

# NOT ALL SURROGACY & RAINBOWS: BARRIERS TO GAY MEN SEEKING TO BECOME PARENTS THROUGH SURROGACY WITHIN THE EUROPEAN UNION

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I.	INTRODUCTION.....	213
II.	SURROGACY POLICY WITHIN THE EU DISPROPORTIONATELY AFFECTS MALE, SAME-SEX COUPLES .....	216
	<i>A. Barriers Abroad</i> .....	217
	<i>B. Biological Barriers</i> .....	218
	<i>C. Barriers to Free Movement</i> .....	223
III.	STRINGENT REGULATION PROTECTS SURROGATE MOTHERS FROM VICTIMIZATION .....	225
IV.	THE EU’S CURRENT POLICY PUSHES COMMERCIAL SURROGACY OUTSIDE ITS BORDERS TO COUNTRIES WITH LITTLE TO NO REGULATION .....	229
V.	CONCLUSION .....	233

## I. INTRODUCTION

For gay men and male same-sex couples who wish to have biological children, commercial surrogacy provides the only realistic option for starting a family.<sup>1</sup> However, because the European Union (EU) does not

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1. Altruistic surrogacy, where the surrogate is not given monetary compensation for her services is permitted in some EU States, such as the UK and Greece. However, the commitment surrogacy requires makes this practice relatively rare. In addition, some States that permit altruistic surrogacy have implemented additional restrictions, such as requiring one intended

permit commercial surrogacy, gay men who wish to be genetically related to their child must pursue surrogacy abroad.<sup>2</sup> The European Parliament (Parliament) has expressly condemned commercial surrogacy, and all EU States forbid surrogacy arrangements in which the surrogate mother is compensated for her services.<sup>3</sup> To support the prohibition of commercial surrogacy, Parliament and EU States claim the practice is inherently exploitative, specifically targets poor, vulnerable women, and leaves surrogate mothers both physically and psychologically damaged.<sup>4</sup> Nevertheless, many nations outside of the EU have a growing surrogacy industry that caters to Union citizens and other procreative tourists.<sup>5</sup> Although the EU's ban on commercial surrogacy has meant that both straight and gay citizens must travel internationally to pursue surrogacy, the ban has primarily and disproportionately burdened male couples. For example, while several countries within Europe, but outside of the EU, permit surrogacy for heterosexual couples, the majority forbid same-sex couples from participation.<sup>6</sup> Therefore, options for male couples are often limited to significantly more expensive surrogacy programs, such as those in the United States, or risky and unregulated programs in developing countries.<sup>7</sup>

Male couples who do engage in commercial surrogacy abroad are also not guaranteed the same legal rights as heterosexual couples upon returning to the EU. Many EU States will only consider the genetically related father to be the child's legal parent and make it difficult or impossible for the non-

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parent be biologically related to the surrogate. See Noelia González, *Regulating Surrogacy in Europe, Common Problems, Diverse National Laws*, 26 EUR. J. OF WOMEN'S STUD. 435, 436 (2019).

2. Alice Cuddy, *Where in Europe is Surrogacy Legal?*, EURONEWS, <https://www.euronews.com/2018/09/13/where-in-europe-is-surrogacy-legal> (Sept. 13, 2018).

3. See *Annual Report on Human Rights and Democracy in the World*, at 29 (Nov. 30, 2015), [https://www.europarl.europa.eu/doceo/document/A-8-2015-0344\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/A-8-2015-0344_EN.pdf).

4. See *A Comparative Study on the Regime of Surrogacy in EU Member States*, EUR. PARL. DOC. PE 474-403(23) (2013).

5. See Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. & HEALTHCARE POL'Y 111, 112, 114-15 (2015).

6. See William Houghton, *Surrogacy for Gay Couples Worldwide*, SENSIBLE SURROGACY <https://www.sensible-surrogacy.com/gay-surrogacy/> (Oct. 14, 2021); *Unregulated Surrogacy Poses Risks for LGBT Couples, Warns Global Consultant*, PRWEB (Mar. 10, 2018), <https://www.prweb.com/pdfdownload/15295170.pdf>.

7. Emma Lott, *Why is Surrogacy for Same-Sex Couples So Expensive?*, GAY PARENTS TO BE (Sept. 8, 2021), <https://www.gayparentstobe.com/gay-parenting-blog/surrogacy-for-same-sex-couples-cost>.

genetically related parent to obtain any parental rights.<sup>8</sup> The lack of a genetic link is often used as a legal loophole to punish male same-sex couples, while heterosexual couples who have engaged in a transnational surrogacy arrangement do not experience any significant repercussions.

In addition to harming same-sex couples, the EU's surrogacy ban does little to protect women from exploitation. In fact, prohibiting surrogacy has pushed more EU citizens to engage in surrogacy arrangements in impoverished countries where women enjoy fewer protections.<sup>9</sup> Surrogacy in poorer countries, like the Ukraine and Russia, often have minimal regulation, and women commonly report experiencing poor healthcare, underpayment, and emotional trauma.<sup>10</sup> At the same time, research from countries that have a strong regulatory framework in place has shown that guidelines and screening procedures generally protect surrogates from both health complications and abuse. Not only do existing EU restrictions enforce a strong anti-gay bias, but the broader grounds for the restrictions do not provide any protections for women.

This note will first argue that the EU's condemnation of surrogacy has a discriminatory impact on gay men and male couples. Due to male biology and persistent homophobia within many EU States, gay men encounter more challenges when attempting to have biological children by surrogacy. Next, this note will demonstrate that the EU's condemnation of commercial surrogacy is based on unsubstantiated beliefs, gender stereotypes, and inapplicable data. Empirical research has shown that surrogate mothers in countries with proper regulation are not comprised of primarily vulnerable women and are not psychologically damaged by their experience. Lastly, this note will argue that the EU's ban on surrogacy has contributed to the growth of an international surrogacy industry, where women in poorer countries are more likely to be victims of abuse. While the purpose of the EU's position is to protect women from victimization, professional regulation and procedural safeguards are more effective at preventing the exploitation of women.

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8. Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 *ILSA J. INT'L & COMP. L. REV.* 369, 380 (2012).

9. See Emma Lamberton, Note, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, *J. PUB. & INT'L AFF.* (2020), <https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children> ("a surrogacy ban could potentially drive the market underground or to third country markets, as happened in Ukraine after the closure of surrogacy markets in India . . ."); *Banning Commercial Surrogacy Will Expose Women to Exploitation*, *THE ECON. TIMES*, <https://economictimes.indiatimes.com/magazines/panache/banning-commercial-surrogacy-will-expose-women-to-exploitation/articleshow/53889509.cms> (last updated Aug. 21, 2016).

10. Lamberton, *supra* note 9.

## II. SURROGACY POLICY WITHIN THE EU DISPROPORTIONATELY AFFECTS MALE, SAME-SEX COUPLES

The EU and most Member States have always condemned commercial surrogacy.<sup>11</sup> Though this position has prevented all Union citizens from engaging in commercial surrogacy within the EU, it has had a less than uniform effect with regard to international surrogacy arrangements. Specifically, the EU's prohibition on commercial surrogacy unevenly burdens gay men and same-sex male couples who wish to have biological children.<sup>12</sup> While both male couples and those facing reproductive issues must pursue surrogacy abroad if they want biological children, only male couples experience significant obstacles as a result of this choice. Even though LGBT individuals are protected against discrimination by EU treaties and laws,<sup>13</sup> their familial rights are still restricted in many Member States.<sup>14</sup> Because certain States have chosen to provide minimal protections for LGBT individuals, male couples who have had children by surrogacy often face blatant homophobia and difficulties establishing their parental rights.<sup>15</sup> Although recent decisions on transnational surrogacy by the European Court of Human Rights and the European Court of Justice have helped to lessen this discriminatory treatment, they have primarily served to benefit heterosexual couples and their surrogate children.<sup>16</sup> Unfortunately,

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11. González, *supra* note 1, at 435-36.

12. *Obstacles to the Free Movement of Rainbow Families*, EUR. PARL. DOC. PE 671-505(74) (2021),

("The parental rights that same-sex couples enjoy under national law vary considerably throughout the EU and . . . when rainbow families move to some EU Member States, the legal ties between child and one or both parents, will be dissolved."); Dan Sobovitz, *Long Way to Go for Gay Rights in Europe*, THE BRUSSELS TIMES (June 21, 2020),

<https://www.brusselstimes.com/opinion/117865/long-way-to-go-for-gay-rights-in-europe/>.

13. Consolidated Version of the Treaty on the Functioning of the European Union art. 2 & 3, May 9, 2008, 2008 O.J. (C 115) 47; Charter of Fundamental Rights of the European Union art. 21, Dec. 18, 2000, 2000 O.J. (C 364).

14. See European Parliamentary Research Service, *The Rights of LGBTI People in the European Union*, at 2 (May 2019)

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637950/EPRS\\_BRI\(2019\)637950\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637950/EPRS_BRI(2019)637950_EN.pdf).

15. *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 74 ("The parental rights that same-sex couples enjoy under national law vary considerably throughout the EU and . . . when rainbow families move to some EU Member States, the legal ties between child and one or both parents, will be dissolved."); Ian Smith, *This is How LGBTQ+ People are Excluded from Freedom of Movement in the EU*, EURONEWS (June 6, 2021), <https://www.euronews.com/travel/2021/06/11/this-is-how-lgbtq-people-are-excluded-from-freedom-of-movement-in-the-eu>.

16. In *Mennesson v. France*, The European Court of Human Rights found that France was obligated to recognize the parentage of the non-genetically related intended mother over a child born by surrogacy. However, the court was silent on whether EU States were required to

due to inconsistent policy and legal barriers, biological children are frequently out of reach for gay men and male couples within the EU.

#### A. *Barriers Abroad*

From the start of their surrogacy journey, gay men encounter more obstacles participating in international surrogacy arrangements than heterosexual couples. There are several nations outside of the EU that allow commercial surrogacy, such as the Ukraine and the Republic of Georgia, but the practice is illegal for homosexual couples.<sup>17</sup> In fact, the United States (U.S.)<sup>18</sup> and Colombia<sup>19</sup> are the only countries in which homosexual couples are legally permitted to employ a commercial surrogate. Due to limited options, gay men must typically travel farther if they wish to take part in a surrogacy arrangement.

The higher cost of surrogacy in LGBT-friendly nations makes the service unattainable for those with lower incomes. Surrogacy costs start at \$60,000 USD in Colombia<sup>20</sup> and \$100,000 USD<sup>21</sup> in the U.S., without factoring in the cost of travel and program fees. Considering the median income in EU states generally falls between \$35,000 USD and \$45,000 USD, employing a surrogate in one of these destinations is likely too expensive for the majority of male couples.<sup>22</sup> Heterosexual couples, on the other hand, have more financial flexibility when choosing to take part in a

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recognize non-genetically related fathers as legal parents. Thus, in many States, one or both parents in a same-sex male couple may not be able to establish parentage over a child born by surrogacy. *See* *Mennesson v. France*, App. No. 65192/11, ¶¶ 96-102 (June 26, 2014), <https://hudoc.echr.coe.int/fre?i=001-145389>.

17. *See* Rachel Savage, *As Anderson Cooper Becomes a Father, Here's What You Need to Know About LGBT+ Surrogacy*, OPENLY (May 1, 2020), <https://www.openlynews.com/i/?id=1b20c88c-cc09-40db-af47-1e40a31a6890>.

18. Not all states have legalized commercial surrogacy. States with permissive surrogacy laws include California, Connecticut, Delaware, Maine, New Hampshire, Nevada, North Dakota, Oregon, and Rhode Island. Additional states allow commercial surrogacy, but with further restrictions, such as on the ability to get a pre-birth order. *See State by State Laws on Surrogacy for Gay Parents*, SIMPLE SURROGACY (Sept. 2, 2019), <https://simplesurrogacy.com/surrogacy/state-by-state-laws-on-surrogacy-for-gay-parents/>.

19. *Same-Sex Surrogacy in Colombia*, SURROGACY COLOMBIA, <https://surrogacycolombia.com/gay-surrogacy/> (last visited Nov. 10, 2021).

20. *Surrogacy in Colombia*, SENSIBLE SURROGACY, <https://www.sensible-surrogacy.com/surrogacy-in-colombia/> (last visited Nov. 10, 2021).

21. Beth Braverman, *How Much Surrogacy Costs and How to Pay for It*, U.S. NEWS (June 2, 2022), <https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it>.

22. *See* Rakesh Kochhar, *Through an American Lens, Western Europe's Middle Classes Appear Smaller*, PEW RES. CTR. (June 5, 2017), <https://www.pewresearch.org/fact-tank/2017/06/05/through-an-american-lens-western-europes-middle-classes-appear-smaller/>.

surrogacy arrangement. Ukraine, Russia, and the Republic of Georgia have all legalized commercial surrogacy for heterosexual couples and cost significantly less than the U.S. and Colombia. For instance, the average cost of surrogacy in the Ukraine is \$35,000 USD,<sup>23</sup> and ranges from \$32,000 to \$42,000 USD in the Republic of Georgia.<sup>24</sup> Due to superior reproductive technology and regulation, wealthier couples may still choose to pursue surrogacy in the U.S. despite the larger expense.<sup>25</sup> However, heterosexual couples with moderate to low incomes have more affordable alternatives to surrogacy that are not available to gay men or male couples.

Undeniably, the EU has little influence over the cost and legality of surrogacy in nations outside of the Union. Nevertheless, the obstacles explained above are challenges gay men confront when navigating the international surrogacy industry before they have even returned to the EU with their families.

### B. Biological Barriers

Due to the biological differences between men and women, same-sex male couples who want a genetic link to their children must engage in surrogacy.<sup>26</sup> Though only one partner is biologically capable of being the genetically-related parent, countries with LGBT-friendly surrogacy laws will provide a birth certificate naming both male partners as father of the child.<sup>27</sup> Yet, upon returning to the EU, some Member States will only recognize the biological father as a legal parent, putting the non-genetically related father at constant risk of losing his parental rights.<sup>28</sup> Generally,

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23. *Ukraine Surrogacy Cost: Benefits and What You Need to Know About the Financial Side*, WORLD CTR. OF BABY, <https://worldcenterofbaby.com/surrogate-cost-in-ukraine/> (last visited Nov. 10, 2021).

24. *Top 4 Cheapest Countries for Surrogacy that Parents Should Know*, IVF CONCEPTIONS, <https://www.ivfconceptions.com/cheapest-countries-for-surrogacy/> (last visited Nov. 10, 2021).

25. See William Houghton, *Understanding Surrogacy Success Rates*, SENSIBLE SURROGACY, <https://www.sensiblesurrogacy.com/surrogacy-success-rates/> (last visited Nov. 10, 2021).

26. Lesbian couples generally do not face the same reproductive challenges as male couples because they are biologically capable of becoming pregnant. Thus, they do not need to hire a third party, a surrogate, to have children, and can instead rely on artificial insemination. See Camisha Russell, *Rights-holders or refugees? Do gay men need reproductive justice?*, 7 REPROD. BIOMEDICINE & SOC'Y 131, 132 (2018).

27. In states where surrogacy is permitted, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate. See *Gestational Surrogacy Law Across the United States*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/married-same-sex-couples/> (last visited Nov. 12, 2021).

28. *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 19-20 (“same-sex couples, who have legally established their (joint) parental status with regard to a child that was born through a surrogacy arrangement in a country where surrogacy is allowed . . . may be

heterosexual couples do not experience the same issues when establishing parentage. Assisted reproductive technologies, such as In Vitro Fertilization (IVF), allow a woman's eggs and a man's sperm to be manipulated outside of the body and the resulting embryo to be implanted in the surrogate's uterus.<sup>29</sup> In the most common scenario, both members of a heterosexual couple will have biological links to the surrogate child, so laws that require a genetic link do not affect them.<sup>30</sup> Thus, policies that withhold parental rights from the non-genetically related parent primarily impact same-sex male couples.

Moreover, though both female and heterosexual couples who cannot conceive naturally also face challenges with having biological children and establishing parentage, the EU's ban on commercial surrogacy disproportionately burdens male couples. In female relationships, one or both partners are capable of having biological children through artificial insemination or In Vitro Fertilization (IVF).<sup>31</sup> Males do not have the option of carrying their own children and must spend a significant amount of money for egg donation and gestational carrier costs.<sup>32</sup> When male couples pursue surrogacy, it is a complex, expensive, and legally precarious decision significantly more difficult than donor insemination or IVF. Further, female couples generally encounter less barriers to establishing joint parentage because of traditionally held beliefs about gender and motherhood.<sup>33</sup> Because women are frequently expected to be inherently maternal and natural caregivers, female couples are viewed to more closely resemble the heteronormative family.<sup>34</sup> The opinion that parenthood is instinctive to women, and not men, is reflected in the familial leave policies

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faced with non-recognition of their status as parents when they return to the EU with their child . . .").

29. See *IVF – In Vitro Fertilization*, AM. PREGNANCY ASS'N, <https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization/> (last visited Mar. 21, 2022).

30. Gestational surrogates agree to carry a fertilized embryo created from another woman's egg and are not biologically related to the child they carry. In the United States, gestational surrogacy constitutes 95% of all surrogacy arrangements. See Robert Klitzman, *Paying gestational carriers should be legal in all states*, STAT NEWS (Feb. 12, 2020), <https://www.statnews.com/2020/02/12/paying-gestational-carriers-should-be-legal-in-all-states/>.

31. Lesbian couples may use IVF to combine one partner's egg with donor sperm, while implanting the resulting embryo in the other partner. Anna Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 360 (2011).

32. Russell, *supra* note 26, at 133.

33. THE PALGRAVE HANDBOOK OF FAMILY POLICY 421 (Rense Niewenhuis & Wim Van Lancker eds., 2020).

34. *Id.*

of EU States.<sup>35</sup> For instance, the majority of States rarely grant paternity or co-parent leave, and when they do, it is seldom paid.<sup>36</sup> Although female couples can still face challenges when attempting to establish the parentage of a non-genetically related parent, biology and ideals about a child's need for a mother have made it easier for female couples to have biological children.

Even where functional infertility, such as a low sperm count or having no viable eggs, prevents one partner from providing their genetic material, heterosexual couples still experience fewer issues establishing parentage.<sup>37</sup> In 2019, the European Court of Human Rights (ECtHR) released an opinion providing that States should recognize a non-genetically related mother as the legal parent of a child born by surrogacy.<sup>38</sup> In *Mennesson v. France*, the Court found that France had violated the child's right to respect for private life by refusing to establish the intended mother's parentage.<sup>39</sup> Introduced by the Convention of Human Rights, the right to respect for private life protects a child from arbitrary interference in his or her privacy, family, and home, and maintains that every child should be able to develop their own personal identity.<sup>40</sup> Despite the lack of genetic link between mother and child, the Court reasoned that declining the existence of the parent-child relationship would have negatively impacted the child's definition of identity.<sup>41</sup> Though the Court acknowledged that States had an incentive to discourage their citizens from participating in surrogacy abroad, this was ultimately outweighed by what was in the best interest of the child.<sup>42</sup> Thus, the Court demanded that EU States adopt some mechanism that would allow the non-genetically related to obtain parentage under domestic law.<sup>43</sup>

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35. *Id.* (“Ideals about a child’s need of a mother are strong, and women are expected to want to have children and to be more child-oriented and better caretakers than men.”).

36. *Id.*

37. *See* Dana, *supra* note 31, at 360.

38. *See* *Mennesson v. France*, App. No. 65192/11, ¶¶ 96, 99 (June 26, 2014) <https://hudoc.echr.coe.int/fre?i=001-145389>; *see also* Concerning the Recognition in Domestic Law of a Legal Parent-Child

Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Advisory Opinion P16-2018-001, Eur. Ct. H.R. ¶ 53 (Apr. 10, 2019). States are not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the legal parent-child relationship with the intended mother: adoption may also serve as a means of recognizing that relation.

39. *Mennesson*, Eur. Ct. H.R. ¶ 99.

40. Eur. Conv. on H.R. at 11, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

41. *Mennesson*, Eur. Ct. H.R. ¶¶ 97, 99.

42. *Id.*

43. *See id.* ¶ 100; *see also* *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 20 (recognition of the parent-child relationship is generally accomplished through second-parent adoption, if not transcription of the foreign birth certificate).



The ECtHR, however, was silent as to whether their reasoning regarding a non-genetically related mother could be similarly applied to a non-genetically related father.

Instead, the ECtHR's advisory opinion established that at a minimum, Member States must examine each surrogacy arrangement "in light of the circumstances of the particular case."<sup>44</sup> This allows States to maintain a large amount of discretion over how their citizens may gain parentage and which citizens are ultimately granted parental rights over a child born by surrogacy. Though some States have created mechanisms for legally recognizing the non-genetically related parent, few provide these options where the intended parents are a same-sex couple. As a result, many States require male same-sex couples to go through court processes before both partners can be recognized as legal fathers,<sup>45</sup> or choose to justify the denial of parental rights with blatant homophobia.<sup>46</sup> In *Menesson*, the ECtHR provided that establishing the parentage of the non-genetically related mother was required so that the child may share the citizenship of his or her parents as to avoid statelessness.<sup>47</sup> The Court's reasoning, specifically the best interests of the child, would in theory demand the recognition of the non-genetically related father regardless of sexual orientation. Unfortunately, the flexibility in enforcement the Court has left up to EU States has often meant that only heterosexual couples enjoy the benefit of the argument.

In the years following *Menesson*, few countries within the EU have introduced mechanisms to allow legal recognition of parentage where the intended parents are a same-sex couple.<sup>48</sup> A 2019 survey found that only

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44. Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Advisory Opinion P16-2018-001, Eur. Ct. H.R. ¶ 54 (Apr. 10, 2019).

45. See Sobovitz, *supra* note 12.

46. See Corte di Cassazione (Sezioni Unite Civili), 6 Marzo 2021, filed 31 Marzo 2021, No. 9006, para. 18 ff; Jessica Phelan, *Italy won't recognize gay couple as dads to surrogate babies: Top court*, THE LOCAL (May 9, 2019), <https://www.thelocal.it/20190509/italy-wont-recognize-gay-couples-as-dads-to-surrogate-babies-top-court/> ("Minister for Families Lorenzo Fontana . . . claims to believe only in 'natural' families with one mother and one father."); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. L ¶ 1; Marton Dunai, *Hungary amends constitution to redefine family, limits gay adoption*, REUTERS (Dec. 15, 2020), <https://www.reuters.com/article/hungary-lgbt/hungary-amends-constitution-to-redefine-family-limits-gay-adoption-idUSKBN28P1N8> ("The new Hungarian constitution defines family as 'based on marriage and the parent child relation. The mother is a woman, the father a man.'").

47. *Menesson*, Eur. Ct. H.R. ¶ 98.

48. Björn Sieverding, *Even where countries in Europe recognise marriage equality, children born to same-sex families remain at risk of statelessness*, EUR. NETWORK OF STATELESSNESS (Nov. 7, 2019), <https://www.statelessness.eu/updates/blog/even-where-countries-europe-recognise-marriage-equality-children-born-same-sex>.

eighteen of forty-three EU states provide methods, such as second-parent adoption, for male couples to obtain equal rights as parents.<sup>49</sup> A small number of EU countries will recognize joint parenthood from the child's birth, but this primarily applies to female couples who have given birth within the EU.<sup>50</sup> Even where second-parent adoption is permitted for male couples, it is frequently a burdensome and lengthy process.<sup>51</sup> Adoption can be expensive and often requires the procurement of attorneys to show the non-genetically related parent is capable of being a competent parent.<sup>52</sup> This can be a humiliating experience, considering both partners, as with heterosexual couples, have raised their children born by surrogacy since birth.<sup>53</sup>

Moreover, EU States that decline to provide a mechanism that would allow non-genetically related fathers to gain parentage often use indirect or flagrant homophobia to justify their policies. In Italy, for instance, the Court of Cassation has ruled that only the biological father of twins born through international surrogacy would be listed as their legal parent.<sup>54</sup> In its opinion, the Court indicated that its decision was “intended to protect the dignity of pregnant women and the institution of adoption.”<sup>55</sup> The Court's statement is somewhat confounding, considering Italy generally restricts adoption to married, heterosexual couples. Even if male couples could legally adopt in Italy, this reasoning ignores that gay men, like those with infertility, have no special duty to adopt. Some countries, such as Hungary, are more blatant in their discrimination against same-sex couples and their ability to be parents. Recently, Hungary amended its constitution to provide that only traditional, heterosexual couples and their children could be defined as a family, effectively banning adoption and parental rights to non-genetically related fathers.<sup>56</sup> Poland has similarly refused to recognize the children of gay parents as legitimate. According to Poland's Supreme Administrative Court, a child of a same-sex couple could not be granted Polish citizenship

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49. *Id.*; Lydia Bracken, *The ECtHR's First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents*, 21 MED. L. INT'L 3, 4 (2021).

50. *See, e.g.*, Sieverding, *supra* note 48.

51. *See Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 20, 116.

52. *See Sobovitz*, *supra* note 12; Roberta Messina & Salvatore D'Amore, *Adoption by Lesbians and Gay Men in Europe: Challenges and Barriers on the Journey to Adoption*, 21 ADOPTION Q. 59, 60-61 (2018).

53. *See Sobovitz*, *supra* note 12.

54. Lilly Wakefield, *Italy Won't Let Gay Dads Register as Co-Parents to Babies*, PINKNEWS (May 9, 2019) <https://www.pinknews.co.uk/2019/05/09/italy-wont-let-gay-dads-register-as-co-parents-to-babies/>.

55. Press Release, Corte Suprema di Cassazione [Supreme Court of Cassation], Judgement in the Matter of Medically-Assisted Procreation (May 8, 2019) (It.).

56. *See Dunai*, *supra* note 46.

because “[o]nly a mother and a father can be parents under Polish law.”<sup>57</sup> Other EU States, such as Bulgaria, Greece, Romania, and the Czech Republic do not even allow gay marriage, much less recognize the parentage of same sex couples.

### C. *Barriers to Free Movement*

The right to free movement is a fundamental principle of EU law and underpins the right of persons to move and reside freely within the territory of the Member States.<sup>58</sup> When a family exercises its free movement rights by moving or travelling to another EU Member State, the host State will recognize the parents’ marriage certificate and their children’s birth certificates.<sup>59</sup> However, traditionally, the right to free movement has been based on the assumption that a Union citizen and their partner are heterosexual.<sup>60</sup> As a result, if one EU State’s law does not allow same-sex couples to be legally recognized as joint parents, their child may lose one or both legal parents when the family enters that State.<sup>61</sup> This refusal to recognize the parentage of homosexual couples can render the child stateless and lead to a host of negative consequences for both the child and parent.<sup>62</sup> For example, the non-genetically related parent may lack the legal authority to grant permission for their child’s medical procedure or obtain custody of the child if the couple were to separate.<sup>63</sup> Thus, the non-genetically related father may be left in legal-limbo regarding their ability to make decisions for their children, or if they would possess any parental rights if their relationship were to end.

Fortunately, a recent decision by the Court of Justice of the European Union (CJEU) in *VMA v. Stolichna Obshtina* proclaimed that a parental relationship between a same-sex parent and their child acknowledged by one State must be recognized by all member States.<sup>64</sup> In the 2021 ruling, the

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57. Milana Nikolova, *Landmark case could increase rights of rainbow parents across CEE*, EMERGING EUR. (Feb. 11, 2021), <https://emerging-europe.com/news/landmark-case-could-improve-the-rights-of-rainbow-parents-across-cee/>.

58. Consolidated Version of the Treaty on the Functioning of the European Union art. 45, May 9, 2008, 2008 O.J. (C 115) 47.

59. *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 11.

60. *Id.*

61. *Id.*

62. *Id.* at 13.

63. *See id.* at 80.

64. Released on December 14, 2021, the judgement of the European Court of Justice has the potential to eliminate the limitations placed on same-sex couples and their families when they exercise their right to free movement. However, even if the EU is successful in enforcing the Court’s judgement, this will not remove the barriers same-sex male couples encounter when they

CJEU demanded that Bulgaria grant citizenship to a child whose birth certificate listed two mothers as the child's legal parents.<sup>65</sup> Even though one mother was a Bulgarian national, the government refused to register the child or issue her a passport.<sup>66</sup> While the child was born in Spain, since neither of her parents were Spanish citizens and Spanish citizenship depends on parentage, the child was essentially left stateless.<sup>67</sup> The CJEU provided that Bulgaria's failure to issue the child a passport violated the rights of the child and her parents to freely move within the EU.<sup>68</sup> Though States could continue to choose whether to legalize same-sex marriage or adoption within their borders, the CJEU stated they must recognize a person's civil status from another State to comply with EU law.<sup>69</sup> The CJEU's ruling not only advances the rights of LGBT individuals within Europe, but appears to clarify the ambiguity left by *Menesson* as to the status of non-genetically related fathers. However, though CJEU judgments are intended to be automatically recognized in all EU States, doubts remain on whether the EU can successfully enforce the ruling.<sup>70</sup>

The EU has yet to enforce a 2018 CJEU decision in regard to EU States' recognition of same-sex unions and the right to cohabit.<sup>71</sup> In *Coman and Others v. General Inspectorate for Immigration and Ministry of the Interior*, the CJEU released a judgement providing that an EU State that did not recognize same-sex marriage must still permit couples to reside with one another if they were legally married in another EU State.<sup>72</sup> The CJEU's decision was in response to Romania's refusal to grant a residency permit to a Romanian citizen's spouse after the couple was legally married in Belgium.<sup>73</sup> Like in *VMA*, the CJEU cited the right to free movement to support its decision, explaining that the right is protected for LGBT citizens and their spouses, despite not fitting the definition of a spouse under Romanian law.<sup>74</sup> Still, after almost four years, Romania has not

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pursue having biological children. See Case C-490/20, *VMA v. Stolichna Obshtina, Rayon 'Pancharevo'*, ECLI:EU:C:2021:1008, ¶ 71 (Dec. 14, 2021).

65. *Id.*

66. *Id.*

67. *Id.* ¶¶ 4, 19.

68. *Id.* ¶ 65.

69. *Id.* ¶ 52.

70. See *Mutual Recognition of Judgements*, EUROPA, [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/mutual-recognition-judgments\\_en](https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/mutual-recognition-judgments_en) (last visited Dec. 15, 2021).

71. See Case C-673-16, *Coman & Others v. Inspectoratul Gen. for Immigr. & Ministry of the Interior*, ECLI:EU:C:2018:385, ¶ 59 (June 5, 2018).

72. *Id.*

73. *Id.* ¶ 12.

74. See *id.* ¶ 31.

implemented the CJEU's ruling.<sup>75</sup> Furthermore, during this time, the European Commission has failed to take any enforcement actions against Romania and other States that have refused to abide by *Coman*.<sup>76</sup> While the parties to *Coman* have since appealed to the European Court of Human Rights for relief, the lack of repercussions for Romania's failure to implement the CJEU's ruling raises questions as to whether States will similarly respond to *VMA*.<sup>77</sup> *VMA* remains an important step in improving the treatment of male couples returning from international surrogacy arrangements, but it appears that they may continue to face barriers to free movement for the foreseeable future.

### III. STRINGENT REGULATION PROTECTS SURROGATE MOTHERS FROM VICTIMIZATION

The European Parliament expressly opposes commercial surrogacy, claiming the practice constitutes an offense against a woman's dignity and commodifies a surrogate's reproductive functions, making her vulnerable to abuse and exploitation.<sup>78</sup> Many EU officials also believe that surrogate women inevitably bond with the children they carry, and are incapable of denying their "maternal instincts."<sup>79</sup> While abuses within the surrogacy industry do occur in impoverished countries with little oversight, the implementation of stringent regulation largely prevents instances of harm. Empirical research has also demonstrated that most women are not psychologically harmed from being a surrogate mother, and that this belief is rather based on misinformation and gender stereotypes.<sup>80</sup>

Critics of commercial surrogacy claim that the industry victimizes vulnerable, poverty-stricken women who are often compelled to become surrogates to improve their financial situation.<sup>81</sup> However, research has

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75. *Freedom of Movement for Same-Sex Spouses: The Coman Case, 3 Years On*, ILGA EUROPE (June 11, 2021), <https://www.ilga-europe.org/blog/freedom-of-movement-same-sex-spouses-coman-case-3-years-on/>.

76. *See Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 9.

77. *See id.* at 42.

78. *See A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra* note 4, at 23.

79. González, *supra* note 1, at 438.

80. *See* Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. OF FAM. L. 13, 41 (2009); *see also* Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 J. GENDER SOC. POL'Y & L. 555, 566 (2013).

81. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy: The Question of European & International Rules*, at 8 (Feb. 2015), <https://www.comece.eu/wp-content/uploads/sites/2/2022/04/20150223-COMECE-opinion-on-gestational-surrogacy.-The-question-of-European-and-international-rules.pdf>.

shown that surrogate mothers within the United States tend to be financially stable and have a moderate to high household income.<sup>82</sup> In fact, data provides that in developed countries, money is rarely stated as the primary or sole motivation for becoming a surrogate mother.<sup>83</sup> The lack of financial difficulties amongst surrogates within the U.S. is predominately due to the rigorous screening and selection procedures that are subject to professional regulation.<sup>84</sup> Though laws vary from state to state, all surrogacy agencies in the U.S. adhere to standards set by the American Society for Reproductive Medicine (ASRM), with many states implementing additional restrictions. The recommendations provided by ASRM ensure that potential surrogates are represented by independent legal counsel, have a stable social environment, and do not have a criminal record.<sup>85</sup> States have further built upon these requirements, disqualifying candidates that receive public assistance<sup>86</sup> or have children on Medicaid or Temporary Assistance for Needy Families (TANF).<sup>87</sup>

When critics within the EU reference empirical data to substantiate their assertion that the surrogacy industry exploits vulnerable women, they cite research from countries with little to no regulatory framework. For example, the International Coalition for the Abolition of Surrogate Motherhood (ICASM), a French feminist group, contend that surrogate

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82. Erika L. Fuchs et al., *Screening of gestational carriers in the United States*, 106 FERTILITY & STERILITY 1496, 1501 (2017).

83. See Busby & Vun, *supra* note 80, at 53 (though financial reasons are an important factor in a woman's decision to become a surrogate, women overwhelmingly report that they primarily choose surrogacy out of altruistic concerns); see also Fuchs et al., *supra* note 82, at 1502; Vasanti Jadva et al., *Surrogacy: the experiences of surrogate mothers*, 18 HUM. REPROD. 2196, 2199 (2003).

84. Busby & Vun, *supra* note 80, at 41 ("Many feminists . . . have suggested that payment for commercial surrogacy will take advantage of . . . ethnic minority women."); Peng, *supra* note 80, at 557 ("Critics repeatedly alleged that surrogate mothers . . . were uneducated [and] did not make informed decisions . . .").

85. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Consideration of the gestational carrier: an Ethics Committee Opinion*, 110 FERTILITY & STERILITY 1017, 1019 (2018).

86. See N.Y. DEP'T OF HEALTH, CLINICAL GUIDELINES FOR ASSISTED REPRODUCTIVE TECHNOLOGY SERVICE PROVIDERS FOR SCREENING OF GESTATIONAL SURROGATES (2021) ("Psychological consultation should . . . cover specific topics such as . . . Personal histories, including . . . financial . . . history . . ."); JOINT COMM'N, LEGIS. COMM'N ON SURROGACY, REP. TO THE LEGIS. at 11-12 (Minn. 2016) ("The Commission recommends that legislation include requirements for the surrogate, including that the surrogate . . . be financially secure and not on any form of public assistance."); *Surrogacy by State: California Surrogacy Requirements*, SURROGATE.COM, <https://surrogate.com/surrogacy-by-state/california-surrogacy/surrogacy-requirements-in-california> ("[S]urrogate qualifications that California professional require . . . almost always include . . . [that the surrogate] receive no financial assistance from the government.") (last visited Jan. 17, 2023).

87. David Dodge, *Meet the Women Who Become Surrogates*, N.Y. TIMES (Feb. 15, 2021), <https://www.nytimes.com/2021/02/15/parenting/fertility/surrogates-new-york.html>.

mothers are willing to sacrifice their health to gain financial stability for their families.<sup>88</sup> In support of this position, the group only references the experience of surrogate mothers in India,<sup>89</sup> where a lack of oversight and proper medical care makes surrogacy significantly more dangerous than in the U.S.<sup>90</sup> Furthermore, in the 2015 Annual Report on Human Rights and Democracy in the World, the European Parliament took a firm stance against surrogacy, stating that the practice was a human rights abuse that preyed on poor women.<sup>91</sup> Similar to ICASM, the Parliament has only discussed the exploitation of women in India and the Ukraine in their condemnation of the commercial surrogacy industry.<sup>92</sup> Although women in poorer countries undoubtedly suffer from mistreatment, this is due to an absence of government regulation, and is not an inherent part of the surrogacy industry itself.

Another common criticism used to denounce commercial surrogacy is that the practice will inevitably result in the surrogate mother and/or child experiencing psychological damage. Proponents of a worldwide ban on surrogacy argue that surrogate mothers are naturally inclined to bond with the child they carry, and that surrogates who report otherwise must be in denial.<sup>93</sup> It is additionally alleged that surrogate mothers need constant psychological conditioning to avoid the pain of relinquishment and to

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88. *Dr. Sheela Suryanarayanan speaks at International Coalition for the Abolition of Surrogate Motherhood*, UOH HERALD (July 9, 2021), <https://herald.uohyd.ac.in/dr-sheela-suryanarayanan-speaks-at-international-coalition-for-the-abolition-of-surrogate-motherhood>.

89. *Id.*

90. See Aimee Jakeman, *Putting a Price on Reproduction: The Global Surrogacy Market*, NEWSECURITYBEAT (Sept. 6, 2016), <https://www.newsecuritybeat.org/2016/09/putting-price-reproduction-global-surrogacy-market>.

91. *Annual Report on Human Rights and Democracy in the World*, *supra* note 3, at 29.

92. *A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra* note 4, at 25, 32; see also Lamberton, *supra* note 9 (the Ukrainian government has been resistant to regulate the surrogacy industry because the market boosts the economy by bringing in over \$1.5 billion USD annually. Surrogate mothers within Ukraine have reported underpayment, poor healthcare, and physical damage following surrogacy).

93. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy*, *supra* note 81, at 12 (“[G]estational surrogacy almost always leads to a very rapid, even brutal separation of the child from the surrogate mother.”); Busby & Vun, *supra* note 80, at 68 (“The [Royal Commission on New Reproductive Technologies] stated that if a surrogate mother ‘succeeds in denying her emotional responses . . . she is dehumanized in the process.’”); Jacky Jones, *Second Opinion: Surrogacy Laws must put children first*, IRISH TIMES (Dec. 3, 2014), <https://www.irishtimes.com/life-and-style/health-family/second-opinion-surrogacy-laws-must-put-children-first-1.2015718> (“Pregnant women bond with the babies they carry . . . This bonding is instinctive . . . and to pretend it can be switched off in a surrogacy arrangement is nonsense.”).

convince themselves the pregnancy is only a commercial transaction.<sup>94</sup> In a study commissioned by the European Parliament, researchers claimed that in many cases, surrogate mothers refused to give up the child because of “important biological bonds” that developed during pregnancy.<sup>95</sup> Moreover, though the child is transferred from the surrogate mother to the intended parents shortly after birth, some also worry that this detachment will have negative effects on the child’s development. It has been surmised that the child would subconsciously suffer from feelings of abandonment that would later manifest in adolescence as feelings of despair, anxiety, and insecurity.<sup>96</sup>

However, the perception that women are incapable of ignoring their “maternal instincts” and that surrogate children are emotionally stunted from the “trauma” of separation is based on unsubstantiated beliefs about motherhood. Empirical research consistently shows that surrogate mothers do not experience emotional instability during or after the pregnancy, and that detachment from the child is reported relatively early.<sup>97</sup> In fact, refusal of the surrogate mother to relinquish the child to the intended parents is incredibly rare in places where proper screening procedures are in place.<sup>98</sup> In the United States, this is likely due to regulation that requires potential surrogates to undergo a psychological evaluation that covers topics such as the woman’s coping skills, maturity, current life stressors, and whether she has a history of sexual and/or emotional abuse.<sup>99</sup> Conversely, in the

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94. EUR. CTR. FOR L. AND JUST., *Surrogate Motherhood: A Violation of Human Rights, Report Presented at the Council of Europe*, at 8 (Apr. 26, 2012), <https://www.ieb-eib.org/ancien-site/pdf/surrogacy-motherhood-icjl.pdf>.

95. *A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra* note 4, at 28 (“Surrogacy interrupts the process of bonding that starts during gestation and continues after birth and this is a very important reason why many surrogates refuse to relinquish the child.”).

96. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy*, *supra* note 81, at 12; *see also* Busby & Vun, *supra* note 80, at 76 (“It has been argued that surrogacy may be bad for children because they may be angry at the women who abandoned them . . .”).

97. Busby & Vun, *supra* note 80, at 68; González, *supra* note 1, at 439 (“Different surveys suggest that most surrogates report feeling less of a maternal bond with the babies they hand over and experience little difficulty in giving the child to the intended parents.”); Jadva et al., *supra* note 83, at 2200 (“[No women] had experienced any doubts or difficulties whilst handing over the baby.”).

98. Alex Finkelstein, *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUMB. L. SCH. SEXUALITY & GENDER L. CLINIC 30 (2016) (“studies conducted in Western countries . . . indicate few women . . . experienced distress upon giving up the child after birth, and that surrogates rarely refuse to relinquish the child after birth.”).

99. *See* CLINICAL GUIDELINES FOR ASSISTED REPRODUCTIVE TECHNOLOGY SERVICE PROVIDERS FOR SCREENING OF GESTATIONAL SURROGATES, *supra* note 86, at 3; *Evaluating Surrogate Mothers*, CAL. CTR. FOR REPROD. MED., <https://cacrm.com/evaluating-surrogate-mothers> (last visited Nov. 6, 2021).



Ukraine, where regulation is lacking, twenty-five surrogates per year appeal to keep their surrogate babies.<sup>100</sup> The opinion that surrogate mothers will inherently love the child from birth, despite the absence of a genetic link, is instead based on the stereotype that women are naturally inclined to motherhood and research that is inapplicable to well-regulated surrogacy industries. For example, it is theorized that a surrogate mother will develop an attachment to the child because mothers often experience difficulties when giving up their children for adoption.<sup>101</sup> However, this comparison is not supported by scientific facts, and does not consider that the reasons for putting a child up for adoption are very different than those present in surrogacy.<sup>102</sup> Moreover, no research has established that children born from surrogate mothers experience any adverse impacts to their development or emotional damage later on in life. A study conducted by the University of Cambridge found that there were no significant differences in the psychological well-being or self-esteem of children born by surrogacy and those born through natural conception.<sup>103</sup>

The absence of evidence demonstrating that surrogate mothers in developed countries are motivated by financial desperation, or are left psychologically harmed by the process, establishes that the EU's ban is not based on protecting women from exploitation. Instead, criticisms are based on data on surrogate mothers from countries with little to no regulation, such as India, Ukraine, and Thailand. Furthermore, the belief that women are emotionally damaged from being a surrogate and are "in denial" if they report otherwise appears to be driven by stereotypes regarding women. Commercial surrogacy challenges traditional perceptions of women as instinctive nurturers and mothers, or as being emotional and irrational. The EU draws upon both these misconceptions about surrogacy to justify its continued illegality amongst member nations.

#### IV. THE EU'S CURRENT POLICY PUSHES COMMERCIAL SURROGACY

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100. Lamberton, *supra* note 9.

101. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy*, *supra* note 81, at 10; *Surrogate Motherhood: A Violation of Human Rights*, *supra* note 94, at 8-9 ("[B]ecause long-term difficulties have been reported by women relinquishing a child for adoption, it is reasonable to expect similar situations will manifest in surrogate mothers over time.").

102. González, *supra* note 1, at 439. Studies of women ten years after they worked as a surrogate mother show that these women still did not endure any psychological issues or feelings of regret in relation to relinquishing the child; see also V. Jadva et. al., *Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins*, 27 *HUM. REPROD.* 3008, 3012 (2012).

103. Susan Golombok et al., *A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14*, 53 *DEV'L PSYCHOL.* 1966, 1974 (2017).

OUTSIDE ITS BORDERS TO COUNTRIES WITH LITTLE TO NO  
REGULATION

Despite the illegality of commercial surrogacy among member nations and the European Parliament's condemnation of the practice, Union citizens can pursue surrogacy in countries outside of the EU. Though some EU nations have attempted to punish families returning from international surrogacy arrangements, decisions by the European Court of Human Rights (ECtHR) have made any meaningful repercussions difficult to enforce. Thus, despite the European Parliament's condemnation, Union citizens are generally free to engage in surrogacy outside of the EU. Unfortunately, many who go abroad in search of a surrogate travel to poorer nations where prices are significantly lower, and where women are more likely to be victims of exploitation. Instead of protecting women from potential abuse, the EU's ban on commercial surrogacy has contributed to the growth of the international market. Effectively, the EU is sending the symbolic message that they are against the exploitation of women, unless it occurs beyond their borders.<sup>104</sup>

Due to a 2014 decision by the ECtHR, member nations within the EU have largely failed to discipline Union citizens who have participated in international surrogacy arrangements. For example, in 2011, France's highest court refused to recognize children born by surrogacy as French citizens, providing "it would give effect to a surrogacy agreement that was null and void on public policy grounds."<sup>105</sup> In the cases of *Mennesson v. France* and *Labassee v. France*, the ECtHR found that the failure of the French government to enter surrogate-born children's birth certificates violated the European Convention on Human Rights.<sup>106</sup> Specifically, the ECtHR found that France had violated Article 8 concerning the children's right to respect for their private life, stating that the best interests of the child outweighed the interests of the state.<sup>107</sup> In its opinion, the ECtHR declared that establishing citizenship and parentage was critical to the

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104. Nila Bala, *The Hidden Costs of the European Court of Human Rights' Surrogacy Decision*, 40 YALE J. INT'L L. 11, 15 (2014) ("The ECtHR decision sends a symbolic message that it is acceptable to protect domestic wombs at the cost of foreign wombs.").

105. See Press Release, European Court of Human Rights, Totally Prohibiting the Establishment of a Relationship Between a Father and his Biological Children Born Following Surrogacy Arrangements Abroad was in Breach of the Convention, Registrar of the Court (June 26, 2014).

106. *Mennesson v. France*, App. No. 65192/11, ¶ 71 (June 26, 2014), <https://hudoc.echr.coe.int/fre?i=001-145389>; *Labassee v. France*, App. No. 65941/11 (June 26, 2014), <https://hudoc.echr.coe.int/fre?i=002-9780>.

107. *Mennesson*, Eur. Ct. H.R. ¶ 101.

“children’s identity within French society,”<sup>108</sup> and that denying this right was detrimental to their best interests. Because all states that are parties to the European Convention generally conform to the judgements of the ECtHR,<sup>109</sup> member nations will be obligated to recognize surrogate children that are born abroad. While the interests of children certainly exceed member nations’ interest in punishing their parents, this decision has the unintended effect of contributing to the very industry that the European Parliament condemns.<sup>110</sup>

Although some Union citizens work with surrogacy agencies in the U.S., many choose to employ surrogates in poorer countries where women have little protections. Before India prohibited foreigners from retaining Indian surrogates, the country was a popular commercial surrogacy destination for those travelling outside Europe.<sup>111</sup> While surrogacy in the U.S. runs upwards of \$90,000 USD,<sup>112</sup> hiring a surrogate in India usually costs under \$30,000 USD,<sup>113</sup> a price that couples could more feasibly afford. But, unlike the U.S., India has minimal regulations to protect vulnerable women from exploitation. Indian women often have no choice between surrogacy and other more oppressive forms of work, and the commitment to surrogacy is generally decided by the husband.<sup>114</sup> Research has also shown that Indian surrogate mothers experience higher rates of depression<sup>115</sup> and pregnancy complications, such as Caesarean sections.<sup>116</sup>

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108. See *id.*; see Sieverding, *supra* note 48 (“[The children’s] right to respect for their private life, which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage, was significantly affected.”).

109. See George Ress, *The Effect of Decisions and Judgements of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT’L L. J. 359, 374 (2005).

110. Akm Ahsan Ullah et. al., *Surrogacy-led migration: reflections on the policy dilemmas*, 21 PUB. ADMIN. & POL’Y ASIA PAC. J. 157, 158 (“With...debates gathering intensity, many countries declared commercial surrogacy illegal. However, where one market closes, another opens in order to meet the growing demand...”); see also Nina Avramova, *The UK’s restrictive surrogacy laws are hurting couples and pushing many abroad*, CNN (Jan. 18, 2019), <https://www.cnn.com/2019/01/18/health/female-surrogacy-abroad-uk-study-intl/index.html>.

111. See Margot Cohen, *A Search for a Surrogate Leads to India*, THE WALL ST. J. (Oct. 9, 2009), <https://www.wsj.com/articles/SB125498315210272749>.

112. *Surrogate Mother Costs*, W. COAST SURROGACY, <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> (last visited Mar. 12, 2023).

113. Cohen, *supra* note 111.

114. See Virginie Rozee et al., *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, 20 BMC WOMEN’S HEALTH 234, 238, 241 (2020).

115. Kristine Schanbacher, Note, *India’s Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women*, 25 HASTINGS WOMEN’S L.J. 201, 205 (2014).

116. Jakeman, *supra* note 90 (“[researchers] found [Indian] surrogates face a higher risk for Caesarean not only because of the possibility of a multiple gestation pregnancy but in order to make the timing convenient for the commissioning parents.”); Steven Spandorfer, *Experts’ Report*

Even though surrogacy in India is no longer available to Union citizens,<sup>117</sup> India's surrogacy industry is representative of how poor, marginalized women can be left vulnerable by procreative tourism.

Presently, Union citizens in search of surrogacy arrangements frequently choose to work with a surrogate in Ukraine. At an average of \$50,000 USD, surrogacy in Ukraine is considerably cheaper than it is in the U.S.,<sup>118</sup> and a much closer destination for commissioning parents travelling from the EU. Sadly, like India, limited regulation has left surrogate mothers within Ukraine susceptible to coercion, exploitation, and greater risk of physical and psychological injury. In Ukraine, what little surrogacy regulation exists principally concerns itself with the rights of the intended parents and offers minimal protections for the surrogate mother.<sup>119</sup> This lack of oversight is likely the reason surrogate mothers within Ukraine have reported unsafe living environments, poor healthcare during and post-pregnancy,<sup>120</sup> and significant underpayment.<sup>121</sup> Many Ukrainian women come from rural villages and become surrogates due to financial pressure, engaging in surrogacy so they can provide for their families.<sup>122</sup> Unfortunately, surrogate mothers often do not achieve financial stability, considering surrogacy agencies pay surrogates only a fraction of the fee paid by the commissioning parents.<sup>123</sup> Despite pressure from the European

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*Examines Medical & Legal Basis for Gestational Surrogacy*, WEILL CORNELL MED. (Mar. 19, 2020) (“Interestingly, all [Indian surrogates] underwent caesarian sections for reasons not explained, putting women at risk for infections, operative complications, and longer recovery times.”).

117. The Indian government banned foreigners from using surrogate mothers in the country in an attempt to curb the exploitation of young, poor women. *See India bans foreigners from hiring surrogate mothers*, THE GUARDIAN (Oct. 28, 2015), <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers>.

118. *Surrogacy in the Ukraine*, THE SURROGACY GUIDE, <https://www.sensiblesurrogacy.com/%20surrogacy-in-ukraine/> (last visited Nov. 8, 2021).

119. *See* Anna Lelyuk, *Ukraine: Ukrainian Surrogacy Laws*, MONDAQ (Nov. 12, 2012), <https://www.mondaq.com/family-law/205832/ukrainian-surrogacy-laws> (Article 123 of the Ukrainian Family Code requires the informed consent of all the parties and stipulates that the surrogate mother has no legal rights over the child. Surrogacy is also regulated by Order 24 and 771, but those primarily deal with artificial insemination and embryo implantation).

120. *See* Kevin Ponniah, *In search of surrogates, foreign couples descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602> (“[Ana, a Ukrainian surrogate mother stated] [s]ome surrogates had health problems that were not diagnosed correctly or treated on time, leading to complications ...”).

121. Lamberton, *supra* note 9 (“Surrogates have ... claimed that companies paid them as little as \$350 USD, though the cost to clients is between \$45,000 and \$55,000 USD.”).

122. *Id.*; Grace Emily Stark, *Renting Wombs, Rending Hearts: The Dark Realities of Surrogacy*, VERILY (Jan. 26, 2021), <https://verilymag.com/2021/01/surrogacy-altruistic-commercial-exploitation-women-children-2021>.

123. Lamberton, *supra* note 9.

Parliament, Ukrainian lawmakers are resistant to impose any regulations upon surrogacy agencies because the surrogacy industry brings \$1.5 billion USD annually.<sup>124</sup> Considering that Ukraine is one of Europe's poorest nations,<sup>125</sup> it appears unlikely Ukraine will take any action restrict its surrogacy industry, especially as the market continues to rise.

Though the European Union certainly does not support the mistreatment of surrogate mothers, its surrogacy ban has assisted in the growth of the international surrogacy industry. While some poorer countries, such as India and Thailand, have recently prohibited foreigners from participating in their surrogacy programs,<sup>126</sup> other nations have quickly taken their places on the global market. Due to rising rates of infertility and the inability of many same sex couples to naturally conceive, it is unlikely the EU's disapproval of the industry will stop its growth. However, allowing some form of commercial surrogacy in the EU would be a significant step towards ending any exploitation of surrogates that occurs abroad. It is unrealistic to believe that Union citizens would stop entering into transnational arrangements if commercial surrogacy is legalized. However, it is reasonable to expect that a majority of Union citizens would prefer to enter a surrogacy arrangement at home. Therefore, it would seem that allowing a regulated form of commercial surrogacy within the EU would better protect the rights of women, while also reducing instances of exploitation that may occur overseas.

## V. CONCLUSION

The European Union's condemnation of commercial surrogacy disproportionately impacts gay men and male couples seeking to have biological children. Even though the EU's ban on commercial surrogacy applies to all EU citizens, gay men returning from international surrogacy arrangements encounter more challenges than heterosexual couples. Although recent decisions by European Courts promise to lift some of the burdens encountered by gay men and their families, the EU's failure to enforce previous rulings raises questions on when or how this will be achieved. While the EU claims a ban on commercial surrogacy is necessary to protect vulnerable women from exploitation, research of surrogate mothers in the United States has shown that professional regulation and safeguards are effective at preventing instances of abuse. Instead, banning

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124. *Id.*

125. Ponniah, *supra* note 120.

126. *India follows Thai lead, bans commercial surrogacy*, BANGKOK POST (Nov. 6, 2015), <https://www.bangkokpost.com/world/756640/india-follows-thai-lead-bans-commercial-surrogacy>.

commercial surrogacy has pushed EU citizens to pursue surrogacy abroad, where impoverished women are more likely to be exploited. If the EU implemented surrogacy regulations, or even issued guidance on the subject within its borders, it could better protect women and decrease the disparity in treatment faced by gay men trying to start families.