hague Conference on Private International Law. Jennifer Degeling, The Intercountry Adoption to Good Practice Revisited: Good practice and real practice. Hague Conference on Private International Law, Nordic Adoption Council Meeting, 2009, 4-5th November, 2009, Rejkavik, Iceland. See also

appears to be a generalized conviction that selling human beings is *per se* violative of their dignity, the catalog of *jus cogens* prohibitions is undefined; theoretically, it may not extend to the sale of human beings outside the context of slavery and conditions considered directly analogous. But one needs to wonder whether palliative measures, representing the payment of a de-facto salary to the gestational mother for the length of her treatment, pregnancy and post-partum recovery as mere "reasonable expenses," would really pass judicial scrutiny.

If a permissive treaty characterized the relevant exchanges as service contracts rather than sales would it more likely be inured from invalidation? Such a treaty might run counter to specific prohibitions – for instance, against "making the human body and its parts as such a source of financial gain"[237] – that arguably might not rise to the level of *jus cogens.* But a requirement that states enforce specific performance by gestational carriers could be seen as contravening norms regarding indentured servitude and habeas corpus.[238] A permissive treaty might, then, risk invalidation under the VCLT as a function of the mechanisms it prescribes rather than because of the exchanges it facilitates.

b. Prohibitionist treaties and the problem of statelessness

But it is not only permissive treaties that may be held in breach of *jus cogens* rules: a prohibitionist treaty that *de facto* entails a substantial risk that children may be born who will be rendered stateless by the operation of the treaty itself may plausibly also incur the same risk. [239]

Deborah Spar THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006).

[237] Charter of Fundamental Rights of the European Union, art. 3, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[238] Some might also see an analogy to cruel and unusual punishment if not torture in the situation of a woman being forcibly separated from a child she has borne without a "waiting period" (such as that provided to birth mothers in adoption) and where the state interest is merely identified with ensuring the performance of contractual terms. For an expansive reading of torturing as including sexual crimes inter alia see Manfred Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/HRC/7/3 (15 January 2008)Citing interpretations of the Human Rights Committee regarding article 7 of the International Covenant on Civil and Political Rights, Nowak refers to sexual violence, the denial of reproductive rights (including abortion), forced abortions and forced sterilizations.

[239] For a careful discussion of this issue, see Claire Achmad, International Commercial Surrogacy: A 21st Century International Human Rights Challenge to Children and Women

In the case known as "Baby Manji," which revolved around a child born of an Indian gestational carrier at the behest of Japanese commissioning parties, the Japanese prohibition on surrogacy prevented recognition of the commissioning parties' parental status, and hence the attribution of Japanese citizenship to the child. Concomitantly, under then applicable Indian rules, Baby Manji was also not considered a child of the gestational carrier and thus not entitled to Indian citizenship. In *Re: X and Y*, children born to a Ukrainian gestational carrier as a result of an agreement with British commissioning parties found themselves in a similar quandary. Under Ukrainian law, the gestational carrier and her husband, having transferred X and Y to the British commissioning parties, had neither the rights nor obligations of parenthood; moreover, the children were deemed to have the nationality of their commissioning parents. But under U.K. law, which prohibited commercial surrogacy arrangements and therefore recognition of filiations derived from such arrangements, X and Y could have been found to be parentless and therefore stateless.[240] Save in cases in which *ius soli* rules provide a safety net, children's citizenship at birth is dependent on that of their parents; parentless, they are also stateless.[241] And stateless, they are – in fact even if not in legal theory – substantially rightless. Moreover, the deprivation of nationality – the engendering of statelessness – is *per* se a violation of human rights norms, in particular in relation to children.[242] A treaty which, because it prohibits surrogacy, bars the recognition of the filiation of those born of surrogacy arrangements and thereby creates a class of children destined to statelessness could well be adjudged in breach of proscriptions against the violation of peremptory norms.

None of the conclusions outlined above is foregone. Sales, enforced performance, the engendering of stateless children may all be interpreted so as not to fit narrow readings of *jus cogens* prohibitions. Both how a treaty regarding surrogacy is framed, what narrative of the

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Requiring Enhanced Protection, Unversity of Leiden, (unpublished L.L.M. in Public International Law thesis) (on file with the author).

[240] For a discussion of Baby Manji in this perspective, see id.; for a discussion of RE: X and Y, supra n. 28~~2221~~.

[241] It should be noted that ius soli jurisdictions may nonetheless impose requirements – for example, relating to the length of stay or the country of residence of the parents -- such that children born of surrogacy arrangements may not qualify for citizenship.

[242] "3. Every child has the right to acquire a nationality," International Covenant on Civil and Political Rights, article 24 (3). The ICCPR (article 15) also provides that "Everyone has the right to a nationality" and "No one shall be arbitrarily deprived of his nationality."

transactions involved it encodes into international law, as well as how human rights law is interpreted, will affect the treaty's ability to stand up to its inevitable and legally-mandated scrutiny under human rights law. Who will make the necessary determinations? Narratives of surrogacy have already undergone multiple permutations and will continue to do so as social movements, courts, policy-makers and politicians debate its complexities.[243] The narratives that "matter" when international agreements are formulated are those that states claim, those that their representatives articulate in negotiating arenas and ultimately reduce to points in documents that officials sign, administrations implement and courts interpret, sometimes in dialogue with human rights treaty bodies and other international institutions. Those narratives are evermore influenced by domestic and transnational networks of civil society actors, by the interaction of the delegates of one country with those of another, in sum by recursive processes that bind together national and transnational, state and civil society. From these discussions and decisions regarding surrogacy, the legal understanding of filiation, and of a basic element of social organization that states have generally defined independently of each other, may emerge profoundly reconfigured.

[243] For an in-depth analysis of the arc of American debate and case-law regarding surrogacy, see Elizabeth S. Scott, supra n. 20; see also I. Barnett and T. Steuernagle, Framing Assisted Reproductive Technologies: Feminist Voices and Policy Outcomes in Germany and the United States, paper presented to the 2005 Annual Meeting of the Midwest Political Science Association, Chicago, IL. April 7-10, 2005; S. Bernini, Family Politics: Political Rhetoric and the Transformation of Family Life in the Italian Second Republic, 13 Journal of Modern Italian Studies, no. 3, at 305-24; M.A. de Wachter and G. M. de Wert, In the Netherlands, Tolerance and Debate, The Hastings Center Report, 17 (3): 15-16 (1987); Sandra Reinecke, In Vitro Veritas: New Reproductive and Genetic Technologies and Women's Rights in Contemporary France, 1 International Journal of Feminist Approaches to Bioethics, no. 1, at 91-125 (2008).

V. Transnationalisation, the treaties of everyday life and the "reserved domain" of state sovereignty: re-visioning international law

If the market in reproductive surrogacy raises thorny issues of international coordination and normative conflict that affect ordinary people in ordinary times, it is not unique in doing so. The transnationalization of everyday life is developing rapidly, bringing a spate of conflicts generated by the divergence of legal orders. As reproductive surrogacy illustrates, crossing borders can no longer be viewed exclusively within the framework of migration, with its implication that one dominant national legal framework replaces another in a particular person's experience. An American couple that commissions a child through surrogacy arrangements in India does not necessarily mean to live in India, a French woman who obtains a degree in the UK may not wish to remain there, an Australian who marries an Englishman in Venice may not settle on the Rialto; moreover, the Australian woman who married in Venice may be the American wife of the Englishman who travelled to India to commission a child with whom he and she returned to the United States (and who may have birth documents pertaining to the several jurisdictions of his parentage and residence if not, as in the Balaz case, of his birth): crossing borders has become a routine aspect of lives in which multiple national legal frameworks come into play, often simultaneously rather than sequentially, for discrete purposes rather than to re-ground the entire set of practices that together make up a life.[244] Otherwise stated: *the personal is transnational.*

A. International law: from crisis to everyday life.

It may be tempting for international lawyers to turn away from an arena whose dramas are largely lost to anyone other than the individuals involved and the particular consular authorities on whose desks their dossiers land. As an academic discipline, international law -- Michael Riesman noted -

[244]In this perspective, the formation of non-national identities may be an aspect of the transnationalization of everyday life, but does not necessarily circumscribe such transnationalization: people can go abroad to get married without identifying with the population of the place in which they are getting married. See THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 79 (2001).

- is crisis driven.[245] Proposing a teaching methodology that would supplement – if not supplant -- the case method and the analysis of legal texts, Riesman focused on peak events -- or "incidents" -- that "highlight overt conflict[s] between two or more actors in the international system"[246] and could serve as "as a prism though which the reactions of elites to particular behavior may be examined and assessed as an indication of their views of law." Shifting the emphasis away from elite perceptions, Hilary Charlesworth commented that international law might look quite different, and the interpretation of those same incidents be notably revised, if it fore-grounded issues that arise in everyday life and developed a methodology adequate to that task. In Charlesworth's proposal, such a methodology would begin by examining structural justice on a global scale and assume the points of view of non-elite groups. "For example," she notes, "we should be able to study 'humanitarian intervention' from the perspective of the people on whose behalf the intervention took place."[247]

Charlesworth analogized the crisis orientation of international law to once-conventional narrative historiographies that focus on discrete events (largely to do with politics and the state) and particular personalities (largely the leading figures implicated in those events). In contraposition to such historiographies, Charlesworth invoked the work of the Annales School: against *l'histoire evenmentielle,* the historians of the Annales pitted the *longue duree'* of crystallized social relationships and modes of interaction that structure everyday life.[248] As Fernand Braudel explained: "Everyday life consists of the little things one hardly notices in time and space…. The event is taken to be unique; the everyday happening is repeated; and the more often it is repeated the more likely it is to become a generality or rather a structure. It pervades society at all levels, and characterizes ways of being and behaving which are perpetuated through endless ages."[249] Braudel saw in "everyday life" the structures that support centennial patterns of social behavior

[245]INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W.Michael Riesman & Andrew R. Willard eds., 1988).
[246]Id. at 15. Proposing the "incident" as a "new international epistemic unit," Riesman goes on to specify the "incident … takes a single critical event as a prism though which the reactions of elites to particular behavior may be examined and assessed as an indication of their views of law."
[247]Hilary Charlesworth, International Law: A Discipline of Crisis, 65 MOD. L. REV. 377, 391 (2002).
[248]Id. at 389
[249]FERNAND BRAUDEL, I THE STRUCTURES OF EVERYDAY LIFE 29 (1981).

rooted in a "material world" made of money and printing presses, bread and dresses, that coexisted (and survived) the fractures brought about by economics and peak events.

But where Braudel and his colleagues saw continuity, social theorists have located conflict and change, self-fashioning as well as inherited structure. For Agnes Heller, "in everyday life the person … shapes his world (his immediate environment) and in this way he shapes himself." She goes on to remark: "At first sight 'shape' may seem too strong a term; after all we have done no more than define everyday activity as the process of growing into a 'ready-made' world, the internal process of accomodation to the world's requirements. …[But] [T]he 'everyday' includes not only what I learned about life's fundamental rules from my father, but what I teach my son as well."[250] In this dialectic between the given and the made, between the burden of the past and the invention of the future, between the static nature of communal society and the dynamic nature of the contemporary world, the everyday becomes the site of both stability and rupture. In Heller's terms: "everyday life is the basis of the current of history. It is from the conflicts of everyday life that the greater conflicts of society in the mass are generated: answers have to be found to the questions thrown up in these conflicts, and no sooner are these settled than they reappear to re-shape and re-structure everyday life anew."[251]

Heller's "conflicts" that spawn transformation are not simply haphazard collections of incompatibilities but expressions of structural dynamics. No one has contributed more to highlighting the structural significance of the conflicts that permeate everyday life than those feminist activists and scholars who first sought to pierce the veil of presumptive irrelevance that obscured the personal -- and the quotidian – from political discussion, and, in so doing, questioned the operation of the distinction between the "private" and the "public" and its implications for gender relations .[252] That distinction is reflected in the differentiation between

[250] AGNES HELLER, EVERYDAY LIFE 6 (1984).
[251] Id. at 47.
[252] To question the operation of the distinction between public and private does not (necessarily) entail undoing that distinction per se. To the contrary, it is entirely possible to question how that distinction has been variously drawn, in which circumstances and with what consequences for whom, so as to re-set it – thereby simultaneously denaturalizing the boundary of the private sphere and evidencing its politically constituted (and constitutive) nature. In contemporary law, the enjeux of these negotiations include definitions of the "family," the rights and obligations

state and non-state actors that informs international law, hindering its capacity to address the issues that most directly affect women's lives: to the extent that international law centers around the commitments that states undertake with respect to each other, it directly regulates state action; the actions of non-state actors enter into its purview only in as much as states may be made to bear responsibility for them.[253] Yet the means for broadening this lens must be found, for it is impossible to mainstream gender perspectives into legal analysis, including into international law, without looking to those domestic arenas in which state action is indirect and private actors dominate that have traditionally been excluded from the "high politics" of inter-state relations.[254] Braudel, Heller and contemporary feminists each in different ways, lead to the conclusion that without understanding everyday life the factors that affect the development, implementation, interpretation and very legitimacy of law -- as of any other feature of social life -- cannot be grasped.[255]

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associated with the concept of "privacy," and the spheres of intimate relations. On contemporary legal and political revisionings of intimacy and its boundaries, see JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM (2002).

[253] See Hilary Charlesworth, Christine Chinkin & Shelley Wright, Feminist Approaches to International Law, 85 AM.J.INT'L L. 613, 625-26 (describing the ways in which the "normative structure of international law … rests on and reproduces various dichotomies between the public and the private spheres and the "public" sphere is regarded as the province of international law."); see also HILARY CHARLESWORTH & CHRISTINE M. CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

[254] The main solution developed thus far centers on the concept of due diligence, which assigns responsibility to states for their failure to prevent, prosecute and remedy specific illegal actions of private actors, although not for the actions of such actors themselves. While "due diligence" obligations have gained particular salience with respect to violence against women, the concept itself was most famously enunciated by the Inter-American Court of Human Rights in reference to state responsibility for private actors' engagement in torture. See Velazquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm. In a slightly different perspective, this essay argues that the capillary regulation of everyday life that characterizes contemporary states highlights the politically constructed nature of the distinction between private and public, and thus places the definition of the private sphere (and of private actors) within the purview of the state.

[255]Remarking on the "growing perception that law is a social phenomenon and ... legal doctrine and legal actors are integral parts of the landscape," Leon Lipson and Stanton Wheeler noted: "If legal events and actors are thus interwoven with the society, understanding legal phenomena requires examining them not in isolation but in relation to the surrounding social world." LAW AND THE SOCIAL SCIENCES (1986) (Leon Lipson and Stanton Wheeler (eds).

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The Transnationalization of Everyday Life: Cross-Border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law

The historians of the *Annales* have long established their own orthodoxies and spawned dissenters and innovators. The attention they have drawn to the social world has in part overlapped with the growth of the social sciences, which have long focused on the ways in which individuals construct and experience everyday life.[256] And lawyers and social scientists have interacted systematically for decades now, *inter alia* finding common ground in the law and society movement. Moreover, feminist critiques of international law have left their mark, perhaps most notably in the elaboration of due diligence standards with respect to states' responsibilities for preventing, prosecuting and providing remedies for acts of violence against women, the emerging recognition of rape in conflict as a crime of war, the appointment of special rapporteurs with mandates related to the protection of women, and Security Council resolutions on the protection of women and their inclusion in peace-building processes. Nonetheless, *international* law as an academic discipline has remained largely constrained by the gravitational pull of large-scale crises and discrete incidents.[257]

This has induced, as Charlesworth pointed out in reference to Riesman's analysis of international law, a characteristic myopia, for the focus on crisis and incident leads to underplaying the experiences of those who live through such crises and incidents, even though they may be epiphenomena of underlying forces that could themselves be of interest to international lawyers, such as the global inequality of wealth, which Charlesworth mentions, or the international market in baby-making on which this essay centers. More fundamentally, however, by setting its sights on the extraordinary and macroscopic, international law may be missing an opportunity to gauge impending transformations and, paradoxically, to detect while they are still *in fieri* the very crises that will later draw its attention, and that may, indeed, portend significant transformations in its own assumptions and *modi operandi*. For the "small conflicts" that so often remain buried in consular offices – conflicts like the one that embroiled the Balaz twins surrounding the filiation of children born from surrogacy arrangements -- and that rarely galvanize state leaderships may be

[256] For a synoptic guide through the relevant literature, see CONTEMPORARY SOCIOLOGICAL THEORY (2009) (Craig Calhoun et al. eds.)

[257] International -- and other -- lawyers have, however, frequently registered the distances that separate legal norms from social realities; on the reflection of this discrepancy in the postures that international lawyers assume, see David Kennedy, Autumn Weekends: An essay on law and everyday life, in LAW AND EVERYDAY LIFE 191 (1993) (Austin Sarat & Thomas R. Kearns eds.), .

like the "small earthquakes" scientists study: "potential... 'beacons' for the mechanical state of the crust,"[258] or, in our case, flashes of light along the fault lines of relations among states whose movements will ultimately reshape the tectonic plates of legal doctrine**.**

Even a rapid glance at the indexes of leading journals of public international law reveals that the issues that most frequently capture the authors' and editors' imaginations revolve around matters that are most easily recognized as germane to legal regulation between states: armed conflict, trade, border-setting, diplomatic privileges and immunities. Whether coincidentally or purposefully, the catalog of issues discussed in international law journals appears to reflect (and respect) an assumed demarcation between the "reserved domain" of matters appropriately left to the "essential jurisdiction" of the state and those properly within the field of inter-state dealings. Two caveats are needed to qualify this assertion. First, human rights issues *do* appear in such journals, albeit largely when treaties either have been or are in the process of being negotiated, such that when matters of everyday life are rendered salient by a human rights treaty and have already been framed in human rights terms, they will then garner attention. Second, when extant treaties directly address matters of everyday life – such as privacy and home life – then the related themes also garner scholarly attention. In these cases, too, like in those concerning trade or armed force, attention is predicated on the recognition that state action has or will be implicated.

But when is state action implicated? More pertinently phrased: when is state action *not* implicated? In contemporary states it is difficult to identify spheres of social life that are not significantly shaped by public policies. Feminists have long argued that the public/private divide is a creature of law, that is, of the exercise of public power.[259] But in international law, the ways in which states constitute and regulate actors and actions that they define as "private" has been implicitly understood as being encompassed within the "reserved domain" of their domestic jurisdiction. States' own definitions of the boundaries between public and private have not always

[258]Leonardo Seeber & John G. Armbruster, Earthquakes as Beacons of Stress Change, NATURE 407, 69-72 (7 September 2000) at http://www.nature.com/nature/journal/v407/n6800/abs/407069a0.html.
[259] See, e.g. Martha Minow. For the implications of this divide in international law, see Charlesworth, Chinkin and Shelley, supra n. 253; Charlesworth & Chinkin, supra n. 253.

been taken at face value by the international community. Most notably, the law of state responsibility calls into question states' ability to distance themselves from putatively private actors. This issue has most frequently arisen in the context of armed conflict but it has also been invoked in relation to especially egregious events such as torture and, more recently, violence against women.[260] The basic premise that the distinction between private and public is a matter for states to draw remains undisturbed unless exceptional circumstances apply.[261] But even were the transnationalisation of everyday life to revolve solely around actors and events situated in areas that states define as "private" – which, as noted above, it does not -- it still would not for that reason be situated beyond the scope of international law and scholarship. While state action is manifestly involved in realms that extend from family relations to education, access to information to access to health care, by highlighting questions that implicate states' presumptive sovereignty in drawing distinctions between private and public, state and non-state actors and arenas, the transnationalization of everyday life and the legal dilemmas it engenders not only train scholarly attention on the very premises of international law itself but also call for a broadening of the scope of the discipline.

B. 'Westphalia' and the 'reserved domain' of states' essential domestic jurisdiction

The notion that arenas of domestic sovereignty can be demarcated and preserved from the encroachments of the international community represents a foundational myth of modern international law. The Westphalian paradigm constituted around the "Right of Sovereignty" has at its heart the claim that a state can exercise autonomous control over its "internal affairs," and

[260] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd Session (2001), and the attendant commentary, in particular Chapter II, Attribution of Conduct to a State.

[261] Thus, for example, the issue of state responsibility for violence against women, which, in a statistical perspective could appear so pervasive and firmly rooted in cultural practices as not to warrant the label of exceptionalism, justifies international legal attention by reference to its gravity. Such attention has, moreover, issued in the promulgation of due diligence norms that do not per se call into question the ways in which states distinguish private from public (unlike, for example, the norms regarding attribution in the Draft Articles on State Responsibility). See Alice M. Miller, Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection, 7 HEALTH AND HUMAN RIGHTS 16, 16-47. For an analysis that finds a direct form of state action in violence sufficient to satisfy the requirements of the Convention Against Torture, see Manfred Nowak, supra n. 238.

that its relations with other states are based on specific agreement.[262] Ian Brownlie described the legal notion of the "reserved domain" of state jurisdiction as a "basic constitutional doctrine of the law of nations."[263] More recently, referring to the United Nations Charter and, specifically, article 2(7) which limits the scope of United Nations actions in relation to states' domestic affairs, former Under-Secretary General for UN Peace-keeping Operations Jean-Marie Guehenno has talked of the agreement to draw a distinction between states' external affairs (potentially subject to international scrutiny) and their internal matters as essential to the settlement upon which the organization was founded.[264] The effectiveness of this distinction has long been subject to question: Stephen Krasner famously described sovereignty as "organized hypocrisy."[265] For Krasner, variations in observance are structural features of international relations, reflections of power asymmetries, divergent interests and the lack of a central authority.[266] But as a matter of international law, variations in respect for the demarcation between the internal and external domain have been accompanied by a continued acceptance of the dichotomy between these two

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[262] See, e.g., Stephen D. Krasner, The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law, 25 MICH. J. INT'L. L. 1075, 1077, (2003-2004). Krasner includes among the three basic traits of "Westphalian/Vattelian sovereignty " the maxim "do not intervene in the internal affairs of other states." This interpretation torques the Westphalian doctrine in a positivist direction; a reading based on a natural law perspective would not place a similar emphasis on the inherent autonomy of states with respect to their internal conduct. Vattel, for one, writing over a century after the establishment of the Peace, distinguished between the natural law that ruled the internal conduct of states and the voluntary and arbitrary laws that regulated the relations among nations. Thus: "The necessary and the voluntary laws of nations are therefore both established by nature, but each in a different manner: the former, as a sacred law which nations and sovereigns are bound to respect and follow in all their actions; the latter, as a rule which the general welfare and safety oblige them to admit in their transactions with each other. The necessary law immediately proceeds from nature; and that common mother of mankind recommends the observance of the voluntary law of nations, in consideration of the state in which nations stand with respect to each other, and for the advantage of their affairs. " To this dual system based on "nature," Vattel added "arbitrary law," that is the law based on the consent of states, either in conventional or in customary form. Natural law – not the law that each state saw fit to enact – thus governed the internal affairs of states within an overall framework in which the principles of internal and external governance were sharply differentiated. Emmerich de Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758) (Joseph Chitty, Esq.trans.), available at http://www.mindserpent.com/American_History/books/Vattel/LawofNationsVattel.pdf.

[263] Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291 (7th ed. 2008).

[264] Jean-Marie Guehenno "Peace-keeping: Testing the Limits of the Concept of International Community," Sherrill Lecture, Yale Law School, December 15, 2008, available at: http://ylsqtss.law.yale.edu:8080/qtmedia/lectures08/YLSSherrillGuehenno121508_s.mov

[265] STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

[266] Id. at.1078.

spheres. "Westphalia" – taken to signify the affirmation of the concept of the sovereign equality of states *in respect to* their independent control over their own *internal* affairs -- one might say, naturalized that dichotomy, masking its political constitution behind the veil of sovereignty, such that inconsistencies in its application have been justified by way of exception rather than as the inevitable result of ongoing contestations over an inherently unstable boundary.[267]

That this boundary was simultaneously constructed and constitutive of the international order was clearly evident to the drafters of the Covenant of the League of Nations and the United Nations Charter as well as of other international agreements in which the nature of statehood and the meanings of sovereignty were explicitly at issue. The Covenant assigned the ultimate determination of whether an issue fell within the domestic jurisdiction of a state to the Council of the League, thus identifying that determination as a matter of international competence.[268] The Montevideo Convention on the Rights and Duties of States -- largely viewed as codifying customary international law, and often taken as a paradigmatic expression of the view of statehood in international law -- required a state to have a defined territory, a stable population, a government and the capacity to engage in foreign relations.[269] That Convention also drew a wall around the boundaries of entities meeting such criteria: the parties to the Convention agreed not to legitimate any territorial acquisitions effected "by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure." Simultaneously, they agreed that state jurisdiction applied to all inhabitants within the territory (whether national or foreign) and that "foreigners may not claim rights other or more extensive than those of the nationals." In other words, foreign states could not procure special benefits for their own citizens, for the benefits available to those within a state's jurisdiction were determined by the state itself. Finally, the parties to the Montevideo Convention declared that "[N]o state has the right to intervene in the internal or external affairs of another," the use of both

[267] But see Alvarez, IOs as lawmakers, supra n. 7 at 156-57; n. x (ACUNIS). On the indeterminacy of the "reserved domain" see generally n. xx and accompanying text.
[268] "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." Covenant of the League of Nations, art. 15. See Jose L. Alvarez, infra, commenting on this article and its subsequent transformation in the United Nations Charter.
[269] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 L.N.T.S., article 1

sides of the binary opposition (internal *and* external) indicating that *all* affairs of state -- *whether* internal *or* external -- are matters over which the state exercises exclusive jurisdiction. [270] Although the criteria for defining the "internal" and "external" affairs of a state remained unspecified, in contrast to the Covenant of the League, the tenor of the Convention generally suggests that such a determination must fall to the states themselves.

The United Nations Charter embedded a similar presumption: a state's jurisdiction over its domestic sphere could only be limited in exceptional circumstances. Article 2(7) circumscribes the Organization's reach to "the application of enforcement measures under Chapter Vll." Nonetheless, the substantial indeterminacy with respect to the demarcation between "internal" and "external" affairs that characterized the Montevideo Convention was amplified by the silence of the United Nations Charter, which, in article 2(7), conspicuously failed to assign responsibility for drawing the boundary between domestic and international jurisdiction. The result, as Alvarez notes, has been structural uncertainty not only over where that boundary lies but also regarding by whom and with respect to which legal and other parameters it is to be determined.[271] In consequence, the push and pull between attempts by the United Nations to assert its competence and defenses by states seeking to limit its interventions has permeated the history of the organization.

C. Denaturalizing the boundary between the internal and external affairs of states

Over the last few decades, the mythology of a "natural" demarcation between the internal and external affairs of states has come under increasing scrutiny. Political scientists have discussed "gradations of sovereignty" and the "unbundling" of sovereignty into a series of discrete rights.[272]

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[270]Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 L.N.T.S., articles 9,8.

[271] See Jose E. Alvarez, The "Right to be Left Alone" and the General Assembly, in Abiodun Williams et al. Article 2(7) Revisited, ACUNIS, Reports and Papers 5, 1994, 5-20.

[272] On gradations of sovereignty, see R. Keohane at n. 285.On the unbundling of sovereignty, see Alvarez. It is worth remembering that years ago Louis Henkin famously relegated the concept of sovereignty to the "shelf of history as a relic from an earlier era." But Henkin also saw in the attributes often taken as characterizing sovereignty the "indicia" of statehood: amongst these were independence, autonomy, territorial authority, integrity and inviolability, impermeability and "privacy," traits associated with the ability to exercise ultimate jurisdictional authority over one's actions. Louis M. Henkin, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995)

Political theorists have underlined the emergence of "cosmopolitan law," an "international public law that binds and bends the will of sovereign nations,"[273] even as they have tracked an emergent "imperial right," exercised by a hegemonic power that "posits equivalence between its interests and those of the "international community "" and then construes the implementation of those interests as its responsibility (and prerogative) and argued for newly negotiated forms of sovereignty within international institutions. [274] Lawyers, long used to the concept of "transnational legal process," have heralded the advent of "global law." And the emergence of "humanity law" out of the conjoined operation of human rights law, international criminal law, and the laws of war has been taken as signaling a profound reorientation of the international legal order from the prioritization of state security to the centrality of human security.[275] Several developments have prompted such attention, which it is beyond the scope of this essay to discuss comprehensively. Among these, however, the doctrine of the responsibility to protect ("RtoP") and the broadening scope of human rights law have appeared particularly salient.

i. The Responsibility to Protect

As the recent campaign in Libya demonstrated, RtoP can be invoked to legitimate humanitarian intervention, for it explicitly articulates a conditional view of sovereignty, predicating respect for territorial integrity on the observance of minimal human rights criteria. It is important to remember, however, that RtoP is legalized by state consent: the conditionality of sovereignty, and the potential intrusion by the international community on the state, implicitly rests on the state's own prior agreement; the document that enshrined RtoP was unanimously approved at the World Summit in 2005.[276] RtoP thus dialectically reaffirms the view of sovereignty as autonomy even as it establishes grounds for its transcendence. As the International Court of Justice remarked over fifty years ago, sovereignty consists in the ability to bind oneself, not in being unbound; RtoP builds on state consent, not on its negation, even though that consent, having been given, creates

[273] SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 16 (2006).
[274] Jean L. Cohen, Sovereign Equality vs. Imperial Right: The Battle over the "New World Order," 13 CONSTELLATIONS 485, 495, (2006).
[275] See RUTI TEITL, HUMANITY LAW (2011).
[276] I use the term "legalize" cautiously as the status of RtoP as a legal matter is subject to debate; RtoP can probably best be described as an "emerging norm of customary international law." The legality of the actions undertaken are therefore (still) directly dependent on Security Council authorization. See Michael W Doyle, International Ethics and the Responsibility to Protect, 13 International Studies Review 72-84 (2011).

the possibility that the state's *dissent* in any particular situation may be over-ridden.[277] With its carefully limited catalog of triggering crimes – genocide, ethnic cleansing, war crimes and crimes against humanity – RtoP authorizes third-party use of force in relation to a state's internal policies only *in extremis*.[278] Moreover, such intervention, being based on a decision taken by the Security Council *acting under Chapter VII of the Charter*, is technically dependent on a prior finding of a threat to international peace and security. The elasticity with which the Security Council has interpreted threats to international peace and security should not obscure the fact that, even in the face of the worst crimes committed by a state against its own people, third party rights of intervention are ordered around the distinction between the internal and external affairs of states: it is its grounding in the latter that legitimates international action. Such legitimation, moreover, ends with the abuse of the people; its reach does not extend to effecting regime change, even though, in practice, a durable solution to abuse may necessitate a change of government. International intervention in internal affairs, in other words, is temporary and confined. Through their acceptance of RtoP, states authorize external scrutiny over their domestic conduct, albeit as an exceptional matter; they predicate such scrutiny on a violation of *international* peace and security. The basic distinction between the internal and the external, the reserved domain and the arena of international competence is salvaged.

ii. International human rights law

But it is the development of human rights law that has most drawn attention to the permeability of the demarcation between a state's internal and external affairs. Human rights obligations are presumptively grounded in state consent, whether explicit, as in conventions, or implicit, as

[277] Keohane notes that "the classic conception of sovereignty prohibits governments from agreeing to rules defining a process, over which it [sic] does not have a veto, that can confer obligations not specifically provided for in the original agreement." Robert O. Keohane, Ironies of Sovereignty: The European Union and the United States, 40 Common Market Stud. 743, 748 (2002).. The consent of the state to the intervention of the international community – through the Security Council -- is given generally although not particularly in each case; sovereignty only requires that the initial agreement be subject to a possible veto, not that the state continue to detain a veto power after the agreement has been established. See Wimbledon case, PCIJ, Series A., No. 1 (1923) (sovereignty entails the capacity to bind oneself, not the freedom to unbind oneself at will).

[278] On the emergence of RtoP and its antecedents in political philosophy and ethics, see Michael W. Doyle,n. 284

through customary international law and general principles "recognized by civilized nations."[279] To phrase the issue somewhat differently, as a result of the contractual view of relations among states that Westphalia has come to represent, the mythology of consent is fundamental to the legitimacy of international law, including to that specifically regarding human rights. As has often been remarked, human rights law entails the submission by states of their internal affairs to international oversight. But both the legality and the legitimacy of this oversight, as well as the capacity of international institutions to exercise it, are subject to agreement. Whereas the major human rights treaties establish reporting procedures, it is generally their accompanying optional protocols that allow for complaints, and such protocols must be separately agreed. While human rights law and institutions claim a super-ordinate status with respect to both domestic legal orders and other forms of international law,in practice their ability to exact compliance depends on powers of persuasion conjoined with reputational and other interests far more than on the exercise of coercion. Like RtoP, human rights law is based on the dialectical interplay between the affirmation and the delegation of state sovereignty over internal affairs.

Nonetheless, to date, the international human rights regime has provided the greatest impetus to the denaturalization of the distinction between the "reserved domain" of state action and the arenas of international competence. In part, this is due to the breadth of international human rights law, for no area of social organization seems inured from its reach. But, in part, structural features of international human rights law engender the denaturalization of the boundary between the internal and external affairs of state *per se*. Human rights law establishes a floor (rather than a ceiling) on which other attributions of rights putatively stand; in principle, it defines the minimal standards by which all municipal systems are to be evaluated. The view from international human rights law is of itself as simultaneously internal and external, endogenous and exogenous to the state system as a whole, for it is generated by states but relatively autonomous with respect to them, dependent on consent but constraining action in the face of dissent, perpetually poised between what states can decide for themselves (their domestic jurisdiction) and what is subject to collective regulation (the international domain). From this continuous oscillatory movement between dependence and autonomy, consent and constraint, national and international, such law derives its critical potential, and weakness.

[279] Statute of the International Court of Justice, art. 38(1)(c).

For that critical potential is blunted by the continued centrality of states in translating external norms into internal obligations. Although under international law states are bound from the moment that an obligation has been assumed, from the perspective of states, they are bound when that obligation has become effective within their national legal orders. A state may not plead the inconsistency between its municipal law and its international obligations to excuse non-performance of the latter *vis-a'-vis* the international community but, within the state itself, it may not be seen to act in contravention of its domestic law.[280] The view from states of international human rights law, as of all international commitments, is one of limited obligation -- states can only be bound to that to which they have consented to be bound *and* to which they have become bound by the operation of their own legal orders. As a corollary, international human rights law does not inform routine state law-making except to the degree that, having been internalized, it has been "domesticated."[281]

iii. The treaties of everyday life

The regulatory conflicts engendered by the transnationalization of everyday life do not primarily arise from a comparison with a universalizing external norm but from the incompatibility of particular domestic norms. And the regulatory frameworks that are now being and will continue to be called forth emanate directly from the normal operation of national legal systems: states daily find themselves addressing issues of family formation, educational credentialing, pensioners' rights, or access to health care. It is these routine matters of state operation that have traditionally been identified with the "reserved domain" of state jurisdiction that are increasingly becoming the subject of international negotiation and regulation. And that regulation, as the case of surrogacy exemplifies, cannot but take the form of explicit agreements among states.

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[280] See, e.g., VCLT.An international obligation becomes immediately effective in domestic law only when the state's internal legal order so disposes, or because it has accepted the direct effect of international provisions. See, e.g., Van Gend en Loos, European Court of Justice, 1963. Even fully monist systems, in which international law is immediately effective, are such in as much as they themselves have legally defined themselves accordingly: as a result, that is, of an internal decision-making process that provides the legal grounding for the automatic incorporation of international law into the domestic order.

[281] On the factors affecting states' commitment to human rights treaties, see Beth Simmons, supra n. 7, at 57-111.

a. The insufficiency of law without the state

In a perspective that circumscribes the role of states in emerging and future forms of governance, some have argued that the transnationalisation of economic and social practices produces "law without a state," the *lex mercatoria* constituting a prime instance of rule-generation by autonomous communities of practice.[282] But the example of the merchants' law – and its internet-based successor, the *lex digitalis* -- is of limited applicability in the specific contexts with which this essay is concerned: the reach of contemporary states extends to virtually all areas of ordinary life. While the balance between private and public varies across sectors and across borders, the capillary scope of contemporary states means that it is difficult to envisage systematic transnational social interaction giving rise to law without states having engaged in providing platforms for such interaction and regulating its effects. The rule-generative activity of communities of practice will not suffice to address the crises created when the filiation of children born of cross-border surrogacy is not recognized, when students who have gone abroad to obtain valuable educations find that their credentials garner social respect but bar them from universities or professions in their own countries, when pensioners retire outside the countries in which they have spent the largest part of their working (and contributory) lives, sometimes encouraged to do so by their own states of origin, only to find that their access to social services or their ability to bank their pensions is limited or when same sex couples married in one jurisdiction find that their marriage (and, with it, their rights) are not cognizable in the state where they have chosen to live. In all these instances and many more, agreements among private actors

[282]Cfr. Andreas Fischer-Lescano and Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 MICH. J. INT'L L. 999, 1010. Fischer-Lescano and Teubner argue that "'Transnational communities' or autonomous fragments of society, such as the globalized economy, science, technology, the mass media, medicine, education and transportation are developing an enormous demand for regulating norms which cannot… be satisfied by national or international institutions. … They have recourse to their own sources of law, which lie outside of national law-making and treaties." Noting that "[p]eople trade first … and they develop customary norms of trading in their commerce," Jeremy Waldron has argued that communities of practice engender customary rules, which, while not enforced by states, nonetheless operate as positive – rather than "purely notional or moralistic" – rules. Jeremy Waldron, "Cosmopolitan Norms," in S. Benhabib cit. at n., p.94. For a general analysis of the transformations engendered by the privatization of international law, which recognizes the continued role of the state in regimes shaped and/or administered by private actors, see Paul B. Stephan, Privatizing International Law, 97 Va. L. Rev. 1573 (2011).

cannot substitute for the durably coordinated inter-state action – either legislative or administrative and often both – that is required for the children to be repatriated, the students enrolled, the pensioners paid and cared for, and the matrimonial bonds recognized (or not): in short, for the individuals in each one of these cases to cross boundaries the way merchants navigate the seas. Whatever specific shapes particular regulatory regimes may take, they will bear the imprints of inter-state negotiation and will result from explicit inter-state agreements.

b. Beyond the dichotomy between human rights treaties and "webs of interstate exchange."

While the effectiveness of the ensuing regimes will depend on the continued interest of states and their constituencies in their application, they will be profoundly affected by the operation of human rights law – for such law will not only have determined the general frameworks within which specific agreements will have been found, they will likely also have provided specific guidance with respect to the substantive issues that arise when matters ranging from individual privacy to family formation, education to pensions, health to rights of establishment and participation in public debate are at stake. The treaties of everyday life call into question the distinction that has so frequently been invoked between human rights conventions, with their intrusions into the arenas of state sovereignty, and those other – implicitly, "normal" -- treaties that the Human Rights Committee characterized as a "web of inter-state exchanges."[283] Political scientists and lawyers have seen different logics at work in agreements that regulate mutually beneficial forms of cooperation and human rights treaties in which states pledge to each other that they will treat those who fall under their jurisdiction with a margin of decency: compliance with the former being easily understood as motivated by interest, compliance with the latter being harder to explain and to track.[284] But the transnationalisation of everyday life means that one state's regulation of its domestic sphere directly affects the citizens of another state. How a state treats its own citizens becomes a matter of immediate concern to another state, and the particular issue, whether filiation, marriage, education, or medicine, hitherto regulated by each state separately, becomes a subject of inter-state negotiation, and ultimately, of international law. Sociological transformation meshes with legal process: the need for international coordination

[283] See n. 190
[284] See Simmons, supra n. 7.

increases, public administrators at the desks of health care and education, tourism and family relations departments find themselves impelled to reach out to colleagues across borders, often aided in doing so by international civil servants, to discuss not the classic matters of foreign affairs – war, peace, trade, navigation – but the routine activities of their own populations.[285] Thus the transnationalisation of everyday life calls into question one of the foundational myths of international law, the Westphalian notion that the governance of the social order can be cleaved from that of international relations , and denaturalizes the demarcation between the "reserved domain" of states' "essential domestic jurisdiction" and that of contractual relations among them. As the web of interstate exchanges expands and intensifies, engendering a thick network of monitoring and implementing *apparatae*, international regimes continue to multiply, and, with them, the jurisdictional arenas of international law.

Half a century ago, the International Court of Justice remarked in *Nottebohm*: "Nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition of its nationality."[286] Yet the *Nottebohm* court, having characterized nationality as a domestic issue, immediately internationalized it: "When two States have conferred their nationality upon the same individual and this situation is no longer confined within the limits of the domestic jurisdiction of one of these States but extends to the international field, international arbitrators or the Courts of third States which are called upon to deal with this situation would allow the contradiction to subsist if they confined themselves to the view that nationality is exclusively within the domestic jurisdiction of the State."[287] Applying the parameter for internationalization set by the *Nottebohm* court -- "when two States" -- it seems unlikely that in an era of globalization any matter can ever be described as lying "essentially" within any state's domestic jurisdiction. Max Weber remarked that there is no subject matter that has not been or cannot become an object of state action; the same could be said of the subject-matter of international law.[288] Paradoxically, there may come a time when it is no longer the scope of international law that is the subject of contract, but the definition of the arenas of states'

[285] On the multiplying forms of interstate coordination, see Anne-Marie Slaughter, supra n. 7.
[286]Nottebohm Case (Second Judgment), ICj (1955) at http://www.icj-cij.org/docket/files/18/2676.pdf (p.35)
[287]Id.
[288] M. Weber, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (T. Parsons, ed.), (1947, 1964) p.155

competence. “Westphalia” will then have been effectively reversed, at least in significant part under the impetus of the transnationalization of everyday life.