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CHANGING RIGHTS TO FAMILY LIFE : BIOLEGALITIES IN THE GLOBALIZATION OF REPRODUCTION

Sonja van Wichelen*

This article focuses on Australian court practices that concern the legalization of parenthood for children born out of overseas surrogacy arrangements. Analysing arguments and decisions from federal and local cases, it demonstrates how a “human rights approach” promoted by judges that act in the “best interest of the child” destabilizes the enforcement of local Australian law regarding commercial surrogacy. Ultimately, the article examines how the law interacts with biotechnological changes and how legal justifications engage with biological and social knowledge that are creating a changing landscape of rights and ethics around surrogacy. Using the concept of “biolegality”, it conceptualizes rights as emerging at the intersection of law and biology in the context of global inequality and migration. It examines the question of which rights-claims are based on genetic truth, and which ones on legal truth. Contrary to conventional understandings that in the pursuit of justice “law lags behind technology,” the article demonstrates how legal knowledge interacts with the life sciences and technologies to build the concept of rights. Moreover, the interaction of information, facts and knowledges includes strong references to “adoption discourse” suggesting a reframing of surrogacy issues through the framework of legal adoption.

I. INTRODUCTION

In 2012 an Indian surrogate gave birth to twins, a boy and a girl. They were commissioned by an Australian couple from Sydney. The Australian

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couple, who were also non-residential Indians (NRIs), already had a biological son and decided to bring back to Australia only the girl, leaving behind the boy named Dev. The reason the parents gave to Australian diplomats was that they couldn't afford to have a third child. Taking the girl would complete their family.¹ The story came to light through the work of two Australian judges (Chief Justice Diana Bryant of the Family Court of Australia and Chief Judge John Pascoe from the Federal Circuit Court of Australia). In a broadcast of the Australian ABC program *Foreign Correspondent* they criticized the Australian government for not taking responsibility over the future of the boy.² The boy was understood to have been adopted by a wealthy Indian couple – known through a friend of the Australian couple. But diplomatic rumours had it that money exchanged hands and that the boy was sold.³

The story of Dev is not an isolated case. The “Baby Gammy” case reached the front pages of Australian as well as international newspapers.⁴ This is a case where a surrogacy arrangement between a Thai surrogate and an Australian couple led to the abandonment of baby Gammy, a boy with Down

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- 1 See, Samantha Hawley, Suzanne Smith and Michael McKinnon, *India surrogacy case: Documents show New South Wales couple abandoned baby boy despite warnings*, ABC NEWS (April 13, 2015) <http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>; Judith Ireland, *Fresh surrogacy concerns over boy abandoned in India*, THE SYDNEY MORNING HERALD (April 14, 2015) <http://www.smh.com.au/federal-politics/political-news/fresh-surrogacy-concerns-over-boy-abandoned-in-india-20150413-1mjy3.html>.
- 2 *Foreign Correspondent, About a Boy*, 2015. 16 June 2016 <http://www.abc.net.au/foreign/content/2015/s4260667.htm>.
- 3 Ben Doherty, Melissa Davey and Daniel Hurst, *Surrogate baby left in India by Australian couple was not trafficked, investigation finds*, THE GUARDIAN (October 9, 2014) <http://www.theguardian.com/australia-news/2014/oct/09/surrogate-baby-left-in-india-by-australian-couple-was-not-trafficked-investigation-finds>.
- 4 See *Thai surrogate baby Gammy: Australian parents contacted*, BBC NEWS (August 7, 2014) <http://www.bbc.com/news/world-asia-28686114>; Juarawee Kitsilpa, *Thai surrogate says unaware twin had Downs until late in pregnancy*, REUTERS (August 3, 2014) <http://www.reuters.com/article/us-thailand-surrogacy-idUSKBN0G30KT20140803>; *Baby Gammy: The ethics and economics of surrogacy*, AL-JAZEERA AMERICA (August 6, 2014) <http://america.aljazeera.com/watch/shows/inside-story/articles/2014/8/6/baby-gammy-the-ethicsandeeconomicsofsurrogacy.html>.

Syndrome. While the boy was left behind with the surrogate in Thailand, his healthy twin sister was brought back by the commissioning parents to Australia.⁵ Both cases were highly mediatized and caused intense public outrage. Such cases illuminate the moral stakes in the biotechnologization and globalization of family-making and allude to a variety of issues such as child abandonment, statelessness, sex selection, eugenics, exploitation of women's bodies – in particular, women from the Global South, and ultimately, the commodification of child bodies.

Much attention has been given to the moral and ethical debates focusing on whether or not commercial surrogacy violates human rights – especially those of women and children. Such discussions tend to concentrate on the question of whether or not – as a sovereign state – commercial and/or transnational surrogacy should be lawfully regulated. Rather than go into this debate, I would instead like to look at what happens in the juridical sphere when children from transnational surrogacy arrangements are brought back to Australia despite the legal restrictions that exist there. As an entry point I use an Australian family court case (*Mason & Mason and Anr*) concerning an international surrogacy arrangement in India and compare arguments and decisions from that case with other federal and local cases in Australia. I demonstrate how a “human rights approach” promoted by judges who act in the “best interest of the child” destabilizes the enforcement of local Australian law regarding commercial surrogacy.

This article also focuses on the implementation of this “human rights approach” in the courts. How does intended parenthood stack up against biological relatedness? Specifically, I am interested in examining how law interacts with biotechnological changes and how legal justifications engage with biological and social knowledge that are creating – I argue – a changing landscape of rights and ethics around surrogacy. Using the concept of “biolegality” I take rights as emerging at the intersection of law and biology in a context of global inequality and migration. Which rights-claims are based on genetic truth, which one on legal truth? I investigate the new socialities these interactions produce but also the lacunae they create. Contrary to conventional

5 For a thorough analysis of this case see Sonja Van Wichelen, ‘Postgenomics and Biolegitimacy: *Legitimation Work in Transnational Surrogacy*’ (forthcoming in October 2016) with AUSTRALIAN FEMINIST STUDIES.

understandings that in the pursuit of justice “law lags behind technology,” I demonstrate by looking at legal practice that legal knowledge interacts with the life sciences and technologies to build the concept of rights. Moreover, the interaction of information, facts and knowledges includes strong references to “adoption discourse” suggesting a reframing of surrogacy issues through the framework of legal adoption. Drawing on scholarship in Legal Anthropology and Science and Technology Studies I argue that rights are co-constituted by law and biology resulting in the formation of new biolegalities. In turn, however, these particular biolegalities also form part of a biopolitics that facilitate reproductive economies.

II. MASON & MASON AND ANOR

The *Mason & Mason and Anor* case was argued in front of the Family Court of Australia in 2013.⁶ It involved a gay couple (A. Mason and B. Mason) who contracted a woman in India (Tisya) to act as their surrogate.⁷ Twins were born out of this arrangement in 2011. One of the commissioning parents was the genetic father and provided the sperm for the IVF procedure. It concerned a gestational surrogacy arrangement, meaning that the birth mother was not the genetic mother. The IVF procedure involved eggs from an anonymous *Indian* donor. The children, then, are genetically half Indian and are racially different from their intended parents.

The couple went to court to obtain a declaration of parentage⁸ for the genetic father of the children. Against earlier judgements (including his own)⁹ the presiding judge, Justice Ryan, ruled against a declaration of parentage.

6 Mason & Mason and Anor, [2013] FamCA 424.

7 The names are pseudonyms created by the court.

8 A declaration of parentage involves an order by a judge to establish that a person is a legal parent. In the state of New South Wales, where the events took place, such an order can be made under the Surrogacy Act, 2010. The Surrogacy Act is intended to facilitate the transfer of legal parentage from the birth mother to the intended parent if certain stringent conditions are met. These include that the arrangements are in the best interests of the child; that the surrogacy arrangement is ‘altruistic’ (not for money); that parties have been counselled; and everyone concerned, including the birth mother, consents to the parentage order being made. For more detail, see the Surrogacy Act, 2010 (NSW), <http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2010%20AND%20no%3D102&nohits=y>.

9 See, Ellison & Anr & Karnchanit, [2012] FamCA 602.

Parenting orders, nonetheless, were given to both intended parents so that the child can live with them and so that they can have equal shared parental responsibilities.¹⁰ The child's best interest was paramount to granting these parental responsibilities.

The ruling reveals a paradoxical outcome in relation to what the state finds lawful and how human rights intervene. Commercial surrogacy is prohibited in New South Wales- the state where this case took place and where the commissioning parents reside. The Surrogacy Act 2010 of New South Wales makes it a criminal offense to enter into a commercial surrogacy arrangement, regardless of where it takes place, and includes a jail term of a few years. This is also the case for two other states- the ACT and Queensland. Nevertheless, the legal prohibitions have not stopped Australian individuals and couples from commissioning surrogacy arrangements overseas. On the contrary, according to estimations, the practice is growing.¹¹

Biological and social infertility have turned many individuals and couples to reproductive technologies in their desire for family life. However, there are several legal rules pertaining to reproductive technologies that are seen as obstacles for people who desire a child. One is the restriction of commercial surrogacy. States in Australia only allow for altruistic surrogacy and the surrogate has a multitude of legal rights before it can terminate legal parentage. Australia was also one of the first countries in the world to recognise that people conceived from donor sperm and eggs are entitled to know their genetic origins. This meant that anonymity became undesirable and states began to phase out the possibility that you could anonymously donate sperm and eggs. Finally, adoption also feeds into this dynamic. Domestic adoption is rare in Australia. Going back to the country's settler-colonial history of the Stolen Generation, where hundreds of thousands of aboriginal children were removed from their

10 A parenting order is about the legal arrangement of parental responsibilities. It usually covers where or with whom a child should live and are based on the principle of 'the best interests of the child'.

11 See, Mary Keyes, Australia, in *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL*, 25-48 (Katrina Trimmings and Paul Beaumont eds., 2013). See also Cosima Marriner, *Surrogacy: Babysitting or baby trading?*, *THE SYDNEY MORNING HERALD* (February 28, 2016) <http://www.smh.com.au/national/surrogacy-babysitting-or-baby-trading-20160226-gn4gt3.html>. The figures indicate a slight decrease in recent years. This is probably due to the shutting down of surrogacy services in Thailand.

homes and placed in white families, Australia has since then preferred a system of fostering over adoption in line with ideas of family preservation that are inextricably linked to culture and place. In recent years, due to a variety of reasons, the number of children available for international adoption has been decreasing significantly. This provides another possible explanation for why people – especially gay couples and people who are single or unmarried – turn to overseas surrogacy.

Of course fertility tourism could not take place if it weren't for the legal, economic, and political conditions of other countries that allow the practice of commercial surrogacy. Currently, several states in the US (including New York, California, Arkansas and New Hampshire), India, Russia, and the Ukraine allow certain forms of commercial surrogacy. The availability of high-end medical facilities and having a renowned reputation in providing excellent services in reproductive technologies (together with the UK, India was the first to deliver IVF children), India is emerging as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with infertile couples in the Global North because of the relatively low cost. Australian commissioning parents roughly pay a fraction of what they would pay in the US. At the same time, Indian clinics are becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. The practice itself is also becoming more mainstream in India where celebrities (like the Bollywood star Shah Rukh Khan) publicly discuss their use of surrogacy services.¹²

India only allows gestational surrogacy, meaning that it does not allow the birth mother or surrogate to also be the genetic mother. A donor egg needs to be part of the arrangement and this has to be an anonymous donor egg or the egg of the intending mother. It is a requirement that at least one of the intending parents be the genetic parent of the child.¹³ In this way, legal parenthood can be established on the basis of a DNA test and the child would then need to apply for citizenship by descent of the genetic parent. India does not allow Indian

12 See, Swati Deshpande, *High court relief for Shah Rukh Khan in surrogacy case*, THE TIMES OF INDIA (June 19, 2014) <http://timesofindia.indiatimes.com/city/mumbai/High-court-relief-for-Shah-Rukh-Khan-in-surrogacy-case/articleshow/36824660.cms>.

13 Usha Rengachary Smerdon, *India*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL, 190-191 (Katrina Trimmings and Paul Beaumont eds., 2013).

citizenship for the commissioned child. In cases where the genetic parent is an overseas citizen of India (OCI), person of Indian origin (PIO), or a non-resident Indian (NRI), the same status will be transferred to the child resulting from a surrogacy arrangement.¹⁴

Following a number of scandals, however, there has been a call for stricter regulation of surrogacy in India. The need for legislation on the issue was first felt in 2008, following the highly mediatized case of baby Manji, a Japanese baby girl born through a commercial surrogacy arrangement between a Japanese man (the genetic father), an Indian surrogate and an anonymous donor.¹⁵ The lack of specific regulation in Japan as well as India complicated the baby's travel to Japan and left her stateless and stranded in India for two years. Toward the end of 2009 another case known as the Balaz twins case further fuelled the necessity to regulate surrogacy. This case involved two children, commissioned by a German man (the genetic father) and his German partner, who were denied German citizenship because the practice was a criminal offense in their country. Nor were they granted Indian citizenship because India does not grant automatic citizenship if the child is not genetically related to an Indian national.¹⁶ In the absence of clarity, the Supreme Court of India had to intervene on humanitarian grounds.¹⁷ Proposed guidelines set out in the long-awaited Assisted Reproductive Technology (Regulation) Bill have recently been passed (November 2015) and at the time of this writing are under inter-ministerial consultation.¹⁸ The Department of Health Research has also recently issued

14 *Id* at 194.

15 Smerdon, *supra* note 13, at 197-198.

16 Smerdon, *supra* note 13, at 199-207.

17 In the end (in May 2010) the Balaz twins were given identity documents and an exit permit to leave India (although it was stressed that this was an extraordinary event that should not set a precedent). Similarly, the German authorities made a one-time exception and issued the twins visas. Both courts took this decision with the understanding that the twins could enter international adoption arrangements as set out by the Hague Adoption Convention. Smerdon, *supra* note 13, at 206-207.

18 See, *Press Release on Law for Regulating Surrogacy*, MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA (December 2, 2015) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=132218>; Bindu Shajan Perappadan, A setback for surrogacy in India?, THE HINDU (November 29, 2015) <http://www.thehindu.com/opinion/op-ed/a-setback-for-surrogacy-in-india/article7927730.ece>; Nirmala George, Surrogates feel hurt by India's ban on foreign customers, CTV NEWS (November 18, 2015) <http://www.ctvnews.ca/health/surrogates-feel-hurt-by-india-s-ban-on-foreign-customers-1.2663609>. Although in some courts there have been cases that were making exceptions, primarily on the grounds

instructions conveying, among others, that the import of human embryos is banned except for research purposes and that foreign nationals (including OCI Cardholders) who visit India for commissioning surrogacy are not to be granted visas.¹⁹

III. THE INTERVENTION OF HUMAN RIGHTS

The highly mediatized cases involving Australia, Japan, and Germany attest to the problems arising in countries that prohibit commercial surrogacy. As such, Australia, Japan, Germany, Denmark, and France are increasingly confronted with legal situations where the child from an international surrogacy arrangement exposes fundamental tensions between the public policies of the sovereign state and the best interest of the child.

Australian authorities automatically grant Australian citizenship to children genetically related to Australian intending parents. So, in contrast to Germany and Japan who did not grant citizenship in the baby Manji case and the case of the Balaz twins, the commissioned children entering Australia were not stateless.²⁰ Australian citizenship, however, does not automatically translate into legal parentage once a person is in the country or state. Parentage orders are made under the state and territory surrogacy legislation, but considering that cross-border surrogacy is unlawful in most states, they cannot be applied to intending parents that have embarked upon overseas arrangements. These parents need to apply instead for parenting orders which are delivered by the federal Family Court. Parenting orders determine parental responsibilities and do not establish legal parenthood as such. The existence of a parental relationship, for instance, is not a prerequisite for applying for or being granted a parenting order.²¹

that there should be an interim period to process the arrangements that were already made before the Bill came into existence. See, Joanna Sugden, *Mumbai Court Lifts Ban on Surrogacy for Foreigners – In Some Cases*, THE WALL STREET JOURNAL (November 4, 2015) <http://blogs.wsj.com/indiarealtime/2015/11/04/mumbai-court-lifts-ban-on-surrogacy-for-foreigners-in-some-cases/>.

19 Vide letter No. V. 25011/119/2015-HR dated 4th November, 2015.

20 Hence, it was not so much citizenship that was an issue in the Mason case. The citizenship problem continues to exist however for abandoned children such as baby Gammy and Baby Dev, the examples I opened this article with.

21 Keyes, *supra* note 11, at 35.

A key consideration in the *Mason* case, as in other cases pertaining to cross-border surrogacy, is the situation where none or just one of the parents is recognized as a legal parent of the commissioned child. This is regarded as a form “limping parentage”, referring to a precarious situation for the parents and children involved when legal assistance is needed after break-up, divorce, or death.²² It is estimated that hundreds of children have entered Australia that are a result of overseas commissioned surrogacy arrangements. Nevertheless, only 20 cases for parenting orders – such as the *Mason* case – have taken place in Australia²³ indicating that the majority of families live without the security and protection of legal parentage. For reasons of legal costs, the risk of being referred to for prosecution, and the small chance that legal parentage is actually granted, many opt out of seeking formal recognition.

The tension between the state’s stance on commercial surrogacy and the best interest of the child is best illustrated by Justice Ryan’s reconsideration of her ruling for legal parentage in an earlier case.²⁴ Instead of applying the general parentage provisions that fall under the jurisdiction of the federal court, she argued that the provisions of the *Surrogacy Act, 2010*, that fall under the jurisdiction of state law, should now be applied in determining parentage in surrogacy cases. Referring to the *Family Law Act*, Judge Ryan came to the conclusion that she could not grant a declaration of parentage in cases involving surrogacy arrangements that fall outside state law. Her decision is in line with recent rulings in other cases. Instead of granting declarations of parentage, parenting orders are granted that are confined to shared parental responsibility until the child is 18, indicating a move toward keeping in line with the regulations that prohibit the practice. Moreover, there have now been several instances where the judge has referred cases to the Director for Public Prosecutions,

22 See, Jenni Millbank, *The New Surrogacy Parentage Laws in Australia: Cautious Regulation or “25 Brick Walls”?*, 35(1) MELBOURNE UNIVERSITY LAW REVIEW 165 (2011); the Hague Conference Report 2012, *supra* note 4, at 20.

23 Keyes, *supra* note 11.

24 As Ryan, J. argued: “[N]otwithstanding my decision in *Ellison & Anor & Karnchanit*, I now have reservations about the correctness of what was said in relation to the availability of the general parenting presumptions in relation to children born through a surrogacy arrangement.” (*Mason & Mason and Anor*: p. 2). See also *Ellison & Anor & Karnchanit* 2012 *FamCA* 602.

arguing that what the applicants have done is illegal.²⁵ This new direction is believed to have led to a decreasing number of applications for declarations of legal parentage.²⁶

Another key consideration in the *Mason* case was the level of exploitation of the surrogate. The judge was presented with the surrogacy contract which among others indicated the conditions of the contract and the transfer of around 5,000 Australian dollars in exchange for acting as a gestational surrogate. Judge Ryan was troubled by two things in the surrogacy contract presented to her. The first was the provisions in the contract which limited the birth mother's ability to manage her health during the pregnancy and make decisions about the delivery of her babies. The second was that the contract was entirely in English and signed by surrogate with a thumb print, indicating that the birth mother was illiterate in English. On the insistence of the court, a consent order was sought and this was met by the birthmother and a notary public in India. The birth mother acknowledged the content of the contract and gave consent to the application. The affidavits delivered the evidence needed to establish that the surrogate was not coerced and fully understood the terms of the surrogacy agreement.

It is important to see how what we could call the "human rights perspective" is framed in surrogacy cases within and beyond national borders. In an earlier case, namely in *Ellison and Anor & Karnchanit*,²⁷ Justice Ryan invited the Australian Human Rights Commission (AHRC) to intervene. Besides a number of recommendations related to evidence about the overseas legal system, the birth mother, and the nature of the child's relationship with the applicants, the human rights position in the Australian case ultimately represents *the best interest of the child*, which is interpreted as the child's legal right to have rights and to be protected- which can only be established through citizenship and the recognition of legal parentage. It is in the child's best interest to have parents. Therefore, intended parents who have broken domestic law to get their child are punished in only limited and bureaucratic ways. This explains why no convictions have actually taken place despite the explicit illegality of the practice

25 This relates to decisions by Justice Watts in Queensland and formally involves the contraventions of the extraterritorial provisions of the former Surrogate Parenthood Act, 1988.

26 Millbank, *supra* note 22.

27 Ellison & Karnchanit [2012] FamCA 602.

in several states. We see here the gap that can emerge between law and ethics, especially in cases of global scope that must be adjudicated locally.

A similar human rights stance is also evident in Europe where the European Court of Human Rights (ECHR) recently ruled against national decisions to not grant citizenship to children resulting from overseas commercial surrogacy arrangements.²⁸ Based on Article 8 of the European Declaration of Human Rights, which is the right to respect for private and family life, the ECHR ruled that intended parents who can give evidence of biological relatedness should be recognized as legal parents.²⁹ Such interventions reveal a pragmatic stance toward the practice of overseas commercial surrogacy. Australia seems to represent a microcosm of what happens in Europe on a regional scale. The next question is how such a pragmatic stance takes place in jurisprudence with the legal tools available to the system. If legal knowledge on surrogacy is scarce, what other forms of knowledge does jurisprudence draw upon to base its perspectives and decisions on?

IV. ENTANGLEMENTS OF ADOPTION KNOWLEDGE

In the *Mason* case, Justice Ryan appointed an independent children's lawyer to represent the children's interests. She also commissioned a family report to describe the family situation of the applicant with his partner and the children. Besides confirming the couple's suitability to parent the twins, the family consultant also raised a number of issues pertaining to the future wellbeing of the children and the manner in which the parents would be able to manage these. One relates to what the family consultant calls "cultural issues" that arise from the fact that the children are genetically half Indian. Among the protective measures that the consultant said they were taking was their explicit desire to be open and to live in proximity to a cohort of families with a similar makeup to theirs. The family consultant also indicated that the children may benefit from spending time in Australia amongst Indian families, for example, through Indian festivals and celebrations:

28 *See*, *Mennesson and Others v. France* (no. 65192/11), and *Labassee v. France* (no. 65941/11).

29 Britta Van Beers, *Is Europe Giving in to Baby Markets? Reproductive Tourism in Europe and the Gradual Erosion of Existing Limits to Reproductive Markets*, 23(1) MEDICAL LAW REVIEW 103–134 (2014).

Borrowed from the discourse about adoption, the twins may potentially face a more complicated task of making sense of their place in the world because they have grown up in a family whose parents faces do not look like theirs and without experiencing their “mother”, and her culture. There may be times in [the children’s] lives when they will be pre-occupied with this task. They may seek contact with their mothers at significant life cycle transitions. It is also possible that it may never be an issue for the twins.³⁰

Additionally, the family consultant argued:

Another argument proffered in the discourse on parentage is that a child’s genetic identity forms part of a child’s history. There may be medical advantages in the children knowing their parentage. The donor mother and [the birth mother] and their families will, apparently, be unlikely and/or unable to seek out [the children]. There may be significant class issues separating the families which may well be apparent to the children as they explore their Indian backgrounds further. The twins may realize that their mothers and any half siblings experienced life very differently to them. Again, this is an issue that the parents can assist the children to understand and deal with.³¹

These examples are illustrative for they reveal to what extent the accommodation of new technologies and knowledge are accommodated in legal practice. As science and technology scholars have noted, “what one knows in science significantly depends on prior or concurrent choices about how one

30 Mason & Mason and Anor, [2013] FamCA 424, 441.

31 Family consultant report dated 6 June 2012; Mason & Mason and Anr, [2013] FamCA 424, 442.

chooses to know it”.³² In having the ability to construct as well as reinforce prevailing notions of expertise and evidence, “legal spaces operate at one and the same time as epistemic spaces.”³³ Biotechnologies rearrange Euro-American kinship knowledge and general understandings of relatedness.³⁴ This includes the blurring of biological and social or legal understanding of kinship. In our example, where the family consultant refers to adoption discourse, one can see how adoption knowledge becomes a dominant way of looking at the future well-being of children resulting from surrogacy arrangements.

The analogy with adoption has proven useful in the court’s deliberation to assess how surrogacy can impact children’s future lives. But it can also be used to interpret the motivations for people to choose this form of family-making. Similar to dynamics in transnational surrogacy, an important reason for people to turn to *international* adoption is because domestic adoption was not a viable option for them. This can be for a number of reasons. In countries like the United States, many states allow both adoption from foster care and privately arranged adoptions. While the latter seems to be reserved for wealthy couples and individuals, the first is seen as bureaucratically cumbersome and associated with a broken system that produces primarily damaged children. Foster care children also involve a high number of African-American children, who are seen as less desirable by the mostly white middle class couple or individual looking to adopt. Finally, children adopted from foster care presumably hold the risk that birthparents could show up at their doorstep. This seems to be eliminated by going overseas.

In countries like Australia, long term fostering is encouraged over clean-break adoptions. Moreover, in countries where domestic adoption is still available, a move towards “open adoptions”, where birthparents are in a position to remain in some kind of contact with their biological children has been

32 Sheila Jasanoff, *Making order: Law and science in action*, in THE HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES, 761-786 (3rd edn, 2007); BRUNO LATOUR, WE HAVE NEVER BEEN MODERN (1993).

33 Jasanoff, *supra* note 32.

34 Marilyn Strathern, KINSHIP, LAW AND THE UNEXPECTED: RELATIVES ARE ALWAYS A SURPRISE (2005); Janet Dolgin, DEFINING THE FAMILY: LAW, REPRODUCTION, AND TECHNOLOGY IN AN UNEASY AGE (1997); Sarah Franklin, EMBODIED PROGRESS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION (2005); Charis Thompson, MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES (2005).

strongly encouraged;^{35 36} This is very much in line with changes – often in the same countries – to restrict the anonymity of egg and semen donors. These directions are based on the right of the child to know their genetic and biological or birth parents and their right to medical information that forms part of their right to health. Open adoptions – like non-anonymous practices in assisted reproduction or surrogacy – do not form the premise of contemporary transnational adoption or surrogacy practice. Going overseas, then, does two things simultaneously: first, it *circumvents* domestic laws and regulations about reproduction such as adoption, assisted reproductive technologies, and surrogacy, and second, it gives intended parents the possibility of having *children of their own*.

The idea of “your own child” has been much discussed in the literature on kinship, property, and law.³⁷ The important point to be made here is that wanting your “own” child does not necessarily or automatically relate to a biogenetic desire, but refers to the desire intending parents have for an exclusive relationship. This exclusive relationship is also anchored in law, where multiple parenthood is not presented as an option as the law allows only two parents. Consequently, new reproductive technologies bring novel situations in the legal domain where biological, social, and legal definitions of parentage are being reconfigured.

V. BIOLOGY IN THE MAKING OF LEGALITIES

In *The Future of Human Nature*, the sociologist Jürgen Habermas argues that biotechnology radically problematizes the structure of legal form by collapsing the categorical distinction between the made and the grown. In relation to reproductive technologies, this includes the existence of “recombinant families”, where the family is de-assembled and then re-assembled through molecular technologies. But does the knowledge we have on genetic relatedness in recombinant families radically alter the kinship knowledge we have founded in our legal systems?

35 Barbara Yngvesson, *BELONGING IN AN ADOPTED WORLD: RACE, IDENTITY, AND TRANSNATIONAL ADOPTION* (2010).

36 See also the opening of a new institute at the University of Sydney in Australia funded by the NSW government promoting open adoption rather than closed: <http://www.facs.nsw.gov.au/reforms/children-young-people-and-families/institute-of-open-adoption>.

37 Dolgin, *supra* note 34; Strathern, *supra* note 34; Marit Melhuus, *PROBLEMS OF CONCEPTION: ISSUES OF LAW, BIOTECHNOLOGY, INDIVIDUALS AND KINSHIP* (2012).

The introduction of DNA testing and the kinship knowledge stemming from these technologies, has challenged the very foundation on which the institution of family law is based.³⁸ Contrary to Habermas' suggestion, however, my analysis from contemporary jurisprudence on global surrogacy suggests that biotechnology does not radically alter or absolutely challenge the instrumentalist understanding of law as a means to an end. Besides instilling the idea of certainty, the implementations also shape new ways of "knowing".

Following Pottage, what scientific truth has done is to "loosen the ontological consistency of the grown [and] reveal the sense in which the grown was produced and stabilized by legal norms and institutions".³⁹ The *Mason* case illustrated the coexistence of the evidence-based legal system with the introduction of scientific facts. Justice Ryan's decision to not automatically grant a declaration of parentage to the genetically related parent attests to the view that the law does not merely replicate scientific truth but that it considers how social order sits with scientific knowledge. As Jasanoff explains in this context:

The social truth of what constitutes a family and what amounts to justice in the eyes of the law operates in these cases independently of scientific truths concerning human reproduction or genetic identity. One may consider such divergences between DNA fingerprinting science and law to be arbitrary, even unjust, but it is important to recognize that they are rooted in institutional logics that are not and need not be the same. Necessarily, then, there cannot be any neat one-to-one mapping between scientific truth and legal evidence based on science.⁴⁰

This does not mean that Justice Ryan simply overruled scientific knowledge in favour of social order. To establish the fact that the children are Australian citizens, a DNA test was ordered by the court to establish that the applicant was the genetic father of the children. After this fact was established

38 Dolgin, *supra* note 34; Strathern, *supra* note 34.

39 Alain Pottage, *The Socio-Legal Implications of the New Biotechnologies*, 2007(3) ANNUAL REVIEW OF LAW AND SOCIAL SCIENCES, 321, 324 (2007).

40 Sheila Jasanoff, *Just evidence: the limits of science in the legal process*, 34(2) THE JOURNAL OF LAW, MEDICINE & ETHICS 328, 335 (2006).

by a scientist, it was admitted to court as evidence. Nevertheless, genetic relatedness is not enough for Federal and State law in Australia to recognize the genetic father as a legal parent. Other factors, such as the relationship built up with the child (family life) or the intentional motivation behind the surrogacy arrangement are often taken into account. The role of courts in regulating social and scientific “evidence” allows the legal institution to hold together both the logic of evidence as well as scientific truth:

Knowledge that comes from [DNA] testing gives a modern way (genetic identification) of being certain about a traditional category of parentage (biological fatherhood); but it is also a traditional way (establishing biological connection) of defining a thoroughly modern kind of parentage (scientifically certain fatherhood).⁴¹

We can observe the intermingling of scientific and traditional parentage in another case – the *Blake & Anor* case of the Family Court of Western Australia⁴² – where an intended father who was not genetically related to the children filed an application for adoption under the state’s adoption legislation.⁴³ Judge Crisford ruled that the applicant could adopt the children after establishing that his partner was the genetic father and thus the “birth parent” of the children. The situation illustrates the expanding understanding of parentage. It suggests legal openness toward non-genetic parenthood and the reconfiguration of the birth parent to include fathers. It also appears to follow the dominant perception that law often lags behind technological and social change.⁴⁴ As Crisford, J. states:

41 Alain Pottage, *The socio-legal implications of the new biotechnologies*, 3 ANN. REV. OF LAW & SOC. SCI. 32-344 (2007).

42 *Blake & Anr*, [2013] FCWA 1.

43 Alexandra Harland and Cressida Limon, *Recognition of Parentage in Surrogacy Arrangements in Australia*, in SURROGACY, LAW AND HUMAN RIGHTS, 145, 160 (Paula Gerber and Katie O’Byrne eds., 2015).

44 Jasanoff, *supra* note 32, at 768: The dominant thesis that law lags behind technology can be seen for instance in popular outlets on surrogacy, for instance on surrogacy and celebrities in India; Gayatri Jayaraman, Suhani Singh and Sonali Acharjee, *The New Baby Bloom*, INDIA TODAY (July 12, 2013) <http://indiatoday.intoday.in/story/surrogacy-abram-shah-rukh-khan-gauri-khan-surrogate-child/1/291019.html> or in more formal settings of human

To suggest that [the applicant] is anything other than parent or a father within its ordinary meaning is to turn a blind eye to the reality of ‘family’ in present day society.⁴⁵

According to Jasanoff, the law’s rhetoric of justification as mainly retrospective offers one explanation to the idea that law often lags behind science and technological change. In our case, Crisford, J.’s attention to the “reality of ‘family’ in present day society” can be seen as taking a risk in the conventional routines of judicial practice. The judge’s openness in interpreting the law more loosely risks the perception that he is *making* law instead of applying it- a practice discouraged in legal practice. However, the way in which he interprets the law does not necessarily transform or make new arrangements. Instead, establishing the genetic parent as the birth parent rearranges legal notions of maternity and paternity *from and through* legal knowledge rather than via scientific truth itself.

These rearrangements reveal the tension that reproductive technologies bring to the legal institutions of paternity and maternity. On the one hand, jurisprudence on paternity has primarily been based on the *presumption* of biological fact (also known as the *pater est* rule). Central to the institution of family law is “a fiction sustained on the basis of evidence rather than knowledge of the facts themselves”.⁴⁶ To become a legal father of a child one needs to be married, be in a de-facto relationship with his partner, or legally recognize the child as his; in other words, he does not have to provide scientific evidence. On the other hand, maternity has for centuries been predicated on the event of birth which is understood as conclusive proof of motherhood (also known as the *mater semper certa est* rule).⁴⁷ The Blake case showed a situation in which maternity is transferred to the genetic father. However, this would not have been possible, for instance, if the surrogate was married and the *pater est* rule applied in India: the surrogate’s partner would then have been the legal father.

rights commissions; see Gillian Triggs, Foreword to SURROGACY, LAW AND HUMAN RIGHTS (Paula Gerber and Katie O’Byrne eds., 2015).

45 Harland and Limon, *supra* note 43.

46 Jasanoff, *supra* note 40, at 336.

47 Richard Storrow, *The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy*, 20 JOURNAL OF GENDER AND SOCIAL POLICY AND LAW 561, 591 (2011-2012).

Biological relatedness does not necessarily trump the social and affective ties of family relations. However, by comparing surrogacy with adoption it becomes clear that different normativities are played out in interpreting the “best interest of the child” or the “right to family life”, which brings me to the second aspect in considering the changes to legal knowledge by scientific truth—the production of new biolegalities.

VI. BIOLEGALITY AS BIOPOLITICS

Scientific truth is not free of morality nor is law merely applying scientific technologies to come to a reasoned conclusion. Deciding on parentage has an effect on the construction of legitimate and illegitimate families. For example, whether or not the scientific knowledge coming out of a DNA kinship test is used in the decision to grant a declaration of parentage, the fact that the request can be made or made compulsory makes applicants and their relations always already implicated by the institution of genetic parenthood. Against the idea that law follows societal changes – in this case family-making through gestational surrogacy – family law is an active agent in producing social mores and constructing new families. In their consequences, biotechnologies and the geneticization of family life can therefore be seen as what Jasanoff calls “bio constitutional”:⁴⁸

Radical shifts in the biological representation of life thus necessarily entail far reaching reorderings in our imagination of the state’s life-preserving and life enhancing functions – in effect, a repositioning of human bodies and selves in relation to the state’s legal, political, and moral apparatus.⁴⁹

It is, then, not only biotechnology that is re-articulating family life through law. Contrary to the belief that law *represents* social relations, they also produce new socialities. What happens in surrogacy cases is that societal heteronormative understandings of the nuclear family are being reconfigured. However, the way in which they are being reconfigured signals a re-institutionalization of the

48 REFRAMING RIGHTS: BIOCONSTITUTIONALISM IN THE GENETIC AGE (Sheila Jasanoff ed., 2011).

49 *Id.*

nuclear family. This was most evident in the *Blake* case where the legal category of maternity was being transferred to the genetic father so that step adoption could take place by the partner. The legal practice on surrogacy shows how the doctrines of family law actually construct new nuclear formations of family life while excluding multiple forms of parenthood.⁵⁰ One could argue that such new configurations produce new biolegalities (the biolegality of surrogacy) and biolegal bodies (the embodied subjectivities formed from such biolegalities).

These new nuclear formations of family life map well onto the reproductive desires informing the reproductive economy. Reproductive markets can only emerge and exist within certain formations of legitimacy that are brought about as much as by reason as by affect. The normalization of reproductive technologies plays an integral part in strengthening what has been called the overall “neoliberalization of the family”.⁵¹ Cultivating reproductive desire, it contributes to the establishment of a neoliberal form of family citizenship where individuals increasingly feel they are not full citizens without the experience and consumption of family-life (pregnancy, birth, and parenting). Furthermore, the growing global acceptance and application of new biomedical technologies has made possible the transnational exchange of gametes, embryos, and babies.

Assisted reproductive technologies fulfil an increasing demand for reproductive services in situations where domestic possibilities are either legally or financially unattainable. As well-documented by a number of researchers, the global reproductive markets resulting from this demand are highly stratified, based on global inequality, and formed in uneven formations of demand and supply mechanisms.⁵² In the case of surrogacy, the practice emerges in countries

50 John Tobin, *To prohibit or permit: what is the (human) rights response to the practice of international surrogacy?*, 20 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 317 (2014); David Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children* (unpublished manuscript) (on file with the PEPPERDINE LAW REVIEW).

51 David L Eng, *Transnational adoption and queer diasporas*, 21(3) SOCIAL TEXT 1-37 (2003); Susan Koshy, *Neoliberal Family Matter*, 25(2) AMERICAN LITERARY HISTORY, 344 (2013).

52 R. Almeling, *Selling genes, selling gender: egg agencies, sperm banks, and the medical market in genetic material*, 72(3) AMERICAN SOCIOLOGICAL REVIEW 319-340 (2007); C. Waldby and M. Cooper, *The biopolitics of reproduction: Post-Fordist biotechnology and women's clinical labour*, 23(55) AUSTRALIAN FEMINIST STUDIES 57-73 (2008); Kalindi Vora, *Re-imagining Reproduction: Unsettling Metaphors in the History of Imperial Science and Commercial Surrogacy in India*, 5(1) SOMATECHNICS 88-103 (2009).

where a large proportion of the population lives in economic deficiency and can provide cheaper labour. So while the globalized, gendered, and racialized practice of commercial surrogacy feeds into these neoliberal longings of family citizenship, the cross-border practice also repositions the participants within particular transnational circuits of exchange.⁵³ The legal integration of a particular economic rationale in commercial surrogacy, then, allows for the expansion of such economic thinking within legal thinking. This has been documented in research on law and biotechnology more broadly. As Jasanoff argues in analogizing cases of American inventors using biotechnology, academics pursuing biomedical research, and intended parents using surrogates to birth a child:

Biotechnology thus emerges as a flowering of human ingenuity that makes possible the untrammelled expansion of America's endless economic frontier. With its meanings fundamentally shaped by legal thinking and discourse, genetic manipulation becomes a device for inscribing American exceptionalism on the very face of nature.

Evidenced though the court's orders in gathering consent from the Indian surrogate, "informed consent" – based on individualist and autonomous conception of the liberal subject – is held as the litmus test to allow a contentious practice. The surrogate can then be regarded as a rational economic agent capable of making informed decisions. No consideration is given, however, to the question of commodification or the fundamental inquiry whether commercial gestational surrogacy can itself be seen as "an intrusion upon the condition of being human".⁵⁵ These are all fundamental concerns discussed in public international law, namely the Convention on the Rights of the Child (CRC), particularly the sale of a child under Article 35, and the Convention on the Elimination of All Forms of Discrimination Against

53 Gillian Hewitson, *The Commodified Womb and Neoliberal Families*, 46 REVIEW OF RADICAL POLITICAL ECONOMICS 489-495 (2014); Vora, *supra* note 52.

54 Sheila Jasanoff, *Ordering life: law and the normalization of biotechnology*, 17(62) NOTIZIE DI POLITEIA 34, 46 (2001).

55 *Id.*

Women (CEDAW), particularly with respect to pregnancy and reproductive rights.⁵⁶

Although not the desired outcome for intended parents (or judges for that matter) the granting of parental responsibilities in Australia does not discourage cross-border surrogacy arrangements. While the number of applications for legal recognition of parentage has dropped, this does not necessarily mean that the practice of cross-border surrogacy has or will decrease. What it means is that extra-legal forms of family life will continue to increase – a situation already taking place due to the expansion of family life beyond the heteronormative model. Also, as no one has actually been prosecuted in these cases, the legal decisions only partly follow the public policy against overseas commercial surrogacy.⁵⁷ What I propose is that the legal practice of ultimately granting parenting responsibilities and not prosecuting the intending parents - both in the name of the child's best interest - differentiates between a narrow "best interest" that privileges the private nuclear family and a broader "human rights" approach that takes into account power and culture. The same trend appears in Europe. The pragmatic approach by the European Court of Human Rights has been interpreted as an argument for tolerance of national restrictive legislation on assisted reproduction, but it also reveals the extent to which the human rights perspective contributes to facilitating the practice of cross-border reproductive tourism.⁵⁸

As judges grapple with legal situations in the domestic domain, transnational solutions are being called upon. The Hague Conference for Private International Law (HCCH) has been identified as the appropriate institution to

56 Tobin, *supra* note 50; Barbara Stark, *Transnational surrogacy and international human rights law*, 18(2) ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 369 (2012).

57 There have been no resulting prosecutions and this suggests for many that the Australian laws are an exercise in pure symbolism. A. G. Stuhmcke, *Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty*, in SURGACY, LAW AND HUMAN RIGHTS (2015). However, symbolism can hold an important place in the moral fabric of the state. Britta C. Van Beers, *Is Europe 'giving in to baby markets?' Reproductive tourism in Europe and the gradual erosion of existing legal limits to reproductive markets*, 23(1) MEDICAL LAW REVIEW 103-134 (2015). It also casts people who evade the extraterritorial laws through travel as morally degenerate and even a national threat. Richard F. Storrow, *Assisted reproduction on treacherous terrain: the legal hazards of cross-border reproductive travel*, 23(5) REPRODUCTIVE BIOMEDICINE ONLINE 538-545 (2011).

58 Storrow, *supra* note 57; Van Beers, *supra* note 29.

deliver a legal instrument regulating international surrogacy arrangements. This institution was also responsible for the 1993 intercountry adoption convention. One could argue – as some scholars have – that besides the protection of children against child trafficking and child-buying, The Hague Adoption Convention has also allowed for an expansion and normalization of the global adoption market.⁵⁹ At best, the Hague Adoption Convention allows for more transparency in the intercountry adoption process. However, as the legal scholar Margaret Radin argues, “Markets require enabling regimes”.⁶⁰ The Hague Adoption Convention forms the legal regime that sets out the rules and practices in order for adoption markets to function and for new markets to be created. Besides enabling markets, such legal regimes can also make legitimate illegal practices known as “child laundering” where stolen or trafficked children are made available as adoptable through the adoption bureaucracy.⁶¹ Ultimately, what the convention does is represent the “best interest of the child” from a “human rights perspective” that privileges a particular moral economy of family life. Such a moral economy represents attachments to capitalist economies and the (neo) liberal nuclear family implicated in such economies.

The Permanent Bureau’s preliminary reports on international surrogacy arrangements talk of international human rights instruments as “needs to be met”.⁶² Such a stance betrays a situation in which rights are there to be upheld, but only in the broader framework of transnational regulation. With respect to the global instrumentalization of human rights, as understood through the doctrines of “the best interest of the child” and the “right to family life”, I suggest a transnational regulation of gestational surrogacy can unintentionally

59 Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28(2) FLETCHER FORUM OF WORLD AFFAIRS 181-197 (2001); David M. Smolin, *Child laundering and the Hague Convention on Intercountry Adoption: The future and past of intercountry adoption*, 48 U. LOUISVILLE L. REV. 441 (2009).

60 Margaret Rodin, *From Babyselling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market* (2015), presented at the, Faculty Seminar Series of the UNSW Law School, Sydney, Australia on August 24, 2015.

61 Smolin, *supra* note 59.

62 Tobin, *supra* note 50, at 318. See Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, drawn up by the Permanent Bureau, Preliminary Document No 10 of March 2012.

reconfigure human rights in such a way that it encourages market forces.⁶³ The reproduction of human rights in such a context, then, can be seen as being constitutive of neoliberalism.

Of course, the courts' attempts to try to do what they think is in the best interest of the child is noble and necessary. And more things in life are constitutive of neoliberalism that are less noble. Nevertheless, it might be worthwhile to take a step back to ask the question what would be at stake if the laws that are put in place for such arrangements were to be adhered to by courts and judges rather than overruled by the principle of the "best interest of the child". At first sight, it seems that at stake are the lives of intentional parents who would be at risk of criminalization. Second, at stake are the lives of babies resulting from overseas surrogacy arrangements who are at risk of remaining or becoming stateless. Underlying the two stakes is a logic less scrutinized and often taken for granted but that is central to forging the legalities around gestational surrogacy- that of genetic relatedness. However, since the child also bears genetic material from another person – usually from an anonymous egg donor – the "intentional link" is added to the justification. It is the genetic link (biological truth) combined with parental intentionality (legal truth) that ultimately inform the justifications for "best interest of the child". These negotiations seem to reflect how Euro-Americans are redrawing boundaries between kinship and commerce, or between persons and things.⁶⁴ In the context of kinship, neoliberalism has brought about the economization of kinship relations found in commercialized and commodified reproduction like adoption, assisted reproduction, and surrogacy.⁶⁵ The more that legal regimes are enabling such forms of economization the more one can ask the question

61 Smolin, *supra* note 59.

62 Tobin, *supra* note 50, at 318. See Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, drawn up by the Permanent Bureau, Preliminary Document No 10 of March 2012.

63 For a similar argument in the domain of trade and human rights see Anne Orford, *Trade, human rights and the economy of sacrifice*, in INTERNATIONAL LAW AND ITS OTHERS (2006); John Erni, Human Rights in the Neo-Liberal Imagination, 23(3) CULTURAL STUDIES 417-436 (2009).

64 Strathern, *supra* note 34.

65 Igor Kopytoff, *Commoditizing Kinship in America*, in CONSUMING MOTHERHOOD, 271-278 (Janelle S. Taylor ed., 2004).

whether our modern ethical sensitivities that have opposed the economization of life are changing as well.

VII. CONCLUSION

The links between law, science, and kinship have rarely been scrutinized but it is in this relationship that one can study the complex effects that biotechnologies have on the making of legal institutions.⁶⁶ This article made an attempt to study that relationship and to include the complexity of globalization in assessing how global markets feed into this dynamic. My aim in examining how parenting orders were justified in transnational surrogacy cases was to examine how two ontological truth systems (law and science) cooperated, reinstated, altered, or obfuscated kinship knowledge. Drawing the analogy with international adoption revealed the normative dimensions of this interplay but also highlighted that this normativity is not necessarily linked to a preference for one truth system over the other.

Where international surrogacy is concerned, the law seems to simultaneously have great symbolic power as well as immense practical limitations. While transnational surrogacy is banned in several Australian states this does not deter people from crossing the national border to seek arrangements there. The parochialism of law amid a complexly global flow of technologies, gametes, and babies is significant. But contrary to conventional understanding that law *lags behind science and technology* and that law needs to catch up with the global flow of reproductive technologies such as the one implicated in transnational gestational surrogacy, the cases discussed in this article show that whilebiological techniques are pushing the boundaries of legal doctrine, it is legal knowledge that is re-arranging social knowledge. I demonstrated this through the discussion on parentage and the integration of adoption knowledge in justifications of surrogacy practices. This is done epistemologically through law. Moreover, contrary to the belief that law *represents* the societal heteronormative understanding of the nuclear family, the legal practice on surrogacy shows how the doctrines of family law actually construct new formations of the nuclear family while excluding formations of multiple parenthood.

66 Pottage, *supra* note 41, at 340.

Finally, the intervention of a specific understanding of human rights, namely through the doctrines of the “best interest of the child” and the “right to family life”, seems to facilitate rather than limit the practice of global commercial surrogacy. The impertinent question here is whether a formalized transnational regulation – such as a Hague Convention for international surrogacy – would be able to curb abuse, exploitation, and trafficking. The concern this article tried to convey is that such a transnational regulation would also be at risk of sustaining and maintaining a global market in gestational surrogacy. This is because complex histories of inequality, economic opportunity, and availability of medical technology continue to shape different global situations in which some individuals cross borders to access commercial surrogacy and others are having to provide that service. In this space, while rights-claims emerge to assist the reproductive desires of the affluent few, one has also to take into account how such a rights-claim impinges on the most vulnerable participants in these interactions.

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