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# COLLABORATIVE FAMILY-MAKING: FROM ACQUISITION TO INTERCONNECTION

PAMELA LAUFER-UKES\*

## I. INTRODUCTION

IN a consumer-driven society, it should come as no surprise that baby markets are booming.<sup>1</sup> Indeed, we can use a catalogue to pick the preferred genetic traits of intended children,<sup>2</sup> or even to peruse potential children for adoption.<sup>3</sup> Adults want to have children in order to build a family. Family provides status, stability, security, joy, support, and comfort.<sup>4</sup> But, when biological or social infertility comes between modern

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1. See BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES (Michele Goodwin ed., 2010) (edited edition of articles discussing the growth of baby markets); DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 77, 80 (2006); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012) (discussing rising use of purchased third-party gametes); Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption*, 88 INDIANA L.J. 1223 (2013) (discussing local and foreign markets in surrogates); Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 415–17 (2012); Amrita Pande, *Transnational Commercial Surrogacy in India: Gifts for Global Sisters?*, 23 REPROD. BIOMEDICINE ONLINE 618 (2011) (describing the rise of foreign surrogacy in India).

2. See, e.g., Arianna Eunjung Cha, *Discounts, Guarantees & the Search for 'Good' Genes: The Booming Fertility Business*, WASH. POST (October 21, 2017), [https://www.washingtonpost.com/national/health-science/donor-eggs-sperm-banks-and-the-quest-for-good-genes/2017/10/21/64b9bdd0-aaa6-11e7-b3aa-c0e2e1d41e38\\_story.html?utm\\_term=.733a27ecfd0e](https://www.washingtonpost.com/national/health-science/donor-eggs-sperm-banks-and-the-quest-for-good-genes/2017/10/21/64b9bdd0-aaa6-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.733a27ecfd0e) [<https://perma.cc/2FUH-YX4H>] (describing the selection process for gamete donors).

3. See Clare Foges, *Delayed Adoption is Sure to Damage a Child*, THE TIMES (October 2, 2017, 12:01 AM), <https://www.thetimes.co.uk/article/delayed-adoption-is-sure-to-damage-a-child-bclzhndx7> [<https://perma.cc/Z7RM-MDBR>] (describing catalogs for children looking for their “forever homes”).

4. See, e.g., Christine Overall, *What is the Value of Procreation?*, in FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES 89, 89–105 (Françoise Baylis & Carolyn McLeod eds., 2014) (deliberating on the various reasons people want to have children, including status); Elizabeth Scott & Robert Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 303–13 (2015) (discussing social value and special legal status of family relationships, especially in caring for dependent family members).

consumers and their family-building goals, new collaborative methods have been sought, methods that necessitate financial investment in lieu of sexual intimacy.

There are two primary alternatives to coital reproduction: assisted reproductive technologies (ART) and adoption. First, one can pay for fertility services such as in vitro fertilization (IVF) to produce desired children, and there is also the option of collaboration—buying gametes, or renting wombs through surrogacy from third parties.<sup>5</sup> The use of ART can be managed locally or, particularly in the case of surrogate motherhood, surrogates can be hired from abroad.<sup>6</sup> Second, one can adopt an infant or very young child, which also entails considerable investment of money, time, and resources.<sup>7</sup> Infant adoption can be done domestically, although a limited number of infants are available each year, or internationally through intercountry adoption (ICA).<sup>8</sup> ART involving third-party gametes or surrogates' wombs and ICA are both methods of what I term "collaborative family-making," which have been developed to fulfill the family-forming desires of socio-economically secure people who seek the procreative collaboration of those who are usually less well-off financially, increasingly foreign, and destitute.<sup>9</sup>

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5. See Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 55–59 (2003); Emily Gelmann, "I'm Just the Oven, It's Totally Their Bun": *The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159 (2011) (couching the need to legalize surrogacy in the context of helping to fulfill couples' procreative desires); Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391 (2012); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 137–44 (2009) (discussing the satisfaction and success attributed to commercial surrogacy as well as the way surrogacy has been accepted in contemporary society).

6. Reasons to look abroad for surrogates include illegality in one's home country, lack of availability of surrogates in one's own country, lower expenses, and desire to remain distant from the surrogate. See, e.g., Laufer-Ukeles, *supra* note 1, at 1266–67.

7. For now, I set aside the fostering of older and special needs children to build a family. Indeed, due to government subsidies, one can adopt an older or hard to place child at little personal expense, but such an option is often considered to be less attractive to those who are primarily looking to solve infertility. See *infra* notes 194–197 and accompanying text.

8. Also called "international adoption."

9. See, e.g., Tobias Hubinette, *From Orphan Train to Babylifts: Colonial Trafficking, Empire Building, and Social Engineering*, in OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION 139, 143 (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds., 2006) (discussing ways in which international adoption involves wealthy westerners looking to poor countries to obtain children); Lila Khabibullina, *International Adoption in Russia: "Market," "Children for Organs," and "Precious" or "Bad" Genes*, in INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 174, 183 (Diana Marte & Laura Briggs eds., 2009) ("Stories about biological mothers who cannot afford to keep their children and rich foreigners who can buy them present international adoption as an unequal transaction between the rich and poor."); KAREN SMITH ROTABI & NICOLE F.

Despite the reality that ART and adoption are two means of collaborative family-making, the legal treatment of ART and adoption are markedly distinct. ART is largely unregulated, the exchange of money to third parties for gametes and wombs is widely considered unproblematic, and even highly commercialized global markets in surrogates are accepted in many jurisdictions.<sup>10</sup> On the other hand, adoption is heavily regulated and fears of commodification and corruption ubiquitous, particularly in the context of ICA, which has come to a near stand-still in the wake of fears of improper payments to birth mothers, child laundering, and fraud.<sup>11</sup> Explicit references to markets and revelations of transfers of money have led to shutdowns and bans in ICA, and the process of legally rooting out financial incentives has undermined the functioning of ICA in fundamental ways.<sup>12</sup>

Accordingly, while markets in designer babies are thriving, ICA, where children are most desperately in need of basic food and care, suffers the most legal condemnation and restriction when its market qualities become too apparent. Although people insist that baby-buying is immoral and illegal in the context of ICA, people use money to create babies through ART and buy parental rights to babies in the market all the time through surrogacy and gamete sales, creating what can be called “the baby markets dilemma.”

The willingness to fuel global markets in designer babies alongside the rapid decline in allowing ICA of children in need creates a moral lacuna that demands analysis. In trying to resolve the asymmetry between the ART and ICA methods of collaborative family-making some have argued that markets should be allowed in both,<sup>13</sup> while others argue that both methods involve improper commodification and exploitation, and therefore should be legally banned, especially in the context of commercial surrogate motherhood.<sup>14</sup> But most scholars and jurists differentiate

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BROMFIELD, FROM INTERCOUNTRY ADOPTION TO GLOBAL SURROGACY: A HUMAN RIGHTS HISTORY AND NEW FERTILITY FRONTIERS 2 (2017) (“An international adoption is most commonly completed by middle- and upper-class families, most often by prospective parents who are predominantly White and have completed a university education. This social dynamic is partly driven by the fact that cost for intercountry adoption in recent years typically ranges from US\$25,000 and upwards.”).

10. See *infra* notes 43–76 and accompanying text.

11. See *infra* part II(B).

12. See *infra* notes 92–149 and accompanying text.

13. See, e.g., Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 247–50 (2009) (referring both to markets in ART and adoption as two examples of baby markets that should not be overly restricted such that middlemen profit while participants fail to reap benefits).

14. See, e.g., David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Market in Children*, 43 PEPP. L. REV. 265 (2016) (arguing that international laws against baby-selling applied to ICA apply equally to international surrogacy).

the two, arguing for the benefits of one method over the other.<sup>15</sup> While the difference in legal treatment of collaboration in adoption and ART can be justified by a variety of legal arguments, including arguments regarding the definition of parenthood and the rights of children not yet born that I explore in depth,<sup>16</sup> I argue that the similarities make such markedly different legal treatment of the markets and money involved in each hard to justify. This is especially true in comparing the legal treatment of ICA and commercial surrogacy, which I describe as the most involved and intimate collaborative form of ART. Adoption suffers from fundamental concerns of exploitation and commodification of birth families and children. ICA is widely viewed as a “‘gray market’ surrounded by bribes, exploiting intermediaries,” and inappropriate treatment of children and birth mothers.<sup>17</sup> But surrogacy poses similar threats of commodification and exploitation of the surrogate and the child.<sup>18</sup> Surrogacy involves women becoming pregnant for a sum of money, resulting in an extensive period of having one’s body used fundamentally for the sake of strangers, in a manner that can be controlling and threatening, mitigating rights to health care, informed consent, and autonomy.<sup>19</sup> In addition, parental rights are relinquished in exchange for that sum.<sup>20</sup> In international surrogacy in particular, distance—geographic, linguistic, cultural, and socio-economic—makes the treatment of the surrogate as an incubator for hire an overwhelming concern.<sup>21</sup> In both contexts of collaborative family-making, the specter of the wealthy westerner looking to the poor and the foreign to help them cure their infertility by providing wombs for rent or children for adoption fundamentally threatens to exploit and commodify human beings in a manner that stains collaborative family-making.<sup>22</sup>

In this Article, I suggest a new way to resolve the baby markets dilemma by reframing collaborative family-making as a process of intercon-

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15. Compare, e.g., ELIZABETH BARTHOLET, FAMILY BONDS (1999) (promoting ICA over fertility markets), with Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990) (arguing for the benefits of ART); see also ROTABI & BROMFIELD, *supra* note 9 (describing the rise of international surrogacy in the wake of the decline of ICA but arguing for differing legal treatment of each).

16. See *infra* notes 151–164 and accompanying text.

17. Khabibullina, *supra* note 9, at 177.

18. See *infra* notes 157–193 and accompanying text.

19. *Id.*

20. See *In re Baby M*, 525 A.2d 1128, 1143 (N.J. Super. Ch. Div. 1987) (\$10,000 payment provided for release of the child and termination of parental rights, reduced to \$1,000 if the surrogate suffers a miscarriage after the fifth month of pregnancy); Janet Dolgin, *Status & Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 523 (1990) (describing the exchange of money for the relinquishment of parental rights); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1929 (1987) (arguing that the difference in perspective between surrogacy as baby-selling and renting of gestational services concern whether the surrogate is a lawful parent).

21. See *infra* notes 184–193 accompanying text.

22. See *infra* Part IV(A).

nection as opposed to acquisition of procreational capacities.<sup>23</sup> Instead of allowing ART markets to thrive and trying, mostly unsuccessfully, to curtail the commercialization of a functional system of adoption,<sup>24</sup> I argue that the frame of interconnection can salvage the benefits of both methods of collaborative family-making while mitigating the stain of commodification and exploitation. Neither women nor children—nor parts thereof—can be bought or sold in the market, and therefore an “acquisition” frame for surrogacy and adoption is problematic. The traditional legal framework is acquisitional in that it allows intended parents to pay for the receipt of desired children by a transaction that ends all legal ties with collaborators without consideration of children’s rights, or the exploitative and commodified nature of these transactions. Instead, children must be protected as human creatures and not commercial goods, and all human parties to the creation should be recognized and respected as more than mere incubators or child producers amongst the poor masses in foreign countries that can be consumed and then discarded when no longer useful. A frame of interconnection involves open processes and the facilitation of ongoing contact between collaborators in family-formation even

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23. See Elizabeth Bartholet & David M. Smolin, *The Debate*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES AND OUTCOMES 244 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) (“The most fundamental problem is money . . . [referring to Guatemala] unaccounted-for funds incentivized systematic child laundering”); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 283–86 (2004) (identifying money as the source of corruption); see also *infra* notes 97–101 and accompanying text. A number of countries have laws reflecting the manner in which it is believed that commerciality taints surrogacy, see Surrogacy Arrangements Act 1985, c. 49, § 1A (U.K.), inserted by Human Fertilisation and Embryology Act, 1990, c. 37, § 36(1) (U.K.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 6(1) (Can.), despite the lack of surrogates that result; see also Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2270–73 (2012) (providing an overview of other nations’ surrogacy statutes); Denise Balkissoon, “It’s Illegal to Pay a Surrogate Mother in Canada So What Would Motivate a Woman to Do It?”, THE GLOBE & MAIL (Feb. 12, 2015), [www.theglobeandmail.com/life/parenting/an-inside-look-at-the-difficult-process-of-surrogacy/article22953150/](http://www.theglobeandmail.com/life/parenting/an-inside-look-at-the-difficult-process-of-surrogacy/article22953150/) [Permalink unavailable].

24. See, e.g., Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 755–69 (2010–2011) (discussing difficulties and limited success in creating functional adoption systems that meaningfully fight corruption); Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 569–71 (2005); Kate O’Keeffe, Note, *The Intercountry Adoption Act of 2000: The United States’ Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT’L L. 1611, 1615 (2007) (discussing the bureaucracy that the Hague Convention imposes that increases costs, delays and time); Katherine Sohr, Comment, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega’s Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT’L L. REV. 559, 565–74 (2006) (discussing how difficult it is for Guatemala to comply with regulatory and bureaucratic hurdles of Hague Convention due to the lack of resources).

after a child is born or adopted. Collaboration creates connections between persons—children are not acquired and “consumed.”

The frame of acquisition that I reject, however, can be distinguished from the presence of financial exchange. Money is often targeted as the cause for the corruption in ICA,<sup>25</sup> but rooting out money and financial incentives undermines collaborative family-making systems, which is needed to fuel a functioning system of ART or adoption and denies needed remuneration for surrogate labor and families in need.<sup>26</sup> Markets and intimate concerns are not incompatible—they interact all the time in the context of human relationships, as well as family-making.<sup>27</sup> Rather, as one commentator explains, the question is, “How to organize a transaction between takers and givers without the child or the mother being turned into merchandise?”<sup>28</sup> Or, asked differently, how a market in collaborative family-making be regulated in an ethical manner?<sup>29</sup> I argue that collaborative family-making can avoid the frame of acquisition and consumption, despite the exchange of money that is bound to persist, by regulating the market dynamics through a frame of interconnection focused on openness and ongoing contact with collaborators in a manner that treats them as human participants as opposed to commodified, disposable beings used for their bodies’ procreational capacities.

An interconnected legal framework that stresses the importance of maintaining openness and ongoing contact between collaborators provides an intermediate path between full embrace or complete rejection of collaborative family-making. Such a regulated “intermediate” framework is currently missing in hotly contested debates between those who promote surrogacy or adoption as currently practiced,<sup>30</sup> and those that argue that either or both systems of commercial collaborative family-making are

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25. See *infra* notes 97–101 and accompanying text.

26. See, e.g., Krawiec, *supra* note 13, at 247–50 (discussing the fundamental market elements of both ART and adoption and how limiting payments to surrogates or birth families denies compensation to those most in need despite handsome profits for intermediaries). For a discussion of how money fuels ICA, see *infra* notes 94–148 and accompanying text.

27. See VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 29 (2005) (discussing her theory of differentiated ties where money and intimacy interact); Ertman, *supra* note 5, at 55–59 (discussing mixed commodification in the context of gamete sales); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493–96 (2005) (discussing mixed commodification in the context of family law).

28. Anne Cadoret, *Mothers for Others: Between Friendship and the Market*, in *International Adoption: Global Inequalities and the Circulation of Children* 271, 280 (Diana Marre & Laura Briggs eds., Margaret Dunham trans., 2009).

29. See Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 362, 369 (Martha M. Ertman & Joan C. Williams eds., 2005).

30. See Bartholet & Smolin, *supra* note 23, at 245–46 (arguing that fears of fraud are overstated and can be combatted without prophylactic bans); Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333 (2007) [hereinafter Bartholet, *The Child's Story*]; Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151 (2007)

either essentially problematic,<sup>31</sup> or that the existence of fraud requires uprooting commerciality in a manner that undermines effectiveness.<sup>32</sup> Thus, in light of the many benefits involved in each, I attempt to salvage both methods of collaborative family-making albeit in a limited and highly regulated open and human form that I argue is still feasible but will suffer less from concerns of commodification, exploitation, and corruption.

An array of social science studies, which are relied upon in this Article to develop this vision of interconnection, have shown that in the case of domestic surrogacy, surrogates and intended families develop close connections with one another during the pregnancy, which naturally continues after the pregnancy as well.<sup>33</sup> Studies in domestic adoption demonstrate the growing dominance of openness and interconnection as well, with complex relations between birth mothers, adoptive families, and children that have been found to be healthy and secure.<sup>34</sup> Children desire and benefit from such openness and ongoing contact with birth families as do birth families and adoptive families.<sup>35</sup> In reality, in the context of domestic adoption and surrogacy, what starts with the desire to “procure” a child, usually ends with familial collaboration and interconnectedness based on mutual respect and ongoing contact.

When it comes to international family-formation, much can be learned from domestic systems in which interconnection is more common and respected and bargaining power is more equal. Domestic adoption is open because birth mothers have the power to demand ongoing connec-

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[hereinafter Bartholet, *Human Rights*]. For supportive accounts of markets in ART and surrogate motherhood, see *supra* note 5 and accompanying text.

31. See, e.g., Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L. 413, 425 (2009) (“Whether the exchange is viewed as one between birth parents with very few resources, and families with resources, or as one between a country with an extensive (admittedly imperfect) social service infrastructure and a country with no social service infrastructure, the exchange bears a neo-colonialist hue.”); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 103–04, 103 n.12 (1998) (describing the reasons to contest mixed race adoptions and the fear of neo-colonialism). For discussions and cites of authors who see surrogacy as fundamentally problematic for a variety of reasons see *infra* notes 167–170 and accompanying text.

32. See Bartholet & Smolin, *supra* note 23, at 244 (“The most fundamental problem is money . . . [referring to Guatemala] unaccounted-for funds incentivized systematic child laundering”); Smolin, *supra* note 23, at 283–86 (identifying money as the source of corruption); see also *infra* notes 97–101 and accompanying text. A number of countries have laws reflecting the manner in which it is believed that commerciality taints surrogacy, see Surrogacy Arrangements Act 1985, c. 49, § 1A (U.K.), inserted by Human Fertilisation and Embryology Act, 1990, c. 37, § 36(1) (U.K.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 6(1) (Can.), despite the lack of surrogates that result. See Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2270–73 (2012); Balkissoon, *supra* note 23.

33. See *infra* notes 177–183 and accompanying text.

34. See *infra* notes 251–258 and accompanying text.

35. See *infra* notes 259–266 and accompanying text.



tions with adoptive families and their birth children.<sup>36</sup> Domestic surrogates are present with intended families and thus natural empathy develops as part of the process.<sup>37</sup> One reason people use international surrogates and ICA is to get away from these connections.<sup>38</sup> Intended families prefer not to deal with emotional ties with surrogates and adoptive families are afraid of biological parents, and ICA provides a comfortable way to avoid them. ICA is closed, secretive, and absolute.<sup>39</sup> Foreigners are treated differently—they are too often otherized and dehumanized. Interconnection to foreigners is viewed as less practical and less feasible, and more subject to fraud and thereby dehumanization and separation is justified. This Article thereby provides a timely reference to globalization, when rates of global migration are at precedent setting heights along with attendant fears and recriminations, suggesting a system of ICA that can build bridges between cultures and allow the transfer of money and resources between people who live with relative excess with those who are desperately in need.<sup>40</sup>

In this Article, I suggest that the descriptive reality of interconnectedness and ongoing contact in domestic surrogacy and adoption be reflected in the legal frameworks for collaborative family-making *ex ante*; that the law frame and support collaborative family-making as interconnection as opposed to acquisition and procurement of desired children whether domestic or global. I have argued for interconnectedness between the surrogate and the intended family in the context of surrogacy in the past,<sup>41</sup> and surrogacy is discussed to provide context to the ethical dilemma of baby markets, contrasting its treatment to that of ICA, and to develop the new frame of interconnection in collaborative family-making. This Article, however, ultimately focuses on the need to develop a new interconnected, open system of ICA in light of its diminishing significance. Only an open and transparent form of ICA more in line with domestic adoption in which adoptive families and birth families meet and have ongoing contact,

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36. See *infra* notes 254–255 and accompanying text.

37. See *infra* notes 241–246 and accompanying text.

38. See, e.g., Françoise-Romaine Ouellette, *The Social Temporalities of Adoption and the Limits of Plenary Adoption*, in INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 69, 77, 81 (Diana Marre & Laura Briggs eds., 2009) (discussing distance as a motivating factor in ICA); Laufer-Ukeles, *supra* note 1, at 1269–71 (discussing the greater detachment between intended parents and surrogates in global surrogacy in India); Pande, *supra* note 1, at 618–20 (discussing distance as a motivating factor in international surrogacy); Jennifer A. Parks, *Care Ethics and the Global Practice of Commercial Surrogacy*, 24 BIOETHICS 333, 334 (2010) (discussing intended parents preference for international surrogates for detachment and lack of complications).

39. See *infra* notes 286–296 and accompanying text.

40. See *infra* notes 335–337 and accompanying text.

41. See Laufer-Ukeles, *supra* note 1, at 1251–59. As will be discussed hereinafter, see *infra* note 268, international surrogacy may be impossible to sustain within this frame of interconnection and thus I argue it should be avoided to the extent possible. See Laufer-Ukeles, *supra* note 1, at 1275.

and where limited, regulated, wealth transfer is permitted, can combat the specter of fraud marring and undermining ICA.<sup>42</sup>

Following from the introduction, this Article will be structured in four additional parts. In the second part, I will describe the current system of ART markets and adoption, discerning how the legal system has treated the two systems distinctly. In the third part, I will consider justifications for treating collaborative family-making through ART and adoption so differently, but then challenge this distinction by pointing to legal, sociological, empirical, and historical similarities. In the fourth part, I will present a new frame of reference based on interconnection as opposed to acquisition appropriate for both forms of collaborative family-making, relying on empirical accounts of interconnection in domestic adoption and domestic surrogacy. Finally, in the fifth part, I will describe a different vision for adoption that accepts the need for money to keep ICA functioning, but refuses to erase the existence of birth families who relinquish children as a result of the poverty and instability they suffer. Thus, I argue for an open system of ICA, with continued connection between birth families and adoptive families, with financial remittances paid from adoptive families to birth families, and facilitated by government agencies that support openness and contact.

## II. DISTINCT LEGAL TREATMENT OF ART V. ADOPTION

### A. *ART is a Booming Business*

ART is a booming billion-dollar business with minimal regulation.<sup>43</sup> Couples who suffer from physical or social infertility are willing to spend large sums of money in order to obtain healthy infant children.<sup>44</sup> Success rates are improving gradually with improvements in technology, but costs are still dramatic.<sup>45</sup> In the U.S. surrogate motherhood costs over \$100,000 and egg donation around \$20,000 depending on the “quality” of the do-

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42. See *infra* notes 283–239; 320–321 and accompanying text.

43. See Ellie Kincaid, *A Booming Medical Industry in the U.S. is Almost Totally Unregulated*, BUS. INSIDER (July 7, 2015), <https://www.businessinsider.com/assisted-reproduction-ivf-industry-regulation-2015-6> [<https://perma.cc/A36K-AX5M>] (noting that in 2013, 1.5% of all births used IVF – the number of IVFs increased by 21% in the year between 2012-2013); see also SPAR, *supra* note 1, at 33; ALEXANDER STYHRE & REBECCA ARMAN, INSTITUTIONALIZING ASSISTED REPRODUCTIVE TECHNOLOGIES: THE ROLE OF SCIENCE 12–16 (2016) (summarizing the use of ART as a market in babies).

44. See Donna Rosato, *How High-Tech Baby Making Fuels the Infertility Market Boom*, MONEY (July 9, 2014), <http://time.com/money/2955345/high-tech-baby-making-is-fueling-a-market-boom/> [<https://perma.cc/M3DA-YMSW>] (“The infertility services market, from infertility clinics and sperm banks to fertility drugs and surrogacy programs, now tops \$3.5 billion, up four-fold from 25 years ago, according to a recent study from research firm Marketdata . . . Overall, growth in the infertility market is projected to continue at a 3.6% annual clip, hitting \$4 billion by 2018.”).

45. See *id.*

nor.<sup>46</sup> Each IVF cycle costs approximately \$12,000 + \$5,000 for medications and usually more than one cycle is needed for egg removal, while sperm donation is much less expensive at around \$500 as is intrauterine insemination at \$2,000.<sup>47</sup> Only approximately 25% of health plans cover fertility treatments.<sup>48</sup> Despite costs, 12% of women use fertility services.<sup>49</sup> As one reporter succinctly characterizes the industry,

The multibillion-dollar fertility industry is booming, and experimenting with business models that are changing the American family in new and unpredictable ways. Would-be parents seeking donor eggs and sperm can pick and choose from long checklists of physical and intellectual characteristics. Clinics now offer volume discounts, package deals and 100 percent guarantees for baby-making that are raising complicated ethical and legal questions.<sup>50</sup>

ART is thus a commercial endeavor, expensive for its consumers and profitable for its agents. The public at large in the U.S. does not shy away from its commercial fabric, or provide federal regulation to limit its commerciality or to protect children born from ART, although scholars and regulation in other countries raise more concerns.<sup>51</sup>

Minimal regulation in the U.S. includes a federal law that requires fertility clinics to report IVF success rates, which the Center for Disease Control and Prevention (CDC) collects and publishes.<sup>52</sup> There is no legal regulation in the U.S. limiting what procedures can be done using ART.<sup>53</sup>

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46. *See id.*

47. *See id.*

48. *See id.*

49. *See* Cha, *supra* note 2 (“According to the Centers for Disease Control and Prevention, 12 percent of American women 15 to 55—7.3 million—have used some sort of fertility service; the use of assisted reproductive technologies has doubled in the past decade.”).

50. *See id.*

51. *See* Cahn, *supra* note 1 (proposing a regulatory system for donor-conceived families); Radikha Rao, *Equal Liberty: Assisted Reproductive Technology & Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1478–81 (2008) (describing the lack of regulation of ART in the U.S. and describing the potential for regulation). For discussion of international regulations of ART, *see* Connie Cho, *Defining Parenthood: Assisted Reproduction in France*, 7 YALE J. MED. & L. 19, 19 (2011); V Fineschi, M Neri & E Turillazzi, *The New Italian Law on Assisted Reproduction Technology* (Law 40/2004), 31 J. MED. ETHICS 536, 537 (2005).

52. *See* Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. §§ 263a-1—7 (2000). Most states do not have any laws regulating ART. A notable exception is Louisiana, *see* LA. STAT. ANN. §§ 9:129–130 (2000) (providing that “[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.”).

53. Human cloning is explicitly prohibited in many states. *See generally* *Embryonic and Fetal Research Laws*, NAT’L CONFERENCE OF STATE LEGISLATORS (Jan. 1, 2016), <http://www.ncsl.org/research/health/embryonic-and-fetal-research->

Most IVF clinics self-regulate by complying with the guidelines of professional organization such as the American Society for Reproductive Medicine (ASRM) and the Society of Assisted Reproductive Technologies (SART). SART and ASRM also collect data on fertility treatments, based on which they designate guidelines for good practice.<sup>54</sup> Such guidelines point to maximum embryo transfers, the preferred age and health condition for IVF candidates, among other guidelines, what is to be done with millions of fertilized eggs that are not used for implantation, how to deal with the ability to tinker with these eggs using CRISPR—issues that some other countries regulate but the U.S. does not.<sup>55</sup>

Most relevant to this Article focused on collaborative family-making is donor-assisted reproductive technologies. In these forms of ART, it is not just medical intervention that is purchased, but human investment as well in the form of the purchase of gametes or wombs or both. Gamete sales are on the rise exponentially.<sup>56</sup> The donor-egg industry, in particular, has taken off in the past decade with the development of a safe and reliable egg-freezing process.<sup>57</sup> “The number of attempted pregnancies with donor eggs has soared from 1,800 in 1992 to almost 21,200 in 2015.”<sup>58</sup> Yet, there is virtually no regulation in the U.S. governing egg sales. Food and Drug Administration (FDA) regulations require registration of eggs and sperm (human tissues) at registered clinics, and sellers<sup>59</sup> must be tested

laws.aspx [https://perma.cc/8M9Z-8FEW] (reporting sperm cannot be used for purposes of artificial insemination without certain laboratory testing protocols).

54. See SOC’Y FOR ASSISTED REPROD. TECH., <https://www.sart.org/> [https://perma.cc/7VPU-ESHJ] (last visited Nov. 24, 2018); AM. SOC’Y FOR REPROD. MED., <https://connect.asrm.org/home?ssopc=1> [https://perma.cc/G44T-CZ8U] (last visited Nov. 24, 2018); see also Rosato, *supra* note 44; MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY AGENCIES 4 (AM. BAR ASS’N 2016), [https://www.americanbar.org/content/dam/aba/uncategorized/family/Model\\_Act.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/family/Model_Act.authcheckdam.pdf) [https://perma.cc/M6V6-94VM] (“The two largest professional medical organizations for reproductive medicine, American Society for Reproductive Medicine (“ASRM”) and the Society for Assisted Reproductive Technology (“SART”), have issued practice and ethical guidelines for their members. However, membership in the organizations is voluntary and the guidelines are self-regulated.”).

55. See, e.g., Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL’Y 349, 356–58 (2012).

56. See NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 25–28 (2009); Cha, *supra* note 2.

57. See Pam Belluck, *What Fertility Patients Should Know About Egg Freezing*, N.Y. TIMES, Mar. 13, 2018, <https://www.nytimes.com/2018/03/13/health/eggs-freezing-storage-safety.html> [https://perma.cc/339Q-9CTE] (“Several years ago, clinics began using a process called vitrification, in which the temperature of the eggs in the liquid nitrogen is dropped so quickly that they are frozen ‘truly in a matter of a second,’ Dr. Goldman said. Eggs frozen by that method are less vulnerable to damage when thawed.”).

58. Cha, *supra* note 2.

59. While regulations and literature refer to gamete sellers as “donors”—the fact that they are obviously highly compensated should not be masked in “donor” language.

for certain communicable diseases and positive tests make sellers ineligible.<sup>60</sup> Eggs are essentially bought and sold on the free market.<sup>61</sup> Sperm and eggs are chosen for their genetic attractiveness and shopped for like any consumer good in the market.<sup>62</sup>

Surrogate motherhood is another form of ART involving collaborative family-making. It raises more concerns and is subject to more regulation, even in the U.S.<sup>63</sup> In surrogacy, involving a contract-pregnancy, it is harder than in gamete sales to ignore the ongoing human component as the womb that is “rented” remains attached to the human participant who is subject to contractual controls and impositions for a significant amount of time.<sup>64</sup> While gametes provide highly valued and well-compensated genetic components, the participation of third parties is occluded by the extraction during a relatively quick procedure. Yet, despite the appreciably greater regulation of surrogacy, commercial surrogacy is legal in many jurisdictions,<sup>65</sup> in widespread use, is a growth business, and is only becoming more popular year over year,<sup>66</sup> both in terms of demand and in actual

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60. See 21 C.F.R. § 1271 (2018). Specimens from reproductive tissue donors must be tested for the following infectious diseases (referred to as “relevant communicable disease agents and diseases” in the regulations): Human Immunodeficiency Virus (HIV), types 1 and 2 Hepatitis B Virus (HBV), Hepatitis C Virus (HCV), *Treponema pallidum* (i.e. syphilis), *Chlamydia trachomatis*, and *Neisseria gonorrhea*. In addition to those listed above, sperm donors must also be tested for: Human T-lymphotropic virus (HTLV), types I and II Cytomegalovirus (CMV).

61. See, e.g., Cahn, *supra* note 1, at 369–74 (describing lack of regulation of gamete donations); Ertman, *supra* note 5, at 55–59; Michele Goodwin, *Relational Markets in Intimate Goods*, 44 TULSA L. REV. 803, 805 (2009).

62. Gametes are chosen based on academic and athletic prowess, beauty, similarity to intended parents, and health profiles. See Krawiec, *supra* note 13, at 220–23.

63. See, e.g., Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER & L. 91 (2002) (reviewing state surrogacy laws); Brock A. Patton, Note, *Buying a Newborn: Globalization & the Lack of Federal Regulation of Commercial Surrogacy*, 79 UMKC L. REV. 507 (2010) (reviewing in detail the laws governing surrogacy in the U.S. and abroad).

64. See *infra* notes 176–182 and accompanying text.

65. See, e.g., Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1011 (2010) (“Interestingly, while most legal systems around the world have sought to uniformly outlaw or heavily regulate other markets wherein humans or their parts are bought and sold—including human trafficking, embryo trafficking, prostitution, and internal organ selling—they have not yet done so with surrogacy.”); Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 VAND. J. TRANSNAT’L L. 1, 40–41 (2015).

66. See Kiran M. Perkins, Sheree L. Boulet, Denise J. Jamieson & Dmitry M. Kissin, *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435 (2016); *ART and Gestational Carriers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/key-findings/gestational-carriers.html> [<https://perma.cc/U43K-4RNJ>] (“In the U.S., the number of gestational carrier cycles increased from 727 (1.0%) in 1999 to 3,432 (2.5%) in 2013.”) (last updated Aug. 5, 2016).

usage of surrogates.<sup>67</sup> Surrogates and agencies can demand high fees and consumers of surrogate services are willing to invest huge sums of capital to realize their procreative desires.

Commercial surrogacy has also gone global.<sup>68</sup> Given the shortage of the number of surrogates available domestically for “westerners” who represent the highest demand population, the market is looking abroad.<sup>69</sup> Furthermore, most of Europe and Asia prohibit surrogacy domestically.<sup>70</sup> England and other commonwealth countries prohibit commercial surrogacy, only allowing the payment of expenses in exchange for surrogate services; therefore, fertility consumers who do not have a friend or relative willing to act altruistically must look abroad to find surrogates.<sup>71</sup> Others simply seek surrogacy abroad due to lower cost and greater distance from the surrogate.<sup>72</sup> In the past, India, Nepal, and Thailand all had booming economies in international commercial surrogacy worth billions of dollars;<sup>73</sup> however, these domestic governments have become weary of the international market, and now allow only domestic surrogacy arrangements.<sup>74</sup> Still, international surrogacy continues to be a big business, finding different locations where local governments are more supportive, such as the Ukraine, Georgia, Laos, and certain districts in Mexico. Nigeria, Guatemala, Malaysia and Kenya are potentially new markets that are currently being explored.<sup>75</sup> Where there are wealthy people intent on using

67. *As Demand for Surrogacy Soars, More Countries are Trying to Ban it*, THE ECONOMIST, May 13, 2017, <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it> [https://perma.cc/RNY3-UE55].

68. See Laufer-Ukeles, *supra* note 1, at 1265–67; Ryznar, *supra* note 65, at 1009–12; Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 298–99 (2005).

69. See Laufer-Ukeles, *supra* note 1, at 1266; Mutcherson, *supra* note 55, at 356–58.

70. See Marcelo de Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417, 420–21 (2010) (discussing bans on surrogacy in Europe and Asia).

71. See, e.g., *Assisted Reproductive Treatment Act 2008* (Vic) s 44 (Austl.); *Assisted Human Reproduction Act*, S.C. 2004, c. 2 (Can.); *Surrogacy Arrangements Act 1985*, c. 49. (U.K.).

72. See Laufer-Ukeles, *supra* note 1, at 1269–71; Pande, *supra* note 1, at 618–20; Parks, *supra* note 38, at 334.

73. See Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 22 (2008) (describing India as a top destination for international surrogacy); see also Danielle Preiss & Pragat Shai, *The Dwindling Options for Surrogacy Abroad*, THE ATLANTIC, May 31, 2016, <https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/> [https://perma.cc/5WPY-S5RX].

74. See *infra* notes 210–13 and accompanying text.

75. See Karen Smith Rotabi & Nicole Footen Bromfield, *The Decline in Inter-country Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns*, AFFILIA J. OF WOMEN & SOC. WORK 129, 134 (2012) (discussing rise of international surrogacy in Guatemala); Preiss & Shahi, *supra* note 73; *Current Law, SURROGACY 360*, <https://surrogacy360.org/considering-surrogacy/current-law/> [https://perma.cc/KKB6-3CGR] (last visited Nov. 25, 2018).

surrogates, a global market is likely to arise. Even in countries where commercial surrogacy is banned domestically, foreign surrogacy is either permitted or practiced in a gray space without notice or prosecution.<sup>76</sup> Ultimately, although more constrained, the market in international commercial surrogacy is still very strong.

ART is not baby-buying, as the child is not yet born, but does involve paying money to obtain a child. In the case of collaborative ART with gamete donors and surrogates, it is paying for parental rights to the child as well, thus it does involve a market in babies.<sup>77</sup> In the context of commercial ART, the commodification of bodies involved in such baby markets is largely accepted, hardly regulated, wildly profitable, and increasingly use and popularized.

#### B. *The Regulated, Limited, and Disappearing Systems of Adoption*

The other way for those suffering with infertility or who want to expand their family to engage in collaborative family-making is adoption.<sup>78</sup> In stark contrast to ART, adoption is highly regulated and not overtly commercial. In fact, commercial adoption is anathema as unethical and illegal baby-selling.<sup>79</sup> Despite some attempts to argue for the benefits of a free market in babies,<sup>80</sup> which have been highly criticized,<sup>81</sup> it is commonly assumed that children who are already born cannot be bought or sold legally or ethically.<sup>82</sup> Payment for babies or parenthood directly to

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(describing destination countries where surrogacy is legal and indicating which countries are “hubs”).

76. See X & Y (Foreign Surrogacy) [2008] EWHC (Fam) 3030 (Eng.) (foreign commercial surrogate agreement excepted despite violation of domestic prohibition due to best interests of the child); Baby Manji Yamada v. Union of India & ANR, (2008) 13 SCC 518 (India) (discussing surrogacy arrangement made by Japanese couple where commercial surrogacy is banned); Henry Bodkin, *Couples Paying £60,000 for Surrogates Despite UK System of ‘Reasonable Expenses Only,’* THE TELEGRAPH (July 2, 2018, 12:01 AM), <https://www.telegraph.co.uk/news/2018/07/01/couples-paying-60000-surrogates-despite-uk-system-reasonable/> [https://perma.cc/Z7BP-KVDF].

77. See generally Krawiec, *supra* note 13, at 247–50 (discussing the range of what she terms “baby markets” including ART and adoption); see also June Carbone & Jody Lynne Madeira, *Buyers in the Baby Market: Toward a Transparent Consumerism*, 91 WASH. L. REV. 72 (2016) (describing the consumer nature of ART).

78. See ROTABI & BROMFIELD, *supra* note 9, at 2 (describing why people adopt, indicating that multiple reasons are common but the need due to medical or social infertility should not be underestimated).

79. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 136 (1996) (describing the limited commerciality of adoption and the outlawing of “commissioned adoption” as baby-sales).

80. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 344 (1978).

81. See, e.g., Ronald A. Cass, *Coping with Life, Law and Market: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73, 73 (1987); Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 350, 354 (1984).

82. See RADIN, *supra* note 79, at 137–38 (“If we permit babies to be sold, we commodify not only the mother’s (and father’s) baby-making capacities—which

birthparents is prohibited worldwide.<sup>83</sup> Birth parents cannot benefit from adoption beyond the payment of “costs and expenses.”<sup>84</sup> Additional regulations include precluding enforcement of pre-birth agreements by giving birth parents time after the birth to rescind any arrangements, as well as other protections to ensure birth parents freely and willingly terminate their parental rights. Fathers and mothers have constitutional due process protection in place that limits the state’s ability to terminate parental connections to the child.<sup>85</sup>

Like in ART, parents must still pay agency and legal fees and expenses to arrange for adoption, especially private adoption, the form in which most infants are placed.<sup>86</sup> Additionally, a certain amount of wealth and security is necessary to be considered suitable for adoption.<sup>87</sup> Private adoption has more market characteristics than public adoption as it allows birth parents to choose adoptive parents and retain greater privacy.<sup>88</sup> Private adoption has been criticized for being too commercial because permissible payments to birth parents include lost wages,<sup>89</sup> and for failing to

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might be analogous to commodifying sexuality but also the baby herself. Commodifying babies leads us to conceive of potentially all personal attributes in market rhetoric, not merely those of sexuality. Moreover, to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and this might well create in those people a commodified self-conception.”); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 136–39 (1993); Margaret Jane Radin, *What, If Anything, Is Wrong with Baby Selling*, 26 PAC. L.J. 135, 144–45 (1995) (address given at the McGeorge School of Law on March 4, 1994).

83. See, e.g., John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 654 (1994); Krawiec, *supra* note 13, at 247–48 (“Although both international law and the laws of all fifty states prohibit “baby selling”—the relinquishment of parental rights in exchange for payment—few states specifically cap or otherwise restrict permissible payments for medical, living, and other expenses of birth parents, allowing some latitude to those eager to evade such restriction.”).

84. UNIF. ADOPTION ACT § 3-703 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1994) (Section 3-703 permitting only payment of reasonable expenses to birth parents).

85. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (protecting unmarried fathers who undertake parental obligations; *In re Juvenile Appeal*, 455 A.2d 1313 (Conn. 1983) (articulating the constitutional standard that must be met before state interference with parental rights).

86. See, e.g., Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 61–64 (2006) (emphasizing the high costs of adopting children in the U.S. and the resulting comparisons to markets in babies); Krawiec, *supra* note 13, at 246–48 (discussing payments to intermediaries); David M. Smolin, *Child Laundering and The Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 493–94 (arguing that ICA is too close to baby-sales).

87. UNIF. ADOPTION ACT § 2-204 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1994) (section 2-204 discussing suitability requirements for adoptive parents).

88. See *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 269 N.E.2d 787 (N.Y. 1971) (describing the public agency adoption process and the birth parents’ surrender of all rights to the agency during relinquishment).

89. See, e.g., Andrea B. Carroll, *Re-Regulating the Baby Market: A Call for a Ban on Payment of Birth Mother Living Expenses*, 59 KANSAS L. REV. 285, 288–89 (2011) (argu-



sufficiently protect the interests of children.<sup>90</sup> However, even private adoptions, which allow birth parents and intended parents to meet and formulate their own contractual arrangements, are highly regulated and monitored. Home visits are used to determine parental suitability, courts must approve the adoption, and birth mothers still have the right to rescind their agreement to transfer the parental rights after the birth.<sup>91</sup> In sum, adoption is a highly regulated process and it is considered deeply important to distinguish adoption from an unethical and illegal market in babies. In contrast to widely-accepted ART “baby markets,” commercial adoption is “taboo.”

While domestic adoption involves a widely-accepted system of what is considered “non-commercial adoption,” even including private adoption, ICA cannot seem to distance itself from the specter of impropriety and illegal baby-sales.<sup>92</sup> Deep concern about the ethics of ICA has been personified in some particularly famous incidents,<sup>93</sup> reported by human rights documents,<sup>94</sup> and compellingly portrayed by scholars such as David Smolin. It is argued that birth-parents are improperly and illegally receiving financial remuneration that children are being “laundered” for financial reasons by intermediaries while birth parents believe their children

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ing that payment for living expenses provides too much compensation for babies in private adoptions); Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and “Consumer” Remedies*, 35 U. LOUISVILLE J. FAM. L. 473, 490 (1996); Alfred L. Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547, 547–54 (1975); Carol S. Silverman, *Regulating Independent Adoptions*, 22 COLUM. J.L. & SOC. PROBS. 323, 329–31 (1989); see also David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 471–72 (1999) (describing private adoptions as fast growing because they are more “consumer-driven” and “can abide by what the client wants”); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1478–97 (1992) (explaining the shift from adoptions that promote the welfare of children to the fulfillment of the desires and needs of couples who want children).

90. Critics claim that independent adoptions sacrifice child welfare and provide insufficient counseling to the parties. See L. Jean Emery, *Agency Versus Independent Adoption: The Case for Agency Adoption*, 3 FUTURE CHILDREN 139, 140–42 (1993). However, others point to the benefits of private versus public adoptions that require relinquishment—benefits to children who do not linger in foster care, birth parents who can be part of the process and ultimately arrange for open adoptions and for adoptive parents who can decrease waiting times. See Mark T. McDermott, *Agency Versus Independent Adoption: The Case for Independent Adoption*, 3 FUTURE CHILDREN, 146, 146–47 (1993).

91. See, e.g., Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 519 (2005).

92. See JUDITH S. MODEL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 147 (2002); Khabibullina, *supra* note 9, at 177.

93. See *infra* note 227 and accompanying text.

94. See ROTABI & BROMFIELD, *supra* note 9, at 68–71 (describing a 2000 UN human rights criticizing human rights abuses in ICA in Guatemala, as well as media focus on abuses).

will only be removed temporarily.<sup>95</sup> And, that due to desperate situations, birth parents are incentivized to sell their children for the money it provides or have children for the money they could bring.<sup>96</sup> The array of concerns from financial incentives in ICA ranges from child theft, kidnapping, fraudulent manipulation of mothers into giving up children, adoption of children from orphanages without parental knowledge or understanding, the selling of parental by birth parents, and falsification of records.<sup>97</sup> These concerns are overwhelming the discussion and feasibility of ICA. Ultimately, money is considered the culprit for this fraud—money and the market are blamed for corrupting ICA and turning good intentions into corrupt human rights abuses.<sup>98</sup> Thus, in discussions of ICA, the exchange of money for children is held directly responsible for fraud, corruption, and child laundering.

Indeed, the primary impetus for the passing of the Hague Convention on Intercountry Adoption (Hague Convention) was to formalize and nationalize the adoption process amidst the growing concern about adoption abuses involving the selling and abduction of children and the overall sense that money was corruption ICA.<sup>99</sup> In order to eliminate such

95. See Smolin, *supra* note 86, at 445 (“The current decline in intercountry adoption, and the recurrent shutdowns or slowdowns of intercountry adoption in many sending countries, are not caused primarily by pre-existing ideological opposition to moving orphans outside of their countries of origin. The primary problem is not ideological disagreement about intercountry adoption, but rather regulatory failure leading to recurrent child laundering scandals and other destructive practices.”); see also ROTABI & BROMFIELD, *supra* note 9, at 17–100 (describing at great length the extent of fraud and corruption uncovered in ICA); D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 365–66 (2005) (describing misrepresentations to parents involving the creation of new identity papers for children in India).

96. See Blair, *supra* note 95, at 356–64 (describing alleged inducements to birth mothers in Cambodia and Guatemala); Melissa Long, *Guatemala Passes Domestic Legislation to Implement Hague Adoption Convention; But Does it Help Children?*, 15 LAW & BUS. REV. AM. 631, 645–46 (2009) (describing allegations of women induced by money to give up children); Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 115 (2008).

97. See MARK MONTGOMERY & IRENE POWELL, *SAVING INTERNATIONAL ADOPTION: AN ARGUMENT FROM ECONOMICS AND PERSONAL EXPERIENCE* 114–32 (2018) (listing the various ways trafficking and corruption claims taint international adoption).

98. See, e.g., Bartholet & Smolin, *supra* note 23, at 244 (“The most fundamental problem is money . . . [referring to Guatemala] unaccounted-for funds incentivized systematic child-laundering”).

99. See Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOBAL POL’Y 91, 92 (2010); Asif Efrat, David Leblond, Steven Liao & Sonal S. Pandya, *Babies Across Borders: The Political Economy of International Child Abduction*, 59 INT’L STUD. Q. 615, 616 (2015) (“The convention aims to increase transparency in international adoption and reduce the risk of irregularities and abuse.”); Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise*, 28 FAM. L.Q. 53, 54 (1994) (“The overarching importance of the Convention lies in its endorsement of intercountry adoption when there is compliance

abuses, the Hague Convention prohibits any financial remuneration to birth parents or inducements of any kind in gaining the consent to adoption from birth parents, including gifts or payment in kind.<sup>100</sup> Moreover, it is not just payment to birth parents but payments to intermediaries that are held up as problematic, and in South America there have been bans on payments to intermediaries as well.<sup>101</sup> Currently, in enforcing the Hague Convention, the overwhelming focus in ICA is on eliminating financial incentives to prevent the perception of uncontrollable fraud and corruption involved in child laundering.

Why does commercialization seem to be an inevitable and uncontrollable aspect of ICA, leading to bans and undermining ICA's potential relevance? Overgeneralization is dangerous, and each country's ICA system has its own incentives and characteristics,<sup>102</sup> but I will outline the connection between ICA, the fears of corruption, and commercialization in the two historically popular sending countries—China and Guatemala.

China was one of the most significant countries of origin—some 88,000 children were adopted in the U.S. between 1992–2014.<sup>103</sup> The one-child only policy resulted in tens-of-thousands of abandoned female babies who were left without the possibility of being adopted within China.<sup>104</sup> In China, ICA was always managed with government oversight and involvement, and financial donations were set in advance to Chinese residential institutions.<sup>105</sup> Turning children over to welfare agencies was not an option as abandonment is illegal in China like in many other jurisdictions, especially once a child is no longer a newborn.<sup>106</sup> Moreover, par-

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with its internationally agreed minimum standards.”); David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 450–52, 494 (2007).

100. See Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption art. 1, 4(c)(3), 8, *opened for signature* May 29, 1993, INS 2009 WL 156573 Art. 1, 4(c)(3), 8.

101. See *infra* notes 126–128 and accompanying text.

102. See DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* 242–44 (2018).

103. See ROTABI & BROMFIELD, *supra* note 9, at 14–15. Families in the U.K. and Canada have received thousands more children from China. *Id.* (citing Selman 2015; Dowling & Brown 2009; Johnson 2012).

104. . Evan Solomon, *Finding Our Place*, MACLEAN'S MAGAZINE (Nov. 16, 2015), [http://go.galegroup.com/ps/i.do?p=OVIC&u=vill\\_main&id=GALE|A434514842&v=2.1&it=r&sid=summon](http://go.galegroup.com/ps/i.do?p=OVIC&u=vill_main&id=GALE|A434514842&v=2.1&it=r&sid=summon) [Permalink unavailable].

105. The China Center for Adoption Affairs was set up in 1996 to act with government oversight. See ROTABI & BROMFIELD, *supra* note 9, at 15.

106. *Id.*; see also David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1, 7–8 (2010) (“Because relinquishment is not a legal option in China, and abandonment is a crime, those who give birth and then abandon their babies are seeking to avoid becoming legally associated with the child in any way.”); Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231, 1279 (2003) (“Like those mothers who abandon babies in China, most who do so in the United States are under tremendous social pressure.

ents could be punished by the state for having more than the maximum number of children allotted to them or be forced to abort.<sup>107</sup> An undocumented number of parents found their only option was to abandon children in public markets or other places where they were likely to be found by others.<sup>108</sup> Ultimately, children find their way to governmental institutions after abandonment, but such institutions are ordinarily overwhelmed and unable to cope with the children's needs, resulting in the push for ICA.<sup>109</sup> Despite the public oversight and regulation, corruption lurked behind the scenes. Public institutions in China were implicated in corruption scandals for profiting from these placements.<sup>110</sup> There were even allegations of child kidnapping, and that public officials would take babies in exchange for \$3,000 in lieu of fining a family for having more than one child.<sup>111</sup> Record-keeping in China is notoriously scarce, adding to the cloud of corruption.<sup>112</sup> Since its booming years, China's improved economy, increased domestic adoptions as well as legal changes in the one-child policy has decreased ICA dramatically; however, its influence on perceptions of ICA remain significant.<sup>113</sup> Legal and political crises such as created the boom of ICA in China have caused swells in public adoption in countries such as Haiti, Korea, and Vietnam, which last as long as they are needed.

Guatemala was once the world's most active sending country in absolute numbers despite its relatively small size.<sup>114</sup> Adoption was suspended by moratorium in 2007 due to reports of rampant fraud, kidnapping, and coercion.<sup>115</sup> The ICA system was privately run in the face of overwhelm-

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Unlike parents in China, however, parents in the United States may surrender an infant for adoption without any legal impact on their future families.”).

107. See *supra* note 106.

108. Mary Landrieu & Whitney Reitz, *How Misconceptions about International Adoption Lead to a Violation of Human Rights against Unparented Children*, 22 TUL. J. INT'L & COMP. L. 341, 351 (2014); see also Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption*, 22 SUFFOLK TRANSNAT'L L. REV. 283, 294–96 (1998).

109. See Singer, *supra* note 108, at 295–96 (discussing how the overwhelming of the government adoption system in China resulted in openness to international adoption).

110. See Patricia J. Meier & Xiaole Zhang, *Sold into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 100–05 (2009) (discussing corruption charges in China even when the government maintained tight oversight due to benefits accrued to social welfare agencies).

111. See ROTABI & BROMFIELD, *supra* note 9, at 16.

112. *Id.*

113. *Id.* at 15.

114. See, e.g., ROTABI & BROMFIELD, *supra* note 9, at 65 (“At its peak, Guatemala was estimated to be sending one child in every hundred live births abroad as an adoptee.”) (internal citations omitted); Smolin, *supra* note 99, at 467–68.

115. U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS NARRATIVE (2015), <https://travel.state.gov/content/dam/aa/pdfs/2015NarrativeAnnualReportonIntercountryAdoptions.pdf> [<https://perma.cc/6REJ-BHYC>] [hereinafter DOS UPDATE] (“In December 2007, the government of Guatemala an-

ing poverty and instability in which the public welfare system was unavailable to provide oversight.<sup>116</sup> Often referred to as a human rights catastrophe, the media reported rampant abuse. Ultimately, a 2000 human rights report from described kidnapping of women and children, adoption rings, coercion of women into pregnancy for adoption, and extreme abuse.<sup>117</sup> Others contest the scope of the abuse, arguing that it was just as likely voluntary exchanges, and that fraud is relatively rare compared to the lawful adoptions that occur.<sup>118</sup> It is hard to quantify the extent of the abuse as adoption and the alleged abuses were all organized privately without meaningful oversight, but the reports that have been produced are threatening.<sup>119</sup> In Guatemala, new laws have been passed since the signing of the Hague Convention in light of the criticism of private adoption systems that create much stricter oversight, require registrations, and ban any payment to private middleman or birth parents.<sup>120</sup> But the strict legislation and the banning of intermediaries makes the functioning of ICA difficult, if not impossible.<sup>121</sup> It is argued that Guatemala's social welfare services will not be able to process, oversee, and inspect adoptions for all the uncared for children who need homes.<sup>122</sup> Indeed, since the passing of the law, Guatemala's ICA has all but disappeared—with a low of two adoptions in 2016 from Guatemala in the U.S.<sup>123</sup> Because the new law that was passed is so difficult to implement, Guatemala is struggling to enforce its own requirements.<sup>124</sup> Accordingly, as a result of prophylactic

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nounced a suspension of new intercountry adoption processing while it worked to develop an adoption process compliant with the Hague Adoption Convention (Convention) that would address vulnerabilities which led to widespread corruption and fraud under the old process. This suspension affected all receiving countries, including the U.S. During FY 2015, Embassy Guatemala City issued only [thirteen] immigrant visas to children adopted from Guatemala by U.S. citizens pursuant to adoptions initiated before the ban").

116. See ROTABI & BROMFIELD, *supra* note 9, at 64–85.

117. *Id.*

118. See Bartholet & Smolin, *supra* note 23, at 245–46 (arguing that fears of fraud are overstated and can be combatted without prophylactic bans); see also MONTGOMERY & POWELL, *supra* note 97, at 132.

119. See ROTABI & BROMFIELD, *supra* note 9, at 68–71.

120. See, e.g., Julie Jimmerson, Note, *Female Infanticide in China: An Examination of Cultural and Legal Norms*, 8 UCLA PAC. BASIN L.J. 47, 71–75 (1990) (describing Chinese forced abortion policies).

121. See, e.g., Long, *supra* note 96, at 650–56 (describing the new law which mandates the creation of a centralized governmental adoption authority and prohibits all profit to birth parents and institutions or agencies acting as middlemen in adoption).

122. *Id.* at 656. The U.S. is currently not processing any adoptions from Guatemala because Guatemala is still trying to implement its domestic laws restricting and regulation the adoption process. *Id.* at 648–53.

123. See William Robert Johnston, *Historical Statistics on Adoption in the United States, Plus Statistics on Child Population and Welfare*, <http://www.johnstonsarchive.net/policy/adoptionstats.html> [<https://perma.cc/F2KN-X5BB>] (last updated Aug. 5, 2017).

124. See Long, *supra* note 96, at 650–56.

cally trying to avoid any corruption by eliminating financial rewards even to intermediaries, as opposed to trying to uproot individual cases of fraud and abuse, the adoption system is simply not functioning.<sup>125</sup>

Since its signing, the adoption processes in many sending countries who are signatories of the Convention have been found guilty of financial “corruption” involving payments to birth families, causing much concern, delays, and the temporary or permanent shutting down of adoption programs as countries try to fix corruption problems and strengthen oversight.<sup>126</sup> Financial abuses have repeatedly led to bans on adoption and private intermediaries throughout Central and South America.<sup>127</sup> Indeed, virtually every sending country—Cambodia, China, Ethiopia, Guatemala, and Vietnam, among others—has had problems with scandals.<sup>128</sup> The most recent State Department figures show that the number of foreign children adopted by U.S. parents declined 9% in 2014 bringing the number to the lowest in thirty years—there were only 6,441 adoptions in the U.S., 74% lower than the peak of 22,884 international adoptions in 2004.<sup>129</sup> It is clear that oversight and formalization of the process has unearthed a constant fear of corruption. Once governed by private, gray-market brokers and agencies, the national governmental oversight was

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125. See Bartholet, *The Child's Story*, *supra* note 30, at 342 (describing how bans on profit taking by private adoption intermediaries caused the international adoption system to ground to a halt in many sending countries); *Home Alone*, *ECONOMIST*, Aug. 6, 2016, <https://www.economist.com/news/international/21703364-fewer-families-are-adopting-children-overseas-home-alone> [<https://perma.cc/4j3B-36AN>].

126. See, e.g., Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform & Infrastructure in Intercountry Adoption Policy*, 22 *PACE INT'L L. REV.* 1, 34 (2010) (“As a result of corruption problems, seventeen of the forty sending countries from which Americans adopt have instituted temporary or permanent moratoriums on private adoptions of their orphans.”); *DOS UPDATE*, *supra* note 115.

127. KERRY O'HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE* 793–811 (3d ed. 2015).

128. See, e.g., Judith L. Gibbons & Karen Smith Rotabi, *Fraud in Intercountry Adoption: Child Sales and Abduction in Vietnam, Cambodia, and Guatemala*, in *INTERCOUNTRY ADOPTION: POLICIES, PRACTICES AND OUTCOMES* 67, 70 (Lucy Jordan & Patrick O'Leary eds., 2012); Smolin, *supra* note 86, at 467–468, *passim* (discussing corruption allegations and scandals in Guatemala and many other sending countries throughout the article); Smolin, *supra* note 106, at 59–61; Kathryn Joyce & Micahel Tsegaye, “*Child Harvesting*” in *Ethiopia's Adoption Program*, *PULITZER CTR.* (Jan. 5, 2012), <https://pulitzercenter.org/reporting/child-harvesting-ethiopia-adoption-program> [<https://perma.cc/HHJ6-X9ZB>].

129. See Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction and Child Welfare Policy*, 81 *LAW & ETHICS HUM. RTS.* 103 (2014) (discussing consistent and significant decreases in the number of adoptions taking place over the last decade); Janice Rodden, *International Adoption in 2014 at Lowest Level Since 1982*, *ADOPTIVE FAMILIES* (Apr. 8, 2015), <https://www.adoptivefamilies.com/resources/adoption-news/international-adoption-2014/> [<https://perma.cc/3TNX-9DEZ>].

supposed to cure abuses and support international cooperation.<sup>130</sup> However, to some extent, the Convention has caused dramatic reductions in the number of adoptions by making receiving countries much more cautious about corruptions and scandals, suspending arrangements prophylactically, and creating more bureaucratic hurdles to finalizing adoptions.<sup>131</sup> Although it is difficult to prove causation, and other factors may also be at play in decreasing ICA,<sup>132</sup> the greater oversight and formalization of the process provided by the Hague Convention has had an impact.<sup>133</sup> Despite attempts to root out corruption, kidnapping, and illegal

130. See Hague Convention, *supra* note 100, at art. 1 (“(a) to ensure that intercountry adoptions take place in the best interests of the child . . . ; (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.”); see also William Duncan, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: Its Birth and Prospects*, in INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS, AND PERSPECTIVES 40, 46–47 (Peter Selman ed., 2000) (Hague convention as intended to reduce the delays, complications, and costs of adoption); Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 569 (2005); O’Keeffe, *supra* note 24, at 1615 (discussing the bureaucracy that the Hague Convention imposes that increases costs, delays and time).

131. See Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways: Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 224–26, 256 & n.328 (2014) (noting some factors contributing to the decline, including the Hague Convention, the increase in the availability and effectiveness of assisted reproductive technologies, and the restrictions preventing LGBT parents from adopting internationally); see also Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should it Matter?*, 95 MINN. L. REV. 485, 547 (2010); Linda D. Elrod & Robert G. Specter, *Review of the Year 2015-2016 in Family Law: Domestic Dockets Stay Busy*, 50 FAM. L.Q. 501, 514 (2017) (“International adoptions have declined partly because of the Hague Convention on Cooperation with Respect to International Adoption and because several countries, including Russia, Romania, and Guatemala, have ended adoption programs or have diminished numbers of children available.”); Paige Tackett, *“I Get By With A Little Help From My Friends”: Why Global Cooperation Is Necessary to Minimize Child Abduction and Trafficking in the Wake of Natural Disaster*, 79 UMKC L. REV. 1027, 1032 (2011) (“[T]he requisite costs [of complying with the Hague Convention] have been astronomical . . . . Compliance with the Hague Convention is expensive and time consuming . . . .”).

132. See BARTHOLET, *supra* note 15, at 24, 28, 34–37 (discussing societal bias for biological children over adoption and the difficulties of adopting after seeking infertility treatments); Gulcin Gumus & Jungmin Lee, *Alternative Paths to Parenthood: IVF or Child Adoption*, 50 ECON. INQUIRY 802, 803–04 (2012) (discussing the impact of ART on adoption); see also Susan Frelich Appelton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEG. F. 393, 408 (2004); Smolin, *supra* note 86, at 494 (“The declines in these key sending nations are not due primarily to the Hague Convention, but have arisen because of developments within those nations.”).

133. See O’HALLORAN, *supra* note 127, at 253–64 (“Since ratification of The Hague Convention, intercountry adoption in Ireland has declined significantly—though the extent to which this is a causal factor is debated.”).

payments to birth parents, these efforts have had limited success and the fear of the improper gray market in ICA persists.<sup>134</sup>

Ultimately, aversion toward and the potential for corruption in the exchange of money for babies in resource-starved countries has made ICA largely unworkable. As both the examples of Guatemala and China demonstrate, unlawful “corrupt” payments grease the levers of private and public systems. Prophylactic attempts to prevent money from changing hands, between birth parents or agents, have made ICA slow, bureaucratic, and impractical causing ICA systems to cease to function.<sup>135</sup> Reforms often result in more expensive adoptions with money being spent on the process as opposed to helping children in need.<sup>136</sup>

The fact that money is being exchanged for children and that a price is paid to birth parents undermines ICA because of “commodification anxiety”—anxiety about allowing the market to determine the value of our lives or our intimate interactions in society.<sup>137</sup>

If a whole person, or some subset of that person integral to the nature of personhood, is sold in the market or referred to in market terms we potentially inflict harm, not just on that person, but we diminish the preciousness of human life and human flourishing generally.<sup>138</sup> As one scholar puts it, “[w]e potentially do harm to ourselves and to human flourishing if we treat something integral to ourselves as a commodity, i.e., as separate and fungible.”<sup>139</sup> The market is a cold and arms-length medium

134. See *supra* note 24; see also Landrieu & Reitz, *supra* note 108, at 350; Katie Rasor, Richard M. Rothblatt, Elizabeth A. Russo & Julie A. Turner, *Imperfect Remedies: The Arsenal of Criminal Status Available to Prosecute International Adoption Fraud in the United States*, 55 N.Y. SCH. L. REV. 801, 801–22 (2010) (exploring the various regulations that can be invoked to prosecute adoption fraud).

135. See, e.g., Taemin Kang, *Breaking the Myths of Intercountry Adoption in Romania*, 10 REGENT J. INT’L L. 131, 137–38 (2014) (fears of corruption resulted in ban on intercountry adoption in Romania); Long, *supra* note 96, at 651–65 (fears of corruption leads to new legislation whose troubled implementation has resulted in a near complete halt to intercountry adoption in Guatemala); I. Willing, P. Fronck & D. Cuthbert, *Review of Sociological Literature on Intercountry Adoption*, 11 SOC. POL’Y & SOC’Y 465, 465–79 (2012) (arguing that Hague Convention and bans on international adoption reflect a bias for Western concerns).

136. See Carlson, *supra* note 24, at 766.

137. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 118 (2000) (describing the term “commodification anxiety” as referring to the unease people feel with measuring human lives and intimate connections in market terms particular in the context of providing remuneration to women’s domestic labor); Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 YALE L.J. 745, 750–51 (2000) (describing the term “commodification anxiety” coined by Joan Williams as essential to reconceiving the relationship between women and financial power.); Joan Williams, *Is Coverture Dead—Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2282 (1994).

138. See *supra* note 82 and accompanying text; see also Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 222, 234–35 (2009); Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 693 (2003).

139. Suter, *supra* note 138, at 222; see also Radin, *supra* note 20, at 1930–36.



and does not take into account the pricelessness of human life or the personal nature of emotions and attachments.<sup>140</sup>

Indeed, the commodification anxiety creates a domino effect creating fears and rumors of the worst kind—that children sent to ICA are being traded for their organs. In Russia for instance, the media circulated concerns that children in illegal adoptions were sold to pedophiles or used for transplantation operations to profit an untraceable intermediary named Nadezhda Fratti.<sup>141</sup> Such persistent rumors also circulated in Brazil in the 1980s, and in Central America and Africa.<sup>142</sup> In fact, these were speculative rumors that conflated stories of corruption in ICA and organ markets<sup>143</sup> Despite the failure of investigations to find such extreme improprieties, the specter of the rich taking the babies of the poor created fear and animosity towards the global transfer of children from poor to wealthy countries in exchange for money.

With so much potential for and difficulty in policing corruption, it has been argued that ICA should cease altogether, reflecting what is perceived as a corrupt and fraudulent reality.<sup>144</sup> Beyond corruption, there are other critiques undermining intercountry adoption. Given that adoption occurs between wealthy and poor countries, ICA is plagued by concerns that it is the new “colonialism,” a means of exploiting the resources of poor countries in favor of the rich ones.<sup>145</sup> Racial concerns are expressed due to the reality that in ICA Black, Hispanic, and other minority children are often transferred to primarily wealthy, white parents.<sup>146</sup> Many argue that ICA deprives children of their rights to cultural affiliation and identities.<sup>147</sup> Critics argue that children adopted internationally have

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140. See, e.g., Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167, 1242–46 (1995); JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, PRACTICES AND POLICIES* 1289 (1993) (“Market rhetoric is extremely useful, but it may be inappropriate in some cases.”); Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 463 (1995) (noting the potential inappropriateness of discussing human bodies in market terms).

141. Khabibullina, *supra* note 9, at 181.

142. *Id.* at 181–82.

143. *Id.* at 182.

144. See, e.g., ROTABI & BROMFIELD, *supra* note 9, at 155–59; see also Smolin, *supra* note 14.

145. See, e.g., King, *supra* note 31, at 426.

146. See *id.*; ROTABI & BROMFIELD, *supra* note 9, at 2 (“An international adoption is most commonly completed by middle- and upper-class families, most often by prospective parents who are predominantly White and have completed a university education.”); Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interests of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 349–50 (2004).

147. See, e.g., G.A. Res. 44/25, *Convention on the Rights of the Child* (Dec. 12, 1989) [hereinafter CRC]; 25 U.S.C. § 1901 (1978); Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child*, in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 37–49 (Jonathan Todres et al. eds., 2006); King, *supra* note 31, at 453–54.

difficulties adjusting to their new cultures and making peace with their mixed identities.<sup>148</sup> There are those that argue that money is better spent providing aid to families in need than in paying to raise their own children.<sup>149</sup>

### III. A SYNCRETIC ANALYSIS OF ART AND ADOPTION AS TWO FORMS OF COMMERCIAL COLLABORATIVE FAMILY-MAKING

What I have described is a functional, and largely unregulated, system of baby markets in ART, including collaborative forms of ART, and even a strong system of international commercial surrogacy alongside a failing and disappearing system of intercountry adoption.<sup>150</sup> Marketization is perceived as inevitably fraudulent and corrupting in ICA while it is largely accepted in the context of collaborative ART, even international surrogacy. In the next section, I consider whether this juxtaposition—the baby markets dilemma—can be justified in light of legal and ethical considerations, historical analysis, and empirical studies.

#### A. *Justifying the Difference*

One way to justify the difference in legal treatment between commercialized ART “baby markets” and marketized adoption is that, due to modern definitions of legal parenthood, markets in gametes and surrogacy do not sell parenthood in the same manner as commercialized adoptions. For instance, in the context of gamete purchases, factors other than genetics are used to define parenthood.<sup>151</sup> In cases of third-party sperm purchases, marital presumptions or intent can be used to define fatherhood.<sup>152</sup> And, in cases of egg purchases, birth or intent is regularly used

148. See Perry, *supra* note 31, at 135; King, *supra* note 31, at 425 (“Whether the exchange is viewed as one between birth parents with very few resources, and families with resources, or as one between a country with an extensive (admittedly imperfect) social service infrastructure and a country with no social service infrastructure, the exchange bears a neo-colonialist hue.”); Riah Lilith, Note, *Buying a Wife But Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoptions*, 9 BUFF. WOMEN’S L.J. 225, 229, 258–59, 262 (2001).

149. Bergquist, *supra* note 146, at 349; King, *supra* note 31, at 425.

150. See generally ROTABI & BROMFIELD, *supra* note 9 (describing at length how ICA is failing while global surrogacy is on the rise). I have also described the booming market in fertility services and gamete sales. However, in this Article I will focus on surrogacy and international surrogacy as these forms of ART involve the greatest investment by family-making collaborators in terms of time and physical involvement. However, gamete sellers are also collaborative family-law participants and their role and their need for recognition has been discussed at length. See Cahn, *supra* note 1.

151. See, e.g., Radhika Rao, *Assisted Reproductive Technology and The Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 963–64 (1996) (discussing how the use of intent to define parenthood creates a contract private ordering around parenthood challenging traditional biology-based norms).

152. See, e.g., CAL. FAM. CODE § 7613(a) (West 2008) (“If, under the supervision of a licensed physician and with the consent of her husband, a wife is insemin-

to define parenthood.<sup>153</sup> In this way, legal definitions of parenthood make gamete sales about buying human tissue, but not about buying legal rights to a child.

Indeed, in jurisdictions where commercial surrogacy is permitted, parenthood is often defined by intent.<sup>154</sup> Thereby, although intended parents purchase gestational services, parenthood rights are not transferred for money as the surrogate is not the legal mother. Because surrogates and other collaborators are defined as legal strangers, it is simpler to allow them to be paid in the market unlike birth parents in adoption whose biological parenthood cannot be questioned and, thus, the specter of baby-selling arises.<sup>155</sup> Moreover, in the majority of surrogacy arrangements worldwide, there is a genetic connection between the baby born to at least one of the two intended parents, if not both, providing a biological connection between intended parents and the child as well.<sup>156</sup> As the intended parents are defined as the natural parents of the child born in surrogacy,<sup>157</sup> the state is more inclined to allow the markets based on caution in getting involved with private parental relationships.<sup>158</sup>

In addition, in adoption, parental rights are transferred to a child that already exists. The market, it is argued, does not sufficiently account for

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nated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.”).

153. See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005) (egg donor consent form relinquishes parenthood rights of donor); Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 281 (1995) (describing intent based parenthood in egg donation).

154. See, e.g., *Johnson v. Calvert*, 851 P. 2d 776, 778 (Cal. 1993).

155. See, e.g., Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 651–53 (2016) (discussing how separating gamete donors from parenthood can be explained by intimacy essentialism and the desire to keep the market and parenthood in separate spheres).

156. See, e.g., IVF Australia, *Surrogacy: IVF Australia's Guide to Preparing for Surrogacy* (2018) 4, 6, [https://www.ivf.com.au/sites/default/files/leaflets/vh-mkt-cln-010-nsw-surrogacy\\_4-8june18.pdf](https://www.ivf.com.au/sites/default/files/leaflets/vh-mkt-cln-010-nsw-surrogacy_4-8june18.pdf) [<https://perma.cc/W4YF-J8LM>] (limiting surrogacy to gestation of children with genetic connections to both the intended mother and father); FLA. STAT. ANN. § 742.15(1)(e) (West 1997) (requirement of genetic connection); SUSAN MARTHA KAHN, *REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL* 188–96 (2000) (discussing Embryo Carrying Agreements Law of 1996); Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIM. LAW. 43, 54 (2008) (“Over the past two decades, there has been an increased use of surrogacy arrangements whereby one woman agrees to carry the fetus of another couple. Most of these situations involve gestational surrogacy in which the surrogate is the birth mother but has no genetic connection to the child.”); Scott, *supra* note 5, at 121 (“[G]estational surrogacy, in which a pre-embryo is implanted in the surrogate, has largely replaced traditional surrogacy, in which the pregnancy results from artificial insemination of the surrogate’s own egg.”).

157. *Calvert*, 851 P.2d at 778.

158. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that “the First and Fourteenth Amendments prevent the State from compelling [parents] to cause their children to attend formal high school to age 16” when such a practice would burden the free exercise of religion).

the interests of children.<sup>159</sup> The state has an obligation to be involved and ensure that child's safety. On the other hand, in ART markets, the child is created by the market, and, thus, it is unclear if the government needs to regulate ART for the sake of children who are not yet born. I. Glenn Cohen, for instance, argues that it cannot be in the best interests of children to prohibit or restrict access to ART because these children would otherwise not be born at all.<sup>160</sup> Thus, implicating Parfit's so-called "non-identity" problem, he claims it cannot be argued that children are better off not having been born at all, or that it would be in their best interests to restrict the ART from which they were conceived because then they would not have been born.<sup>161</sup> However, the state does have a duty to ensure basic rights for children once they are born, and thus, legislation may be necessary to regulate ART pre-birth, for instance by mandating record keeping to secure access to genetic identity.<sup>162</sup>

These two differences between ART and adoption are significant and can justify differences in legal treatment. Accordingly, while some argue that commercial surrogacy constitutes baby-selling in a manner parallel to adoption,<sup>163</sup> there are legally and conceptually at least two significant reasons to differentiate legal treatment of ART markets and commercialized adoption.<sup>164</sup>

#### B. *Parallels May Overwhelm Similarities*

On the other hand, ART markets and commercial adoption share many similarities, and there is good reason to hold them to similar standards of regulation and even to allow similar levels of commerciality. These similarities stem from the reality that collaborative ART and adoption are two means of procuring children for those who are unable to have children without third-party collaborators. However, as I describe in this part, these similarities move beyond this common starting point and reflect systematic symmetry, especially in the context of commercial surrogacy, where the intimate nature of the engagement makes corruption concerns particularly compelling. The similarities and shared attributes should make us question the striking lack of symmetry between the legal

159. See *supra* notes 137–140 and accompanying text (discussing the ethical objections to baby-selling).

160. See I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 454–55 (2011).

161. *Id.*

162. See Pamela Laufer-Ukeles, *The Lost Children: When the Rights to Children Conflict with the Rights of Children*, 8 LAW & ETHICS HUM. RTS. 219, 219–25 (2014) (discussing the limits of the non-identity theory in the context of children who will one day be rights bearers).

163. See, e.g., Smolin, *supra* note 14, at 311.

164. For discussion comparing surrogacy and adoption, see ROTABI & BROMFIELD, *supra* note 9, at 121; HACKER, *supra* note 102, at 241 (comparing the commodification in adoption to the commodification in surrogacy); Krawiec, *supra* note 13, at 246–50 (arguing that both are examples of baby markets).

acceptance of collaborative ART markets and its refusal to accept commercialization in ICA.

1. *Commodification and Exploitation in Surrogacy*

As described above, commercial adoption is anathema due to the fear that birth parents will be exploited by being pressured to sell their babies and, more generally, that the marketization and commodification of children fails to value the pricelessness of humanity or protect individual children from harm and trafficking.<sup>165</sup> Commodification anxiety, particularly in the context of global transfers of children, creates unease and justifies significant bureaucratic and legal hurdles to prevent commercialization of the process.<sup>166</sup>

However, similar concerns about commodification and exploitation surround surrogate motherhood. Many have made essentialist and theoretical arguments about the harms of commodification in surrogate motherhood including the commodification of the woman's body,<sup>167</sup> the cheapening of the value of parenthood and child-making,<sup>168</sup> the inability to give fully informed consent,<sup>169</sup> and the exploitative nature of the surrogate contract.<sup>170</sup> These kinds of arguments are comparable to concerns about baby-selling in ICA.

In addition, empirical studies and lessons from decades of surrogate motherhood practice demonstrate real harms from these arrangements to surrogate women, especially in international surrogacy. Surrogacy involves long-term relationships, physical control and restraint, and biologi-

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165. See *supra* notes 137–140 and accompanying text.

166. *Id.*

167. See, e.g., Radin, *supra* note 20, at 1930–36; Smolin, *supra* note 14, at 334.

168. MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 113 (2001); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 75 (1990).

169. See, e.g., MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 27 (1990) (arguing that “to portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting surrogate mother, rather than to see her as driven by circumstances. . . [fails] to take account of realities.”); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 172 (Larry Gostin ed., 1990); Rosemary Tong, *The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements*, 21 J. SOC. PHIL. 40, 45 (1990) (“To say that a woman ‘chooses’ to do this . . . is simply to say that when a woman is forced to choose between poverty and exploitation, she sometimes chooses exploitation as the lesser of two evils.”); see also *In re Baby M.*, 525 A.2d 1128, 1149 (N.J. Super. Ct. Ch. Div. 1987) (“Counsel for the Whiteheads says that until Mrs. Whitehead felt the emotion of birth and sensed the child, she could not give informed consent at the time she signed the contract.”).

170. See, e.g., Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood: An Ethical Analysis*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 136, 141–42 (Larry Gostin ed., 1990); CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 118, 124–26 (1987).

cal exchanges with embryos that create a personal intimacy among surrogate, embryo, and intended parents that is not regularly commodified.<sup>171</sup> Intended parents are involved in the surrogate's physical health, decision-making, and her everyday activities in an atypical manner given their concern for the child she is carrying. The intended couples often accompany surrogates to doctors' appointments and have interests in her actions, what she consumes, and where she travels.<sup>172</sup> Indeed, surrogate contracts may assert control over the lives of surrogates while they gestate—contracts may prevent surrogates from international travel or participation in high impact sports or cigarette smoking, or they may require certain actions and encumber surrogates' freedom generally.<sup>173</sup> From the time a pregnancy is initiated, surrogates are literally trapped, physically, into their agreements and into their entangled relationship with intentional parents despite changes of heart, disputes, or unexpected suffering.

The nature of this relational bond and the dangers it poses are apparent in the context of medical decision-making during surrogacy.<sup>174</sup> It is questionable whether the right to informed consent to medical treatment, a right that protects human dignity and must be exercised at the time of treatment, can withstand the surrogacy agreement which fundamentally constrains and commits the surrogate to "reasonable" medical treatment and procedures in advance.<sup>175</sup> In fact, provisions of surrogacy contracts may involve agreeing to abort under pre-determined conditions, although the enforceability of such provisions is questionable.<sup>176</sup>

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171. Laufer-Ukeles, *supra* note 1, at 1236–38 (discussing the intimacy involved in surrogacy).

172. See, e.g., Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 WASH. L. REV. 647, 657 (2010) ("Provisions such as the specifics of the IVF treatment, prenatal care, and whether the intended parents can attend medical appointments are incorporated into the contract to reinforce that, while the surrogate may be the one carrying the child, it is not her pregnancy. From the parties' perspectives, the pregnancy belongs to the intended parents and the surrogate is hired to provide a valuable service.") (citations omitted).

173. See, e.g., Kimberly R. Willoughby & Alisa A. Campbell, *Having My Baby: Surrogacy in Colorado*, COLO. LAW., Jan. 31, 2002, at 103, 105–06 (itemizing the kind of restrictions found in surrogacy contracts).

174. See generally Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent and Surrogate Motherhood*, 43 N.C. J. INT'L L. 96 (2018).

175. *Id.* at 104–05 (describing the problems of contractually waiving the right of informed consent in surrogate contracts); see also Katherine Drabiak-Syed, *Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiation in Surrogacy Contracts*, 39 J.L. MED. & ETHICS 559, 559 (2011) ("[A]dditional interested parties—the intended parents—are involved in the medical decision-making relationship.").

176. Holcomb & Byrn, *supra* note 172, at 657 n.42 ("Many surrogacy contracts incorporate provisions related to abortion and fetal reduction. The surrogate has a constitutional right to have an abortion; however, in many instances the parties to a surrogacy contract may insert a provision into the contract requiring that the surrogate waive her right to an abortion or stating that an abortion must be performed in certain circumstances.").

The nature of the surrogate motherhood process involves surrogates and intended parents experiencing the pregnancy and labor together and becoming emotionally and intimately involved in each other's daily lives and relationships.<sup>177</sup> Researchers have described the relationship as more than just a "commonplace friendship" but rather a relationship deeply intertwined with the welfare of the child and based on the intimate physical nature of the pregnancy.<sup>178</sup> Surrogates expect this relationship to continue through the pregnancy and after birth.<sup>179</sup> It is the quality of the relationship between the surrogate and intended parent that largely determines her satisfaction with the process.<sup>180</sup> However, when surrogates feel that the intended parents are distant, and that the level of relationship did not meet their expectations, the surrogates are likely to express dissatisfaction.<sup>181</sup> Even if the relationship was good during the pregnancy but then tapers off after the birth the surrogate's satisfaction with the whole process drops dramatically.<sup>182</sup> When relationships do not exist, in contrast to a surrogate's expectations, surrogacy too often results in devastation for the surrogate, revealing a darker side where parties feel abused and dehumanized—precisely the harms that commodification of intimacy threatens.<sup>183</sup>

While relationships that harbor vulnerability and intimacy in surrogacy usually exist domestically, and most domestic surrogates are ultimately satisfied with the process,<sup>184</sup> international surrogacy involves far

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177. See ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* 205–29 (2010); Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57, 58, 64–67 (describing his thesis of "maternal-fetal detachment" during commercial surrogacy and noting the strong relationships developed with infertile couples using the concept of "defection"); Melinda M. Hohman & Christina B. Hagan, *Satisfaction with Surrogate Mothering: A Relational Model*, 4 J. HUM. BEHAV. SOC. ENV'T 61, 67–69, 81–82 (2002); Helena Ragoné, *Chasing the Blood Tie: Surrogate Mothers, Adoptive Mothers and Fathers*, 23 AM. ETHNOLOGIST 352, 359–62 (1996).

178. R.J. Edlmann, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 125, 129 (2004).

179. TEMAN, *supra* note 177, at 361; Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 31–32 (2005); Hohman & Hagan, *supra* note 177, at 67–69.

180. TEMAN *supra* note 177, at 215–25; Baslington, *supra* note 177, at 65–67; Ciccarelli & Beckman, *supra* note 179, at 22–24 (reporting twenty-seven empirical studies from January 1983–December 2003); J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 358–59 (2011); Hohman & Hagan, *supra* note 177 at 67–69, 81–82.

181. TEMAN, *supra* note 177, at 205–21; Hohman & Hagan, *supra* note 177, at 67–69.

182. TEMAN, *supra* note 177, at 225–29; Ciccarelli & Beckman, *supra* note 179, at 32.

183. D. KELLY WEISBERG, *THE BIRTH OF SURROGACY IN ISRAEL* 193 (Univ. Press of Fla. 2005).

184. Scott, *supra* note 5, at 137–44 (discussing the satisfaction and success attributed to commercial surrogacy as well as the way surrogacy has been accepted in contemporary society).

greater potential for exploitation and commodification.<sup>185</sup> Although surrogates often still imagine they are connected to intended parents in a manner similar to local surrogates, as they are still humans who are involved in deeply intimate and involved processes, this is more illusion than reality.<sup>186</sup> Unlike domestic surrogacy, empirical accounts do not attest to warm ongoing relations between surrogates and intended parents—in fact, they usually do not even meet.<sup>187</sup> Rather, the process is much more dehumanized, with babies removed immediately from surrogates, birth processes being almost exclusively by C-section, and surrogates being monitored and controlled much more closely.<sup>188</sup> International surrogacy, unlike domestic surrogacy, is usually not a joint collaborative family-making process but a mechanized ordering process.<sup>189</sup> Moreover, in international surrogacy, the western standard of informed consent is unlikely to apply.<sup>190</sup> When there is no relationship between the surrogate and intended parents, she is more likely to be expected to put her own health in danger for the sake of the fetus, be subject to coercive medical treatment like abortions, and be subject to degrading restrictions during pregnancy for the sake of the baby she carries.<sup>191</sup> For example, in international surrogacy, surrogates have related how, in cases of multiple fetal pregnancies, the doctors do not expressly seek their permission before carrying out fetal reductions.<sup>192</sup> In addition, the high sums paid to foreign surrogates, who are empirically more destitute and less educated than surrogates in domestic surrogacy, threaten to exploit her poverty where few, if any, alter-

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185. Laufer-Ukeles, *supra* note 1, at 1265–75.

186. Pande, *supra* note 1, at 622 (describing how many foreign surrogates emphasize their global sisterly ties with commissioning couples, insisting that they will continue to stay in constant contact after the birth and even that the intended parents were likely to pay for the surrogate's children's educational expenses directly out of familial love).

187. *Id.*; Parks, *supra* note 72, at 335.

188. See Scott Carney, *Inside India's Rent-a-Womb Business*, MOTHER JONES, Mar./Apr. 2010, at 68, <https://www.motherjones.com/politics/2010/04/surrogacy-tourism-india-nayna-patel/> [<https://perma.cc/7A9H-ZR8B>]; ROTABI & BROMFIELD, *supra* note 9, at 147 (noting automatic use of C-sections in foreign surrogacy in India).

189. Pande, *supra* note 1, at 622; AMRITA PANDE, *WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA* 68 (2014) (“The surrogate is expected to be a disciplined contract worker who will give the baby away immediately after delivery without creating a fuss.”).

190. Choudhury, *supra* note 65, at 49 (discussing ways to improve Indian informed consent); Amy Parker, *Reproductive Labor or Trafficking: The Effect of Disparate Power on Consent in Transnational Surrogacy Agreements*, 25 J. TRANSNAT'L L. & POL'Y 155, 169 (2015-2016) (discussing lack of informed consent in Indian surrogacy contracts); Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1459–61 (2009); Richard F. Stortow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L. J. 295, 309 (2005).

191. SPAR, *supra* note 1, at 94.

192. Diksha Munjal-Shankar, *Autonomy, Choices and Consent in Commercial Surrogacy: Viewing through the Indian Lens*, 7 ASIAN BIOETHICS REV. 380, 385 (2015).



nate options exist for securing needed income.<sup>193</sup> In sum, international surrogates are particularly vulnerable to being commodified by being treated as mechanical incubators without rights, interests, and personal entanglements, as well as exploited for their destitute conditions. We should be just as uncomfortable commodifying women as we are commodifying birth parents and children, although the different legal treatment attests to the greater discomfort in commodifying parenthood.

## 2. *Domestic Adoption is Already Commodified*

In addition to the potential harms of commodification and exploitation that already exist in surrogacy, it is also worth noting that adoption is explicitly commodified domestically in ways that are largely accepted. First, for children who are difficult to place for adoption, either due to their age or due to their special needs, the government provides public subsidies to adoptive parents to ease the adoption process.<sup>194</sup> Despite the explicit commerciality of the process, the fear of corruption is low. The amount of the subsidies is insufficient to incentivize permanent adoption and responsibility for a child. Finally, the state would have to make these expenditures to foster parents or group homes, in any event, and thus paying the money to permanent parents helps both children in need of stability, parents in need of income, and the overstretched welfare system who obtains a permanent caregiver for children.<sup>195</sup> In fact, the lack of money is considered an invalid reason to prevent special needs adoptions.<sup>196</sup> Despite overt commerciality, this program is widely accepted and has achieved some success with an uptick in adoptions.<sup>197</sup>

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193. Smerdon, *supra* note 73, at 54; PANDE, *supra* note 189, at 60 (money earned through surrogacy is equivalent to almost five years of total family income.); Anne Donchin, *Reproductive Tourism and the Quest for Global Gender Justice*, 24 *BIOETHICS* 323, 326 (2010) (“[P]overty induces people to resort to work that separates them from their families or jeopardizes their health.”); Ryznar, *supra* note 65, at 167.

194. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. Every state now has a state subsidy program with federal and state funds available for those who adopt special needs children. Generally, a special needs child is one that is eligible for adoption and the state has determined, after making reasonable efforts to place the child, that the child will not be placed without a subsidy. See 42 U.S.C. § 673(c) (2018); 42 U.S.C. § 673 (1980). Congress has legislated financial incentives for the states in order to increase such adoptions. See 42 U.S.C. § 673b (2009) (amended AFSA provision).

195. Dawn J. Post, *Adoption Bonuses and Broken Adoptions*, 33 *CHILD L. PRAC.* 9 (2014) (discussing how adoption payments help the adoption system for special needs children).

196. See, e.g., W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 *WM. & MARY BILL RTS. J.* 883, 904–05 (2006).

197. Paul Placek, *National Adoption Data*, in *ADOPTION FACTBOOK IV* 3, 28–29 (National Council for Adoption 2007), <https://www.adoptioncouncil.org/files/large/c3dfa7b8619e8aa> [<https://perma.cc/A2HS-LEC6>] (60% in 2002, up from 48.5% in 1996).

Second, private adoptions, through which most newborn babies are placed in the U.S., also have overtly commercial aspects.<sup>198</sup> Private adoptions are popular because birth mothers retain more control of the process, are able to select adoptive parents, and set the terms of the adoption, including agreements for continuing contact.<sup>199</sup> Adoptive parents pay large fees to agencies and lawyers to obtain legal custody, and the birth mother can also benefit financially to some extent as she can receive payment for expenses, including lost wages.<sup>200</sup> Private ordering coupled with payments for lost wages and high agency fees give private adoption a free market commercial feel.

3. *History of Adoption Demonstrates It Has Always Been a Commercial Undertaking*

Furthermore, historical accounts of domestic adoption demonstrate that commerciality has always been a fundamental part of legal adoption.<sup>201</sup> Financial benefit was an explicit and accepted incentive in early legal-adoption systems.<sup>202</sup> While social workers sought to place children in foster and adoptive homes due to charitable incentives, the benefits of useful children were explicitly used to lure foster and adoptive parents to providing homes for children in need due to poverty, neglect, or abuse.<sup>203</sup> Moreover, although adoption statutes and parental consents relinquished children to charitable organizations authorizing permanent placement with adoptive families, as adoption was largely driven by poverty, birth families regularly viewed placement of children as a temporary measure to provide children with a better life, training, food, and lodging.<sup>204</sup>

198. See, e.g., Goodwin, *supra* note 86, at 62 (emphasizing the high costs of adopting children in the U.S. and the resulting comparisons to markets in babies).

199. See Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in *Baby Markets: Money, Morals, and The Neopolitics of Choice* 41, 55–60 (2009).

200. See, e.g., Goodwin, *supra* note 86, at 64–69 (describing overall fees paid to middlemen and birth parents); Krawiec, *supra* note 13, at 246–49 (discussing payments to intermediaries); Carroll, *supra* note 89, at 288–89 (discussing the living expense fees that she argues turns domestic adoption into improper commodification of babies); Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and “Consumer” Remedies*, 35 U. LOUISVILLE J. FAM. L. 473, 490–91 (1996).

201. VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 172–99 (1985) (discussing the transition from the desirability of useful children who worked to sentimental useless children and the monetary incentives needed to place unwanted children).

202. *Id.* at 172–73 (“The most renowned nineteenth-century program of placing children in family homes was directly contingent on children’s economic usefulness.”).

203. *Id.* at 173–74 (“The plight of nineteenth century babies was the flip side of children’s usefulness.”); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1092–93 (2003).

204. Cahn, *supra* note 203, at 1092–93 (describing how foster placements even where parents relinquished all rights were considered temporary before the mid-twentieth century).

Over time, the children's rights movement and the delegitimization of children's labor made adopting children for their economic utility unpalatable and actively discouraged.<sup>205</sup> Yet, in an about face, parents became eager to pay for children to fulfill procreative desires when health or circumstances made natural birth unavailable.<sup>206</sup> Baby markets to acquire precious, healthy babies developed although the law and ethics tried to discourage such markets, or at least make them "gray"—avoiding payment directly to birth parents.<sup>207</sup> Thus, historically, adoption could be differentiated from a free-market purchase of babies due to controlling regulation; but, one cannot pretend that adoption has not consistently and fundamentally involved financial remuneration and financial incentives.

#### 4. *Global Bust and Boom*

In fact, the similarities between ICA and international surrogacy are becoming more apparent, with the specter of commodification and exploitation beginning to mar both processes in similar ways. While there are still high demands from the "acquiring" population interested in obtaining surrogacy services or in adopting children from abroad, sending countries are reigning in their supply of children, in both contexts, for fear of the way each system treats their citizens.

The boom and bust quality of ICA has been observed for years.<sup>208</sup> A sending country opens its doors to allowing its unparented or orphaned children to be adopted, only to close its doors a few years later leaving parents in limbo, and other potential adoptive families looking for other countries willing to engage. From Ethiopia to Romania, Guatemala, Vietnam, Laos, China, Russia, and many more, countries follow a "boom and bust" cycle in sending children for ICA: "When scandals emerge, governments lumber into action. But then the demand just shifts to another country, and the problems start all over again."<sup>209</sup>

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205. ZELIZER, *supra* note 201, at 176 (explaining that children were re-envisioned as sacred treasures to be valued for the emotional, sentimental rewards of raising them and not the economic benefits to the family).

206. JULIE BEREBSKY, *LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851-1950* 51-74 (2000) (describing adoption as a way to cure infertility and the stigma childlessness caused); ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 141 (1997) (explaining how after WWII was an era of "compulsory parenthood" that saw adoption as a service for the infertile).

207. ZELIZER, *supra* note 201, at 192 ("Sentimental adoption created an unprecedented demand for children under three, especially for infants . . . 'there [were] not enough babies to go around.'").

208. *See, e.g.*, KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING AND THE NEW GOSPEL OF ADOPTION* 132 (2013) ("[I]n recent years international adoption has become an ever-quickenning boom-bust spiral."); Kathryn Joyce, *The Evangelical Orphan Boom*, N.Y. TIMES, Sept. 21, 2013, <https://www.nytimes.com/2013/09/22/opinion/sunday/the-evangelical-orphan-boom.html>.

209. Joyce, *supra* note 208; *see also* BECCA MCBRIDE, *THE GLOBALIZATION OF ADOPTION: INDIVIDUALS, STATES, AND AGENCIES ACROSS BORDERS* 95-109 (2016).

This same boom and bust system is now plaguing international surrogacy as local governments are increasingly troubled by the international trade in their women's reproductive services.<sup>210</sup> India, Thailand, and certain regions of Mexico were just a few years ago the biggest markets for international surrogacy, but all have since outlawed the practice internationally, although commercial domestic surrogacy is still allowed.<sup>211</sup> Nepal, another popular destination for surrogacy, has banned the process completely in order to protect its citizens. Such bans in popular destination countries are only leading to the rise of commercial surrogacy in other locales, where, arguably, there are even more language barriers and even more poverty—such as in Guatemala and Western Africa, the sites of numerous adoption scandals.<sup>212</sup> When India first banned surrogacy for gay men, before it banned all international surrogacy, Indian agencies responded by relocating to Nepal, Thailand, and Cambodia, flying out frozen embryos that were awaiting wombs and women who were already pregnant to give birth. Now, in the wake of further bans, the business is shifting to South America, Africa, Greece, Laos, and Ukraine. Indian women seeking to be surrogates are going to places like Kenya, far from their families and friends, unable to speak the local language, and they are therefore more vulnerable to exploitation and abuse.<sup>213</sup> The demand for babies is unstoppable given the existence of poor countries with women desperate to make money often to feed their own hungry children. The insatiable market for children will find supply somewhere, even as some governments try to ban it. And, unlike ICA, there is no Hague Convention banning the market—the market is accepted even if distasteful.

##### 5. *The Baby Markets Dilemma—Designer Babies and Children in Need*

Despite the fears of commodification and corruption in both methods of collaborative family-formation, baby markets still thrive in the context of collaborative ART. And we might want to salvage some form of ICA. It is still undisputed that there are millions of children worldwide who need food, shelter, and care, despite the reality that, in many of the countries in which they live, it is hard to avoid the fear of fraud and corruption.<sup>214</sup> UNICEF reports that about 2.7 million children live in institutionalized care, although others put the numbers higher at 8-12

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(describing boom and bust cycle across numerous countries); ROTABI & BROMFIELD, *supra* note 9, at 155–56 (summarizing boom and bust nature of ICA).

210. *As Demand for Surrogacy Soars*, *supra* note 67; ROTABI & BROMFIELD, *supra* note 9, at 125–26 (describing boom and bust in India, Thailand, and Nepal which all currently ban foreign surrogacy).

211. See ROTABI & BROMFIELD, *supra* note 9, at 125–26 (describing boom and bust in India, Thailand, and Nepal which all currently ban foreign surrogacy).

212. See *supra* Part II(B).

213. See *supra* note 210 and accompanying text.

214. *Orphans*, UNICEF, <https://www.unicef.org/media/orphans> [<https://perma.cc/FU9D-22CJ>] (last visited Nov. 9, 2018). UNICEF and global partners define an orphan as a child under 18 years of age who has lost one or both parents

million.<sup>215</sup> There are also many more millions of children who are orphaned or “unparented” and living on the streets.<sup>216</sup> Although some critics argue that the number of orphans has been exaggerated by pro-adoption advocates,<sup>217</sup> it is still evident that the number of legal orphans who could benefit from adoption far exceeds the number of adoptions that occur annually.<sup>218</sup> While intermediaries may be portrayed as “mafiosos” because of the money that they make from child placement, when the government is not able to manage child welfare and neglect, children may otherwise be left to die and suffer.<sup>219</sup> Studies indicate that children raised in institutions and without families suffer serious effects from such environments, especially young children, and struggle on all barometers of successful development with high rates of criminality, low rates of raising their own families, or holding jobs.<sup>220</sup> Advocates for ICA point to children’s right to have stable homes.<sup>221</sup>

Advocates for ICA also point to impossibly high morbidity rates, degrees of hunger, lack of education amongst the poorest, orphaned, and institutionalized children in sending countries, and the gut-wrenching fact that poor children from these countries have very high mortality rates.<sup>222</sup> Ultimately, the long-term outcomes for children adopted from abroad are

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to any cause of death. By this definition, there were nearly 140 million orphans globally in 2015, with 15.1 million having lost both parents.

215. *Id.*; Corinna Csáky, *Keeping Children out of Harmful Institutions: Why We Should be Investing in Family-Based Care*, SAVE THE CHILDREN 3 (Nov. 2009), <https://resourcecentre.savethechildren.net/node/1398/pdf/1398.pdf> [Permalink unavailable] (noting at least 8 million and likely much higher number).

216. Susan O’Rourke Von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children’s Convention and International Response to Children’s Human Rights*, 18 SUFFOLK TRANSNAT’L L. REV. 589, 616 (1995); *see also* Marc D. Seitles, *Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 IN PUB INT. 159, 159 (1997); Janet Shapiro, *Ethically Informed Practice with Families Formed via International Adoption: Linking Care Ethics with Narrative Approaches to Social Welfare Practice*, 6(4) ETHICS & SOC. WELFARE 333, 336 (2012) (pointing to 8 million children living in orphanage settings, and 100 million street children).

217. *See, e.g.*, Fiona Bowie, *Adoption and the Circulation of Children: A Comparative Perspective*, in CROSS-CULTURAL APPROACHES TO ADOPTION 3, 14 (Fiona Bowie ed., 2004); Claudia Fonesca, *The Circulation of Children in a Brazilian Working-Class Neighborhood: A Local Practice in a Globalized World*, in CROSS-CULTURAL APPROACHES TO ADOPTION 165 (Fiona Bowie ed., 2004); Oreskovic & Maskew, *supra* note 96, at 74.

218. Carlson, *supra* note 24, at 770.

219. Landrieu & Reitz, *supra* note 108, at 350–51 (“[C]orruption is an everyday occurrence in many countries in all facets of life, particularly in underdeveloped countries, which are home to many children involved in international adoptions. In some places, nothing happens until palms are greased.”).

220. *See, e.g., id.* at 346–48.

221. *See, e.g.*, MONTGOMERY & POWELL, *supra* note 97, at 19–32; Elisabeth Bartholet, *International Adoption: The Human Rights Issues*, in BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES (2010).

222. MONTGOMERY & POWELL, *supra* note 97, at 21 (calculating the hundreds of children saved by adoption based on morbidity rates).

overwhelmingly positive as compared to children left behind in orphanages and poverty.<sup>223</sup> The problem is the vast difference between the potential for fraud and corruption—and the history of such corruption—before the adoption occurs and the positive outcomes afterwards.<sup>224</sup> And, as has been shown, attempts to fight corruption tend to bring these adoption systems to a halt. Thus, the question is whether anything can be done to salvage a functional system of ICA while mitigating fears of commodification, exploitation, and corruption.

In sum, although collaborative ART markets and commercial adoption can be distinguished, the parallels between these two systems are striking. They both involve exchanges of money, legally and historically, and they both involve the problem of commodification and exploitation, especially when collaborators are distant geographically and culturally from the acquiring parents. The vast difference in the way commercial adoption is treated as opposed to commercial surrogacy is suspect in light of the ethical benefits of caring for children in need as opposed to creating genetic “designer” babies. Only adoption can provide homes to children without shelter and food and the law’s harsh treatment of adoption as compared to surrogacy is hard to justify. A willingness to accept a market that commodifies and exploits women while fiercely fending off payment to needy birth parents who are struggling to provide for their families, results in a system willing to commodify women unless they are deemed legal parents. But the complex reality for struggling birth parents, their children, and surrogates is more complex than such neat definitions and distinctions allow.

#### IV. A NEW FRAME FOR COLLABORATIVE BABY-MAKING

##### A. *Money, Markets and the Stain of Acquisition*

In the previous parts, I have attempted to demonstrate that, although surrogacy is recognized and accepted as being highly marketized and adoption is perceived as not appropriate for commodification, the reasons to differentiate between the two systems pale in comparison to the ways such systems run in parallel. In war-torn, and poverty-stricken countries, where poor and even devastated people seek a better life, agents, intermediaries, surrogates, and birth parents will go to desperate measures to obtain basic necessities and feed starving, uncared for, or merely uneducated and languishing children. In such a context, the wealthy, white westerner from abroad coming to a starving country to obtain a child to build their family in exchange for money will threaten to exploit and commodify, creating concerns about fraud and impropriety, whether in the

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223. *Id.* at 104–08; ROTABI & BROMFIELD, *supra* note 9, at 3 (citing numerous studies of positive outcomes for children of ICA).

224. ROTABI & BROMFIELD, *supra* note 9, at 3 (discussing contrast between outcomes of adoption and the troubled stories of how ICA comes to be).

context of surrogacy or adoption.<sup>225</sup> Even if adoptive parents seek to help children in need,<sup>226</sup> the specter of the wealthy buying children from destitute foreigners with whom they cannot even communicate threatens the dignity and security of the foreign nation and its people. In adopting abroad, Madonna and Angelina Jolie both expressed the desire to adopt for the sake of helping children in need, but in both cases, they became embroiled in inevitable allegations of corruption and fraud.<sup>227</sup> So, too, international surrogacy seems soiled by the very nature of the system, regardless of good intentions and agreements that provide benefits to all participants.

Tobias Huniette describes why commodified acquisition is so troubling by identifying striking similarities between ICA and the Atlantic slave trade—both are driven by insatiable consumer demand, private market interests, and cynical profit-making.<sup>228</sup> “[B]oth utilize a highly advanced system of pricing where the young, the healthy, and the light skinned are the most valued . . . . Both the enslaved and the adopted are separated from their parents, siblings, relatives, and other significant others at an early age; stripped of their original cultures and languages; reborn at harbors or airports.”<sup>229</sup> International surrogacy, at its worst, shares a similar threat to commodifying surrogate women. Treated as vessels for the children they bear, their health, autonomy, and dignity are traded for money in surrogate contracts that can force them to abort, to undergo invasive procedures, and to allow doctors to prioritize the babies’ health over their own.<sup>230</sup>

The problem of abuse, commodification, and exploitation, “commodification anxiety,” is commonly associated with the exchange of money for persons, bodies, organs, parenthood, or other intimate concerns considered to be inappropriate for the market.<sup>231</sup> Indeed, we see

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225. Bergquist, *supra* note 146, at 349; *see also supra* note 9 and accompanying text.

226. ROTABI & BROMFIELD, *supra* note 9, at 2 (adoption is a religious calling for some—to save the orphan); DENIESE MAGNESS DILLON, AN INCONVENIENT CALLING: A FORTY YEAR JOURNEY IN INTERNATIONAL ADOPTIONS AND HUMANITARIAN AID 7–11 (2017) (describing adoption as a calling).

227. MONTGOMERY & POWELL, *supra* note 97, at 7 (“Madonna is showing exactly what shouldn’t be done: airlifting one or two pretty children into the comparative wealth of the West, leaving behind bereft families who want— but can’t afford—to bring that child home.”) (citing E.J. Graff, *The Seamier Side of International Adoption*, N.Y. TIMES: ROOM FOR DEBATE (May 10, 2009, 8:00 PM), <https://roomfordebate.blogs.nytimes.com/2009/05/10/celebrity-adoptions-and-the-real-world/> [<https://perma.cc/6SVG-3P2S>]); *id.* at 113–14 (discussing the way Madonna bypassed residency laws in Malawi to enable Madonna to adopt a child); ROTABI & BROMFIELD, *supra* note 9, at 5 (discussing how both the Jolie and Madonna adoptions caused an uproar).

228. MONTGOMERY & POWELL, *supra* note 97, at 13.

229. Hubinette, *supra* note 9, at 143.

230. *See supra* notes 174–176 and accompanying text.

231. *See supra* notes 137–140 and accompanying text.

how the market has led to fears of exploitation, commodification, and fraud in both adoption and surrogacy. However, we also know that the market is what facilitates collaborative baby-making and that, without it, such systems would not function.<sup>232</sup> The question is whether there is any way to regulate an ethical and noncorrupt system of collaborative family-making while still permitting the exchange of money that fuels the process.

The resolution of this dilemma is to understand that it is not the exchange of money alone, even for intimate services or objects, that is corrupting. Arguing that money does not essentially corrupt intimate exchanges, Viviana Zelizer provides myriad sociological and empirical examples of how money and intimacy are essentially intertwined, highlighting the financial aspects in intimate relationships that are barely hidden beneath the surface.<sup>233</sup> According to Zelizer, we are all connected to people in many ways, and the market and the intimate are in constant interaction, being negotiated and parsed.<sup>234</sup> Moreover, although the way transactions in intimate goods and services mix money and emotions may make them difficult to negotiate, “people manage to integrate monetary transfers into larger webs of mutual obligations without destroying the social ties involved.”<sup>235</sup> Thus, she argues that attempts to separate money from intimate sales are about setting boundaries between intimacy and commerciality, not about complete separation.<sup>236</sup> It is not money itself that corrupts, but the way money can dehumanize human interactions. Zelizer argues that the goal of regulation should be to create what she terms “fair mixtures” between markets and intimate, human relations and body parts—“We should stop agonizing over whether or not money corrupts, but instead analyze what combinations of economic activity and intimate relations produce happier, more just, and more productive lives.”<sup>237</sup> The question is what is a “fair mixture”—what combinations of economic activity and baby-making minimize harm, advance justice, and reflect our notions of modern parenthood and children’s rights. Put differently, how

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232. See *supra* notes 126–136 and accompanying text.

233. ZELIZER, *supra* note 27, at 28–32. Intimate sales include “taboo trades”: (1) the sale of human bodies (baby-selling, organs); (2) the sale of ongoing bodily functions (slavery, surrogacy, prostitution); and (3) the sale of love (care services, intimate relationships). See Goodwin, *supra* note 61, at 805.

234. See, e.g., Nancy Folbre & Julie A. Nelson, *For Love or Money-Or Both?*, 14 J. ECON. PERSP. 123, 132 (2000) (“One could, of course, let self-interest overtake altruistic concerns and do the work in a cold-hearted way, but this not implied a priori. One could, in fact, be exceptionally nonmaterialistic and generous.”).

235. ZELIZER, *supra* note 27, at 28.

236. Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in RETHINKING COMMODIFICATION 362 (Martha M. Ertman & Joan C. Williams eds., 2005) (“[T]o commodify or not to commodify that is not the question.”).

237. *Id.*



do we allow the exchange of money for children, without commoditizing and dehumanizing the children and other vulnerable parties?<sup>238</sup>

The exchange of money for intimate concerns does not necessarily corrupt; rather, it is treating people as commodities that can be purchased and consumed that is corrupting. It is not the transfer of wealth from adoptive to birth families that commodifies the system inappropriately, it is treating children and birth families as commodities and not as interest and rights bearers who are part of the collaborative process of family-making. There is nothing corrupt or exploitative about surrogate mothers receiving money—they work hard for their fee, investing their time and energy, risking their health, and compromising their freedom.<sup>239</sup> What is corrupting is the way international surrogates, in particular, are treated like incubators, their status as medical patients, their rights to informed consent in medical-decision making ignored, and their human dignity infringed when they are treated as disposable and irrelevant at the child's birth.

The frame of acquisition currently shaping the legal treatment of collaborative family-making is not sustainable in the context of surrogacy or adoption. Collaborative family-making currently exists within an acquisition framework in that it allows intended parents to procure a child through payment and they are delivered such a child free of all connections to other collaborators, even birth parents. Surrogates sell their rights to free and noncoercive medical treatment, the right to interact with a child they carried for nine months, and their right to make many life choices during pregnancy. Birth parents surrender all connections to their child. Surrogates and birth parents are essentially erased by the nature of the financial transaction. Such transactions are not sufficiently concerned with the rights, status, and interests of children, surrogates, and birth parents, which are the weaker parties in the transaction who are essentially erased by the transaction in order to fulfill the intended parents' demand. In this way family-making collaborators are acquired and treated as commodities.

B. *Interconnection and Ongoing Contact: From Empirical Studies to Legal Regulation*

Instead of designing collaborative family-making as acquisition, we need to view collaborative family-making as a system of human collabora-

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238. Cadoret, *supra* note 28, at 280.

239. See, e.g., ROTABI & BROMFIELD, *supra* note 9, at 136 (describing surrogates perspectives on their efforts as powerful work); Folbre & Nelson, *supra* note 234, at 132 (discussing the way surrogacy is viewed as commercial work and altruistic behavior); Elly Teman, *The Social Construction of Surrogacy Research: An Anthropological critique of the Psychological Scholarship on Surrogate Motherhood*, SOC. SCI. & MED. 67, 1104–12 (2008) (discussing the importance of the work aspect of surrogacy and the money received for commercial surrogates); see also PANDE, *supra* note 189, at 60–70.

tion and interconnection. Humans cannot be bought or sold, they cannot be acquired or consumed, and neither can their baby-making capabilities. People, however, can be collaborated with in exchange for remuneration. Collaboration entails a mutual relationship where both parties have a role, a voice, rights, autonomy, status, and recognition. The more the parties are on equal footing—the less one party is silenced and merely used as a vessel for producing a child—the more ethical and interconnected the collaborative family-law making. Interconnection ethically recognizes collaborators as part of process and not people who can be erased by financial transaction. Therefore, interconnection involves openness and ongoing contact.

Social science studies attest to the nature of collaboration and interconnection in practice. As described above, in domestic surrogate systems, where surrogates and intended families share a cultural understanding, language, and geographic proximity, empirical studies all attest to the natural development of close relationships among collaborators in addition to a commercial exchange.<sup>240</sup> These relationships flow naturally from the intimacy of the surrogate process and the nature of the shared venture.<sup>241</sup> The intended parents are grateful and feel empathetic and connected to the woman who is helping them achieve their procreative desires.<sup>242</sup> The intended parents want the surrogate to feel happy and secure and thereby, also enable her to act in accordance with their wishes regarding the pregnancy. The surrogate seeks the emotional attachments to help her contend with the physical and emotional turmoil of enduring a pregnancy for the sake of others.<sup>243</sup> And, it is only connection and relationships that can curb the fear of intended parents not caring for the surrogate's well-being, physical health, and rights to informed consent in medical decision-making during the surrogate process.<sup>244</sup> Such relationships appear to provide security and a sense of self-worth that is important to surrogates.<sup>245</sup> Surrogates indicate that, although they are professionals working for money, they are also providing a tremendous gift to intended parents and expect appreciation and the relationship that develops involves real emotional bonds.<sup>246</sup> In other words, surrogates want to be

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240. See *supra* notes 177–182 and accompanying text.

241. Parks, *supra* note 72, at 335 (“[H]uman beings are not best understood as individual rights bearers or property owners, but as vulnerable beings-in-relation who rely on one another for care, concern, nurture, and identity.”).

242. TEMAN, *supra* note 177, at 142–47, 205–29; Baslington, *supra* note 177, at 66–67; Homan & Hagan, *supra* note 177, at 67–69, 81–82; Ragone, *supra* note 177, at 359–62.

243. TEMAN, *supra* note 177, at 142–47, 205–29; Baslington, *supra* note 177, at 66–67; Homan & Hagan, *supra* note 177, at 67–69, 81–82; Ragone, *supra* note 177, at 359–62.

244. See Laufer-Ukeles, *supra* note 174, at 145–46.

245. TEMAN, *supra* note 177, at 205–33; Pande, *supra* note 1, at 619.

246. See LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 136 (2007); TEMAN, *supra* note 177, at 205–33.

treated as more than wombs for hire, they want to be treated as humans who are connecting and interacting with the intended family. Only such relations appear to safeguard the woman's self-worth allowing her to feel as an equal partner—more than a mere womb for rent.

Statistics and empirical accounts of domestic adoption parallel accounts of domestic surrogate motherhood with regards to the development of interconnected relationships. In its more traditional form, adoption transferred all parental rights from birth parents to adoptive parents, erasing the legal and empirical reality of genetic parents and sealing their identities.<sup>247</sup> The era of secrecy and complete transfer of parental rights, creating privacy and exclusivity in adopted parents and complete alienation from birth families, has been understood to have developed in a time of prejudice and racism.<sup>248</sup> Adoption was part of a moral condemnation of birth families' inability to raise their own children, or recalcitrant behavior that led to unwed childbirth.<sup>249</sup> More recently, adoption is looked at as a solution for single Black motherhood.<sup>250</sup>

But a new reality has taken shape, particularly in the U.S., but in other domestic adoption systems as well.<sup>251</sup> Social changes and movements, including adoptive children's desire to open sealed documents revealing their genetic identities and to connect to birth families, the reduction of shame in parenthood out of wedlock, and an increase in adoption of older children where erasing birth parents is less tenable, have resulted in vastly greater openness in adoption.<sup>252</sup> Currently, open adoption is the norm in

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247. SHANLEY, *supra* note 168, at 15–20.

248. Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 89–90 (2010) (“This regime is not surprising in light of the historic context of adoption, the legal regulation of which evolved during a time when poor, racially marginalized children were placed for adoption as a method of socializing them into White middle-class, Protestant norms.”). Italian, German, and Irish children saved during the child saving and progressive eras in the late 19th and early 20th century were considered not white. *Id.* (citing LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 76–77, 98–106 (1999)).

249. Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 457–62 (2004) (noting simultaneous and racialized discourse surrounding the promotion of color-blind adoption, cutbacks on support for single mothers and children, and reduced protections of maternal-child bonds in child welfare policy).

250. *Id.*

251. See, e.g., Rhoda Scherman, *Openness and Intercountry Adoption in New Zealand*, in *INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES* 288–89 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012); Ouellette, *supra* note 38, at 69–75 (discussing open adoption in Quebec).

252. See E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 215 (1998) (“In the new world of adoption, with its dearth of white infants and with open adoption gaining popularity, adoptive parents were powerless to disagree with birth parents' demands for openness.”); Appell, *supra* note 248, at 91 (“Armed with this moral authority, birth mothers began to seek adoptive parents who would be willing to engage in open adoption in which birth and adoptive parents meet each other and might even have ongoing contact”); Appell, *supra* note 249, at 457; see also Cynthia R. Mabry, *The Psychological and Emo-*

domestic U.S. adoption systems.<sup>253</sup> Openness is driven largely by the demands of birth parents in private adoption and older children in public adoptions.<sup>254</sup> There is a large variety of openness, ranging from meetings before birth and exchanges of information to ongoing interconnection through the life of the child.<sup>255</sup> There is fluidity in openness levels, with studies showing that contact is subsequently established in some arrangements that did not start off as open, while relationships are sometimes curtailed or ended even though the initial plan had been for ongoing contact.<sup>256</sup> The stories of openness are varied and complex and no single model applies.<sup>257</sup> The variety of openness reflects the range of situations that collaborative families make for themselves.<sup>258</sup>

Secrecy and the lack of transparency are no longer considered positive in most cases for any of the parties involved, especially birth parents

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*tional Ties that Bind Biological and Adoptive Families: Whether Court-Ordered Postadoption Contact Is in an Adopted Child's Best Interest*, 42 CAP. U. L. REV. 285, 323–24 (2014) (arguing in favor of post-adoption contact); Evan P. Donaldson Adoption Institute, *Openness in Adoption: From Secrecy and Stigma to Knowledge and Connections* 5–6 (March 2012), [https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2012\\_03\\_OpennessInAdoption.pdf](https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2012_03_OpennessInAdoption.pdf) [<https://perma.cc/D34Y-BNC9>] (“As the stigma gradually evaporated over the ensuing decades, the number of agencies offering open adoptions grew rapidly and, by 1999, close to 80 percent offered that option”).

253. See *supra* note 252 (noting that open adoptions have become an increasingly popular option).

254. *Id.*; see also Annette Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law & Practice*, 75 B.U. L. REV. 997, 1008–09, 1028–29 (1995); Lucy McGaugh & Annette-Peltter Falahahwai, *Secrets and Lies: A Model Statute for Collaborative Adoption*, 60 LA. L. REV. 13, 66–67 (1999) (“Indeed, in an adoption market of scarcity, their superior bargaining power is believed to be the impetus behind the open adoption trend.”).

255. See Appell, *supra* note 248, at 92–93 (discussing various ways states handle open-adoption contracts); Chris Jones & Simon Hackett, *Communicative Openness Within Adoptive Families: Adoptive Parents' Narrative Accounts of the Challenges of Adoption Talk and the Approaches Used to Manage These Challenges*, ADOPTION Q. 157, 158–59 (2007) (describing a variety of medium whereby post-adoption contact between birth families and adoptive families is maintained, including handwritten, electronic, and telephonic); Carol Sanger, *Bargaining for Motherhood: Post Adoption Visitation Agreements*, 41 HOF. L. REV. 309, 321–22 (2013) (discussing the range of participants in open adoptions as well as the type of arrangements).

256. HAROLD D. GROTEVANT & RUTH G. McROY, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS (1998); Thomas M. Crea & Richard P. Barth, *Patterns and Predictors of Adoption Openness and Contact: Fourteen Years Postadoption, Paper presented at 14th Annual Conference of the Soc'y for Soc. Work & Research* (Jan. 16, 2010), [https://www.researchgate.net/profile/Thomas\\_Crea/publication/268081330\\_Patterns\\_and\\_Predictors\\_of\\_Open\\_Adoptions\\_Fourteen\\_Years\\_Postadoption/links/546cc9010cf2a7492c55a9d9/Patterns-and-Predictors-of-Open-Adoptions-Fourteen-Years-Postadoption.pdf](https://www.researchgate.net/profile/Thomas_Crea/publication/268081330_Patterns_and_Predictors_of_Open_Adoptions_Fourteen_Years_Postadoption/links/546cc9010cf2a7492c55a9d9/Patterns-and-Predictors-of-Open-Adoptions-Fourteen-Years-Postadoption.pdf) [Permalink unavailable].

257. See, e.g., GUYLAINE HUBBARD-BROSMER & ANN WRIXON, TRUE STORIES OF OPEN ADOPTION (2013) (providing a myriad of stories reflecting the variety and complexity of interaction and involvement between birth parent and adoptive parents and their kin).

258. *Id.*

and children, but for adoptive parents as well.<sup>259</sup> Fears that children would be confused by multiple attachments seem overstated, as children in open adoption arrangements attest to feeling secure in their attachments to adoptive parents,<sup>260</sup> and more self-confident and grounded due to knowing their birth parents, or at least knowing their identities.<sup>261</sup> Children in open adoption with ongoing contact are more satisfied with the level of openness in their own adoptions than are those without such contact, identifying the following benefits: coming to terms with the reasons for their adoption, physical touchstones to identify where personal traits came from, information that aids in identity formation, positive feelings towards their birthmother, and others.<sup>262</sup> Indeed, it is the lack of such contact with birth parents and knowledge about places of origin that seems to inject insecurity into adoptees.<sup>263</sup> On the whole, studies show that openness in adoption enhances adoptees' lives, especially in transracial adoptions and provides overall security and stability.<sup>264</sup> Birth mothers fair better in grief resolution and in being whole with their deci-

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259. GROTEVANT & McROY, *supra* note 256, at 91–92; Harold D. Grotevant et al., *Openness in Adoption: Outcomes for Adolescents Within Their Adoptive Kinship Networks*, in *ADVANCES IN APPLIED DEVELOPMENTAL PSYCHOLOGY; PSYCHOLOGICAL ISSUES IN ADOPTION: RESEARCH AND PRACTICE* 167–86 (2005).

260. David Brodzinsky, *Family Structural Openness and Communication Openness as Predicators in the Adjustment of Adoption Children*, 6 *ADOPTION Q.* 1, 10 (2006); Amanda Hawkins et al., *Communicative Openness About Adoption and Interest in Contact in a Sample of Domestic and Intercountry Adolescent Adoptees*, 10 *ADOPTION Q.* 131, 132 (2007); Rachel Levy-Shiff, *Psychological Adjustment of Adoptees in Adulthood*, 25 *INT'L J. BEHAV. DEV.* 97 (2001).

261. GROTEVANT & McROY, *supra* note 256, at 91–92; Annette Baran, Reuben Pannor & Arthur Sorosky, *Open Adoption*, in *SOC. WORK* 97, 97 (Mar. 1976) (“There is no sound reason to continue in the belief that biological parents be banished, or that a child’s emotional connections with biological parents preclude the creation of healthy and stable placements.”); Margaret Sykes, *Adoption with Contact: A Study of Adoptive Parents and the Impact of Continuing Contact with Families of Origin*, *ADOPTION & FOSTERING* 20, 25 (2005);

262. See Jerica M. Berge et al., *Adolescents’ Feelings About Openness in Adoption: Implications for Adoption Agencies*, 85(6) *CHILD WELFARE* 1011, 1011–39 (2006) (describing children’s satisfaction with openness in adoption); Harold D. Grotevant et al., *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, 10 *ADOPTION Q.* 79, 79–101 (2007); Gretchen Miller Wrobel et al., *Factors Related to Patterns of Information Exchange Between Adoptive Parents and Children in Mediated Adoptions*, 19(4) *J. APPLIED DEVELOPMENTAL PSYCHOL.* 641, 641–57 (1998).

263. GROTEVANT & McROY, *supra* note 256, at 91–92; Appell, *supra* note 248, at 100–05. But see Michael P. Sobol et al., *Paths to the Facilitation of Open Adoption*, 49 *FAM. REL.* 419, 419 (2000) (“[O]pen adoption interferes with proper grieving for the birth mother, has negative effects on the child’s development, leads to adoptive parent insecurity and uncertainty, and is more likely to result in identity confusion for the adoptee.”).

264. Marianne Berry, *Adoptive Parents’ Perceptions of, and Comfort with, Open Adoption*, 72 *CHILD WELFARE* 231, 231–46 (1993) (noting benefits to adoptees in transracial adoptions); Lynn Vok Korff et al., *Openness Arrangements and Psychological Adjustment in Adolescent Adoptees*, 20 *J. FAM. PSYCHOL.* 531, 534 (2006).

sion to relinquish exclusive parenthood rights.<sup>265</sup> Openness has also been shown to benefit adoptive parents who feel comfortable and secure in their attachments with adoptive children and with the contact with birth mothers.<sup>266</sup> Indeed, openness reduces fear that children would be taken away as opposed to exacerbate it; transparency assists security as opposed to threatening it.

Thus, in surrogacy, interconnection is a reflection of the relationship that happens during the pregnancy and naturally continues post-birth. In adoption, on the other hand, interconnection happens based on the demands of birth parents due to their greater bargaining power and their desire to have contact with their genetic offspring. Interconnection in adoption also serves the interests of children and even adoptive parents who find security and identity in contact with birth parents. Interconnection in surrogacy reflects the reality of interconnection *de facto* while, in adoption, interconnection is created by mutual agreement, *ex ante*.

Neither surrogacy nor adoption legally require such interconnection; rather, studies indicate they develop on their own through private understandings and agreements. Moreover, even when the parties agree to such openness in advance, such contact is not always enforceable.<sup>267</sup> It is time for a change—the law should help craft and promote a system of ongoing contact and interconnection in collaborative family-making *ex-ante* and not only as a matter of practice, but as a matter of protected rights and interests for the sake of vulnerable parties—birth parents, children, and surrogates. I have suggested that interconnection should frame surrogate motherhood, and have argued that surrogates should have a right to re-

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265. Linda Cushman, Debra Kalmuss & Pearla Namerow, *Openness in Adoption: Experiences and Social Psychological Outcomes Among Birth Mothers*, 25 MARRIAGE & FAM. REV. 7, 7–18 (1997) (explaining birthmothers who have ongoing contact with their children report less grief, regret and worry, as well as more peace of mind, than do those who do not have contact).

266. GROTEVANT & McROY, *supra* note 256, at 90–92 (finding greater openness is linked with reduced fear and greater empathy toward birthparents, more open communication with their children about adoption, and other benefits in their relationships with their adopted children) (citing Berry et al., 1998; Grotevant, Perry & McRoy, 1994; Siegel, 2008).

267. See, e.g., *In re Visitation of K.M.*, No. 3-15-0724, 2017 WL 657641, at \*4 (Ill. App. Ct. Feb. 17, 2017) (due to public policy reasons, Illinois does not recognize post-adoption visitation agreements); *Birth Mother v. Adoptive Parents*, 59 P.3d 1233, 1235 (Nev. 2002) (refusing to uphold visitation agreements not entered into under specific statute or entered into in the absence of a statute providing for enforcement); Sanger, *supra* note 255, at 319–20 (“By 2011, twenty-six states and the District of Columbia had enacted laws providing for some form of enforceable agreement between birth parents and adoptive parent.”). Some states enforce contact agreements, but only if they are found to be in the best interests of children. See, e.g., IND. CODE ANN. §§ 31–19–16–1 to –2 (West 2018) (allowing a court to order post-adoption visitation as long as it is determined to be in the child’s best interests); MINN. STAT. ANN. § 259.58 (West 2007); *In re Adoption of S.K.L.H.*, 204 P.3d 320, 333 (Alaska 2009) (allowing open adoption if the post-adoption agreement is part of divorce decree); *Groves v. Clark*, 982 P.2d 446 (Mont. 1999); *Birth Mother*, 59 P.3d at 1236.

tain openness and interconnection with birth families.<sup>268</sup> Such interconnection can also be framed as a matter of legal expectation within the adoption context. In both contexts, empirical accounts indicate the need for enforcement is not necessary in most circumstances. However, in its expressive capacity, the law can set certain expectations, and create understandings that promote and facilitate openness and ongoing contact in collaborative family-making.<sup>269</sup> Ultimately, in a system that expects ongoing contact, the intended or adoptive parents need to be concerned with the collaborators' well-being and stability, their autonomy and dignity, and the potential for fraud and abuse, because the collaborators will not disappear. This ongoing contact should be supported because it is an essential factor in staving off fears of commodification and exploitation. Indeed, studies indicate that the lack of contact can harm surrogates who feel commodified,<sup>270</sup> and does not appear to be beneficial for adoptive children, creating perceptions of instability, the lack of identity, and the lack of transparency. Such protections should not be left to private ordering, as weaker parties will not be able to sufficiently protect their interests, particularly in international collaborative family-making where power dynamics are more unbalanced due to gaps in education, social and political power, as well as economic disparities.<sup>271</sup> It is therefore necessary for the law to step in to help birth parents and surrogates, who are usually more vulnerable and have less bargaining power, and are at danger of being commoditized and exploited, to establish such contact to protect family-making collaborators and the children they help create.

This does not mean that if a collaborator in family-making is not interested in ongoing interconnection she can or should be forced to do so—she will, however, retain the ability to do so if she chooses. Moreover, such contact need not be regular and overly invasive, but occasional and may involve correspondence as opposed to in-person meetings.<sup>272</sup> Moreover, mere consent through private ordering to an arrangement (or lack thereof) between collaborators as a reflection of autonomy is not

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268. Laufer-Ukeles, *supra* note 1, at 1267–78. Note, however, that I argue that due to the geographic distance that prevents interconnection and relationship-forming during international surrogacy, international surrogacy should be avoided in favor of domestic surrogacy where interconnection can be promoted. *Id.* at 1275–78.

269. Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836–37 (1985) (non-recognition is still a form of regulation leaving power to private ordering as opposed to protection from the state).

270. See *supra* notes 177–183 and accompanying text.

271. See Smerdon, *supra* note 73, at 54; Ryznar, *supra* note 65, at 167; Donchin, *supra* note 193; Pande, *supra* note 189, at 60.

272. See Appell, *supra* note 248, at 92–93; Sanger, *supra* note 255, at 321–22; Jones & Hackett, *supra* note 255, at 158–59 (discussing the varied ways domestic adoption functions).

enough.<sup>273</sup> From the perspective of relational autonomy, autonomy is not something that can be achieved by consent, but the law can promote autonomy, fairness, and ethical markets through facilitative regulation.<sup>274</sup>

A frequent criticism of the openness and interconnection I describe is that it violates the privacy of the intended parents in surrogacy or the adoptive parents in adoption.<sup>275</sup> Indeed, some adoptive parents seek ICA or international surrogacy for the way collaborators are less present in the arrangement.<sup>276</sup> While the right to privacy keeps the state from preventing persons from having a child, the state does not need to similarly refrain from protective legislation in the context of collaborative family-making based on privacy because collaborative family-making is fundamentally not a private undertaking and can have dramatic effects on third-party collaborators.<sup>277</sup> While intended parents retain primary legal parenthood status, the existence of other collaborators need not detract from their parenthood and can help frame the child's identity. In the case where collaborators harass or impinge, courts will need to get involved in any event to separate the parties regardless of legal provisions. If ongoing contact harms the child, it can of course remain electronic or be suspended—but such cases are likely to be rare and identifiable given the plethora of empirical accounts of positive ongoing relations. Accordingly, the nature of collaborative family-making involving third parties makes such concerns overwrought.

Interconnectedness requires a new way of thinking about relationships and kinship.<sup>278</sup> Recognizing the reality of a multiplicity of family ties

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273. See, e.g., Jennifer Damelio & Kelly Sorensen, *Enhancing Autonomy in Paid Surrogacy*, 22 *BIOETHICS* 269, 275 (2008); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 8–9 (1989).

274. See, e.g., GRACE CLEMENT, *CARE, AUTONOMY, & JUSTICE: FEMINISM AND THE ETHIC OF CARE* 21–22 (1996); Theresa Glennon, *Regulation of Reproductive Decision-making*, in *REGULATING AUTONOMY: SEX, REPRODUCTION AND FAMILY* 149, 151–52 (Shelley Day Sclater et al. eds., 2009); Susan Sherwin, *A Relational Approach to Autonomy in Health Care*, in *THE POLITICS OF WOMEN'S HEALTH: EXPLORING AGENCY AND AUTONOMY* 19, 26–28 (1998); Nedelsky, *supra* note 273, at 14.

275. See, e.g., *Johnson v. Calvert*, 851 P. 2d 776, 786–87 (privacy concerns undermine possibility of two mothers); Andrews, *supra* note 169, at 167; John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 24–27 (Larry Gostin ed., 1990); Martin Hevia, *Surrogacy, Privacy and the American Convention on Human Rights*, *J. L. & BIOSCIENCES* 1, 15 (2018) (arguing that a right of ongoing contact would be too much of an intrusion on intended parents privacy rights).

276. See Pande, *supra* note, at 618–20; Laufer-Ukeles, *supra* note 1, at 1269–71; Parks, *supra* note 38, at 334.

277. See, e.g., Rao, *supra* note 51, at 1478 (arguing that states can regulate ART to protect third-party interests without violating privacy).

278. I use the term “kinship” in this Article for the way it has been understood to create familial ties beyond blood relations based on shared relations or interests and close ties surrounding common interests and goals between friends with emotional connections. See DAVID M. SCHNEIDER, *A CRITIQUE OF THE STUDY OF KINSHIP* 97–112 (1984) (describing kinship as involving both biological and social dimensions); CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMU-*



allows for a remodeling of collaborative family-making into a new form of “kinship,” in which interconnected people share legal responsibilities and financial benefits. In both surrogacy and adoption, there is only one set of legal parents, but other parties need not therefore be legal strangers.<sup>279</sup> This frame of connectedness demands viewing relatedness as being multifaceted and rejecting the perspective of parenthood as binary and exclusive of all other legal attachments to children.<sup>280</sup>

Interconnection blunts the impact of the stain of the acquisitional frame and minimizes the commodification anxiety involved even when money is transferred between intended parents and family-making collaborator. For instance, discussing the benefits of ICA for children in terms of the benefits of financial comfort—having an education, sufficient food, basic health care, and a better quality of life—is often seen as inappropriate in the frame of acquisition.<sup>281</sup> In their June 2012 policy brief,

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NITY (1974) (explaining the difference between kin and blood relationships among poor urban African-Americans). As one anthropologist notes, “Kinship, whether we choose to label it as biological, social or fictive, is a way of identifying others as in some way special from the rest, people to whom the individual or collectivity feel responsible in certain ways.” Kimberly M. Mutcherson, *Blood and Water in a Post-Coital World*, 49 FAM. L. Q. 117, 118 (2015) (citing Diana Gittins, *The Family in Question: What is Family? Is it Universal?*, in SHIFTING THE CENTER: UNDERSTANDING CONTEMPORARY FAMILIES (2010)). One can use the language of kinship to denote “the depth of connection between individuals who have made a commitment to treat each other as family even without genetic connection.” *Id.* at 121. Annette Appell uses the term “kinship” to describe the connections that develop between birth families and adoptive families in open adoption. See Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1061 (1995) (noting that open adoption has the potential for “creating a new kinship network that forever links the birth family and the adoptive family through the child who is shared by both.”).

279. See, e.g., Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 19–20 (2008) (examining the advantage of extending parental status recognition to those currently called third parties or legal strangers); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 455 (2008) (discussing a conscious attempt by scholars to address the changing composition of the American family in light of the current legal construction of caregiving, which treats nonparents as strangers).

280. See Barbara Bennett Woodhouse, *Children’s Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497, 501–03 (1993) (“The needs of children have inexorably forced us to work with their real, functional families, and not the formal family described by traditional law.”); Frank F. Furstenberg, *Fifty Years of Family Change: From Consensus to Complexity*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 22 (2014) (“As far as I know, there is no evidence that children growing up in complex households in family systems across the globe experience more problems in later life; indeed, there are reasons to expect just the opposite if multiple caregivers (parents, grandparents, uncles, and aunts) provide attention and care to children in the household. The greater number of parent figures, one might hypothesize, the greater the investment in children so long as the attention and care is stable and coordinated.”); Robert A. Simon, *Polyparenting: The Psychological Impact of Having Multiple “Parents” in a Child’s Life*, 36 FAM. ADVOC. 35 (2013) (discussing the way multiple parental figures have always raised children and the benefits entailed).

281. MONTGOMERY & POWELL, *supra* note 97, at 29–30.

Intercountry Adoption, the NGO Save the Children expressed a widely-held belief on the subject of poverty and adoption: “Poverty and a lack of resources should never be a reason for the separation of a child from his or her family.”<sup>282</sup> We do not want financial resources to allow people to acquire children because others are poor—it is too close to baby-selling. However, if the child is not acquired, only saved and raised with economic and food security while retaining contact with birth parents and birth culture, the benefits can be more easily appreciated without feeling that a child has been sold due to poverty. Similarly, a surrogate that receives compensation for undergoing a traumatic pregnancy and invasive medical procedures will appear more a participant and less a body acquired if she is treated as ongoing kin within the family unit.

Interconnection can also reduce the fraud that is expected to result from commodification of intimate subjects. To understand abuse of ICA in Guatemala, one must recognize the political instability, genocide and rampant human rights abuses that were occurring in the background of adoption—if the entire country is racked by violence against women,<sup>283</sup> genocide of indigenous persons,<sup>284</sup> and children left orphaned by war and poverty,<sup>285</sup>—the potential for abuse in a system in which money flows to agencies from wealthy western countries is troubling but not surprising. In the background of rampant fraud and abuse, surrogates are also likely to be exploited and used for the money they will bring. In desperate times, children are to go hungry and uncared for or even be abandoned and starve—it is not really adoption itself or money that causes these problems. However, any chance for a financial payoff which incentivizes agents and intermediaries to place children exacerbates the problem and becomes part of an abusive system, making corruption seem inevitable. Interconnection and transparency aim at the heart of the abuse in a systematic manner by encountering and recognizing the status of collaborators who are feared to have been abused.

#### V. OPEN KINSHIP ADOPTION AS A NEW PARADIGM

A new system of intercountry adoption must be framed from an entirely different perspective—one of interconnection and not acquisition. This interconnection must treat foreigners as persons with rights and interests, as well as ongoing presence, avoiding exploitation and commodification of family-making collaborators to the extent possible. Moreover,

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282. *Id.* at 31–32 (citing international rights documents that object to ICA based on poverty).

283. *See, e.g.,* ROTABI & BROMFIELD, *supra* note 9, at 64–72 (describing violence against women and human rights abuses generally in Guatemala at the time of adoption fraud).

284. *See, e.g., id.* at 71–73 (describing conditions of civil war and genocide in Guatemala at the time of adoption scandals).

285. *See, e.g., id.* at 1–21 (describing the range of domestic crises that caused instability and corruption in sending states beyond just adoption scandals).

foreign collaborators' need for money should be accounted for in this type of system. Collaborative family-making can be fueled by money and yet treat people with dignity and support autonomy through regulations that limit markets. In this section, I set out three characteristics of a new system of intercountry adoption through the frame of collaboration and interconnection: 1) openness and continued contact; 2) regulated and controlled wealth transfers to birth families and birth communities; and 3) government agencies that coordinate and facilitate the interconnected vision of intercountry adoption and address abuse and fraud through maintaining ongoing contact and openness.

A. *Open Adoption in ICA and the Complex Kinship Family*

Modern ICA is outdated, lags behind domestic adoption, and is too marred by the stain of acquisition and corruption. The secrecy and closed nature of ICA reflects a system that developed in a climate of prejudice and bias against those who were unable or unwilling given traditionalist social dynamics to raise their own children.<sup>286</sup> While social movements and bargaining power have changed the nature of adoption domestically in the U.S., in the more difficult dynamics of intercountry adoption, openness has not taken hold.<sup>287</sup>

Indeed, more traditionalist foreign countries may still have prejudices or other cultural reasons for keeping adoption secretive.<sup>288</sup> On the other hand, it also seems that foreign placements in orphanages are sometimes intended by parents to be temporary in order to feed their children and birth parents are not aware that they may be placed abroad permanently without potential contact.<sup>289</sup> Desperate families may do desperate things to keep their children nourished and safe. Even if children need to be raised abroad for the sake of their own survival and ability to flourish, contact should not be severed. In order to save ICA and stave off the specter of fraud and corruption surrounding intercountry adoption, supporters should seek openness in the process, not only in terms of birth parents' identities, but also in advocating for sustaining contact between birth parents and adoptive parents throughout the child's youth.

The Hague Convention is premised on the traditional closed model of adoption.<sup>290</sup> The option for open adoption is not readily available be-

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286. See *supra* notes 251–253 and accompanying text.

287. See *infra* note 321–322 and accompanying text.

288. See, e.g., MONTGOMERY & POWELL, *supra* note 97, at 159–60 (addressing concerns that open adoption places western values on foreign countries).

289. See, e.g., *id.* at 118–21 (discussing cases of fraud where parents did not knowingly relinquish parental rights to foreigners). In this way, adoption may be viewed in foreign countries as temporary and unbinding when engaged in for reasons of poverty as it was once viewed domestically in the U.S. See *supra* notes 203–204 and accompanying text.

290. Barbara Yngvesson, *Reconfiguring Kinship in the Space of Adoption*, in *International Adoption: Global Inequalities and the Circulation of Children* 103, 105 (Diana Marre & Laura Briggs eds., 2009).

tween Hague Convention signatories because there is no private adoption and the birth families are not allowed to meet with the adoptive families; rather, the agencies act as intermediaries.<sup>291</sup>

However, information about birth families is supposed to be maintained according to the Hague Convention so that such information can be accessed by children.<sup>292</sup> It is widely acknowledged that record keeping is important for children's sense of self and security.<sup>293</sup> The Convention of the Rights of the Child gives children a right to know the identity of birth parents as an element of being raised and treated in their own best interests.<sup>294</sup> Despite this requirement, the lack of substantive, reliable records is pervasive in ICA.<sup>295</sup> Administrative practices in most sending countries compromise children's and adoptive families' efforts to access information about the circumstances of the child's birth—not unlike the practices of western countries half a century ago.<sup>296</sup> For instance, China provides very general information, always saying the child was found and then provides mere descriptions of the child and a birthdate.<sup>297</sup>

Adoptive parents in ICA often search for continuing attachments to birth communities for the sake of their adopted children.<sup>298</sup> Parents who adopt feel connected to their children's birth countries and try to instill knowledge and cultural identity in their children to help them make sense of their complex origins.<sup>299</sup> Studies indicate that many international adoptees desire to connect with their birth culture and racial identity,

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291. Ouellette, *supra* note 38, at 72–73.

292. *Id.*; Hague Convention, *supra* note 100, art. 30 (calling for preservation of information concerning the child's origin).

293. Shapiro, *supra* note 216, at 337 (recommending taking steps to preserve information about the birth family in order to promote a child's safety and development).

294. *CRC*, *supra* note 147, at art. 7; Michael Freeman, *The New Birth Right: Identity and the Child of the Reproduction Revolution*, 4 INT'L J. CHILD. RTS. 273 (1996).

295. See Shapiro, *supra* note 216, at 337 (discussing the lack of reliable information kept in intercountry adoption); *Factsheet: Birth Registration Overview*, UNICEF (2003), <http://www.unicef.org/newsline/2003/03fsbirthregistration.htm> [<https://perma.cc/R25K-LTHP>]; see also MONTGOMERY & POWELL, *supra* note 97, at 128–32 (describing problems of missing and falsified information in ICA); Ouellette, *supra* note 38, at 76–77.

296. For discussion of lack of information in ICA, see *supra* note 295.

297. Ouellette, *supra* note 38, at 76–77.

298. Diane B. Kunz, *The Re-Invention of Adoption Law: A Reflection*, 55 N.Y. L. SCH. L. REV. 853, 858–59 (2010/2011) (“[B]irth cultures are exalted as never before in the United States.”).

299. Lynette Clemetson, *Adopted in China, Seeking Identity in America*, N.Y. TIMES, Mar. 23, 2006, at A1, <https://www.nytimes.com/2006/03/23/us/adopted-in-china-seeking-identity-in-america.html> [<https://perma.cc/W6VV-WTTY>] (reporting that the leading edge of more than 55,000 children adopted from China by American families are becoming teenagers and beginning to explore their identities in diverse ways); Solomon, *supra* note 104 (describing the personal pilgrimage to discover adoptive children's place of origin and familial circumstances pre-adoption).

make homeland visits, and learn their native language.<sup>300</sup> Adoptive families go on journeys of physical, intellectual, and emotional discovery.<sup>301</sup> However, specific information is often limited and the search for specific community affiliations can be difficult. As Françoise-Romaine Ouellette aptly notes, these connections are largely to culture, not a family.<sup>302</sup>

Yet, the yearning of children of ICA is not just to know their culture but to know their familial origins as well. A recent BBC documentary, titled “Meet me on the Bridge,” describes the experience of an adopted woman from China whose adoptive parents held a note from the birth parents that was later used to locate the birth parents. The birth parents felt compelled to leave her at a market due to their poverty and the one child policy in China at the time.<sup>303</sup> The reunion was celebrated as joyous, and is one of many of such happy anecdotes that have been studied and seem to strengthen and benefit adoptees.<sup>304</sup> The sadness seems only to be about lost time. The necessity of keeping records closed and people alienated from each other until such connections can later joyously and serendipitously be made despite impossible circumstances is difficult to justify.

Beyond record keeping and access to information, children have increasingly been recognized to have the right to relationships with persons with whom they have attachments even if these persons are not their legal parents, including grandparents, siblings, and other kin,<sup>305</sup> and to have the government support these rights.<sup>306</sup> To the extent children’s rights and interests are at the heart of adoption, adoption should keep contact with birth families open as it both reflects their stated desires as well as

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300. See Wendy Tieman et al., *Young Adult International Adoptees’ Search for Birth Parents*, 22 J. FAM. PSYCHOL. 678, 678 (2008); Hosu Kim, *Mothers Without Mothering: Birth Mothers from South Korea Since the Korean War*, in INTERNATIONAL KOREAN ADOPTION: A FIFTY YEAR HISTORY OF POLICY AND PRACTICE 131, 143 (Kathleen Ja Sook Bergquist et al. eds., 2007) (highlighting that Korean birth mothers are viewed as the “primal bond to the adoptees’ racial/cultural identity in the growing, postadoption, and service economy, i.e., annual cultural festivals, culture camps, and trips to the motherland”).

301. See Tieman, *supra* note 300, at 678; Kim, *supra* note 300, at 151.

302. Ouellette, *supra* note 38, at 77.

303. Changfu Chang, *The Secret Note that Led to My Birth Parents—Meet Me on the Bridge*, BBC NEWS (Dec. 8, 2017), <http://www.bbc.com/news/av/stories-42257906/the-secret-note-that-led-to-my-birth-parents> [https://perma.cc/XP2A-NWUU].

304. Yngvesson, *supra* note 290, at 103 (describing several such cases of reunification and the joy and resolution they brought, characterizing these meetings as realizing a biological reality that already exists).

305. See, e.g., JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006); Barbara Bennet Woodhouse, “Are You My Mother?”: *Conceptualizing Children’s Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL’Y 107 (1995); Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2166–67 (2011).

306. Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 780–82 (2016) (discussing the right of children to have their relationships supported by the state).

provides significant benefits according to empirical accounts.<sup>307</sup> Given modern understandings of the centrality of identity, particularly in the context of ICA where racial disparities are usually involved, it is hard to imagine how closed adoption is good for children.<sup>308</sup> As Tobias Hubinette explains, summarizing a body of literature that focuses on interviews with interracial adoptees, “What is striking in the empirical results is the always-present feeling of profound bodily alienation and racial isolation.”<sup>309</sup> Knowing and being in contact with birth families can quell such concerns. While intercountry adoption has resulted in overwhelmingly positive development and educational based-outcomes for children,<sup>310</sup> contact with birth families can assist with emotional turmoil many children of ICA experience as they age and struggle with their own identities.<sup>311</sup>

Empirical studies of the benefits of open adoption, response to children’s express desires, and changing perceptions about children’s rights to relationships have fostered support for open adoption domestically in the U.S., along with birth parents’ demands for contact and their higher bargaining power.<sup>312</sup> But, good will and understanding of children’s need for identity has not sufficiently crossed over into the international realm. The idea that the U.S. was willing to separate the children of illegal immigrants from their parents and detain them separately, has recently caused

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307. Appell, *supra* note 254, at 1060–61 (“If adoption is to become truly child-centered, those participating in it as professionals, advocates, parents, law makers, and adjudicators must resist defining the process as the creation of one family and the dissolution of another. To the contrary, adoption should be viewed as a way to provide continuity and security for children whose parents are unable or unwilling to care for them, and not as a way to provide adults with children to build a family. Conceptualizing adoption as a service for children, not adults, enables the recognition that adults cannot force children to relinquish all ties to their origin; rather, children are forever and inextricably bound to their birth families, even while loving, caring for, and belonging with their substitute caretakers.”); Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 184–86 (2015) (discussing the importance of children’s right to identity in knowing birth parents).

308. Ouellette, *supra* note 38, at 79 (“In what circumstances can it be said that the interests of the child lie in breaking all connections with his or her birth family as a social and symbolic source of identity and belonging? Even when ties to the birth parents are severed, should the child become a stranger to his or her entire kin group?”).

309. Tobias Hubinette, *Post-Racial Utopianism, White Color-Blindness and “the Elephant in the Room”: Racial Issues for Transnational Adoptees of Color*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 221, 225 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012); MONTGOMERY & POWELL, *supra* note 97, at 108–09 (summarizing studies of the psychological identity concerns faced by children of ICA).

310. See MONTGOMERY & POWELL, *supra* note 97, at 21; ROTABI & BROMFIELD, *supra* note 9, at 2.

311. See, e.g., Yngvesson, *supra* note 290, at 106–09 (stressing the importance of building a kinship framework to build identity for children adopted from abroad).

312. See *supra* notes 254–255 and accompanying text.

an outcry in the U.S.<sup>313</sup> But our treatment of the poor, migrant foreigner has consistently been to expect familial associations different from what we would accept for ourselves.<sup>314</sup> Migrant laborers both legal and illegal work incredibly hard at low paying jobs that U.S. citizens often are not willing to do and often live apart from their families sending payments back to support family-members.<sup>315</sup> Family separation is thereby already occurring in order to feed children. Intercountry adoption also involves separation due to poverty but should not involve cutting all ties in perpetuity due to poverty and crisis.

Advocates have noted that the benefits of cross-cultural bridge building and understanding are an important aspect of ICA.<sup>316</sup> Open ICA can create bonds between diverse countries as opposed to the more colonialist perspective of removing children to solve infertility problems for rich westerners.<sup>317</sup> More than creating bonds with the children themselves, and the corresponding understanding that racial differences do not negate familial relations,<sup>318</sup> bonds can be created with families that live in foreign countries creating greater understanding of the other and a more interconnected global community.

Not only is openness a more ethical way to treat children and birth families, it is also the only realistic way to resolve the major legal and ethical impediments to ICA as it currently functions.<sup>319</sup> Concerns about fraud and falsification of birth records can only be credibly resolved by opening the adoption process and guaranteeing that relatives and kin are in contact with adoptive families.<sup>320</sup> Mere records are not sufficient; rather, face-to-face meetings and connections need to be maintained. In this way, adoptive parents can be sure of birth-parents' intentions, have mutual understanding regarding continued contact, and the identities of all involved would be clear. Given continuous contact, the fears of fraud—kidnapping, lack of consent, falsified records, and the need for prophylactic measures countries have taken to avoid it—would be less pressing. Ultimately, the threats of fraud have been pervasive, and it is not clear if openness will cure all the ills of ICA—but given the potential benefits, there is sufficient reason to attempt this radically different way of framing adoption.

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313. See, e.g., Karl Vick, Maya Rhodan & Molly Ball, *Border War*, TIME, July 2, 2018, at 26–33 (series of articles dedicated to discussing the trauma of the separation of illegal parents from their infant and minor children).

314. See HACKER, *supra* note 102, at 243.

315. See *id.*

316. MONTGOMERY & POWELL, *supra* note 97, at 14–15, 174–78; Bartholet, *The Child's Story*, *supra* note 30, at 350–52; Ouellette, *supra* note 38, at 83 (“Adoption issues are connected with overarching societal questions regarding cultural pluralism. It is an important to factor them into our thinking and generate dialogue about the institution.”).

317. See Perry, *supra* note 31, at 101.

318. See Yngvesson, *supra* note 290, at 108–09.

319. See *supra* Part II(B).

320. See, e.g., MONTGOMERY & POWELL, *supra* note 97, at 151–52.

Open ICA has been practiced in limited circumstances.<sup>321</sup> In the Marshall Islands, adoption is understood to involve openness by its nature. When confronted with the prospect of open ICA, nearly 70% of prospective birth parents responded positively and many favored such open arrangements.<sup>322</sup> Such open arrangements likely require intermediaries to arrange contact between adoptive and birth families, but such intermediaries are already involved in a financial capacity.<sup>323</sup> A study of these adoptions in the Marshall Islands demonstrated that birth parents had an entirely different perspective on adoption than baby-sales, as they believed that at age 18, children would return to them well-educated and wealthy and that their parenthood had not been entirely relinquished, although they would not raise their children themselves.<sup>324</sup> They had positive views toward adoption, felt a connection with adoptive parents, and allegations of abuse and fraud were absent. Furthermore, birth parents often give gifts and scholarships to birth parents and their children.<sup>325</sup> The Marshall Islands model is worthy of imitation.

Calls for open adoption have been made by some adoption advocates.<sup>326</sup> For instance, in their recent book, *SAVING INTERNATIONAL ADOPTION*, the co-authors argue that the private market should govern international adoption so that birth families and adoptive families can meet and negotiate their own terms in private ordering.<sup>327</sup> The authors are focused more on the benefits of private ordering than on openness, however, as the co-authors want to leave it up to private negotiations to determine whether the adoptions remain open or are more closed.<sup>328</sup> However, as will be discussed in the following sections, unequal bargaining power and cultural and linguistic barriers can make parity in private negotiations difficult to rely upon.

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321. Ouellette, *supra* note 38, at 78–81.

322. See Seymore, *supra* note 307, at 186 (citing Jini L. Roby et al., *Openness in International Adoption: A Study of U.S. Parents Who Adopted from the Marshall Islands*, 8 *ADOPTION Q.* 47, 51 (2005)); ROTABI & BROMFIELD, *supra* note 9, at 53–55; Scherman, *supra* note 251, at 290.

323. See Seymore, *supra* note 307, at 186.

324. *Id.* at 186–87.

325. ROTABI & BROMFIELD, *supra* note 9, at 55.

326. See HACKER, *supra* note 102, at 240–42 (calling for open adoption as part of an intercountry adoption system focused on feeding children in need); MONTGOMERY & POWELL, *supra* note 97, at 139–49 (advocating an open free market system of adoption); Scherman, *supra* note 251, at 290–91 (suggesting the future of ICA should involve openness and contact). See generally Seymore, *supra* note 307 (arguing that identity rights of children and concerns about fraud support opening international adoption).

327. MONTGOMERY & POWELL, *supra* note 97, at 148–52.

328. *Id.*



### B. *Charity and Wealth Transfer*

The second element of an interconnected system of ICA is permitting the transfer of money from adoptive parents to birth parents or birth communities. From a frame of interconnection as opposed to acquisition, the monetary transfer can be allowed to provide for birth families' needs, enhance their security and well-being, feed remaining children, and enrich birth communities as opposed to acquiring exclusive rights to a child. Adoptive families will in any event spend significant monies on the adoption and, thus, it is hard to justify the payment of money to all parties concerned except the birth families.<sup>329</sup> Connecting to birth families also means allowing them to benefit financially from the adoption process, because it is often their lack of resources and poverty that make the adoption necessary.

However, the free market is an inappropriate apparatus for managing such transfers of wealth. Payments to birth parents should be regulated to ensure they do not act to exploit or induce baby-sales, or even to become pregnant, but instead facilitate participation in the process for those who are already unable to care for children.<sup>330</sup> The fear of commodification and exploitation of birth parents and children justify a regulated market. Legal limitations on the amount of payment could limit the fear of undue pressure. According to the Hague Convention, expenses are allowed to be paid to birth parents.<sup>331</sup> But, beyond payment of expenses, payments to birth parents could cover a similar range of expenses covered in domestic adoption, including lost wages during pregnancy and while navigating the adoption system, payments that are not currently allowed under the Hague Convention.<sup>332</sup> Upon meeting birth families, such payments may seem just and proper as an act of good will towards people in need and can dignify the system.<sup>333</sup>

Alternately, if birth families are not identifiable, money could be paid to communities to provide social services for families and remaining chil-

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329. O'HALLORAN, *supra* note 127, at 818; Meier & Zhang, *supra* note 110, at 100–05 (discussing how public agencies took large profits from international adoption); MONTGOMERY & POWELL, *supra* note 97, at 143–44; Krawiec, *supra* note 13, at 247–50.

330. Blair, *supra* note 95, at 356–64 (describing alleged inducements to birth mothers in Cambodia and Guatemala); Long, *supra* note 96, at 645–46 (describing allegations of women induced by money to give up children and even women becoming pregnant to gain money from payments provided by mediators in international adoption); Oreskovic & Maskew, *supra* note 96, at 115.

331. Hague Convention, *supra* note 100, at art. 32 (“No one shall derive improper financial or other gain from an activity related to an intercountry adoption” and that only reasonable expenses may be charged or paid). Article 29 reinforces the ban on improper financial inducements by prohibiting contact between prospective adoptive parents and the birth parents prior to the adoption. *Id.* at art. 29.

332. MONTGOMERY & POWELL, *supra* note 97, at 143–44.

333. *Id.* at 143–45 (describing discomfort with being unable to provide some money or gifts to struggling birth parents in ICA).

dren. For instance, Shani King suggests that mandatory contributions to sending communities could ameliorate fears of exploitation and colonialization and provide benefits to poverty-stricken communities.<sup>334</sup> Indeed, there is a project in Piemonte, Italy that mandates that those who adopt internationally make payments to an organization that supports capacity building in that country to avoid the need for ICA in the future and allow families and communities to raise children in the countries of their national origin.<sup>335</sup> While I think such programs are less beneficial than direct contact with birth families, both in terms of benefits to children and family-making collaborators and in terms of effectiveness in reducing corruption and fraud, they reflect a move towards recognizing collaboration and the need for charity as opposed to a system based on acquisition.

Indeed, as Daphne Hacker characterizes ICA, it is not just about family-making, it is also about feeding hungry children.<sup>336</sup> Hacker categorizes intercountry adoption with parental remittances—money sent back home from work abroad—and child labor as various means of meeting the basic needs of children living in poverty.<sup>337</sup> While ICA as I have characterized it is still fundamentally about family-making, focusing also on the ways adoption can feed the hungry can help us transition from a more selfish perspective on family-making to a more giving, shared, interconnected vision that maintains focus on children's rights and needs. The idea of adoption as charity is not new, it is a common justification for choosing ICA.<sup>338</sup> A better balance between charity and the desire for family-making can be found in a system of open adoption that allows payments to birth families and children that remain behind, and the maintenance of birth identity and family connections which advance children's interests, than a system of closed adoption based on a frame of acquisition where adoptive parents have exclusive rights to children, and agents and intermediaries are paid, but birth parents are not.

We are in an era of unprecedented migration of peoples in search of better lives and sufficient sustenance worldwide.<sup>339</sup> In the U.S. and beyond there is significant apprehension about immigration in general, and

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334. . King, *supra* note 31, at 464.

335. See REGIONE PIEMONTE, [http://www.arai.piemonte.it/cms/media/files/PUBBLIC\\_%20semi%20di%20cooperazione\(1\).pdf](http://www.arai.piemonte.it/cms/media/files/PUBBLIC_%20semi%20di%20cooperazione(1).pdf) [<https://perma.cc/E7L3-N2WG>] (last visited Dec. 3, 2018) (in Italian, translation provided by Prof. Barbara Bennett Woodhouse, Emory Law School).

336. HACKER, *supra* note 102, at 242–44.

337. *Id.* at 197–244.

338. See ROTABI & BROMFIELD, *supra* note 9, at 2 (citing studies of the charitable desires of adoptive parents).

339. See, e.g., Gustavo Capdevila, *Unprecedented Human Migration Cries Out for a Global Response*, INTER PRESS SERV. NEWS AGENCY (June 25, 2018), <http://www.ipsnews.net/2018/06/unprecedented-human-migration-cries-global-response/> [<https://perma.cc/3HJU-R9NF>].

illegal immigration, in particular.<sup>340</sup> Migrants are searching for more economic and political stability and a way to feed their families. It is fundamentally disconcerting to use poverty as a reason to terminate parental rights.<sup>341</sup> In the domestic context, advocates and scholars such as Dorothy Roberts and Richard Wexler have argued forcefully that parental termination systems confuse poverty with neglect and that economic stability can preserve parental connections.<sup>342</sup> They argue for the abolition of the foster care system in favor of social welfare programs.<sup>343</sup> One could argue that similarly, in the context of ICA, if there was enough aid distributed throughout the world eliminating poverty, could stave off the need for most international adoptions. But, there is also a difference between the legal and ethical responsibility that the U.S. has to its own citizens and its obligation or capacity to cure the inefficiencies, corruption, and political instability of failing economies abroad. While some argue that the money spent on adoption is better off being sent to poverty-stricken communities,<sup>344</sup> there is no way to demand or even incentivize people to do so unless they have a connection to that foreign community which intercountry adoption can provide.<sup>345</sup> Although intercountry adoption could not

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340. See, e.g., Eduardo Porter & Karl Russell, *Migrants Are on the Rise Around the World, and Myths About Them Are Shaping Attitudes*, N.Y. TIMES, June 20, 2018, <https://www.nytimes.com/interactive/2018/06/20/business/economy/immigration-economic-impact.html> [<https://perma.cc/E8MA-AJY8>] (describing unprecedented global migration from south to north and the many forms fear of immigrants and immigration takes).

341. See MONTGOMERY & POWELL, *supra* note 97, at 29; *Intercountry Adoption Policy Brief*, SAVE THE CHILDREN (June 2012), [resourcecentre.savethechildren.net/node/6250/pdf/6250.pdf](https://resourcecentre.savethechildren.net/node/6250/pdf/6250.pdf) [Permalink unavailable] (“Poverty and a lack of resources should never be a reason for separation of a child from his or her family.”); Ellen Pinderhughes et al., *A Changing World: Shaping Practices Through Understanding of the New Realities of Intercountry Adoption*, THE DONALDSON ADOPTION INSTITUTE (October 2013), [https://adoptioninstitute.org/old/publications/2013\\_10\\_AChangingWorld.pdf](https://adoptioninstitute.org/old/publications/2013_10_AChangingWorld.pdf) [<https://perma.cc/9L55-3T38>].

342. See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012); Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129 (2001) (describing in detail the connection of poverty, foster care, and termination of parental right). See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

343. ROBERTS, *supra* note 342; Roberts, *supra* note 342; Wexler, *supra* note 342, at 129.

344. Bergquist, *supra* note 146, at 349; King, *supra* note 31, at 425.

345. Carlson, *supra* note 24, at 752–53 (“Not having sought to adopt, these non-adoptive parents would be no more likely than anyone else to have developed any connection or commitment with any particular orphanage or aid organization. They would be no more obliged than anyone else to send any amount of their money to orphanages.”); Jonathan Dickens, *The Paradox of Inter-Country Adoption: Analysing Romania’s Experience as a Sending Country*, 11 INT’L J. SOC. WELFARE 76 (2002); Michael Ambrose & Anna Mary Coburn, *Report on Intercountry Adoption in Romania*, USAID 2 (Jan. 22, 2001) (discussing how intercountry adoption can harm children left behind).

solve the global problem of children's poverty and neglect,<sup>346</sup> one way to address those needs would be to allow intercountry adoption as a means of wealth transfer, allowing wealth to be transferred from westerners seeking to raise foreign children to the hungry poor. By building connections, ICA may not only ease the plight of individual children, but also improve the plight of other children in those countries, as would appear to have occurred in the case of Romania, by bringing needed resources and attention to the plight of orphans.<sup>347</sup> And, as discussed above, the frame of interconnection can differentiate such transfers from acquisition and corruption in favor of collaboration and kinship.

However, while charity and wealth transfer are part of intercountry adoption, wealth transfers should be a mandatory form of payment and not merely "gifts" or pure "charity." Financial "gift" giving to countries of origin is a standard practice among adoptive families who visit their children's birth communities or orphanages: "[gift giving] is standard practice for returning families. Help the place that raised and protected your daughter in some way."<sup>348</sup> This way of viewing adoption—through an ideology of "giving"—staves off concerns that motherhood should not be commodified.<sup>349</sup> However, "any gift without a counter-gift gives the donor excessive power over the receiver."<sup>350</sup> In intercountry adoption, power imbalances between adoptive families and birth families are already at issue and, therefore, a gift frame should be avoided in favor of the frame of interconnection within a limited and regulated market.

### C. *Government as Facilitator of Interconnection*

Finally, the government must retain a significant role in facilitating intercountry adoptions, albeit in a different way than conceived in the Hague Convention under the frame of acquisition while avoiding commodification. Instead of merely attempting to keep records, mediate adoption placements, and ensure that birth families do not receive money, government facilitators should work towards facilitating positive interconnections between family law-collaborators. Open adoption is based on the concept of communication between the parties involved in the adoption process.<sup>351</sup> It is necessary to have an intermediary beyond the free market to ensure that the collaborative family-making functions appropriately in a

346. See, e.g., Bergquist, *supra* note 146, at 349–50 (critiquing international adoption for the small percentage of children in need it reaches).

347. See, e.g., Carlson, *supra* note 24, at 755.

348. Solomon, *supra* note 104, at 42; see also Families Without Borders, *Guatemalan Adoption, and the Best Interests of the Child: An Informative Study*, UNICEF, at 54 (Nov. 2003), <http://www.familieswithoutborders.com/FWBstudyGuatemala.pdf> (describing how many adoptive families give back to Guatemala through support for local charities, donations of medical supplies, food and clothing, and funding for community development projects).

349. Cadoret, *supra* note 28, at 277.

350. *Id.*

351. *Id.* at 277–80.

manner that facilitates a fair transaction that respects and recognizes both sides of the collaboration—"between takers and givers without the child or the birth mother turned into merchandise."<sup>352</sup>

Unlike in domestic adoption, where the lack of infants gives birth parents bargaining power and thus open adoption is left to private ordering, one must assume that birth families in ICA do not have the sophistication or bargaining power to secure terms that meet their interests at the negotiating table. Instead, we should apply what has been learned from domestic adoption regarding the benefits of openness to all collaborators. The law should give power to international collaborators, especially because they do not have sufficient power to make demands in private ordering. Moreover, expecting the parties to write a contract in intercountry adoption is not realistic given limits in resources, cultural gaps, and language barriers. Even if a contract were written, birth parents would need assistance from an international agency to facilitate or, if necessary, to enforce it.

More importantly, government facilitation of open adoption has the potential to manage and mitigate fraud and abuse. If birth parents do not disappear, it will be harder for intermediaries to hide abusive practices and kidnapping. Getting to know the birth family can clear up misunderstandings, clarify records, and help assure consent. Pessimists may argue that the horrors of the baby-markets will produce "fake parents" or fake death certificates to hide abuse. To the extent possible, ICA governmental agencies must be charged with rooting out abuse because adoption without such oversight cannot be allowed. One might even counter that if a country is rich enough to ensure that a formal open adoption system works, they would be unlikely to need ICA at all—it is only desperation that causes people to send their children away. And, one can never be sure that there will not be fraud and abuse because there will inevitably be money at stake in a functioning system of adoption. Even in the domestic U.S. with illegal immigrant children, we are afraid of illegal adoptions taking place!<sup>353</sup> How can we ensure that such travesties do not occur abroad? Indeed, I have argued that, due to international surrogacy's elevated potential for abuse, domestic surrogacy should be preferred, and international surrogacy avoided.<sup>354</sup>

Still, in a system of open adoption, parents may not feel that they are giving up their child entirely and may prefer their child grows up abroad,

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352. *Id.* at 280 (suggesting that intermediaries are necessary to manage interactions between agents of demand and supply in the context of intimate markets such as adoption, surrogacy and organ donation).

353. Kathryn Joyce, *The Threat of International Adoption for Migrant Children Separated from their Families*, INTERCEPT (July 1, 2018, 9:37 AM), <https://theintercept.com/2018/07/01/separated-children-adoption-immigration/> [https://perma.cc/QCJ4-PVRK] (discussing the fate of adoption that meets children who are separated from illegal immigrant parents and are never reunited).

354. Laufer-Ukeles, *supra* note 1, at 1274–75; Laufer-Ukeles, *supra* note 174, at 139, 147–48.

as has occurred in the Marshall Islands.<sup>355</sup> Moreover, in the context of open ICA, it is more possible to maintain an ongoing connection than in international surrogacy because there is a greater recognition of birth parent status in our culture as genetics is usually viewed as a more significant contribution than gestation, which is merely characterized as “incubation.”<sup>356</sup> And, while surrogates build connections during surrogacy, which is not practical when surrogates are abroad, in adoption the connection is inherently genetic and based on birth status. Most importantly, although nothing can guarantee that fraud will not exist in destitute countries, I would argue that the risk is more than worth taking in ICA than in international surrogacy, given the benefit of raising children in need. Saving a life should ethically take precedence over achieving the dream of a genetically-related child. Given the poverty and suffering worldwide, the constant migration and devastation, there may be no better solution than an open system of adoption that builds bridges between cultures, between the wealthy and privileged and the poor. In light of the lack of aid to meet the basic needs and protections of all peoples, not trying to create an open, ethical system of ICA is also problematic.

Distance, along with language and cultural barriers, will make such understandings and ad hoc engagement more complex in intercountry adoption.<sup>357</sup> Openness in ICA may require long-distance communications, overcoming language and cultural barriers, electronic communications, and even occasional travel. What such relationships might look like is still a matter of conjecture as open ICA is currently rare,<sup>358</sup> but it is safe to assume that they will be as varied and multi-faceted as domestic open adoption where interconnections are strong and then weak and different roles are played at different times.<sup>359</sup>

Finally, the geographic and cultural distance between parties in ICA, as well as the socio-economic disparities, may elevate the fear of entanglements with birth families and elevate wealthy foreigners’ fear of being harassed. Fears of entanglements also occur in the context of domestic adoption.<sup>360</sup> People fear the other—the stranger—but collaborators need

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355. See *supra* notes 321–325 and accompanying text.

356. I do not agree with this perspective, but it does reflect modern legal treatment of surrogacy. See *Smith & Smith v. Jones & Jones*, No. 85-532014, WL (Mich. Cir. Ct. Wayne County March 15, 1986) (holding that the intended mother who donated the egg was the legal mother due to her genetic donation and proclaiming the gestational surrogate “a human incubator”); *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (App. Div. 2000); see also, e.g., *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (rejecting the intended parents’ and gestational surrogate’s joint claim that the surrogate merely acted as an incubator and terming that argument a “simplistic comparison” because it ignores the fact that there are human emotions and biological changes involved in pregnancy).

357. ROTABI & BROMFIELD, *supra* note 9, at 289–90.

358. See *supra* notes 321–323 and accompanying text.

359. See *supra* notes 257–258 and accompanying text.

360. See, e.g., Ouellette, *supra* note 38, at 77.

to be able to work together. Regulations must be put into place with international government agencies acting as overseers to prevent harassment and fraud. While instances of harassment occur, domestic adoption studies demonstrate the benefits of openness and note that the fear is greater than the actual threat of entanglements. Nonetheless, such entanglements will have to be understood as a cost to the transaction for adoptive parents even if they would prefer to avoid such entanglements as entanglements are part of working together in collaboration.<sup>361</sup>

## VI. CONCLUSION

The desire to have children can overwhelm and incentivize those who want to be parents to go to great lengths when simple traditional coital sex is not the answer. Parenthood is a worthy and valuable goal and alternative methods should not be readily banned. However, when alternative methods intimately and essentially involve other peoples' bodies, lives, genetic and emotional connections, those people and their connections, emotions, and attachments cannot be acquired in a conventional market manner. This is because, ethically and legally, we must avoid treating humans as commodities, as objects and not subjects, as a means of obtaining one's own ends and not as interest bearers in their own rights. Although poverty can lead people into exploitative and commodifying transactions, the law must rise above and refuse this corruption. Avoiding fears of commodification and exploitation need not involve banning financial exchanges. Rather, through a frame of interconnection and ongoing contact we can preserve the humanity of family-law collaborators, while attempting to thwart fraud and corruption.

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361. See *supra* notes 262–269 and accompanying text.