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A, B & C V. IRELAND: THE UNBORN AND AN APPRECIATION OF THE MARGIN OF APPRECIATION

Shaun de Freitas and Ewelina Ochab

ABSTRACT

On December 16, 2010, the Grand Chamber of the European Court of Human Rights (“ECtHR”) in A, B & C v. Ireland (“ABC”) found that it was not for the Court to decide on the validity of Ireland’s legislation which prohibited abortions except in instances where the pregnant woman’s life is threatened. According to ABC, the ‘margin of appreciation’ allows the Court to not take a specific view on matters related to the termination of the unborn. As expected, the ABC ruling received criticism from supporters of a more unlimited choice, allowing for pregnant women to decide to have an abortion. This article is an appraisement of ABC’s ‘broad’ application of the ‘margin of appreciation,’ and specifically argues that, against the background of differences and complexities related to the status of the unborn, the ECtHR needs to follow a strictly cautionary approach. In this also lies an argument that regional human rights courts should take a cautionary approach when dealing with morally inclined human rights matters in general.

1. Introduction

A, B & C v. Ireland (“ABC”)1 arose from an application lodged on July 15, 2005 to the European Court of Human Rights (“ECtHR”), which was directly referred to the Grand Chambers for a hearing that commenced December 9, 2009. The third applicant,2 C, complained that the restriction

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1. The authors would like to thank Paul Coleman, Ian Lee and Andrew Legg for their comments on earlier drafts. Shaun de Freitas BProc, LLB, LLM, Associate Professor, Faculty of Law, University of the Free State. Ewelina Ochab German-Polish Law School Diploma (Humboldt, Berlin), LLB (University of Kent), Post-graduate Diploma (City Law School, London), Barrister, Inner Temple Member, Blackstone Legal Scholar.

2. The third applicant, before commencing chemotherapy treatment for cancer, asked her doctor about the implications of her illness relating to her desire to have children. The doctor advised her that it was not possible to predict the effect pregnancy would have on the cancer, but, if she did become pregnant, it would be dangerous for the fetus if she underwent chemotherapy during the first trimester. Eventually the cancer went into remission and the applicant unintentionally became pregnant. She was
on abortion and the lack of clear legal guidelines regarding the circumstances in which a woman may have an abortion to save her life infringed upon her right to life under Article 2 of the European Convention on Human Rights ("ECHR"). All three applicants, A, B, and C, complained that the restriction on abortion stigmatized and humiliated them, and risked damaging their health in breach of Article 3 of the ECHR (which deals with torture and inhuman or degrading treatment or punishment).

They further complained, in the context of Article 8 of the ECHR (regarding right to respect for family and private life), that the national law on abortion was not sufficiently clear and precise. Specifically, they argued that the Constitutional term ‘unborn’ was vague and the law’s criminal prohibition was open to different interpretations. The fact that women unaware of this fact when she underwent a series of tests, contraindicated during pregnancy, to determine her current state of health. When she discovered she was pregnant, she was unable to find a doctor willing to determine whether her life would be at risk if she continued to term or to give her clear advice as to how the fetus might have been affected by the tests she had undergone. Given the uncertainty about the risks involved, the applicant decided to have an abortion in the United Kingdom. Although her pregnancy was at a very early stage, she could not have a medical abortion (where drugs are used to induce miscarriage), because she could not find a clinic which would provide this treatment to a non-resident due to the need for follow-up. Instead, she had to wait for eight weeks until a surgical abortion was possible, which caused her emotional distress and fear for her health. On returning to Ireland after the abortion, the applicant suffered the complications of an incomplete abortion, including prolonged bleeding and infection. Id. paras. 22-26.

The first applicant, A, was unmarried, unemployed, and living in poverty at the time of the events in question. She became pregnant unintentionally, believing that her partner was infertile. She had four young children, all at that time in foster care as a result of problems the applicant had experienced as an alcoholic. During the year preceding her fifth pregnancy, the applicant had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at this critical moment in her life would jeopardize the successful reunification of her existing family, so she decided to travel to England to have an abortion. The United Kingdom National Health Service refused to carry out the operation at public expense and she had to borrow the money from a money lender for treatment in a private clinic. Her difficulty in raising the money delayed the abortion by three weeks. She had to travel to England alone, in secrecy and with no money to spare, without alerting the social workers and without missing a contact visit with her children. On her return to Ireland, she experienced pain, nausea, and bleeding for eight to nine weeks, but was afraid to seek medical advice because of the prohibition on abortion. Id. paras. 13-17. The second applicant, B, was single when she became pregnant unintentionally. She had taken emergency contraception (the "morning-after pill") the day after the unprotected intercourse, but she was advised by two different doctors that this had not only failed to prevent the pregnancy, but had also given rise to a substantial risk that it would be an ectopic pregnancy, where the fetus develops outside the uterus. The applicant was not prepared to become a single parent or to run the risks associated with an ectopic pregnancy, so she travelled to England for an abortion. On her return to Ireland she started passing blood clots and, since she was unsure whether or not this was normal and she could not seek medical advice in Ireland, she returned to the clinic in England for a check-up two weeks after the abortion. The impossibility for her to have an abortion in Ireland made the procedure unnecessarily expensive, complicated, and traumatic. Id. paras. 18-21.

Irish courts relied upon relevant court decisions and various pieces of domestic legislation, including the Constitution. A referendum was held in 1983 resulting in the adoption of a provision
could, provided they had sufficient resources, travel outside Ireland to have an abortion defeated the purpose of the restriction, and the fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive.

Additionally, the applicants viewed Ireland’s restriction on abortion as a breach of Article 14 of the ECHR (discrimination on specific grounds, such as gender), in that it had placed an excessive burden on them, as women; particularly on the first applicant, a poor woman who had more difficulty traveling. On December 16, 2010, the Grand Chamber reviewing ABC ruled that, among other things, it was not for the Court to decide the validity of Ireland’s legislation which prohibits abortions except in instances where the pregnant woman’s life is threatened. According to ABC’s holding, the margin of appreciation allows the Court to avoid taking a specific view on moral issues related to the termination of the unborn, specifically where a pregnant woman claims inhumane treatment and violation of privacy in an attempt to qualify her right to have an abortion.

As expected, ABC’s ruling received criticism from those who supported pregnant women having the choice to get an abortion to preserve their health and well-being. This article is an assessment of ABC’s ‘broad’ application of the ‘margin of appreciation,’ specifically arguing that the morality involved and the indeterminate character of the status of the unborn necessitate that the ECtHR follow a strictly cautionary approach, which is of relevance to any regional human rights court.

This article begins by emphasizing the issues raised by ABC and then provides a detailed analysis of the mechanism of the margin of appreciation. This necessitates an engagement with the ECHR, as well as the interpretation of rights it provides. Also included is a critical look at ascribing an absolutist approach to some rights, followed by discussion on the matter of ‘original intention’ of the ECHR. The idea of evolutive interpretation will also be investigated in order to caution against its dangers. This article then explores the importance of the mechanism of the margin of appreciation in resolving which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favor and 416,136 against). This Article, a self-executing provision of the Constitution not requiring legislation to give it effect, reads as follows: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

6 Id. para. 50. This Act proposed to permit abortions to be lawfully provided in Ireland at specific institutions, but only when, in the opinion of the doctor, it was necessary to prevent a real risk of loss of the woman’s life, other than self-destruction. Id. para. 52.

7 Id. para. 213.
the conflicts between the ECtHR and domestic courts, and also considers the importance of striking a balance between the national and the supranational judicial scene. Last, but not least, this article engages the question of the status of the unborn as viewed by the ECtHR and by international law in general. While the ECtHR in ABC did not deal with the status of the unborn, this article discusses the reasoning behind that decision as well as its possible consequences.

2. ABC on the unborn and the margin of appreciation

ABC emphasized that Article 8 of the ECHR cannot be interpreted to mean that pregnancy and its termination pertain uniquely to a woman’s private life. Particularly in the sense that whenever a woman is pregnant her private life becomes closely connected with the developing fetus. According to ABC, a woman’s right to respect for her private life must be weighed against other competing rights, including those of the unborn child. Thus, Article 8 cannot be interpreted as conferring a right to abortion. However, according to ABC Ireland’s prohibition of abortions, including those performed to preserve a mother’s health and/or well-being, about which the first and second applicants complained, and the third applicant alleged the inability to establish her qualification for a lawful abortion in Ireland, comes within the scope of their rights in terms of Article 8.

In its analysis (pertaining to the complaints of the first and second applicants regarding Article 8) of whether Ireland’s restrictive approach towards abortions constituted a ‘legitimate aim’, ABC stated, “[t]he impugned restrictions in the present case . . . were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum . . . .” In determining whether the interference was “necessary in a democratic society” against the background of Article 8, ABC proclaimed that “the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the ‘exact content of the requirements of morals’ in their country, but also on the necessity of a restriction intended to meet them.” The Court decided that due to the substantive sensitivity of the

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8 Id.
9 Id. para. 214.
10 Id. (ABC stated that the difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, required a separate determination of the question of whether Article 8 had been breached).
11 Id. para. 226.
12 Id. para. 232.
moral issues raised by the question of abortion, a broad margin of appreciation was to be accorded to Ireland in its determination of whether it had struck a fair balance between the protection of the right to life of the unborn, which reflected the public interest in Ireland, and the conflicting Article 8 rights of the first and second applicants.\textsuperscript{13}

\textit{ABC}, referring to \textit{Vo v. France},\textsuperscript{14} ruled that deciding when the right to life begins\textsuperscript{15} comes within the states’ margin of appreciation due to the dissensus on the issue emanating from different scientific and legal approaches and the fact that the rights claimed on behalf of the fetus and those of the mother are inextricably interconnected.\textsuperscript{16} Consequently, \textit{ABC} did not believe that Ireland’s prohibition of abortion for reasons of health and well-being, justified by the profound moral views of the Irish people regarding the nature of the life of the unborn and its protection, exceeded the margin of appreciation accorded to the Irish state. Rather, according to \textit{ABC}, Ireland’s prohibition struck a fair balance between the respect for the private lives and rights of the first and second applicants and the rights invoked on behalf of the unborn.\textsuperscript{17}

Regarding the third applicant, \textit{ABC} found that the Irish authorities had failed to comply with their positive obligation to secure an effective respect for her private life. The court reasoned that the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure meant that the third applicant was prevented from establishing whether she qualified for a lawful abortion in Ireland, in accordance with Ireland’s Constitution.\textsuperscript{18} Therefore, the Court found that there had been a violation of Article 8 of the Convention in this respect.\textsuperscript{19}

There are those of the view that:

\textsuperscript{13} \textit{Id.} para. 233.
\textsuperscript{15} And consequently, whether Article 2 of the ECHR provides protection to the unborn.
\textsuperscript{16} A, B \& C, App. No. 25579/05, Eur. Ct. H.R. para. 237 (The Court also took into account that a choice had emerged, in that women seeking abortion on these grounds could lawfully travel abroad to have the abortion performed. Furthermore, women seeking abortion could lawfully access appropriate information about abortion, as well as abortion-related health care and, in particular, post-abortion care. \textit{Id.} para. 239.).
\textsuperscript{17} \textit{Id.} para. 241.
\textsuperscript{18} \textit{Id.} para. 267.
\textsuperscript{19} \textit{Id.} para. 268.
... this decision raises questions on the ECtHR interpretation of the margin of appreciation in cases which concern a moral issue such as abortion. The doctrine should not be used as a mechanism to avoid making decisions which may be seen as controversial in the home jurisdiction. There is an emerging consensus on abortion to protect the health and well-being of the mother in Europe. Thus it is unclear why A and B’s applications did not succeed. This decision will thus only assist the medical profession in cases where the mother’s life is at risk. However where the health and well-being of the mother is at risk, and she is not in a position to voluntarily travel abroad for an abortion, she has no option but to return to the Courts.20

The view above that “an emerging consensus on abortion to protect the health and well-being of the mother in Europe” as qualification for having A and B’s applications succeed lacks a deeper analysis of the nature of the ECHR and the ECtHR.

Concerning the ECHR, Wolfgang Friedmann commented that the right of an individual to bring complaints, culminating in the compulsory jurisdiction by a supranational court, against violations of his or her rights by the state of his or her own nationality, is a derogation from the principle of absolute state sovereignty over national citizens. The extension of this revolutionary principle to a wider community is dependent on the degree to which a wider circle of nations may be drawn together by common values and purposes to an extent sufficient to make a supranational jurisdiction.21

As celebratory as this may be for the furtherance of human rights protection, this ‘revolutionary development’ that Friedmann speaks of must be approached with caution. These ‘common values and purposes’ should not imply the exclusion of more specific interpretations by member states themselves. Specifically, foundational human rights norms included in the ECHR which have been allocated a limited literal formulation, such as that pertaining to the right to life. ABC is a good example of a cautionary approach in this regard, with the margin of appreciation doctrine playing an integral role. The scope of influence of the ECtHR’s creative interpretation on other jurisdictions should not be underestimated. This article next scrutinizes the importance of the margin of appreciation and addresses potential problems that may appear when applying the margin of appreciation.


3. Interpretation, morals and the margin of appreciation

Looking at ABC, it is impossible not to refer to the issue of morality, which in turn provides us with a more nuanced understanding of the approach ABC took regarding the margin of appreciation. What makes one act moral in this specific time and place and what makes it immoral under different circumstances? ABC refused to answer this question with regard to the parameters of the termination of the unborn. The ECtHR shifted this burden to the domestic courts, arguing that they are in a better position to answer this question. In this regard, the decision of the ECtHR, and the recognition of their judicial weakness seems plausible. Such a decision also has a substantial impact on the applicability of the ECHR’s rights throughout member states.

The Preamble of the ECHR indicates that its aim is in “securing the universal and effective recognition and observance of the rights therein declared” and in achieving a “greater unity between its members,” as well as in pursuing the “maintenance and further realization of human rights and fundamental freedoms.”22 The Preamble recognizes that the ECHR’s rights will be maintained by “an effective political democracy,” as well as “by a common understanding and observance of the Human Rights upon which they depend.”23 Lastly, the Preamble refers to its member states as “countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”24 In summary, the ECHR’s Preamble does not indicate that the Convention’s rights are universal or that they should be applied univocally. Scrutinizing the wording used therein, it appears that the ECHR’s rights are more of a framework that should aim towards “greater unity,” but not absolute unity.25 The member states are “like-minded” though, not single-minded, and therefore some differences in reading and applying were foreseen from the very beginning.26 Also, the Preamble contains no reference to a common morality throughout the member states.27

23 Id.
24 Id.
25 Id.
26 Id.
27 See id.
There is an express reference to morality in the body of the ECHR as an exception to the strict adherence to the rights it contains. The structure of the ECHR indicates that morality cannot be imposed, and was not intended to be imposed, leaving this matter to the discretion of the member states. An evolutive interpretation of the ECHR, while it can attach additional meaning to the words used, cannot change the qualification of the rights or the status of the rights from a relative to an absolute understanding. Also of interest is that, as far as the issue of abortion is concerned, the text of the ECHR does not make any reference to abortion or the unborn while the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, for example, refers expressly to cases qualifying a lawful abortion by the member state.

Scrutinizing the wording of the ECHR, one has to agree that it sets out basic rights that are very vague and broad. The idea behind it was to establish some fundamental rights-frameworks that would be incorporated by the member states and adapted according to their own constitutional traditions. Through such incorporation/adaptation, the rights mentioned in the ECHR should then become the member states' own rights. Having the general framework, the member states should then adjust it to the context of each specific state by filling it with their own domestic law, traditions, and sense of morality. Such an understanding of the ECHR allows member states to analyze it in the light of their own history, traditions and morals without forcing them to apply a unitary interpretation or morality. While it must be emphasized that, generally speaking, vague and broad frameworks are at risk of potential abuse because of evolutive interpretation, in the case of so many contextually diverse member states, the vagueness is necessary, if not crucial.

Considering the construction of the ECHR's rights, the mere establishment of a breach does not imply that the member state shall

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28 See id. art. 8(2) (Article 8(2) expressly refers to morality as a limitation to the right provided in Art. 8(1): “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”), See also id., arts. 6(1), 9(2), 10(2), 11(2), and 39(3).


be liable for it. As confirmed from the ECHR’s text, the majority of its rights are not absolute. The text of the ECHR already prescribes a situation in which the rights will be limited. As far as Article 8 is concerned, subsection 2 of the Article indicates possible exceptions; for example, “in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”31 While some of those conditions are relatively easy to scrutinize via reference to legal provisions in the state, as well as the legislator’s aim behind the enactment of such legislation, it is the proportionality test that might be problematic.

The proportionality test requires the ECtHR to scrutinize and balance conflicting rights. As far as ABC was concerned, the woman’s right to respect for her private life had to be weighed against other competing rights and freedoms invoked, including those of the unborn.32 However, balancing conflicting rights often includes references to moral issues, shifting the nature of the test from a purely legal to moral. The doctrine of the margin of appreciation is of major, if not crucial, importance in order to adequately serve the ECHR rights in question. Additionally, as expressly indicated in Article 8(2), limitations might be imposed in order to protect morals.33 Consequently, in the case of ABC, the question of morality appears twice: first, whether the domestic legislation prohibiting abortion as a limitation under Article 8(2) aims to protect morals in the state and secondly, whether the rights of the applicants outweigh the rights of the unborn (status of the unborn).34

While one of the most important aims of the ECHR was to establish similar legal frameworks for all member states, the states were nevertheless not deprived of their sovereignty. The doctrine of the margin of appreciation emphasizes the importance of the sovereignty of the states, their unique characteristics, and autonomous privileges. The margin of appreciation is commonly used in cases where there is no recognized European consensus.

Additionally, the margin of appreciation is crucial in dealing with moral issues. This is because a moral view on a specific matter comprises an abstract and indeterminate dimension being elucidated

31 ECHR, supra note 22, art. 8(2).
33 ECHR, supra note 22, art. 8(2).
by, among other things, the societal background and context of the specific state. It is therefore plausible that the margin of appreciation is prescribed a higher degree of relevance for sensitive areas, such as issues related to public morals. The margin of appreciation is often compared to a design allowing flexibility in resolving disputes emerging from diversity, for example different political, cultural, and religious traditions of individual member states. Its major aim is to strike a balance between national sovereignty and international supervision.

The rationale behind this doctrine is that national courts and judges are in a better position to read and apply ECHR law in the light of their constitutional tradition or the needs of people living in that specific state. While general frameworks for the member states are useful and desirable on one hand, on the other hand a strict adherence to those frameworks, without leaving any discretion to the national courts, might neglect the needs of the very diverse ECHR member states and might consequently do more harm than good.

Of equal concern is the evolutive approach to interpretation, which often neglects the original intention of the ECHR.

The ECHR is referred to as a ‘living document’ that requires an evolutive interpretation, particularly in light of contemporary social conditions. This would also mean that the interpretation of the ECHR is temporary, constantly changing, and adjusting to the social and/or political conditions. Considering the 59 years that the ECHR has been in force, there is agreement that the interpretation of the rights of the ECHR has changed over the years and may not have reached its final interpretation yet. Consequently, the application of evolutive interpretation can cause much confusion as well as significant discrepancy, neglecting the original meaning and aim of the ECHR. Furthermore, as far as evolutive interpretation is concerned, particularly regarding the rights provided by the ECHR, “once expanded beyond the traditional core of fundamental liberties,

36 Id. at 711.
38 Bakiricioglu, supra note 35, at 711.
40 Gallagher, supra note 30, at 2.
there is no obvious reason for limiting the number and range of interests, claims and entitlements that can be dressed up as human rights.”  

ABC is highly relevant in this regard, especially considering the interpretation of the scope and applicability of Article 8. While originally Article 8 was used to protect family life (as a unit as well as relationships between family members), privacy, home and correspondence, in adherence to the textual interpretation, its spectrum has expanded substantially.  

As indicated by ABC, Article 8 does indeed include the reproductive rights of women, yet there is no emphasis on the ‘meaning in practice’ of the reproductive rights of women. While it could be argued that women should have the right to decide whether to have a child or when to have a child, that was not ABC’s underlying issue. The reproductive rights of women referred to in ABC were more far-reaching and concerned the right to abortion. The Court shifted the public focus from the issue of abortion to the decision-making rights of women without clarifying that the issue in ABC included the right to abort a pregnancy as part of reproductive rights.

There is a substantial difference between merely deciding if and when to become pregnant and whether, if already pregnant, to continue the pregnancy. Considering the current state of the interpretation of the ECHR’s rights as applied in ABC, the Right to Private Life gives a right not only to decide ‘if and when’ but also whether to continue the pregnancy or to abort. The Chamber was very careful with the words it used and did not say directly that Article 8 includes the right to abortion. The judgment contains no statement clearly indicating that the Chamber supported abortion. Yet, the judgment needs to be read as a whole in the light of all circumstances of the case as well as the arguments submitted by the applicants. The Chamber skillfully avoided the use of the word ‘abortion’ and instead referred to women’s reproductive rights and the right to respect for their private lives. It is concerning where such ‘creative’ interpretation will take us in the future. The margin of

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44 Id. para. 214.
45 Id.
appreciation is a safeguard against the overactive courts in a broad, evolutive interpretation of ECHR rights.46

Emily Wada describes the margin of appreciation as a self-imposed mechanism of judicial restraint,47 as it has been implemented by the ECtHR, to limit its role to that of supervisor in light of the principle of subsidiarity.48 Wada discusses the doctrine further in light of the presence, or lack thereof, of a uniform consensus across member states on contentious issues.49 Janneke Gerards notes the ECtHR’s fragility, and hence the need for the Court to tread carefully in order to ensure good relations with member states, and therefore their compliance.50 Key moral issues, like abortion, have been determined by the Court to have a wider margin.51 Paolo Carozza comments that the margin of appreciation doctrine "overtly injects a certain degree of relativity into the application of the [ECHR]'s norms, and has thus been considered the cornerstone of the [ECHR]'s respect for diversity of nations."52

According to Gerards, the ECtHR reiterates the doctrine of the margin of appreciation, including its background, "in almost every case placed before it and it commonly explains the reasons why the various factors result in a particular scope of the margin of

46 Gallagher, supra note 30, at 4.
48 See Who We Are, COUNCIL OF EUROPE, http://www.coe.int/aboutcoe/index.asp?page=quiSommesNous (The Council of Europe website defines this as being a principle which allows each member state to have the task of deciding democratically, what is appropriate for itself. It sees member states as being in the best position to determine what is ‘necessary’ according to the local issues, rather than international courts. Thus, the Court is not a ‘Supreme Court’ of appeal but rather a supervisor of member states, to ensure that member states are acting within the margin of appreciation, which is indeed not limited.).
49 Wada, supra note 47, at 275.
51 See Bakircioglu, supra note 35, at 727; see also Eva Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, 56 HJIL 240 (1996), available at http://www.zaoerv.de/56_1996/56_1996_1_2_a_240_314.pdf (This source provides a list of important factors taken into consideration by the ECtHR in deciding in the application of the margin of appreciation, and whether such application requires a wide or narrow approach. Brems states that “the idea is that the more important a right is, the smaller the margin granted to the national authorities to interpret or restrict it. The ultimate consequence of this line of reasoning is that with regard to the most important articles of the Convention, in particular 2 and 3, no margin is left to the national authorities.” Id. at 264.).
appreciation in each individual case.” Gerards adds, “[t]his makes the doctrine into a very flexible tool that may moreover provide useful information to the national authorities as to their room for manoeuvre. As a judicial instrument to negotiate with problems of pluralism, it is therefore very attractive indeed.” Gerards also contends that the ECtHR should not substitute a national legislature’s opinion for its own. Further, he claims it is important to guarantee fundamental rights in a manner that matches the differences between national traditions and perceptions, which allows for cultural variation.

Considering that the margin of appreciation partially limits the unitary application of ECHR rights, it has many enemies. Some have argued that excessive use of the mechanism contradicts the idea behind having a harmonious legal framework within the member states. Critics have also argued that the margin of appreciation opens doors to abuse by limiting the exercise of human rights. Quite the contrary, the margin of appreciation allows a proper application and execution of human rights in that ECHR rights are adapted to the domestic legal system and so transform them into national human rights. Thus, the margin of appreciation allows a realistic relationship between member states and the ECHR. In order for human rights to work, they have to be integrated with the constitutional tradition and morals of the individual state.

As previously explained, the ECHR’s rights are not absolute and the limitations of human rights are incorporated in the body of the ECHR. The ECHR’s construction, to include prescribed limitation and discretion to the member states regarding their implementation of it, as well as the discretion of the ECtHR regarding the use of a broad margin of appreciation, makes the unitary application of ECHR rights impossible, yet not unreasonable. It might even be argued that the discrepancies caused by interpretation and application of ECHR rights are more reasonable than adherence to the artificial European consensus on moral issues.

Comparing ABC’s emphasis on the morality of the issue at hand, and the Court’s view that a wide application of the margin of interpretation is the appropriate approach given the circumstances, with that of the general function and expectations of the margin of

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53 Gerards, supra note 50, at 116.
54 Id. at 116-17.
55 Id. at 104.
56 Bakiricioglu, supra note 35, at 731.
57 de la Rasilla del Moral, supra note 37, at 612.
appreciation doctrine, indicates that there is an acceptable, inextricable relationship between a wide application of the margin of appreciation and the determination of the status of the unborn. In the next section, it is argued that due to the complexity of the status of the unborn the ABC ruling pertaining to the claims by the first and second applicants was the proper approach to take.

4. The status of the unborn

A submission was made in ABC that some argue that conventional law does not impose rigid standards as requirements for member states on moral questions, although certain minimum standards for the protection of fundamental rights are stipulated. In addition, it was submitted to ABC that member states are provided a wide margin of discretion, depending on the nature of the right, the nature of the issues at stake and the importance of those issues, as well as the existence or absence of international law or consensus on the topic.

The contemporary jurisprudential milieu reflects diverse narratives on the status of the unborn. Narratives which epitomize, for example, the restructuring of criminal codes in order to protect the unborn from violent actions and bioethical efforts related to the human embryo. International human rights instruments reflect, on the one hand, a vague understanding of the legal status of the unborn, while on the other hand one finds that some instruments clearly support the protection of the unborn. Sixty-nine states (including Ireland) prohibit abortion entirely or allow it only in cases

where the mother’s life is threatened.\textsuperscript{62} Four have some type of prohibition.\textsuperscript{63}

Michael Perry observes that in virtually all liberal democratic societies there is a deep and widespread dissensus about the moral status of the human fetus in its earliest stages of development.\textsuperscript{64} Perry adds that there is little, if any, reason to doubt that this dissensus will be enduring.\textsuperscript{65} In fact, there is a varied understanding on the status of the unborn not only within Western human rights jurisprudence and societal views, but also in Eastern and African cultures, and non-religious circles. Judge Ress’ dissent in \textit{Vo v. France}\textsuperscript{66} is interesting because he asserts that, “\text{[h]istorically, lawyers have understood the notion of ‘everyone’ as including the human being before birth and, above all, the notion of ‘life’ as covering all human life commencing with conception, that is to say from the moment an independent existence develops until it ends with death, birth being but a stage in that development.”\textsuperscript{67}

The above-mentioned differences and consequent complexities related to the status of the unborn, as well as the wording of Article 2 of the ECHR, strengthen the understanding that Article 2 does not present any negative component requiring a state to deny the right to life to the unborn. As submitted to \textit{ABC}, an Article 2 claim to expand abortion cannot be considered if it raises no issue separate from an Article 3 claim of torture or inhuman treatment.\textsuperscript{68} Also, Article 2 should only accommodate abortion where the life of the pregnant woman is seriously threatened or in similar defensive matters. This complexity related to the clarification of Article 2, and consequently the status of the unborn, confirms the ‘importance of the right in question’ as well as the ‘exceptional character of a situation’ as important factors to be taken into consideration regarding the margin

\textsuperscript{62} See Submission to EUR. CT. H.R., supra note 59, at 30.

\textsuperscript{63} Malta, Andorra, Monaco and San Marino. See \textit{Vo v. France}, supra note 14, at 62.

\textsuperscript{64} MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 61-62 (2006).

\textsuperscript{65} Id.


\textsuperscript{68} See Submission to EUR. CT. H.R., supra note 59, at 16 (Here reference was made to \textit{Ocalan v. Turkey} (2005) 41 EHRR 985 and \textit{D v. United Kingdom}, 24 EHRR 425 (1997). The said observations state, “Moreover, Ireland does not diminish the right to life of women – it gives full and equal treatment to their and their children’s right to life. And the unborn’s right to life as understood by Ireland allows abortive actions to save the lives of women.” Id.).
of appreciation. These have also been identified as important factors by the ECtHR.

According to Eva Brems, “in the very beginning of the development of the idea of a domestic margin of appreciation, the European Commission for Human Rights, which was the initial promotor of the doctrine, linked the concept with that of the interpretation of vague and general concepts.” As stated earlier, Article 2 of the ECHR is certainly a vague and general concept when it comes to confirming whether the unborn is part of it or not. In this regard, it is also important to emphasize that there is no negative component in Article 2 requiring a state to deny the unborn the right to life in order to vindicate the right to life of women.

Janneke Gerards observed that some of the ECtHR’s judges have contended that the ‘better placed argument’ should be the only factor applied in deciding about the margin of appreciation. This factor is of special relevance when ruling on measures relating to particularly sensitive, complex, or moral issues. According to Aaron Ostrovsky, “[h]uman rights rhetoric often contains a strong moral or ethical dimension: the idea that there is a core ‘good’ which is superior to, and outweighs, cultural differences. In this vein, human rights lawyers often work to persuade tribunals to an essentially moral position.” Anne-Marie Slaughter commented that even where a body of supranational law is formally binding, the ECtHR has no coercive power to compel adherence. Rather, they must rely on persuasion.

When it comes to deciding on the morality of the termination of the unborn, there is no persuasive argument that the unborn is not a human life. If human rights tribunals want to try to legitimize their decisions, which “often means taking into account cultural differences

69 Brems, supra note 51, at 294.
70 Submission to EUR. CT. H.R., supra note 44, at 16.
71 Gerards, supra note 50, at 110 (Gerards further observes that the ECtHR, “leaves a wide margin of appreciation . . . in cases requiring a difficult balance to be struck between conflicting fundamental rights and interests; in cases demanding highly technical and specialist expertise; or in cases where specific historical circumstances . . . make it difficult for the court to understand the need for certain restrictions.” Id. at 110-11. The seeking of a determination as to the status of the unborn should certainly not be excluded from this equation.).
72 Id. at 111.
which would seem to dilute an essentially moral position,” then ABC was correct in applying a wider margin of appreciation due to the complexity of having to clarify the precise nature of the unborn and/or the morality of terminating the unborn. Ostrovsky also commented that in “allowing a margin of appreciation, a tribunal says to a State, we will trust your conception of core rights and allow them to fit into the greater concept of core rights, but only until there is a clear collision between the two.” Applying this test to ABC, there is no clear collision between Ireland’s view on the status of the unborn against the background of the core right to life in Article 2 of the ECHR and the ‘greater concept’ of the right to life reflected by that Article. In ABC, the margin of appreciation was applied in order to allow for divergent interpretations of the meaning of life under Article 2 of the ECHR. This allows for the text to respond flexibly to divergent needs within divergent cultures and views on the all important yet complex determination regarding the nature of human life. There is substantial uncertainty whether a pregnant woman wanting an abortion and calling upon the protection of Article 8 of the ECHR, for reasons of health and well-being per se, should present no protection for the unborn.

The ECtHR and the Commission’s records regarding cases directly linked to the unborn are indicative of an avoidance of making a concerted effort towards clarifying the status of the unborn. For example, Wolfgang Freeman observed that although confronted with the issue in 1992, the ECtHR avoided defining whether “everyone’s right to life” includes the unborn child. Another example is Katherine O’Donovan’s observation that the ECtHR decided Vo v. France in a neutral stance, again avoiding answering the question of

75 Ostrovsky, supra note 73, at 57.
76 Id. at 58.
78 Katherine O’Donovan, Taking a Neutral Stance on the Legal Protection of the Fetus: Vo v France, 14 MED. L. REV. 115 (2006) (The Court acknowledged that: “. . . it has yet to determine the issue of the ‘beginning’ of ‘everyone’s right to life’ within the meaning of the provision, and whether the unborn should have such a right.” Vo v. France, supra note 11, para. 75. Furthermore, the court stated that, “. . . the issue of when the right to life begins comes within the margin of appreciation which the court generally considers that states should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a ‘living instrument which must be interpreted in the light of present-day conditions’. . . . The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the contracting states themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life.” Vo v. France, supra note 11, para. 82.).
the legal status of the unborn.\textsuperscript{79} This confirms the complexity of the issue at hand, consequently qualifying the importance of the ECHR’s application of a wide interpretive approach to the margin of appreciation against the background of $ABC$.

It is this moral complexity related to the status of the unborn that resulted in $ABC$ excluding any relevance consensus among member states regarding the interpretation of the ECHR, $ABC$ having interpreted Article 8 of the ECHR as not conferring a right to abortion.\textsuperscript{80} Paolo Carozza stated that following the ‘consensual’ route has its dangers as it can lead to a ‘vulgar form of positivism.’\textsuperscript{81} Carozza added that the ECHR surely does not support the negation of all national differences, but instead sets a minimum level of compatibility.\textsuperscript{82} Also in Vo, the Court emphasized that, concerning the status of the unborn, there is no such consensus among the states. It said, “the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life.”\textsuperscript{83} This potential power lying in consensus to create universal norms pertaining to complex issues such as those related to the beginning of life needs to be cautioned against and $ABC$ took the correct stance. It would be apt to briefly comment here on the problematic nature of consensus as authoritative norm against the background of the ECHR.

While the European consensus was successfully rebutted in the body of $ABC$’s judgment, some of its concurring opinions strongly

\textsuperscript{80} See A, B & C, App. No. 25579/05, Eur. Ct. H.R. para. 214; para. 7 (Geoghegan, J., concurring).
\textsuperscript{81} Carozza, supra note 52, at 1228.
\textsuperscript{82} Id. (Carozza also foresees problems in this regard when considering the inclusion of states outside of Western Europe which have much more divergent domestic legal, social, and political traditions. Id. at 1231); See Eyal Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 31 N.Y.U. J. INT’L, L. & POL. 843, 852 (1999); See also de la Rasilla del Moral, supra note 37, at 617 (regarding the absence to date of a profound and detailed comparative research to the common ground or patterns. The lack of European consensus on the status of the unborn and abortion is not surprising considering the diversity among the member states due to their different constitutional systems and traditions.); George Letsas, THE ECHR AS A LIVING INSTRUMENT: ITS MEANING AND LEGITIMACY, THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 7 (2012); Konstantin Dzhehtsiarou, European Consensus: A Way of Reasoning 1 (UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 11/2009), available at http://ssrn.com/abstract=1411063 (emphasizing that the ECHR does not provide any specification on the European consensus.).
\textsuperscript{83} Vo, App. No. 53924/00, Eur. H.R. Rep., para. 82.
disagreed. The mere establishment of the definition of European consensus is highly problematic. It is often referred to as a common ground or a similar pattern of practice across the member states. The existence of such a similar pattern or common ground would result in the ECtHR having more discretion in deciding whether to make a decision on highly problematic issues, which are often outside its expertise or knowledge. While it could be argued that consensus aims at a unification of law and its application across the member states, this argument fails on one major point. No profound and detailed comparative research has ever been provided on this common ground or patterns. The mere fact that the parliaments in the majority of member states have legalized abortion does not reflect European consensus.

The question is whether European consensus on matters of moral concern requires an all-inclusive support by the states or whether any kind of majority consensus would be sufficient. It is clear that as far as the member states are concerned, there is no absolutely inclusive consensus regarding the nature of the unborn and its moral dimension. On the other hand, if a majority of the member states would amount to consensus, the question would be whether the opposing countries as the minority could be forced to implement the majority’s consensual vote regarding a specific moral understanding. In other words, the question here would be whether a specific moral approach can ever be forcibly imposed on a state.

There is a plethora of literature and case law pointing out the erroneousness of the idea of European consensus. Such cases as Handyside v. UK or Otto-Preminger-Institut v. Austria indicate that while it is impossible to establish a European consensus in cases raising sensitive moral issues, it will be up to the national courts to deal with such issues, since they are better equipped to scrutinize them in light of their own national identities. As far as the status of the unborn is concerned there is no European consensus on the scientific and legal definition of the beginning of life, as emphasized in Vo v. France. Consequently, since there is no consensus on the

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84 Bakiricioglu, supra note 35, at 728 (ABC concurring opinions).
85 de la Rasilla del Moral, supra note 37, at 617.
86 Id.
87 Dzehtsiarou, supra note 82, at 13.
status of the unborn, it is impossible to establish consensus regarding abortion, as these issues are closely connected. While it is highly unlikely that a consensus between the member states will ever be possible, it appears that the higher standard of 'consensus' in regard to the status of the unborn has been shifted to a lower standard of 'trend' or 'pattern' among member states. Bearing this in mind, ABC rightly avoided merely following the illusionary patterns or common grounds that do not necessarily reflect European consensus.

The ECtHR refused to deal with the question of the status of the unborn, labeling this a moral issue and shifting the burden onto domestic courts. However, it should be emphasized that the ECtHR in Vo v. France did explicitly recognize the possibility that the unborn might be a human being, unlike ABC. A similar possibility was recognized in X v. United Kingdom, where the Commission emphasized that Article 2 lacks any mention of abortion and the possible implications that carries. The Commission indicated three options when interpreting Article 2: as not covering the unborn, as covering the unborn with limitations, or as absolutely covering the unborn. The Commission excluded the possibility of an absolute protection stating that this “would mean that the ‘unborn life’ of the [fetus] would be regarded as being of a higher value than the life of the pregnant woman.” It has been argued that such an understanding of Article 2 was not intended by the founders of the ECHR at the time of its drafting, since at that time member states allowed abortion in order to save the life of the mother. The recognition of the limited rights of the fetus under Article 2 was also recognized in H v. Norway.

CONCLUSION

Ann Glendon referred to the collective wisdom of the wide variety of legal systems represented by the judges serving on the ECtHR. In ABC, there were eleven votes to six that the rights

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94 Korff, supra note 92, at 10.
96 Slaughter, supra note 74, at 132-33.
provided to the first and second applications by Article 8, and Article 13 in conjunction with Article 8, had not been violated.\textsuperscript{97} This is a convincing reflection of the angle taken by the ‘collective wisdom’ of the wide variety of legal systems represented by the judges serving on the ECtHR, in following a broad approach to the margin of interpretation regarding the protection of the unborn, requiring appreciation. \textit{ABC} also made it clear that a prohibition of abortion to protect unborn life is not automatically justified under the ECHR, whether on the basis of unqualified deference to the protection of the unborn or on the basis that an expectant mother’s right of respect for her private life is of a lesser stature.\textsuperscript{98}

The margin of appreciation performs a useful role inside the European Convention’s human rights protection system. It provides an elegant solution for the tension existing between national and European legal rules within a supranational judicial system so that it is not necessary to completely subordinate one to the other.\textsuperscript{99} However, Eva Brems warned that it is important to control the use of the margin of appreciation to avoid its becoming a door through which arbitrariness and uncertainty can enter the European Convention.\textsuperscript{100} The margin of appreciation has a fundamental role to play in maintaining a balanced relationship between the poles of universalism and relativism. For complex matters, such as the determination of the legal status of the unborn, the ECtHR allowed for the subservience of universalism to that of relativism in determining whether the unborn should be protected for reasons of health and well-being \textit{per se}. This does not mean that there should be no universalist angle providing a minimal level to balance the woman’s need for protection with that of the unborn.

There is more of a consensus and less contentiousness on the view that where the woman’s life is threatened by the continued protection of the unborn, or where inhumane treatment is incurred against the woman, then the termination of the unborn should be allowed. This should also be followed in matters which Michael Paulsen refers to as cases for reasons of "self-defense," for example, rape, incest, and

\begin{footnotes}
\footnote{98} Id. para. 238.  
\footnote{100} Brems, \textit{supra} note 51, at 313.
\end{footnotes}
serious fetal defect.\textsuperscript{101} This is supported by the concurring opinions of Judges López Guerra and Casadevall, who stated that, “[w]hile bearing in mind the State’s margin of appreciation, the degree of intensity and gravity of the present dangers to the woman’s health or well-being must be taken into account case by case, in order to appraise whether the prohibition falls within that margin of appreciation.”\textsuperscript{102} In this way, a nuanced approach to the balancing of interests of the pregnant woman and those of the unborn is attained, and the universalist call for the protection of basic interests in the face of gross adversity is brought to the fore. The view that the health and well-being of the pregnant woman \textit{per se}, as an unlimited interest qualifying abortion will result in an arbitrary and insensitive deification of the universalist claim. It may be that due to the specificity of moral communities, among others, the concept of human dignity as a transcendent value which gives an aspirational flavor to human rights can result in relativistic insights that are acceptable. \textit{ABC} is a prime example of a ruling on something more initial than human dignity, as an essential part of the argument entails the determination of when human dignity is established in the biological development of a human being.

There is also the risk of the current and popular inter-judicial use of human rights jurisprudence in the context of national and regional human rights legal systems.\textsuperscript{103} The attractiveness for other courts regarding the human rights jurisprudence of a regional human rights court such as the ECtHR, provides added responsibility for the ECtHR to be wary of probing too deeply into matters of moral concern, such as abortion. \textit{ABC}’s application of the margin of appreciation provided a wise solution for the possible tension that may exist in a supranational judicial system between national and regional rules and kept the variety of opinions, including the different interpretations of Article 2, regarding the legal status of the unborn intact.


\textsuperscript{102} A, B & C, App. No. 25579/05, Eur. Ct. H.R. para. 3 (Casadevall, J., Guerra, J., concurring); (Additionally stating, “[I]t cannot be excluded that in other cases, in which there are grave dangers to health or the well-being of the woman wishing to have an abortion, the State’s prohibition of abortion could be considered disproportionate and beyond its margin of appreciation.” \textit{Id.} para. 5.)

\textsuperscript{103} See Slaughter, supra note 74, at 106 (According to J. G. Merrills, the jurisprudence of the ECtHR can even play an important role in the formulation of treaties. This adds to the heightened responsibility of the ECtHR to not take too rigid a view on such a contentious and complex matter as the legal nature of the unborn.).
ABC also ensured, by means of the margin of appreciation, that little tension exists between itself and the judiciary beyond Europe, and that courts around the world would not be tempted to follow an unbalanced approach regarding the relationship between the rights of the woman and fetal interests. This temptation to view the findings of a regional human rights court, such as the ECtHR, in moral issues as ‘global’ or ‘universal’ overlooks the possible subjectivity that could accompany such findings in moral and contentious matters. If ABC had not applied a wide approach to the margin of appreciation, then the norm that the health and well-being of the woman as qualifier for abortion per se would have run the risk of becoming not only a supra-national, but also a supra-regional norm, through the workings of the courts in general. Such a ‘superficialization’ of the status of the unborn would be contrary to a nuanced sense of worth that should be awarded to the unborn. For the ECtHR to have done otherwise would, at worst, be opposed to the accommodation of the possibility of the unborn being human, and consequently the usurping of respect for the individual and humanity. At the basis of this understanding lies the concern for the protection of mankind, something which is inextricably connected to the question of the beginning of life, the parameters of human dignity and of being human.

104 See Kenneth Anderson, Foreign Law and the U.S. Constitution, 131 POL’Y REV. 33, 35-36 (2005) (Referring to the United States Supreme Court case, Roper v. Simmons, 543 U.S. 551 (2005), Anderson commented, “A certain sleight-of-hand is involved in much discussion of the ‘universal’ values the Court has grown fond of citing in the abstract. An unstated, unargued-for assumption in much of this rhetoric is that ‘global’ and ‘international’ are the same as ‘universal.’ It presumes, in other words, that if one’s position can be described as ‘global’ or ‘international’ or ‘transnational’ because it transcends mere geography and mere borders, it is ‘universal’ in the moral sense of applicable to all, free of particular interests, free of prejudice and attachments, impartial and disinterested and hence suitable to judge as between others’ particular interests. But why assume that the views of those who live globally, internationally, or transnationally are indeed morally universal? Why assume that they have no particular interests and no partiality?” (Id.).
¿CUANTO CUESTA? THE PRICE PAID BY BOTH THE
PERPETRATOR
AND THE VICTIM OF CHILD SEX TOURISM IN
MEXICO

Elisa Contreras-Salazar*

INTRODUCTION

What can $260.00 buy you? For Tom, it bought him a sex tourism trip to Mexico, which included a hotel room and a night of pleasure with a thirteen or fourteen year old boy, or so he thought. At first glance, Albert Thomas “Tom” Rogers seems to be a respectable fifty-one year old man. His professional portfolio is in education, holding positions from school custodian, bus driver, sports coach, teacher, to the more respected position of school superintendent for the Tanque Verde Unified School District in Tucson, Arizona.¹

However, what people are not aware of is that Tom is a pedophile and a sex tourist. Tom was arrested on June 19, 2010, by an undercover agent after attempting to book a sex tour to Mexico for the purpose of engaging in sex with a thirteen or fourteen year old boy.² After his arrest, he admitted to collecting pornographic material depicting a child as young as five years old engaging in sexual conduct.³ In reality, Tom bought himself a plea of guilty with a sentence of 100 months in a United States federal prison and a lifetime of probation for attempted travel with intent to engage in sex with a minor and possession of child pornography.⁴

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⁴ Id.
Child sex tourism is a growing phenomenon and a multi-billion dollar industry.\(^5\) Somewhere in the world, another “Tom” is making plans, hopping on an airplane, and contacting people for a sex tour to Mexico. Men like Tom purposely go abroad to countries like Mexico to purchase sex acts with a minor believing that no one will ever find out. Conversely, the U.S. government has made concerted efforts to punish the activities of American citizens and resident aliens who travel abroad to participate in the sexual exploitation of children.\(^6\) The U.S. has enacted laws such as the PROTECT Act of 2003 and other Federal laws aimed at stopping sex tourism. Likewise, countries like Mexico are moving towards making changes to their legal system to criminalize and punish these individuals. In 2011, Mexico made changes to its Constitution to combat human trafficking and as of July 2012 made amendments to its penal code to punish both the procurers and perpetrators of sexual exploitation.

This note will focus on child sex tourism in Mexico. The first part of this note will introduce the phenomenon of child sex tourism, its definition, reasons why it exists, and will cover the parties involved in the sexual exploitation of children. The second part of this note will analyze why Mexico is a target country for the practice of child sex tourism and the physical and criminal consequences of the perpetrator involved in child sex tourism in both the United States and Mexico. The third part of this note will focus on sex tourism’s psychological and physical effects on the child victim, Non-Governmental Organizations (NGOs), and the urgent need for national social awareness of child sex tourism and human trafficking in Mexico.

I. BACKGROUND

According to the U.S. Department of State, over 3,000,000 U.S. Citizens travel to Cancun and other Mexican beach resorts each year.\(^7\) Some tourists visit these areas of Mexico to escape their daily routines, relax, and vacation; while other tourists visit for the sole purpose of engaging in sexual relations with a minor. Mexico has become a leading hotspot of child sexual exploitation.

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exploitation. A study done in 2000 by UNICEF Mexico and the DIF/National System for Integral Family Development estimated that more than 16,000 children in Mexico were involved in prostitution. In 2005, the number of reported victims of child prostitution within the country had increased to 20,000.

A. Definition of Child Sex Tourism

Due to the growth of the tourist industry child sex tourism has increased in recent years. While child sex tourism has existed for decades, there has been a movement in recent years towards attacking and ending child sex tourism.

The definition of child sex tourism has developed over time and is continuously being refined. The U.S. responded to child sex tourism in the early 1990s when it amended the Mann Act with the Violent Crime Control and Law Enforcement Act of 1994, which included a provision known as the Child Sexual Abuse Prevention Act (CSAPA). CSAPA was the first Congressional effort addressing the issue of child sex tourism and making traveling abroad for the purpose of engaging in sexual activity with a minor a criminal offense.

In 2005, the U.S. Department of State defined child sex tourism as traveling for the purpose of engaging in the prostitution of children and identified it as commercially facilitated child sexual abuse. As recent as 2012, the End Child Prostitution Child Pornography & Trafficking of Children for Sexual Purposes International (ECPAT), a London based group which campaigns to put an end to the sexual exploitation of children, defined child sex tourism as “the commercial sexual exploitation of children by men or women who travel from one place to another, usually from a richer country to one that is less developed, and there engage in sexual acts with

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10 Id.
12 Hall, supra note 6, at 165.
13 Id.
B. Reasons Child Sex Tourism Exists

Mexico is one of the leading destinations in Latin America for sexual tourism. One may wonder why this is so. Factors such as poverty, poor law enforcement in receiving countries, consumer demand, cost, and availability are among the many factors that boost the child sex tourism industry within a country. In Mexico, the primary factors driving Mexican children into prostitution are poverty, consumer demand, and forced labor.

1. Poverty

Nearly half the population of Mexico lives in poverty. It is no surprise that poverty is one of the primary factors for children in Mexico to be exploited for sexual purposes. According to ECPAT, “a significant number of Mexican boys and girls are trafficked within Mexico for sexual exploitation, often lured from poor rural districts to urban, border, or tourist areas through false offers of employment.” Many estimate that of the 150,000 children that live on the streets, fifty percent are victims of trafficking for sexual purposes.
2. Demand for Child Prostitution

Both pedophiles and those who pay for sex create the demand for child prostitution. Pedophiles are adult individuals who have a sexual interest in children. However, most perpetrators that create the demand are “respectable doctors, lawyers, serviceman and teachers—many with children of their own.” Many of these individuals enjoy the anonymity of traveling across the border to engage in sexual acts with a minor, knowing no one will ever find out. They tell themselves that in another country the moral and social restraints can be ignored along with the sense of responsibility for their actions. Moreover, many of these individuals are under the mistaken belief that they are less likely to contract HIV or other sexually transmitted diseases if they have sex with a child. Others simply rationalize their actions by convincing themselves that children abroad are less sexually inhibited and believe they are actually helping the child’s family financially. Due to these myths, the demand for sex drives up child sex trafficking and child sex tourism.

3. Forced Labor

Many Mexican children are forced into prostitution. Children are a prime target because they are vulnerable, uneducated, and can be easily controlled. Too often, parents serve as procurers of those in search of young children due to their need, illiteracy, distress, and lack of employment opportunities. Some parents sell their children to sex ring gangs to pay off their debts and get out of economic problems. Other parents encourage their children to enter the sex industry in order to keep food on their table.
Some of these parents are found under the influence of drugs and alcohol and resort to using their children as a form of good business. These parents live off of the money brought in by the prostitution of their young children, rather than working themselves. Yet other parents place their children in a position where they believe they must help support their family and willingly enter into prostitution. It is unfortunate that children are forced or feel forced to enter into prostitution.

C. Parties Involved in Sexual Exploitation

There are four parties involved in the sexual exploitation of children: perpetrators, procurers, facilitators, and child victims.

1. Perpetrators

There is no common profile of the perpetrators who sexually exploit children. Perpetrators may be old, young, single, married, blue collar, or white collar men. They come from all social and economic backgrounds. Some may be pedophiles, but most are respectable individuals with careers, jobs, and, at times, family men with children of their own. However, the majority of sex tourists are adult males from more developed countries who travel to lesser developed countries where laws are weakly enforced and sex is cheap and readily available. According to recent reports, Americans comprise an estimated twenty-five percent of all sex tourists.

Perpetrators fall within two categories: they are either preferential abusers or situational abusers. Preferential abusers are those who travel abroad with the primary intent of having sexual relations with children. Whereas situational abusers are those who do not intentionally travel with the purpose to exploit children, but do so out of convenience when the situation arises. While preferential abusers are typically pedophiles who travel for the excitement and do it to feed their addiction, the majority of those who pay to sexually exploit children are situational abusers who do not

31 Stop Sex Trafficking of Children & Young People, supra at 21.
32 Id.
33 Id.
35 Child Sex Tourism, supra note 26.
36 Steinman, supra note 23, at 61.
meet the clinical diagnosis of pedophilia.\textsuperscript{37} Situational abusers typically act on impulse because they are far from home and take the opportunity when it presents itself.\textsuperscript{38}

Most perpetrators rationalize their acts by perceiving their victims as willing participants.\textsuperscript{39} They convince themselves that they are not abusing or harming the child because the child has chosen that profession.\textsuperscript{40} They justify their actions by assuming that the child consented to the sexual act and they believe that they have in some way contributed to helping the child out of poverty.\textsuperscript{41} Sadly, many of these child sex tourists return home with a clear conscience after their trip not realizing that they have committed a crime.\textsuperscript{42}

2. \textit{Procurers and Facilitators}

Facilitators are those who expedite the victimization process and are not directly involved in child prostitution.\textsuperscript{43} Facilitators “include businesses, governments, and other institutions who receive some benefit from the commercial sex trade.”\textsuperscript{44} For example, hotels are facilitators when they allow pimps to prostitute children on their premises. Likewise, governments are held to be facilitators when they fail to regulate the commercial sex market.\textsuperscript{45}

Procurers are essentially pimps who are directly involved in sexual trafficking of children. These individuals extend the services and resources that make sexual trafficking of children practicable and lucrative.\textsuperscript{46} They prey on children and take advantage of the economic situation and poverty of the children and their families. Ultimately, these procurers persuade children and, at times, their family members to allow the child to enter into their employ.\textsuperscript{47} Once under their employ, the pimp forces the child into the

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\begin{itemize}
\item \textsuperscript{37} Hall, \textit{supra} note 6, at 160-61.
\item \textsuperscript{38} \textit{Id.} at 161.
\item \textsuperscript{39} Kyle Cutts, \textit{A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act}, 58 CASE W. RES. 277, 284 (2007).
\item \textsuperscript{40} Steinman, \textit{supra} note 23, at 61.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} Cutts, \textit{supra} note 39, at 284.
\item \textsuperscript{43} Steinman, \textit{supra} note 23, at 63.
\item \textsuperscript{44} \textit{The Demand for Sex Tourism}, MODERN INJUSTICE (Aug. 10, 2011), \texttt{http://modern-injustice.com/2011/08/10/the-demand-for-sex-tourism/}.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} Steinman, \textit{supra} note 23, at 62.
\item \textsuperscript{47} \textit{Id.} at 63.
\end{itemize}
commercial sex trade by the means of threats, physical violence, and constant fear that they will hurt their families if they fail to comply.48

3. Child Victims

Over 1,000,000 children worldwide enter the sex trade every year.49 Most are girls between ten and eighteen years of age50 and are from Latin American countries.51 Those vulnerable to human sex trafficking are children who live on the streets, who are in refugee camps, whose family lives have been disrupted, and who are neglected.52

In Mexico, it is estimated that approximately 20,000 children are sexually exploited each year.53 The exploitation of these children usually takes place in areas most traveled by tourists, such as resort areas and the northern border of Mexico. These children are often poor, and lured into the sex industry or forced by criminal child trafficking gangs into child prostitution.54

II. WHY MEXICO?

Mexico is one of the leading destinations in Latin America for sex tourism.55 Furthermore, “Mexico is one of the favored destinations of pedophile sex tourists from Europe and the United States.”56 An estimated twenty-five percent of the child sex tourists in the world are from the United States.57 Among the reasons that sex tourists travel to Mexico are proximity,
expected anonymity, accessible children, low cost of travel, and the low cost of prostitution.

A. Travel Expenses & Proximity

One of the reasons why U.S. Citizens travel to Mexico each year is due to its proximity and affordability. For example, if booked in advance the cost for a sex tourist to take a three night all-inclusive vacation, between December 10, 2012 and December 13, 2012, with hotel and airfare included, from Houston, Texas to Cancun, Mexico, is no more than $750 per person.\(^58\) The same vacation from Chicago, Illinois to Acapulco, Mexico is under $670 for just the airfare.\(^59\) Moreover, a sex tourist from Texas, Arizona, New Mexico, or California, who is just looking for a day trip to Mexico, can jump in his or her vehicle and drive to Tijuana, Nuevo Laredo, Nogales, Ciudad Juarez, or any of the other U.S. border towns for less than a full tank of gas. Since travel between the U.S. and Mexico is quite inexpensive, American sex tourists fuel the demand for child sex trafficking in Mexico.

B. The Cost of the Act

Another reason why Americans travel to Mexico to engage in sex with children is due to the inexpensive cost of having sexual relations with children. It has been reported that men pay anywhere from $10 to $50 for intercourse or oral sex with children.\(^60\) These children are forced to sleep with an average of twenty to thirty men per day, in tiny rooms with a mattress, a trashcan and a curtain as a door.\(^61\) The low cost makes this business continue as clients can afford to keep coming back for more.

III. CONSEQUENCES OF CHILD SEX TOURISM IN MEXICO AND THE U.S.

Child sex tourism is illegal in both the United States and Mexico. There are both physical and criminal consequences that the perpetrator may face if engaged in child sex tourism.

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\(^59\) Id.


\(^61\) Brito, supra note 48.
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A. HIV/AIDS

Many perpetrators prefer young child prostitutes over adult prostitutes because they believe that the children have a lower risk of contracting AIDS and other sexually transmitted diseases. However, research has found that children are more vulnerable to infection of sexually transmitted diseases. Experts believe that child prostitutes are more likely to carry the HIV virus than adults. There is no telling how many child prostitutes worldwide have been infected with HIV, but estimates suggest they are in the millions. Child prostitutes have weaker immune systems, underdeveloped bodies, and a proneness to injuries and lesions during sexual relations, making the probability of contracting HIV even higher.

Additionally, due to the limited or nonuse of condoms among child prostitutes, children are also susceptible to sexually transmitted diseases such as herpes, chlamydia, crabs, gonorrhea, and syphilis. Due to the lack of concern by their pimps many of these children fail to be routinely examined at clinics or take any precautions to prevent such diseases. As a result, the child prostitutes wind up spreading HIV/AIDS and sexually transmitted diseases to their clients, the perpetrators, without knowing. Therefore, a single infected child who serves twenty to thirty clients per day may pass HIV or a sexually transmitted disease to thousands of perpetrators per year.

B. Criminal Penalties in Mexico and Lack of Enforcement

It was not until January 2000 that the Mexican government first enacted a law declaring sex tourism to be a crime. In 2006, there was a reform in the Mexican Federal Penal Code which established punishment of up to fourteen years of prison for sexually exploiting a minor. In 2007,
additional reforms were made to Mexico’s Federal District Penal Code which denied a reduction of sentence time for crimes related to pornography, human trafficking, corruption, sex tourism, sexual exploitation, and labor exploitation. Ultimately, in November 2007, the President of Mexico passed laws to prevent and punish human trafficking.

While it appears that Mexico has taken positive and proactive steps in its legal system within the last fifteen years to address sexual exploitation and sex tourism within its country, Mexican officials fail to enforce and prosecute under its laws, making them practically nonexistent. For example, in the year 2011 there were only forty investigations of human trafficking and three convictions in Mexico City. None of the investigations or convictions involved sex tourism. This is in a city where there are estimated 10,000 women who are victims of human trafficking. In 2011, for the first time, the Attorney General’s Office of the Special Prosecutor for Organized Crime in Mexico obtained a conviction and sentence for a human trafficking crime. In this rare conviction, a Mexican judge sentenced four men involved in a human trafficking case to sixteen to eighteen years in prison. Presently, no convictions have been reported in regards to sex tourism.

Nevertheless, on July 14, 2011, a move towards enforcement was made by Mexico’s President, Felipe Calderon, when he approved two changes to Mexico’s Constitution to combat human trafficking. The first change

71 The CDHDF Presented the Special Report on the Commercial and Sexual Exploitation of Children in the Federal District, COMMISSION DE DERECHOS HUMANOS DEL DISTRITO FEDERAL (Aug. 9, 2007), http://portaldic10.cdhdf.org.mx/index.php?id=pibol15507 (stating that “The Sub-Secretary of the GDF, Juan José García Ochoa, stated that the Government of the capital city will publish the reforms to the Federal District Penal Code in the Official Journal of the Federal District next week. These reforms deny the reduction of sentence, when the participation in the carrying out of the crimes related to pornography, people trafficking, corruption and sexual tourism is substantiated. He pointed out that penal classifications have also been modified and that the sentences for crimes against the morals of children or of those who are not able to understand the meaning of the incident.”).
74 Id.
76 Id.
77 Mexico changes constitution to combat human trafficking, CNN (July 14, 2011, 10:06 AM), http://thecnnfreedomproject.blogs.cnn.com/2011/07/14/mexico-changes-constitution-to-combat-human-trafficking/ (“[O]ne that requires those accused of human trafficking to be imprisoned during trials, and one that guarantees anonymity of victims who denounce the crime.”); see Procuraduría General de la República [Attorney General’s Office], Decreto por el que se reforman los artículos 19, 20 y 73 de la
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requires anyone charged with human trafficking to be imprisoned during their trial. This change secures the perpetrator and eliminates the risk of an accused fleeing or hiding in order to avoid criminal prosecution. The second change in the Constitution requires and guarantees the concealment of the identity of any victim who denounces the perpetrator and/or the crime. This change in the Constitution is fundamental as it provides such victims with confidence and security to come forward to accuse their handlers.

Another recent step towards combating human trafficking occurred in April 2012, when Mexico’s Congress unanimously passed an anti-human trafficking bill that establishes preventative and punitive measures to aid victims of human trafficking. President Calderon signed the bill and amendments into law on June 14, 2012. The law allows for sentences of up to forty years for those convicted of sexual exploitation and abuse. The bill also provides funds to care for the victims. More importantly, the law is intended to go after not only people who entrap victims and hold them...
against their will to exploit them, but also to the perpetrator of sexual services.  

Unfortunately, in the past Mexico has failed to utilize its legal system to go after the handlers, pimps, and perpetrators of child sex trafficking. While Mexico has the legislature in place to attack human trafficking, the country currently fails at enforcing laws and using its criminal legal system to charge these individuals. Perhaps the role of the Legislature is to understand how to prosecute these crimes. To date there are very few human trafficking cases reported, with none involving punishment of sex tourists. Hopefully with the recent amendments to the penal code and Mexico’s Constitution, law enforcement will be more apt to go after human traffickers and child sex tourists by utilizing Mexico’s laws to punish these individuals.

C. Criminal Penalties in the United States

Most sex tourists are not arrested in the country where they engage in criminal acts. As a result of United States legislation, an American sex tourist can now face severe criminal charges in the United States. The PROTECT Act of 2003 was signed into law on April 30, 2003. The PROTECT Act prohibits “travel with intent to engage in illicit sexual conduct” and engaging in “illicit sexual conduct in foreign places.” It establishes that “a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.” The term “illicit sexual conduct” is defined as a sexual act with a person under eighteen years of age or any commercial act with a person under eighteen years of age.

The PROTECT Act does not require “double criminality,” meaning the act need not be an offense in both the United States and the destination country. For example, an American citizen may be prosecuted under the PROTECT Act for having sexual relations with a minor even though the age of consent in the destination country may be significantly lower.

84 Id.
87 Id.
88 Id.
89 Id.
90 Hall, supra note 6, at 169.
Additionally, the PROTECT Act mandates life imprisonment for repeated sex offenses against children.\textsuperscript{91}

The PROTECT Act, expanded the basis for criminal liability in various ways: (1) proof of travel with the intent to engage in illicit sexual conduct is no longer required; (2) an attempt to engage in illicit sexual conduct of crimes is now punishable; (3) tour operators face liability; (4) an internet tip-line provides a means to report internet related sexual crimes; and (5) no statute of limitations applies to child sex crimes.\textsuperscript{92}

The PROTECT Act provides domestic punishment for American citizens who escaped arrest in the destination country, would not be prosecuted by domestic authorities, or are extradited back to the U.S. specifically for prosecution.\textsuperscript{93} As of February 2008, the United States had already convicted sixty-five child sex tourists.\textsuperscript{94} While some may claim that the PROTECT Act violates the Constitution, the act has withstood constitutional challenges. In \textit{United States v. Clark}, the Court of Appeals for the Sixth Circuit held that extraterritoriality is allowed based upon the nationality principle, which permits a country to apply its laws to extraterritorial acts of its own nationals.\textsuperscript{95}

Countries like Mexico suffer from underdeveloped legal systems, ineffective laws, and at times unethical law enforcement. The PROTECT Act is a powerful law that is being implemented by our judicial system in order to achieve a means to end sex tourism when Americans are unlikely to be arrested and prosecuted when they commit a sexual offense against a child abroad.

\section*{IV. Effects of Child Sex Tourism on the Victim}

Children that are victims of child sex trafficking suffer from profound physical and psychological effects. Exploited children not only suffer loss of dignity, self-esteem, and confidence, but are also subjected to physical harm, illness, inhumane treatment, and enslavement.\textsuperscript{96}

\subsection*{A. Physical Effects}

\begin{itemize}
  \item \textsuperscript{91} Id. at 168.
  \item \textsuperscript{92} Id. at 167.
  \item \textsuperscript{93} Cutts, supra note 39, at 285.
  \item \textsuperscript{94} The Facts About Child Sex Tourism, supra note 14.
  \item \textsuperscript{95} U.S. v. Clark, 435 F.3d 1100 (6th Cir. 2006).
  \item \textsuperscript{96} Healy, supra note 25, at 1873.
\end{itemize}
The physical consequences that prostituted children suffer include lack of rest, nourishment, and health care.\textsuperscript{97} The physical effects of prostitution are devastating, with the most terrifying health effect being the child’s exposure to sexually transmitted diseases, including HIV and AIDS.\textsuperscript{98} Moreover, many female victims involved in prostitution have an increased risk of contracting infectious diseases and of becoming pregnant before they even reach the age of eighteen.\textsuperscript{99} Trafficked children may also suffer from internal injuries and lacerations to the genital area, anus, mouth, and may also have difficulty walking or sitting due to bruises.\textsuperscript{100}

Many child victims are also prone to being raped, assaulted, robbed, and even killed. As adults, they are susceptible to becoming adult prostitutes, drug addicts, and criminals.\textsuperscript{101} Many children are kept as sex slaves under the influence of alcohol and drugs as a means of physical and psychological control.\textsuperscript{102} In essence, the children are deprived from their support system, basic needs, education, healthcare, and the right to be free from exploitation.\textsuperscript{103}

B. \textit{Psychological and Behavioral Effects}

Many child victims also suffer from severe psychological effects such as depression, low self-esteem, post-traumatic stress disorder, and attempted suicide.\textsuperscript{104} The victims’ psychological effects can last a lifetime.\textsuperscript{105} These psychological effects may include panic attacks, sleeping disorders, drug and alcohol abuse, addictions, eating disorders, low self-esteem, self-hatred, traumatic flashbacks, isolation, mental illness, personality disorders, and at times suicide.\textsuperscript{106} To cope with their painful reality, many children abuse drugs and alcohol as a means for temporary escape.\textsuperscript{107}

\textsuperscript{98} Healy, supra note 25, at 1873-74.
\textsuperscript{99} Flowers, \textit{supra} note 62, at 153.
\textsuperscript{100} STAIRWAY FOUNDATION INC., \textit{supra} note 97.
\textsuperscript{101} Healy, \textit{supra} note 25, at 1873.
\textsuperscript{102} Flowers, \textit{supra} note 62, at 155.
\textsuperscript{103} STAIRWAY FOUNDATION INC., \textit{supra} note 97.
\textsuperscript{104} Flowers, \textit{supra} note 62, at 153.
\textsuperscript{105} STAIRWAY FOUNDATION INC., \textit{supra} note 97.
\textsuperscript{106} \textit{Id}.
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Many child prostitutes will not seek help due to their fear of others and authorities. Those who want assistance have a “psychological paralysis” that involves wanting the help, but rejecting it. However, research has shown that once a child seeks out psychological treatment and counseling, it can help reduce the trauma over the child’s lifetime.

V. EFFORTS TO MAKE A CHANGE

A. Non-Governmental Organizations

Non-Governmental Organizations (NGOs) play a critical role in providing resources for enforcement against sex tourism. ECPAT International is “a global network of organizations and individuals working together to end child prostitution, child pornography, and the trafficking of children for sexual purposes.” ECPAT Mexico was established in 2002, with its primary focus in children’s rights and raising awareness of child human trafficking. ECPAT Mexico provides educational brochures, materials, reports, and news articles about child sex tourism. For example, ECPAT Mexico provides training materials to the community, such as The Training Guide to Combating the Trafficking in Children for Sexual Purposes and Upholding the Right of Children to Live Free from Commercial Sexual Exploitation: Interventions and Recommendations, while also providing materials to victims of child sex tourism in the Young Person’s Guide to Child Sex Tourism. Their focus is on eliminating child sex tourism throughout the country. The organization continuously works on promoting legal reform, raising awareness through the mass media, conducting workshops, and participating in training prosecutors in Mexico.

Another NGO in Mexico, which has been successful at advocating law and protecting children’s rights, is Casa Alianza Mexico. Casa Alianza

109 Id.
110 STAIRWAY FOUNDATION INC., supra note 97.
114 STAIRWAYS FOUNDATION INC., supra note 97.
Mexico was established in 1988. This organization provides care and protection to girls and boys who have been victims of neglect, abuse, abandonment, addiction, sexual exploitation, and human trafficking. Casa Alianza Mexico has six residential centers within the nation that house up to eighty children, seventeen teen moms, and twenty-four babies per night. The goal of Casa Alianza Mexico is to prepare the child for life after leaving its facility by implementing life plans for each child. Casa Alianza also created a groundbreaking twenty-four hour toll-free crisis hotline, Acercatel, which serves children and youth in crisis throughout Mexico. It has been reported that Acercatel receives around 30,000 calls a year from children and teenagers between the ages of five and eighteen, with most cases being children who have been abused or exploited. At the time, Acercatel was a groundbreaking service program in Mexico. It continues to provide children with the confidentiality to talk through problems and receive the love and support of a trained counselor.

The Mexican government needs to collaborate with NGOs, such as EPCAT Mexico and Casa Alianza Mexico, which have played an important role in forming and executing strategies to prevent child sex tourism. These NGOs have been successful in advocating the passage of new legislation regarding human trafficking and encouraging law enforcement officials to enforce the law. Pedophiles, tour operators, and those who profit from child sex tourism will be deterred from continuing their illegal actions only when it is made clear that they will be prosecuted.

B. Need for Foreign Campaigns and Training

The Mexican Government should acknowledge the depth of human trafficking and sex tourism within its country, especially since children are involved. The Government should allocate more resources to detect human trafficking and generate social awareness about child trafficking to prevent children from being forced into the sex industry. More importantly, they should focus on providing law enforcement officers with adequate training on how to detect victims and manage sex tourism cases. Overall, the country should implement national awareness of child trafficking and child sex tourism in order for communities to identify and help the victims.

116 Id.
118 Id.
VI. CONCLUSION

Child sex tourism must stop. According to the Trafficking in Persons Report of 2012, Mexico is a Tier 2 country, meaning it does not fully comply with the Trafficking Victims Prevention Act’s minimum standards.\footnote{Trafficking in Persons Report 2012, U.S. DEP’T OF STATE (June 19, 2012), http://www.state.gov/secretary/rm/2012/06/193368.htm.} However, Mexico is making significant efforts to end child sex tourism by passing legislature, allocating funds, and raising public awareness. As a result of Mexico’s struggling economy and the recent overwhelming violence by drug-gang wars, Mexican officials have little to no time to target human trafficking crimes, specifically sex trafficking cases.\footnote{Jim Forsyth, Sex Tourism Takes Hold in Mexico, WOAI LOCAL NEWS (Oct. 3, 2010), http://radio.woai.com/cc-common/news/sections/newsarticle.html?feed=119078&article=7669582.} Thus, the United States may be better equipped to regulate extraterritorially to protect Mexican children. Since American tourists are committing these crimes, the United States should continue its efforts to regulate and punish these individuals when possible. Essentially, the United States and Mexico must combine forces in an attempt to eliminate child sex tourism in Mexico.
SAME-SEX MARRIAGE: A TRUE THREAT TO THE FREE EXERCISE OF RELIGION

Doug Christensen*

Today, a hot controversy across the United States is whether the Federal Defense Of Marriage Act (DOMA)¹ should be repealed and same-sex marriage legalized nationally. Arguments between liberals and conservatives have raged back and forth perhaps leaving many who are undecided or uneducated upon the subject wondering which side to take.

Investigation of the legal articles concerning same-sex marriage reveals that the majority of legal academics argue that marriage is a universal civil right and there is no valid reason to deny homosexuals the ability to be married.² On the other hand, a few legal scholars argue that legalizing same-sex marriage would essentially open a proverbial can of social worms, resulting in devastating effects to our nation.³ Unfortunately, this point of view seems largely ignored or perhaps just prematurely dismissed as incorrect. Although this topic is certainly sensitive for many, and rightfully so, there is merit to openly discussing and evaluating all sides of the debate before concluding which side is right. It seems that too often the arguments

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against same-sex marriage are not given any credibility because the homosexual movement is advancing so rapidly.\(^4\)

Not only is this debate raging within the United States, it is occurring on a world-wide scale. To date, the United Nations (U.N.) has not officially recognized the legality of same-sex marriage. In fact, official U.N. documents recognize marriage only as between a man and a woman. For example, the Universal Declaration of Human Rights proclaims protection for families based upon marriages between "men and women."\(^5\) The U.N. does recognize the legality of same-sex marriages that are performed in countries where the practice is legal, but it ultimately leaves deciding whether or not to legalize same-sex marriage up to each nation.\(^6\)

The debate on whether to nationally legalize same-sex marriage, or at least the intensity of the debate, is fairly new within the United States. Since the morality and legality of same-sex marriage has already been thoroughly argued, this note will focus on the harmful effects that legalizing same-sex marriage will eventually have on the First Amendment of the U.S. Constitution, particularly the free exercise of religion within our nation.

More specifically, this note will argue how other nations, that have already legalized same-sex marriage, exemplify the restrictions that will be placed on the free exercise of religion within the United States if DOMA is repealed and same-sex marriage is nationalized. Additionally, it will show how this will be the case regardless of the protections provided by the First Amendment of the Constitution.

For those who do not believe that the national legalization of same-sex marriage would actually curb any fundamental American liberty, there are numerous examples, globally, to rebut that position. Such restraints to personal religious liberty have already occurred internationally. This note will focus specifically on such incidents that have occurred in Western Europe and Canada.

Part I of this note will discuss flaws inherent in the arguments advocates of same-sex marriage commonly make against those who for religious purposes believe that marriage is only to be performed between a man and a woman. Part II will evaluate specific instances of religious persecution in Western Europe that have arisen because of legalization of same-sex marriage. Part III will then discuss Canada's evolution of legalization of same-sex marriage: first, sweeping social change, followed by evolution of


\(^6\) See Domestic partnership and same sex marriage, UNSPECIAL.ORG (March 2004), http://www.unspecial.org/UNS627/UNS627_T06.html.
legal doctrines, and finally the specific harms that have occurred as a direct result of those changes. Part IV will compare the evidence that this article has presented up to that point to the current controversy within the United States and the negative effects that repealing DOMA and legalizing same-sex marriage nationally will have on the free exercise of religion within the U.S.

INTRODUCTION

Before diving into this note’s main argument, it will be helpful to briefly explain the background of the legalization of same-sex marriage both internationally and within the United States. The tides of this so-called cultural progression are rapidly washing over the continents of the globe. To date, seven countries in Western Europe have legalized same-sex marriage. Additionally, one in North America, one in South America, and one in Africa have also chosen to legalize same-sex marriage. The Netherlands led the way in 2001. Since then, others have followed at an accelerating pace: Belgium in 2003; Spain and Canada in 2005; South Africa in 2006; Norway and Sweden in 2009; and Portugal, Iceland, and Argentina in 2010. Although the number of nations that have legalized same-sex marriage is a small percentage of the total nations throughout the world, the fact that ten nations have made it legal is quite disturbing when one considers that in 2000, just thirteen years ago, no nation had yet legalized same-sex marriage.

Aside from a national legalization, certain countries that have not legalized same-sex marriage nation-wide, such as Mexico and Israel, still recognize the legitimacy of same-gender marriages performed in other countries where that practice is legal. Also, some countries allow legal differences between different jurisdictions within the country. Mexico is an example of this; same-sex marriage is legal within the limits of Mexico City but nowhere else in the country. The United States currently falls in this category as each of the 50 states are individually allowed to decide whether to legalize same-sex marriage, but it is not yet federally mandated.

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8 Wardle, Attack on Marriage, supra note 3, at 1367.
9 Williams, supra note 7.
10 Id.
11 See Defense of Marriage Act, supra note 1, at § 2(a) (Presently, the Defense of Marriage Act is an assertive protection for states that do not wish to accept same-sex marriages as part of their codified law. The Act explicitly states, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").
Though legalizing marriage between persons of the same sex appears harmless, even progressive, it is in reality harmful to the freedom of religious ideas and practices. These blights have festered in many forms; some as prosecutions of citizens who, for religious reasons, have refused to accept same-sex marriage, some as cultural shifts that have led to social antagonism toward any who oppose same-sex marriage, and others falling somewhere between the two. The current status quo, both domestic and abroad, suggests that harm to true religious freedom will increase unless the public is educated regarding these harms and decides to actively oppose these 'progressive' cultural tides.

The United States is currently experiencing these cultural and legal patterns. Though DOMA is still in place, thereby preventing the federal government from legalizing same-sex marriage nationally, seven states and the District of Columbia have legalized same-sex marriage within their respective jurisdictions. This trend has continued to gain momentum ever since Massachusetts legalized it in 2004. Since then, the following states have legalized same-sex marriage: Connecticut in 2008; Iowa and Vermont in 2009; New Hampshire and the District of Columbia in 2010; New York in 2011; and, most recently, Washington on February 13th of 2012. Additionally, on November 6th, the general voting ballot in Maine is set to contain an initiative that if approved, which is likely to be the case, will legalize same-sex marriage. This would be the first voter legalization of same-sex marriage within the United States, demonstrating the rapidly growing public support for same-sex marriage in the nation.

12 See Wardle, supra note 3.
13 Id.
15 Vestal, supra note 14.
16 Reese, supra note 14; Vestal, supra note 14.
17 Same-Sex Marriage and Domestic Partnerships on the Ballot, NCS.L.ORG, http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx (last updated Jul. 31, 2012) (Other states that will have same-sex marriage related issues on their ballots include Minnesota, Maryland, and Washington. In Minnesota, the legislature referred a question on the constitutional definition of marriage to the ballot. On the other hand, the ballot measures in both Maryland and Washington are attempts to overturn the legalization of same-sex marriage within these respective states, instigated by the legislature and signed by the governor.).
18 Id.
I. THE MAJOR FLAW IN THE HOMOSEXUAL ARGUMENT AND WHY SOME RELIGIOUS FAITHS WILL NEVER BE ABLE TO ACCEPT SAME-SEX MARRIAGES

Despite the arguments in favor of same-sex marriage, several religious faiths within the United States will never acknowledge same-sex marriage as a valid practice, let alone as morally right, because of the deeply seeded doctrines of their respective faiths. The Catholic Church holds the status of the family to be sacred and a valid marriage between a man and a woman is central to that belief.\(^{19}\) Within the Catholic Church, it is believed that the jurisdiction of the church over marriage provides "an authentic protection for family values," and thus, performing a marriage between persons of the same-sex can never be acceptable within the church.\(^{20}\)

Likewise, the Church of Jesus Christ of Latter-day Saints (LDS Church or LDS), another forerunner among the religious sects opposed to same-sex marriage, holds a similar view regarding marriage and the family. In a formal proclamation issued by its First Presidency and Council of Twelve Apostles, the LDS Church declared that "marriage between a man and woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children."\(^{21}\) Additionally, this proclamation affirmed the LDS belief that sexual relations are only to be performed within the bounds of a lawful marriage between a man and woman.\(^{22}\) In other words, the LDS Church has explicitly declared that one of its foundational doctrines prevents its members from ever supporting or accepting the performance of same-sex marriages.

Critics argue that churches will inevitably change their individual policies regarding same-sex marriage when the level of antagonistic social pressure rises high enough.\(^{23}\) This argument lacks a true understanding of many religious faiths throughout the U.S., including the two mentioned above. In both the Catholic and LDS churches, the definition of marriage has always been a sacred and fundamental doctrine, and, as such, the

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\(^{20}\) Id.

\(^{21}\) Church of Jesus Christ of Latter-Day Saints, The Family: A Proclamation to the World (Sept. 23, 1995), available at http://www.lds.org/family/proclamation?lang=eng (This proclamation was originally read by Gordon B. Hinckley, Church president at that time, as part of his sermon at the LDS General Relief Society Meeting held that same day.).

\(^{22}\) Id.

definition of marriage cannot be altered to include marriages between those of the same sex. Fairly recently, the Human Rights Campaign group (HRC) accused the LDS Church of altering its official policy by accepting homosexual relationships as normal and no longer recognizing them as sinful. Scott Trotter, spokesperson for the LDS Church, responded that the HRC's representations "are simply absurd," and further elaborated that such a stance would be contradictory to the fundamental beliefs held by the LDS Church. Trotter's response clearly indicates the LDS Church's resolve: that no matter what opposition it faces it simply cannot change its religious doctrine concerning same-sex marriage.

This is not to say that persecution of individuals who advance or accept same-sex marriage should ever be tolerated. However, by the same token, those who are morally and religiously opposed to same-sex marriage should never be forced—through legislation, popular opinion, or otherwise—to accept it, even if it is legalized. To do so would be a direct violation of the First Amendment of the United States Constitution.

Understandably, most advocates of same-sex marriage argue that same-sex marriage is an equal protection issue and label persons opposed to it as bigots or homophobes. This is not true. This argument fails to take into account that persons opposed to same-sex marriage have a significant list of reasonable concerns. Admittedly, it is axiomatic that there are some who do oppose homosexual activists only because they are in some way prejudiced against homosexuals. Nonetheless, the actions and opinions of that handful of people should not speak for those who do have legitimate concerns.

One major concern among many who oppose same-sex marriage is the potential for infringement upon their personal religious beliefs and the freedom to openly oppose same-sex marriage as immoral, or for any other legitimate personal reason. The following sections of this article will illustrate the ways in which the freedom of religion guaranteed by the First Amendment is not violated when individuals object to same-sex marriage on religious grounds.

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24 LDS Church responds to claims of changes in church policy regarding homosexuality, L.A. TIMES (Nov. 16, 2010, 9:17 PM), http://www.latimes.com/kstu-news-release-newlds-church-policy-removes-same-sex,0,361434.story (The HRC claimed that it achieved a victory on behalf of the homosexual community because of recent changes the LDS church made to its official Handbook of Instructions. The newest edition no longer advises church leaders to counsel members who experience same-sex attraction to seek "reparative" therapy. HRC proponents claimed this implied the LDS church's acceptance of homosexual behavior.).

25 See id.

26 U.S. CONST. amend. I ("[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . ").

27 Wardle, supra note 3, at 1378; Cline, supra note 23.

28 See Wardle, supra note 3, at 1378.
Amendment\textsuperscript{29} will be harmed if DOMA is repealed and same-sex marriage is adopted nation-wide.

II. SOCIAL CHANGE, LEGALIZATION OF SAME-SEX MARRIAGE, AND THE SUPPRESSION OF RELIGIOUS FREEDOM IN WESTERN EUROPE

A. Pastor Ake Green: An Early Example of Religious Suppression

Obvious disruptions to the free exercise of religion surfaced early on in Sweden. The prosecution of Swedish Pastor Ake Green in 2004 is an extremely disturbing example of how restraints to the freedom of religion develop.\textsuperscript{30} While serving as a Pentecostal pastor in Kalmar, Sweden, Green was found guilty of "hate speech against homosexuals" and sentenced to one month in prison.\textsuperscript{31} What did Green say that was so egregious that it qualified as hate speech under the new Swedish law? According to reports, while preaching he condemned homosexuality as a "deep cancerous tumor in the entire society."\textsuperscript{32} It is important to keep in mind that he expressed this point of view in his capacity as a religious leader relying on the Bible as the main source for his sermon.\textsuperscript{33} Moreover, Pastor Green’s remarks reveal that his sermon was not an attack on homosexuals. Rather, it was, in his belief, a sincere gesture of help to them in the form of a call to repentance:

Jesus is saying that you have to repent. Jesus’ view of homosexuality is a call to repentance. They have washed their robes and made them white, therefore they stand before the throne of God. There is a purifier. Nobody has to be defeated by sexual immorality. Nobody has to say: “I have such a losing battle in this area.” Everybody can be set free and delivered. You can receive it if you want it.\textsuperscript{34}

\textsuperscript{29} See U.S. Const. amend. I.


\textsuperscript{33} See Pastor Ake Green’s Sermon, supra note 32 (Inspection of the transcript shows that Green referenced the Bible throughout his entire sermon, and that it was the main source from which he drew his conclusions).

\textsuperscript{34} Id. (emphasis added).
Additionally, Pastor Green concluded his sermon by clearly declaring that his message was one that was meant to help others, not as an attack:

We must never think that some people, because of their sinful lives, would end up outside of grace. Paul says about himself that he was the foremost of all sinners, but he encountered an abundance of grace and mercy. He also states in First Corinthians 6:9-11, when he lists sexual immorality with other sins, that you can be saved from all the listed sins, including sexual immorality. What these people need, who live under the slavery of sexual immorality, is an abundant grace. It exists. It is valid also for them. Therefore we will encourage those who live in this manner to look at the grace of Jesus Christ. We cannot condemn these people -- Jesus never did that either. Jesus never belittled anyone. He offered them grace. We must never belittle anyone who lives in sin. The sin we cannot bear -- but the human being [we must hold up]. It is by showing all people grace and mercy that we can win them for Christ.35

Though it is easy to understand why a homosexual person would likely be offended by Green's sermon, the point at issue here is different. Regardless of how others may feel, Pastor Green should be able to practice his religion as he sees fit; in fact, Pastor Green's statement, as an expression of his religious belief, should have been protected as a fundamental right enumerated in Sweden's Constitution.36 Specifically, the Swedish Constitution guarantees its citizens "the freedom to practice one's religion alone or in the company of others."37 Green did not encourage the abuse or maltreatment of homosexuals. He was not out in public taunting or verbally abusing homosexuals. Rather, Pastor Green made these statements in the context of a religious sermon inside his church.38

Thus, Sweden's hate speech law effectively denied Pastor Green one of his fundamental rights supposedly guaranteed by the Swedish Constitution, that of exercising his religious beliefs, even among his own congregation. Critics might argue that in the United States the First Amendment would bar this type of hate speech law from being passed, however this argument would not be valid. This will be discussed in further detail later in this note.39 For the time being, it is important to understand that Sweden's hate speech law has caused its citizens to be deprived of their constitutionally

35 Id. (emphasis added).
37 Id.
38 Freedom of Religion on Trial in Sweden, supra note 30; Mohler, supra note 31.
39 See infra Part IV.
guaranteed right to worship freely,\textsuperscript{40} which is akin to the U.S. Constitution's guarantee of the right to freely exercise one's religion.\textsuperscript{41}

Critics that are unconcerned about American law evolving into something similar to Sweden should closely evaluate Pastor Green's story. Sweden's culture changed very quickly. Sweden's Constitution guarantees, at least in text, its citizens the right to freely exercise their individual religion and that right is said to be an absolute right in that it cannot be restricted without a change to the fundamental law enumerated in its constitution.\textsuperscript{42}

However, that is exactly what happened with the free exercise of religion in Sweden. In 2002, The Riksdag, Sweden's parliament, passed a hate speech law favoring the protection of homosexual orientation which was subsequently codified as an official part of the Swedish code of statutes known as the "Svensk författningssamling" (SFS). This law declares that any person may be punished if his or her statement "threatens or expresses contempt for a national, ethnic or other such group with allusion to race, color, national or ethnic origin, religious belief or sexual orientation."\textsuperscript{43}

Moreover, if the offense is found to be "aggravated," the prison sentence imposed may be up to four years.\textsuperscript{44} The statute also instructs courts that, when determining if the speech was aggravated, it should consider factors such as whether the message had "particularly threatening and abusive content" and whether it was "spread to a large number of people in a way that was likely to cause significant attention."\textsuperscript{45} Church sermons were explicitly included within the reach of the statute.\textsuperscript{46}

Cecilia Julin, the Swedish ambassador to Slovakia at the time, explained that the law was enacted to silence public addresses that might "instigate hatred towards a certain group."\textsuperscript{47}

During the debate over the legislation before it was passed the Swedish chancellor of justice admitted that after the laws were passed, church sermons that simply declared homosexual behaviors as sinful, and

\textsuperscript{40} Regeringsformen [RF] [Constitution] 2:1(6).
\textsuperscript{41} U.S. Const. amend. I.
\textsuperscript{43} Id.
\textsuperscript{44} Mohler, supra note 31; See also 16 ch. 8 § Brottsbalken (Svensk författningssamling [SFS] 2002:800).
\textsuperscript{45} Mohler, supra note 31.
nothing more, "might" be considered a criminal offense. While the debate exposed the potential for the limitation on the free exercise of religion, by way of criminalization, it is important to note that that "fear" has actually come to fruition.

Though Pastor Green's prosecution is not current news, this incident should be alarming to any who consider the freedom to worship essential, or at least appreciate the importance of fundamental human rights in general. While discussing this incident involving Pastor Green, Reverend Albert Mohler, Jr. pointed out that "Evangelical Christians—and all those who cherish civil liberties—should observe this case with great interest and concern." Vladimir Palko, Slovakia's Interior Minister to Sweden at the time of this incident, suggested that the incident foreshadowed a bigger problem brewing in Europe: "In Europe people are starting to be jailed for saying what they think."

The most disturbing thing about Green's prosecution was the response from advocates for the homosexual movement. Kjell Yngvesson, the prosecutor in the Green case, justified Green's conviction by saying, "[o]ne may have whatever religion one wishes, but this is an attack on all fronts against homosexuals. Collecting Bible citations on this topic as he does makes this hate speech." It is quite disturbing that a prosecutor, appointed by society to be responsible for making sure criminals are punished, believes that a pastor's research of the Bible is punishable by imprisonment. Mohler referred to Yngvesson's statement as one of the "most shocking and revealing statements uttered by any legal official in recent times." From that point onward, quoting from the Bible, a form of religious expression, was effectively outlawed in Sweden, at least in that context. This is clearly religious discrimination.

Following Green's arrest, same-sex marriage activists openly pledged to monitor church sermons in Sweden, vowing to report violations to the authorities. As Soren Anderson President of the Swedish Federation for Gay, Lesbian, and Transgender Rights declared, his organization would "report hate speech regardless of where it occurs," adding that religious liberty is not a valid reason to allow speech that is offensive to

48 Id.; See also 16 ch. 8 § BROTTSBALKEN (SFS 2002:800).
49 Freedom of Religion on Trial in Sweden, supra note 30.
50 Mohler, supra note 31.
51 Id.
52 Id. (emphasis added); See Freedom of Religion on Trial in Sweden, supra note 30.
53 Mohler, supra note 31.
54 Id.
55 Id.
homosexuals. If Anderson's logic were applied it could prevent any religious expression because someone will disagree with any given religious doctrine and could be offended by it. Such flawed logic is not even worth consideration. Its application would be absurd. By the same logic, one would argue that there cannot be anymore disagreement between people on any subject because someone could always be offended.

No matter how supporters of the hate speech view it, in reality its implementation led to the conviction of Pastor Green. This in turn transformed the rule of law in Sweden from preventing "hate speech" to actually prohibiting speech that is purely part of religious expression, such as citing the Bible from a church pulpit. That is why this disturbing event, leaving its inimical mark on Sweden, is a prime example of the resulting religious discrimination when society accepts, embraces, and finally legalizes same-sex marriage.

U. S. citizens should be concerned because seven states have already completed this transition, and repealing DOMA would accelerate the process. If nothing changes, we are bound to end up in the same disastrous situation as Sweden.

B. Great Britain: An Alarming Example of how Social Change Leads to the Legalization of Same-Sex Marriage and the Subsequent Suppression of True Religious Freedom

Recent legal changes in Great Britain exemplify how fast political and societal influences can alter a country's existing legal protections. The British Parliament has not yet legalized same-sex marriage, but it is only a matter of time before that happens. Currently, only civil unions, affording the same rights as marriages, are legal for same-sex couples in Britain. Beginning in 2010, Parliament began to implement drastic changes to the legal status of same-sex partnerships. Traditionalist British bishops became concerned that vicars would be taken to court and accused of discrimination if they turned down requests to officiate civil unions on religious premises, such as churches. These concerns were raised after a parliamentary vote

56 Id.
57 Freedom of Religion on Trial in Sweden, supra note 30.
60 Id.
that allowed for civil unions to be performed in places of worship in Britain for the first time ever.\textsuperscript{61}

Originally, the Civil Partnerships Act, as enacted by Parliament in 2004, limited the location for civil union ceremonies strictly to secular venues such as register offices.\textsuperscript{62} But in 2010, the Equality Act adopted by Parliament amended the Civil Partnerships Act to allow for civil unions to be performed in places of worship for the first time ever.\textsuperscript{63} While the amendment contains a provision stating that religious organizations will not be forced to host civil unions if they choose not to,\textsuperscript{64} clergy remained gravely concerned.\textsuperscript{65} They worried not only about the bill itself, but also about the cultural developments in Britain that would likely follow, restricting their freedom of religious belief by imposing sanctions on them for refusing to perform civil unions at their parishes.\textsuperscript{66} Research shows that laws are likely to be amended to follow evolution of national social culture, so British clerics had good reason to be nervous.\textsuperscript{67}

Reverend Michael Scott, the former Joint Bishop of Winchester, proclaimed, "I believe that [the amendment] will open, not the Church of England, but individual clergy, to charges of discrimination if they solemnize marriages as they all do, but refuse to host civil partnership signings in their churches. Unless the Government does something explicit about this, I believe that is the next step."\textsuperscript{68} Retired Reverend David James, Bishop of Bradford, also expressed similar concern when he warned of the "unintended consequences" of the proposed change.\textsuperscript{69} He contended that although the amendment was presented as "an available option" to religious groups who agree with homosexual relations, he was "not so confident" that the status quo would stay that way.\textsuperscript{70}

It was not just clergy who were worried about this proposed amendment though. Several legal and governmental professionals also expressed their concerns. Lord Waddington, former Home Secretary explained, "If this amendment were carried, it would only be a matter of time before it was argued that it was discriminatory for a church incumbent to refuse to allow a civil partnership ceremony to take place when the law allowed it."\textsuperscript{71} He also

\textsuperscript{61} Id.
\textsuperscript{62} Civil Partnership Act, 2004, c. 33, §6.1(b).
\textsuperscript{64} Equality Act, 2010, c. 15, pt. 16 § 202(4).
\textsuperscript{65} Beckford, supra note 59.
\textsuperscript{66} Id.
\textsuperscript{67} See Wardle, supra note 3.
\textsuperscript{68} Beckford, supra note 59.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
opined that any clergyman “prepared to register marriages but not to register civil partnerships would be accused of discrimination on grounds of sexual orientation in the provision of services and pressure would be brought to bear on him to pocket his principles and do what he believed to be wrong.”72 Waddington concluded his remarks by predicting that if the proposed amendment passed, such ministers would "without doubt" be the subjects of much costly litigation.73 Later, in 2011, Waddington supported his earlier postulations by listing before parliament some of the injustices that had already occurred as a result of the Equality Act.74

Also adding credibility to this view, Andrea Williams, director of the Christian Legal Centre, identified some practical concerns to such an amendment: “We have seen countless cases where, as a result of similar sorts of legislation, religious adoption agencies have been forced to close and Christians have been forced out of their jobs for acting according to their beliefs.”75 She also commented on the inevitable liberal cultural shift that would follow in Britain if such an amendment were to remain unopposed:

There is no doubt that the homosexual lobby will now test it: they will apply for ceremonies in churches and when the minister refuses they will challenge him under the law. . . . This is a further blurring of the definition of civil partnerships, which are becoming equivalent to marriage and churches are being forced to treat them as such.76

Mike Judge of the Christian Institute added to the discussion by explaining the inevitable cultural change in Britain that would surely follow such an amendment. In part, he commented, "[w]e are very concerned about this and it’s a very alarming proposal," and "[e]ven if this amendment says on the face of it that it only applies to those who choose to perform civil partnerships, that will not end up being the case and clergy will end up facing very costly legal bills in order to defend themselves against law suits."77 Having experience in this area of law, Mr. Judge understands that a legal landscape evolves after this type of amendment is passed, creating a high risk of the deprivation of personal religious freedom.

Neil Addison, a barrister who specializes in religious discrimination, agreed with Judge’s prediction. Addison remarked, "[a]s the Law now stands

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72 Id.
73 Id.
75 Beckford, supra note 59.
76 Id.
77 Id.
Churches and Synagogues that are registered to conduct Marriages could easily find themselves being sued for discrimination if they do not register to conduct Civil Partnerships." Additional, "[L]ocal Authorities could also refuse to grant or renew marriage authorisation to Churches and Synagogues that do not also apply for Civil Partnership authorisation."

Such overwhelming concern from both experienced government and legal professionals should arouse suspicions, if not alarm, any responsible citizen. The freedom of religion is a fundamental human right that responsible citizens must actively protect.

Luckily, clergyman and legal activists raised enough of an outcry that ministers in parliament subsequently altered Lord Alli's proposed amendment. By the end of the month the amendment was proposed, Baroness Royall, the Leader of the House of Lords, insisted that the amendment contain an exculpatory provision allowing vicars to opt-out of hosting civil-union ceremonies on their respective properties. Though this relieved those opposed to Alli's amendment the threat of homosexual activism had not been quenched by any means. As it turned out, the advocates for same-sex marriage could not be kept at bay for long. Unfortunately, these advocates had gained enough social momentum to sway Britain's culture in favor of accepting the homosexual agenda.

As planned, by November 2010 Parliament legalized the performance of civil-unions in religious settings. The amendment freeing vicars from liability for refusing to perform civil-unions was included. However, it is alarming to note the cultural landslide that occurred in Britain allowing passage of that amendment. By December 2010, less than a year after the strenuous battle over allowing civil unions on religious premises, Parliament was already discussing legalizing same-sex marriage. By September 2011, Lynn Featherstone, Equalities Minister in Parliament, announced plans to begin official consultations by March of 2012 to seriously consider

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legalizing same-sex marriage in Britain. With the momentum advocates for same-sex marriage have gained, it is predicted that Great Britain could legalize same-sex marriage by 2013.

Harriet Harman, Equality Minister in Great Britain, predicted such an outcome back in 2010. During the initial debate over where civil-unions could be performed she said, "I look forward to [the Equality Bill] taking its place on the statute books following further scrutiny by the House of Commons, but that will not be the end of the story. After the Bill is passed we will set to work implementing and enforcing it, putting equality firmly at the centre of Government." Harman's statement exhibits the subtle cultural changes that homosexual advocates create.

More specifically, Britain's battle leading up to the enactment of same-sex marriage exemplifies the pattern homosexual activists follow to alter the social culture in order to successfully legalize same-sex marriage. First, they influence the culture's social philosophy and level of acceptance, and then the inevitable legal amendments follow. All of this is done in the face of obvious threats to the free exercise of religion.

Often these social changes are implemented by degrees; here this happened with civil-union law. Once this type of change gains a stronghold in society, a cultural-philosophical landslide takes place resulting in the gradual restriction of the religious rights within that nation. Comparing the current cultural-philosophical status in the U.S. with Britain should be a wake-up call for those in our nation concerned with keeping our freedom to worship free.

III. Judicial Activism Resulting in the Adoption of Same-Sex Marriage and Restriction of Religious Freedom in Canada

An inspection of Canada's evolving law and social climate also supports the theory that legalizing same-sex marriage leads to restrictions on religion. To better understand this it is necessary to understand the changes in Canada's law and social culture that led to a national legalization of same-sex marriage.

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86 Christopher Hope, Gays to be given right to marry, THE TELEGRAPH (Sept. 17, 2011, 7:00 AM), http://www.telegraph.co.uk/news/politics/8769845/Gays-to-be-given-right-to-marry.html.
87 Beckford, supra note 59 (emphasis added).
88 See SEARS, supra note 4, at ch. 1 & 8.
89 Id.
90 Id. at 17-18; SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 3, at 104 (Quoting: Eugene Volokh, Same-Sex Marriage and Slippery Slopes, 33 Hofstra L. Rev. 1155, 1178 (2005)).
91 Beckford, supra note 59.
In 1982, the Canadian Legislature adopted the Charter of Rights and Freedoms (Charter) as an addition to the Canadian Constitution. Its central premise is the equal treatment of all people under the law. Adhering to the Charter, in 1995 the Canadian Supreme Court decided that discrimination on the basis of sexual orientation was prohibited, and one year later the Canadian Human Rights Act was amended to include sexual orientation as discrimination to bring it into conformity with the Supreme Court's decision.

Intriguingly, Canada's legalization of same-sex marriage began with provincial courts first declaring its legality. This step-by-step process created a domino effect that eventually culminated in 2005 when the Canadian legislature finally legalized same-sex marriage nationally through the Civil Marriage Act (the Act). Collectively, the Provincial courts' rulings led to the Supreme Court's decision. They also paved the way for the discrimination of any who religiously opposed same-sex marriage. Late in 2004, when the debate over same-sex marriage had reached a boiling point, the Canadian Supreme Court finally considered the matter and ultimately ruled for same-sex marriage. At the same time, it reassured religious groups that they would not have to perform same-sex marriages if doing so would be contrary to their beliefs. In reality, when the Act was later implemented based on the decision of the Supreme Court it provided, in relevant part:

... no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under

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94 Submission of the Canadian Human Rights Commission, supra note 93.
96 See Civil Marriage Act, S.C. 2005, c. 33 (Can.).
the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.\footnote{Civil Marriage Act, S.C. 2005, c. 33 § 3.1 (emphasis added).}

Still, civil servants opposed to the performance of same-sex marriages for religious reasons were not protected by the court's ruling; "Religious Officials" were the only persons the Court officially granted immunity to.\footnote{Civil Marriage Act, S.C. 2005, c. 33 § 3; Same-Sex Rights: The Supreme Court Decision, supra note 97.} The supposed protection the Act provided for the free exercise of religion was just a façade. In reality, no adequate protections were afforded for individuals who are religiously opposed to same-sex marriage. The sanctions civil servants endured in Manitoba is a poignant example of the harm that befalls private individuals when there is a lack of statutory protection combined with judicial activism.

In September 2004, Manitoba's Supreme Court legalized same-sex marriage in \textit{Vogel v. Canada}. Justice Douglas Yard declared that defining marriage as exclusive to heterosexual couples was "no longer constitutionally valid in view of the provisions of the Charter of Rights and Freedoms."\footnote{Manitoba recognizes same-sex marriages, CBC NEWS, http://www.cbc.ca/news/canada/story/2004/09/16/manitobasamesex040916.html (last updated Sept. 16, 2004, 10:35 PM); See also Manitoba becomes 4th province with legalized 'gay marriage', BP NEWS (Sept. 16, 2004), http://bpnews.net/bpnews.asp?ID=19114.} Though Justice Yard decided this case under the guise of equality, he effectively denied those religiously opposed to same-sex marriage the right to freely exercise their individual religious beliefs. Shortly after \textit{Vogel}, Manitoba's Vital Statistics Office mailed a notice to the province's 600 marriage commissioners ordering them to return their Certificates of Registration if they had a problem performing same-sex marriages.\footnote{Commissioners have right to refuse to wed gay couples, CBC NEWS, http://www.cbc.ca/news/canada/story/2004/11/11/samesex_041111.html (last updated Nov. 11, 2004, 1:29 PM).} This forced marriage commissioners opposed to same-sex marriage to choose between adhering to their religious convictions and staying employed.\footnote{Id.} At least eleven of those marriage commissioners resigned by responding that authorizing same-sex marriages would contravene their religious beliefs.\footnote{Id.} In response, Vic Toews, a Canadian federal justice critic, filed a formal complaint stating that making provincial commissioners choose between faith and employment is discriminatory.\footnote{Id.} His claim failed. Still, forcing
government employees to choose between their jobs and their personal beliefs is hardly a preservation of religious freedom. Rather, it gives the gay rights equal protection agenda priority over religious freedom.

The acceptance of same-sex marriage in Canada was sparked by a social acceptance of it and engrained in society by judicial activism. Now it is considered a "cultural norm" throughout the country.\textsuperscript{106} It seems that few have any concern that there will be immediate harm to clergy who refuse to marry same-sex couples.\textsuperscript{107} But some are concerned that the cultural acceptance of same-sex marriage will develop to where legal suits may be filed against clergymen who refuse to perform same-sex marriages.\textsuperscript{108} Even some advocates of same-sex marriage admit that worries over the eventual denial of religious freedoms may be valid.\textsuperscript{109} One theory is that the social attitude of the public will eventually evolve to the point that refusing to perform same-sex marriages is considered socially unacceptable, like the evolution of U.S. society regarding racism and sexism during the civil rights era.\textsuperscript{110} The comparison poses that a widespread acceptance of same-sex marriage would eventually lead to lawsuits against clergy for refusing to marry a homosexual couple. Once that door is opened, social pressure would eventually cause the Supreme Court to conform its decisions to the public will. Finally, the legislature would be more likely pass hate speech laws similar to Sweden's.\textsuperscript{111}

The domino effect, created by provincial courts legalizing same-sex marriage combined with the drastic moral-cultural shift throughout Canada regarding same-sex marriage and the problems created thereby, should not be disregarded by U.S. citizens. Many similar events are presently taking place within our country implicating that we are on the same path as Canada. This will be the case unless people take a firm stance against the social acceptance and legalization of same-sex marriage within our country.


\textsuperscript{107} Id.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Cline, supra note 23 (The author's argument is essentially that historically mistreatment of African-Americans and women was common to American society, specifically within its Christian religions. Ultimately, society changed and eventually religions could no longer hold blacks or women as second class citizens without being wrong by society's standards. To do so today would result in one being labeled a racist and outcast from mainstream society. The author concludes by predicting that the "same will eventually happen with gays in America."); See also Robinson, supra note 106.

\textsuperscript{111} Robinson, supra note 106.
IV: THE UNITED STATES AND THE CONTROVERSY OVER DOMA

A. The Current Status Quo in the United States

The social-political landscape within our own country has changed drastically in the past few years. For the first time since DOMA was instituted, the President’s administration has not actively supported it.112 In fact, President Obama has called for the repeal of DOMA, declaring it an "unwarranted congressional interference with state sovereignty."113 This is not the only problem that supporters of the free exercise of religion in the U.S. face. Like the other countries previously mentioned, the United States has already seen its fair share of gay-rights activists interfering with the fundamental rights of others.

One of the most commonly cited instances was when Catholic Charities of Boston (Catholic Charities) was forced to close its doors.114 Catholic Charities, owned and operated by the Catholic Church, was one of the nation’s oldest adoption agencies.115 When the Massachusetts Supreme Court ordered that gay marriage be legalized in 2003, it alleged that religions failing to provide services for same-sex couples could only be motivated by an "animus" against them.116 In response, the Vatican clarified that the reason Catholic Charities could not place children with same-sex couples was because doing so would be a direct violation of Catholic doctrine.117 Ultimately, the change in Massachusetts law led to a denial of public funds vital to the survival of Catholic Charities, and the Catholic Church had to choose between adhering to its doctrine and keeping the adoption agency open.118 Obviously, the Church could not diverge from one of its

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112 SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 3, at 107.
113 Id.
115 Gallagher, supra note 114.
117 Gallagher, supra note 114.
118 Id.
fundamental doctrines. The closure of Catholic Charities impacted many and culminated in what referred to as "a tragedy for kids."  

More recently, others in the U.S. who are religiously opposed to homosexuality and same-sex marriage have been persecuted. In August 2011, Jerry Buell, a teacher at Mount Dora High School, was suspended from his teaching position and threatened with termination pending an investigation regarding "homophobic" remarks he wrote on his personal Facebook account.  

Buell's comments were his personal reaction to the legalization of gay marriage in New York.

Mount Dora's administration suspended Buell after receiving complaints about his Facebook page and school officials claimed they were concerned that his comments might lead to intimidation of homosexual students in his classroom. Buell responded, "It was my own personal comment on my own personal time on my own personal computer in my own personal house, exercising what I believed as a social studies teacher to be my First Amendment rights."  

In another incident comparable to Buell's debacle, the University of Toledo suspended Crystal Dixon, its associate vice president of human resources, for submitting an editorial note to a local newspaper. Dixon disagreed with an article comparing modern-day homosexuals with African-American civil rights activists of the fifties and sixties. Dixon was subsequently fired for her disagreement. Matt Barber of Concerned Women for America wholeheartedly supported Mrs. Dixon and stated that the University's reaction, "certainly violate[d] the spirit of the First Amendment and the spirit of free speech upon which this nation was founded."  

Efforts to protect religious organizations from discriminatory effects legalizing same-sex marriage have in some instances already failed. In 2009, as the New Hampshire legislature crept towards legalizing same-sex marriage, Democratic Governor John Lynch demanded that a same-sex marriage bill include protection for religious institutions against same-sex

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119 Id.
121 Id.
122 Id.
123 Id.
125 Id.
126 Id.
However, the Governor's request was quickly snubbed by the State's House of Representatives. Governor Lynch expressed his concern by explaining that without explicit protections provided in the bill, the personal and business interests of those religiously opposed to same-sex marriage could be harmed in several areas including religiously sponsored counseling, courses, retreats, and housing. Unfortunately the Governor's concerns went unheeded and no such protections were afforded by the legislature.

Among these denials of fundamental rights within the U.S., perhaps the most concerning, is the denial of the fundamental religious right to oppose same-sex marriages. A shocking denial of this right occurred in New Jersey in 2008. The conflict began when a lesbian couple, Harriet Bernstein and Luisa Paster, asked to use a pavilion owned by the Ocean Grove Camp Meeting Association (Ocean Grove), a devout Methodist Organization, for their civil-union ceremony. Ocean Grove's administrator, Reverend Scott Hoffman, refused the couple's request because his organization's religious doctrine disagrees with homosexual relationships. In his own words Hoffman described his refusal saying, "[t]he principle was a strongly held religious belief that a marriage is between a man and a woman. We're not casting any aspersions or making any judgments. It's just, that's where we stand, and we've always stood that way, and that's why we said no."

The lawsuit against Ocean Grove alleged that the Methodist group unlawfully discriminated against Bernstein and Paster based on their sexual orientation. Although Ocean Grove appealed to the New Jersey Supreme Court that they owned the pavilion and the First Amendment protected their right to practice their faith without government intrusion, the court disagreed, ruling that Ocean Grove's refusal of access to the lesbian couple amounted to unlawful discrimination. The lawsuit resulted in a revocation of Ocean Grove's tax exemption for the pavilion area and Hoffman concluded that Ocean Grove would lose around $20,000. A result that was seriously detrimental to Ocean Grove.

What happened to Ocean Grove should worry anyone who understands that the Free Exercise Clause in the First Amendment to the Constitution

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128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Hagerty, supra note 114.
assures citizens that the government will not interfere with their ability to act on their religious beliefs. The ruling of the New Jersey supreme court blatantly denied private citizens their fundamental right to freely exercise their religion by living according to their religious beliefs, because it denied them the right to oppose same-sex marriage, or civil-union in this case. After an evaluation of the current status quo within the United States in relation to how same-sex marriage is viewed, it is readily apparent that our society, both morally and legally, has already started to follow in the footsteps of Great Britain, Canada, and even Sweden.

B. A Turbulent Future

Unless there are significant cultural, social, and political changes within the U.S., the free exercise of religion will be impinged. The U.S. is currently on track for a future filled with difficulty, including the eventual social rejection and persecution of people that refuse to accept same-sex marriage. Truly, the push for same-sex marriage is on "a collision course" with the freedom to exercise one's religious beliefs. Repealing DOMA would propel the entire country to immediately accept same-sex marriage, both politically and socially, resulting in a cultural shift similar to Canada. Certain state courts have already followed Canada's example by declaring same-sex marriage must be instituted under the Equal Protection Clause of the Constitution. If this pattern continues, it is only a matter of time before the U.S. will face the enactment of hate speech laws similar to Sweden's.

According to Douglas Kmiec, a renowned Constitutional Law expert, the legal battle over same-sex marriage will only increase in intensity as gay rights advocates gain more social support. He also predicted potential religious restrictions that will commence after advocates for same-sex marriage have gained enough ground. Specifically, Kmiec referenced Professor Eugene Volokh's outline of the goals of the gay rights movement. Volokh is a noted libertarian scholar and advocate for same-sex marriage. In an article Volokh wrote, he outlined the three major goals of the gay rights movement as 1) freedom from government oppression, 2) equal treatment by the government, and 3) delegitimizing and legally punishing behavior that

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135 See U.S. CONST. amend. I.
136 See supra Parts II & III.
137 Severino, supra note 3.
138 See supra Part III.
139 SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 3, at 104.
140 E.g., id. at 104-09.
discriminates against or condemns homosexuals.\textsuperscript{141} Other gay rights advocates seek to "discredit[] and force[] to the margin' religious practices that honor traditional marriage."\textsuperscript{142} These intentions are clearly supported by the declarations in After the Ball, a homosexual activist manifesto. They are included in phrases like, "[i]n regards to those] who feel compelled to adhere rigidly to an authoritarian belief structure, such as an orthodox religion, that condemns homosexuality, our primary objective regarding die-hard homohaters of this sort is to cow and silence them."\textsuperscript{143} Such statements reveal that advocates of same-sex marriage will not rest until they have completely stripped the religious rights of all opposed to same-sex marriage.

The specific consequences from legalizing same-sex marriage in the U.S. would likely include not only the withdrawal of public benefits from religious institutions that refuse to accept same-sex marriage, but also governmental compulsion of religious institutions to provide financial or other support for same-sex couples.\textsuperscript{144} This "punishment" will occur eventually, over a long period of time and in several steps.\textsuperscript{145} The first step for gay rights activists is to get the government to add sexual discrimination to "generally applicable" nondiscrimination laws.\textsuperscript{146} This has already happened on several local levels, but currently DOMA is the last major obstacle to restrictive national nondiscrimination laws.\textsuperscript{147}

If gay rights activists were successful here, the first consequence would likely be that any religious organization refusing to marry a same-sex couple would be denied tax exemption.\textsuperscript{148} Although this might not seem to be an egregious punishment, for many churches it would be harmful, even fatal.\textsuperscript{149} The most difficult part for gay rights activists would be explaining how denying tax exemptions would not violate the rights of organizational and expressive association, free exercise of religion, and free speech.\textsuperscript{150} However, "[a]rguments dismissing these rights are being advanced in legal writing and they deserve to be taken seriously."\textsuperscript{151} Moreover, "it should not

\textsuperscript{141} Id. at 104 (Quoting: Eugene Volokh, Same-Sex Marriage and Slippery Slopes, 33 Hofstra L. REV. 1155, 1178 (2005)).

\textsuperscript{142} Id.

\textsuperscript{143} SEARS, supra note 4 (Quoting KIRK & MAIDSEN, AFTER THE BALL 176.).

\textsuperscript{144} Severino, supra note 3, at 943; See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 3, at 104-05.

\textsuperscript{145} SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 3, at 104.

\textsuperscript{146} Id.

\textsuperscript{147} See Vestal, supra note 14.

\textsuperscript{148} SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 3, at 105.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. (emphasis added).
be thought that a religious organization would have significant constitutional protection under the Free Exercise Clause.”

Given the cultural change that has already occurred in the U.S. and our current Administration's position on same-sex marriage, the number of steps before it would be seen to be publicly acceptable to punish outlier churches or religious bodies is likely to be fewer than first anticipated by Kmiec in 2005. Such declarations from thoughtful and accomplished legal scholars should be a sharp warning to U.S. citizens. The guarantees of free religion contained within the Constitution are under attack and must be preserved. This is true regardless of agreement with religious doctrines that oppose same-sex marriage. Everyone should be concerned with preserving the freedoms provided in the Constitution.

CONCLUSION

Contrary to arguments from proponents of same-sex marriage, the free exercise of religion in the United States will be restricted by a national legalization of same-sex marriage, even if this is an eventual effect. In fact, the full harm will not likely be realized until decades have passed. The trend of legalizing same-sex marriage is quickly growing, both within the United States and internationally. This will continue to happen unless people realize the restrictions on the free exercise of religion that will result and act to oppose them. It is essential that the right to freely exercise one's religious beliefs be preserved. Even those whose opposition to same-sex marriage is not based on religious beliefs, would be threatened if our Constitution is simply disregarded.

Indeed, evaluating countries that have embraced same-sex marriage reveals issues with the First Amendment that will inevitably arise if same-sex marriage is socially accepted within the U.S. and DOMA is repealed. As we have seen, Great Britain is illustrative of the detrimental effects the lack of adequate opposition to same-sex marriage will generate. Eventually, the rights of persons religiously opposed to same-sex marriage will be restricted. As previously discussed, initially homosexual advocates in Britain were hard pressed to even pass legislation that would accomplish their agenda. But within a year Parliament went from barely allowing the performance of

152 Id.
153 Id. at 107.
154 Wardle, supra note 3.
155 Williams, supra note 7; Vestal, supra note 14.
156 See supra Part II.B.
157 See Beckford, supra note 59.
same-sex unions on religious premises\textsuperscript{158} to deciding to legalize same-sex marriage.\textsuperscript{159} Canada has long since socially accepted and legalized same-sex marriage.\textsuperscript{160} This was not immediate. Like Great Britain, changes in Canada occurred gradually.\textsuperscript{161} However, Canada first set foot on that path by a strong, widespread advocacy for homosexuals, specifically their "right" to marry.\textsuperscript{162} Both countries are examples of the slippery slope a country slides down as it fosters the arguments of homosexual activists: first it tolerates such practices, then accepts them, and finally it embraces them to the degradation of those who stand religiously opposed to same-sex marriage.

This will be the path for any country who tolerates homosexual advocacy without adequate opposition, and the U.S. has been on that path a long time already.\textsuperscript{163} It is only a matter of time before it experiences the same problems as Great Britain and Canada unless there is much stronger opposition against same-sex marriage. DOMA is just one of the first barriers to advocates for same-sex marriage, but their quest will not stop with its abolition. They will proceed until they have effectively stripped away all religious rights of any persons opposed to same-sex marriage or other homosexual practices.\textsuperscript{164}

If the U.S. persists in continuing down this path, eventually hate speech laws similar to Sweden's will be enacted.\textsuperscript{165} The enactment of such laws would logically follow the course of events that other countries that have legalized same-sex marriage have already embarked on. As the social culture in the U.S. continues to embrace same-sex marriage, the courts will bend to meet popular demand as they did in Canada. If courts continue to promote same-sex marriage through the ranks of constitutional rights, then eventually opposition to same-sex marriage will be treated as "invidious discrimination," "irrational," or "motivated by animus."\textsuperscript{166} It is true that the Free Exercise Clause of the First Amendment to the Constitution should protect the rights of religious persons from restriction. However, years of precedents eroding religious liberty will make it difficult to protect these

\begin{footnotes}
\item[158] See Beckford, supra note 81.
\item[159] See Hope, supra note 86.
\item[160] See supra Part III.
\item[161] Id.
\item[162] See supra Part IV.
\item[163] Id.
\item[164] Same-Sex Rights: The Supreme Court Decision, supra note 97.
\item[165] See supra Part I.
\item[166] See supra Part I.
\end{footnotes}
religious rights.\textsuperscript{167} Especially since courts have been "increasingly hostile" to Free Exercise claims since recent decisions of the Supreme Court.\textsuperscript{168}

For these reasons, it is essential not only that our government should actively support DOMA by opposing any attempt to repeal it, but that responsible citizens throughout the country adamantly advocate against legalizing same-sex marriage. It is no secret what the result will be if we continue down the path that we are on. The choice is ours; we are free to decide whether to be snared by the restrictions that this so-called progressivism would place on the free-exercise of religion or to choose the better part and preserve our rights by preventing the legalization of same-sex marriage.

\textsuperscript{167} Id. at 945.

\textsuperscript{168} Id. (Referring to Employment Division v. Smith, 494 U.S. 872 (1990) and Locke v. Davey, 540 U.S. 712 (2004)).
VIEWING SURROGACY THROUGH THE LENS OF THE BEST INTERESTS PRINCIPLE OF THE CONVENTION ON THE RIGHTS OF THE CHILD

Elyse M. Smith

INTRODUCTION

“Baby-Selling Ring Busted” reads the press release circulated by the Federal Bureau of Investigation.1 Theresa Erickson, one of the most prominent fertility lawyers in the world,2 admitted before the U.S. District Court for the Southern District of California that she and her business partners used gestational surrogates “to create an inventory of unborn babies that they would sell for over $100,000 each.”3 Erickson and her co-conspirators, also well-known American fertility lawyers, would arrange for women overseas to become pregnant, then, after the pregnancy progressed into the second trimester, would begin the search for prospective parents in the United States (“U.S.”).4 For her actions, Erickson was sentenced to five months in prison, nine months house confinement, and fined $70,000.5 Her accomplices also were given one-year prison sentences.6 The revelation that Erickson and her associates were operating a baby-selling ring rocked the Artificial Reproductive Technology (“ART”) community, and starkly exposed the lack of sufficient regulation of surrogacy both domestically and abroad.

The practice of surrogacy7 is rapidly expanding. In the U.S., estimates suggest the number of surrogate agreements rose 89% from

1 J.D. Candidate, 2013.
3 FBI press release, supra note 1.
4 Id.
6 Id.
7 There are two types of surrogacy. In traditional surrogacy, “the surrogate’s own eggs are used and are inseminated with the intended father’s sperm. Gestational surrogacy occurs when the surrogate is implanted with an embryo created with the intended parents’ genetic material or with donor eggs or
2004 to 2008, and one source claims that the number of surrogacy arrangements increases by 1,300 a year in the U.S. alone. The numbers are growing worldwide as well. While surrogacy is banned in several developed countries, regulation is lax in developing nations where surrogacy has become a booming market. The rise of surrogacy in developing nations is fueled largely by the increasing number of infertile couples who are crossing borders to obtain fertility treatments overseas, particularly surrogacy arrangements, which are either too expensive or prohibited by law in their home countries. One of the most popular destinations for such “fertility tourism,” is India, where surrogacy services can be arranged for about $22,000 or less, as compared with costs of up to $100,000 or more in the U.S.

Such rapid expansion of surrogacy and the recent conviction of Theresa Erickson raise questions as to what extent surrogacy should be regulated, how it should be regulated, and by whom. Inconsistent regulation across the globe has given rise to fertility tourism and growing concerns about the exploitation of women and children. Referring to the patchwork of state laws governing surrogacy in the U.S., one journalist commented that the “lax atmosphere means that it is now essentially possible to order up a baby, creating an emerging commercial market for surrogate babies that raises vexing ethical questions.” While surrogacy “implies some of our most
fundamental concerns, including procreation rights, family values, and class relationships," there is a noticeable lack of regulation of its practice, particularly in the international context.

In response to the rapid proliferation of surrogacy agreements, this article argues that surrogacy be regulated in accordance with the principles of the Convention on the Rights of the Child ("CRC"), and concludes that this will lead lawmakers to ultimately ban surrogacy. Part I will begin the discussion by arguing that such regulation is best carried out by domestic legislatures. Part II will follow with the development of an appropriate analytical framework for addressing the issue, drawing upon the articles of the CRC. The CRC, ratified by every nation state, save Somalia and the U.S., requires states in Article 3(1) to make the best interests of the child a primary consideration in all matters, including legislative action that affects children. The language of the CRC will be explored for the purpose of generating a rubric for determining the best interests of the child. Next, in Part III, this best interests rubric will be applied to the issue of surrogacy, with a survey conducted using social science research regarding the effects of ART and surrogacy on children; this leads to the conclusion that it is in the best interests of the child that surrogacy be banned.

PART I
LEGISLATURES ARE THE PROPER FORA FOR FORMULATING SURROGACY REGULATIONS

The first question in regard to the development of surrogacy regulation is determining which organizational body is best suited to promulgate such guidelines. Some argue that regulation is best handled by the medical community. In this way, ethicist George Annas suggests that while differing laws will lead people to cross borders to contract for a surrogate, "[o]nly the development of international norms, adopted and followed by the medical profession

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15 David Orentlicher, Book Review: Does Mother Know Best?, 40 HASTINGS L.J. 1111 (reviewing MARTHA A. FIELD, SURROGATE MOTHERHOOD (1988)).
itself, is likely to ever produce uniformity in global practices.” 18 Yet, though Annas favors the use of professional standards over legal mechanisms to regulate surrogacy and ART, he recognizes that currently “international ethical norms are inadequate to set practice standards for reproductive tourism or to keep pace with the reach of modern communications.” 19 Further, as another commentator points out, there is a “growing tribe of experts within the medical market who see profits in this procedure,” which presents a possible conflict of interest when formulating regulations. 20

For many years, doctors and patients were the sole decision makers in regard to ART and surrogacy, as assisted reproduction has been relegated largely to the private sphere. However, as “the advent of high-tech and highly publicized procedures, such as in vitro fertilization (IVF), [has] generated increasing unease in the wider community,” nation states have sought to develop regulatory schemes to address the rapidly advancing science of ART. 21 The expanding use and development of artificial reproductive sciences has led to a growing sense that “the physician should not be left to make decisions of an ethical nature by himself.” 22 Which has prompted many states and international bodies to establish ethics committees to investigate these complex issues. 23 Rather than rely on the ART industry to self-regulate, these nations have turned to ethics committees to make recommendations for taking adequate and appropriate legislative action. 24

This movement towards legislative control over surrogacy in particular, and ART in general, is mirrored in statements by American judges in numerous court decisions on surrogacy contracts.

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19 Id.
23 Id.
24 Daniels et al., supra note 21, at 33.
Currently, the U.S. lacks a nation-wide law regarding surrogacy,\textsuperscript{25} and individual state laws on surrogacy “tend to be all over the board.”\textsuperscript{26} In states where there is no law, judges have called upon the legislature to deal with the complicated issue of surrogacy. Faced with contested surrogacy contracts, many judges have little or no guidance as to how to rule, and many petition the legislature to take action.

For example, the New Jersey Supreme Court, in the case \textit{In re Conroy}, reflected on the legislature’s resources and ability to “synthesize vast quantities of data and opinions from a variety of fields and to formulate general guidelines that may be applicable to a broad range of situations”\textsuperscript{27} in concluding that “[a]s an elected body, the Legislature is better able than any other single institution to reflect the social values at stake.”\textsuperscript{28} Similarly, the Florida Supreme Court stated in regard to sensitive social issues:

\\[\text{[b]ecause the issue with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all institutions and individuals be properly accommodated.}\textsuperscript{29}\\

Nevertheless, some judges have chosen to legislate from the bench,\textsuperscript{30} leading Justice Arabian in his concurrence in \textit{Johnson v. Calvert} to caution, “[t]o date, the legislative process has failed to


\textsuperscript{26} Sember, supra note 7, at 197.

\textsuperscript{27} \textit{In re Conroy}, 486 A.2d 1209, 1221 (N.J. 1985).

\textsuperscript{28} \textit{Id}. at 1220.

\textsuperscript{29} Saltz v. Perlmutter, 379 So.2d 359, 360 (Fla. 1980).

\textsuperscript{30} See, e.g., \textit{J.F. v. D.B.}, 879 N.E.2d 740, 744 (Ohio 2007), (determining that because Ohio did not have a public policy specifically banning surrogacy contracts, the contract at issue was valid. In his dissent, Judge Cupp vigorously contested the majority’s conclusion, recognizing that it was a controversial area of law and required guidance from the legislature. He warned, “[w]ithout comprehensive rules of engagement for such activity [surrogacy contracts], preferably prescribed by the legislature, it is not difficult to imagine a developing ‘marketplace’ for multiparty, multistate child-production contracts”).
produce a satisfactory answer. This court should be chastened and not emboldened by that failure." 31 Thus, in light of the foregoing, it is evident that "[l]egislatures are the appropriate forums to deal with these issues and to determine public policy." 32

PART II
THE "BEST INTERESTS OF THE CHILD" IS THE APPROPRIATE ANALYTICAL FRAMEWORK FOR ADDRESSING SURROGACY

Once it is established that legislatures are the proper venue for addressing the issue of surrogacy, the question arises as to how legislatures are to assess this complex issue. What principles ought to guide lawmakers in their decision-making? There are various interests involved in a surrogacy arrangement. The primary interests are those of the commissioning parents, the surrogate mother, and those of the child. Though the interests of the commissioning parents and the surrogate 33 are not insignificant, and the commissioning parents’ infertile condition evokes heartfelt sympathy, ultimately, the interests of the children must prevail, in accordance with the CRC.

A. The Convention on the Rights of the Child Establishes the "Best Interests of the Child" as the Appropriate Framework for Evaluating Surrogacy

The CRC, the "most highly ratified instrument in international law," 34 is of great utility in approaching the issue of surrogacy. Though the CRC does not directly address the issue of surrogacy arrangements, its principles are readily applied to this developing issue.

33 It is argued that the term “surrogate,” used to refer to the woman who carries a child for the commissioning parents, is a misnomer. “Surrogate” denotes a substitute mother, yet a child developing in the womb “does not view the surrogate mother as a surrogate for anything.” Nicole Miller Healy, Beyond Surrogacy: Gestational Parenting Agreements Under CA Law, 1 UCLA Women’s L.J. 89, 90 n. 5 (1991).
To begin, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (hereinafter “Optional Protocol”), which has been adopted by over 100 countries, provides a clear prohibition against the sale of children. Article 2 defines the sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” This definition likely applies to surrogacy contracts in which a child is transferred from the gestator to the intended parents in consideration of monetary compensation and reimbursement.

However, should states reject the application of the Optional Protocol to surrogacy agreements, the text of the CRC provides further guidance to legislatures, in that it urges states to consider the interests of the child in all its actions. The Preamble to the CRC recalls and emphasizes the words of the Declaration of the Rights of the Child (1959), stating, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” To provide such legal protection, Article 3(1) of the CRC provides, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Providing further explication of Article 3(1), the United Nations Committee on the Rights of the Child states, “[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions,” whether those decisions are directly related to the child or not.

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36 Id. art. 2.
37 CRC, supra note 17, art. 3.
38 Id. at preamble.
39 CRC, supra note 17, art. 3.
Emily Logan, an internationally recognized children’s rights expert, notes that the best interests principle was not a novel concept when written into the 1989 CRC, as it was included in previous human rights instruments such as the 1959 Declaration on the Rights of the Child. In fact, some argue that the principle of the best interests of the child is “now crystallized into customary international law.” However, what is unique about the best interests principle contained in the CRC is that, for the first time, it places an obligation on states “to ensure that children’s interests are placed at the heart of government and all decision-making which impacts on children.”

In addition to the best interests principle, the CRC promotes three other primary principles: the principle of non-discrimination in Article 2; the right of children to express their views on matters affecting them in Article 12; and the child’s right to survival and development in Article 6. These principles are intended as more than mere ideals, but rather as influences on policy. The Committee reminds states that ratification of the CRC involves the obligation under international law to implement the treaty. Such implementation denotes a process whereby States Parties take action to ensure the realization of all rights recognized in the CRC by all children in their jurisdiction.

This process takes one of two forms: either the transformation approach or the incorporation approach. A state following a transformation approach will use treaty provisions as the basis for enacting legislative rules in accordance with the treaty, while in the incorporation approach the treaty itself becomes part of national law. Whether achieved through the transformation or the incorporation approach, states are under an obligation to

42 RHONA K. M. SMITH, TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 454 (2d ed. 2010).
43 Logan, supra note 41.
44 CRC, supra note 17.
45 General Comment 5, supra note 40, at 7.
46 Id.
48 Id.
implement the provisions of the CRC. Many states have taken such action under the CRC, including references to the best interests of the child in national laws that impact children. Furthermore, various regional organizations have also adopted the principles of the CRC, particularly the best interests principle, in seeking to implement the international rights of the child in their regions. In an approach that “represents a significant step forward that shows a common legal framework in international human rights law applicable to children,” the Inter-American Court of Human Rights stated, in accordance with the CRC, that the best interests of the child is a “regulating principle regarding children’s rights based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development.”

In Europe, the European Union Agency for Fundamental Rights has adopted the CRC as its normative framework for monitoring and developing children’s rights in European Union member states. Similarly, the European Court of Justice in the case European Parliament v. Council of the European Union stated that the Court takes account of the CRC “in applying the general principle of Community law.” In Africa, the Organization of African Unity adopted its own treaty on children’s rights in 1990, the African Charter on the Rights and Welfare of the Child, which provides in Article 4(1), “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

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49 See CRC, supra note 17, art. 4 (providing that parties to the treaty are required to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”).
50 SMITH, supra note 42, at 456.
51 VAN BUREN, supra note 47, at 401.
56 Id.
This treaty, considered “the most progressive of the treaties on the rights of the child,” echoед the sentiment of the CRC, but goes a step further to provide even more protection for children by making the best interests of the child the primary consideration.

A common criticism of the application of the best interests standard is that the text of CRC Article 3(1) suggests that the best interests of the child is “a” primary consideration, not “the” primary consideration. According to Geraldine Bueren, a leading international human rights lawyer, there was debate during drafting of the CRC as to whether the best interests of the child should be only a primary rather than the paramount consideration. The first draft, adopted in 1980, referred to the best interests principle as “the paramount consideration.” However, in a “regrettable weakening of the primacy of the best interests of the child in the United Nations Convention, which was never adequately explained,” Article 3(1) of the final instrument refers to it as “a primary consideration.” Nevertheless, provisions tailored to specific situations such as Article 21, which deals with adoption, refer to the best interests as the paramount consideration. A reading of the travaux preparatoires generated during negotiations of the Convention reveal that several delegates believed that the use of the phrase “the paramount consideration” was broader and “better protected the child,” but in the interest of compromise, the Working Group agreed to adopt the term “a primary consideration” in recognition of various delegates’ concerns that the child’s interest is not overriding in every case. Despite this weakening of the standard, Bueren notes, it is clear from documents generated during treaty negotiations that “it is only in certain situations that the child’s best interests would not prevail,” such as medical emergencies. She goes on to suggest, “in states which have incorporated the Convention into their domestic laws the

58 VAN BUEREN, supra note 47, at 402.
59 Id. at 48-9.
60 Id.
61 Id.
62 VAN BUEREN, supra note 47, at 46; CRC, supra note 17, art. 3(1).
63 Id. at art. 21.
65 VAN BUEREN, supra note 47, at 48-49; Id. at 24.
burden of proof would be on those who seek to argue that other interests prevail.”\textsuperscript{66}

B. The U.S. and the CRC

A special note on the U.S.’ relationship with the CRC is appropriate at this juncture. Although “[i]t is indisputable that the U.S. played a pivotal role in the drafting of the Convention,”\textsuperscript{67} the U.S. has not ratified the treaty as of the writing of this article. Resistance to ratification arises largely out of concerns that the CRC undermines national sovereignty and interferes with parental rights.\textsuperscript{68} It is beyond the scope of this article to explore the debate within the U.S. regarding ratification. Nevertheless, the best interests principle remains relevant to American policy formation because while the U.S. has not ratified the CRC, it has signed the treaty.\textsuperscript{69} Although signing a treaty does not bind a state under international law, Article 18 of the Vienna Convention on the Law of Treaties, to which the U.S. is a party, obliges states “to refrain from acts which would defeat the object and purpose of the treaty.”\textsuperscript{70} Thus, the U.S. has a duty to refrain from frustrating the provisions of the CRC and its four principles, and therefore, must act in a way that does not undermine the best interests of the child.

Further, while the U.S. has not ratified the CRC, it is party to the two optional protocols to the Convention, regarding children in armed conflict,\textsuperscript{71} and the sale of children, child prostitution, and child pornography.\textsuperscript{72} In addition, it is party to the International Covenant on Civil and Political Rights, which contains provisions guaranteeing various rights to children including the right to protection and the right to acquire a nationality.\textsuperscript{73} In this way, the U.S. has manifested its

\textsuperscript{66} Id. at 49.
\textsuperscript{68} Id. at 195.
\textsuperscript{72} See generally Id.
\textsuperscript{73} International Covenant on Civil and Political Rights, 2200A (XXI), art. 24 (1966).
willingness on the international stage to protect the interests of children.

Moreover, the principles of the CRC parallel American law in numerous ways, as seen in the opinion of Supreme Court Justice Frankfurter who stated, “[c]hildren have a very special place in life which law should reflect.”74 For example, just as Article 3 of the CRC promotes the best interests of the child as an important principle, so do the statutes and case law of the U.S.75 In light of American involvement in the drafting of the CRC, the decision of the American delegation to sign the treaty, and ratify the optional protocols to it, as well as the presence of comparable legal principles in American law, there is a strong argument that the U.S. is inclined to assimilate the best interests principle into the decision-making calculus of its legislatures.

C. Developing a Best Interests Rubric Under the CRC

Despite widespread agreement that the best interests principle applies to all decision-making that affects children, pinpointing a definition of “best interests” is difficult, leading one commentator to state that it poses a question “no less ultimate than the purpose of life itself.”76 Though the “list of factors competing for the core of best interests is almost endless,” the CRC provides much needed guidance, insofar as “the rights in the Convention may be used as signposts by which the best interests of the child may be identified.”77

This article will focus on three articles of the CRC in developing a possible rubric with which legislatures may evaluate surrogacy. First, Article 6(2) provides, “States Parties shall ensure to the maximum extent possible the survival and development of the child.”78 Next, under Article 8(1), “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”79 Lastly, Article 7 asserts that a child, “as far as possible

76 VAN BUEREN, supra note 47, at 47.
77 Id. at 48.
78 CRC, supra note 17, art. 6(2).
79 Id. art. 8(1).
[has] the right to know and be cared for by his or her parents.”

Articles 7 and 8, which are closely linked to the child’s right to psychological health and development recognized in Article 6, will be discussed in further detail later in this article.

In regard to Article 6, the Committee on the Rights of the Child (“Committee”), which is tasked with the implementation of the CRC, urges states to ensure the survival and development of all children to the maximum extent possible, yet development and survival are not limited to mere physical health. Rather, “the Committee expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.”

Recognizing the special needs of very young children, including infants, the Committee released special guidelines specifically geared towards implementation of the CRC for young children. In light of the importance of the first years of a child’s life, the Committee urges states “to take all possible measures to ... create conditions that promote the well-being of all young children during this critical phase of their lives.” Moreover, while “[e]nsuring survival and physical health are priorities,” the Committee notes that Article 6 “encompasses all aspects of development, and that a young child’s health and psychological well-being are in many respects interdependent.” Therefore, the Committee concludes that the “right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention.”

For example, the implementation of Articles 7 and 8, which charge states with the responsibility to protect a child’s right to identity and right to know his or her parents, furthers the goal of Article 6, such that the preservation of a child’s identity and familial relations is a vital component of his or her psychological health. Thus, the implementation of these and all the provisions of the CRC

80 Id. art. 7.
81 General Comment 5, supra note 40.
82 Id.
84 Id. at 10.
85 Id.
86 Id.
promote the developmental rights of the child and further his or her best interests.

PART III

APPLYING THE BEST INTEREST STANDARD TO THE SURROGACY DEBATE

Much of the literature on surrogacy contracts focuses only on the interests of the surrogate mother and/or the commissioning parents. Given the State’s responsibility to protect the interests of the vulnerable child, the debate must give more attention to the effects of surrogacy on the resulting child. This section examines the physical, psychological, and emotional effects of surrogacy arrangements on the children whose existence is contracted for in the agreement.

A. Threats to Physical Health and Development

In gestational surrogacy, the most common form of surrogacy, a woman agrees to carry a child that was conceived using either a donor egg or the commissioning mother’s egg and sperm from a donor or the commissioning father. Thus, gestational surrogacy arrangements require the use of assisted reproductive technology including IVF to create the embryo(s) that are implanted in the surrogate. This differs from traditional surrogacy agreements, which are infrequently arranged, in which the carrier’s own eggs are fertilized and implanted using either artificial insemination or IVF. Therefore, IVF and other forms of ART are an integral component of

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87 For example, many scholarly articles and books rightly discuss the negative impact of surrogacy on the surrogate mother, not only in terms of her health, but also with respect to the negative impact of surrogacy on her dignity and on her family’s well-being. But there remains a dearth of literature on the effect of surrogacy on the child.


89 The Center for Disease Control defines in vitro fertilization as “fertilization outside of the body.” In IVF, “[d]octors treat the woman with a drug that causes the ovaries to produce multiple eggs. Once mature, the eggs are removed from the woman. They are put in a dish in the lab along with the man’s sperm for fertilization. After 3 to 5 days, healthy embryos are implanted in the woman’s uterus.” Reproductive Health: Infertility FAQs, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/reproductivehealth/Infertility/ (last updated April 19, 2012).

90 Id.

surrogacy. For this reason, policy-makers addressing the issue of surrogacy are prudent to heed studies that have been released in recent years regarding the effects of ART on children. Though most studies do not address surrogacy in particular, revealing the lack of scientific inquiry into surrogacy, studies on ART in general are instructive in this debate.

B. Risks of ART

A “growing consensus in the clinical community” suggests that there are risks in IVF. There is significant evidence that children born through ART are at higher risk for birth defects, low birth weight, and even genetic disorders. A meta-analysis conducted in 2005 suggests that there “is a statistically significant increased risk of birth defects in infants conceived using ART in the order of 30-40%.” Similarly, in a study conducted by the U.S. government in 2009, researchers found that “some birth defects occur more often among infants conceived with ART.”

Another study found that ART infants, even singleton infants, were “more than twice as likely as naturally conceived infants to have major birth defects diagnosed during the first year of life and were also more likely to have multiple major defects.”

Looking at the

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92 In discussing the negative impact of ART on children, the author wishes to make clear at the outset that children with disabilities are deserving of the utmost respect on account of their dignity as human persons. In this way, the author affirms the dignity of these children and does not suggest that they are any less deserving of respect when arguing that the adverse consequences of ART are not in the best interests of the child. Children have a right to health and development under Article 6 of the CRC, and when the use of ART interferes with this right, one can argue that the use of ART is not in the best interest of the child.


97 “Singleton” refers to an infant that does not have a twin or multiple. A singleton pregnancy involves only one fetus. See infra note 95.

medical records of over 15,000 ART children, geneticists in France found “a major congenital malformation in 4.24% of the [IVF] children,” as compared with 2-3% in the general population.99 In light of that study, the lead scientist urged, “[i]t is important that all doctors and also politicians are informed about this.”100

In addition to birth defects, children born through ART are at risk for premature birth and low birth weight. Powerful financial incentives lead many fertility doctors to disregard industry guidelines that encourage the transfer of only one embryo in IVF, in favor of implanting multiple embryos in hopes that at least one will “take.”101 When a multiple pregnancy results, the risk of premature birth and other birth complications increases. With 50% of IVF pregnancies resulting in multiple births, the rate of twins, triplets, and higher order births is increasing.102 As one study confirms, “high rates of multiple births, with attendant complications of prematurity and low birth weight, are well documented.”103 As a result, a 2009 study, from the March of Dimes, listed fertility treatments as one of the primary causes for a 36% increase in infant prematurity in the preceding twenty-five years.104 In this way, the ART industry “creates preterm infants with in vitro and other fertility treatments even as the government and nonprofit groups work to fight the nation’s 12.7% rate of prematurity, regarded as a major national health care problem.”105

Of particular concern for researchers is the possible link between IVF and genomic imprinting disorders. A team of researchers in Australia found that “children conceived by IVF are significantly more likely to have BWS [Beckwith-Wiedemann Syndrome],

100 Id.
103 Nancy S. Green, Risks of Birth Defects and Other Adverse Outcomes Associated with Assisted Reprod. Tech., 114 PEDIATRICS 256 (2004). In response to the risks that accompany multiple births, such as the risks of developmental delay or cerebral palsy, several European countries have outlawed the transfer of more than one embryo in a given IVF cycle. See SAUL, supra note 101.
104 Id.
105 Id.
compared with children conceived naturally.”  

Beckwith-Wiedemann Syndrome (“BWS”) is a disorder that is “characterized by prenatal and/or postnatal overgrowth, macroglossia, abdominal-wall defects, neonatal hypoglycemia, hemihypertrophy, ear abnormalities, and an increased risk of embryonal tumors.” Though researchers are unsure as to the precise mechanisms underlying the increased risk for BWS, the results of this and previous studies suggest that the genetic make-up of the embryo is altered and adversely affected by the culture used in the petri dish.  

For years, scientists have recognized the potential for the in vitro culture to affect the activity of genes, thus influencing the embryo’s development. One team of researchers found that “the culture medium used for IVF treatment has a significant effect not only on early embryonic development, but also on subsequent fetal development and the newborn child.” Similar concerns have been raised about the long-term effects of pre-implantation genetic diagnosis, a procedure in which one or two cells are removed from a three-day-old embryo for analysis. There is also growing evidence that the patterns of genetic abnormalities present in ART children with Down’s Syndrome are different and more complex than those present in the naturally occurring condition. This has led researchers to suggest that “a lot of the chromosomal abnormalities are not those that are conventionally age-related[,]” and they “raise[d] the concern that some of the abnormalities might be treatment-related.”

These and many other reports represent the nascent study of the long-term effects of ART on children. Although an estimated 3.75 million babies have been born since the advent of IVF, “few follow-

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107 Id. at 526-27.
108 Id. at 528.
111 Squires, supra note 102, at 2–10.
up studies of children conceived through ART have been performed.” Despite the challenges of IVF studies, such as the near impossibility of identifying a perfect control group, far more research is needed to understand fully the implications of this rapidly developing science. As one scientist stated, “It is imperative that we ensure that the demand for these services and the rapid technological advances in this field do not exceed our ability to understand the potential long-term effects of these procedures on children.” The most vulnerable party involved, the child, must be protected and his or her best interests promoted.

C. The Impact of the Uterine Environment on the Child In Utero

Once the child has been implanted in the surrogate mother, he or she faces further potential challenges to his or her development. The uterine environment has an extensive influence on the health and development of the fetus, a reality that more and more scientists are acknowledging and studying. The rapidly developing field of prenatal study has even attracted the attention of Nobel Prize winning economist Amartya Sen, who has undertaken a study of how prenatal experience impacts the health and productivity of a population. It is commonly understood that what a pregnant woman is exposed to, “the air she breathes, the food and drink she consumes, the chemicals she’s exposed to, even the emotions she


115 “[Y]et as every researcher acknowledges, infertility outcome studies themselves suffer from unusual limitations. For one thing, it’s impossible to get a perfect control group. When you compare children of infertile women with children of fertile ones, you cannot know whether any problems in IVF children are due to the procedure itself, the drugs the women take, or the underlying condition—including, simply, age—that created the infertility in the first place.” Liza Mundy, How Do IVF Babies Turn Out? Fertility Specialists Confront Disturbing Evidence, SLATE (Nov. 3, 2004), http://www.slate.com/articles/health_and_science/medical_examiner/2004/11/how_do_ivf_babies_turn_out.html.

116 See Squires, supra note 102.


feels, is shared in some fashion with her fetus.”119 For example, ground-breaking research in the 1980s revealed that poor prenatal nutrition was a factor in high rates of heart disease in the United Kingdom.120 Further, the Journal of American Medical Association reported that children born in China during the terrible famines that occurred during the Great Leap Forward were twice as likely to develop schizophrenia as those born during other times.121 Moreover, the sad occurrence of fetal alcohol syndrome and its effects provide additional support for the argument that the uterine environment impacts the child in the womb.122 In pointing to the prenatal origins of diseases such as diabetes and heart disease, Dr. Peter Nathanielsz put it succinctly, “[h]ow we are ushered into life determines how we leave.”123

Additionally, there is mounting evidence that maternal stress, through the release of the stress hormone cortisol, can negatively affect the unborn child.124 For example, researchers have shown that women pregnant during the Arab-Israeli Six-Day War of 1967 gave birth to children who were more likely to be diagnosed with schizophrenia as adults.125 This information is particularly relevant to the surrogacy debate in light of the stress that drives some women to become surrogates, particularly in developing nations. In India, for example, news reports on fertility clinics in the country reveal that the women hired as surrogates face very stressful situations.126 In an interview with an American journalist, one Indian surrogate admitted that she became a surrogate because she was desperate for money and had the option of either selling her kidney or becoming a surrogate.127 Reflecting on her situation and those of her fellow

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119 Murphy Paul, supra note 117.
120 Id.
122 Kristof, supra note 117.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
surrogates, another Indian woman bluntly stated, in reference to the common practice of fertility doctors performing caesarian sections on surrogate mothers, “[w]e have to cut our stomachs for money.”

Adding to a surrogate’s stress, many doctors in clinics overseas separate a surrogate from her own family and house her in a dormitory with other surrogates in order to monitor her nutrition and health. As a result, many women are unable to see and care for their own families during the nine months they work as a surrogate. Desperate for cash, these women endure long separations from their families, the pain of social stigma, and the physical and emotional pain of surrogacy in their bodies. Such stressful conditions harm not only their own health and dignity, but also likely harm the health of the unborn children they carry.

D. Threats to Psychological Health and Development

The child of surrogacy may face further stress when she is born and separated from her birth mother. Though some surrogacy agreements may be arranged to allow the surrogate mother and child to stay together for a short period following birth, surrogacy contracts typically require the separation of the child from the birth mother soon after delivery, as the entire process is centered on delivering the baby to the commissioning parents as soon as possible. In India, for example, caesarian sections are scheduled to allow commissioning parents the opportunity to travel to the clinic from abroad for the birth. Despite the fact that caesarean sections “are considered riskier for the baby under normal circumstances and double to quadruple the woman’s risk of death during childbirth, the doctors rely on them heavily.”

While it may be inconvenient to commissioning parents, separating the child from his or her birth mother soon after birth is not in the child’s best interests. Nine months in the womb establishes a “complex link, in nature both psychological and biological, with an epigenetic component, [which] is the foundation for early bonding”

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129 Id.
130 Id.
between mother and child. The first few hours of a baby’s life are an important time of bonding with the mother, at which time the child “is driven by instincts to remain connected to her” and “even short term separation from mother leads to elevated cortisol in [the] infant, indicating stress.” Newborns know their mothers’ voices and their scent, and when kept close to their mother’s body, they feel safe, and, “the transition from life in the womb to existence outside the uterus is made much easier for them.” This bonding and attachment process is vital to the psychological health of a child, and provides the foundation for a stable emotional life.

Yet, if separated from her mother, a newborn may suffer adverse consequences. In an instructive study of rat pups, scientists discovered that after one full day of separation from their mother, the rat pups showed “altered brain organization of chemical receptors” and suffered double the number of normal brain cell deaths.

Within the context of surrogacy, the separation of child from mother could have a negative impact on the child’s psychological, not just physical, development. Psychologists, studying maternal separation in adoption, found that “[e]ven infants adopted shortly after birth experience some disruption in the attachment and bonding process, for it has begun in utero” and continued after birth. Reflecting on the powerful maternal-child bond, the National Ethics Committee of France, in its recommendation that gestational surrogacy continue to be banned in France, cautioned that to “ignore or deny the effects of pregnancy and of the mother-child relationship on the child’s future could well be damaging for the child.”

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136 PALMER, supra note 134, at 22–23.

137 Id. at 53–54.


139 Opinion No. 110, supra note 132, at 6.
Inspired by her own experience with adopting a three-day-old infant, psychologist Nancy Newton Verrier undertook research on the effect of early maternal separation on children.\textsuperscript{140} She concludes,

[m]any doctors and psychologists now understand that bonding doesn’t begin at birth, but is a continuum of physiological, psychological, and spiritual events which begin in utero and continue throughout the postnatal bonding period. When this natural evolution is interrupted by a postnatal separation from the biological mother, the resultant experience of abandonment and loss is indelibly imprinted upon the unconscious minds of these children, causing that which I call the ‘primal wound’.\textsuperscript{141}

Though adoptive, or in the case of surrogacy, commissioning parents, may still be able to form an attachment with the child, and the child with them, Verrier maintains that the psychological effects of the separation cannot be undone, no matter how loving and warm the caregiver may be.\textsuperscript{142} Even if the child is not genetically related to the surrogate, Verrier is convinced that “the profound connection is in the prenatal bonding and that the emotional trauma of separation will occur even when the child is in no way genetically connected to the gestating mother.”\textsuperscript{143} Children are as genetically related to their fathers as their mothers, yet separation from the father is not traumatic to newborns, supporting the argument that the connection between the newborn and birth mother is unique, strong, and goes beyond a genetic connection. In light of this developing research, it would seem to conceive a child “with the intention of separating [the mother] from that child would be setting the child up for psychological distress.”\textsuperscript{144} Though infants “are designed to survive in the face of adversity, it may not be wise to intentionally create it.”\textsuperscript{145}

Certainly, there are circumstances where the separation of mother from child may be in the best interests of the child. For example, a birth mother who does not possess the means to support a child and

\begin{itemize}
\item \textsuperscript{141} Nancy Newton Verrier, PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD (10th prtg. 2006).
\item \textsuperscript{142} VERRIER, supra note 140, at 19.
\item \textsuperscript{143} Id. at 205.
\item \textsuperscript{144} Id. at 205.
\item \textsuperscript{145} PALMER, supra note 134, at 89.
\end{itemize}
who makes the difficult decision to give up her child for adoption, may do so because she believes that it is in her child’s best interest to be raised by another. In that instance, a child already exists, and the relinquishment is an unfortunate reality, but the best option given the circumstances. On the other hand, in surrogacy, the very essence of the arrangement is the separation of the child from the birth mother; the child is conceived with the express purpose of removing her from her birth mother, and delivering her to the commissioning parents. Whereas in adoption, the aim is to find a family for a baby or child, the opposite is true in surrogacy, where the aim is to obtain a baby for the parent(s). While surrogate mothers and the agencies that employ them make a concerted effort to prevent the surrogate from bonding with the child, there is little they can do to prevent the baby from bonding to her mother.

For these reasons, the debate on surrogacy must be sensitive to the needs of children. The need to bond with the birth mother and to breastfeed, which is extraordinarily important for the psychological and immunological development of the child, are factors that must be considered by legislatures around the globe. Commenting on the legislative debate in India, Imrana Qadeer urges lawmakers to look at the effects of surrogacy on the child, highlighting that:

[n]urturing and bonding acquired a new meaning with knowledge of genetics and of intrauterine and early development. It was established that for the child’s genetic potential to unfold fully, it should be nurtured in a biologically optimum and socially secure environment. For the development of a well adjusted baby, the importance of not separating it from the gestational mother too early was thus laid by modern scientific knowledge.

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147 For example, surrogacy agencies attempt to prevent the surrogate from bonding with the child by prohibiting the surrogate from providing her own eggs for the pregnancy, and by providing counseling to overcome the cognitive dissonance that results from refusing to bond with and relinquishing a child they have carried in their wombs for nine months. Id.; see also Elizabeth Marquadt, COMMISSION ON PARENTHOOD’S FUTURE, One Parent or Five: A Global Look at Today’s New Intentional Families 46 (2011), available at http://www.familyseholars.org/assets/One-Parent-or-Five.pdf.
149 Qadeer, supra note 20.
Therefore, in light of the scientific evidence and in accordance with Article 6 of the CRC, states must debate the issue of surrogacy with a close eye to the harmful effects of the practice on children.

E. Threats to the Child’s Right to Preservation of Identity and to Know His or Her Parents

The Committee on the Rights of the Child urges states to “create conditions that promote the well-being of all young children during this critical phase of their lives.” The Committee reminds states, “Article 6 encompasses all aspects of development, and that a young child’s health and psychological well-being are in many respects interdependent.” Of particular importance to the psychological well-being of a child is the development and preservation of his or her identity, a matter addressed in Articles 7 and 8 of the CRC.

Article 8 states that children have the right to preserve their identity, including nationality, name, and family relations. Similarly, Article 7 provides that all children have a right “as far as possible to know . . . his or her parents.” The CRC is the first human rights treaty to explicitly recognize such a right to identity, a right integral to the dignity of the human person. As one scholar writes, “[t]here can be few more basic rights than a right to one’s identity.” Further, the child’s right to know his or her parents is vital to the development of the child as “such social definitions are important to children in terms of their identity.”

Though the CRC was not written specifically with ART and surrogate children in mind, the Committee includes ART children within the scope of Articles 7 and 8, as evidenced by the Committee’s reaction to the reservations to the CRC submitted by several

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150 General Comment 7, supra note 83.
151 Id.
152 CRC, supra note 17, art. 8.
153 Id. art. 7.
155 Id.
157 Freeman, supra note 154, at 151.
countries. In these reservations, the states asserted their belief that Article 7 presents no obstacle to their domestic practice of anonymous gamete donation and closed adoptions. In response, the Committee expressed its concern that children born anonymously, such as via anonymous gamete donation, are denied the right to know their parents and urged states “to take all necessary measures to prevent and eliminate the practice of the so-called anonymous birth.” Thus, according to the CRC implementation guide published by UNICEF, it is reasonable to assume that in regard to Article 7, “the definition of ‘parents’ includes the genetic parents (for medical reasons alone this knowledge is of increasing importance to the child) and birth parents, that is the mother who gave birth and the father who claimed paternity.” Therefore, it is reasonable to conclude that a child born through surrogacy has the right under Article 7 to know the woman who gave birth to him or her.

However, the child’s right under Article 7 to know his or her parents is not likely to be enjoyed often, as it may be difficult for a child to re-establish contact with his or her birth mother as the child grows up, provided the child knows the circumstances of his or her birth by surrogate. In the case of fertility tourism, miles and language divide the surrogate mother from the child. Even where the surrogacy contract was executed domestically, the general practice of commissioning parents and surrogates to cut ties after the birth makes it difficult, if not impossible, for children to know their birth mothers. However, in some cases, the surrogate mother does keep in touch with the child, most often when she had a previous relationship with the commissioning parent.

158 See, e.g., U.N. Committee on the Rights of the Child, Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, U.N. Doc. CRC/C/2/Rev.8 (1999) (in which Luxembourg states in its fourth reservation to the CRC, “[t]he Government of Luxembourg believes that article 7 of the Convention presents no obstacle to the legal process in respect of anonymous births, which is deemed to be in the interest of the child, as provided under article 3 of the Convention.” Similarly, in its declarations and statements, the Czech Republic states, “[i]n cases of irrevocable adoptions, which are based on the principle of anonymity of such adoptions, and of artificial fertilization … the non-communication of a natural parent’s name or natural parents’ names to the child is not in contradiction of this provision”).


160 HODGKIN, supra note 156, at 105.
F. Split Motherhood

A child’s rights under Articles 6, 7 and 8 face further challenges from the phenomenon of “split motherhood” in surrogacy. In a natural pregnancy, a woman carries a child that was conceived with her ovum and which she intends to raise. The genetic, biological, and social roles of motherhood are preserved in one person. In surrogacy, however, these roles are divided among up to three women, (an egg donor, a gestator, and a commissioning mother) in a deliberate division that may psychologically harm the child. Concerns over the repercussions of split motherhood led the Austrian government to prohibit ova donation for use in in vitro fertilization, which was subsequently upheld by the European Court of Human Rights in S.H. and Others v. Austria. Similarly, the German government also banned egg donation for the purpose of protecting the child’s welfare by preserving the unambiguous identity of the mother. As an intervener in the S.H. case, the German government submitted, “[s]plit motherhood [is] contrary to the child’s welfare because the resulting ambiguousness of the mother’s identity might jeopardise the development of the child’s personality and lead to considerable problems in his or her discovery of identity.” The Italian government intervened, adding that “splitting motherhood would lead to a weakening of the entire structure of society,” which would negatively impact the interests of children as well.

G. Studies of the Psychological Effects of Surrogacy on Children

Given that the CRC provides that children have a right to psychological health, preservation of identity, and to know their parents, what does the scientific literature say about the psychological effects of surrogacy on the child? Unfortunately, scientific research on ART offspring in general is limited and very little information is

161 John A. Robertson, Surrogate Mothers: Not So Novel After All, in ETHICAL ISSUES IN THE NEW REPRODUCTIVE TECHNOLOGIES 172–73 (2nd ed. 2005).
163 Id. at ¶ 69.
164 Id. at ¶ 70.
165 Id. at ¶ 73.
known about children born through surrogacy. Further, few studies follow ART children beyond adolescence and, according to one source, no data are available regarding surrogate families after the child’s preschool years. According to psychologist Susan Golombok, a leading researcher in the field, it is not known how the circumstances of surrogacy impact the child’s psychological and identity development. In particular, “[n]either is it known how children will feel about the unique facets of surrogacy such as the fact that they had been conceived in order to be relinquished by their gestational mother.”

This paucity of information regarding the impact of surrogacy on children ought not embolden legislatures to legalize surrogacy, but rather give them reason to expand the debate to consider the views of teenage and adult gamete donor-offspring, an ever-growing cohort of individuals whose experiences are analogous to those of surrogate children. It would be “wishful thinking,” according to the National Ethics Committee of France, to think that the issue of surrogacy could be clarified by studies that are inherently limited. Yet, in its recent report recommending that France continue its ban on surrogacy, the Committee argued that in light of the experiences and sufferings of donor-offspring adults, the possibility of a negative impact on “the psyche of people born following a GS [gestational surrogacy] procedure cannot be dismissed out of hand.” Indeed, the serious possibility of negative consequences on surrogate offspring cannot be overlooked. The views of young adult donor-offspring, particularly those under eighteen years of age, are of particular interest as Article

167 Id.
168 Id.
169 Id. at 311.
170 Id.
171 Id. at 15-16.
172 OPINION NO. 110, supra note 132, at 16.
173 Id. at 15-16.
12 of the CRC states that children have a right to express their views in all matters affecting them.\textsuperscript{174}

It is important to note that it is often not until the teen years and beyond that children of ART begin to question their identity and seek answers regarding their biological or genetic parents.\textsuperscript{175} For example, it is at this time that concerns about genetic and health history as well as concerns about avoiding possible incest with donor half-siblings come to the fore.\textsuperscript{176} The search for information forces donor offspring to come face to face with the circumstances of their conception, causing some to publicly express their distaste for ART.\textsuperscript{177} Yet, some commentators argue that children conceived through ART have no place criticizing their mode of conception, as they would not exist otherwise. Joanna Rose, a donor-offspring and advocate for adults and children like herself, responds to this argument saying, “[i]f I were the result of rape, I would still be glad to be alive, but that doesn’t mean I or any one else should approve of rape.”\textsuperscript{178}

To silence debate on the effect of ART on children by arguing that without ART such children would not exist side-steps the issue and dismisses the experiences and concerns of ART offspring. Such logic would give license to doctors and parties to eschew criticism of their ART methods simply by virtue of the fact that a human child resulted, no matter how the child may be impacted by the

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\textsuperscript{174} CRC, supra note 17, art. 12.


\textsuperscript{177} See, e.g., Tangled Webs Statement on Donor Conception, TANGLEDWEB, INC., http://117.58.251.10/~mytwalk/tangledwebs/dc.php (stating “No-one has the right to a child. The interests and welfare of potential and actual children born as a result of the use of DC must be the over-riding consideration in all decisions concerning the use of such technologies and in the subsequent lives of the children so created. The interests of such children must override those of gamete donors and of social and genetic parents. Social and psychological research overwhelmingly supports the proposition that it is in the best interests of every child to know and to be raised by his or her genetic parents. The child should only be removed in extreme circumstances as a last resort for their safety. The desire to provide children for infertile couples does not override the child’s need for and right to this vital relationship with his or her genetic parents”) [hereinafter Tangled webs]. TangledWebs is an organization of individuals, personally and professionally affected by donor conception, which raise awareness about the life-long issues affecting donor offspring.

circumstances of his or her conception as he or she matures.\textsuperscript{179} As times passes, the negative impact of ART on offspring is attracting more attention. Yet, as scholar Margaret Somerville notes, “donor-conceived people are challenged to prove ‘scientifically’ the harm done to them.”\textsuperscript{180} But sociology is not hard science and the turmoil a donor-gamete child may experience is not quantifiable.\textsuperscript{181}

However, a survey of the literature produced by donor-offspring, including websites, news articles, and even testimony provided to legislative bodies regarding donor anonymity statutes, reveals that there is increasing evidence of the negative impact of artificial procreation on the resulting children. For example, a recent study revealed that many donor-offspring experience trouble with the law and substance abuse at rates higher than adopted or natural conception children.\textsuperscript{182} Further, donor-offspring express unease concerning the circumstances of their birth, such that 45% of donor-offspring agreed that “[i]t bothers me that money was exchanged in order to conceive me.”\textsuperscript{183}

This unease, particularly regarding the role of money in their conception, has led some donor-offspring to speak out against the practice of gamete donation and other aspects of ART.\textsuperscript{184} One such advocate, Damian Adams, laments the circumstances of his conception saying, “I have been dehumanised by the fact that I have been bought and sold like a piece of commodity.”\textsuperscript{185} In a debate regarding gestational surrogacy in Australia, he pointed out, “[a]ll the talk about what the adults desire and want but not many people talk

\textsuperscript{179} See Philip G. Peters, Jr., \textit{How Safe is Safe Enough? Obligations to the Children of Reproductive Technology} 49 (2004) (discussing the argument that the effects of ART can only be considered harmful if the injuries caused are so severe that living with them is worse than never existing at all).

\textsuperscript{180} Somerville, supra note 178.

\textsuperscript{181} Id.

\textsuperscript{182} ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, \textit{My Daddy’s Name Is Donor: A New Study of Young Adults Conceived through Sperm Donation, Institute for American Values: The Commission on Parenthood’s Future} (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf [hereinafter \textit{Daddy’s Name is Donor}].

\textsuperscript{183} Id. at 7.

\textsuperscript{184} See, e.g., Tangled Webs, supra note 177 (“What happens when artificially created bundles of joy begin to speak for themselves? Revolt! I’m a product of an anonymous sperm donor and now that I’m an adult I’m searching for answers and speaking out”); see also CONFESSIONS OF A CYRO-KID, http://cryokidconfessions.blogspot.com (last visited Oct. 16, 2012).

\textsuperscript{185} Baby Business, supra note 175.
about the welfare of the child.”

Yet the interest of the child ought to figure large in the surrogacy debate as “[t]o have been bought and sold may well pose a threat to a child’s sense of security.”

H. Threat to the Spiritual and Moral Health and Development of the Child

Not only does being “bought and sold” pose a threat to the child’s sense of security, such commodification of the human person is likely to negatively impact the child’s spiritual and moral development. In its implementation guidelines, the Committee on the Rights of the Child explicitly states that the right to health and development under Article 6 is a holistic concept encompassing the physical, psychological, spiritual, and moral aspects of the child.

The introduction of monetary compensation for the relinquishment of a child by his or her birth mother, particularly when the very existence of the child was contemplated and actualized in consideration of financial exchange, introduces the specter of commodification. How does the knowledge of his or her conception affect the child of surrogacy? How is the spiritual and moral development of surrogacy offspring affected by the crass commercialization of children as seen in the recent “Win a Baby Contest” run by an Ottawa radio station? Advertisements for the contest featured pictures of smiling infants with the words underneath, “[s]he could be yours!” a gimmick reminiscent of an advertisement for a new car or pair of shoes. Though widely criticized, the contest reveals a growing attitude of commercialization towards ART and surrogacy, an attitude that logically leads to the commodification of children and fertility, as seen in the shocking baby-selling scheme of Theresa Erickson and her conspirators.

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186 Id.
187 Freeman, supra note 154, at 177.
188 General Comment 5, supra note 40.
189 Angela Mulholland, Radio Station Defends Its Win a Baby Contest, CTV NEWS (Sept. 29, 2011), http://www.ctv.ca/CTVNews/Canada/20110929/win-baby-fertility-radio-station-110929/ (where winners were awarded money for fertility treatments).
190 Id.
Yet, even if outright commodification of children is prevented, the attitude of commercialization is likely to remain attached to surrogacy arrangements, with negative consequences on the way surrogacy offspring view themselves and the world. Though researchers acknowledge that there is a dearth of information regarding the effects of surrogacy on children,192 the statements of gamete-donor offspring, such as Damian Adams193 and others who express their discomfort and even disgust at the role of money in their existence,194 give us insight into how children may be negatively impacted by the reality of surrogacy. Such considerations, which get to the heart of the spiritual and moral health and development of the child and maturing adult, cannot be overlooked in the surrogacy debate.

Nevertheless, some commentators suggest that concerns about the negative effects of surrogacy have not materialized and that familiarity with the practice of surrogacy should lead to legalization.195 Yet, as the literature suggests, little research is conducted on the effect of surrogacy on any of the parties involved, particularly the child,196 making claims that there are no negative effects premature. Further, research on ART children such as donor-gamete offspring, which show that ART poses serious threats to the interests of the offspring, is instructive and ought to inform legislators in this debate. For this reason, legislatures must investigate the issue thoroughly and maintain focus on the best interests of the child.

I. A Snapshot of Legislative Reactions Across the Globe

Legislative responses to surrogacy differ around the world. Commercial surrogacy is banned or greatly restricted in Germany,197 Austria,198 Italy, Spain, Great Britain, the Netherlands, Norway, 

192 Golombok, supra note 166, at 311.
193 Baby Business, supra note 175.
194 Daddy’s Name Is Donor, supra note 182, at 7.
196 Freeman, supra note 154, at 151.
Sweden, Switzerland, Denmark, Canada, and Australia. In Israel, surrogacy is legal and to a large extent, socially accepted. On the other hand, to date, the U.S. has yet to enact a nation-wide law regarding surrogacy. In Asia, surrogacy is not widely accepted due to the strong cultural sense of blood ties in the family. However, in India, one of the most popular fertility tourism destinations in the world, commercial surrogacy was legalized in 2002. In South Africa, altruistic surrogacy is legal while in Latin America, surrogacy is not commonly practiced and is not supported by the public or by medical professionals. In Guatemala, however, foreign surrogacy agencies have recently descended upon the country, taking advantage of the abject poverty of Guatemalan women to arrange inexpensive surrogacy agreements for foreign couples.

The States that have instituted bans or restrictions on surrogacy have done so over concerns of exploitation of surrogates and in the interest of the needs of the child. In Canada, for example, the Standing Committee on Health asserted its unequivocal support for the paramountcy of the child’s interests in regard to ART, stating, the legislation must protect[] the physical and emotional health as well as the essential dignity of the children who are the intended and desired result of these procedures...our thinking is directed by the feeling that children conceived through assisted human reproduction warrant even greater

199 Markens, supra note 10, at 23.
201 Id.
consideration than the adults seeking to build families or the physicians or researchers seeking new knowledge.\textsuperscript{207}

Though the Standing Committee on Health did not recommend an outright ban on surrogacy, it did not mince words in stating that “[c]ommercial surrogacy treats children as objects and the reproductive capacity of women as an economic activity.”\textsuperscript{208} It went on to suggest that even altruistic, non-commercial, surrogacy arrangements “can also be socially harmful for the resulting child.”\textsuperscript{209}

Approaching the issue of surrogacy with a similar concern for the interests of children, the German government banned surrogacy agreements considering the separation of the psychosocial relationship between the surrogate and the child “inimical to the welfare of the child.”\textsuperscript{210} Legislators were concerned about identity problems that may arise in the child as a result of splitting motherhood among up to three women.\textsuperscript{211} A similar rationale was adopted by the Austrian government, whose ban on certain forms of ART was upheld in a recent decision of the European Court of Human Rights.\textsuperscript{212} In that case, the Court found that Austrian couples’ right to family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms was not violated when the government banned the only method of ART that would have allowed them to conceive a child.\textsuperscript{213} In this way, the Court upheld a law that banned a form of ART on the grounds that the use of such technology was not in the best interests of the child.\textsuperscript{214}


\textsuperscript{208} \textit{Id.} at 68.

\textsuperscript{209} \textit{Id.} at 70.


\textsuperscript{211} \textit{Id.} at 97; \textit{see also} Case of S.H. and Others, App. No. 57813/00, supra note 162, at ¶ 70.

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{See id.} (stating that such laws would only stand as long as there lacked a general consensus in Europe regarding these issues).
RECOMMENDATIONS AND CONCLUSION

In light of the survey of research presented in this article and given ratifying states’ obligation to implement the CRC, or in the case of the U.S., the responsibility not to undermine the principles of the CRC, the following are recommendations to legislatures evaluating surrogacy arrangements:

(1) Make the best interests of the child the guiding principle of the debate;
(2) Gather information regarding the impact of surrogacy and other forms of ART on resulting offspring;
(3) Listen to the testimony and opinions of ART offspring, including donor-offspring (donor-offspring insight is valuable as they often face similar circumstances as children of surrogacy); and
(4) Err on the side of protecting children against known and potential threats to their rights under the CRC, including the right to holistic health and development, right to identity, and right to know their parents.

Surrogacy arrangements “touch upon one of the most, if not the most, sensitive subjects of human endeavor.” 215 Nevertheless, legislatures must engage this issue, and must do so with the best interests of the child in mind. Following an evaluation of the negative impact of surrogacy on the resulting child, including interference with his or her physical, psychological, and identity development, legislatures must ban surrogacy agreements in the best interests of the child.