

INTERNATIONAL COMMERCIAL SURROGACY AND ITS PARTIES

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The position of women and children at the heart of international commercial surrogacy requires a careful consideration of this market. In undertaking it, this Article considers the rights, interests, and obligations of the parties to a surrogacy, as well as the various opportunity costs of international commercial surrogacy. Such a discussion is particularly relevant today as India, a center of international surrogacy, begins to legislate on the subject, and relatedly, as American states continue to grapple with issues regarding surrogacy.

I. INTRODUCTION

Many proposals on reproduction and children have been made over the years, varying in modesty. Often, these proposals reflect and integrate economic realities,¹ as well as people's biological desire to have children.² However, it would have required significant imagination to predict that, eventually, embryos would be implanted in foreign women in faraway lands, with the resulting children being brought back to the United States.

Nonetheless, several types of these surrogacies—wherein a child is carried, delivered, and relinquished by a third-party—have arisen as a solution to infertility, which affects approximately ten

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1. Jonathan Swift famously proposed, with satire, that children be consumed to fight poverty. Jonathan Swift, *A Modest Proposal* (1729), reprinted in *THE PROSE WORKS OF JONATHAN SWIFT*, Vol. VII, at 201-16 (Temple Scott ed. 2006), available at <http://www.gutenberg.org/files/18250/18250-h/18250-h.htm>.

2. Elisabeth Landes and Judge Richard Posner have proposed a baby market. Elisabeth M. Landes & Judge Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323-48 (1978). See also Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 59 (1987); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 203-05 (2009).

percent of Americans.³ For example, altruistic surrogacies are done without financial motives, as opposed to commercial surrogacies. In a gestational surrogacy, meanwhile, the surrogate mother bears a nongenetic child following in vitro fertilization with a couple's embryo. A traditional surrogacy, on the other hand, results in a surrogate's genetic child following her artificial insemination with the intended father's sperm.⁴

Although each of these types of surrogacies implicates a differing set of questions and consequences, this Article focuses on the type of surrogacy that places women and children at the heart of a competitive market—international, commercial, gestational surrogacy, wherein foreign women bear nongenetic children for a fee. At least two general historical trends in the United States might have facilitated this type of surrogacy: the post-industrial, changed value of a child that encourages infertile couples to spend significant sums on conception⁵ and the advancement of reproductive technologies.⁶

The simultaneous advancement of reproductive technologies

3. Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 *FORDHAM L. REV.* 93, 100 (2001). This rate of infertility is expected to dramatically increase over the next twenty-five years. *Id.* See also *infra* notes 104-06 and accompanying text (noting that infertility may result from the postponement of child-bearing).

4. The Law Commission of India's Report on surrogacy defines these terms similarly. LAW COMMISSION OF INDIA, GOV'T OF INDIA, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY NO. 228, ¶¶ 1.4-1.6, at 10 (Aug. 2009), <http://lawcommissionofindia.nic.in/reports/report228.pdf> [hereinafter LAW COMMISSION REPORT].

5. Whereas historically children have been expected to engage in paid work to contribute to the family, child labor was disfavored in the later phases of the industrialization and afterwards. Today, the costs of raising a child are high. See, e.g., HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 8 (2002) (identifying that, presently, the average child significantly costs a household, instead of financially contributing). Specifically, the average expenditures per child in a middle-income, husband-wife American family were \$221,190 in 2008, versus \$183,509 (in 2008 dollars) in 1960. CTR. FOR NUTRITION POLICY & PROMOTION, U.S. DEPT. OF AGRIC., *EXPENDITURES ON CHILDREN BY FAMILIES* 23 (2008), <http://www.cnpp.usda.gov/Publications/CRC/crc2008.pdf>. This notion of parenthood as a financial sacrifice might have facilitated the payment of significant sums for the conception of a child.

6. Reproductive technologies have given infertile couples numerous ways to conceive children alternatively. For example, researchers at Stanford have recently determined the genes that coax human embryonic stem cells into becoming cells that form eggs and sperms, which would allow people to make children without contributing their actual eggs or sperm. Kehkooi Kee et al., *Human DAZL, DAZ and BOULE Genes Modulate Primordial Germ-Cell and Haploid Gamete Formation*, 462 *NATURE* 222, 222-25 (2009). These technologies have been highly rewarded; for example, the inventor of in vitro fertilization won the Noble prize in medicine in 2010. Lisa Belkin, *I.V.F. Takes the (Nobel) Prize*, *N.Y. TIMES*, Oct. 4, 2010, available at <http://parenting.blogs.nytimes.com/2010/10/04/i-v-f-takes-the-nobel-prize/>.

in many countries⁷ has provided many international choices for Americans seeking to commission surrogacies. The result has been rampant forum shopping by couples seeking the best surrogacy prices and conditions. Forum shopping has also been facilitated by the differences among jurisdictions' legal and policy approaches to surrogacy. Interestingly, while most legal systems around the world have sought to uniformly outlaw or heavily regulate other markets wherein humans or their parts are bought and sold—including human trafficking, embryo trafficking, prostitution, and internal organ selling—they have not yet done so with surrogacy.

In the meantime, India, to which already much is outsourced, has emerged as a leading fertility tourism destination for many American couples.⁸ This status has been made possible by the lack of American legal obstacles to international surrogacies,⁹ the ease in acquiring American citizenship for the resulting child,¹⁰ and the low prices of the burgeoning surrogacy business in India. However, the poverty many Indian women face,¹¹ along with the various unpleasantries associated with surrogacy, invariably implicate the issues of the commodification of children and the exploitation of impoverished women in India.

This Article therefore evaluates the law and public policy surrounding international commercial surrogacies, focusing on those occurring in India. Part II briefly considers various legal frameworks governing surrogacies, including those in the United

7. The world's first and second in vitro fertilization babies were born two months apart, one in Great Britain and one in India. LAW COMMISSION REPORT, *supra* note 4, ¶¶ 1.1-1.2, at 8-9.

8. Throughout this Article, the term "commissioning couples" or "commissioning parents" will describe those who commission, or arrange for, the surrogacy. They are the intended parents. See *infra* Part III.A (explaining the public policy considerations concerning parents commissioning a surrogacy).

9. On the other hand, fertility tourism could instead be treated similarly to how sex tourism is treated through 18 U.S.C. §§ 1591, 2421, 2422, and 2423, or how the mail-order bride system is regulated by the International Marriage Broker Regulation Act of 2005, with the prospective brides receiving critical information about buyers and with the buyers being profiled by the federal government. Daniel Epstein, *Romance is Dead: Mail Order Brides as Surrogate Corpses*, 17 BUFF. J. GENDER L. & SOC. POL'Y 61, 64-65 (2009).

10. See Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 73-74 (2009). Compare Re: X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (U.K.) (illustrating the difficulty of obtaining English citizenship for a child born to English commissioning parents and a Ukrainian surrogate).

11. INDIAN SURROGACY LAW CENTRE, LAW COMMISSION'S REPORT ON SURROGACY ¶ 4, <http://blog.indiansurrogacylaw.com/wp-content/uploads/2009/09/ISLC-comments-on-Law-Commission-Report.pdf> (noting that the prevailing socio-economic situation in India led to the increase of the nation's surrogacy business). See also *infra* Part III.B (explaining that surrogates are often pressured into surrogacy because of their economic conditions).

States and India—the latter likely undergoing legislative review in the near future. Part III then evaluates the rights and interests of the surrogate, of the couple seeking surrogacy, and of the resulting child. This Part proposes woman- and child-centered frameworks in which to think about such surrogacies, if they are to remain legal, and underscores the high opportunity costs associated with this market.

II. THE CURRENT LEGAL FRAMEWORK ON SURROGACY

The availability of surrogacies abroad has resulted in an international aspect to surrogacy. Accordingly, when considering the legal frameworks governing surrogacy, one must include all of the frameworks most relevant to commissioning couples, which entail those of the United States and India—two surrogacy hotspots, especially for Americans. The framework predominantly applying to a particular surrogacy depends on the place of the surrogacy.¹² Increasingly, however, it is India.

A. Surrogacy in the United States

There is no overarching federal law on surrogacy, nor is it clear on what grounds such legislation would rest, nor whether it would be desirable. Although unlikely, the United States Supreme Court could begin to address the topic, determining, for example, that the right to procreate includes the right to commission surrogacy,¹³ that the commerce clause may be used to federally regulate surrogacy,¹⁴ or that substantive due process protects surrogacy from governmental intrusion.¹⁵ The lack of such determinations to date, however, has left the matter of surrogacy to the states, which have differed in their respective approaches to the issue.

State action on surrogacy agreements, whether judicial or legislative, impacts the practice of surrogacy in those states because most surrogacies are contracted.¹⁶ States can either

12. See *supra* note 9 and accompanying text (noting that there is a lack of legal obstacles in the U.S. concerning international surrogacies).

13. See *infra* note 77 (noting that the U.S. Supreme Court has currently not addressed the issue of whether assisted reproductive techniques are included in the “basic civil rights of man.”).

14. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 95 (2006) (noting that it is unclear whether Congress could use its constitutional commerce powers to regulate commercial surrogacy and how the Supreme Court would view such regulation).

15. *Id.*

16. Although difficult to estimate the total number of surrogacies, there were, for example, 571 recorded surrogate contracts in the United States in 2001. *Id.* at 94.

declare surrogacy contracts enforceable, void and unenforceable,¹⁷ or enforceable only if noncommercial.¹⁸

Some state legislatures, however, have entirely abstained from action,¹⁹ leaving the matter to the courts. Other state legislatures have been active on the subject.²⁰ Florida, Nevada, New Hampshire, and Virginia, for example, have statutorily permitted the enforceability of surrogacy contracts, but not the payment of surrogates.²¹ Illinois permits both surrogacy contracts and reasonable compensation.²² On the other hand, many jurisdictions have attempted, with varying degrees of success, to legislatively prohibit the enforcement of surrogacy contracts entirely, whether by banning or voiding them. This group includes Arizona, the District of Columbia, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Utah.²³ However, an Arizona Appellate Court subsequently declared the parentage

17. Louisiana, Michigan, New York, and Washington are examples of states that find commercial surrogacy contracts void. LA. REV. STAT. ANN. § 9:2713 (1987); MICH. COMP. LAWS ANN. § 722.855 (West 1988); N.Y. DOMESTIC RELATIONS LAW §122 (McKinney 1992); WASH. REV. STAT. ANN. § 26.26.240 (West 1989). See also Katherine Drabiak, Carole Wegner, Valita Fredland, & Paul R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 303 (2007) (providing a reason for rejecting enforcement of such legal contracts).

18. Drabiak et al., *supra* note 17, at 303.

19. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 443 (2004).

20. See SUSAN MARKENS, SURROGATE MOTHERHOOD 28-29 tbl.2 (2007) (providing a helpful graphic depiction of the states' positions on surrogacy).

21. FLA. STAT. ANN. § 742.15 (West 2010); NEV. REV. STAT. § 126.045 (2009); N.H. REV. STAT. ANN. §168-B:16 (West 2010); VA. CODE ANN. § 20-160 (West 2010). See Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185, 189 (2008) (providing background on the preceding states' differing approaches to surrogacy).

22. 750 ILL. COMP. STAT. ANN. 47/25.

23. ARIZ. REV. STAT. § 25-218 (LexisNexis 2007) ("No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract."); D.C. CODE ANN. § 16-402(a) (LexisNexis 2005) ("Surrogate parenting contracts are prohibited and rendered unenforceable in the District."); IND. CODE §§ 31-9-2-126 to 127, 31-20-1-1 to 3 (2003); LA. REV. STAT. ANN. § 9:2713 (2005) ("A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy."); MICH. COMP. LAWS § 722.855 (2002) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); NEB. REV. STAT. § 25-21,200 (1995); N.Y. DOM. REL. LAW § 122 (McKinney 1999) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); N.D. CENT. CODE § 14-18-05 (2004 & Supp. 2007) ("Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void."); UTAH CODE ANN. § 76-7-204 (2003 & Supp. 2007).

definitions in Arizona's surrogacy statute unconstitutional,²⁴ while a federal district court overruled the Utah legislature's attempt to provide for criminal sanctions in surrogacy cases.²⁵

State courts have also played significant roles in resolving issues associated with surrogacy.²⁶ One judicial trend noted by commentators is reluctance to uphold commercial surrogacy agreements as against public policy.²⁷ For example, in the famous surrogacy case *Baby M*, the Supreme Court of New Jersey determined that, under state law, "the payment of money to a 'surrogate' mother [is] illegal, perhaps criminal, and potentially degrading to women."²⁸ Accordingly, the court upheld a woman's right to change her decision after she agreed, under a surrogacy contract, to be artificially inseminated with a man's sperm and to surrender the baby to him and his wife.²⁹ Nonetheless, the commissioning parents received custody of the child because it was in the best interests of the child, while the surrogate mother had potential visitation rights.³⁰ Such domestic cases might have contributed to the appeal of international commercial surrogacy for American couples.

State courts have also been called upon to determine the parentage of children resulting from surrogacy, often being requested to issue pre-birth parentage orders declaring the commissioning parents to be the legal parents before the child is born.³¹ One California court, for example, facilitated the state's

24. *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (determining that it was unconstitutional, on equal protections grounds, that the state's surrogacy statute permitted the commissioning father to rebut the surrogate's husband's parentage, but not the commissioning mother to do the same).

25. *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1269 (D. Utah 2002).

26. *But see Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993) ("It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so.").

27. *See, e.g., Tuininga, supra* note 21, at 190 ("Some authors have identified recent trends in the case law relating to surrogacy contracts. One such trend is that courts are loath to enforce contracts in situations that noticeably commercialize the arrangement; situations where the child is strongly analogous to an ordered and delivered product.").

28. *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988). *Baby M* catalyzed legislative efforts in other states on the subject of surrogacy. *See* MARKENS, *supra* note 20, at 22-43 (noting that other states made legislative efforts on the subject of surrogacy). *See also infra* notes 153-56 and accompanying text (relating the events of the *Baby M* case).

29. *In re Baby M*, 537 A.2d at 1251.

30. *Id.* at 1260-61.

31. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634 (2005). On establishing paternity after the artificial insemination process, see Browne Lewis, *Two Fathers, One Dad: Allocating the Parental Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV.

status as a surrogacy-friendly jurisdiction³² by concluding that:

[A]lthough the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.³³

Another California court, noting that a particular surrogate child had no legal parents under the circumstances of the case, held that sufficient proof for a pendente lite child support order existed because the undisputed evidence showed that the commissioning husband signed the surrogacy contract.³⁴

Nonetheless, state laws on surrogacy are hardly uniform. In an effort to aid such uniformity, the American Bar Association drafted the American Bar Association Model Act Governing Assisted Reproductive Technology.³⁵ Article 7 addresses gestational surrogacy, providing various approaches to the conditions for the enforceability of gestational agreements.³⁶ Furthermore, Article 8 permits reimbursement to surrogates and reasonable compensation.³⁷ Meanwhile, Article 8 of the Uniform Parentage Act addresses gestational agreements, their validation by court hearing, and parentage issues.³⁸

Despite these model acts, legal inconsistencies continue to abound among states, which, when coupled with the lack of federal

949, 958-88 (2009). On establishing maternity after assisted reproduction, see Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 604-24 (2009).

32. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 121-23 (2009) (describing the positive impact of *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993), on California's appeal for those seeking surrogacy arrangements).

33. *Johnson*, 851 P.2d at 782. At around this time, California courts were calling upon the California legislature to enact legislation on surrogacy as guidance. See MARKENS, *supra* note 20, at 45-48 (detailing the route of the *Johnson* case through the California judiciary and the court's plea for legislative guidance after its landmark decision declaring a surrogacy contract as not contrary to public policy). For a graphic depiction of the introduction of various surrogacy legislation in California from 1981-92, both successful and unsuccessful, see *id.* at 32-33 tbl.3. For the same in New York from 1983-92, see *id.* at 35-37 tbl.4.

34. *Jaycee B. v. Superior Court*, 42 Cal. App. 4th 718, 726 (Ca. App. Ct. 1996).

35. American Bar Association, *American Bar Association Model Act Governing Assisted Reproductive Technology*, 2008 A.B.A. SEC. FAM. L. COMMITTEE REPROD. & GENETIC TECH., available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

36. *Id.* art. 7.

37. *Id.* art. 8.

38. UNIFORM PARENTAGE ACT, art. 8 (2000).

legislation, facilitate much interstate travel by infertile couples to surrogacy-friendly states. The acceptance of commercial surrogacies by some states, however, remains relatively unique.³⁹ Surrogacy contracts are entirely prohibited in, for example, Austria, Egypt, France, Germany, Italy, Japan, Netherlands, Norway, Spain, Sweden, and Switzerland.⁴⁰ Surrogacy is also banned in certain regions of Australia.⁴¹ Meanwhile, Canada,⁴² Denmark, Hong Kong, and Great Britain⁴³ have national laws banning commercial surrogacy.⁴⁴

Other countries, however, permit and encourage surrogacy—providing very favorable conditions that appeal to many commissioning American couples. These countries include the Ukraine and India.⁴⁵ In particular, India serves as a quintessential example of a developing country that has been structured to attract a significant portion of the world's commercial surrogacy business.

B. Surrogacy in India

India has strengthened its economy partly because of its success in attracting outsourced business.⁴⁶ Included in this strategy has been an effort to increase medical tourism, or the travel of people for medical treatment.⁴⁷ The Indian government has even begun issuing medical visas.⁴⁸ An important subset of this medical tourism includes fertility tourism, which has become a \$500 million industry in India.⁴⁹

39. MARKENS, *supra* note 20, at 23.

40. *Id.* at 24 tbl.1.

41. Isabel Karpin, *The Uncanny Embryos: Legal Limits to the Human and Reproduction Without Women*, 28 SYDNEY L. REV. 599, 616 n.62 (2008).

42. Assisted Human Reproduction Technology Act, 2004 S.C. (Can.). The Act imposes a \$500,000 fine or up to 10 years in jail for engaging in commercial surrogacy. *Id.*

43. *See* Re: X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (U.K.).

44. MARKENS, *supra* note 20, at 24 tbl.1.

45. *See, e.g.*, Re: X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (describing the surrogacy process in the Ukraine); *see infra* Part II.B (analyzing the surrogacy process in India).

46. *See, e.g.*, Jared Sandberg, *It Says Press Any Key, Where's the Any Key?*, WALL ST. J., Feb. 20, 2007, at B1, available at <http://online.wsj.com/public/article/SB117193317217413139.html> (last visited Oct. 23, 2010) (noting a nine percent growth in India's economy due to data outsourcing alone).

47. Smerdon, *supra* note 10, at 23 ("In 2003, India's finance minister, Jaswant Singh called for India "to become a 'global health destination'" and encouraged measures to facilitate a medical tourism industry including improvements in airport infrastructure.").

48. Rupa Chinai & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, 85 BULLETIN OF THE WORLD HEALTH ORG. 164, 164-66 (2007), available at <http://www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.

49. Krawiec, *supra* note 2, at 225.

Presently, commercial surrogacy is legal in India and lacks notable government regulation or legislation. However, in 2005, the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS) drafted the National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India,⁵⁰ but they are not enforceable in courts of law.⁵¹ The guidelines provide that, for example, only infertile couples may commission surrogacies and a woman may not serve as a surrogate more than three times.⁵²

Nonetheless, the lack of legal regulation of commercial surrogacy in India has led many fertility doctors in India to self-regulate. In fact, several self-regulated clinics, recognized to be legitimate, have attracted significant fertility tourism, such as those in Anand, a small town in Gujarat.⁵³

While an informal legal environment would ordinarily be highly problematic in the surrogacy context, particularly in regard to guaranteeing the enforceability of surrogacy agreements,⁵⁴ many factors might prevent certain problems from arising in India. First, these surrogate mothers become surrogates due to their poverty and usually cannot afford to keep the resulting child.⁵⁵ Second, surrogates are typically selected only if they already had children.⁵⁶ Third, because these surrogacies are

50. INDIAN COUNCIL OF MED. RESEARCH & NAT'L ACAD. OF MED. SCI., NAT'L GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA 1-118 (2005), http://www.icmr.nic.in/art/art_clinics.htm [hereinafter NAT'L GUIDELINES FOR ACCREDITATION].

51. LAW COMMISSION REPORT, *supra* note 4, ¶ 3.5(b), at 21-22.

52. NAT'L GUIDELINES FOR ACCREDITATION, *supra* note 50, at 55-76.

53. LAW COMMISSION REPORT, *supra* note at 4, ¶ 1.7, at 11. One of the most recognized fertility doctors in Gujarat is Nayna Patel, who runs a fertility clinic. Rina Chandran, *Poverty Makes Surrogates of Indian Women in Gujarat*, REUTERS, Apr. 8, 2009, <http://www.reuters.com/article/healthNews/idUSBOM1574520090408?pageNumber=1&virtualBrandChannel=0>. "In the absence of legislation, Patel sticks to guidelines of apex body Indian Council of Medical Research, which say a surrogate may only be implanted with the egg and sperm of the couple or anonymous donors, and that she must be below 45 years. Patel also insists couples seeking surrogates must have a medical condition that makes child bearing impossible or risky, and draws the line at gay couples and single parents. The surrogate, who must have her husband's consent, has no rights over the baby . . ." *Id.*

54. See SPAR, *supra* note 14, at 94 (noting that a lack of consistent regulation of surrogacy is "riskier for the intending parents, who . . . don't fully know whether their contracts are enforceable; and riskier for the surrogates, who don't have the same kinds of protection that prevail in other endeavors.").

55. See *infra* notes 61, 67 and accompanying text (stating that Indian surrogates often choose surrogacy based on financial reasons).

56. See, e.g., SPAR, *supra* note 14, at 87. In its model act, the American Bar Association also proposes using only those women as surrogates who have already had at least one child. *American Bar Association Model Act Governing Assisted Reproductive Technology*, *supra* note 35, alternative B, art. 7, § 702, ¶

strictly commercial—with the child being a sort of product—and because the surrogates seldom contribute their genetic material,⁵⁷ Indian surrogates do not often litigate to keep the resulting child. Therefore, couples commissioning surrogacies in India might not encounter many surrogates who resist the surrogacy agreement and refuse to relinquish the child.⁵⁸

Accordingly, the lack of Indian legal regulation of surrogacy benefits, instead of hinders, those seeking surrogacy in India⁵⁹ because the free market determines everything from the costs to the conditions, which are all encapsulated in a contract between the commissioning couple and the surrogate. This market favors foreigners, who are often able to afford the relatively lower costs of surrogacy in India.⁶⁰ And, although demand for surrogates can be fairly described as good, there is a significant supply of Indian women willing to serve as commercial surrogates.⁶¹ This maintains low prices of surrogacy, particularly when compared to those in the United States. The typical surrogacy fee in India has

1(b).

57. Gestational surrogacy, wherein the surrogate does not contribute her genetic material, makes the race or ethnicity of the surrogate irrelevant. This facilitates international surrogacy because commissioning couples' racial or genetic preferences for children can be met regardless of the surrogate's ethnicity and genetic composition. Krawiec, *supra* note 2, at 225. In fact, the differing race of the surrogate might even serve as a reminder that the baby is not the surrogate's. Deborah R. Grayson, *Mediating Intimacy: Black Surrogate Mothers and the Law*, 24 CRITICAL INQUIRY 525, 540 (1998).

58. *But see* Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 279 (2009) ("Dr. Patel [a fertility doctor in India, *see supra* note 53] acknowledges that on many occasions, the gestational surrogates do get attached to the babies they carry, forgetting that they share no genetic ties."); Erickson Law Blog, *Surrogacy in India Is Not All That It Is Cracked Up To Be...Lawus Appear To Be Non-Existent*, (Jan. 27, 2009, 3:06 PM), <http://www.proudparenting.com/node/2536> (noting a case pending before a Delhi court regarding an Indian surrogate's decision to keep the resulting child).

59. *See* Krawiec, *supra* note 2, at 208 ("In the baby market, the institutional framework uniformly increases—rather than reduces—transaction costs, leaving both producers and consumers in the baby market vulnerable in the process, and enhancing the role of Baby Market Intermediaries and their potential for market gains.").

60. These costs are only a fraction of those in developed countries. *See infra* notes 62-63 and accompanying text (explaining that the costs of surrogacy in India are almost one-third of the price in developed countries such as the United States).

61. Thirty-five percent of Indians live on less than one dollar per day, while a surrogate mother earns between six and ten thousand dollars. Krawiec, *supra* note 2, at 226. *See also* *Bundle of Hope for Surrogate Mother, US Couple*, AHMEDABAD NEWSLINE, Feb. 27, 2007, <http://cities.expressindia.com/fullstory.php?newsid=224289> ("To raise money for her son who is suffering from a complicated cardiac problem, the desperate mother from Kolkata came to Anand last year, looking to become a surrogate mother, as she had heard that she could earn a large amount of money through this.").

been around \$25,000 to \$30,000, which is approximately a third of that in developed countries such as the United States.⁶² The surrogate is paid only between \$6,000 and \$10,000 of the total cost, with the fertility clinics or other middlemen receiving the balance.⁶³

Low surrogacy costs, coupled with the casual legal environment, have therefore made India a popular fertility destination. This is despite the potential stigma attached to serving as a surrogate in India, which compels many Indian women to do so quietly and to live apart from their families during the duration of their pregnancies,⁶⁴ even though living outside the marital home in itself may have a social stigma.⁶⁵ The particular stigma attached to surrogacy, however, may partially result from certain parallels between surrogacy and sex work.⁶⁶ Nonetheless, with thirty-five percent of Indians living on less than one dollar per day, many commit to becoming surrogates.⁶⁷

It is unclear for how much longer commercial surrogacy will remain unregulated by Indian law. In August 2009, the Law Commission of India delivered Report No. 228, entitled "Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy."⁶⁸ In this report, the Indian Law Commission recognizes that the country has become a reproductive tourism destination.⁶⁹ The Commission also acknowledges the moral aspects to surrogacy:

The moral issues associated with surrogacy are pretty obvious, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money.⁷⁰

The Report also recognizes that "surrogacy involves the conflict of various interests and has inscrutable impact on the primary unit of society viz. family," thereby making surrogacy a

62. LAW COMMISSION REPORT, *supra* note 4, ¶ 1.7, at 11.

63. Krawiec, *supra* note 2, at 225-26.

64. Lee, *supra* note 58, at 280.

65. Amy Hornbeck, Bethany Johnson, Michelle LaGrotta, & Kellie Sellman, Note, *The Protection of Women from Domestic Violence Act: Solution or Mere Paper Tiger?*, 4 LOY. U. CHI. INT'L L. REV. 273, 277 (2007).

66. See generally Amrita Pande, *Not an 'Angel', not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN J. OF GENDER STUD. 141 (2009) (noting similarities between surrogacy and sex work). Surrogacy might be seen as baby-selling, prostitution, and rape. SPAR, *supra* note 14, at 83.

67. Krawiec, *supra* note 2, at 226. See also *supra* note 61 and accompanying text (noting that the reason is, many times, purely financial).

68. LAW COMMISSION REPORT, *supra* note 4.

69. *Id.* ¶ 1.7, at 11.

70. *Id.* ¶ 1.8, at 11.

legally complex issue.⁷¹

Nonetheless, the Report concludes that surrogacy is legal, as well as protected under both international and domestic law.⁷² The Commission cites Article 16.1 of the Universal Declaration of Human Rights 1948, which provides that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family.”⁷³ The Law Commission suggests that this right includes protection of surrogacy.⁷⁴ Nonetheless, the Commission concedes that many countries, despite being bound by similar law, have not recognized the reproductive right to include the right to surrogacy.⁷⁵

The Commission, therefore, seeks support for surrogacy in domestic law. Specifically, the Commission cites *B. K. Parthasarathi v. Government of Andhra Pradesh*,⁷⁶ in which the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy.”⁷⁷ The Law Commission reasons that “[n]ow, if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection.”⁷⁸

Nonetheless, the Law Commission’s Report—as its full title suggests—calls for legislation on surrogacy, and the Commission has several recommendations for legislative regulation. Specifically, the Commission recommends the enforceability of surrogacy agreements, which should provide for financial support for the resulting child in case of divorce or death of the

71. *Id.* ¶ 4.1, at 24-25.

72. *Id.* at 21-25.

73. *Id.* at 11-12 (citing Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a16>).

74. LAW COMMISSION REPORT, *supra* note 4, ¶ 1.9, at 11-12.

75. *Id.* ¶¶ 1.11-1.13, at 13-14.

76. *Id.* ¶ 1.9, at 11-12 (citing *B. K. Parthasarathi v. Govt. of Andhra Pradesh*, AIR 2000 A. P. 156 (India)).

77. *Id.* The Law Commission Report stated that this Indian case agreed with *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which characterized the right to reproduce as “one of the basic civil rights of man.” LAW COMMISSION REPORT, *supra* note 4, ¶ 1.9, at 11-12. However, *Skinner* does not necessarily support surrogacy as the case dealt with sterilization, not assisted reproductive techniques. *Skinner*, 316 U.S. at 536-38. In fact, the Supreme Court decided *Skinner* several decades before the advent of assisted reproductive technologies, and has not yet addressed the constitutionality of surrogacy. See *supra* notes 13-15 and accompanying text.

78. LAW COMMISSION REPORT, *supra* note 4, ¶ 1.10, at 12-13. This extrapolation on the part of the Law Commission has been criticized by commentators who note that the constitutional right to procreation does not necessarily include a role for a third party surrogate mother. INDIAN SURROGACY LAW CENTRE, *supra* note 11, ¶ 8.

commissioning couple.⁷⁹ Furthermore, one of the commissioning parents should be the genetic donor as well, to reduce the chance of child abuse.⁸⁰ Finally, any legislation on the subject should recognize the resulting child to be the legitimate child of the commissioning parents without adoption or other proceedings.⁸¹

Interestingly, however, the Report warns against commercial surrogacies in particular. Specifically, the Report proposes, "The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial."⁸² However, this recommendation might not result in the complete bar of commercial surrogacies.⁸³ Instead, it is more likely that the industry will soon be regulated, resulting in the elimination of illegitimate fertility clinics engaging in commercial surrogacies.⁸⁴

The Indian Council of Medical Research has also released a draft Assisted Reproductive Technology Bill and Rules 2008.⁸⁵ The proposed bill recognizes the legality of surrogacy and the enforceability of surrogacy agreements.⁸⁶ Furthermore, foreign commissioning parents would need to appoint a local guardian who would be legally responsible for caring for the surrogate until the baby is surrendered to the commissioning parents.⁸⁷ Under the proposed bill, a surrogate mother must also relinquish her parental rights and the child is presumed to be the legitimate child of the commissioning parents, which would be reflected in the child's birth certificate.⁸⁸ Other chapters of the proposed bill deal with the fertility clinics themselves.⁸⁹ A subsequent conference on surrogacy also seemed focused on waiving or restricting all rights to the child, other than those of the commissioning parents.⁹⁰

Therefore, surrogacy will likely remain legal in India despite legislative reform, particularly in light of the constitutional arguments in support of surrogacy made by the Law Commission.⁹¹ However, the extent to which surrogacy is

79. LAW COMMISSION REPORT, *supra* note 4, ¶ 4.2, at 25.

80. *Id.* ¶ 4.2(4), at 26.

81. *Id.* ¶ 4.2(5), at 26.

82. *Id.* ¶ 4.1, at 25.

83. INDIAN SURROGACY LAW CENTRE, *supra* note 11, ¶ 18.

84. A complete bar to commercial surrogacy would undermine India's strategy of aggressively recruiting medical tourism. See *supra* notes 46-49 and accompanying text (noting some of the steps India has taken to increase its medical tourism, including issuing medical visas).

85. LAW COMMISSION REPORT, *supra* note 4, ¶¶ 2.1-2.6, at 16-19.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* ¶¶ 3.1-3.5, at 19-24.

91. See *supra* notes 73-78 and accompanying text (noting the reasons why, even if legislation is passed on the issue, surrogacies will likely continue to

regulated in India may change under the impending legislation—especially in the case of commercial surrogacy.

In the meantime, Indian courts have begun dealing with the reality of surrogacy, recently holding that children born to an Indian surrogate are Indian citizens so that they may receive passports to enter the homeland of their commissioning parents.⁹² Furthermore, in *Baby Manji Yamada v. Union of India*, the Indian courts faced a question regarding the custody of a baby born of a surrogate after the commissioning parents divorced and the commissioning mother disowned the baby. The judicial system ultimately directed the petitioner, the baby's paternal grandmother, to the National Commission for Protection of Child Rights.⁹³ Nonetheless, Indian courts have not yet comprehensively addressed surrogacy, leaving the task to the legislature.⁹⁴

In sum, while the Indian Law Commission and the Indian Council of Medical Research have attempted to usher in legislation on surrogacy, legislative efforts in India remain in their infancy. Until the issue of surrogacy is legislatively addressed, however, India continues to provide an unregulated market in relatively inexpensive commercial surrogacies, which has appealed to many American couples.⁹⁵ Although the legal framework governing these international surrogacies remains relatively straightforward in both the United States and India, the public policy concerns, considered next, are much less so.

III. THE PARTIES TO A SURROGACY

Given the importance and sensitivity of the subject of surrogacy, it would be very difficult, and perhaps unwise, to consider only the legal framework of international commercial surrogacy while ignoring public policy goals. Should surrogacy remain legal, these public policy considerations center on protecting the three primary groups of people involved in international commercial surrogacies: the surrogates, the commissioning parents, and the resulting children.⁹⁶ It is therefore

remain legal in India).

92. *German Couple to Get Travel Papers of Surrogate Twins*, INDIANEXPRESS.COM, Dec. 5, 2009, <http://www.indianexpress.com/news/german-couple-to-get-travel-papers-of-surrogate-twins/550241/>.

93. *Yamada v. Union of India*, 2008 S.C.A.L.E. 76, 13 (India), available at <http://judis.nic.in/supremecourt/helddis.aspx>; LAW COMMISSION REPORT, *supra* note 4, ¶ 1.15, at 15. See Smerdon, *supra* note 10, at 69-72 (providing further background on the *Baby Manji* case).

94. INDIAN SURROGACY LAW CENTRE, *supra* note 11, ¶ 10.

95. See, e.g., Lee, *supra* note 58, at 277 (explaining that a commercial surrogacy arrangement in India involves only two parties—the commissioning parents and the gestational surrogate).

96. It might be argued that fertility clinics or other middlemen are also party to many surrogacies, but, other than the financial aspect, they lack any

important to analyze the rights, interests, and obligations of these parties. They naturally vary, but each has implications for the potential regulatory framework adopted in India, as well as in any American state.

A. *The Commissioning Parents*

The commissioning parents—those who initiate the surrogacy and are the intended parents—face many issues that should be addressed in any attempt to regulate commercial surrogacy. Among these are the causes requiring a surrogacy, whether the surrogate will abort, and whether surrogacy is preferable to other reproductive options.

International commercial surrogacy arose mainly as a reproductive option for infertile couples.⁹⁷ However, a couple occasionally commissions surrogacy not because of infertility, but because of an avoidance of pregnancy for career or other personal reasons.⁹⁸ Some fertility clinics in India have barred such couples from commissioning surrogacies, but, in the absence of legislation, this decision is currently made on the level of the individual clinics.⁹⁹

However, legislatively barring such couples from commissioning surrogacies would discriminate between fertile men—who would be allowed to enter into surrogacy arrangements due to their wives' infertility—and fertile women—who would not be permitted to commission surrogacies despite their husbands' infertility. Furthermore, because much infertility results from people's delay of childbearing for career-oriented reasons,¹⁰⁰ such a

particular or personal stake in the transactions. Therefore, they will not be considered in this Part. For more on these third parties, see Landes & Posner, *supra* note 2, at 323-48, Posner, *supra* note 2, 59-72, and Krawiec, *supra* note 2, at 211-31.

97. See, e.g., *infra* note 118 and accompanying text (noting that, although adopting from a foreign country is less costly, international commercial surrogacy is still a thriving business); Louis Michael Seidman, *Baby M and the Problem of Unstable Preferences*, 76 GEO. L.J. 1829, 1831 (1988) (explaining that "some individuals, primarily childless couples and those who sympathize with them, support surrogacy.").

98. See, e.g., Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 924-26 (2009) (noting the career costs of bearing and having children); Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 623 (1993) ("Pregnancy and motherhood can dramatically affect women's educational and career prospects, as well as their relationships with others.").

99. See *supra* note 53 (discussing a doctor who follows the guidelines of the Indian Council of Medical Research).

100. See, e.g., Cintra D. Bentley, Note, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy Within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 393 n.14

policy would discriminate against young, fertile parents choosing surrogacy for career reasons even though they are commissioning the surrogacy for the same reason that many older, infertile couples have become infertile. This disparate treatment might run afoul of an equal protection principle.¹⁰¹

Moreover, if surrogacies are considered a legitimate reproductive technique, then it seems arbitrary to preclude fertile women from seeking it. On the other hand, if surrogacies are legitimate only as a last resort—because of a recognition of ethical or other limitations on the widespread use of such technology—then a natural limit on surrogacy might be to make surrogacy available only to those unable to conceive. However, such a limit might not significantly reduce the number of people seeking fertility because people, if commissioning surrogacy for career reasons, will simply wait to commission the surrogacy at an older, and less fertile, age.¹⁰²

Nonetheless, surrogacy remains a solution often for infertile couples, which includes ten percent of Americans.¹⁰³ The frequency of infertility, however, prompts the need to re-examine its causes. Although many factors may contribute¹⁰⁴ and there are many young infertile couples, some infertility among American couples results from delayed child bearing.¹⁰⁵ Women in particular may choose to postpone child-bearing for personal or professional reasons, especially if they believe that it is necessary to avoid

(1998) (explaining that the increasing trend in infertility rates among couples in the United States is partly due to the large number of thirty-five to forty-year old women who have put off child-bearing for career reasons).

101. People may commission surrogacies to minimize the career costs of bearing children. *See supra* note 98. *See also supra* note 24 (noting the decision in *Soos*, whereby the Arizona Appellate Court found the state's surrogacy statute unconstitutional because it allowed the commissioning father to rebut the surrogate father's parentage, but did not allow the commissioning mother to do the same).

102. *See supra* note 100 and accompanying text, and *infra* notes 105-07 and accompanying text (providing that limiting surrogacy to only those unable to conceive may not significantly reduce the number of people wanting surrogacy because many will simply wait until they are older and less fertile).

103. Yamamoto & Moore, *supra* note 3, at 100. Same-sex couples also often commission surrogacies. Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U.L. REV. 1235, 1240 (2005).

104. JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* 7 (Spinifex Press 1995) (noting that one of the most commonly cited causes of female-factor infertility is sexually-transmitted diseases—the most common of which is Chlamydia, which can damage the female reproductive system).

105. *See infra* notes 106-107 (noting that many women delay child-bearing in order to pursue a career, fearing discrimination for having children earlier in their careers).

workplace disadvantages and that assisted reproduction might resolve any subsequent fertility problems.¹⁰⁶ Accordingly, researchers predict that infertility rates will continue increasing as more people delay childbearing.¹⁰⁷

However, reliance on surrogacy and other artificial techniques might facilitate societal intolerance of younger parenthood.¹⁰⁸ Instead of creating incentives for women to risk foregoing natural childbearing due to delay, however, society might wish to build a more parent-friendly culture. In other words, the resources and attention focused on assisted reproduction through surrogacy could be shifted to support parenthood at an earlier age, which might reduce infertility rates more so than the progress of assisted reproductive technology.¹⁰⁹

Whatever the reason for the surrogacy, however, commissioning couples often face similar issues in this endeavor. For one, abortion can completely alter the expectations of the surrogacy.¹¹⁰ Although the surrogate's health might become an issue,¹¹¹ there are many reasons a surrogate might want to end a surrogacy, such as to threaten or extort money from the commissioning couple, or due to a change of heart.¹¹² On the flip

106. Michele Goodwin, *Assisted Reproductive Technology and The Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 2 (2005) ("This article argues that assisted reproductive technology (ART) is mistakenly regarded as equitable accommodation for women and their families who wish to delay pregnancies in order to avoid discrimination. Pregnancy and motherhood discrimination, I argue, are 'soft,' but real discrimination that create 'double binds' for women who believe they must choose between the pursuit of a career and early motherhood.").

107. June Carbone, *Conflicting Interests in Reproductive Autonomy and Their Impact on New Technologies: Issues of Access to Advanced Reproductive Technologies: If I Say "Yes" to Regulation Today, Will You Still Respect Me in the Morning?*, 76 GEO. WASH. L. REV. 1747, 1763 (2008).

108. See *supra* Part III (focusing on the public policy considerations concerning surrogates, commissioning parents, and the resulting children of surrogacy arrangements).

109. One scholar has criticized "a social system that fails to equitably accommodate women, families, and children by masquerading complex and even dangerous medical options as naturally positive alternatives." Goodwin, *supra* note 106, at 5.

110. On abortion in the United States, see Yamamoto & Moore, *supra* note 3, at 131-43.

111. The mother's health is recognized as a justification for many abortion procedures. See, e.g., *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) ("[I]f the state is interested in protecting fetal life after viability, it may go so far to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.").

112. For example, an Ohio woman involuntarily became a surrogate through a mistaken implantation of a stranger's embryo, but her religious views prevented her from aborting even though she would likely not be able to carry another child to term. Stephanie Smith, *Fertility Clinic to Couple: You Got the Wrong Embryos*, CNN.COM, Sept. 22, 2009, <http://www.cnn.com/2009/HEALT>

side, commissioning parents, unhappy with a particular fetus, may want the surrogate to abort even when she may not want to do so.¹¹³

In this context, one of the most important questions triggered is whether the timeframe of the surrogate's abortion choice is limited, unchanged, or entirely eliminated upon her decision to enter into a surrogacy arrangement.¹¹⁴ In India, for example, the Law Commission recommends that abortions during surrogacy be governed by the Medical Termination of Pregnancy Act of 1971, which permits abortion of any pregnancy before twelve weeks.¹¹⁵ This might ordinarily concern commissioning parents, except that it might be less of a problem in India for the same reasons that most Indian women do not contest the surrogacy contract and keep the resulting child.¹¹⁶

In any jurisdiction's debate on abortion during surrogacy, some may argue that the surrogate, commodified in the process, has no right to abort the baby of another. Others may argue that the baby is only a product of the surrogacy and therefore may be aborted by the surrogate.¹¹⁷ Depending on the jurisdiction, abortion might therefore be a concern for commissioning parents.

Finally, before selecting surrogacy, commissioning parents face the very difficult question of which specific reproductive option to choose. Although adoption is significantly less expensive than surrogacy, surrogacy remains a thriving business.¹¹⁸ While

H/09/22/wrong.embryo.family/index.html. See also Yamamoto & Moore, *supra* note 3, at 96 ("In situations where a gestational carrier is used, the right to abort must be balanced against the rights of both the fetus and the intended parents.").

113. For a discussion of such a situation, see Tuininga, *supra* note 21, at 144-45 (discussing possible outcomes of the situation wherein the parents were unhappy with the fetus but the surrogate refuses to have an abortion).

114. Yamamoto & Moore, *supra* note 3, at 143 ("Most lawyers and commentators believe a gestational carrier has the same unrestricted right as any other woman to abort the fetus she is carrying at any time she desires." *But see id.* (proposing "that a gestational carrier's right to abort should be restricted, since she owes a trustee's duty to both the fetus she is carrying and the intended parents.")).

115. LAW COMMISSION REPORT, *supra* note 4, ¶ 4.2(9), at 27; see generally The Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament (India).

116. See *supra* notes 54-58 and accompanying text (discussing that, in India, some of the risks of surrogacy are inherently abated).

117. See *infra* Part III.C.1 (noting arguments on the commodification of the child). See also *infra* Part III.B (noting arguments on the commodification of the surrogate).

118. For example, the average cost for an American couple to adopt a Chinese child is between \$10,000 to \$20,000. Robert S. Gordon, Note, *The New Chinese Export: Orphaned Children—An Overview of Adopting From China*, 10 TRANSNAT'L LAW 121, 143-44 (1997). Much of this money is allocated to support the Chinese orphanages. Kay Johnson, *Politics of International and*

there may be obvious reasons for this, such as genetic preferences, there may also be less obvious reasons for it, such as societal pressure to have genetic children. This may be truer in foreign countries, as illustrated in India's Law Commission Report, which hypothesized that "[a] woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. Some authors put it as follows: *The parents construct the child biologically, while the child constructs the parents socially.*"¹¹⁹ When commissioning mothers feel this way, however, counseling may be helpful—if couples approach surrogacy with significant emotion, their position is undermined.¹²⁰

Given that the opportunity cost of commissioning surrogacy is not adopting an existing child in need of a home, it might be useful to advise commissioning parents of their various options.¹²¹ It has been suggested that certain social concerns might prefer international adoption to international commercial surrogacy. One commentator, for example, suggests that economic inequity is more blatant in surrogacy than in adoption because in surrogacy "a rich woman pays a poorer one to carry her child."¹²² Another commentator underscores that adoption is preferable because "[w]e live in a world that has no need for more people. We are rapidly destroying our environment because of our inability to handle the people we already have."¹²³ Of course, social concerns might not significantly influence couples undertaking emotional decisions regarding their family.

In sum, commissioning parents are composed of mostly infertile couples, but some fertile couples as well. The issues facing them are similar nonetheless, centering on the causes for surrogacy, the possibility of abortion, and reproductive

Domestic Adoption in China, 36 LAW & SOC'Y REV. 379, 388 (2002). Meanwhile, the cost of an Indian surrogacy is \$25,000 to \$30,000, which is still approximately a third of that in developed countries such as the United States. See *supra* notes 62-63 and accompanying text.

119. LAW COMMISSION REPORT, *supra* note 4, ¶ 1.2, at 9 (italics in original).

120. Arthur Serratelli, Note, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GW J. INT'L L. & ECON. 633, 644 (1993) (quoting 464 PARL. DEB., H.L. (5th ser.) col. 1523 (1985) (Eng.) (detailing the remarks of Lord Meston during the Second Reading in the House of Lords)).

121. "An informed and voluntary decision is not easily reached. The childless face a bewildering array of possibilities." Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 882 (1985). "Childless persons ought to be made cognizant of the full range of their reproductive and childrearing options, including adoption." *Id.* at 883.

122. SPAR, *supra* note 14, at 93-94.

123. Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5, 9 (1995).

alternatives. The issues facing surrogates, on the other hand, are much different.

B. The Surrogates

Surrogates, who carry a fetus to term before relinquishing the resulting child, face vastly different issues from the commissioning parents. Often, their role in the surrogacy raises concerns, which heighten when economic inequities are involved. This problem is illustrated by the situation in India, where women are typically pressured into the socially unacceptable job of surrogacy by their economic conditions, and sometimes, by their own families' desperation for income.

The first, and most obvious, issue implicates the inevitable argument that surrogacy commodifies the surrogates.¹²⁴ This concern invariably arises given the exchange of money for the surrogacy, prompting the use of such terms as "wombs for rent."¹²⁵ In the international context, furthermore, the commodification concern has been extended to concerns of the trafficking of women.¹²⁶

International commercial surrogacy is also problematic for those working to eliminate "the perception and use of women exclusively as child bearers."¹²⁷ Feminists may especially oppose this use of women by society, as well as the idea of a childless man pressuring his infertile wife to accommodate his reproduction.¹²⁸ However, other feminists may support the gift and choice made by a surrogate, as well as the consequent expansion of fertility choices to all women.¹²⁹ Nonetheless, all groups of feminists, as most people, would be concerned about an international commercial surrogacy regime that overlooks the interests of surrogates, as many frameworks currently tend to do.

Problematically, international commercial surrogacy triggers concerns of the exploitation of surrogates, especially when they come from deep poverty that limits their choices. One author has suggested that the typical profile of a surrogate mother is young, already a parent, and poor.¹³⁰ While "[s]ome of these poor, young

124. *But see* Tuininga, *supra* note 21, at 194 (citing Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2326 (1995) ("Epstein notes the term 'commodity' is misused in the surrogacy context.")).

125. *See* LAW COMMISSION REPORT, *supra* note 4, ¶ 1.7, at 11 (arguing that surrogacy is a large source of income in certain areas, thus giving rise to terms such as "womb for rent").

126. GENA COREA, *THE MOTHER MACHINE* 245 (Harper & Row 1985).

127. Hollinger, *supra* note 121, at 913.

128. *Id.*

129. *See, e.g., id.* (arguing that women considering surrogacy should have the right to make the choice that is best for them).

130. SPAR, *supra* note 14, at 87.

mothers will live in the developed world[,] . . . many more, demographically speaking, will live in the poorer nations of the developing world, where opportunities for poor, young women are even scarcer.”¹³¹ In these cases, criticism of commercial surrogacy also takes on a racial undertone as “many observers saw the expanding market as further evidence . . . of the exploitation of (poor, nonwhite) women by their richer or more indulgent sisters.”¹³²

India is an example of a jurisdiction wherein impoverished women enter into commercial surrogacies likely because of a lack of other options, even if the undertaking is culturally stigmatized.¹³³ Despite a potential stigma, it is suspected that some surrogates are pressured into this business by their husbands and families for financial reasons.¹³⁴ If this is the case, then to help minimize the exploitation of women by their families, Indian property law should ensure that the proceeds of the surrogacy belong solely to the surrogates. This should already be the result of the current separate property regime in India, wherein each spouse solely owns the property to which she has legal title, both during the marriage and upon potential divorce.¹³⁵ In such a system, surrogacy proceeds should be considered the separate property of the wife, just as damages for personal injuries suffered by a spouse are considered to be separate property in the United States.¹³⁶ Still, Indian law should be vigilant in protecting women’s assets because the patriarchal familial structure of many families may result in the usurpation or mismanagement of the payment for the surrogacy.¹³⁷

Regardless of the jurisdiction in which a surrogacy occurs, however, there may be negative physical effects of serving as a surrogate. For example, there are health risks and dangers inherent to every pregnancy.¹³⁸ Furthermore, there are health

131. *Id.*

132. *Id.* at 82.

133. See *supra* note 66 accompanying text (discussing surrogacy in India and the stigma surrounding it due to the parallel between it and “sex work”).

134. Sreeraman, *India Urged to Regulate “Commercial Surrogacy”*, MEDINDIA, Dec. 12, 2009, <http://medindia.net/news/India-Urged-to-Regulate-Commercial-Surrogacy-62159-2.htm>; Sudha Ramachandran, *India’s New Outsourcing Business-Wombs*, ASIA TIMES ONLINE, June 16, 2006, http://www.atimes.com/atimes/South_Asia/HF16Df03.html.

135. Louise Harmon & Eileen Kaufman, *Dazzling the World: A Study of India’s Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*, 19 BERKELEY WOMEN’S L.J. 32, 49 n.99 (2004).

136. See, e.g., *Fehring v. Fehring*, 58 A.D.3d 1061, 1062 (N.Y. App. Div. 2009) (discussing the division of money resulting from damages received in personal injury lawsuits when the injured party is married).

137. INDIAN SURROGACY LAW CENTRE, *supra* note 11, ¶¶ 13-14 (describing India as a patriarchal society).

138. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 927 (1992)

consequences to recurring or multiple pregnancies.¹³⁹ Finally, postpartum depression, which affects ten to twenty percent of women giving birth, may affect the surrogate, being complicated by the relinquishment of the child.¹⁴⁰

There may also be psychological consequences to serving as a surrogate. For many, relinquishing a child upon birth may be difficult.¹⁴¹ English law therefore provides that the surrogate mother is always the legal mother, even if her genetic material was not used.¹⁴² Similarly, her husband is always the legal father unless it can be shown he did not consent to the surrogacy arrangement.¹⁴³ Meanwhile, the National Guidelines in India, in a legal void, provide the opposite: Indian surrogates are not the legal mothers.¹⁴⁴ Proposed legislation in India would similarly not consider the surrogate to be the legal mother.¹⁴⁵ Although it is important to clarify a jurisdiction's legal position on these matters, ultimately, it may be difficult to apply rigid rules to surrogates who might be unable to foresee the full psychological effects of giving up their child, which may explain many American states'

(Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands.").

139. See, e.g., Stacey Pinchuk, *A Difficult Choice in a Different Voice: Multiple Births, Selective Reduction and Abortion*, 7 DUKE J. GENDER L. & POLY 29, 31 n.20 (2000) (providing authorities that list a variety of complications resulting from multiple pregnancies).

140. Michele Connell, Note, *The Postpartum Psychosis Defense and Feminism: More or Less Justice For Women?*, 53 CASE W. RES. 143, 145-46 (2002); see also *infra* notes 141 and 146-47.

141. For an account of surrogacy from the perspective of the first American surrogate, see generally ELIZABETH KANE, *BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER* (1988) (detailing the story of Elizabeth Kane, who was the first woman to deliver on a contractual promise and give up the son born out of that promise). Kane subsequently joined the National Coalition Against Surrogacy. Edwin McDowell, *Surrogate Mother's Story*, N.Y. TIMES, June 23, 1988, <http://www.nytimes.com/1988/06/23/books/surrogate-mother-s-story.html>. See also *infra* note 146 and accompanying text (referring to the strong emotional bond associated with motherhood and the surmounting grief often caused by the severance of the bond between mother and child).

142. Re: X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030 (U.K.); Human Fertilisation and Embryology Act, 1990, c. 37, § 27, sched. 1 (Eng.).

143. Re: X & Y (Foreign Surrogacy), [2008] EWHC (Fam) 3030; Human Fertilisation and Embryology Act, § 27. However, the Act permits a court to make a different parental order if the surrogate permits it. Human Fertilisation and Embryology Act, § 30.

144. LAW COMMISSION REPORT, *supra* note 4, ¶ 1.14, at 14.

145. See *supra* note 86 and accompanying text (proposing that surrogacy agreements be considered on par with other contracts and their terms be enforced).

reluctance to uphold surrogacy contracts.¹⁴⁶ Nonetheless, regardless of the law's position, many surrogates may experience difficulty in surrendering the child.¹⁴⁷

In those jurisdictions that aim to aggressively build their surrogacy market, the concept of opportunity cost also arises. For example, the Indian government has expended many resources to generate medical tourism, which includes commercial surrogacy.¹⁴⁸ The opportunity cost of these efforts, however, is that different industries are not being developed, industries that might be less controversial for Indian women.

In sum, international commercial surrogacy invariably prompts concerns that surrogates are commodified and exploited, especially when lack of opportunity drives the surrogate's decision. Furthermore, a commercial surrogacy may negatively impact the surrogate's mental and physical health, often unforeseen by the surrogate at the time she enters the surrogacy contract. Any potential regulation of international commercial surrogacy should therefore be mindful of these various issues.

C. The Children

Children are perhaps the most important, but overlooked, aspect of commercial surrogacy. There are, in fact, two groups of children that are impacted by international commercial surrogacy: (1) the children resulting from commissioned surrogacies, and, less obviously, (2) the existing children awaiting adoption all across the world.¹⁴⁹ Although the consequences of commercial surrogacy for

146. See Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 331 (2005) (explaining that surrogates often cannot comprehend the strong emotional connection that will result from carrying a child for nine months—similar to the economic phenomenon where people, without reason, increase their valuation of an item beyond its fair market value the longer they maintain possession).

147. "For them, severance of their maternal connection to the child may cause lifelong grief, desperation, psychopathology and guilt." Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 192-93 (1994). See also *supra* note 141 and accompanying text (providing insight into the first American surrogate's experience, as well as into her depression after parting with the child).

148. See *supra* notes 46-49 and accompanying text (citing data that details India's plan to strengthen its already growing medical tourism economy).

149. There may also be a third group of impacted children: the surrogates' children, who, for example, may develop a fear of being given away as well. This group is beyond the scope of this Article, but, for further background on this category of children, see Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 217 (1992) (stating that, while this fear may be unfounded, children often are extremely insecure and seeing their mother give away a newborn may cause them to fear being given away as well); Shari O'Brien, *Commercial*

these two groups of children are very different, both groups are notably affected by the expansion of surrogacy.

1. *Commissioned Children*

The first, and most obvious, group of children impacted by surrogacy is the group resulting from it: commissioned children. The concerns related to them include the physical and mental consequences of being born of a surrogate, as well as the aftermath of a potential family breakup and the approach of the courts to the problems attendant to commercial surrogacy.

The standard governing many legal matters related to children is the “best interests of the child” standard, which is used by many countries to guard the interests of children in legal proceedings.¹⁵⁰ This standard has also been invoked in the surrogacy debate, although its flexibility has enabled both sides to rely on it.¹⁵¹ Nonetheless, it is important to continue determining the best interests of the child in the debate on surrogacy, without

Conceptions: A Breeding Ground for Surrogacy, 65 N.C. L. REV. 127, 144 (1986) (explaining that a surrogate’s existing children may, without being told the truth of what was going on, be fearful that they or a sibling may be given away).

150. Courts in both England and the United States rely on the best interests standard in deciding child-related cases. For background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006) (stating that the clear enunciation of the standard is most often credited to Justice Cardozo in the 1925 case of *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925)). For a background on this principle in England, see KERRY O’HALLORAN, *THE WELFARE OF THE CHILD* 9-35 (Ashgate 1999) (providing an overview of the use of the best interests standard in English courts).

151. “In both Canada, where surrogacy agreements are void and have no legal status, and in the United States, where the situation is variable, the best interests of the child is the predominant consideration in the debate over surrogacy.” Hugh V. McLachlan & J. Kim Swales, *Show Me the Money: Making Markets in Forbidden Exchange: Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROBS. 91, 93 (2008). *But see* Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 443 (2004) (“[I]t is practically impossible to determine what is in the best interest of a particular child before that child is conceived. Consequently, while these arrangements may benefit the interests of the parties and brokers involved, preconception arrangements cannot be based upon a true best interest determination.”); McLachlan & Swales, *supra* note 151, at 93 (“Whatever most ethicists might say, it is far from obvious that such matters should be settled solely on the basis of the best interests of the child concerned—even if it could be established what those best interests are. In any case, there is no reason to think that surrogacy agreements, commercial or not, are likely to be at variance with the best interests of the children concerned.”).

which the process risks objectifying children in the advent of markets trading in wombs, genetic material, and embryos.¹⁵²

The *Baby M* case in New Jersey is an early example of the resolution of a surrogacy custody case according to the best interests standard, wherein the court ultimately upheld a woman's right to change her decision after she agreed, under a surrogacy contract, to be artificially inseminated with a man's sperm and to surrender the baby to him and his wife.¹⁵³ Although Baby M had gone home with the commissioning couple after the birth, four days later, the surrogate visited and disappeared with the baby.¹⁵⁴ The commissioning parents called the police while the surrogate threatened to leave the country with the baby.¹⁵⁵ The ensuing events played out in court, with the child being moved between her surrogate family and her intended family before finally returning home with the latter due to the court's interpretation of the child's best interests.¹⁵⁶

In other jurisdictions, however, the legal standard for determining the natural parent, and therefore child custody, is who intended to bring the children into being,¹⁵⁷ which is always favorable to the commissioning parents and, because of its resemblance to a bright-line rule, may reduce custody battles, though at the risk of being too rigid. Under any legal standard for custody, the desirability of avoiding prolonged custody battles, as well as minimizing the movement of children between homes, supports the need for legal clarity on the enforceability of commercial surrogacy contracts and the ramifications of any resulting custody issues.

While custody battles may result from too much interest in the commissioned child, problems also follow when a break in the commissioning family reduces, or entirely eliminates, the desire for an already commissioned child. For example, in *Jaycee v. Superior Court of Orange County*, a man filed for divorce, alleging that no minor children resulted from the marriage.¹⁵⁸ However,

152. See, e.g., *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988) ("Worst of all, however, is the contract's total disregard of the best interests of the child.").

153. *Id.* at 1234. See also *supra* notes 28-30 and accompanying text (discussing the *Baby M* case).

154. SPAR, *supra* note 14, at 70.

155. *Id.*

156. *Id.*; *In re Baby M*, 537 A.2d at 1248, 1255-61.

157. *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993); see *supra* note 33 and accompanying text (pointing out that judicial consideration of this case coincided with calls for the California Legislature to increase interest in enacting surrogacy legislation). Countries that treat the intended parents as the legal parents include Hong Kong, Israel, and Russia. In Australia, the surrogate and her husband are treated as the legal parents. MARKENS, *supra* note 20, at 24-25 tbl.1.

158. *Jaycee B. v. Superior Court*, 42 Cal. App. 4th 718, 722 (Ca. Ct. App. 1996).

the wife asserted in her response that the “[p]arties were expecting a child by way of surrogate contract”¹⁵⁹ and sued for child support. The court, in reversing the trial court, granted temporary child support until parentage could be established.¹⁶⁰ Such problems are especially cause for concern in a jurisdiction whose law does not establish the definitions of parentage or provide guideposts in such disputes.

Even in the smoothest enforcements of surrogacy agreements, there are concerns for the physical health of the resulting children. Included in these are the potential effects of reproductive technologies on the resulting children’s health. For example, artificial reproductive techniques might increase the opportunity for multiple pregnancies and the risk of cerebral palsy.¹⁶¹ One study has also suggested higher rates of birth defects among babies conceived by assisted reproduction.¹⁶² Finally, suspected developmental delay increased four-fold in children born after in vitro fertilization, which is commonly used in commercial surrogacy.¹⁶³

There are also potential psychological difficulties for children resulting from commissioned surrogacy, and in particular, from international commercial surrogacy. As one commentator notes, these issues might include “confusion about the circumstances of their birth, difficulties with identity formation, and desires to be reconnected to their apparently lost genetic heritage.”¹⁶⁴ Furthermore, it may be psychologically difficult for an infant to be severed from the birth mother.¹⁶⁵ Although such issues unavoidably arise in the adoption context, they are being intentionally created in international commercial surrogacy. For example, many adults adopted as children or conceived of anonymous sperm often have a deeply rooted desire to understand

159. *Id.*

160. *Id.* at 721-22.

161. Cheryl Erwin, *Creating Life? Examining the Legal, Ethical, and Medical Issues of Assisted Reproductive Technologies: Utopian Dreams and Harsh Realities: Who Is in Control of Assisted Reproductive Technologies in a High-Tech World?*, 9 J. GENDER RACE & JUST. 621, 630 (2006).

162. Darine El-Chaar et al., *Risk of Birth Defects Increased in Pregnancies Conceived by Assisted Human Reproduction*, 92 FERTILITY AND STERILITY 1557, 1559 (2009). Another study suggests that infertile males might pass infertility onto their sons through assisted reproductive technology. See Lois Rogers, *Test-Tube Boys May Inherit Fertility Problems*, TIMESONLINE, Feb. 7, 2010, <http://www.timesonline.co.uk/tol/lifeandstyle/health/article70177969.ece> (discussing the first evidence that test-tube babies may inherit their fathers’ fertility problems).

163. Bo Stromberg et al., *Neurological Sequelae In Children Born After In-Vitro Fertilisation: A Population-Based Study*, 359 LANCET 461, 463 (2002).

164. Hollinger, *supra* note 121, at 917.

165. Serratelli, *supra* note 120, at 645.

their identities and origins.¹⁶⁶ While surrogacies in India are not necessarily done anonymously, the international and commercial nature of the transaction may reduce the commissioned person's ability to explore her origins, the inability of which has frustrated many adoptees.¹⁶⁷

Nonetheless, the fertility business, including international commercial surrogacy, continues to thrive and raise, for many, the argument that children are mere commodities in the market¹⁶⁸ with their interests neglected.¹⁶⁹ It is therefore vital to mind the interests of children when institutionalizing commercial surrogacy through legislation, which should aim to protect those most vulnerable.

In sum, there are many unique issues concerning children who result from commercial surrogacies, ranging from psychological and physical issues to legal custody battles. Another group of children impacted by surrogacy—international children awaiting adoption—face entirely different, but also significant, issues created by international commercial surrogacy.

2. *Adoption Candidates*

When speaking of international surrogacy, it is difficult not to consider its impact on adoption, both domestic and international. The institutions of surrogacy and adoption, in fact, have a symbiotic relationship because couples seeking to expand their families alternatively can parent only a limited number of children, who may either result from adoption or from assisted reproductive techniques.¹⁷⁰ The effect of this symbiotic relationship is two-fold: (1) surrogacy may absorb resources that would otherwise be devoted to adoption, but, on the other hand, (2) surrogacy provides competition that might make adoption more effective and efficient.

The displacement of resources from adoption to surrogacy is one negative effect of this symbiotic relationship. While much

166. Margaret Ryznar, *Two to Tango, One in Limbo: A Comparative Analysis of Fathers' Rights in Infant Adoptions*, 47 DUQ. L. REV. 89, 106-08 (2009).

167. *Id.*

168. *But see* McLachlan & Swales, *supra* note 151, at 97 ("Even if babies could be and were bought and sold, it does not follow that they would subsequently and consequently be maltreated as 'commodities.'"). For the commodification of the surrogate argument, see *supra* Part III.B.

169. RAYMOND, *supra* note 104, at xxii; *see also supra* notes 150-52.

170. "In the United States alone in 2001, roughly 41,000 children were born through assisted reproduction, 6,000 of whom were created through the use of 'donated' eggs and 600 of whom were carried by surrogates. In 2003, Americans adopted 21,616 children through international adoptions and gave birth to thousands of babies using commercially purchased sperm." Krawiec, *supra* note 2, at 205.

money is spent on assisted reproduction,¹⁷¹ there are many children around the world awaiting adoption. One explanation for the popularity of surrogacy may be parents' desire to genetically reproduce, or, at the very least, fulfill certain genetic preferences for their children. Gestational surrogacy, wherein the surrogate does not contribute her genetic material, fulfills many of these preferences. Nonetheless, the opportunity cost of investing in international commercial surrogacy is the potential neglect of the adoption market.

On the other hand, the dawn of artificial reproductive techniques might improve the adoption frameworks—many of which currently erect bureaucratic barriers to adoption—by providing a competing source of children who need homes. China, the source of many American adoptions,¹⁷² serves as an illustration of current, occasionally fickle, adoption restrictions: the China Center of Adoption Affairs recently issued new regulations effective for all adoption applications received after May 1, 2007.¹⁷³ Now, adoptive parents must have been married for at least two years, must have graduated from high school, and must have at least \$80,000 worth of assets.¹⁷⁴ They must not be

171. The most popular infertility treatment is IVF, where one cycle can cost anywhere from \$8,000 to \$11,000. Yamamoto & Moore, *supra* note 3, at 101-02. A live birth, however, is often achieved only after three or four treatment cycles. *Id.* at 102-03. Infertile couples spend approximately \$1 billion per year in the pursuit of pregnancy. *Id.* at 103. *See also supra* note 5 and accompanying text (noting the post-industrial change in views regarding children).

172. "Between 1985 and 2006, 62,389 children were adopted to the United States from China." Elisa Poncz, *China's Proposed International Adoption Law: The Likely Impact on Single U.S. Citizens Seeking to Adopt from China and the Available Alternatives*, 48 HARV. INT'L L.J. ONLINE 74, 78 (2007), available at www.harvardilj.org/attach.php?id=113. Surrogacy and other assisted reproductive techniques, however, might reduce the adoption of Chinese children by Americans. Dr. Janice Raymond has offered a description of the relationship between infertility in the Western world and fertility in the Eastern world. RAYMOND, *supra* note 104, at 1-2. The evidence for this observation includes, on the one hand, the success of the fertility business in the United States that aims to remedy infertility and, on the other hand, the overpopulation problems in India and China that has led to regulation of fertility, such as the one-child policy.

173. *See* OFFICE OF CHILDREN'S ISSUES, U.S. DEPT OF STATE, INTERCOUNTRY ADOPTION, <http://adoption.state.gov/country/china.html> (listing requirements such as not having been divorced more than two times, having at least \$80,000 worth of assets at the time of adoption, and having a BMI (Body Mass Index) of less than forty) [hereinafter INTERCOUNTRY ADOPTION].

174. *Id.* The Chinese government has traditionally required that adoptive parents be married, but has allowed a limited percentage of adoptions by single parents. Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 607 (2004).

deformed, mentally ill, blind in either eye, or have a body mass index over 39.¹⁷⁵ Meanwhile, an international surrogacy arrangement requires no income or weight checks,¹⁷⁶ presenting an attractive alternative to international adoption. This might drive couples away from adopting children from China to commercial surrogacy, even though, as one commentator pointed out, "It seems crazy to drive those who want to parent away from already existing children who need homes and into the production of new children."¹⁷⁷ To compete with fertility technology, therefore, adoption restrictions may have to be eased, resulting in a more efficient international adoption market.

China also serves as an example of a country with an adoption system that seemingly favors international adoption over domestic adoption,¹⁷⁸ which might also have to change as commercial surrogacy reduces the international homes available for Chinese children. Thus far, China has taken advantage of the demand for international adoption by charging higher fees than in domestic adoptions¹⁷⁹ while maintaining the country's one-child policy.¹⁸⁰ In fact, it has been suggested that China's success in placing children overseas has led to baby trafficking to meet the demand for babies.¹⁸¹ However, the advent of international commercial surrogacy as an alternative encourages China to refocus its efforts on domestic absorption of orphans, which has many potential benefits, including the preservation of the

175. INTERCOUNTRY ADOPTION, *supra* note 173. For commentary on the weight limitations for adoptive parents, see Kimberly A. Collier, Note, *Love v. Love Handles: Should Obese People Be Precluded From Adopting a Child Based Solely Upon Their Weight?*, 15 TEX. WESLEYAN L. REV. 31, 53 (2008).

176. See *supra* Part II (illustrating the absence of statutory weight restrictions in commissioning surrogacy).

177. Bartholet, *supra* note 123, at 9.

178. Patricia J. Meier & Xiaole Zhang, *Sold into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 105-06 (2008) (noting that China prioritized building its intercountry adoption program over its domestic one); Bethany G. Parsons, *Intercountry Adoption: China's New Laws Under the 1993 Hague Convention*, 15 NEW ENG. J. INT'L & COMP. L. 63, 83 (2009) ("Under the current state of China's one-child policy, it is nearly impossible for the country to promote in-country adoption before allowing children to be adopted internationally.").

179. See, e.g., Meier & Zhang, *supra* note 178, at 106 (noting the Chinese orphanage system's reliance on revenues from international adoption); see also *supra* note 118.

180. "In an attempt to control population and prevent mass starvation, China implemented a one child per family birth policy limitation [in 1979]." Gordon, *supra* note 118, at 131. There are, however, limited exceptions to the one-child policy. Rachael Savanyu, *The Public Womb: Women Under China's One-Child Policy*, 9 BUFF. WOMEN'S L.J. 17, 19 (2000-2001).

181. Meier & Zhang, *supra* note 178, at 87-88.

children's identities and their retention of their homeland.¹⁸²

The impact of international commercial surrogacy may therefore have a multifaceted effect on international adoption. On the one hand, the primary opportunity cost to growing the international commercial surrogacy business is the reduction of international adoption. Children are being created while existing children face their "real-world alternative to adoption [of] life or death on the streets or in orphanages."¹⁸³ On the other hand, international commercial surrogacy inherently provides competition to arcane and bureaucratic adoption laws that will have to consequently adjust to remain viable. The potential benefit of this is reduced restrictions on both international and domestic adoption, aiding those children awaiting permanent homes.

This analysis of children's interests in the debate regarding international commercial surrogacy is nonetheless incomplete without a consideration of the interests of the commissioning parents and the surrogates. All three parties are differently, but significantly, impacted by surrogacy. Their interests must be carefully weighed and balanced in any regulatory approach to surrogacy if it is to remain legal. Given the sensitivity of the situation and the rife potential for conflict among the parties, this is a challenging task.¹⁸⁴

IV. CONCLUSION

In sum, it is important to remember, when discussing international commercial surrogacies, that at the heart of this market are women and children. This recognition requires any discussion of surrogacy to include an in-depth analysis of the issues implicating the various parties to a commercial surrogacy—the commissioning couples, the surrogates, and the resulting children.

In undertaking such an analysis, this Article has considered the rights, interests, and obligations of these parties, as well as the various opportunity costs of international commercial surrogacy. In light of such an analysis, this Article has proposed a more woman- and child-centered framework in which to think about such surrogacies.

182. For the argument that Chinese children's best interests require an increase in domestic placement, see generally KAY ANN JOHNSON, *WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA* (2004). *But see* Poncz, *supra* note 172, at 78 (noting various opinions on this issue).

183. Bartholet, *supra* note 123, at 11.

184. See Yamamoto & Moore, *supra* note 3, at 96 (noting that infertile couples must endure emotional, physical, and financial burdens for the chance of a child, while gestational carriers suffer considerable physical and emotional burdens carrying the fetus and then parting with it after birth).

This framework is particularly important as India begins to legislate on the subject and as the American states continue to grapple with the issues related to surrogacy. Given the international nature of commercial surrogacy, these two commercial surrogacy hotspots are, in fact, interconnected, with the changing market for commercial surrogacy in India implicating the American one. Therefore, it is important to observe the consequences of the many calls in India to regulate the industry, or to end it entirely. Until these calls are heeded, India continues to provide an unparalleled and unregulated commercial market in surrogacy on a global scale.

