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2022

Abandonment via International Surrogacy

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I. INTRODUCTION

In the midst of the new war between Ukraine and Russia, six-year-old Bridget’s adoption has been halted, leaving her indefinitely without parents for the second time.¹ Bridget was born via surrogate in Ukraine but left stateless and unadoptable once the American parents who “commissioned” her decided not to take her to the United States after learning she has an “incurable” mental and physical illnesses that left her gravely ill at birth.² Though the American parents listed on Bridget’s documents requested that she be taken off life support at five months old, Bridget survived and lives today with special needs.³ Despite her survival, her parents refused to take her home, leaving her in an orphanage.⁴ As will be further explained in Part IV, when U.S. citizens contract with foreign surrogates, they must affirmatively apply for the U.S. citizenship the child typically “acquires by birth” and retrieve the child from the foreign country where they were born.⁵ When Bridget was two years old, her parents sent a letter to Ukraine, consenting for Bridget to be adopted.⁶ However, the letter was not recognized under Ukrainian law,⁷ rendering her unadoptable.⁸ Bridget was also stateless⁹ since the American intended parents who commissioned her birth failed to apply for her U.S. citizenship and Ukraine does not confer

¹ Mary Grace Keller, *Torn by War: Crisis in Ukraine Impacting Local Adoptions*, THE FREDERICK NEWS POST (Mar. 5 2022), https://www.fredericknewspost.com/news/torn-by-war-crisis-in-ukraine-impacting-local-adoptions/article_d7fb1b26-ac78-5ec7-bb7d-96bfea3153e0.html.

See also *Frederick County Family Cannot Adopt Ukrainian Girl Due to War*, WFMD FREE TALK, (Feb.26, 2022, 8:59AM), <https://www.wfmd.com/2022/02/26/brunswick-family-cannot-adopt-ukrainian-girl-due-to-war-2/>.

² Samantha Hawley, *Damaged Babies and Broken Hearts: Ukraine’s Commercial Surrogacy Industry Leaves a Trail of Disasters*, ABC NEWS (Aug. 19, 2019, 3:12PM), <https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388>.

³ See Hawley, *supra* note 2.

⁴ *Id.*

⁵ See *infra* Part IV.

⁶ See Hawley, *supra* note 2.

⁷ The article does not explain why the letter was not recognized under Ukrainian law, but notes that the letter was not signed in the presence of the Consul General of the U.S. Embassy. *Id.*

⁸ See Hawley, *supra* note 2.

⁹ *Id.*

Ukrainian citizenship to children born via Ukrainian surrogates.¹⁰ Fortunately, in 2019, Ukraine made an exception for Bridget, making her a Ukrainian citizen and therefore adoptable.¹¹ In February 2022, Bridget was finally on the verge of adoption by an American couple from Maryland¹² who call her “Brizzy” and claim they already feel she is their daughter.¹³ Unfortunately, because of the new war, there is no guarantee of when Bridget can finally move out of the orphanage and into the United States.¹⁴

This is one of many incidents involving the abandonment of children born via international surrogacy.¹⁵ It has been speculated that at least ten other children born in Ukraine alone were also abandoned there by the foreign couples who commissioned them.¹⁶ Outside of Ukraine, there were several notable examples in the media,¹⁷ some of which helped lead to the banning of commercial surrogacy¹⁸ in countries like India, Nepal, and Thailand which were once huge destinations for foreign couples looking to contract with surrogates.¹⁹ Though those countries have banned commercial surrogacy, the change in the market created a huge demand boom for surrogacy in Ukraine.²⁰ The international surrogacy market is made up primarily by prospective parents from the U.S., Australia, the United Kingdom, and other Western European

¹⁰ *Id.*

¹¹ See Hawley, *supra* note 2.

¹² *Frederick County Family Cannot Adopt Ukrainian Girl Due to War*, WFMD FREE TALK, (Feb.26, 2022, 8:59AM), <https://www.wfmd.com/2022/02/26/brunswick-family-cannot-adopt-ukrainian-girl-due-to-war-2/>

¹³ However, no time frame was suggested. See Hawley, *supra* note 2.

¹⁴ *Id.*

¹⁵ See *infra* Part III.

¹⁶ See Hawley, *supra* note 2.

¹⁷ See *infra* Part III.

¹⁸ Commercial surrogacy involves financial surrogacy arrangements, where the intended parent(s) pay the surrogate for carrying a child for them. These arrangements are usually gestational, meaning the surrogate is not genetically related to the child. See Mark Henaghan, *International Surrogacy Trends: How Family Law is Coping*, AUSTRALIAN J. ADOPTION 7(3) (2013).

¹⁹ Emma Lamberton, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, J. PUB. & INT’L AFF. (2020).

²⁰ *Id.*

countries.²¹ Though the war in Ukraine has already had an impact on surrogacy,²² the international commercial surrogacy market there will likely move to another country, considering how profitable it has been for Ukraine.²³

Because international surrogacy is not governed by international laws, the commercial market is not handled uniformly, leaving the process for these children up to many different variables depending on the country of the intended parents and the country where the surrogate resides.²⁴ In 2015, the Hague Conference on Private International Law [“HCCH”]²⁵ created an Expert’s Group on the Parentage/Surrogacy Project to study international surrogacy law issues in relation to the parentage of children.²⁶ The Hague Conference’s Experts’ Group on the Parentage/Surrogacy Project, will be meeting for the final time in 2023 to provide their recommendations on how to regulate commercial surrogacy internationally.²⁷ It is worth noting, the group did something similar for international adoption²⁸ in the 1993 Hague Conference on Protection of Children and Co-Operation in Respect to Intercountry Adoption.²⁹ Anticipating the HCCH’s eventual recommendations, the American Bar Association [“ABA”] released the ABA

²¹ See Lamberton, *supra* note 19.

²² Andrew E. Kramer, *In a Kyiv Basement, 19 Surrogate Babies Are Trapped by War but Kept Alive by Nannies*, N.Y. TIMES (Mar. 12, 2022), <https://www.nytimes.com/2022/03/12/world/europe/ukraine-surrogate-mothers-babies.html>.

²³ See Lamberton, *supra* note 19 (discussing the high profitability of the international surrogacy market and how surrogacy clinics were quickly created to meet the new demand after the banning in Thailand, Nepal, and India). See also *infra* Part II.

²⁴ Victoria R. Guzman, *Article: A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be A Uniform Federal Law Permitting Commercial Surrogacy?*, 38 HOUS. J. INT’L L. 619, 624 (2016).

²⁵ The Hague Conference on Private International Law [hereinafter HCCH] is an intergovernmental organization which often covers international family and child protection law, including international adoption. About HCCH, HCCH (last visited May 1, 2022), <https://www.hcch.net/en/about>.

²⁶ The Parentage/Surrogacy Project, HCCH (last visited May 1, 2022), <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

²⁷ *Id.*

²⁸ See *infra* Part II.

²⁹ See David M. Smolin, *Article: Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Market of Children*, 43 PEPP. L. REV. 265, 270 (2016) (arguing for international regulation of commercial surrogacy regulation similar to that under HCCH international adoption).

Model Act Governing Assisted Reproduction Technologies [“ABA Model”],³⁰ providing some suggestions for the HCCH to take up,³¹ but there is no guarantee on how this will be regulated in the future.³²

The problem involving abandoned children born via international surrogacy requires immediate attention.³³ The U.S., which has stated that commercial surrogacy does not involve the exploitation of children,³⁴ but also refers to it as a market³⁵ seen by some scholars to be the illegal sale of children,³⁶ has a moral responsibility to care for these children they allow to be commissioned by U.S. citizens.³⁷ This is especially true when there is a biological connection between them that makes the child eligible for U.S. citizenship “at birth,” though the citizenship process should be adjusted to provide U.S. citizenship “at birth” to those American intended parents who have no genetic relation to the child.³⁸ In 2021, the U.S. adjusted some of their citizenship laws to grant children born via surrogacy to U.S. citizen intended parents U.S. citizenship “at birth” when the genetic parent is not a U.S. citizen but is married to one.³⁹

³⁰ See Section of Family Law: Assisted Reproductive Technologies, AM. BAR ASS’N (Feb. 8, 2016), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2016/2016-midyear-112b.pdf> [hereinafter ABA Report].

³¹ Section of Family Law: Assisted Reproductive Technologies, AM. BAR ASS’N (Jan. 26, 2018), <http://apps.americanbar.org/dch/committee.cfm?com=FL142000>.

³² See *infra* Part V. See also David M. Smolin, *The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export*, 49 CUMB. L. REV. 1 (2019).

³³ See *infra* Part V.

³⁴ U.S. Mission Geneva, *ID With the SR For the Right to Privacy Joseph Cannataci and the SR on the Sale and Sexual Exploitation of Children Maud de Boer-Buquicchio*, U.S. MISSION TO INT’L ORG. IN GENEVA (Mar. 7, 2018), https://geneva.usmission.gov/2018/03/07/id-with-the-sr-for-the-right-to-privacy-joseph-cannataci-and-the-sr-on-the-sale-and-sexual-exploitation-of-children-maud-de-boer-buquicchio/?_ga=2.8923568.466814927.1592339635-604313170.1592339635.

³⁵ See ABA Report, *supra* note 30.

³⁶ See Smolin, *supra* note 32. Compare Lily Johnson, *Commercial Surrogacy is the Sale of Children?: An Argument That Commercial Surrogacy Does Not Violate International Treaties*, with 28 WASH. INT’L L.J. 701 (2019) (arguing that commercial surrogacy is not the sale of children under The Optional Protocol to the Convention on the Rights of the Child, an international treaty that bans the sale of children).

³⁷ See *infra* Part IV.

³⁸ See *infra* Part IV.

³⁹ Jaelyn Diaz, *U.S. Ends Policy of Denying Citizenship to Children Born Via IVF or Surrogacy*, NPR (May 19, 2021, 6:54AM), <https://www.npr.org/2021/05/19/998143097/u-s-ends-policy-denying-citizenship-to-children-born-via-in-vitro->

However, it has not directly addressed citizenship with respect to children born via international surrogacy and abandoned abroad by U.S. citizens.

The possibility for U.S. intended parents to abandon their children abroad stems from the citizenship process between their birth abroad and the subsequent physical custody by the intended parents.⁴⁰ Though the children are usually eligible for U.S. citizenship “at birth,” the U.S. parents must affirmatively apply for citizenship for the child and often have to prove a genetic relation to the child, explained further later.⁴¹ When these parents decide they no longer want the child, often due to disability or other reasons, they can simply leave the child there and face few or no consequences.⁴² The Americans who abandoned Bridget may have commissioned a second set of twins after Bridget.⁴³

To prevent abandonment, statelessness, and unadoptability like Bridget’s case, I propose that the U.S. adjust its citizenship laws to allow parties other than the intended parents to file for U.S. citizenship on behalf of these children.⁴⁴ These “other parties” would be parties who are in temporary physical custody of the child born via surrogacy abroad, including surrogacy clinics, U.S. embassies, surrogates, or orphanages. Additionally, I suggest that the U.S. remove the genetic component to the conferral of U.S. citizenship “at birth” to address the fact that not all international surrogacy arrangements involve a biologically related intended parents. Since the U.S. is responsible for American children who have been abandoned,⁴⁵ they should be

surrogacy#:~:text=The%20State%20Department%20will%20now,by%20other%20assisted%20reproductive%20me
ans.

⁴⁰ See *infra* Part IV.

⁴¹ See *infra* Part IV.

⁴² See *infra* Part IV.

⁴³ See Hawley, *supra* note 2 (noting that Bridget’s commissioning parents may have commissioned a second set of twins after Bridget (her twin died at birth)).

⁴⁴ See *infra* Part VI.

⁴⁵ See *infra* Part IV.

responsible for children who are eligible for U.S. citizenship “at birth” but were abandoned by their U.S. intended parents, leaving them potentially abandoned, stateless, and potentially unadoptable like Bridget. The proposed changes to U.S. citizenship laws will resolve the dilemma in three ways. First, it will allow for the retrieval of these abandoned children, as explained in Part V. Second, it will allow the U.S. to put the child up for adoption in the U.S., removing the possibility that they will be stateless and unadoptable like Bridget. Third, it will create consequences for abandoning these children, since once the children have U.S. citizenship, child state abandonment laws apply to them, as explained in Part IV. The consequences of child abandonment under U.S. state law⁴⁶ will hopefully deter U.S. citizens from abandoning these children.

In Part II, I will discuss a brief overview of surrogacy with the United States and how it works in the international context. In Part III, I will discuss examples of the abandonment of American children born abroad via surrogate and how they were handled. In Part IV, I will discuss how the process of taking custody works for children born via surrogate abroad and how the U.S. usually handles the abandonment of American children. In Part V, I will analyze the solutions considered by scholars and nations and demonstrate why my proposal is still necessary. Finally, in Part V, I detail my proposal as stated above and address any counterpoints.

II. OVERVIEW OF SURROGACY AND THE POTENTIAL FOR EXPLOITATION

In this section I, will provide background information necessary to understand international surrogacy arrangements involving U.S. citizens and foreign surrogates. First, I will

⁴⁶ See *infra* Part IV.

provide a general overview of surrogacy within the international context, including concerns regarding children abandoned like the example of Bridget.⁴⁷

A. Overview

Surrogacy is a form of assisted reproductive technology (“ART”) where a woman carries and delivers a child for another person, often a couple.⁴⁸ There are two types of surrogacy: traditional and gestational. Traditional surrogacy is where the surrogate is genetically related to the child she carries for another person.⁴⁹ This type of surrogacy is the least common type that occurs and is not allowed in many places.⁵⁰ Gestational surrogacy is the most common type of surrogacy that occurs,⁵¹ where the surrogate carrying the child has no genetic relation to them. This paper will focus on gestational surrogacy, the most common type within the international context.⁵² Within the surrogacy market⁵³, the parents who “commission” the child via contract with the surrogate are typically referred to as the “intended parents.”⁵⁴ The term intended parents demonstrates how surrogacy is typically viewed, with the surrogate having little to no parental rights over the child.⁵⁵

⁴⁷ See Hawley, *supra* note 2.

⁴⁸ Surrogacy, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴⁹ Jessica M. Caamano, *International, Commercial, Gestational Surrogacy Through the Eyes of Children Born To Surrogates in Thailand: A Cry for Legal Attention*, 96 BOSTON U. L. REV., 571, 574 (2016).

⁵⁰ See Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 320-21 (2013).

⁵¹ Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1260 (2013).

⁵² *Id.*

⁵³ See ABA Report, *supra* note 30.

⁵⁴ See Caamano, *supra* note 49.

⁵⁵ State surrogacy statutes generally require that intended parents take responsibility over the child, though surrogates have rights to make medical or healthcare decisions while they are pregnant. Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1594 (2020), (citing ME. REV. STAT. ANN. tit. 19-A, § 1932(3)(J)(4) (2018) (“The intended parent or parents must ... accept parental rights and responsibilities of all resulting children immediately upon birth regardless of the number, gender or mental or physical condition of the child or children.”); *see, e.g., Id.* § 1932(3)(J)(3) (“The gestational carrier has the right to use the services of a health care provider of her choosing to provide her care during her pregnancy.”); *see also* D.C. CODE § 16-406(a)(4)(C) (Supp. 2019) (“[T]he surrogate shall maintain control and decision-making authority over the surrogate’s body.”); *id.*

Since the beginning of modern surrogacy in 1985,⁵⁶ it has been controversial.⁵⁷ It is especially controversial within the international context where there is no standard international regulation of surrogacy and no uniform way of handling surrogacy between countries.⁵⁸ Both for couples, surrogates, and the nations where surrogacy occurs, surrogacy continues to be a big business.⁵⁹ Several issues involving exploitation of surrogates⁶⁰ and notable cases in the media about the abandonment of children born via surrogacy,⁶¹ caused many of the countries that played the largest roles in the international surrogacy market to have banned commercial surrogacy.⁶² However, this has not curbed the market for surrogacy. The closure of the surrogacy market in India, Thailand, and Nepal created a huge spike in demand, allowing Ukraine to enter

§ 16-406(a)(5) (“[T]he [intended] parent or parents shall ... [a]ccept physical custody of the child immediately after the child's birth, regardless of the child's gender or mental or physical condition or the number of children ...”).

⁵⁶ The first successful gestational surrogacy arrangement occurred in the U.S. in 1985. See Nayana H. Patel, *Insight into Different Aspects of Surrogacy Practices*, 2018 J. HUM. REPROD. SCI. 212, 213.

⁵⁷ One of the earliest controversies involved the “Baby M” case, where the New Jersey Supreme Court invalidated a surrogacy contract, designating the surrogate, who donated her own genetic material to the child, as the legal mother, while the non-biological intended mother could only become the child’s legal mother through adoption. Eric A. Feldman, *Baby M Turns 30: The Law and Policy of Surrogate Motherhood*, 44 AMERICAN J. L. & MED. 7, 17 (2018), citing *In re Baby M*, 537 A.2d 1227, 1261 (N.J. 1988).

⁵⁸ A United Nations study noted that international surrogacy varies between nations, and even within nations, with countries such as the U.S., Mexico, and Australia regulating surrogacy by local law. *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, 9, U.N.DOC.A/HRC/37/60 (Jan. 15, 2018) at P15. [hereinafter Special Rapporteur].

⁵⁹ A 2020 study by Global Market Insights, Inc. determined that the lucrative global surrogacy market generated \$4 billion revenue in 2020 and will cross USD \$33.5 billion in revenue by 2027. *Surrogacy Market by Type (Gestational Surrogacy, Traditional Surrogacy), Technology (Intrauterine Insemination {IUI}, In-vitro Fertilization {IVF}), Age Group (Below 35 Years, 35-37 Years, 38-39 Years, 40-42 Years, 43-44 Years, Over 44 Years), Service Provider (Hospitals, Fertility Clinics), Regional Outlook, Price Trends, Competitive Market Share & Forecast 2027*, GLOBAL MARKET INSIGHTS INC. (June 9, 2021), <http://www.gminsights.com>.

⁶⁰ “One common reason for opposing legalized and regulated commercial surrogacy is the fear that the practice exploits vulnerable and impoverished women....” Victoria R. Guzman, *Article: A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be A Uniform Federal Law Permitting Commercial Surrogacy?*, 38 HOUS. J. INT’L L. 619, 635 (2016) (citing Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L 1429, 1444-46 (2009)).

⁶¹ See *infra* Part III.

⁶² India, Thailand, and Nepal closed their surrogacy markets due to human trafficking concerns. Lamberton, *supra* note 48. See also Hawley, *supra* note 2; Emma Lamberton, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, J. PUB. & INT’L AFF. (2020) (citing Ray Saptarshi, *India Bans Commercial Surrogacy to Stop “Rent a Womb” Exploitation of Vulnerable Women*, TELEGRAPH, <https://www.telegraph.co.uk/news/2018/12/20/india-bans-commercial-surrogacy-stop-rent-womb-exploitation/#targetText=India%20has%20banned%20commercial,womb%20haven%20for%20childless%20couples.&targetText=Now%2C%20surrogate%20mothers%20must%20be,married%20at%20least%20five%20years>).

the market, with Ukraine now holding 25% of the global surrogacy market.⁶³ Though the war between Ukraine and Russia has already had an impact on their commercial surrogacy,⁶⁴ commercial surrogacy will likely simply move to another country willing to take advantage of the financial benefits it brings, just as Ukraine did.

B. How Surrogacy Works Involving U.S. Citizens and Foreign Surrogates

Surrogacy within the U.S. is governed by state law,⁶⁵ making it one of the only countries where there is no national regulation.⁶⁶ States either permit surrogacy, disallow it, or have no statutes regarding it.⁶⁷ Since it involves more than one country, international surrogacy involving U.S. citizens is governed by the U.S. state where they reside and the country where the surrogate resides. Because of the different U.S. state laws and foreign laws, there is a lack of consistency⁶⁸ that creates much confusion and difficulty in the process of determining statehood, parentage, and bringing children back to the intended parent's country.⁶⁹ Though there have been efforts to make a more uniform set of rules within the U.S.,⁷⁰ they have not had the intended effect because the states either don't adopt the uniform rule, or they only adopt part of it, detracting from the purpose of the proposed statutes.⁷¹ California is considered one of the greatest hotbeds for

⁶³ Lamberton, *supra* note 19.

⁶⁴ The start of the Ukrainian war forced 19 surrogate babies underground, with their intended parents unsure of when they can retrieve them. Kramer, *supra* note 22.

⁶⁵ Guzman, *supra* note 60 at 625.

⁶⁶ Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 25-27 (2008).

⁶⁷ Guzman, *supra* note 60 at 625-27.

⁶⁸ See Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120, 125 (2012); ABA Report, *supra* note 30 at 1.

⁶⁹ Guzman, *supra* note 60 at 628.

⁷⁰ The Uniform Parentage Act proposed a uniform set of laws for states to adopt in order to address the lack of uniformity in U.S. surrogacy law. UNIF. PARENTAGE ACT § 803(a) (amended 2002), 9B U.L.A. 90 (Supp. 2015).

⁷¹ See Guzman, *supra* note 60 at 627 (proposing that federal regulation is required to address lack of conformity, among other issues).

domestic and international surrogacy due to its liberal surrogacy laws.⁷² Other states, like Michigan, don't allow surrogacy at all and actually impose consequences on those who take advantage of other state laws to get around their prohibition on surrogacy contracts.⁷³

One of the most controversial aspects of the surrogacy industry involves issues inherent to international surrogacy. Many have argued that commercial surrogacy is the sale of children,⁷⁴ and particularly, that the U.S. is actively exploiting and contributing to a global market of children.⁷⁵ Because it's often much cheaper to contract with surrogates abroad rather than with surrogates in the US, American couples often go abroad to build their families.⁷⁶ Because of the hugely varying ways in which surrogacy is regulated between countries, there have been many opportunities for the exploitation of people involved in the process, namely the children and the surrogates themselves. The industry in India used to be particularly noteworthy, with reports of human rights violations against surrogates, from inadequate pay to isolation from family members and poor health standards.⁷⁷ Additionally, the issue of abandonment of children has played a large role in the recent treatment of international surrogacy. One notable case, Baby

⁷² Special Rapporteur, *supra* note 46 at P14.

⁷³ MICH. COMP. LAWS ANN. § 722.859 (1)-(3) (West 2014).

⁷⁴ David M. Smolin, *Article: Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Market of Children*, 43 PEPP. L. REV. 265, 337 (2016) (arguing that most commercial surrogacy is the illegal sale of children and that, any residual commercial surrogacy should be regulated, as it was for international adoption).

⁷⁵ David M. Smolin, *The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export*, 49 CUMB. L. REV. 1, 2 (2019) (arguing that the U.S. is actively building worldwide markets in children and that it is not too late to put an end to it).

⁷⁶ The average cost of contracting with a U.S. surrogate is between \$80,000 and \$120,000, while contracting with a Ukrainian surrogate is around \$30,000. Madeline Roache, *Ukraine's "Baby Factories": The Human Cost of Surrogacy*, ALJAZEERA, <https://www.aljazeera.com/features/2018/9/13/ukraines-baby-factories-the-human-cost-of-surrogacy#:~:text=Ukraine%20has%20become%20an%20increasingly,%24120%2C000%20in%20the%20United%20States.>

⁷⁷ Nicole Broomfield and Karen Smith Rotabi, *Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations*, GLOB. SOC. WELFARE 123, 126-28 (2014); *See also* Lamberton, *supra* note 19.

Gammy,⁷⁸ lead to Thailand banning commercial surrogacy altogether⁷⁹ and Australia making commercial surrogacy illegal in all Australian states.⁸⁰ Once Thailand, Nepal, and India banned commercial surrogacy with their countries, the market did not slow down but simply moved to the black market or other countries, like Ukraine.⁸¹

Though there is no international regulation of surrogacy, the HCCH which created international adoption standards⁸² has been considering similar regulations for international surrogacy.⁸³ The 1993 Hague Conference on Protection of Children and Co-Operation in Respect to Intercountry Adoption currently has 104 contracting parties, including the United States.⁸⁴ The HCCH started the “Experts’ Group on the Parentage/Surrogacy Project” in 2015 and will be meeting again in 2023 for their final recommendations.⁸⁵ Because surrogacy has its own unique variables in comparison to adoption, the matter deserves regulation specifically tailored to it.

There have been some remedies suggested for dealing with the problems inherent to international surrogacy. Those remedies will be discussed in Part V, and compared to my proposal in Part VI. Though I have briefly mentioned some issues regarding international

⁷⁸ See *infra* Part III.

⁷⁹ See Abby Phillip, *A Shocking Scandal Led Thailand to Ban Surrogacy for Hire*, WASH. POST (Feb. 20, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/20/a-shocking-scandal-led-thailand-to-ban-commercial-surrogacy-for-hire/>.

⁸⁰ Australia allows altruistic surrogacy, where the intended parent only covers the surrogate’s expenses in relation to surrogacy, pregnancy, and birth. Surrogacy in Australia, SURROGACY AUSTL., <https://www.surrogacyaustralia.org/need-surrogate-whats-next/#:~:text=Commercial%20surrogacy%20is%20illegal%20in,to%20surrogacy%2C%20pregnancy%20and%20birth> (last visited May 1, 2022).

⁸¹ Lamberton, *supra* note 19.

⁸² See Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, HCCH (last visited May 2, 2022), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>. See also David M. Smolin, *Child Laundering and the Hague Convention on Intercountry*

⁸³ The Parentage/Surrogacy Project, HCCH (last visited May 1, 2022), <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

⁸⁴ Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, HCCH (last visited May 2, 2022), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

⁸⁵ *Id.*

surrogacy, the focus of this paper will be on the issue of abandonment of American children born via international surrogacy. I will not try to solve all issues regarding international surrogacy because they are complex. Nevertheless, as will be explored in Part VI, the likelihood of effective international regulation is unclear, especially involving U.S. citizens. Since the U.S. leaves the regulation of surrogacy up to the states, implicitly allowing it, the immediate focus should be on how the US. can take responsibility for the children they are allowing to be created, especially since they are essentially Americans, addressed in Part VI.

III. THE POTENTIAL FOR ABANDONMENT, STATELESSNESS, AND UNADOPTABILITY

Though there are many concerns involving international surrogacy, one notable issue involves the abandonment of children born under gestational surrogacy. U.S. citizens sometimes contract with foreign surrogates to carry their child yet decide for some reason not to retrieve the child once born abroad.⁸⁶ This issue is not unique to surrogacy involving the U.S.,⁸⁷ however, by leaving states the ability to allow surrogacy, they are implicitly allowing these situations. Since the U.S. is responsible for every American child who is abandoned, even abroad⁸⁸, they should also take responsibility over these children who are usually considered U.S. citizens at birth.⁸⁹ There have been situations where even when the parents apply for citizenship, they haven't been able to get the citizenship due to the "difficult" process, though there were recent changes to address that.⁹⁰ Though the U.S. recently changed its citizenship law governing children born

⁸⁶ See *infra* Part III.

⁸⁷ See *infra* Part III.

⁸⁸ See *infra* Part IV.

⁸⁹ See *infra* Part IV.

⁹⁰ See *infra* Part III.

under ART,⁹¹ the change does not address the real issue, which is demonstrated in the examples below.

A. Bridget

As mentioned in Part I, the case of Bridget is illustrative of the potential for child abandonment in international surrogacy, and how the gap between birth and transference of physical custody to the intended parents creates opportunities for child abandonment, statelessness,⁹² and even unadoptability.⁹³ Like that situation where Ukraine granted an exception to confer citizenship onto Bridget, and therefore making her adoptable at last, other situations involved one time exceptions or special circumstances for the children.⁹⁴ Furthermore, there may have been at least ten other cases of abandonment by foreign couples in Ukraine itself.⁹⁵

There are many reasons that a child could become abandoned by the parents who commissioned their birth.⁹⁶ Intended parents have changed their minds due to situations such as disability, unforeseen circumstances like marital issues⁹⁷ and even the frustration with the

⁹¹ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (August 5, 2021), <https://www.uscis.gov/newsroom/news-releases/uscis-removes-barriers-to-us-citizenship-for-children-born-abroad-through-assisted-reproductive#:~:text=WASHINGTON%E2%80%94%20Today%2C%20U.S.%20Citizenship%20and.policy%20update%20will%20allow%20a.> See 8 U.S.C.A. §§ 1401; 1409 (West).

⁹² Brianna Richards, “*Can I Take the Normal One?*” *Unrelated Commercial Surrogacy and Child Abandonment*, HOFSTRA L. REV. 201, 203 & 210 (2015) (addressing issues of abandonment and statelessness in international surrogacy arrangements and pointing out that these situations often arise out of intended parents “changing their minds” due to issues such as disability or change in marriage status).

⁹³ See *supra* Part I.

⁹⁴ Note that the time frame for these ten cases was not given. *Id.*

⁹⁵ Ukraine’s “Children’s Ombudsman,” Nikola Kuleba, appointed by Ukraine’s president, stated he was aware of 10 additional cases of abandonment by foreign intended parents. See Hawley, *supra* note 2.

⁹⁶ See Richards, *supra* note 92 at 210 (pointing out that these situations often arise out of intended parents “changing their minds” due to issues such as disability or change in marriage status).

⁹⁷ *Id.*

citizenship process required to bring the child back to the U.S.⁹⁸ Because surrogacy is not internationally regulated, this leaves the fate of the child up to the mixture of laws between the country their parents are citizens of and the country where they are born. Though the United States is not the only country where intended parents contract with surrogates abroad, it is one of the biggest involved in the market⁹⁹ since there is no national regulation and the intended parents from here can save so much money by finding surrogates abroad rather than at home.¹⁰⁰ The U.S. has already accepted responsibility over American children who are abandoned domestically and internationally,¹⁰¹ and since children born via surrogacy or ART are considered citizens at birth,¹⁰² they have a responsibility to not only address the abandonment of these children and the consequences that come from that, but to also take an active role in the well-being and care of those children.¹⁰³ Though unclear how many times these abandonment situations occur, the cases discussed in this paper are notable examples that illustrate the potential and severity of the issue.

B. Baby Gammy

There have been notable examples of intended parents abandoning their children to the care of surrogate mothers who have no genetic relation to the child. One of the biggest and well-known examples of the child abandonment and statelessness issue involves “Baby Gammy.”¹⁰⁴

⁹⁸ See *infra* Part IV.

⁹⁹ U.S. citizen prospective parents are some of the primary drivers of the international surrogacy market, along with intended parents from Australia, the United Kingdom, the Nordic countries, and other Western European countries. Lamberton, *supra* note 19.

¹⁰⁰ See Roache, *supra* note 76.

¹⁰¹ See *infra* Part V.

¹⁰² See *infra* Part V.

¹⁰³ See *infra* Part IV.

¹⁰⁴ See Richards, *supra* note 92, at 211-12 (citing Abby Ohlheiser, *Australian Mother, Father in Down Syndrome Surrogate Case Defend Themselves in TV Interview*, WASH. POST (Aug. 11, 2014), <http://www.washingtonpost.com/news/world/wp/2014/08/11/australian-mother-father-in-down-syndrome-surrogate-case-defend-themselves-in-tv-interview>).

As with Bridget, the children abandoned by their intended parents often have a disability.¹⁰⁵ This case was big in the media at the time.¹⁰⁶ In 2013, an Australian couple contracted with a surrogate in Thailand to conceive their child, with no genetic relation between the child and the surrogate.¹⁰⁷ After finding out that one of the twins she carried would be born with down syndrome, the surrogate claimed that the couple told her she needed to get “rid” of the baby, though the surrogate refused to undergo an abortion.¹⁰⁸ When the twins were born, the Australian couple traveled to Thailand to pick up their children but decided to only bring the “normal one” with them, leaving the other twin in the care of the surrogate who had no genetic relation to the child.¹⁰⁹ Unlike with Bridget in Ukraine, Baby Gammy was not completely abandoned, though the surrogate who birthed her was given financial support from an Australian-based charity once it became clear that the baby would stay with her.¹¹⁰

Though this case did not involve citizenship dilemmas, if the surrogate did not want to take care of the child or if Thailand did not allow the child to become one of their citizens, as Ukraine does not, the child could have ended up in a much worse situation. Furthermore, though this did not involve a United States citizen, the same situation has occurred involving U.S. citizens, such as Bridget, and the lack of uniform regulation between nations creates the same possibility.¹¹¹ Nevertheless, in response to situations like this, Thailand banned commercial

¹⁰⁵ See Lamberton, *supra* note 19.

¹⁰⁶ See Richards, *supra* note 92, at 211-12.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *infra* Part IV.

international surrogacy.¹¹² Australia has also since then made it illegal for all commercial surrogacy, though they allow altruistic surrogacy, where the surrogate does not get paid.¹¹³

C. Baby Manji

Other than disabilities, there are unlimited circumstances that may cause intended parents to abandon the children they commission.¹¹⁴ One situation involved an unexpected divorce.¹¹⁵ In 2007, a Japanese couple contracted with a gestational surrogate in India but unexpectedly divorced one month before the birth of Baby Manji.¹¹⁶ While the intended father still wanted to raise the baby, the intended mother no longer wanted to and refused to go to India to be with the child after she was born.¹¹⁷ Unfortunately, though the father was biologically related to his child, the baby was left stateless with the baby not having citizenship in any country for a while, because of the differing citizenship requirements between the two countries in the surrogacy context.¹¹⁸ Japan did not issue citizenship at first because they require[d] birth citizenship.¹¹⁹ Though the baby was born in India, they did not confer Indian citizenship because their law did not allow single adoptive fathers (his status according to them) to adopt baby girls.¹²⁰ Like with Bridget, eventually, “after much legal wrangling” and citizenship issues, Baby Manji’s father was able to take her home to Japan.¹²¹

¹¹² See Richards, *supra* note 92.

¹¹³ See *supra* Part V.

¹¹⁴ See Richards, *supra* note 92.

¹¹⁵ See Richards, *supra* note 92, at 212-13.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

This case demonstrates the citizenship issues inherent in international surrogacy arrangements and why it is ideal for countries to completely address these possibilities.

D. Examples of Child Abandonment by U.S. Citizens

The following few cases discussed are examples that involve surrogacy with U.S. citizens, the country that I am proposing should adopt citizenship policy changes to address the potential abandonment, statelessness, and unadoptability of American children born abroad via international surrogacy.

In 2002, after claimed “frustration after spending thousands of dollars over many months in her pursuit of a surrogate baby”, a U.S. woman abandoned her surrogate-born son on a bench in a passport office in India.¹²² Not understanding the process properly, she tried and failed to get an Indian passport for her baby, falsely believing that he required one to leave the country, she simply left him there.¹²³ However, once the passport officials were able to locate her and helped her get the proper documentation to help bring the baby back to the USA.¹²⁴ Nevertheless, the mother left her baby, technically an American at birth,¹²⁵ alone on a bench in India out of frustration with the process to take the child home.¹²⁶ This created serious potential for the child to be completely abandoned in a foreign country without intended parents. If India did not confer citizenship to children born via Indian surrogates, as in the Bridget situation, the child could have ended up similarly unadoptable.

¹²² Jennifer A. Parks and Timothy F. Murphy, *So Not Mothers: Responsibility for Surrogate Orphans*, 44 J. MED. ETHICS 551, 552 (2018).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See *infra* Part IV.

¹²⁶ Jennifer A. Parks and Timothy F. Murphy, *So Not Mothers: Responsibility for Surrogate Orphans*, 44 J. MED. ETHICS 551, 552 (2018).

Furthermore, there was an abandonment example involving U.S. citizens due to marital issues, like in Baby Manji. “In May 2014, American actress Sherri Shepherd filed for divorce from her husband, Lamar Sally. Prior to the divorce filing, Shepherd and Sally had entered into a commercial surrogacy contract with a Pennsylvania woman who gestated a child for the couple, using Lamar Sally’s sperm and donor ova. During divorce proceedings, Shepherd attempted to void the surrogacy contract, effectively denying responsibility for the gestating child. Any nullification of the contract would have left the surrogate as the child’s legally recognized mother, the prior contractual agreement notwithstanding. When a lower court ruled against the attempt to nullify the contact, Shepherd turned to the appeals court in Pennsylvania. That court refused to hear her case and required her, as the boy’s legal mother, to provide financial support. Shepherd has not seen the child since his birth and has refused any contact with him.”¹²⁷

This case demonstrates that the Baby Manji abandonment case involving unforeseen circumstances, like marital problems, occurs with U.S. citizens as well.

IV. HOW THE U.S. IS RESPONSIBLE FOR AMERICAN AND HOW THE CITIZENSHIP PROCESS CREATES THE POTENTIAL FOR CHILD ABANDONMENT IN THE INTERNATIONAL SURROGACY CONTEXT

In this section, I will explain why the U.S. should be responsible for children abandoned by U.S. citizens via international surrogacy to address their potential abandonment, statelessness, and unadoptability like Bridget. First, I will discuss the U.S.’s responsibility over abandoned American children and how that can be applied to children abandoned abroad as well. Second, I

¹²⁷ *Id.*

will explain how U.S. citizens must pick their children up from the country they are born in and affirmatively apply for the U.S. citizenship they are usually entitled to “at birth.”

A. The U.S.’s Legal and Moral Responsibility Over American Children

American children are under the responsibility of the U.S. when they are abandoned or neglected by U.S. citizens.¹²⁸ This is governed by state child abandonment laws, with varying consequences to the U.S. citizens who are their parents. Oregon considers abandonment of a child a Class C *felony* when a person deserts their child under 15 years of age with the intent to abandon them.¹²⁹ Since a Class C felony in Oregon can result in a maximum of five years in prison, a fine of as much as \$125,000, or both,¹³⁰ the statute places significant consequences on the abandoning parent. Other states, like Alabama, consider abandonment of a child a Class A *misdemeanor* when a person deserts their child less than 18 years old in any place with intent wholly to abandon it.¹³¹ Though not as severe as Oregon’s felony treatment, a Class A misdemeanor in Alabama can result in a maximum of one year jail sentence and a fine of as much as \$6,000.¹³² Just as state law governs American surrogacy arrangements,¹³³ the state where the parent resides determines the consequences attributable to abandoning their American children.

¹²⁸ “Every state has made some statutory provision whereby the state can step in to protect the health, safety, and well-being of its infant citizens from endangerment by abusive, neglectful, or simply unavailable parents, whether by temporarily removing an endangered child ... and then returning the child to its parents, ... or by permanently removing the child from the environment and making that child available for a adoption by another family.” Wanda E. Wakefield, Annotation, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R.4th774.

¹²⁹ OR. REV. STAT. ANN. § 163.535 (Westlaw through 2022 Sess.).

¹³⁰ OR. REV. STAT. ANN. §§ 161.605, 161.625 (Westlaw through 2022 Sess.).

¹³¹ See ALA. CODE § 13A-13-5 (Westlaw through 2022 Sess.).

¹³² ALA. CODE §§ 13A-5-2, 13A-5-7, 13A-5-12 (Westlaw through Act 2022-442).

¹³³ See Guzman, *supra* note 48 at 627.

Once a child is abandoned, there is potential for termination of parental rights, surrendering the child to the state.¹³⁴ This is usually done based on the best interest of the child, however, the parent can often voluntarily sign away their parental rights.¹³⁵ In Oregon, child abandonment is statutory grounds for termination of parental rights,¹³⁶ however, the court is only authorized to order termination of a parent's rights to a child if its in the best interest of the ward.¹³⁷ The parent may voluntarily relinquish parental rights at any time,¹³⁸ however, the relinquishment is revocable until the child is physically placed in adoptive placement.¹³⁹ When considering the termination of parental rights, Alabama courts also consider the best interests of the child, and consider abandonment as one of several potential grounds for termination.¹⁴⁰ Alabama's goal in these cases is the best interest of the child, including returning the child to their parents or placing them for adoption with a foster parent if abandoned.¹⁴¹

Though U.S. citizen child abandonment usually happens within the domestic context, the U.S. is still responsible for American children when they are abroad. The U.S. State Department's Foreign Affairs Manual discusses the policy related to minor American citizens abroad.¹⁴² The manual dictates that "a U.S. citizen/national minor who is found in a foreign country without a parent or guardian generally should be returned to the United States, barring extenuating circumstances such as an extended family or appropriate safe haven organization in

¹³⁴ See comparison of Oregon law to Alabama law in the following notes.

¹³⁵ *Id.*

¹³⁶ See OR. REV. STAT. § 419B.508 (LEXIS through 2022 legislation).

¹³⁷ OR. REV. STAT. § 419B.500 (LEXIS through 2022 legislation).

¹³⁸ OR. REV. STAT. § 418.270 (LEXIS through 2022 legislation).

¹³⁹ OR. REV. STAT. § 418.270(4) (LEXIS through 2022 legislation).

¹⁴⁰ ALA. CODE § 12-15-319(a) (LEXIS through Acts 2022, No. 22-65).

¹⁴¹ ALA. CODE § 12-15-315 (LEXIS through Acts 2022, No. 22-65).

¹⁴² 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1761.1 (2021), <https://fam.state.gov/fam/07fam/07fam1760.html> (specifically, Section 7 FAM 1760 Runaways, Abandoned Children, and Other Unaccompanied Minors).

the host country.”¹⁴³ Furthermore, the manual notes: “We can and do work with local authorities in foreign countries to attempt to ensure the protection of U.S. citizen/national minors abroad. For young children, it is usually a relatively simple matter.”¹⁴⁴

If non-parents can apply for U.S. citizenship on behalf of the child, then as American children, the U.S. will have the authority and ability to retrieve that child and bring them to the U.S., and therefore under the care of the United States system rather than potentially abandoned, stateless, and unadoptable.¹⁴⁵ Because parents who decide to leave their child behind will presumably not apply for their child’s U.S. citizenship,¹⁴⁶ the child is not yet considered an American child and the state child abandonment laws do not apply to them. The process must be adjusted to allow the U.S. to intervene when necessary, rather than allowing the child to be potentially stateless, abandoned, and unadoptable like Bridget and other children like her. Furthermore, because the intended parents who abandon their child abroad will presumably choose to voluntarily surrender their parental rights, the child will be immediately up for adoption. The process for citizenship will be described next, demonstrating how the full process leaves essentially American children in the position to be abandoned.

B. U.S. Citizenship Process

Citizenship is typically the first step in retrieving a child born via surrogacy abroad and bringing them to the U.S.¹⁴⁷ The process of applying for citizenship for these children is left

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See infra* Part VI.

¹⁴⁶ Otherwise, they’d be opening themselves up to the consequences of abandoning their child in the state where they reside. It would also require them to travel to the country of birth, sign all the paperwork, and then leave without the child. It seems likely that people would not go to such lengths while abandoning their child.

¹⁴⁷ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, *supra* note 91.

entirely up to the intended parents. In order to retrieve their child born via a foreign surrogate mother, the U.S. citizen parent must travel to the U.S. embassy or consulate in the country where the child was born and affirmatively apply for a Consular Report of Birth Abroad of an American Citizen (CRBA) or a U.S. passport.¹⁴⁸ These documents require that the child has U.S. citizenship.¹⁴⁹ The parent must also establish a genetic connection with the child, with DNA testing as the best option.¹⁵⁰ Children without a genetic or gestational connection to a U.S. citizen or spouse of a U.S. citizen will not be considered to have “automatically acquired citizenship at birth” under INA Sections 1401 and 1409.¹⁵¹

Children born via surrogacy are usually eligible for citizenship “at birth.”¹⁵² However, the process is not automatic since the intended parents must first go to the country where the child was born and apply for their U.S. citizenship.¹⁵³ Because they can simply choose not to apply for citizenship of the children they intentionally abandon, those children are left in the hands of the country they were born, which varies greatly, putting the children at risk.¹⁵⁴ The full citizenship and process will be described next.

Children born on U.S. soil automatically have U.S. citizenship, even if they are biologically related to foreign commissioning parents.¹⁵⁵ This means that they are given the full care and responsibility of the U.S. government if they are abandoned there.¹⁵⁶ Things are more

¹⁴⁸ See *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, TRAVEL.STATE.GOV (last visited May 2, 2022), <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; 8 U.S.C.A. § 1401 (West); 8 U.S.C.A. § 1409 (West).

¹⁵² See *supra* note 148.

¹⁵³ *Id.*

¹⁵⁴ See *infra* Part II.

¹⁵⁵ 8 U.S.C.A. § 1401(a) (West) (“The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States...”).

¹⁵⁶ Their specific circumstances will depend on the state where they are born.

complicated for children born outside of the U.S. but intended for U.S. citizens. Though it's possible and common for these children born abroad to gain U.S. citizenship, it is not automatic and requires certain actions taken by the U.S. citizen parents.¹⁵⁷ Children born abroad acquire U.S. citizenship at birth if the parent or parents of the child meet the conditions prescribed in the Immigration and Nationality Act ("INA").¹⁵⁸ The INA has been interpreted to mean that, under INA 301 or 309 for the child born via surrogacy abroad "acquire[s] U.S. citizenship at birth" when a U.S. citizen parent is the genetic mother or father, or the genetic parent is married to a U.S. citizen parent.¹⁵⁹ Prior to 2021, the "USCIS required that the child's genetic parents (or the legal gestational parent and one of the genetic parents) to be married to one another for a child to be considered born in wedlock" and eligible to acquire U.S. citizenship at birth.¹⁶⁰ The policy was adjusted to "ensure fair access and support for all families"¹⁶¹ following a couple controversial cases where surrogates born abroad to married same-sex couples were denied U.S. citizenship at birth.¹⁶² The children were eventually granted U.S. citizenship by birth because their parents were married at the time of their birth and therefore the State Department misapplied the law.¹⁶³ Nevertheless, the U.S. changed the policy to make the process simpler and fairer. If parents decide to abandon these children, they are still left potentially stateless, abandoned, and unadoptable despite any genetic connection to a U.S. citizen.

¹⁵⁷ See *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, *supra* note 148.

¹⁵⁸ *Id.*

¹⁵⁹ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, *supra* note 91 (citing 8 U.S.C.A. § 1401 [301] (West); 8 U.S.C.A. § 1409 [309] (West)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *Diaz*, *supra* note 39.

¹⁶³ *Id.*

Changing the process slightly, to allow other parties such as surrogacy clinics, temporary legal guardians, and even surrogates¹⁶⁴ will make it possible for these children to gain the U.S. citizenship they are “automatically” entitled to at birth. Rather than creating an all new process, this change would simply reflect the realities of the situation and give children what they are already entitled to have: U.S. citizenship and the protection of the U.S. when their parents are negligent. It would also require eliminating the genetic component of the citizenship requirement, further increasing the fairness for all families that the U.S. has proposed as a goal¹⁶⁵ since not all international surrogacy arrangements involve a genetic connection to one of the intended parents.

V. SOLUTIONS CONSIDERED AND WHY THE U.S. MUST STILL CHANGE THE CITIZENSHIP PROCESS FOR AMERICAN CHILDREN ABANDONED ABROAD VIA INTERNATIONAL SURROGACY

The issue with abandonment of these children have been spoken about many times, with different scholars and countries reaching different conclusions. I will describe a few of them and explain despite the efficacy of these suggestions, the U.S. must still change their citizenship process for children born to U.S. intended parents.

A. Banning Surrogacy?

Whether surrogacy should be banned has been considered many times. For some countries, issues like the abandonment of children born via surrogacy has caused them to ban surrogacy in some form or another.¹⁶⁶ When Baby Gammy was abandoned in Thailand by her

¹⁶⁴ See *infra* Part VI.

¹⁶⁵ See Diaz, *supra* note 39.

¹⁶⁶ See Surrogacy in Australia, *supra* note 80.

Australian biological parents, Thailand decided to ban surrogacy altogether.¹⁶⁷ Furthermore, countries that played very large roles in the commercial surrogacy market, India and Nepal, have banned surrogacy.¹⁶⁸ Therefore, it is necessary to address whether an obvious solution to this matter would be to ban surrogacy within the U.S. for the very same reasons.

However, the banning of surrogacy within India, Thailand, and Nepal have not actually slowed down the international surrogacy market.¹⁶⁹ Instead, the practice moved in drove to Ukraine,¹⁷⁰ and now that there is a war, it will likely simply move to another developing country where there is more opportunities for exploitation of surrogates and children.¹⁷¹ Furthermore the several scholars argue that the banning of commercial surrogacy, such as in India, will promote a black market,¹⁷² with some experts concerned that a surrogacy black market will simply continue unregulated with worse conditions than prior to the ban.¹⁷³

Furthermore, the banning of surrogacy will have other impacts: taking away opportunities for infertile and queer couples seeking to build their families.¹⁷⁴ It will also take away money from the surrogates who are debatably benefiting from surrogacy.¹⁷⁵ Though surrogacy between foreign surrogates and U.S. citizens is much cheaper, it's still a lot of money for the places where

¹⁶⁷ See Phillip, *supra* note 79.

¹⁶⁸ See Lamberton, *supra* note 19.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Virginie Rozee and Sayeed Unisa, *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India before the new law of 2018*, 20 BMC WOMEN'S HEALTH 234 (2020) (citing Sarojini Nadimpally and Sneha Banerjee and Deepa Venkatachalam, *Commercial Surrogacy: A Contested Terrain in the Realm of Rights and Justice*, 18 ASIAN PACIFIC RESOURCE AND RESEARCH CENTRE FOR WOMEN (2016); Sharmila Rudrappa, *Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002-2015*, SAGE JOURNALS (Nov. 17, 2017), <https://doi.org/10.1177/0896920517740616>).

¹⁷³ Neha T. Bargri-Anand, *A Controversial Ban on Commercial Surrogacy Could Leave Women in India With Even Fewer Choices*, TIME (June 30, 2021), <https://time.com/6075971/commercial-surrogacy-ban-india/>.

¹⁷⁴ In 2018, same-sex couples represented approximately 40% of surrogacy clients. See Ray, *supra* note 62.

¹⁷⁵ See Broomfield, *supra* note 77 at 132.

they live.¹⁷⁶ For example, Ukraine’s popular surrogacy company, BioTexCom, offered at least one Ukrainian surrogate over USD \$11,000 for one pregnancy, “a sum more than three times the average yearly salary in Ukraine of approximately USD \$3,000.”¹⁷⁷ Banning international surrogacy involving U.S. citizens will not only take away those sources of income, but also have implications on the autonomy of surrogates and their rights to work.¹⁷⁸ Since other professions have autonomy to accept jobs that may impact health, at least one scholar argues that regulation rather than banning is necessary to allow women work autonomy “in a way that lessens the likelihood of a third party exploiting the women.”¹⁷⁹

Most importantly, banning international surrogacy with the U.S. is simply unlikely. Since surrogacy with U.S. citizens is governed by state law,¹⁸⁰ there is no way for the United States to ban surrogacy entirely without each state individually deciding to do so. Since states have not even adopted a uniform set of rules, or even a uniform adoption of those rules,¹⁸¹ it is highly unlikely that the states will come to a consensus any time soon. Furthermore, the United States has already stated a position on international regulation, that seems to support the legality of surrogacy in the U.S. (noted in the ABA Report).¹⁸²

B. Policy Recommendations?

Several scholars have considered the issue of abandonment of children abroad and have suggested policy recommendations. For one, Brianne Richards argues that the answer lies within the power of surrogacy clinics: that the clinics are in the best position to resolve the

¹⁷⁶ See Roache, *supra* note 76.

¹⁷⁷ *Id.*

¹⁷⁸ See Broomfield, *supra* note 77.

¹⁷⁹ See Broomfield, *supra* note 77 at 131-132.

¹⁸⁰ See Smerdon, *supra* note 66.

¹⁸¹ See Guzman, *supra* note 71.

¹⁸² See ABA Report, *supra* note 30.

abandonment dilemma by counseling the intended parents about the possibility of disabilities or other unexpected circumstances so they can make fully informed decisions regarding surrogacy.¹⁸³ Though that is true and beneficial it doesn't change the fact that unforeseen circumstances can still lead the intended parents to abandon the children *after* initial counseling or where the disability aspect is not involved, such as changes in marriage or the frustration of the process between birth and transference of physical custody.

It's also important to note that relying on clinics alone, even if that were feasible, will not necessarily change the issue. A newer surrogacy clinic in Ukraine, Biochem has had several reports of malpractice, showing how easily surrogacy clinics can avoid responsibility.¹⁸⁴

To address these issues at their source for the sake of care of these children, the U.S. needs to make adjustments to the citizenship application process.¹⁸⁵ I will explain that in Part VI.

C. International regulation?

Some scholars have argued that international regulation is the only solution for international surrogacy issues, including the abandonment of surrogate children abroad, should be resolved by the Hague Adoption Convention, as was done for similar international adoption concerns but tailored to surrogacy issues.¹⁸⁶ In 2023, the Hague Adoption Convention is convening for their long-awaited (since 2015) final recommendations on international regulation of surrogacy,¹⁸⁷ so there is potential for the future of international regulation.

¹⁸³ See Richards, *supra* note 92 at 224-27.

¹⁸⁴ See Lamberton, *supra* note 19.

¹⁸⁵ See *infra* Part VI.

¹⁸⁶ See Lamberton, *supra* note 19.

¹⁸⁷ See The Parentage/Surrogacy Project, *supra* note 26.

Though promising, there's no guarantee that their recommendations will resolve the issue of abandoned, stateless, and potentially unadoptable American children. First, though the U.S. signed the 1993 Hague Convention in 1994, the country did not ratify the Convention until 2007, putting it into effect in 2008.¹⁸⁸ Therefore, even if the recommendations are immediately adopted and signed by most other nations, the proposed recommendations could potentially go without force in the U.S. for many years. This is especially true considering the ABA Model Report. Anticipating the HCCH's eventual final recommendations on the international regulation of commercial surrogacy, the ABA Report urged the United States Department of State to negotiate for lesser regulation, with the Convention focusing more on "conflict of laws and comity problems inherent in international citizenship and parentage proceedings."¹⁸⁹ This suggests that the United States will be unlikely to accept all recommendations from the Hague Convention. Therefore, even with the prospect of international regulations, there's no guarantee and the U.S. should simply take an active role where they can, in citizenship law.

D. U.S. Immigration Law?

Another avenue of action against this issue is through immigration law, changing the U.S.'s citizenship process in general. The U.S. has already addressed the matter in a couple ways by making it easier to confer citizenship for children born to unwed U.S. intended parents, but does not address abandoned children's issues.¹⁹⁰ Fortunately, since the U.S. has recently altered the citizenship laws to address ART and surrogacy,¹⁹¹ they can make another change and not

¹⁸⁸ USA Joins 1993 Hague Intercountry Adoption Convention, HHCH (last visited May 2, 2022), <https://www.hcch.net/en/news-archive/details/?varevent=141>.

¹⁸⁹ ABA Report, *supra* note 30.

¹⁹⁰ USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology, *supra* note 91.

¹⁹¹ *Id.*

have to reconfigure how surrogacy is regulated domestically. Furthermore, the ABA report's focus on citizenship matters¹⁹² demonstrates the U.S.'s willingness to potentially address issues of abandonment, statelessness, and un-adoptability.

VI. PROPOSAL

In this section, I will detail my proposal to adjust the U.S. citizenship laws to prevent the potential abandonment, statelessness, and unadoptability like Bridget's case explained throughout this paper.

I propose that the U.S. adjust its citizenship laws to allow parties other than the intended parents to file for U.S. citizenship on behalf of these children. These "other parties" would be parties who are in physical custody of the child born via surrogacy abroad, including surrogacy clinics, U.S. embassies, surrogates, or orphanages. Additionally, I suggest that the U.S. remove the genetic component to the conferral of U.S. citizenship "at birth" to address the fact that not all international surrogacy arrangements involve a biologically related intended parents.

First, I will describe the three ways this proposal will alleviate the potential abandonment, statelessness, and unadoptability for children abandoned via international surrogacy involving U.S. citizens. The proposed changes to U.S. citizenship laws will resolve the dilemma in three ways. First, it will allow for the retrieval of these abandoned children, as explained in Part V. Second, it will allow the U.S. to put the child up for adoption in the U.S., removing the possibility that they will be stateless and unadoptable like Bridget. Third, it will create consequences for abandoning these children, since once the children have U.S. citizenship,

¹⁹² The ABA urges, "That any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstances of their birth, will be certain." See ABA Report, *supra* note 30.

child state abandonment laws apply to them, as explained in Part IV. The consequences of child abandonment will hopefully deter U.S. citizens from abandoning these children.

A. The Proposal Works in Three Ways:

1. Retrieval of Abandoned Children.

First, adjusting the citizenship process, per my proposal will allow for the retrieval of these abandoned children, as explained in Part V.

Children born on U.S. soil automatically have U.S. citizenship, even if they are biologically related to foreign commissioning parents.¹⁹³ This means that they are given the full care and responsibility of the U.S. government if they are abandoned there.¹⁹⁴ Things are more complicated for children born outside of the U.S. but intended for U.S. citizens. Though it's possible and common for these children born abroad to gain U.S. citizenship, it is not automatic and requires certain actions taken by the U.S. citizen parents.¹⁹⁵ Children born abroad acquire U.S. citizenship at birth if the parent or parents of the child meet the conditions prescribed in the Immigration and Nationality Act ("INA").¹⁹⁶ The INA has been interpreted to mean that, under INA 301 or 309 for the child born via surrogacy abroad "acquire[s] U.S. citizenship at birth" when a U.S. citizen parent is the genetic mother or father, or the genetic parent is married to a U.S. citizen parent.¹⁹⁷ Prior to 2021, the "USCIS required that the child's genetic parents (or the legal gestational parent and one of the genetic parents) to be married to one another for a child to

¹⁹³ See *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, *supra* note 148; 8 U.S.C.A. § 1401 (West); 8 U.S.C.A. § 1409 (West).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* 8 U.S.C.A. § 1401 (West); 8 U.S.C.A. § 1409 (West).

¹⁹⁷ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, *supra* note 91.

be considered born in wedlock” and eligible to acquire U.S. citizenship at birth.¹⁹⁸ The policy was adjusted to “ensure fair access and support for all families”¹⁹⁹ following a couple controversial cases where surrogates born abroad to married same-sex couples were denied U.S. citizenship at birth.²⁰⁰ The children were eventually granted U.S. citizenship by birth because their parents were married at the time of their birth and therefore the State Department misapplied the law.²⁰¹ Nevertheless, the U.S. changed the policy to make the process simpler and fairer. If parents decide to abandon these children, they are still left potentially stateless, abandoned, and unadoptable despite any genetic connection to a U.S. citizen.

Changing the process slightly, to allow other parties such as surrogacy clinics, temporary legal guardians, and even surrogates will make it possible for these children to gain the U.S. citizenship they are “automatically” entitled to at birth. Rather than creating an all new process, this change would simply reflect the realities of the situation and give children what they are already entitled to have: U.S. citizenship and the protection of the U.S. when their parents are negligent. It would also require eliminating the genetic component of the citizenship requirement, further increasing the fairness for all families that the U.S. has proposed as a goal²⁰² since not all international surrogacy arrangements involve a genetic connection to one of the intended parents. Changing this process will allow the U.S. to retrieve children from abroad if they have been abandoned there by their U.S. citizen parents.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See Diaz, supra* note 39.

²⁰¹ *Id.*

²⁰² *Id.*

2. Care

Second, my proposal will allow the U.S. to put the child up for adoption in the U.S., removing the possibility that they will be stateless and unadoptable like Bridget, as discussed in Part IV.

Citizenship is typically the first step in retrieving a child born via surrogacy abroad and bringing them to the U.S.²⁰³ The process of applying for citizenship for these children is left entirely up to the intended parents. In order to retrieve their child born via a foreign surrogate mother, the U.S. citizen parent must travel to the U.S. embassy or consulate in the country where the child was born and affirmatively apply for a Consular Report of Birth Abroad of an American Citizen (CRBA) or a U.S. passport.²⁰⁴ These documents require that the child has U.S. citizenship.²⁰⁵ The parent must also establish a genetic connection with the child, with DNA testing as the best option.²⁰⁶ Children without a genetic or gestational connection to a U.S. citizen or spouse of a U.S. citizen will not be considered to have “automatically acquired citizenship at birth” under INA Sections 1401 and 1409.²⁰⁷

Children born via surrogacy are usually eligible for citizenship “at birth.”²⁰⁸ However, the process is not automatic since the intended parents must first go to the country where the child was born and apply for their U.S. citizenship.²⁰⁹ Because they can simply choose not to apply for citizenship of the children they intentionally abandon, those children are left in the

²⁰³ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, *supra* note 91.

²⁰⁴ *See Assisted Reproductive Technology (ART) and Surrogacy Abroad*, *supra* note 148.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*; 8 U.S.C.A. § 1401 (West); 8 U.S.C.A. § 1409 (West).

²⁰⁸ *See supra* note 148.

²⁰⁹ *Id.*

hands of the country they were born, which varies greatly, putting the children at risk.²¹⁰ The full citizenship and process will be described next.

Children born on U.S. soil automatically have U.S. citizenship, even if they are biologically related to foreign commissioning parents.²¹¹ This means that they are given the full care and responsibility of the U.S. government if they are abandoned there.²¹² Things are more complicated for children born outside of the U.S. but intended for U.S. citizens. Though it's possible and common for these children born abroad to gain U.S. citizenship, it is not automatic and requires certain actions taken by the U.S. citizen parents.²¹³ Children born abroad acquire U.S. citizenship at birth if the parent or parents of the child meet the conditions prescribed in the Immigration and Nationality Act ("INA").²¹⁴ The INA has been interpreted to mean that, under INA 301 or 309 for the child born via surrogacy abroad "acquire[s] U.S. citizenship at birth" when a U.S. citizen parent is the genetic mother or father, or the genetic parent is married to a U.S. citizen parent.²¹⁵ Prior to 2021, the "USCIS required that the child's genetic parents (or the legal gestational parent and one of the genetic parents) to be married to one another for a child to be considered born in wedlock" and eligible to acquire U.S. citizenship at birth.²¹⁶ The policy was adjusted to "ensure fair access and support for all families"²¹⁷ following a couple controversial cases where surrogates born abroad to married same-sex couples were denied U.S. citizenship at birth.²¹⁸ The children were eventually granted U.S. citizenship by birth because

²¹⁰ See *infra* Part II.

²¹¹ See *supra* note 148.

²¹² Their specific circumstances will depend on the state where they are born.

²¹³ See *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, *supra* note 148.

²¹⁴ *Id.*

²¹⁵ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, *supra* note 91 (citing 8 U.S.C.A. § 1401 [301] (West); 8 U.S.C.A. § 1409 [309] (West)).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *Diaz*, *supra* note 39.

their parents were married at the time of their birth and therefore the State Department misapplied the law.²¹⁹ Nevertheless, the U.S. changed the policy to make the process simpler and fairer. If parents decide to abandon these children, they are still left potentially stateless, abandoned, and unadoptable despite any genetic connection to a U.S. citizen.

Changing the process slightly, to allow other parties such as surrogacy clinics, temporary legal guardians, and even surrogates will make it possible for these children to gain the U.S. citizenship they are “automatically” entitled to at birth. Rather than creating an all-new process, this change would simply reflect the realities of the situation and give children what they are already entitled to have: U.S. citizenship and the protection of the U.S. when their parents are negligent. It would also require eliminating the genetic component of the citizenship requirement, further increasing the fairness for all families that the U.S. has proposed as a goal²²⁰ since not all international surrogacy arrangements involve a genetic connection to one of the intended parents. Furthermore, changing the citizenship process will allow children to be put up for adoption once brought to the United States.

3. Deterrence

Third, my proposal (above) will create consequences for abandoning these children, since once the children have U.S. citizenship, child state abandonment laws apply to them, as explained in Part IV. The consequences of child abandonment under U.S. state law will hopefully deter U.S. citizens from abandoning these children.

²¹⁹ See Diaz, *supra* note 39.

²²⁰

American children are under the responsibility of the U.S. when they are abandoned or neglected by U.S. citizens.²²¹ This is governed by state child abandonment laws, with varying consequences to the U.S. citizens who are their parents. Oregon considers abandonment of a child a Class C felony when a person deserts their child under 15 years of age with the intent to abandon them.²²² Since a Class C felony in Oregon can result in a maximum of five years in prison, a fine of as much as \$125,000, or both,²²³ the statute places significant consequences on the abandoning parent. Other states, like Alabama, consider abandonment of a child a Class A misdemeanor when a person deserts their child less than 18 years old in any place with intent wholly to abandon it.²²⁴ Though not as severe as Oregon's felony treatment, a Class A misdemeanor in Alabama can result in a maximum of one year jail sentence and a fine of as much as \$6,000.²²⁵ Just as state law governs American surrogacy arrangements,²²⁶ the state where the parent resides determines the consequences attributable to abandoning their American children.

Once a child is abandoned, there is potential for termination of parental rights, surrendering the child to the state.²²⁷ This is usually done based on the best interest of the child, however, the parent can often voluntarily sign away their parental rights.²²⁸ In Oregon, child abandonment is statutory grounds for termination of parental rights,²²⁹ however, the court is only authorized to order termination of a parent's rights to a child if it's in the best interest of the

²²¹ Wakefield, *supra* note 128.

²²² OR. REV. STAT. ANN. § 163.535 (Westlaw through 2022 Sess.).

²²³ OR. REV. STAT. ANN. §§ 161.605, 161.625 (Westlaw through 2022 Sess.).

²²⁴ See ALA. CODE § 13A-13-5 (Westlaw through 2022 Sess.).

²²⁵ ALA. CODE §§ 13A-5-2, 13A-5-7, 13A-5-12 (Westlaw through Act 2022-442).

²²⁶ See Guzman, *supra* note 48 at 627.

²²⁷ See comparison of Oregon law to Alabama law in the following notes.

²²⁸ *Id.*

²²⁹ See OR. REV. STAT. § 419B.508 (LEXIS through 2022 legislation).

ward.²³⁰ The parent may voluntarily relinquish parental rights at any time,²³¹ however, the relinquishment is revocable until the child is physically placed in adoptive placement.²³² When considering the termination of parental rights, Alabama courts also consider the best interests of the child, and consider abandonment as one of several potential grounds for termination.²³³ Alabama's goal in these cases is the best interest of the child, including returning the child to their parents or placing them for adoption with a foster parent if abandoned.²³⁴

Though U.S. citizen child abandonment usually happens within the domestic context, the U.S. is still responsible for American children when they are abroad. The U.S. State Department's Foreign Affairs Manual discusses the policy related to minor American citizens abroad.²³⁵ The manual dictates that "a U.S. citizen/national minor who is found in a foreign country without a parent or guardian generally should be returned to the United States, barring extenuating circumstances such as an extended family or appropriate safe haven organization in the host country."²³⁶ Furthermore, the manual notes: "We can and do work with local authorities in foreign countries to attempt to ensure the protection of U.S. citizen/national minors abroad. For young children, it is usually a relatively simple matter."²³⁷

If non-parents can apply for U.S. citizenship on behalf of the child, then as American children, the U.S. will have the authority and ability to retrieve that child and bring them to the U.S., and therefore under the care of the United States system rather than potentially abandoned,

²³⁰ OR. REV. STAT. § 419B.500 (LEXIS through 2022 legislation).

²³¹ OR. REV. STAT. § 418.270 (LEXIS through 2022 legislation).

²³² OR. REV. STAT. § 418.270(4) (LEXIS through 2022 legislation).

²³³ ALA. CODE § 12-15-319(a) (LEXIS through Acts 2022, No. 22-65).

²³⁴ ALA. CODE § 12-15-315 (LEXIS through Acts 2022, No. 22-65).

²³⁵ 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1761.1 (2021), <https://fam.state.gov/fam/07fam/07fam1760.html> (specifically, Section 7 FAM 1760 Runaways, Abandoned Children, and Other Unaccompanied Minors).

²³⁶ *Id.*

²³⁷ *Id.*

stateless, and unadoptable.²³⁸ Because parents who decide to leave their child behind will presumably not apply for their child's U.S. citizenship, the child is not yet considered an American child and the state child abandonment laws do not apply to them. The process must be adjusted to allow the U.S. to intervene when necessary, rather than allowing the child to be potentially stateless, abandoned, and unadoptable like Bridget and other children like her. Furthermore, because the intended parents who abandon their child abroad will presumably choose to voluntarily surrender their parental rights, the child will be immediately up for adoption.

B. Counterarguments and Rebuttals

In this section, I consider and address counterarguments to my proposal to adjust the U.S. citizenship process for American children born via international surrogacy. First, the potential unintended consequences of my proposal to adjust the U.S. citizenship process for American children born via international surrogacy. Second, the difficulty in having the U.S. change its citizenship laws to meet my proposal. Third, the potential redundancy of my proposal when the HCCH releases its 2023 recommendations for the global regulation of international surrogacy.

1. Unintended Consequences

First, the potential unintended consequences of my proposal to adjust the U.S. citizenship process for American children born via international surrogacy. By allowing automatic citizenship to even those children not genetically related to the U.S. citizen parents, the U.S. would be opening up the possibility of conferring citizenship automatically to non-genetic

²³⁸ See *infra* Part VI.

children outside of the surrogacy context. This would have impact adoption laws. It may even spark a conversation about citizenship for alien children.

However, though the U.S. has not done something like this before, they have shown willingness to adjust the citizenship process to change the unwed status, something they had not done previously.²³⁹ Furthermore, the U.S. can create a very specific exception here for surrogacy arrangements so the change does not impact every other citizenship matter.

2. Difficulty in Getting the U.S. to Actually Change the Law.

Second, I address the difficulty in having the U.S. change its citizenship laws to meet my proposal. The likelihood of the U.S. actually adopting my proposal is unclear. However, since surrogacy within the U.S. is governed by state law, adjusting the citizenship process to allow other parties to apply for citizenship on behalf of children born via international surrogacy, and removing the genetic relationship component to “automatic” citizenship, is one of the only things the U.S. can do to address this issue on a national level. The state laws have not stopped the problems with abandoning surrogate children, but hopefully this will help.

Furthermore, as mentioned several times, the U.S. has shown willingness to change the citizenship process to address surrogacy dilemmas. Since they were willing before, hopefully they will be willing to take a few more steps in that same direction.

3. Hague Conference’s 2023 Recommendations

²³⁹ *USCIS Removes Barriers to U.S. Citizenship for Children Born Abroad Through Assisted Reproductive Technology*, *supra* note 91.

Third, the potential redundancy of my proposal when the HCCH releases its 2023 recommendations for the global regulation of international surrogacy.²⁴⁰ Since the HCCH plans to release their report on international surrogacy in 2023, we can expect some suggestions on how to deal with the issue of potentially abandoned, stateless, and unadoptable children born via international surrogacy. Therefore, it may be best to consider my proposal after I can review those recommendations. However, there is no guarantee that the U.S. will even adopt the recommendations so my approach will cover those issues regardless. Furthermore, if the recommendations include good solutions for the problem addressed in this paper, I will consider and potentially add that on to my proposal later on. Until then, my proposal stands on all the research I could find before the 2023 HCCH meeting.

VII. CONCLUSION

Though the abandonment of children will be benefitted by better counseling for people looking to have children via surrogacy, the U.S. must make affirmative action to resolve the issue that leaves children stateless, abandoned, and potentially unadoptable overseas. Just like they are responsible for all American children, born on U.S. soil or to U.S. citizens, they should be responsible for the care of children born abroad to U.S. citizens. The problem stems from the fact that if the U.S. parents decide not to bring their kid back to the U.S. with them, if they choose not to apply for their citizenship, the U.S. has no ability to take control of the child and bring them into U.S. care by retrieving them. If the child was able to attain citizenship via methods outside of their parents, e.g. the surrogacy clinics or officials at embassies, then the U.S. would be able to pick up the children and bring them to the U.S., just as any other U.S. child

²⁴⁰ See The Parentage/Surrogacy Project, *supra* note 26.

abandoned abroad. This would allow the children to be put into the care of the state in any way that fits the child's best interests. Furthermore, allowing for someone other than the parents to apply for the child's citizenship will allow the states to apply child abandonment laws, and the consequences, onto the parents, and potentially get them banned from future surrogacy arrangements, rather than the current system which allowed an American couple to get another surrogate contract even though they already abandoned one child they commissioned.

Since the U.S. has the ability to change its citizenship laws, they can resolve important international surrogacy issues even though the federal government cannot currently regulate surrogacy. Since the U.S. has already shown some commitment to addressing the international surrogacy issue, (by making it easier to confer citizenship onto children born via ART out of wedlock), they can do the same and make it possible for other parties to apply for U.S. citizenship on the children's behalf.