

## **The Heritage Foundation's Input for the Special Rapporteur on Violence Against Women and Girls for her Report on Surrogacy**

April 18, 2025

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The Heritage Foundation respectfully submits the following report in response to the Special Rapporteur's call for input to help inform her forthcoming report on surrogacy and violence against women and girls. Below are answers to some of the questions she posed.

### ***What specific forms of violence are women and girls subjected to in the context of surrogacy?***

Surrogacy, by its very nature, commodifies a woman's body, reducing her to her reproductive and gestational capabilities. The multibillion-dollar fertility industry often targets poor women who see an opportunity to make thousands of dollars in exchange for renting their bodies. Regardless of the circumstances, the practice of surrogacy requires that a woman's body be used as a conduit in a transaction that produces a baby for someone else.

The act of purchasing a woman's reproductive capability and "renting" her body is a violation of her human dignity, and as such, amounts to violence. Additionally, the women who act as surrogates are vulnerable to trafficking and other forms of physical and psychological violence in a largely unregulated and immensely profitable industry.<sup>1</sup>

### ***What are the consequences of surrogacy for all parties involved?***

Surrogacy turns procreation into an act of the will, in which a child is built according to the specifications of adults. As Heritage Foundation expert Emma Waters argues, such practices dehumanize children and contribute to a more atomized society. Surrogacy, like other artificial reproductive technologies, decouples marriage from sex, sex from pregnancy, pregnancy from motherhood, and biology from parenthood. The surrogacy industry reduces the surrogate mother to a nameless, sexless 'gestational carrier,' merely serving a function in a transactional process. Childbearing becomes child-making.

This has consequences for all parties involved, and for society as a whole. Contractual agreements weaken the natural ties of the family. With surrogacy, men and women can effectively build a child—to their preferred specifications—independent of a marriage or

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<sup>1</sup> For example, see Dr. Sheela Saravan's submission to the UN Special Rapporteur on the sale and sexual exploitation of children in 2019, in which she writes: "The surrogacy trafficking trade used the same network that was used for domestic work and sex trade from the poor regions of India into urban areas. These unmarried girls [were] impregnated with embryos without their consent. Others were confined in homes and when some girls tried to run away, they [were] caught, brought back and beaten." The full submission is available at <https://www.ohchr.org/en/calls-for-input/report-safeguards-protection-rights-children-born-surrogacy-arrangements>.

family. And if surrogate-born children can be commissioned and then sold based on the preferences of the adults involved, then what security do any children have? The surrogacy industry is dehumanizing for all members of society.

While much is still unknown<sup>2</sup> about the long term physical and mental health outcomes of surrogacy for women and children, it is clear that the practice of surrogacy is fraught with harm for both the surrogate mother and the child.<sup>3</sup> For example, surrogate births typically have higher obstetrical complications for the mother, while children born through surrogacy are more likely to experience preterm birth and have low birth weight.<sup>4</sup>

While harder to quantify, the psychological violence that surrogacy entails for both the mother and the child is significant and traumatic. In relinquishing a child who has grown in her womb for the duration of her pregnancy, the surrogate mother is required to do something that violates her natural instinct to continue bonding with the child after birth. In most cases, the surrogate is explicitly prohibited from breastfeeding the baby after delivery. This is certainly psychologically damaging for the postpartum woman.

The psychological consequences for the baby may be even worse. The child born of surrogacy is deprived of the only mother he has ever known in the voice he has heard throughout pregnancy, and through the scent and taste of her amniotic fluid. He experiences this loss even if he is being handed over from the surrogate mother to the biological mother, in the case where the commissioning parent is also the egg donor. This is a primal wound to the child.

Later, when the child born of surrogacy grows up, he must come to terms with the idea that he was designed, selected and bought by the parents who raise him, and sold by the mother who bore him.

### ***What are the legal, policy or regulatory frameworks governing surrogacy?***

While most developed nations have outlawed commercial surrogacy, the United States is in the minority in its explicit support of surrogacy. There are very few federal laws or regulations concerning the practice of surrogacy in the United States; it is primarily a state-level issue. California and New York are the leaders in the American surrogacy market.

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<sup>2</sup> For more on the inadequacies of research studies on the effects of surrogacy, see Emma Waters, “Inconclusive: The Research On Surrogacy’s Impact on Children,” The Institute for Family Studies, March 21, 2024 at <https://ifstudies.org/blog/inconclusive-the-research-on-surrogacys-impact-on-children>.

<sup>3</sup> Grace Melton and Melanie Israel, “How Surrogacy Harms Women and Children,” The Heritage Foundation, May 5, 2021 at <https://www.heritage.org/marriage-and-family/commentary/how-surrogacy-harms-women-and-children>.

<sup>4</sup> For example, see Woo, Irene et al. “Perinatal outcomes after natural conception versus in vitro fertilization (IVF) in gestational surrogates: a model to evaluate IVF treatment versus maternal effects,” *Fertility and Sterility*, Volume 108, Issue 6, 993 – 998 at [https://www.fertstert.org/article/S0015-0282\(17\)31941-6/fulltext](https://www.fertstert.org/article/S0015-0282(17)31941-6/fulltext)

California has even passed legislation to establish parenthood in surrogacy arrangements separate from biology or adoption. Nearly all states in the U.S. permit surrogacy and enforce surrogacy contracts. Surrogacy is illegal in only three states—Louisiana, Michigan and Nebraska.

Because U.S. law is so accommodating to commercial surrogacy, the United States is a leading destination for foreigners seeking to commission a baby. As Heritage Foundation experts Emma Waters and Simon Hankinson detail in a recent report, “the international ‘rent-a-womb’ industry is disproportionately fueled by Chinese nationals (41.7 percent) with France (9.2 percent) and Spain (8.5 percent) as the next highest nationalities” employing surrogates in the United States.<sup>5</sup>

Professor David Smolin, a leading legal expert on surrogacy explains that, “the United States is attractive to foreigners seeking surrogacy services because it is one of the few nations that offers stable legal systems explicitly supportive of commercial surrogacy.”<sup>6</sup> Surrogacy remains an under-regulated industry in the United States, and there are virtually no limits to who can enter into a surrogacy contract—unlike the screening processes surrounding adoptive or foster parents—enabling all manner of bad actors and unfit parents to commission a child.<sup>7</sup>

Most surrogacy contracts spell out what the surrogate can and cannot do while pregnant, sometimes including prohibitions on sexual intercourse with a spouse or significant other. Many contracts stipulate what the surrogate can and cannot eat or drink, and often require the surrogate to have a caesarian section. Additionally, many surrogacy contracts include a ‘reduction of fetus’ clause that permits the intended parents to instruct the surrogate to abort one or all the babies she is carrying. If she fails to comply, the surrogate may be in violation of her contract and will have to forego some or all of her compensation.

Commercial surrogacy contracts essentially amount to the sale of a child. As David Smolin notes, “intending parents are not merely paying for a child to be created, gestated, and birthed, for they certainly would not be satisfied unless they were also given exclusive physical and legal custody of the child.”<sup>8</sup>

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<sup>5</sup> Emma Waters and Simon Hankinson, “The New Face of Birth Tourism: Chinese Nationals, American Surrogates, and Birthright Citizenship,” *Heritage Foundation Issue Brief No. 5357*, July 16, 2024 at <https://www.heritage.org/china/report/the-new-face-birth-tourism-chinese-nationals-american-surrogates-and-birthright>.

<sup>6</sup> David M. Smolin, *The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export*, 49 *Cumberland Law Review* 1 (2019).

<sup>7</sup> For example, see Emma Waters, “Under-regulated and unaccountable,” *World Magazine*, April 22, 2024 at <https://wng.org/opinions/under-regulated-and-unaccountable-1713780144>.

<sup>8</sup> David Smolin, JD “Commercial Surrogacy,” *Treating Infertility: The New Frontier of Reproductive Medicine* edited by Natalie Dodson and Emma Waters, EPPC at <https://eppc.org/wp-content/uploads/2025/03/3-Commercial-Surrogacy.pdf>.

In the United States, the primary legal difference between baby selling (which is illegal) and a legal commercial surrogacy contract is the timing of the agreement. If the contract is signed prior to conception, it is a legal transfer of parental rights from the surrogate to the intended parents. However, if the parties sign the contract after the child is conceived, the law considers that to be a form of child trafficking.

In the related cases of adoption or organ donation, U.S. law prohibits the transfer of money between the two parties for any reason. But when it comes to surrogacy, the law ignores those precedents.

While not a party to the Convention on the Rights of the Child, the U.S. has signed and ratified the optional protocol on the sale of children, child prostitution and child pornography. Unfortunately, the official position of the U.S. with respect to this commitment is that “surrogacy arrangements fall outside the scope of the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography,”<sup>9</sup> and that they do not involve the exploitation of children.

***How is the requirement to consider the child’s best interests reflected and implemented in relevant laws, policies and regulations concerning surrogacy?***

Unlike the laws and processes that govern foster care and adoption in the United States, surrogacy contracts do not consider the best interests of the child that will be created whatsoever. Adoption laws prohibit adoptive parents from buying a child from the birth mother, and the “best interest of the child” standard is paramount in foster, adoption, and custody cases.

***How is the child’s right, wherever possible, to know and be cared for by his or her parents (Article 7.1 of the UN Convention on the Rights of the Child) taken into account in relevant laws, policies and regulations regarding surrogacy?***

Surrogacy prioritizes the desires of adults over the needs of children. It elevates the idea of a “right” to procreate, or the entitlement of having a child, and diminishes the natural right of a child to know and be cared for by his or her mother and father.

Those who employ surrogates are usually unable to have their own biological children: single men, same-sex couples, and women who are unable or unwilling to carry a child. Therefore, any child who those commissioning parents then raise will be intentionally separated from at least one of his or her parents. A child born through surrogacy could have up to six “parent” figures involved in his or her creation: the biological mother (egg), the

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<sup>9</sup> See *Interactive Dialogue with the Special Rapporteur for the Right to Privacy Joseph Cannataci and the Special Rapporteur on the Sale and Sexual Exploitation of Children Maud de Boer-Buquicchio* Statement as delivered by Ian McKay, Attorney-Advisor at the 37<sup>th</sup> Session of the UN Human Rights Council, Geneva, March 6, 2018 at [https://geneva.usmission.gov/2018/03/07/id-with-the-sr-for-the-right-to-privacy-joseph-cannataci-and-the-sr-on-the-sale-and-sexual-exploitation-of-children-maud-de-boer-buquicchio/?\\_ga=2.8923568.466814927.1592339635-604313170.1592339635](https://geneva.usmission.gov/2018/03/07/id-with-the-sr-for-the-right-to-privacy-joseph-cannataci-and-the-sr-on-the-sale-and-sexual-exploitation-of-children-maud-de-boer-buquicchio/?_ga=2.8923568.466814927.1592339635-604313170.1592339635).

biological father (sperm), the surrogate mother (womb), the in vitro fertilization technician, and the intended mother and father who commissioned the child.

The child born of a surrogate would never consent to the intentional loss of his or her mother. As child rights advocate Katy Faust explains, surrogacy “splices what should be one woman, ‘mother,’ into three purchasable and optional women.” These are the genetic mother (the egg donor) who gives the child his or her biological identity, the birth mother (the surrogate) to whom the newborn baby experiences attachment, and the social mother (intended parent) whose maternal love is critical to the child’s development. According to Faust, “for children, none of these three mothers are optional, and anytime they are not found in the same woman, the child experiences loss.... Surrogacy intentionally, and often commercially, forces a child to lose one or all of them.”<sup>10</sup> That is an injustice, permissible by law in the United States, against the child’s natural right to know and be cared for by his or her parents.

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<sup>10</sup> Katy Faust, “The Conservative, Pro-Life Case Against Surrogacy,” *The Federalist*, December 4, 2023 at <https://thefederalist.com/2023/12/04/the-conservative-pro-life-case-against-surrogacy/>.