Law & Social Inquiry
Volume 44, Issue 4, 1141–1173, November 2019

Law& Social Inquiry

Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study

Ruth Zafran and Daphna Hacker

This article seeks to establish the extent to which the voices and interests of transnational commercial surrogates—women who are paid by intended parents from another country for carrying a pregnancy—are accounted for by those with power to shape the policy around this complex area in the country of the intended parents. Through a first-of-its-kind qualitative study of the viewpoints of policy makers and government officials, taking Israel as a case study, the research maps the hierarchy of interests in Israel as the country of the intended parents, in which the rights and well-being of the transnational surrogates are largely neglected. The study finds that, even when awareness of the vulnerability of transnational surrogates is relatively evolved among officials, they admit that the motivation and ability of the country of the intended parents to supervise the protection of the surrogates—during a process that takes place in another country—are extremely limited. Equipped with the empirical findings, the article examines the actual and potential regulative arenas relevant to transnational surrogacy (also known as international surrogacy), and offers an alternative normative framework to correct the current regulative failure in providing much-needed legal protection for transnational surrogates.

INTRODUCTION

The exact scope of the phenomenon of surrogacy—whereby babies are born to women (the surrogates) who carry the pregnancy for others (the intended parent/s)—is unknown. However, it is estimated that the number of children born annually through *transnational* commercial surrogacy is higher than 20,000 (Scherman et al. 2016).

Ruth Zafran (rzafran@idc.ac.il) is a Senior Lecturer at the Radzyner Law School, Interdisciplinary Center Herzliya, Israel; and a Visiting Scholar at the Berkeley Institute for Jewish Law and Israel Studies and at the Center for the Study of Law & Society (Berkeley Law) for 2017–2019.

Daphna Hacker (dafna@post.tau.ac.il) is an Associate Professor at the Tel Aviv University Law Faculty and the head of the Women and Gender Studies Program at Tel Aviv University.

We thank the Mission Droit et Justice (the Ministry of Justice of the French Republic) for supporting the study reported in this article: Legal and Sociological Analysis of the French Context Considering Foreign Practices Related to Filiation of Children Conceived through Surrogacy Abroad (United Kingdom, Belgium, Israel) (http://www.gip-recherche-justice.fr/publication/analyse-juridique-et-sociologique-de-letat-des-questions-en-france-a-la-lumiere-des-pratiques-etrangeres-en-matiere-de-filiation-des-enfants-concus-hors-la-loi-belgique-grande-bretagne-israel/) and Dr. Karène Parizer-Krief for initiating the multinational research group we were part of. We also thank the Interdisciplinary Center Herzliya and the Cegla Center for the Interdisciplinary Research of the Law at Tel Aviv University Law Faculty for their generous support; Amanda Dale for her editing; and Dasi Anderman-Shahar, Zohar Fort, Tal Ronen, Daniel Findler, and Eynat Meytahl for their research assistance. We also thank Ayelet Blecher-Prigat, Leslie P. Francis, Michele Goodwin, Lisa Ikemoto, Laura T. Kessler, Radhika Rao, and Amnon Reichman for their useful insights.

This is in addition to the number of children born domestically through surrogacy; for example, more than 2,000 children per year are born in the United States by this means, and 400 in the United Kingdom (The Economist 2017).

On the global scale of childbirth, surrogacy is a marginal phenomenon. However, due to its moral complexity and sensitivity, it attracts public attention and extensive academic research. Much of the scholarly writing deals thoroughly with the fragile situation of surrogates in general, and transnational surrogates in particular. Some authors have developed theoretical frameworks with which to analyze this situation (see, for example, Radin 1987; Posner 1989; Epstein 1995; Campbell 2013; Laufer-Ukeles 2013), while others offer a normative evaluation based on empirical studies conducted in different parts of the world, mainly the United States, the United Kingdom, Australia, Israel, and India (see, for example, Teman 2010; Pande 2014; Rudrappa 2015; Samama 2015).

Most of the empirical studies exploring the phenomenon of transnational surrogacy study the surrogates' perspectives, well-being, and conditions. There are very few empirical works dealing with the countries of the intended parents (Arvidsson et al. 2018; Eyal and Adi 2018), and not even one, to the best of our knowledge, that examines the perspective of the key actors who shape the surrogacy-related regulatory regime in these countries.[1] The present article aims to begin to address this lacuna by exploring the moral viewpoints of those who regulate transnational surrogacy. The work examines the normative standings of those who—publicly and privately—frame the regulative regime that governs transnational surrogacy in Israel for Israeli intended parents.

Israel provides a fascinating case study, as its citizens take part in relatively significant numbers in the global phenomenon of transnational surrogacy. In 2013, for example, 169 applications for parental orders relating to babies born though transnational surrogacy were submitted to Israeli courts (in addition to fifty-eight cases of domestic surrogacy reported by the Health Ministry),[2] compared to 167 applications submitted to British courts in relation to both domestic and transnational surrogacy (Dugan 2014). While the numbers of applications in the United Kingdom are probably far from representative of the true scope of transnational surrogacy undertaken by British citizens (Dugan 2014), the numerical similarity is still staggering when taking into account that Britain's population is eight times larger than that of Israel (approximately sixty-four million versus eight million, in 2013). According to our estimation, based on data provided by Israeli authorities, at least 1,230 babies were born to Israelis through transnational surrogacy between 2005 and 2016.[3]

1. It is important to mention the extensive and important research done by Hillary Berk (2015), which deals with the place of private lawyers and agencies in shaping the contracts between the intended parents and surrogates in the United States. Unlike Berk's study, the study reported here moves beyond the private contractual negotiations toward state regulation.

2. E-mail correspondence (January 31, 2018) with Ms. Eti Dekel, Coordinator of the Israeli Committee for the Approval of Surrogacy Agreements, which acts in accordance with the Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 1996.

3. There are no published statistics on the number of babies born to Israelis through international surrogacy. However, there are data available on the number of petitions to the Israeli Family Courts by intended parents who need the court's approval for the genetic test that will allow the immigration of the baby to Israel (as the genetic child of an Israeli citizen). According to data we received from the Ministry of Foreign Affairs and the Ministry of Interior, between 2005 and 2016, a total of 1,230 petitions

In the first part of the article, we briefly present the Israeli legal framework governing surrogacy. In the second part, we detail the research methodology we applied in the present study. We then set out, in the third and main part of the article, the findings this yielded, uncovering the actors and the social and cultural forces that shape policy, regulation, and rights affecting transnational surrogates, as well as the "hierarchy of interests" these actors and forces, simultaneously, construct and are constructed by. Within this hierarchy, we show that the interests of the intended parents and their desire to have a baby override all other interests, including those of the surrogate. Importantly, we explore how, over time, the legal advisors of the relevant governmental ministries—predominant in shaping the applicable legal framework—became conscious of the human trafficking discourse and attempted to safeguard the informed consent of the surrogate, albeit principally to protect Israel's reputation within the international human rights community. However, these legal advisors admit that, even this motivation, alongside their growing awareness of the vulnerability of transnational surrogates, does not, and probably cannot, translate into effective regulation that adequately protects this foreign collective. This is due, among other reasons, to the position taken by Israeli judges who allow *all* babies born through transnational surrogacy into the country, regardless of any suspicious circumstances. In the fourth part of the article, titled Regulatory Pragmatism, we place our findings within the overall debate over the proper regulation of transnational surrogacy. We argue that, while recent theories that position transnational responsibility for protecting foreign surrogates' human rights with the countries of the intended parents are appealing, realistically, only regulation that creates normative synergy between domestic and transnational surrogacy—motivated by a yet-to-be-shaped international treaty—can effectively protect the surrogates. We conclude the article by sketching an outline of one such alternative regulatory regime, necessarily multilayered, that we believe has the potential to address the challenge of safeguarding transnational surrogates' interests.

But first, we would like to clarify our stance on surrogacy. Based on our own research and on works published by others, we take a factual and normative stance according to which surrogacy puts women at risk of exploitation. The other parts of the triangle, namely intended parents (Triger 2015; Gezinski et al. 2018) and children born as a result of surrogacy (Rotabi et al. 2017), are also in a fragile situation; however, they are not the focus of this article. Moreover, while the common argument differentiates between Western surrogates, who are allegedly in a much better position than surrogates from less developed countries, we will show in this article that, in relative economic terms, this is not necessarily the case. Notwithstanding, the magnitude of the risk embedded in surrogacy, and its potential and actual consequences for the surrogates and for women as a social group, are a source of controversy among researchers in the field (Davies 2017), and also for us as the two authors of this article. This scholarly controversy need not be resolved here. It suffices to agree that surrogacy puts the surrogate in a complex situation that is in need of regulative attention, and that the difficulties triggered by such a situation may be exacerbated in states that do not

were submitted. The number of children is greater than the number of petitions, as one petition can be submitted for a surrogacy procedure that yielded more than one baby. Indeed, one of the agency owners we interviewed reported a twin-birth rate of 30 percent, and the other 18 percent.

guarantee the safety of women and their equal rights, as well as within transnational settings such as those discussed in this article.

THE LEGAL FRAMEWORK

Israeli law deals only with domestic surrogacy, in which both the intended parents and the surrogate are Israeli citizens. The Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 1996 (in essence, the Israeli Surrogacy Law, hereafter "the ISL") establishes a stringent procedure according to which any heterosexual couple seeking surrogacy is required to comply with certain preconditions and receive the endorsement of an approval committee, composed of experts in the fields of medicine, law, ethics, and religion (hereafter "the Committee") (Shalev 1998). The ISL also regulates the compensation the surrogate may receive, which is defined as "reimbursement of real expenses" and "compensation for suffering [and] loss of earnings." In practice, as we learned during the study, Israeli surrogates are paid in the region of 45,000 dollars to 65,000 dollars (plus possible extras), which, in most cases, exceeds the real expenses and material losses they suffer. Upon the birth of the child, and through a paternity order, the court defines the intended parents as the sole and only parents of the child, and the legal connection between the surrogate and the child is severed (Zafran 2015).

Notwithstanding the fact that domestic commercial surrogacy is permitted in Israel, not all Israeli intended parents can—or want to—rely on Israeli surrogates (Mitra 2018). First, the ISL does not allow same-sex couples to be intended parents; this option is open only to heterosexual couples. Additional restrictions established by the Committee further reduce the options even among heterosexual couples (for example, age considerations and the number of children they already have). Third, restrictions are imposed on the profile of the surrogate—who must be unmarried but must also already have children of her own. She must also share the religion of the intended mother, but she cannot be a relative. Some of these conditions are imposed by the ISL, and others by national guidelines developed by the Committee.[4] All these conditions significantly limit the availability of eligible Israeli surrogates. Finally, the informants in our study argue that the Committee's lengthy approval process, as well as the high costs of surrogacy in Israel, constitute additional factors that drive Israelis toward transnational surrogacy agreements.[5]

As there is no statute prohibiting it, and in light of the legislature's silence (or lacuna) in this regard, it is held, both administratively and judicially, that Israelis are allowed to use surrogacy services in other countries. Unpublished guidelines on *transnational* surrogacy were shaped by the senior legal advisors of the relevant ministries to deal with the matter (hereafter the "guidelines"). The guidelines, implemented by the Israeli consulates abroad and by the Israeli courts that deal with these cases, require a DNA test to be performed on the baby to establish the paternity of at least one Israeli

4. Israeli Ministry of Health. "Guidelines for Intended Parents and the Surrogate Mother." https://www.health.gov.il/DocLib/pon_tofes18.pdf (accessed August 29, 2018).

5. But see Triger (2015), who argues that a transnational surrogacy transaction, even in developing countries, might be more expensive than a local one.

parent, and the consent of the surrogate. She must provide two identity documents and sign an affidavit confirming that she is not the mother of the newborn, that she waives all rights to any link or relationship with him or her, and that she approves the baby's departure to Israel. The intended genetic parent also needs to present the surrogacy contract and a legal opinion that proves that surrogacy is not illegal in the country in question. After the baby has entered Israel, and in cases in which the child has another intended nongenetic parent, the status of the second parent is recognized through a judicial procedure in the Israeli Family Court.

RESEARCH METHODOLOGY

This article evolved out of a combined comparative study (Boele-Woelkei 2015), commissioned and supported by the French Ministry of Justice. Conducted by four research teams (each team composed of one legal scholar and one sociologist) from four countries, the study dealt with similar questions of the scope, characteristics, and regulation of transnational surrogacy in the respective countries.[6] As the Israeli sociolegal pairing, we took the opportunity to continue beyond the shared research plan and to delve deeper into the "regime of justifications" (Boltanski and Thévenot 2006) present in the sociolegal field shaping the Israeli regulation of transnational surrogacy. This article explores one of the main themes that emerged from our study regarding the presence of a constructed and constructing hierarchy of interests, which places the interests of the intended parents much higher than those of the foreign surrogates.

The study methodology was aimed at capturing all major actors involved in shaping the regulation governing transnational surrogacy in Israel. The mapping of these actors evolved during the study, following the understanding embedded within qualitative methodology that a deep acquaintance with the field can only be achieved through an ongoing process that includes intense presence and conversation within it (Gibton 2016). We identified three groups of relevant actors: *public* (state legal advisors, judges, and legislators); *private* (agency owners and private lawyers); and *civil society* (activists within NGOs).

Public: The Israeli guidelines on transnational surrogacy, mentioned above, were shaped by senior legal advisors of the relevant ministries as a response to Israelis' de facto use of surrogacy abroad and in the shadow of parliamentary stagnation that has, thus far, failed to address this relatively new phenomenon. We therefore centered our research interviews on these legal advisors. We were fortunate to receive the cooperation of *all* the senior advisors who had contributed to the relevant guidelines (n = 6), from all the governmental ministries involved: the Ministry of the Interior, the Ministry of Justice (2), the Ministry of Foreign Affairs, the Ministry of Health, and the Ministry of Welfare. We also received official information through a request under the Freedom of Information Law (1998) and through the reports published by the *Knesset* (Israeli parliament) research and information center (Almagor Lotan 2012; Haseisi 2013). In addition, we interviewed a family court judge, who is closely involved in transnational surrogacy cases and contributed significantly to the judicial impact on

6. The collaborative effort resulted in a report drafted by Karène Parizer-Krief (2017).

the emerging regulation; and we complemented the study of this impact by analyzing all Israeli published legal decisions related to transnational surrogacy (n = 29).[7] We also interviewed the advisor to the former Minister of Health, who initiated a law proposal on transnational surrogacy (that was not enacted); and we analyzed all Israeli parliamentary discussions over domestic and transnational surrogacy (n = 18).[8]

Private: We interviewed the owners of two major surrogacy agencies considered to be at the forefront of the transnational surrogacy industry and searched the commercial Web sites of these and other agencies. We also interviewed two private lawyers who have been intensely involved in shaping the contracts between Israeli intended parents and foreign surrogates. These private actors provided us with four examples of such contracts, which they explained are based on typical templates relating to surrogacy in India (1), Georgia (2), and Texas (1). We also sourced, via an MA student, two Israeli surrogacy contracts, for comparison.

Civil society: We interviewed a prominent feminist activist—the most vocal and eloquent in the public Israeli civil society debate on transnational surrogacy, who was mentioned as a relevant actor by other interviewees. We also documented, as non-participating observers, two Israeli conferences on surrogacy (held in December 2015 and May 2016) and acted as both participants and observers in another four conferences (June 2013; July 2013; May 2014; and April 2016) to hear more activist and academic voices. Finally, we liaised with the General Manger of the Israel National Council for the Child—the main NGO dealing with legal matters relevant to children—to check our observation that the best interests of the child do not play a significant role within the Israeli public discourse over surrogacy.

Together, these interviews and artifacts enabled us to conduct an in-depth analysis of the perceptions held by key players in the Israeli field regulating transnational surrogacy, regarding the rights and interests of the foreign surrogates and their place in relation to the rights and interests of other stakeholders.

The open-ended and semistructured interviews were recorded and transcribed. Together with the artifacts, the transcriptions were analyzed according to the questions set during the combined comparative research. For the purpose of this article, the findings were re-analyzed by means of the grounded theory method (Strauss and Corbin 1998), to specifically identify the content and emphasis attributed by interviewees to the foreign surrogates, versus the weight they gave to other stakeholders (the intended parents, the child, the state, and the private agencies). The analyses of multiple resources by two researchers enhances the trustworthiness of the data, through triangulation (Anney 2014). Finally, the findings were presented at several conferences and received feedback that, on several points, prompted us to conduct further careful and nuanced examination of our conclusions.

7. Although family court and district court cases are not published officially, there are a few Israeli electronic databases that publish the cases sent for publication by judges. For this research we examined the two main databases, Nevo and Takdin. Using the term "surrogacy" without any time limit, we scanned all the results and mapped all the relevant cases (including the Supreme Court cases, which are published fully and officially).

8. All the deliberations of the Knesset and its relevant committees are transcribed and published on the Knesset official Web site, which is accessible to the public. Here, as with the research we conducted with the court cases, we searched for all the protocols that included the term "surrogacy," without any time limit. All the relevant protocols were analyzed.

Each interviewee signed an informed consent form and was asked whether s/he wished to remain anonymous in the study reports. While a few gave permission to disclose their identity, in all cases we report the findings using the interviewees' professional identity rather than their names, to protect those who did not give such permission. Moreover, in some cases the interviewees asked to speak off the record; therefore, these sections of the interviews are not reported. Some of the participants asked to see and approve the quotes from their interviews before publication. In these cases, we submitted the quotes we planned to use, and abandoned some in light of the interviewees' requests, or slightly adjusted the details of others to protect confidentiality. None of these accommodations compromised our ability to report the significant findings. All translations from Hebrew, of quotes from interviews and from legal and policy materials, are our own, with the assistance of a professional editor to secure the preservation of the original meaning.

Clearly, the study is limited in that it does not include the voices of the intended parents (though it does relate to their actions), the transnational surrogates, or the children born through transitional surrogacy. Despite this limitation, however, we are confident of having captured the views of all the actors relevant to our study; the other voices, though extremely important, are beyond the scope of our study, as they do not play any significant role in the regulation process. Another limitation is that our research is based on only one country, albeit a very central one within the transnational surrogacy phenomenon, as explained in the Introduction. We have endeavored to address this limitation by referring to the available literature and data from other parts of the world, but we encourage other researchers to conduct similar studies in their own countries, and thus expand and enrich the empirical and normative discussion we initiate here.

Now, we turn to our findings. The first section of the Findings part presents the hierarchy of considerations constructed by the public and private regulators within the research field (and which currently guides it). The intended parents and their *perceived right* to parenthood are markedly at the top of the hierarchy. The second section explores the rights and interests of the foreign surrogates as seen through the eyes of these Israeli regulators.

FINDINGS

Citizens' Right to Parenthood as the Paramount Consideration

The interviews show that the interests of the Israeli intended parents dominate the perceptions of the public and private actors concerned, and that all other interests, including those of the surrogates and the children born through surrogacy, are marginalized. As the interviews revealed, this was true especially in the first few years, when the phenomenon of transnational surrogacy into Israel was just beginning to be felt and its regulation was barely formed. We found that, certainly in the context of the judicial regulatory perspective, and among the private actors involved in shaping the transnational surrogacy contracts, this is still very much the case.

From the outset, there was agreement among the interviewees that the Israeli intended parents are willing to do whatever it takes to become parents and that they largely ignore any other interests. They were described by one agency owner (2)[9] as "crushed, lacking belief … after years of [fertility] treatments" and by the judge as "in very great distress, willing to pay and do anything on earth" to bring a child into the world. Another agency owner (1) observed that the intended parents are willing to even sell their homes, and one of the legal advisors (4) went as far as suggesting that they might turn to illegal child trafficking, as the desire to become parents is so intense.

The extreme pronatalist Israeli culture, documented also by other researchers (see, for example, Birenbaum-Carmeli 2016, 16; Yeshua-Katz 2017), which helps explain the obsession of the Israeli intended parents with having a child at any price, was also echoed in the world view of two of the most powerful state actors interviewed. According to this world view, Israeli citizens have an undisputed natural right to parenthood, regardless of sexual orientation or marital status, and therefore to the option of crossing the border for surrogacy. One of the legal advisors (4) observed:

> Human beings have the right to parenthood. [But] nature does not enable them to bring a child into the world, at the moment. I am ready to enable them, and I want to enable them, because they have the right to parenthood. However, I cannot enable it here in Israel right now, and I also don't see how [because of legal restrictions on domestic surrogacy for gay intended parents]. I'm telling you this in all honesty. So, let's enable [transnational surrogacy for those who cannot access it in Israel].

Likewise, the judge we interviewed relates to parenthood as a basic right when she explains the judicial motivation to assist in a swift and effective procedure to recognize the parent's spouse as a second legal parent and, by that, to bring the transnational surrogacy to completion:

> On the one hand, I have the side of the parents. Who are Israeli citizens. And who want to realize their parenthood. Which is a right as far as I am concerned—part of human dignity and freedom [which Israeli law determines as basic human rights]. When they come to court they take action in a legitimate procedure. They did not break the law, they come to court and ask the court for a remedy to realize their parenthood, to recognize their rights as parents. … And they perceive this procedure as very offensive. I mean … a person can come and give me such a text: "I am the citizen of the state, I served in the military [Israel enforces an obligatory military service], I pay taxes, I do all that I am required to do [by the state], and the minute I need the state, I come, I initiate this procedure, you doubt something that is the most basic to my identity." A normal person perceives this as unbearable. Arbitrariness on the part of the state. This is one thing that I need to take into consideration. And I have here structured power imbalance between a

9. As the identity of the interviewees is anonymized, we added numbers as to differentiate between them within each category of interviewees.

> citizen who faces the state that has resources and knowledge and power, and the regulation in its hand.

Unsurprisingly, the private commercial actors are the most forthright in placing the interests of the intended parents (their paying clients) at the top of the list. Two of them who we interviewed had used transnational surrogacy as intended parents themselves, which had motivated them to open their own business. Their personal experience drove them to look for quicker and cheaper ways to enable people to become parents through transnational surrogacy. As one of them (agency owner 1) explained:

> The beginning [of my business] followed my own personal experience . . . the process I went through in the US with my partner. During that process I tried to think of how to transform, to make it accessible to more people, because we did it in the US, and I sold an apartment for it, and we paid lots and lots . . . nearly one hundred and fifty thousand dollars. It came into my mind, especially with my high-tech background; I was a project manager in a high-tech company. And at the time, perhaps even more so than today, it was very common to do outsourcing of anything to India. So I thought, how can such outsourcing be done [for surrogacy]? I know that this is a dirty word in this context, but that was my genuine thought [laughing].

The feminist activist was the only interviewee that doubted the natural right to parenthood, in the name of which intended parents are allowed to shop for surrogacy abroad: "It is the legal arena that signaled to us, as a society, that a right to parenthood exists, this is the whole story. Like, this was one of the problematic sources in my opinion, which turned it into 'I deserve it,' 'I also want,' 'I also can.'"

As she identified, the perception of the right to parenthood as almost *absolute* is prevalent within the judicial decisions over transnational surrogacy that we have studied. Israeli courts have ruled that gay couples are allowed to resort to foreign surrogates (such as in *Mamat-Magad v. Ministry of Interior* [2014]), though they are not allowed to use the services of Israeli ones, according to the ISL, and they have recognized the right of relatively old intended parents to access foreign surrogacy services (as reported by one of the agency owners (2)), though, again, in this case Israeli surrogacy is prohibited. In fact, the right to parenthood of the Israelis who can afford transnational surrogacy is much broader and easier to fulfill than that of Israelis who turn to Israeli surrogates, as the former are not governed by the much stricter and more limiting regulations governing domestic surrogacy.

In 2014, the Israeli Supreme Court stated:

> In a long line of cases it was ruled that the right to parenthood is one of the basic human rights in Israel, as part of every human's nature, his freedom and dignity. . . . Quite a few Israeli citizens, as it became clear in the petitions before us, turn to surrogacy abroad. There is no prohibition in Israeli law on the procedures taken by those who turn to surrogacy abroad. . . . Among them are heterosexual couples, who can, in many cases, fulfill their parenthood in a number of other ways, gay couples (like the petitioners in front of us) and also singles, for whom according to existing law, the route

> of surrogacy abroad is a major practical route, the only one at times, to become parents. In doing so, they fulfill a natural urge embedded in humans, to procreate and establish a family. We must look for a way to ease their route—all, while guarding other interests worthy of protection. (*Mamat-Magad v. Ministry of Interior* [2014])

While the court mentions the duty to guard "other interests worthy of protection," our study reveals that, ultimately, in all Israeli legal procedures related to transnational surrogacy—even in cases where the legality of the process is questionable—all babies are allowed into Israel, and probably will be allowed in the future. As one of the legal advisors (3) confirms: "In the end, they all enter. Yes. In the end they all enter."

Interestingly, some of the government legal advisors voiced criticism against the intended parents, in the name of the child's welfare or the surrogate's health. One of them (6) expressed concern over the ability to cope of one gay couple who have had seven children through transnational surrogacy with triplets and twins, calling this scenario "unnatural" and "an insane burden" that the Israeli legislature should have prevented. Likewise, another (4) criticized couples who use multiple surrogates implanted with multiple embryos: "And then you find out that simultaneously they had fertilized four [eggs], 'just in case' ... What is that about? What is this? Cows? Your right isn't mirrored by any obligation? Your right is absolute?" The criticisms against intended parents who choose to implant multiple embryos in the surrogate's womb also included the higher risk of premature births in such cases and the economic burden that this places on the Israeli health system.

One could argue that the interests of the intended parents correlate, to some extent, with the best interests of the child. Naturally, in almost every case, the newborn's best interest is to be recognized as an Israeli citizen and as the intended parent's child, as soon as possible, so as not to be left stateless and parentless for any length of time. Surprisingly, though, references to the best interests of the child in this context were virtually absent during the interviews, and other interests of the children (for instance, to have access to information regarding their origins) are not part of the regulators' agenda or of the public discourse in Israel related to surrogacy.[10]

Following one legal advisor's (4) criticisms in the interview (noted earlier), we mentioned the minority opinion—supporting the abolishment of commercial surrogacy in Israel—that had been expressed in a public committee report (Mor-Yosef 2012). She responded thus: "The minute I start, I cannot stop. A right I granted, it is impossible to refute. It might not be expanded, but it is impossible to refute this right." It appears from this reaction that the legal advisors who constructed the permissive regulation now find themselves trapped and *constructed by* it.

Furthermore, the feminist activist we interviewed argued that the growing criticism among legal advisors is not motivated, first and foremost, by genuine concern over the

10. This stance is compatible with the civil society stance in Israel. NGO involvement in the discourse regarding international surrogacy is limited, and this is also the case from children's point of view. The **Israel National Council for the Child** does not object to local and international surrogacy. Its main demand for regulation is to ensure that the intended parents are prescreened, so that children are not put at risk of being raised by unfit adults (as noted in a letter from the National Council for the Child to the Health Minister, Mrs. Yael German, dated January 15, 2014, on file with the authors).

surrogates' or the children's interests, but rather evolved: "because Israel gained a very bad reputation, very bad. Don't mind the Occupation [of the Palestinian territories]. The reputation is that Israelis go to places around the world, and rapaciously manage this industry."

Indeed, two of the legal advisors voiced deep concern over Israel's interests as a state. One of them (2) explained Israel's insistence on the free consent of the surrogate thus: "I want everybody to confirm that they consent, so that nobody can say we kidnapped a child. Our fear is that we will be accused of kidnapping children. This is always the fear." In responding to our question, "So as far as you are concerned, the surrogate is also a source of concern for Israel?" she added:

> Of course, of course. If only for the reason that Israel can be attacked over this thing, that this is human trafficking. So I will ignore her? But I mentioned the two directions: first, because I think that legally human trafficking is an offence even if it is legal in the country where it is performed. So legally it is clear we have to care about her [the surrogate]. But there is also the status of the state of Israel as a state of civility that is not trafficking humans. This is harmful to the state. Harmful to the state.

It is in this context that we should understand the criticism we heard from four out of the six government legal advisors interviewed, regarding the courts, for not assisting them in shaping some limitations around transnational surrogacy, and instead, legitimizing it almost in all circumstances. For example, one advisor (3) described her disappointment with the Supreme Court: "I expected that the Court would express some kind of criticism of Israelis going, acting in another country, without checking the [foreign] legislation [in advance], and then demanding that [Israel] allows them to do so [use surrogacy abroad]. The exact opposite happened; the judges looked at the State Attorneys and asked 'Why are you making it difficult? And how can you better facilitate it?'" Another advisor (2) stressed:

> When we present our demand for a review of the relevant foreign law [before the courts], [the judges] respond by asking us "Why? And what do you care?" These were the responses of the court. The response was not: great, well done, you are protecting . . . , etc. And that is what I think the response should have been. But fine, we have done our part, and moreover, we have taken care of the country's international standing, which the judge here is not necessarily thinking of. We are in the opposite situation in the courts. Meaning, [the court's reaction is] "Why are you even [intervening] . . . ?" And it stems from the fact that [courts] see a couple and [the couple] says: "We want a child; we have no children; that is the essence of our life." And most of us live for our kids, so you identify with them.

A third (5) concluded: "It is out of control. We lost control. The judges are completely on board and see these couples and are willing to allow everything."

In sum, Israeli intended parents, private commercial agencies, judges, and governmental legal advisors position the right to parenthood as an almost absolute right that

legitimizes transnational surrogacy, even in circumstances in which it is not allowed in relation to domestic surrogacy, a situation labeled by the second author as "globordered hypocrisy" (Hacker 2017, ch. 4). The parents, agencies, and judges, unlike the governmental legal advisors and the feminist activist, also seem to turn a blind eye to the moral dilemmas and risks involved in transnational surrogacy. As one of the legal advisors (4) commented: "If someone wants a child, there is no traffic light, it is a freeway. Nothing here will surprise me, I already went through all the surprises." Even among the legal advisors—who became the regulators of transnational surrogacy in the face of the Israeli parliament's inaction and who gradually became aware of its complexities—a major source of concern is Israel's reputation as a developed and international law-abiding state, rather than the interests of the surrogates or children born of the surrogacy process.

Indeed, the right to parenthood of Israeli citizens, as well as their interest in an expedient and relatively cheap surrogacy procedure, triumphs over any other consideration, and, as our study reveals, results in 100 percent entry and citizenship approvals for babies born through surrogacy abroad with one Israeli genetic parent. However, as will be explored in the next section, this does not mean there is a lack of awareness of the vulnerabilities of the foreign surrogates. Such awareness has indeed developed among regulators over time. However, as the legal advisors of the government ministries admit, this awareness has yet to evolve into satisfactory and enforceable regulation.

Foreign Surrogates through the Israeli Gaze

The findings corroborate that Israel, as a state, did not plan to become part of the transnational surrogacy phenomenon. Rather, it became involved by default, due to the actions of Israeli citizens who took it upon themselves to start using surrogates abroad, in around 2010, without permission ex ante. The interviewees repeatedly described the intended parents' actions as challenging the unprepared Israeli authorities with a fait accompli, demanding at the embassy abroad ex post citizenship status and parental recognition for babies already born. As one of the legal advisors (2) noted: "If I recall correctly, I simply received a call from our embassy in India and they said 'Listen, we don't know what to do, people are showing up here with preemies [premature babies] … what do we do? They are saying it's surrogacy ….' And then we didn't know what … I mean, it's like the first time you encounter it." And another advisor (1) noted: "It reached us while there were already children standing on the doorstep, meaning, we weren't in some academic debate about how to address the phenomenon. And that's part of the difficulties in dealing with it, that in the end it's about children so we have to decide what to do."

The interviews revealed that, when first faced with these requests, Israeli officials were not aware of the dangers of exploitation of the surrogates. One legal advisor (3), for example, recalled: "I think it started with a big sense of justice. You know, a sense that we are saving babies and bringing them [home] … truly, I say, I remember my first cases." Awareness of the risks of transnational surrogacy grew, in particular, thanks to the feminist organization Isha L'Isha – Haifa Feminist Center, which organized

roundtables and discussions on the issue,[11] and to the international antitrafficking discourse that was transplanted into Israeli discourse and legislation in the beginning of the third millennium, mainly in relation to prostitution (Hacker 2015). As the advisor to the Minister of Health reflected: "[The state is concerned] also by the rights of the women in Third World countries, this is something that deeply troubles the Ministry of Justice, they have the Human Trafficking Unit."

The activist we interviewed was able to elaborate more (and more eloquently) than any other interviewee on the subject of the harms of surrogacy to the women involved:

> I called it trafficking; I thought, it is fertility trafficking. And there was great opposition, particularly from the Indian women, that in the beginning bothered me a lot. Like, they said that it identifies them with prostitution, and they already have a heavy burden on their shoulders, we do not need to add this, etc. . . . I see more damage on the global scale because these are processes that occur within a market, a market that is not free; it is a wild market; it is an abusive market. It is not a market that gives women freedom and choice, but it channels them into a world of economic concepts, commodification.

Crucially, hearing the voices of the surrogates (see, for example, Huber et al. 2017) and of the feminist advocates in their respective countries led this activist, and others in the field, to stop labeling surrogacy as trafficking and to stop comparing it to prostitution. Indeed, a nonparticipatory observation we conducted during a conference entitled "Surrogacy: Feminist Perspectives," which took place at the Hebrew University in December 2015 and brought together feminist activists, researchers, and Israeli surrogates, taught us that Israeli feminists have abandoned their previous demand to abolish domestic and transnational surrogacy. They have shifted to a discussion framed around the agency of the surrogate and the security of her health—which, they argue, is conditioned by access to information, by protective regulations, and by the right to maximize her profit (see also Shalev et al. 2016; Bassan 2016a).

Even within NGOs representing intended parents, we found an evolving awareness of the vulnerabilities of the foreign surrogates. For example, in a parliamentary debate over a crisis that emerged in 2014 due to Thailand's new antisurrogacy regulation, the representative of an organization for gay parents said: "We need to find a solution to regulating surrogacy in Israel with equality for men, regardless of their sexual orientation, and we need to regulate surrogacy abroad. Because we also, although not everybody thinks so, are in favor of the woman surrogate [being able to] do it with consent, in a country in which it is regulated, that she will not be poor, that she will have other choices and will *want* to do it" (The Internal Affairs and Environment Committee, The Israeli Knesset 2014).

Similarly, it appears that Israeli officials have gradually become sensitive to a variety of problematic aspects in this sphere. The judge we interviewed, for example,

11. A few other NGOs joined the discussion, led by Isha L'Isha, to shed light on the risks to surrogates and oppose commercial surrogacy. See the statement submitted by Israel Women's Network to the Commission on the Status of Women of the Economic and Social Council (2015): www.un.org/ga/search/view_doc.asp?symbol=E/CN.6/2015/NGO/113. See also the stance voiced by the campaign group Gays against Commercial Surrogacy via its Facebook page https://www.facebook.com/GaysNeged (Hebrew).

compared the contracts of domestic Israeli surrogacy to those initiated by Israelis abroad:

> There is a difference. Significant. The Israeli agreements are much more balanced. They are much more balanced agreements. But again, [in domestic surrogacy] there are social workers who accompany the process, these people undergo psychological pre-evaluations. This agreement is much more comprehensive, and you will see that the situation is much more balanced between the parents and the surrogate. Abroad, this is not the case. There, they are very long contracts, very long, half of [which refers to] rights relinquishment and transformation of duties [on the part of the surrogate].

Indeed, a contract we were shown by one of the private lawyers (between Israeli intended parents and an Indian surrogate), as a typical example, included articles such as that the surrogate: commits to "make herself available to medical tests and/or check-ups, as and when necessary and advised by the Attending Physician"; "will not terminate the Pregnancy in terms of this Agreement at her will"; "will never claim any right nor make any claim over, and in respect of, the Child"; "will keep secret the contents of this Agreement"; "agrees not to take or keep with her any copy of this Agreement or any medical paper and documents relating to her surrogate motherhood"; and understands that the "Intended Parents shall not bear responsibility for any damage incurred as a result of pregnancy or treatment involved." While the contract details thirty articles related to the surrogate's obligations, there are only two related to the intended parents, and nowhere does it state how much the surrogate will be paid or under what circumstances. Although surrogacy contracts from other countries, we observed, were also imbalanced in favor of the intended parents, it seems that the Indian ones were the most extreme in that regard, when compared, for examples, to such contracts in Georgia or the United States.

One of the legal advisors (3) elaborated on the question of surrogacy being perceived as human trafficking:

> These are concerns that were raised in the past, although no criminal charges materialized. [For example, concerns over] all kinds of declarations [in the contract], that she [the surrogate] must subject herself to all the examinations that she is demanded to undergo, and she must see the doctor that she is demanded to see. There are countries with "surrogacy farms", and she cannot get out. Financially, many times, if it does not result in a birth she is not entitled to monetary compensation. We had cases of miscarriages in which the surrogate lost her uterus ... and I do not know what compensation she got for it. Usually they are very, very young.

Another legal advisor (2) also raised the concern of "trafficking in women," and described her findings from going over contracts from the United States, Georgia, and India for a case she litigated: "It repeats itself, that the surrogate must undergo reduction [selective reduction of a multifetal pregnancy], undergo an amniotic fluid test ... she is obliged to abort the fetus in the case of a defect, at the complete

discretion of the intended parents." This legal advisor also criticized various practices including obliging the women to sign contracts written in English, which they cannot read, commuting Indian surrogates to Nepal after India closed its doors to transnational surrogacy, encouraging twin pregnancies "that are not necessarily in the best interest of the mother," and allowing teenagers to be surrogates.

Even one of the private agency owners (1), who specializes in surrogacy in Asia, admitted that the condition of the surrogates "is not utopian ... not rosy." He mentioned that sometimes the women, who are kept in special "surrogacy hostels" during the pregnancy, want to return home to their husbands and children, but the contract prohibits this. He also told us that, within his agency, the rate of twin births is 30 percent and all of the surrogates undergo a cesarean: "Theoretically they have a choice, but it is not really a choice, because once the doctor tells them that this is what they should do ... they will go for it." This agency owner also contrasted the status of the surrogates in Asia with that of American surrogates, explaining that Israelis who are assisted by a surrogate in Asia have no contact with her, and no relationship is established. In the United States, by contrast, the intended parents are in touch with the surrogate during the pregnancy, and often also after the baby is born. This can be explained not only by technology and culture, as the interviewee suggested, but also by the fact that the American surrogates *choose* the intended parents and at least to some extent negotiate the contract with them, while the surrogates in Asia often do not know the intended parents before the birth, and do not liaise with them over the contract. That agency owner further admitted: "These contracts [in Asia] are practically there for the legal procedure of the states. It is not really a contract ... I mean, the contract is read to them [the surrogates]."

However, unsurprisingly, this agency owner and other interviewees from the private sector sought to minimize the impression of harm caused to the surrogates, by offering an alternative narrative of economic empowerment. He presented what he perceives as the ultimate proof that surrogacy is beneficial to the surrogates: the fact that women who have just completed a surrogacy process in a surrogacy hostel do not wish to return home, but immediately "come and ask to do it again."

Likewise, among the state actors, it was accepted as fact that the money the surrogate receives "can secure her for a few generations," as the judge argued, or that it allows surrogates to "buy a house later and their son goes to university," as one of the legal advisors (6) suggested. Even the feminist activist reported, in all honesty, that her Indian colleagues "did not think that prevention is the goal but regulation, because, they said, there are women for whom it is an economic solution." However, Bassan (2016b: 637) argues: "Although surrogates expect the income to improve their lives, higher education institutions cost almost the same; a house in their district, wedding expenses, and dowry all cost more than the amount that they receive." As we will claim later in the article, the significance of the financial reward and its value to the surrogate vary remarkably from country to country.

The interviewee taking the most radical stance in terms of playing down the risks and harms to the surrogates and celebrating surrogacy as a win-win-win situation (intended parents–surrogate–private sector) was the agency owner (2), who specializes in surrogacy in Georgia:

> there is no difference [in our agency] between the family [intended parents] and the surrogate. It is not that, because you have money then the surrogate is miserable. We have no such things. The surrogate carries exactly the same weight as the [intended] family. . . . Because of the exploitation of the surrogates—this is the most important thing [that we want to avoid]. That people say that, actually, what are you doing? You buy embryos. We cannot ignore it, right? It is a fact. . . . This is why they have prohibited it all over the world, because you turned it into some kind of a jungle. So we set a goal for ourselves and said, first of all for our conscience, not so "they say . . ." or that tomorrow the BBC will do . . . [but] for our conscience, for our sense of comfort. We treat the surrogates in a completely different way than people know.

He elaborated on his agency's "different way":

> Each surrogate, before embryo transfer, receives from us a gift and a thank you and letter of appreciation. Little things, yes? . . . There was Women's Day, we threw them a party. They receive little things that empower them, that give them a sense that we do not patronize them, that the millionaire Israelis arrived and . . . no. We take care of them. Listen, we have a psychologist there . . . . She goes to the surrogate's home and makes sure that her husband did not force her, that the children are clean, the house is tidy and . . . Million little things that we give them so they feel [content].

He also claimed his agency pays the surrogate between 16,000 dollars and 20,000 dollars when a child is born ("understand, this is a ten-year salary"; "with that sum they can build a house"); 8,000 dollars in the case of an early miscarriage ("it is not her fault"); and the full sum in the case of a late abortion demanded by the intended parents due to a detected embryo defect ("so what does she care?"). The agency apparently has a twin-pregnancy rate of just 18 percent and a 20 percent cesarean rate. For this agency owner, treating the surrogate relatively well is not only for "the conscience," but it is also a business strategy: "They [the surrogates] talk among themselves, and they say 'look, [name of agency] is a company of human beings.' It has an impact."

Indeed, when it comes to surrogates from Georgia and the United States, it seems that the actors in the research field assume that there is no need to be concerned over potential abuse of the surrogate. They assume that, in these countries, unlike in Asia, the surrogates are insured and are paid very generously (see also Markens 2012). The Advisor to the Minister of Health, for example, argued that no regulation should be applied to surrogacy performed in the United States and other developed countries. He also stated, in relation to the discussions over the desirable regulation of ova selling and surrogacy: "Every feminist or feminist organization that we sat with dealt only with Nepal, India, and Thailand. We heard no complaints on Mexico. No one dealt with Ukraine, Georgia, Canada, or the US." Moreover, a few of the interviewees even suggested that, in countries such as the United States and Georgia, the surrogate is the more powerful party, compared to the desperate intended parents, and that regulation is needed to prevent *her* from

exploiting *them*, and not only the other way around (see also Triger 2015; Prosser and Gamble 2016). For example, the judge, explaining why she prefers all surrogacy for Israelis to be domestic rather than transnational, argued that:

> If it takes place here, I have more trust that the process will run as it should. I mean, in many cases the people [intended parents] are under great duress. They are willing to pay and do anything in the world, including at times to actually sell their house, take loans of hundreds of thousands of Shekels [$1 = 3.5 Shekels], that some cannot pay back. They are, in many cases, tempted to [do] all kinds of … they will follow anyone who promises them something. They are willing to pay any amount on earth. And sometimes, a Georgian surrogate will come who is … really, I am not being sarcastic, of the best of the Georgian girls, that knows that by this [surrogacy] she will change her situation for herself, for her household, for her grandchildren sometimes, for the rest of her life. And sometimes she will be the much stronger party than them [the intended parents].

Interestingly, though, of all the interviewees, the owner of the agency that specializes in surrogacy in Georgia was the most critical of the lack of regulation in relation to the agencies, regardless of the country they operate in. He argued that many in the private sector are "charlatans" who act irresponsibly due to the lack of state supervision, and that, as a minimum, there should be transparency of success and failure rates: "I want the publication of how many coffins returned from Nepal. How many returned with deficiencies? How many births? How many preemies? How many [cases of hospitalization via] intensive care? How many twins?" Clearly, this (unpublished) information is crucial also for the evaluation of the risks to the surrogates.

Although research shows positive findings regarding the surrogate's well-being in the United States, Canada, and the United Kingdom (Busby and Delaney 2010), transnational surrogacy presents problematic aspects even for surrogates from the most developed country on the list of Israelis' surrogacy destinations: the United States. For example, one of the private lawyers interviewed (2) admitted that he and his colleagues try to minimize the bargaining power of the US surrogates: "[In the United States] they have social laws for surrogates and they can demand things. We … anchor it pretty strongly in the agreements in advance … so there will not be demands on … there is a certain limit. So she will not ask for Chinese acupuncture every Monday and Thursday, and a car, and … Because such things have actually happened, and were protected by the law." But, most importantly, and much to our surprise, we discovered that US surrogates earn less than their Indian counterparts and those in other countries, when payment is analyzed in relative rather than absolute terms (see Table 1).

The perception that, in the United States, the surrogate is paid "more money, much more money" than in other countries, as one of the legal advisors (2) claimed, is based on the fact that US surrogates are paid, per single pregnancy, more than twice the amount a Georgian surrogate is paid, and almost five times what an Indian surrogate received when India was still open to transnational surrogacy. Yet, in real terms, a US surrogate receives much less than surrogates in these two countries (especially compared to Georgia), when the average and minimum salary and purchasing power in each

TABLE 1:
Payment to Surrogates in Absolute and Relative Terms (2016)

	United States (Texas)	Georgia	India
Surrogacy payment (USD)	33,100[a]	14,000[b]	7,000[c]
Average monthly income per capita (USD)	2,392.8[d]	115.6[e]	155.2[f]
Surrogacy payment expressed as a multiple of national average monthly income	13.8	121.1	45.1
Annual minimum wage (USD)	15,080[g]	576[h]	1,708.20[i]
Surrogacy payment expressed as a multiple of national annual minimum wage	2.2	24.3	4.1
Wage gap[j]	0.3	0.3	0.3
Female unemployment rate[k]	4.8%	10%	3.8%

[a]Data obtained from a contract we analyzed. This data correlates with the average amount said by other scholars to be paid to American surrogates. See Mutcherson (2018, 157), indicating the range of 25,000 dollars to 45,000 dollars.

[b]Data obtained from a contract we analyzed. According to commercial Web sites, the surrogate's compensation is much higher. Needless to say, higher compensation strengthens our argument. See, for example, https://www.fertility-miracles.com/Surrogates/benefits.html and https://southernsurrogacy.com/surrogates/financial-benefits.

[c]Data obtained from interviewees. These data correlate with other sources (Niezna 2012). However, the exact amounts are unclear and probably vary from case to case. See Voigt, Kapur, and Cook (2013).

[d]Real per Capita Income for Texas 2016 ($28,714) and for the United States in general ($31,128). https://www.deptofnumbers.com/income/texas (original source: US Bureau of Census).

[e]National Statistics Office of Georgia. "Households Income." http://www.geostat.ge/index.php?action=page&p_id=182&lang=eng (1 USD = 2.613 GEL).

[f]https://tradingeconomics.com/india/gdp-per-capita.

[g]The minimum wage in Texas is US$7.25 per hour (see https://www.minimum-wage.org/texas). Calculation based on $7.25 hourly wage x 8 hours per day x 5 days per week x 52 weeks.

[h]The monthly minimum wage for public sector employees has been approximately $48 since 2015. The minimum wage for private sector employees was GEL20 ($8) per month but was not applied in practice (see https://www.minimum-wage.org/international/georgia). Calculation based on $52 x 12 months.

[i]Federal law sets health and safety standards, but state laws set minimum wages, hours of work, and health and safety standards. The daily minimum wage (with local cost of living allowance included) varies from 197 rupees ($2.89) in Bihar to 447 rupees ($6.57) in Delhi. State governments set a separate minimum wage for agricultural workers: https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265536#wrapper. Based on a $6.57 daily wage x 5 days per week x 52 weeks = $1,708.20.

[j]All data retrieved from the World Economic Forum: "Global Gender Gap Index 2016." http://reports.weforum.org/global-gender-gap-report-2016/rankings.

[k]Data retrieved from the World Bank, "Unemployment, Female (% of Female Labor Force)." https://data.worldbank.org/indicator/SL.UEM.TOTL.FE.ZS.

country are taken into account. Hence, while in countries such as India, and especially Georgia, surrogacy can constitute a dramatic economic opportunity that is unlikely to arise in any other way (Choudhury 2015), in the United States it is a relatively minor economic event. These counterintuitive findings highlight how problematic it is to treat surrogacy in the United States as if it were in no need of any kind of transnational regulation, since, unlike surrogates in developing countries, US surrogates are supposedly not vulnerable at all—as was suggested, for example, by the Advisor to the Israeli Health Minister. Of particular interest are the conditions in the surrogacy contract, offering

low compensation for different procedures (such as surgeries) and losses caused by pregnancy and delivery to the surrogate.[12]

While our analysis points to differences in the kinds of potential abuse that surrogates in developed countries face, compared to developing ones, the guidelines regulating transnational surrogacy of Israelis, formulated by the legal advisors interviewed, do not differentiate between countries. Moreover, their drafting was triggered by the abusive elements of surrogacy in Asia, as well as evidence of illegalities taking place in Asian countries (such as forgery of identification documents and signatures). The legal advisors have attempted to address the latter concern by securing the surrogate's informed consent to deliver the baby to the Israeli intended parents, through an affidavit signed by the surrogate, in person, at the consulate, after she has identified herself by providing two identity documents (the requirement to be identified by two documents was imposed in 2014). One of the advisors (3) explained, in relation to the guidelines she and her colleagues developed: "I think that, for us, as [we] are a long way away and [we] try the most to make sure that this procedure is done according to some standards that we can live with, these demands are minimal demands. To see the surrogate at the consulate is not a small thing. I mean, to see that she comes, to see that no one is putting any pressure on her; that no one comes with her, pushes her to sign a document she does not understand."

Hence, the guidelines are targeting only the end of the surrogacy process, to secure the safe departure of the child to Israel, with no future claims of child trafficking on the part of the surrogate or the host country. Although the guidelines demand that the intended parent displays the surrogacy contract at the consulate, no substantial demand (such as reviewing the content of the contract) is made. The guidelines do not address the need for informed consent *before* embryo transplant, or the terms of the contract, including the sums to be paid in different circumstances and the right to privacy and medical autonomy of the surrogate.

Notwithstanding, the legal advisors reported that their ongoing involvement also began to have the effect of "soft law," in the sense of affecting the conduct of the agencies. For example, in the beginning, contracts in India were signed by the surrogate only after she became pregnant, but later on they were signed beforehand, although this is not specifically mentioned in the guidelines. Still, the legal advisors are well aware that the guidelines and evolving additional effects are still far from securing the surrogate's rights and interests. As the aforementioned advisor (3) observed:

> We sign up the surrogate on a consent affidavit, [as] a substitute to parental agreement to adoption that exists in Israeli law. But it is almost merely a formality, because we know that in most countries she has no [parental] rights anyhow. . . . It scares me to think about it because these are places where it is extremely hard to supervise what is going on, it is countries . . . like what we see in India, that in most cases, women from a very, very low status are used.

12. For instance, offering the woman 1,000 dollars in the case of an open fetal/obstetrical surgical procedure or an operation relating to ectopic pregnancy, according to the sample contract from Texas we analyzed.

> You know, the assumption that they understand the procedure they enter is a very problematic assumption.

In an attempt to work toward broader—and international—regulation, the state of Israel was among the first to approach the Hague Conference on Private International Law (HCCH), calling for an international convention on surrogacy (Hacker 2017, 145). The legal advisors we interviewed expressed disappointment at the international community for failing to draft such a convention and to regulate surrogacy on a global scale, as it had done in the case of intercountry adoption. Next, the advisors had pushed for a national law that would regulate transnational surrogacy performed by Israelis. The resulting proposal was drafted by the Ministry of Health in 2014. The section on transnational surrogacy includes, among other provisions: supervision of the commercial agencies or the authorization of contracts with a surrogate without the mediation of an agency, subject to approval of the surrogacy agreement by a special committee; a guaranteed payment to the surrogate, even when the process does not culminate in a live birth; a demand that the agreement will be explained to the surrogate; and conditions that aim to ensure the surrogate's free choice, privacy, and human dignity. In the case of these provisions not being fulfilled, the proposal includes sanctions of one year's imprisonment in the case of an individual and a fine of about 10,000 dollars in the case of a company, albeit no civil sanctions, such as not allowing the child into Israel. The Advisor to the Health Minister explained that a no-entry sanction was included in the law proposal by the Ministry of Justice, but was later removed due to the Ministry of Health's pressure in the name of the child's best interests not to be left behind, parentless and stateless.

Ultimately, this law proposal was not given parliamentary approval, due to unexpected elections that resulted in a new government. The ultra-orthodox Health Minister, Yaakov Litzman, was not in favor of promoting it, mainly due to the section that permits domestic surrogacy among single individuals (which might be interpreted as also including gay couples). Moreover, while the legal advisor to the former Health Minister was very proud of how the proposed law sought to safeguard the surrogate's interests ("if you read it, not one single detail is missing"), one of the other advisors interviewed (1) was more skeptical: "Your ability to control what happens in a foreign country [where the surrogacy takes place] and to ensure [compliance] via remote control is very limited. At the end of the day, we're trying to do it through the law proposal, but it's still a very limited, long-distance control."

Finally, it is important to stress that the surrogates' voices are not heard within the Israeli regulative field. First, the interviewees were not aware of any legal suit against Israel, an Israeli agency, or Israeli intended parents brought by a foreign surrogate, either in Israel or in her home country. It appears that litigation, which could have provided a channel to express the surrogates' grievances, is simply not used, either because they do not have such grievances, or because the contract blocks them from suing, or because they cannot afford the costs involved. Second, the interviewees revealed that there had been no active attempt on the part of any of the relevant Israeli ministries to communicate with foreign surrogates or to learn directly from them about their experiences and needs. Third, it would appear that the interviewees have not read the studies that include surrogates' narratives, particularly from India (see, for example, Pande 2014; Rudrappa 2015).

But while Israel has not sought or received any feedback from surrogates, it is currently facing a harsh backlash from most of their home countries. Since 2012, India, Thailand, and Nepal have closed their doors to transnational surrogacy. Attempts to turn to Mexico failed, as it was also quick to prohibit this option. The Israelis were caught by surprise, and even refused, initially, to accept the new reality, causing diplomatic commotions. As one of the interviewees (who asked to remain anonymous on this point) detailed: "There are agencies here that promise the moon and the stars. They didn't check the legal situation [abroad]. They didn't check what is happening there. Come on, go ahead, give me [the money] ... I'll do it [secure a baby] for you. They gain the whole bonanza. And then bang! The gates close; bang! You can't take the child out."

Further study is needed to understand the forces that successfully challenged global hypercapitalism and reduced the scope of transnational surrogacy in countries that profited from it quite substantially. Whether there was a wish to end surrogates' exploitation, as one of the legal advisors interviewed (6) implied, or a reaction to damaged national pride and a refusal to supply "spare parts to the Western world," as another (4) argued, is yet to be explored. Or it may have been a result of several high-profile scandals related to pedophilia and disabled babies deserted by the intended parents (Fellowes 2017: 254), or a mixture of such motives, along similar lines to those that caused the drastic decline in transnational adoption (Hacker 2017, ch. 6). What is certain is that, while Israel—and the international community—failed in securing the rights and interests of foreign surrogates, those who live in developing countries are increasingly protected from transnational surrogacy due to its prohibition, for better or for worse.[13] Surrogates living in the United States, Georgia, Ukraine (Mohapatra 2012; Kirshner 2015), and Greece (Chortara et al. 2016), on the other hand, are still part of a very lightly regulated transnational arena.

REGULATORY PRAGMATISM

The previous part—Findings—explored Israel as a detailed case study demonstrating the limited motivation and ability of the country of the intended parents to protect the rights and interests of foreign surrogates. By that it adds an empirical piece to the complex bricolage of understandings relevant to the regulation of transnational surrogacy, as so little attention has been paid to the sociolegal reality within the countries of the intended parents. We now turn to the normative dimension. While our findings could be regarded as relevant only to one country, Israel, we will show in this part of the article how, in fact, they shed light on the practices of other countries whose citizens take part in the global surrogacy market. In what follows, we place our Israeli empirical findings within a broader context that will lead us to the international and translational regulatory framework we recommend. This broader context includes existing law (and lacunae) in other countries, as well as the law in the regional and international spheres, some of the major theories and regulatory suggestions that can be found within the

13. Fellowes (2017) recently warned that the law that prohibits transnational surrogacy in India will drive it underground and expose the surrogates to even greater risks.

fascinating literature on transnational surrogacy, and relevant empirical findings of other scholars. Indeed, the discussion in this part will provide a clear example of Clare Huntington's (2018) important reminder that, while empirical findings should inform policy makers, the evaluation of different legal rules and difficult policy choices is, and should be, also always about competing values and normative judgment.

Potentially, transnational surrogacy could be regulated through any combination of: an international treaty; the legal systems of the intended parents' countries of origin (which can either prohibit their citizens from surrogacy abroad, or allow and regulate it); the legal systems of the countries in which the surrogacy takes place; and the market. But the regulation of transnational surrogacy is particularly complicated, as it involves several kinds of actors: the surrogates, the intended parents, the children born as a result, and the private agencies and legal and medical professionals. It involves at least two countries with different legal regimes—the country of the intended parents and the country in which the surrogacy is taking place—and, in many cases, different social and cultural characteristics. It is controversial, both ethically and morally (Francis 2017). And it has several focal points of vulnerability that may pull in opposite directions.

The shortcomings of the different arenas of regulation and of the various suggested laws may be a result of these complexities. In some regulative arenas, not enough attention is paid to all vulnerable parties (mainly the surrogates or the children); in others, the moral dispute leads to a deadlock. Some of them do not match the necessary measures (for example, effective border control) with the purpose for which the regulation was designed (for example, to provide a deterrent to transnational surrogacy). After mapping and evaluating five of the predominant regulative paths, we will outline, in general terms, our own alternative, which we believe better fits the complicated situation of transnational surrogacy. In particular, it also more effectively addresses the surrogates' vulnerabilities, which stand at the heart of this article.

International Law

The most commonly suggested solution to transnational surrogacy is to regulate it by means of an international treaty to enforce certain standards on the ratifying countries. As we saw in the Findings part of this article, the state of Israel was among the first to actively call for the drafting of such a treaty. One of the related avenues proposed is to adapt the existing 1993 Hague Convention on intercountry adoption (Thomale 2017). Some are calling for the adoption of a private international law instrument designed specifically for the surrogacy context. Margalit (2016) proposes that a treaty be drafted to ensure: that the intended parents are suitable, to protect the best interests of the child; that parentage is determined before the birth so that the child does not remain stateless (among other reasons); and that the surrogate mother is suitable and her welfare and autonomy in the surrogacy process are protected. Moreover, argues Margalit, such a treaty should establish some kind of authority to facilitate an information-sharing mechanism between different countries and agencies.

However, efforts to reach a consensual treaty have, so far, proven futile. In 2001, the HCCH attempted to tackle transnational surrogacy. But it was not until 2012 that a Preliminary Report to the Member States was submitted, followed by a council

instruction to circulate a questionnaire to determine the issues that should be addressed and current state policies regarding surrogacy and filiation. In 2014, following the presentation of the status reports, the council decided to consider establishing a working group on the topic, which has not concluded its work due to a lack of consensus. Not only has a treaty not materialized, but, reading the conclusions of the Experts' Group of the HCCH and its recommendations, "The Parentage/Surrogacy Project 2017" (Hague Conference on Private International Law 2017), it appears that there has been little focus on the status and needs of the surrogates.

The European Union (EU) has also considered several options for regulating transnational surrogacy—either by adapting the existing 1993 Hague Convention on intercountry adoption; by drafting a new treaty on the subject; or by relying on "soft law" instruments and support action at the national level (Rigon and Céline 2016). Very much like the HCCH, the EU Parliament briefing is focused on the children: their legal parenthood; their entitlement to leave the country of origin; and their entitlement to reside permanently in the receiving country. The surrogates' interests are mentioned only in passing.

It is not surprising that efforts to articulate an international treaty have not been fruitful. As Bassan argues, drafting universal rules is difficult due to the disparity between states. While some condemn the practice of surrogacy, others are willing to accept it. Even between states that accept it, a debate is expected regarding the desirable content of this international regulation, as "issues of reproduction, family and parenthood" are "personal, social and cultural issues and thus vary widely from state to state" (Bassan 2016a: 303; see also Ergas 2013). However, we believe that some of this failure can be attributed to the fact that the suggested drafts are not focused on the surrogates and do not address the gap between the attitudes of local systems (which sometimes forbid surrogacy altogether) and the permissive (even if restrictive) position of a planned future treaty. Further, we contend that it is feasible to create an international regulative scheme that bridges, or at least reduces, this gap.

Attempted Prohibition of Transnational Surrogacy by the Intended Parents' Country of Origin

Countries that strongly oppose surrogacy may try to enforce prohibition of both domestic and transnational arrangements. One example of this stance is France, which decided in 1994 to prohibit its citizens from entering into surrogacy agreements (French Civil Code 1994, article 16–7). While no sanction was applied, any surrogacy agreement contracted domestically or transnationally despite the prohibition was not enforceable, and the intended parents were not allowed to be recognized as formal legal parents by France, or to adopt the child that was born as a result. However, this stance was challenged before the European Court of Human Rights (ECHR) in the *Mennesson* case (Mennesson v. France, App. No. 65192/11, Eur. Ct. H.R. [June 26, 2014]). As a result, in 2015, the French Cour de Cassation (Judgment No. 619 of July 3, 2015 (14–21.323), Court of Cassation) allowed for the first time the transcription of a foreign birth certificate of a child born through surrogacy abroad. Additional decisions taken by the Cour de Cassation paved the way for the father's partner

(male or female) to adopt the child (Judgment No. 620 of July 3, 2015 (15–50.002), Court of Cassation).

Hence, France was forced by the ECHR to loosen its rules to protect the child. By doing so, the ban on international surrogacy—designed by France—collapsed, as the main incentive not to go into surrogacy was removed. The ECHR decisions in the French case naturally have an effect on other European systems. Several countries that oppose or strictly prohibit the practice, such as Germany (which even has a criminal sanction against it), are nonetheless creating mechanisms to protect children born this way transnationally (Voskoboynik 2016).

Even without international or regional interventions, systems that decided to ban their citizens from entering into surrogacy agreements abroad find themselves in a complicated situation when a child is born despite the prohibition and the parent asks to enter the country with him/her. An enforceable prohibition means leaving the child parentless and nationless or taking the infant from the intended parents and placing him/her for adoption—a heavy price indeed. Even the criminal option is probably ineffective, as can be inferred from the Australian example: while several Australian jurisdictions have criminalized extraterritorial commercial surrogacy, they do not enforce it (Johnson et al. 2014). Sending the intended parents to jail is surely harmful to the child born through the illegal surrogacy as it places his/her future on an even more vulnerable and potentially chaotic path.

While the children are better protected by the current inability of the countries of intended parents to prohibit surrogacy, the foreign surrogates find themselves with no safeguards aimed at protecting their interests, due to the regulative lacuna.

Regulating Transnational Surrogacy via the Legal System of the Intended Parents' Country of Origin

A more original solution, not yet applied but gaining popularity within the literature, places the responsibility to protect the foreign surrogate on the countries that allow their citizens to shop for transnational surrogacy. Though he does not deal with surrogacy directly, Benvenisti's theoretical and normative framework entitled "Sovereigns as Trustees of Humanity" can serve as the infrastructure supporting this solution. Benvenisti claims that, in a global world, states should (and already do, to some extent) "assume certain underlying obligations toward strangers situated beyond national boundaries" (Benvenisti 2013: 297) and that they are "obligated to take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligations" (300). According to his argument, courts are among the institutions with a responsibility to "adapt the law to the demands of global welfare" (328). We would argue that Benvenisti's claim regarding "strangers situated beyond national boundaries" is even more valid (on a theoretical level) regarding surrogates, who are connected—in a very concrete way—to the intended parents and thus to the latter's countries of origin. Hence, we contend, they should not be regarded as "strangers."

Although we believe that transnational responsibility is a desirable goal, our research shows that, currently, it might not be a realistic one. The Israeli example

we detailed earlier demonstrates the centrality of the intended parents' interests within the regulative scheme in their country of origin. The ultimate goal of the Israeli policy makers is to ensure that the intended parents fulfill their desire to become parents. With the exception of Israel's diplomatic interests, little attention is paid to other stakeholders and their rights and interests. Even when policy makers become more aware of the particular vulnerabilities of the foreign surrogates, it has not led to effective protective measures. The political interests behind leaving a legislative vacuum to satisfy citizens' demands for transnational surrogacy, courts' tendency to assist their citizens and the babies already born, and the geocultural distance between Israel and the countries in which the surrogacy is actually taking place are all contributing to the abandonment of a serious attempt to protect the foreign surrogates from abuse.

To the best of our knowledge, there is not even one country that regulates by legislation its citizens' involvement in surrogacy abroad, let alone by guaranteeing the foreign surrogates' rights. Although there are no studies parallel to ours, dealing with the points of view of policy makers, including on the administrative level, in other countries, it seems reasonable to assume that the Israeli case study is not unique in the difficulties it highlights in guaranteeing the surrogates' interests. A study from Sweden (the only one we were able to identify in this context) reinforces this assumption. Arvidsson et al. (2018) found that, while Sweden bans surrogacy, its social workers are nevertheless faced with Swedish intended parents' applications to legalize the status of children born through transnational surrogacy. In many cases, these social workers give up their moral beliefs against surrogacy, put aside their concerns regarding the foreign surrogates' interests and rights, and recommend the children be granted full legal status by the court. If a system like Sweden, which opposes surrogacy, cannot effectively protect overseas surrogates, then those more tolerant toward this practice will be all the more unlikely to do so.

Even Bassan (2016a), who developed the idea that the countries of the intended parents bear responsibility toward the foreign surrogates, acknowledges that the Israeli case proves that these countries cannot deal with the protection of the surrogates on their own. According to her analysis (which focuses on the legislative level), as indicated by the Israeli proposed law that was ultimately not enacted, even the most well-intended legislature cannot protect the surrogates fully (341–43).

Regulating Transnational Surrogacy via the Legal Systems of the Countries in Which the Surrogacy Is Taking Place

Theoretically, each and every country is ideally placed to create the proper regulation for its own surrogates. The cultural characteristics and unique values of each society provide the most suitable setting for shaping the right regulation: to decide whether to ban surrogacy or to facilitate it; to restrict it only to its citizens or to open it to foreigners; and, if it is permitted, under what conditions and limitations.

As we saw during our research, several countries that were dominant in the transnational surrogacy market—first and foremost India—have decided to restrict commercial surrogacy. Closing the markets can be seen as a desired outcome, especially for those who view surrogacy as the ultimate evil (Raymond 1989; Anderson 1990). However, in

view of its potential economic advantages for surrogates and their families, we contend that a more nuanced legal stance may ultimately prove more beneficial. Especially in the less developed countries in which the payment to the surrogate is substantial and most likely cannot be achieved by these women in any other legal way (Pande 2010: 974), it might be preferable to enable (regulated) surrogacy rather than ban it altogether.

In any event, the thriving markets for surrogacy that are still operating (and others that will probably open in the future) are not regulated effectively, or they are not regulated at all by the home countries of the surrogates. The United States, which takes a central role in this global market, regulates it state-by-state. Legal approaches to surrogacy vary widely between states: some ban it completely, while others impose very few limitations, including allowing surrogacy for foreigners (see Storrow 2015; Maine Parentage Act, title 19-A, § 1931; 750 ILCS 47/25, § 25; California Family Code § 7962). All in all, "surrogacy [in the United States] remains largely unregulated" (Berk 2015: 146) and the legal protections for the surrogate are not yet developed (Beir 2018). Ukraine and Georgia are currently allowing transnational commercial surrogacy explicitly, regulating it only at a minimal level and imposing no requirements designed to protect the surrogates (Kariauli 2016; Khurtsidze 2016; Allan 2017).

The concern for surrogates' well-being becomes more pressing when women's rights and equality in a given country are tenuous or lacking altogether (Tang 2016: 201–02). As in other spheres of life, these women—as others have learned from the Indian case—may find themselves subject to male control, whether by their husbands (Choudhury 2015: 31–32) or the men who run the industry (Rimm 2009; Saxena et al. 2012). Thus, if we want to assure the surrogates' interests and rights, we should not leave it only to their homeland legal systems.

Market Regulation

Some scholars argue that surrogacy does not need special regulation. Modern contract law, Margalit (2014) asserts, is well equipped to deal with the unique problems of surrogacy. But, as Margalit himself claims in a later article (2016), the free market with its contract law is less adequate in the case of transnational surrogacy, especially for arrangements involving surrogates from poor countries.

As mentioned earlier, we were able to interview some of the most prominent private sector actors: two who run large surrogacy agencies, and two private lawyers professionally involved in the field. We found, as others did (Berk 2015), that the private sector does not—and probably cannot—assure the surrogates' interests either. The surrogates suffer from structural weakness dictated by their lower class and wealth inferiority, at its most extreme in less developed countries (Rimm 2009). Moreover, the surplus in the "supply" of surrogates in Asia (Tang 2016) and probably also in Eastern Europe contributes to women's weak position and inability to satisfyingly take care of their interests through private negotiation with the intended parents and their representatives (Choudhury 2015). Even in the case of Western surrogates, as we found both from our research and from other studies (Berk 2015), agencies and lawyers articulate the contracts in a way that extensively limits the rights of the surrogates. Their free choice, freedom of movement, and bodily integrity are all restricted during the process.

Moreover, as shown in Table 1, surrogates in the Global North receive even less monetary compensation, in relative terms, than surrogates in the Global South.

Although the industry itself has some intrinsic motivation to protect the well-being or at least the satisfaction of the surrogates (so that it may continue to operate unhindered), the main focus of the private actors, almost by definition, is their own profit (Rimm 2009) and the interests of their paying clients—the intended parents.

SUGGESTED FRAMEWORK FOR REGULATING TRANSNATIONAL SURROGACY

Based on our empirical findings and the analysis of the current regulative failure to provide surrogates with the necessary legal protections, we would like to conclude this article by offering a solution that we believe maximizes the benefits of each of the regulative arenas mapped in the previous section and can harmonize them.

We suggest that the key to safeguarding transnational surrogates' basic rights and interests, on the premise that the transnational surrogacy market cannot or should not be eliminated, is to establish international consensus around three basic principles:

(i) Countries would be allowed to prohibit surrogacy. However, in the case that a citizen of such a country seeks to have a child and enters into a contract for transnational surrogacy, the country would have to grant the child citizenship. The second author believes that in such cases the country should be allowed to place the newborn for adoption by another citizen, to deter such future violation of its national law. The first author, on the other hand, believes that the power to prohibit surrogacy should be exerted only in the form of monetary fines against the intended parents and agencies, while the child should be allowed to stay with the intended parents. The local system could also feature highly rigorous procedures for recognizing the minors as the intended parents' legal children, to help discourage future international surrogacy agreements.

(ii) Only countries that allow domestic surrogacy would be allowed to enable their citizens to use transnational surrogacy. The measures taken to safeguard the rights and interests of the domestic surrogates would also apply to their foreign counterparts, under the condition that at least the minimum protective standards (mentioned in the next point) would apply. However, the amount to be paid to the surrogate could be differentiated, and would be determined by the relevant markets.

(iii) All states that take part in surrogacy ought to agree on minimum (but significant) standards to safeguard surrogates, if and when an arrangement is being set between their citizens and a transnational surrogate. What these minimum standards might consist of would hopefully be explored in detail by others in the future, but must include protections of the surrogate's free choice and of her health and bodily integrity; be based on a minimum age requirement and a residency requirement; and guarantee payment to the surrogate, including when the procedure proves unsuccessful.

On the first principle, to our understanding, the only viable means of reaching a global consensus over surrogacy is to let countries allow it or prohibit it, as they wish. The moral views over this reproduction option are in such conflict (and will likely remain so) that there is little point, we believe, in attempting to oblige states to reach a normative agreement. Hence, the treaty we imagine is such that it can be ratified by all

states regardless of where they position themselves on the normative spectrum relating to the perceived legitimacy of surrogacy. Moreover, as the short history of transnational surrogacy teaches us, nothing less than placing the child for adoption will deter citizens from shopping for surrogacy abroad if their country prohibits it. The second author assumes that, eventually, this sanction would stop transnational surrogacy into countries that prohibit it, hence this principle will safeguard transnational surrogates from the actions of intended parents from countries that do not provide protection for domestic and transnational surrogates. The first author, however, objects to placing the child for adoption. Separating the child from the genetic parent, as well as severing contact with the person who initiated the process, having dreamed about parenthood and longed for the child, would be immoral and would probably infringe the infant's rights to identity and family relationships. The first author assumes that other sanctions may be designed, although she concedes that they will probably be less effective.

The second principle is intended to end the globordered hypocrisy manifested by countries, like Israel, that establish different protective measures for domestic and transnational surrogates. The minimum standards guaranteed in the treaty, according to the third principle, will allay the fear of a "race to the bottom," in which countries could potentially reduce the protection granted to their citizen surrogates rather than institute greater protection for foreign surrogates. Beyond this fear, we believe that, since the vast majority of intended parents come from democratized and developed countries, the impact will be reversed, with more protection given to transnational surrogates.

As the US example demonstrates, in countries in which the market is the major regulator, and surrogates, in the main, are protected by proper contract law and procedural safeguards (such as the obligation to be represented by a separate independent counsel), the minimum standard, set by the third principle, will provide the necessary protection to the foreign surrogate. This will compensate for the power imbalance between her and the intended parents. It is our belief that this principle will lower the motivation to outsource surrogacy to other countries, as the price paid to the surrogate will be the only significant difference between domestic and transnational surrogacy, and as crossing the border for surrogacy has its own costs. When transnational surrogacy does take place, it will be within international and national regulatory regimes that view the foreign surrogate as worthy of just as much protection as the citizens of the country of the intended parents.

CONCLUSION

While transnational surrogacy is a numerically insignificant phenomenon when compared to the overall number of childbirths, it is one of the spheres in which the complex sociolegal challenges of our era are most keenly felt. It is a clear and fascinating example of the growing intensity of border crossing, as well as the continued resilience of geopolitical borders and gendered, economic, and other social boundaries, which demand empirical investigations and normative deliberations that simultaneously take into account the parochial, national, bilateral, regional, and international spheres. Our detailed sociolegal case study of Israeli law and the discourse of policy makers, placed within the broader context established by findings and legal analysis from other

countries and the international arena, makes what we hope to be a significant contribution to achieving the much-needed breakthrough within the currently stagnant and inadequate regulation of transnational surrogacy. We believe that this conscious move away from what Beck (2006) termed the "trap of methodological nationalism" is critical if we are to address this and many other globordered phenomena that are still awaiting a deeper empirical investigation and humane regulation.

REFERENCES

Allan, Sonia. (2017) "Governing Transnational Surrogacy Practices: What Role Can National and International Regulation Play?" In *Babies for Sale: Transnational Surrogacy, Human Rights and the Politics of Reproduction*, edited by Davies Miranda, 344–75. London: Zed Books.

Almagor Lotan, Orly. "Surrogacy in Israel and Surrogacy by Israelis Abroad: The Current Situation and Recommendations for Change by a Public Committee." Knesset Research and Information Center (May 2012), https://fs.knesset.gov.il/globaldocs/MMM/094e6b58-e9f7-e411-80c8-00155d010977/2_094e6b58-e9f7-e411-80c8-00155d010977_11_6781.pdf (Hebrew).

Anderson, Elizabeth S. "Is Women's Labor a Commodity?" *Philosophy and Public Affairs* 19, no. 1 (1990): 71–92.

Anney, Vicent N. "Ensuring the Quality of the Findings of Qualitative Research: Looking at Trustworthiness Criteria." *Journal of Emerging Trends in Educational Research and Policy Studies* 5, no. 2 (2014): 272–81.

Arvidsson, Anna, Sara Johnsdotter, Maria Emmelin, and Birgitta Essén. "Gauging the Interests of Birth Mother and Child: A Qualitative Study of Swedish Social Workers' Experiences of Transnational Gestational Surrogacy." *European Journal of Social Work* 21, no. 1 (2018): 86–99.

Bassan, Sharon. "Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions." *Michigan Journal of International Law* 37, no. 2 (2016a): 299–349.

—— "Can Human Rights Protect Surrogate Women in the Cross-Border Market?" In *Women's Human Rights and the Elimination of Discrimination*, edited by Maarit Jänterä-Jareborg and Hélène Tigroudja, 601–40. Leiden/Boston: Nijhoff Publishers, 2016b.

Beck, Ulrich. "Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda." *British Journal of Sociology* 57 (2006): 1–23.

Beir, Zoe M. "Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy." *Vanderbilt Law Review* 71, no. 1 (2018): 285–317.

Benvenisti, Eyal. "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders." *American Journal of International Law* 107, no. 2 (2013): 295–333.

Berk, Hillary. "The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor." *Law and Society Review* 49, no. 1 (2015): 143–77.

Birenbaum-Carmeli, Daphna. "Thirty-Five Years of Assisted Reproductive Technologies in Israel." *Reproductive Biomedicine and Society Online* 2 (2016): 16–23.

Boele-Woelkei, Katharina. "Combined Comparative Research in the Field of Family Relations: Some Reflections from the Legal Perspective." *Journal of Family Research* 27 (2015): 239–56.

Boltanski, Luc, and Laurent Thévenot. *On Justification. The Economies of Worth*. Princeton, NJ: Princeton University Press, 2006.

Busby, Karen, and Vun Delaney. "Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers." *Canadian Journal of Family Law* 26, no. 1 (2010): 13–94.

Campbell, Angela. *Sister Wives, Sex Workers and Surrogates: Outlaws by Choice?* London: Routledge, 2013.

Chortara, Theodora, Simone Penasa, and Lucia Busatta. "The Best Interests of the Child Born via Cross-Border Surrogacy: A Comparison between Greece and Italy." *BioLaw Journal–Rivista di BioDiritto* 1 (2016): 189–210. doi: 10.15168/blj.v0i1.137.

Choudhury, Cyra Akila. "The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor." *Vanderbilt Journal of Transnational Law* 48, no. 1 (2015): 1–65.

Davies, Miranda, ed. *Babies for Sale: Transnational Surrogacy, Human Rights and the Politics of Reproduction*. London: Zed Books, 2017.

Dugan, Emily. "Revealed: Surrogate Births Hit Record High as Couples Flock Abroad." The Independent, March 2, 2014. https://www.independent.co.uk/news/uk/home-news/revealed-surrogate-births-hit-record-high-as-couples-flock-abroad-9162834.html.

Epstein, Richard E. "Surrogacy: The Case for Full Contractual Enforcement." *Virginia Law Review* 81, no. 8 (1995): 2305–41.

Ergas, Yasmine. (2013) "Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy." *Emory International Law Review* 27, no. 1 (2013): 117–88.

Eyal, Hedva, and Moreno Adi. "'Quiet, Dependent, Nice and Loyal': Surrogacy Agencies' Discourse of International Surrogacy." In *Bioethics and Biopolitics in Israel: Socio-Legal, Political and Empirical Analysis*, edited by Hagai Boas, Yael Hashiloni-Dolev, Nadav Davidovitch, Dani Filc, and Shai J. Lavi, 139–59. Cambridge: Cambridge University Press, 2018.

Fellowes, Melanie G. "Commercial Surrogacy in India: The Presumption of Adaptive Preference Formation, the Possibility of Autonomy and the Persistence of Exploitation." *Medical Law International* 17, no. 4 (2017): 249–72.

Francis, Leslie. "Is Surrogacy Ethically Problematic?" In *The Oxford Handbook of Reproductive Ethics*, edited by Leslie Francis, 388–406. Oxford: Oxford University Press, 2017.

Gezinski, Lindsay B., Sharvari Karandikar, Sarah Huber, and Alexis Levitt. "Commissioning Parents' Experiences with International Surrogacy: A Qualitative Study." *Health and Social Work* 43, no. 3 (2018): 175–84.

Gibton, Dan. *Researching Education Policy, Public Policy, and Policymakers*. Oxon,UK: Routledge, 2016.

Hacker, Daphna. "Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law." *Harvard Human Rights Journal* 28, no. 1 (2015): 11–64.

—— *Legalized Families in the Era of Bordered Globalization*. Cambridge: Cambridge University Press, 2017.

Hague Conference on Private International Law, "The Parentage/Surrogacy Project 2017." 2017. https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

Haseisi, Rada. "Information on Surrogacy for Same-Sex Couples in Israel." *Knesset Research and Information Center* (May 2013), http://fs.knesset.gov.il/globaldocs/MMM/1d596b58-e9f7-e411-80c8-00155d010977/2_1d596b58-e9f7-e411-80c8-00155d010977_11_7080.pdf (Hebrew).

Huber, Sarah, Sharvari Karandikar, and Lindsay Gezinski. "Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy." Affilia: *Journal of Women and Social Work* 33, no. 1 (2017): 69–84. doi: 10.1177/0886109917729667.

Huntington, Clare. "The Empirical Turn in Family Law." *Columbia Law Review* 118, no. 1 (2018): 227–314.

Johnson, Louise, Eric Blyth, and Karin Hammarberg. "Barriers for Domestic Surrogacy and Challenges of Transnational Surrogacy in the Context of Australians Undertaking Surrogacy in India." *Journal of Law and Medicine* 22, no. 1 (2014): 136–54.

Kariauli, Nino. "Surrogacy and Its Legal Consequences According to the Legislation of Georgia." *European Scientific Journal (special edition)* (2016): 215–22. http://eujournal.org/index.php/esj/article/view/8604/8234.

Khurtsidze, Ia. "Legal Regulation of Surrogacy in Georgia." *European Scientific Journal (special edition)* (2016): 165–69. http://eujournal.org/index.php/esj/article/view/8597/8227.

Kirshner, Shany Noy. "Selling a Miracle? Surrogacy through International Borders: Exploration of Ukrainian Surrogacy." *Journal of International Business and Law* 14, no. 1 (2015): 77–97.

Laufer-Ukeles, Pamela. "Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption." *Indiana Law Journal* 88, no. 4 (2013): 1223–79.

Margalit, Yehezkel. "In Defense of Surrogacy Agreements: A Modern Contract Law Perspective." *William & Mary Journal of Women and the Law* 20, no. 2 (2014): 423–68.

—— "From Baby M to Baby M(anji): Regulating International Surrogacy Agreements." *Brooklyn Journal of Law and Policy* 24, no. 1 (2016): 41–92.

Markens, Susan. "The Global Reproductive Health Market: US Media Framings and Public Discourses about Transnational Surrogacy." *Social Science and Medicine* 74, no. 11 (2012): 1745–53.

Mitra, Sayani. "Cross-Border Reproflows: Comparing the Cases of India, Germany, and Israel." In *Cross-Cultural Comparisons on Surrogacy and Egg Donation: Interdisciplinary Perspectives from India, Germany and Israel*, edited by Sayani Mitra, Silke Schicktanz, and Tulsi Patel, 83–102. Cham, Switzerland: Palgrave Macmillan, 2018.

Mohapatra, Seema. "Achieving Reproductive Justice in the International Surrogacy Market." *Annals Health Law* 21, no. 1 (2012): 191–200.

Mor-Yosef, Shlomo. "Recommendations of the Public Committee on the Legal Regulation of Medically Assisted Reproduction in Israel." *May* 2012, https://www.health.gov.il/PublicationsFiles/BAP2012.pdf (Hebrew).

Mutcherson, Kimberly M. "Things That Money Can Buy: Reproductive Justice and the International Market for Gestational Surrogacy." *North Carolina Journal of International Law* 43, no. 4 (2018): 150–81.

Niezna, Maayan. "Problems and Disturbing Signs in Transnational Surrogacy Cases." *Israeli Ministry of Justice*. January 2012. https://tinyurl.com/y8qg4avc (Hebrew).

Pande, Amrita. "Commercial Surrogacy in India: Manufacturing a Perfect Mother–Worker." *Signs* 35, no. 4 (2010): 969–92.

Pande, Amrita. *Wombs in Labor: Transnational Commercial Surrogacy in India*. New York: Columbia University Press, 2014.

Parizer-Krief, Karène. Legal and Sociological Analysis of the French Context Considering Foreign Practices Related to Filiation of Children Conceived through Surrogacy Abroad (United-Kingdom, Belgium, Israel) (June 15, 2017), http://www.gip-recherche-justice.fr/wp-content/uploads/2017/07/Rapport-14.18.pdf (French).

Posner, Richard E. "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood." *Journal of Contemporary Health Law and Policy* 5, no. 1 (1989): 21–31.

Prosser, Helen, and Natalie Gamble. "Modern Surrogacy Practice and the Need for Reform." *Journal of Medical Law and Ethics* 4, no. 3 (2016): 257–74.

Radin, Margaret Jane. "Market-Inalienability." *Harvard Law Review* 100, no. 8 (1987): 1849–1937.

Raymond, Janice G. "The International Traffic in Women: Women Used in Systems of Surrogacy and Reproduction." *Reproductive and Genetic Engineering* 2, no. 1 (1989): 51–57.

Rigon, Amalia, and Chateau Céline. Regulating International Surrogacy Arrangements: State of Play. Policy Department C: Citizens' Rights and Constitutional Affairs. European Parliament (PE 571.368). 2016. https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf.

Rimm, Jennifer. "Booming Baby Business: Regulating Commercial Surrogacy in India." *University of Pennsylvania Journal of International Law* 30, no. 4 (2009): 1429–62.

Rotabi, Karen Smith, Susan Mapp, Kristen Cheney, Rowena Fong, and Ruth McRoy. "Regulating Commercial Global Surrogacy: The Best Interests of the Child." *Journal of Human Rights and Social Work* 2, no. 3 (2017): 64–73.

Rudrappa, Sharmila. *Discounted Life: The Price of Global Surrogacy in India*. New York: NYU Press, 2015.

Samama, Eti. "Within Me, But Not Mine: Surrogacy in Israel." In *New Cannibal Markets: Globalization and Commodification of the Human Body*, edited by Jean-Daniel Rainhorn and Samira El Boudamoussi, 123–40. Paris: Éditions de la Maison des Sciences de l'Homme, 2015.

Saxena, Pikee, Archana Mishra, and Sonia Malik. "Surrogacy: Ethical and Legal Issues." *Indian Journal of Community Medicine* 37, no. 4 (2012): 211–13.

Scherman, Rhoda, Gabriela Misca, Karen Rotabi, and Peter Selman. "Global Commercial Surrogacy and International Adoption: Parallels and Differences." *Adoption and Fostering* 40, no. 1 (2016): 20–35. doi: 10.1177/0308575915626376.

Shalev, Carmel. "Halakha and Patriarchal Motherhood: An Anatomy of the New Israeli Surrogacy Law." *Israel Law Review* 32, no. 1 (1998): 51–80.

Shalev, Carmel, Adi Moreno, Hedva Eyal, Michal Leibel, Rhona Schuz, and Talia Eldar-Geva. "Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A Call for Action." *Israel Journal of Health Policy Research* 5, no. 59 (2016): 1–12. doi: 10.1186/s13584-016-0117-0.

Storrow, Richard E. "Surrogacy: American Style." *Surrogacy, Law and Human Rights*, edited by Paula Gerber and Katie O'Byrne, 193–216. Farnham, UK: Ashgate Publishing, 2015.

Strauss, Anselm, and Juliet Corbin. "Grounded Theory Methodology: An Overview." In *Strategies of Qualitative Inquiry*, edited by Norman K. Denzin and Yvonna S. Lincoln, 158–83. Thousand Oaks, CA: Sage Publications, 1998.

Tang, Xinran "Cara." "Setting Norms: Protections for Surrogates in International Commercial Surrogacy." *Minnesota Journal of International Law* 25, no. 1 (2016): 193–215.

Teman, Elly. *Birthing a Mother: The Surrogate Body and the Pregnant Self*. Berkeley, CA: University of California Press, 2010.

The Economist. "Help Wanted: As Demand for Surrogacy Soars, More Countries Are Trying to Ban It." May 13, 2017. https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it.

The Internal Affairs and Environment Committee, The Israeli Knesset. Protocol #198. 2014. http://m.knesset.gov.il/Activity/committees/InternalAffairs/Pages/CommitteeProtocols.aspx (Hebrew) (accessed April 17, 2018).

The World Bank, "Unemployment, Female (% of Female Labor Force)." https://data.worldbank.org/indicator/SL.UEM.TOTL.FE.ZS (accessed March 5, 2018).

Thomale, Chris. "State of Play of Cross-Border Surrogacy Arrangements: Is There a Case for Regulatory Intervention by the EU?" *Journal of Private International Law* 13, no. 2 (2017): 463–73.

Triger, Zvi. "A Different Journey: Experiences of Israeli Surrogacy Parents in India." *Theory and Criticism* 44 (2015): 177–202 (Hebrew).

Voigt, Kevin, Mallika Kapur, and Lonzo Cook. "Wombs for Rent: India's Surrogate Mother Boomtown." CNN. November 4, 2013. https://www.cnn.com/2013/11/03/world/asia/india-surrogate-mother-industry.

Voskoboynik, Katherine. "Clipping the Stork's Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism." *Indiana International and Comparative Law Review* 26, no. 2 (2016): 336–82.

Yeshua-Katz, Daphna. "Childless in an IVF-Nation: Online Stigma-Coping Strategies in Support Groups for Childless Israeli Women." *Information, Communication and Society* 21, no. 10 (2017): 1436–52.

Zafran, Ruth. "The Equal Right to Be a Parent? Resort to Surrogacy in Israel." *Mishpatim* 8 (2015): 1–32. https://tinyurl.com/yd84rgyu (Hebrew).

CASES CITED

HCJ 566/11 *Mamat-Magad v. Ministry of Interior* 35 (2014).

Judgment No. 619 of 3 July 2015 (14-21.323), Court of Cassation - Plenary Assembly - ECLI: EN: CCASS: 2015: AP00619.

Judgment No. 620 of 3 July 2015 (15-50.002), Court of Cassation - Plenary Assembly - ECLI: EN: CCASS: 2015: AP00620.

Mennesson v. France, App. No. 65192/11, Eur. Ct. H.R. (June 26, 2014).

STATUTES CITED

California Family Code § 7962.
Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) Law, 5756-1996 (Israel).
Freedom of Information Law, 5758-1998 (Israel).
French Civil Code (1994).
750 ILCS 47/25, § 25 (Illinois).
Maine Parentage Act, title 19-A, § 1931.