

BOOMING BABY BUSINESS: REGULATING COMMERCIAL SURROGACY IN INDIA

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1. INTRODUCTION

“Fertility tourism” describes the act of traveling abroad to take advantage of assisted reproductive technologies.¹ Fertility tourism is often motivated by prohibitions or restrictions on the use of reproductive technologies at home.² In addition to the availability

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¹ See Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 300 (2005).

² See IFFS SURVEILLANCE 07, 87 FERTILITY AND STERILITY 50, eds. Howard Jones et al., April 2007, available at http://www.iffs-reproduction.org/documents/Surveillance_07.pdf (surveying regulations of surrogacy in international jurisdictions) [hereinafter IFFS SURVEILLANCE]; see also Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 214-15 (1996) (describing how strict

of prohibited treatment options, cross-border demand for fertility services may be fueled by lower prices and lax governmental regulations in destination countries.³ In places where “fertility tourism” is booming, the reproductive technology industry is often completely unregulated or policed only by medical societies who implement industry standards through the mechanism of endorsement.⁴ Indeed, some commentators have argued that “fertility tourism,” enabled by unfettered access to reproductive technologies abroad, helps to make local restrictions on reproductive options viable by ensuring the availability of proscribed reproductive options for infertile couples who need and desire them most.⁵

India is currently a top destination for fertility tourism. High quality health care, Western-trained doctors and low medical costs⁶ make India attractive to would-be Western parents.⁷ Another reason for India’s popularity with infertile couples is the relative scarcity of laws regulating reproductive technologies.⁸ In 2005, the Indian Council of Medical Research (“ICMR”)⁹ drafted national

regulation in some countries can lead to increased demand for surrogates in less regulated countries).

³ See generally June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 518–33 (2006) (describing the factors that lead to international “jurisdiction shopping” for fertility services).

⁴ See Carbone & Gottheim *supra* note 3, at 522 (“If the home jurisdiction poses too many obstacles to obtaining the desired good or services, and the customer is forced to look elsewhere to proceed, she is likely to seek the jurisdictions where it is easiest to acquire the services desired.”).

⁵ See Storrow *supra* note 1, at 305 (“[F]ertility tourism acts as a moral safety valve permitting national parliaments to express local sentiments while simultaneously acknowledging the moral autonomy of those who do not agree with those sentiments.”).

⁶ See Mike Celizic, *More and More Couples Finding Surrogates in India*, MSNBC, Feb. 20, 2008, <http://www.msnbc.msn.com/id/23252624/> (listing the attractions of India for fertility tourists).

⁷ In India, couples commissioning surrogacies are not always—or even predominately—Westerners. Clients come from within India, from Taiwan and Japan, as well as from the United States, Europe, and Australia. Only about half the babies born are born to Westerners or Indians living in the West. Abigail Haworth, *Surrogate Mothers: Wombs for Rent*, MARIE CLAIRE, <http://www.marieclaire.com/world/articles/surrogate-mothers-india> (last visited Feb. 23, 2009).

⁸ See Carbone and Gottheim *supra* note 3, at 524 (“Consumers . . . exploit discrepancies in regulation to gain greater access to services.”).

⁹ The Indian Council of Medical Research is India’s highest rule making authority on medical research. ASHISH CHUG & SATARUPA CHAKRAVORTY,

guidelines (“Guidelines”) to regulate fertility services.¹⁰ These Guidelines, however, are not legally binding.¹¹ As a consequence, foreigners are able to take advantage of the liberal policies of private hospitals in India, where doctors are willing to exercise reproductive options that are banned, heavily regulated, or difficult to obtain in many countries around the world.¹² In recent years, this has led to a growing phenomenon which some journalists have dubbed “the ultimate outsourcing”: infertile couples are increasingly turning to India in search of a surrogate to carry their child.¹³

Since the 1970s, when in vitro fertilization (“IVF”) first made it possible for a woman to carry a child genetically unrelated to her, governments have grappled with the complex legal, moral, and ethical issues raised by IVF surrogate motherhood. In the past several decades, a number of countries have placed considerable restrictions on its use¹⁴ and others have banned it outright.¹⁵ In Italy, sterile couples, gay couples, and single adults are prohibited from resorting to any form of surrogate motherhood, egg, or sperm donation under the country’s Medically Assisted Reproduction Law.¹⁶ In Germany, implanting an egg in anyone other than the

SURROGACY ARRANGEMENTS: COMPARATIVE DIMENSIONS AND PROSPECTIVE ANALYSIS OF THE LAW IN INDIA (2000), <http://www.surrogacy.com/legals/article/india.html>.

¹⁰ The draft National Guidelines were prepared by an expert committee consisting of distinguished professionals, scientists, and educationalists from relevant spheres of study. *Id.*

¹¹ *Id.* (“Although these are draft rules, devoid of statutory force, but it shall have the necessary legal validity once approved by parliament.”).

¹² Komal Vijay Singh, *India Inc Wins Over ‘Out’ Patients*, THE TRIB. (India), April 8, 2006, <http://www.tribuneindia.com/2006/20060408/saturday/main1.htm> (describing the obstacles to obtaining fertility treatment in Britain).

¹³ See Celizic *supra* note 6 (“[C]ouples from the United States and elsewhere are increasingly turning to India for the ultimate outsource—surrogate mothers.”); see also Haworth *supra* note 7 (describing India’s “booming trade” in reproductive tourism).

¹⁴ The United Kingdom, Canada, Greece, South Africa, and Israel are among the countries that permit in vitro fertilization (“IVF”) surrogacy subject to regulation. IFFS SURVEILLANCE *supra* note 2, at 51.

¹⁵ Austria, Denmark, France, Germany, Italy, Norway, Spain, Sweden, Switzerland, Taiwan, and Turkey all prohibit at least some types of IVF surrogacy. *Id.*

¹⁶ See Sophie Arie, *Fertility’s Closed Italian Frontier*, CHRISTIAN SCI. MONITOR, Mar. 10, 2004, available at <http://www.csmonitor.com/2004/0310/p01s04-woeu.html> (noting that the law limits treatments to “stable” couples who are married or live together).

woman undergoing IVF is punishable by a fine or a jail term.¹⁷ In Sweden, in vitro fertilization is allowed only between partners.¹⁸ Restrictions like these on fertility practices have generated growth in the fertility tourism industry in India, as well as places in Eastern Europe and Asia, as individuals look beyond their local clinics for sought-after treatments.¹⁹ But even in countries like the United States and Great Britain, where regulations on reproductive services are less strict, the high price of these services forces many people to pursue less costly options abroad.²⁰

There are no firm statistics on how many surrogacies have been arranged in India.²¹ By some estimates, the surrogacy industry is now a \$445 million dollar a year business;²² surrogacy cases are said to have more than doubled in the past two years.²³ Demand is expected to grow with increased awareness, as major media outlets like *New York Times* and *Oprah* spotlight towns such as Gujarat, where more than fifty surrogates are pregnant with children destined for international locales.²⁴ Given the recent flurry of activity in an area of medicine which has traditionally been fraught with controversy, it is appropriate to ask whether the current Guidelines in India provide a sufficient response to the complicated ethical and legal questions that these arrangements present.

In recent months, the ICMR was spurred to action by the case of "Baby Manhji," a highly publicized custody dispute involving a Japanese father and a child conceived by an Indian surrogate

¹⁷ Krim *supra* note 2, at 215.

¹⁸ *Id.* at 216.

¹⁹ See Storrow *supra* note 1, at 307 (discussing how the restrictive Italian reproductive service laws have "generated growth in the fertility tourism industry in Eastern Europe and elsewhere in the world").

²⁰ See Singh, *supra* note 12 (citing cost as a motivating factor for Britains seeking an Indian surrogate).

²¹ Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, available at <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

²² Haworth *supra* note 7. Profits could reach as much as \$6 billion in coming years. Priti Sehgal, *Reproductive Tourism Soars in India: Adoption and Surrogacy Laws Have Yet to Catch Up*, THE WIP, Oct. 7, 2008, http://www.thewip.net/contributors/2008/10/reproductive_tourism_soars_in.html.

²³ See Sehgal *supra* note 22 (noting a 150 percent increase in surrogacy cases in India).

²⁴ Gentleman, *supra* note 21. See also Sehgal, *supra* note 22 (explaining that the "city of Anand in Gujarat has emerged as a hub for surrogate mothers").

mother.²⁵ The biological father faced legal complications when he divorced the child's intended mother, but was not permitted, as a single man, to adopt the child under Indian law.²⁶ The case drew attention worldwide and resulted in a ruling by the Supreme Court of India upholding the commercial surrogacy agreement.²⁷ In the aftermath of this case, the ICRM concluded that greater governmental oversight was in order. Accordingly, in addition to the Guidelines already in place, the ICRM prepared the Assisted Reproductive Technology (Regulation) Bill 2008 ("ART Bill").²⁸ This bill was submitted for public review in late 2008 and is expected to be tabled at the next parliamentary sitting. If passed, it will make India the first nation to follow the example of Israel in erecting a framework of national legislation governing the practice of surrogacy.²⁹

India's minimal regulation of surrogacy agreements raises a broad host of concerns from both a legal and ethical standpoint. These concerns cluster around the three key participants in the transaction: the commissioning (or intended) parents, the surrogate (or gestational) mother, and the child. From the perspective of the intended parents, enforceability of the surrogacy contract is the paramount consideration.³⁰ In the United States, legal controversies arising from surrogacies usually focus on the question of whether a woman's pre-birth waiver of parental rights is adequate to establish parental rights in the intended parents.³¹ The outcome of the Baby Manhji case suggests a greater degree of

²⁵ Harmeet Shah Singh, *Japanese Girl Born to Indian Surrogate Arrives Home*, CNN, Nov. 2, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/11/02/india.baby/index.html>.

²⁶ Posting of Robert to Reproductive Alternatives Blog, http://reproductive-alternatives.com/reproductive_alternatives_blog/?y=2008&m=10 (Oct. 8, 2008, 08:39 EST).

²⁷ *Id.*; Singh, *supra* note 25.

²⁸ Sehgal, *supra* note 22.

²⁹ See Krim *supra* note 2, at 219 (asserting that Israel was the first country, in 1996, to legalize surrogacy and pass national legislation regulating surrogacy).

³⁰ See generally Vanessa S. Browne-Barbour, *Bartering for Babies: Are Pre-conception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429 (2004) (analyzing the various approaches courts have take to custody disputes arising out of surrogacy arrangements).

³¹ See *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (holding pre-birth waiver inadequate to establish legal parenthood in intended parents). *But see* *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (looking to the intention of the parties to establish legal parenthood).

enforceability may be available in India, but the question of whether parental rights will prevail against the objections of a surrogate mother has yet to be tested. Other issues for commissioning parents that need legislative clarification include rights to immigrate with the child and financial obligations in the event of maternal injury or death.

From the perspective of the unborn child, the most pressing matter is the situation into which the infant will be born. Another potential problem is the fate of the child if he or she, for reasons of disability or changed circumstances such as divorce, is desired by neither the surrogate mother nor the intended parents.

Finally, surrogacy agreements, especially minimally regulated surrogacy agreements, pose a variety of dangers for the surrogate herself. Among those dangers are exploitation by third parties, lack of fully-informed consent, and threats to the mother's mental and physical health during and after the pregnancy.³² Of course, issues pertaining to each of these parties can overlap. For example, some jurisdictions in the United States settle custody disputes between the surrogate and the intended parent by determining what custodial arrangement is in the "best interest" of the child.³³

Surrogacy presents a myriad of difficult questions beyond the scope of this Comment. Rather than attempt to address the protections afforded to all three participants in the surrogacy transaction under the current Guidelines and the ART Bill in India, this Comment will focus on the rights and protections granted to women who consent to provide surrogacy services. Already there is evidence of a growing concern among doctors in India for the welfare of surrogates under this system.³⁴ This Comment will ask what actions courts and legislature can take to foster the appropriate level of protection for women working in the surrogacy industry. Section 2 will describe how surrogacy is currently practiced in India. Section 3 will look at the major scholarly and legal controversies regarding the treatment of gestational surrogacy as a commercial transaction. Section 4 will

³² See Sam Dolnick, *World Outsourcing Pregnancies to India*, ABC NEWS, Dec. 31, 2007, available at <http://wtopnews.com/?sid=1318237&nid=105> (citing higher maternal death rate as one concern for surrogates in India.).

³³ See generally *In re Baby M*, 537 A.2d at 1256 ("[T]he child's best interests determine custody.").

³⁴ See Gentleman, *supra* note 21, at A9 ("Even some of those involved in the business of organizing surrogates want greater regulation.").

evaluate the ICMR Guidelines and the ART Bill in light of these controversies. It will ask, first, whether commercial surrogacy arrangements should be enforceable and, second, what additional legal limits would help promote the interests of surrogates.

This Comment will conclude that India's decision to permit commercial surrogacy is a defensible one. It will argue, however, for application of a labor rights framework to help reconcile the competing values of contractual autonomy and protection from exploitation. On this basis, it will advance recommendations for modifying the current proposed regulations to strengthen the bargaining power of surrogates and help prevent the abuse of women working in the surrogacy industry. These recommendations include recognizing minimum standards of care and compensation for surrogates, limiting contractual obligations enforceable against the surrogate, and requiring that neutral intermediaries facilitate the surrogacy arrangement.

2. SURROGACY IN INDIA

2.1. *Commercial Versus Non-Commercial Arrangements*

A standard surrogacy arrangement involves a contract for the surrogate to be artificially inseminated, carry a fetus to term, and relinquish her parental rights over the child once born. Literature on surrogacy identifies several variations on this arrangement, each of which poses unique problems for law and policymakers. One important factor is payment. In many states,³⁵ and in a number of countries around the world,³⁶ surrogacy is legally recognized only if it is noncommercial or "altruistic." In noncommercial arrangements, the commissioning couple may pay expenses incurred by the surrogate as a result of her pregnancy, but does not provide any additional consideration for the gestational woman's services as a surrogate.³⁷ Often, the

³⁵ Arkansas, Kentucky, Illinois, Nevada, Nebraska, Maryland, Louisiana, Virginia, and Washington are among the states that permit only altruistic surrogacy. See Browne-Barbour, *supra* note 30, at 449-56 (discussing various states whose legislature expressly recognize surrogate contracts).

³⁶ Greece, West Australia, and South Australia are all examples of jurisdictions that allow altruistic but not paid agreements. IFFS SURVEILLANCE, *supra* note 2, at 50.

³⁷ See Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Contracts*, 51 *DRAKE L. REV.* 605, 608 (2003) (elucidating the difference between commercial and altruistic surrogacies).

gestational woman in these arrangements is a family member or close friend of one or both of the commissioners. Given the commitment of time and physical sacrifices involved in childbirth, surrogacy is understandably rare where it is restricted to noncommercial arrangements.

In commercial arrangements, by contrast, payment is made to the gestational women for her services, and may also be made to a third party broker or agent who brought the commissioners and gestational women together.³⁸ These arrangements are more controversial. Critics draw comparisons between commercial surrogacy and other stigmatized market transactions that involve the exchange of money for use of another person's body, like prostitution,³⁹ "baby-selling,"⁴⁰ and organ sales.⁴¹ Commercial surrogacy is often banned on the grounds that it reflects an improper motivation to gestate a child, introduces commerce into matters of sexual behavior, and commodifies mothers and children.⁴²

2.2. Traditional Versus Gestational Surrogacy

Genetic contribution of the surrogate is a second relevant factor in distinguishing between different types of surrogacy arrangements. In traditional or "partial" surrogacy, the surrogate supplies the uterus as well as her egg; typically, the commissioning father (often the husband of the intended mother⁴³) provides the sperm.⁴⁴ As a result, the child produced is genetically related to the commissioning father and the gestational mother. This kind of surrogacy does not require biotechnology and records of its

³⁸ *Id.*

³⁹ Lisa L. Behm, *Legal, Moral, and International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 578 (1999).

⁴⁰ Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 415 (2002).

⁴¹ Jay R. Combs, *Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico*, 29 N.M. L. REV. 407, 408 (1999).

⁴² See e.g., *In re Baby M*, 537 A.2d 1227, 1249 ("There are, in a civilized society, some things that money cannot buy.").

⁴³ IFFS SURVEILLANCE, *supra* note 2, at 50.

⁴⁴ See Behm, *supra* note 39, at 557-58.

application can be found as far back as the Old Testament.⁴⁵ With the advent of IVF, “full” or gestational surrogacy is now also an option for infertile couples. Under these arrangements, the surrogate supplies the uterus, but the intended mother supplies the egg—either her own or that of an anonymous donor.⁴⁶ Under the Uniform Parentage Act, a prospective gestational mother, a donor or the donors, and the intended parents may enter a contract stipulating that: (1) “the prospective gestational mother agrees to pregnancy by means of assisted reproduction;”⁴⁷ (2) “the prospective gestational mother . . . and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction;”⁴⁸ and (3) “the intended parents become the parents of the child.”⁴⁹ Women who have functioning ovaries but no uterus, such as women who have undergone a hysterectomy and women born without a uterus, frequently use this method.

Gestational surrogacy may reduce the risk of custody disputes between surrogate mothers and commissioning parents because the surrogate mother is not genetically related to the child she bears. Nevertheless, these disputes have been known to occur. They can become especially complicated if a third-party egg donor is involved, effectively fragmenting the maternal role into three parts—genetic, gestational, and social—none of whom have an obviously greater claim to the child. In one case, the sperm of a Japanese man was inseminated into seventeen eggs donated by a twenty-one-year-old American student. Six of the eggs were then implanted in the womb of a thirty-year-old American woman.⁵⁰ “This arrangement resulted in ‘the first surrogate delivery involving three ‘mothers’ on both sides of the Pacific Ocean”⁵¹ In a somewhat simpler case, *Johnson v. Calvert*, a gestational surrogate attempted to retain custody of the child after her relations with the genetic parents deteriorated.⁵² The California court in this case adopted a test that looks at the intent of the

⁴⁵ See *Genesis* 16:1-2 (describing how Sarah’s maid, Hagar, acted as a surrogate for Sarah and Abraham).

⁴⁶ Behm, *supra* note 39, at 558.

⁴⁷ Unif. Parentage Act § 801(a)(1) (amended 2002).

⁴⁸ *Id.* § 801(a)(2).

⁴⁹ *Id.* § 801(a)(3).

⁵⁰ Krim, *supra* note 2, at 220.

⁵¹ *Id.*

⁵² *Johnson v. Calvert*, 851 P.2d 776, 778.

parties to resolve disputes between the genetic and gestational mother,⁵³ but courts in the United States take many different approaches to similar custody battles.⁵⁴

2.3. *India's National Guidelines and Proposed Regulations*

Most Indian surrogacy arrangements are commercial and gestational. The ICRM Guidelines, as well as the new ART Bill, do not permit artificial reproduction technology clinics to participate in partial surrogacy arrangements.⁵⁵ Each states that an egg donor cannot act as a surrogate mother for the couple to whom the egg is being donated.⁵⁶ Furthermore, even though relatives and persons known to the commissioning couple may act as surrogates,⁵⁷ the Guidelines and the Act prohibit the use of eggs donated by or purchased from a relative or a known friend of either the wife or the husband.⁵⁸ This might reflect a wish to avoid eventual friction between the social and genetic mother, but critics complain that it also prevents many noncommercial, "altruistic" arrangements from forming, charging that the true purpose of the provision is to generate income for fertility clinics and donor banks.⁵⁹

Arguably, the ban on partial surrogacy facilitates the process of establishing parental rights over the child born through surrogacy because it guarantees that at least one member among the commissioning participants will bear a genetic relationship to the child and that the surrogate mother will not have a rivaling claim

⁵³ See *id.* at 782 ("[S]he 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.").

⁵⁴ Larkey, *supra* note 37, at 621–628 (identifying four separate state tests for adjudicating legal maternity—intent-based, genetic contribution, "best interest of the child," and the gestational mother preference).

⁵⁵ The same rule applies under Israel's legislative scheme. See Krim, *supra* note 2, at 219; Assisted Reproductive Technology (Regulation) Bill ch. VII(34)(13) [hereinafter ART Bill], available at <http://subalternmedia.com/wp-content/uploads/2008/12/draft-art-regulation-bill-rules-2008-2.pdf>.

⁵⁶ MINISTRY OF HEALTH AND FAMILY WELFARE, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION, AND REGULATION OF ART CLINICS IN INDIA § 3.5.4 (2005) [hereinafter Guidelines].

⁵⁷ *Id.* § 3.10.6.

⁵⁸ *Id.* § 3.5.14; ART Bill ch. IV(20)(12). A relative or known friend, however, may act as a surrogate. ART Bill ch. VII(34)(18).

⁵⁹ Rita Dutta, *ICMR's Proposed Prohibition Creates Furore*, EXPRESS HEALTH CARE MGMT., <http://www.expresshealthcaremgmt.com/20020715/cover1.shtml> (last visited Mar. 27, 2009).

to parentage—on genetic grounds at least.⁶⁰ This helps to circumvent one of the stumbling blocks that has led several countries⁶¹ and many states in the United States to strike down surrogacy contracts as against public policy.⁶² Where the birth mother and the genetic mother of the child are the same, courts and legislatures have had a harder time accepting the distinction between surrogacy arrangements and “baby-brokering,” an internationally condemned practice.⁶³ But where the genetic mother is also the intended mother, or the genetic mother is an egg donor, courts have been more willing to view the surrogacy agreement as a contract for surrogacy “services” and not an effort to commission or purchase a child.⁶⁴

The restriction to gestational surrogacy helps to clarify the role of the surrogate, but several ambiguities do still exist in the present

⁶⁰ See Larkey *supra* note 37, at 614 (“In the case of a gestational arrangement, the surrogate has no genetic link to the child involved, and therefore arguably has no interest or right to ‘sell’ the child that is birthed.”).

⁶¹ For example, French Supreme Court of Appeals (Cour de Cassation) found commercial surrogacy to be illegal because it violates adoption statutes. See Angie Godwin McEwen, *So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT’L L. 271, 282 (1999). In Europe alone, Denmark, Norway, Switzerland, Austria, Germany, Italy, Spain, and Turkey all prohibit commercial IVF surrogacy agreements. See IFFS SURVEILLANCE, *supra* note 2, at 51.

⁶² See *In re Baby M*, 537 A.2d 1227 (1998) (invalidating surrogacy agreement as against public policy). See also *In re Adoption of Paul*, 146 Misc. 2d 379, 383 (N.Y. Fam. Ct. 1990) (“[R]emuneration to a mother, in exchange for her surrender of the child for adoption violates New York’s well-established policy against trafficking in children.”). Some states expressly invalidate commercial surrogacy under statute. See e.g., MICH. COMP. LAWS § 722.855 (1988) (“A surrogate parentage contract is void and unenforceable as contrary to public policy.”).

⁶³ See Hague Conference on Private International Law: Final Act of the 17th Session, May 29, 1993, *Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, art. 32, para. 1–3, 32 I.L.M. 1134, 1143 (prohibiting “improper financial gain” and “unreasonably high remuneration” in international adoptions).

⁶⁴ See *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993) (characterizing surrogacy as a service contract). See also *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 65 (1994) (“[W]hen a child is delivered by a gestational surrogate who has been impregnated through the process of *in vitro* fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child. If [they] have not relinquished or waived their rights to assume the legal status of natural parents, they shall be considered the natural and legal parents of that child.”); Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/5 (2005) (allowing intended parents to obtain a pre-birth determination of the parentage of a child with no right of the gestational surrogate to change her mind after the pregnancy begins).

Guidelines regarding the transfer of parental rights, some of which have been rectified under the proposed ART Bill. The Guidelines contemplate legal adoption by the child's biological parents, and they also allow the intended parents to establish through genetic fingerprinting that the child is theirs.⁶⁵ It is unclear, however, how this provision on adoption relates to a separate provision stating that when a surrogate mother carries a child biologically unrelated to her, the birth certificate "shall be in the name of the genetic parents."⁶⁶ Moreover, the Guidelines require that surrogate mothers relinquish in writing all parental rights concerning their offspring,⁶⁷ but no time frame is given for when this must occur and no discussion is had of whether the gestational mother can refuse to relinquish the child. The Guidelines seem to call for the surrogate to surrender her parental rights in a contract with the intended parents prior to undertaking the medical side of the surrogacy arrangement—as is the usual practice in ART clinics—followed by the establishment of parental rights in the intended parents before the birth certificate is completed.

The ART Bill clarifies some of these ambiguities by making explicit that the intended parents and surrogate mother "shall enter into a surrogacy agreement which shall be legally enforceable;"⁶⁸ that "a surrogate mother shall relinquish all parental rights over the child;"⁶⁹ that the birth certificate will bear the names of the intended parents;⁷⁰ and that the intended parents "shall be legally bound to accept the custody of the child/children irrespective of any abnormality the child/children may have, and the refusal to do so shall constitute an offense."⁷¹ The Bill establishes that the child born through surrogacy is the "legitimate child" of the intended parents, whether married or separated.⁷² It also requires intended parents to provide proof that they will be able to immigrate with the child, once born, and to arrange for a

⁶⁵ Guidelines § 3.10.1.

⁶⁶ *Id.* § 3.5.4.

⁶⁷ *Id.* § 3.5.5.

⁶⁸ ART Bill ch. VII(34)(1).

⁶⁹ *Id.* ch. VII(34)(4).

⁷⁰ *Id.* ch. VII(34)(10).

⁷¹ *Id.* ch. VII(34)(11).

⁷² *Id.* ch. VII(34)(1)–(5).

local guardian to be responsible for the surrogate during the course of her pregnancy.⁷³

The ICMR Guidelines and the ART Bill contemplate financial compensation for surrogate mothers. The Guidelines state that the “surrogate mother would be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother.”⁷⁴ Elsewhere, the Guidelines stipulate that payments to surrogate mothers “should cover all genuine expenses associated with the pregnancy.”⁷⁵ This includes the period of pregnancy and post-natal care relating to the pregnancy.⁷⁶ Likewise, the ART Bill provides:

All expenses, including those related to insurance, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.⁷⁷

It adds, furthermore, that “the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.”⁷⁸

Under both the Guidelines and the ART Bill, law firms and donor banks may charge the couple for providing an egg or a surrogate mother.⁷⁹ The Guidelines stipulate that financial “negotiations between a couple and the surrogate mother must be conducted independently between them.”⁸⁰ Documentary evidence of this arrangement must be available,⁸¹ but neither the ART center nor the law firm or donor bank who found the gestational mother can be involved in the monetary agreement.⁸²

⁷³ *Id.* ch. VII(34)(19).

⁷⁴ Guidelines § 3.5.4.

⁷⁵ *Id.* § 3.10.3.

⁷⁶ *Id.* § 3.5.4.

⁷⁷ ART Bill ch. VII(34)(2).

⁷⁸ *Id.* ch. VII 34(3).

⁷⁹ Guidelines § 3.9.2; ART Bill ch. V(26)(6).

⁸⁰ Guidelines § 3.9.2.

⁸¹ *Id.* § 3.10.3.

⁸² *Id.*

Indeed, advertisements regarding surrogacy by the ART clinic are prohibited under both sets of regulations.⁸³ The responsibility for finding a surrogate mother ultimately rests with the couple.⁸⁴

Finally, the ICMR Guidelines and the ART Bill set criteria for the selection of surrogate mothers as well as those who will be granted access to their services. Both require that a prospective surrogate mother be under the age of forty-five and that the ART clinic ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full-term pregnancy.⁸⁵ She must also submit to HIV testing and certify that she will not engage in behavior that puts her at risk of contracting the virus during her pregnancy.⁸⁶ The rules prohibit the performance of any ART procedure without spousal consent and limit the number of times that a woman may act as a surrogate to three.⁸⁷ Doctors at Indian ART clinics report imposing a further requirement on the women selected to serve as surrogates: they must have children of their own.⁸⁸ This is viewed as helping to reduce the likelihood that the gestational mother will bond with the child she is carrying.

The Guidelines and ART Bill also place some limits on those who can receive surrogacy services. Surrogacy "should normally be considered only for patients for whom it would be physically or medically impossible/undesirable to carry a baby to term."⁸⁹ The ICMR eliminated provisions from the Guidelines that would make these services available to single women,⁹⁰ but the right of single individuals to avail themselves of ART is restored under the pending Bill.⁹¹ Notably, there is no discussion of any further

⁸³ Guidelines § 3.10.4; ART Bill ch. VII(34)(7).

⁸⁴ ART Bill ch. VII(34)(7).

⁸⁵ Guidelines § 3.10.5. ART Bill ch. VII(34)(5)

⁸⁶ See Guidelines § 3.10.7 (noting that the surrogate "must provide a written certificate that she has not had a drug intravenously administered into her through a shared syringe, has not undergone blood transfusion, [and that] she and her husband . . . have had no extramarital relationships in the last six months.").

⁸⁷ *Id.* § 3.10.8; ART Bill ch. VII(34)(5), 34(16)

⁸⁸ See Celizic, *supra* note 6 (noting that this requirement is meant to ensure that surrogate mothers are fully aware "of what it takes to go through a pregnancy.").

⁸⁹ Guidelines § 3.10.2. See also ART Bill ch. IV(20)(10) ("No assisted reproductive technology clinic shall consider conception by surrogacy for patients for whom it would normally be possible to carry a baby to term.").

⁹⁰ Guidelines § 3.16.4.

⁹¹ ART Bill ch. VII(32)(1).

inquiry into the suitability of the commissioning couple to serve as parents, a matter that has prompted criticism of surrogacy arrangements in general.⁹²

3. THE DANGERS OF SURROGACY AGREEMENTS

The current ICMR Guidelines and the proposed ART Bill reflect an effort to protect potential surrogate mothers in India through limited regulation and oversight. In order to evaluate whether these measures are sufficient, they should be assessed against strong critiques of the practice of surrogacy advanced by courts, legislatures, and legal scholars. The remaining portions of this Comment will address whether these regulations go far enough to mitigate the potentially exploitative effects of surrogacy arrangements. It will begin by asking in what ways these arrangements can be potentially exploitative. Can commercial surrogacy arrangements exist that are not exploitative? If commercial surrogacy is allowed to persist in India, what policies should guide the parliament in taking steps to further protect the women who work in this industry? Finally, what specific steps should be taken to enhance the protections offered under the ICMR Guidelines?

3.1. *Economic Exploitation*

The complex moral and ethical controversies surrounding the gestational mother's role in commercial surrogacy arrangements arise from uncertainty over how to characterize her involvement in the transaction. Should we perceive surrogate mothers as active economic agents freely pursuing their own ends or as victims whose lack of free choice is exploited by wealthier commissioning parents?⁹³ Opponents of surrogacy liken these arrangements to prostitution, paid adoptions, or organ sales. They argue that by permitting infertile couples to enlist surrogates for a fee, governments accede to the commodification of women's bodies.⁹⁴

⁹² See *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988) (criticizing the contract's apparent disregard for the fitness of the custodial parents to care for a child).

⁹³ See generally, Norma Juliet Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspective*, 59 S. CAL. L. REV. 1043 (1986) (providing an overview of the various feminist perspectives on the issue of reproductive technology).

⁹⁴ See, e.g., Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT. L. REV. 303, 308 (1994) ("Surrogacy is likely to

Courts and legal scholars who reject commercial surrogacy as contrary to public policy often express a concern that it will reinforce a perception of women as mere "baby-making machines" and promote a view of children as marketable "goods" or products.

Concerns about economic exploitation have motivated some state courts in the United States to restrict or prohibit commercial surrogacy.⁹⁵ The questionable practice of exchanging money for "gestational services" is further complicated in the international context by the fact that surrogate mothers in non-Western countries usually earn less than their Western counterparts for the same services. In the United States, the total cost of surrogacy arrangements can reach \$80,000,⁹⁶ with about \$15,000 going to the surrogate mother and another \$30,000 to the surrogacy agency.⁹⁷ But the total cost for a paid surrogate and medical expenses in India is only around \$10,000 to \$30,000.⁹⁸ Although this is a relatively small amount of money, in a country where the average annual income is \$500, the \$3,000 to \$7,000 compensation earned by gestational mothers can represent a very significant sum.⁹⁹ Most individuals who participate as surrogates in these agreements are economically-deprived women who will admit to being attracted by the opportunity to earn as much as fifteen years of their income in nine months (for this reason, advertisements seeking surrogates are often directed at poorer districts).¹⁰⁰ Critics contend that the lower figures paid to women abroad reflects their unequal bargaining positions, maintaining that these less-costly arrangements merely exploit the diminished negotiating power of

increase the commodification of all women—that is, the extent to which we view all women as commodities with a market price linked to men's valuation of them.").

⁹⁵ See *Doe v. Att'y Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992) ("[T]here is a danger of women being exploited by these surrogacy-for-profit arrangements, and the protection of women from that danger warrants government intrusion.").

⁹⁶ See Celizic, *supra* note 6.

⁹⁷ Anuj Chopra, *Childless Couples Look to India for Surrogate Mothers*, CHRISTIAN SCI. MONITOR, Apr. 03, 2006, available at <http://www.csmonitor.com/2006/0403/p01s04-wosc.html>.

⁹⁸ Judith Warren, *Outsourced Wombs*, NY TIMES, Jan. 3 2008, <http://warner.blogs.nytimes.com/2008/01/03/outsourced-wombs/#comment-17829>.

⁹⁹ *Id.*

¹⁰⁰ See Deepak Mahaan, *Outsourcing Wombs in India*, CNSNEWS, Nov. 8, 2007, <http://www.cnsnews.com/public/Content/Article.aspx?rsrcid=18743>.

the potential surrogates.¹⁰¹ Without regulation, international arrangements could become even more predatory, particularly with competition among women driving prices even lower.¹⁰²

Charges of exploitation of poor women by rich foreigners suggest that the problem could be redressed if surrogate mothers were to receive sufficient compensation separate from living and medical expenses.¹⁰³ But the issue of exploitation does not lend itself to such a simple solution. Some opponents of commercial surrogacy agreements argue that large sums are themselves exploitative; they fear that women will enter these agreements out of economic necessity, without fully understanding the psychological and physical burdens that they stand to endure in the process.¹⁰⁴ The concern is that privileged couples may be taking advantage of the fact that impoverished women, who face a lack of real alternatives, are unable to refuse the offer of such high compensation.¹⁰⁵ Socioeconomic conditions may force women to enter disadvantageous agreements, rendering their decision to participate less than truly voluntary. A related concern is the possibility that women will be pressured by their relatives or husbands to be a surrogate for the sake of the large pay-out.¹⁰⁶

A final concern about the exploitative impact of these arrangements is that they promote inequality. Some U.S. state courts, in rejecting surrogacy arrangements, have raised the specter

¹⁰¹ Nadin Taub, *Surrogacy: Sorting Through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285, 288 (1990) (discussing the imbalance in bargaining power between the surrogate and the potential parents).

¹⁰² See Iris Leibowitz-Dori, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 335–36 (1997) (evaluating the potential for abuse and exploitation of women in the international surrogacy trade).

¹⁰³ See CHUG & CHAKRAVORTY, *supra* note 9 (“[T]here should be no aversion to the concept of payment made to the surrogate for her services.”).

¹⁰⁴ See Becker *supra* note 94, at 309 (“Women without much money will be tempted, because they have so few other options, to sign contracts that might ultimately be extremely painful for them to go through with”).

¹⁰⁵ See *In re Adoption of Paul*, 146 Misc. 2d 379, 385 (N.Y. Fam. Ct. 1990) (stating that the inducement of substantial compensation made any choice to serve as a surrogate involuntary); see also Angie Godwin McEwan, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 293 (1999) (“Opponents of commercial gestational surrogacy argue that the fee paid to [a] surrogate ‘constitutes an undue inducement. . . .’”).

¹⁰⁶ Haworth, *supra* note 7, at 5.

Surrogate Mothers: Wombs for Rent, MARIE CLAIRE, <http://www.marieclaire.com/world/articles/surrogate-mothers-india> (last visited Feb. 23, 2009).

of a *Brave New World* scenario unfolding along class lines, wherein poor, fertile women bear children for wealthy, infertile or working women.¹⁰⁷ It is improbable that the women who typically chose to serve as surrogates would be able to afford a surrogate themselves. Only couples who enjoy a higher economic status are likely to have access to this option. Thus, these arrangements tend to yield an inequitable distribution of medical resources.¹⁰⁸ Some commentators suggest that gestational surrogacy arrangements ultimately could result in "the exploitation of lower income women by turning them into 'human breeders' for fertile women who do not wish to sacrifice their professional careers or endure the discomfort and inconvenience of pregnancy, but still want children who are genetically their own."¹⁰⁹

Surrogacy in a global market adds another dimension to this grim picture by introducing the prospect of unacceptable racial distinctions between the commissioning and the commissioned parties. International surrogacy is especially problematic when performed at "bargain prices" for wealthy foreigners because it promotes the racist and imperialist view that it is acceptable to exploit and dehumanize women of different origins, as well as the perception that the resources and services of less developed nations exist for the benefit of more developed nations. Opponents of fertility tourism warn that it may "create and perpetuate the notion that one role of poor and minority women is to serve as child bearers for more wealthy white commissioners."¹¹⁰

¹⁰⁷ See *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988) ("[W]e doubt that infertile couples in the low-income bracket will find upper income surrogates.").

¹⁰⁸ Indian surrogates are often given access to the best nurses, doctors, and nutritionists. Thus, they benefit temporarily from discrepancies in health care. However, the fact, that India's infant mortality rate is sixty-nine times higher than that of the United States suggests that there may be other, more profitable uses for the medical resources diverted by surrogacy arrangements. See Celizic, *supra* note 6 (listing the attractions of India for fertility tourists).

¹⁰⁹ Yvonne M. Warlen, *The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law*, 62 UMKC L. Rev. 583, 583-84 (1994).

¹¹⁰ Browne-Barbour, *supra* note 29, at 476; Wikler, *supra* note 93, at 1053 (restating G. Corea's vision of a "breeding brothel" approach to reproduction, in which white women would be selected as egg donors and turned into machines for producing embryos and women of color would be used as breeders).

3.2. *Informed Consent, Health Risks, and Market Manipulation*

Another objection raised by opponents of surrogacy agreements holds that a surrogate mother cannot voluntarily relinquish her parental rights prior to the child's birth because she cannot predict in advance how she will feel about giving up the potential child at the end of her pregnancy.¹¹¹ Surrogacy agreements involve a precommitment to transfer parental rights to the intending parents, but this precommitment risks:

- (a) that surrogates will initially fail to predict their level of attachment to the unborn child and will discount the risk that they will not want to surrender the child after birth and
- (b) that nobody (including the surrogate) will be able to foresee how much the surrogate will value the child once she has gestated the child for nine months.¹¹²

Contracts for the sale of ordinary goods and services are founded on the ability of the parties to the contract to trade away property rights along with the right to change their minds about the exchange. But courts and commentators argue that the significant intervening factors of pregnancy and the development of a mother-child bond introduce questions about whether a woman can knowingly and voluntarily alienate her future rights to an unborn child, a child towards whom she cannot accurately predict her future feelings.¹¹³ Some surrogacy proponents object to the suggestion that women cannot make a rational and informed choice about how to use their bodies, finding in it a paternalistic excuse to limit women's economic autonomy.¹¹⁴ But others counter that limits on maternal-surrender clauses, while they certainly restrict a woman's freedom to contract in this area, may "promote [the surrogate's] future autonomy more profoundly, avoiding

¹¹¹ See generally Molly J. Walker Wilson, *Pre-Commitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision-Making Capacity*, 31 J. LEGIS 329 (2005).

¹¹² *Id.* at 331.

¹¹³ *Id.*; see also, *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (stating that the surrogate "will not be able to predict what her feelings will be towards the child she bears.").

¹¹⁴ See *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993) (observing that "[t]he argument that a woman cannot knowingly and intelligently agree" to serve as a surrogate "carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law").

impairment of the sense of self-identity that could result from being compelled to honor a deeply regretted promise made by a 'former self.'"¹¹⁵

The problem of how informed potential surrogates are about the risks associated with these arrangements is compounded by the economic and educational disparities that often exist between parties to these agreements. Poorer women "may be more vulnerable and potentially subject to greater risk of being manipulated by commissioners and brokers."¹¹⁶ Because the controlling party "has the power to control the flow of information and the presentation of options," courts and legal scholars worry that commissioning parents and their agents might attempt to mislead or unduly influence a potential surrogate.¹¹⁷ In the celebrated New Jersey case, *In re Baby M*, which found surrogacy agreements unenforceable in New Jersey, the court offered among its reasons for striking down these agreements that fact that the surrogate mother in question had received little independent legal or psychological counseling, at best forcing her to make uninformed decision and at worst making her susceptible to manipulation.¹¹⁸ The intending parents, eager for a child, and the ART clinic, eager for a commission, may be prone to underestimate the risks of the procedure to the gestational woman. These risks include physical harm from pregnancy, psychological harm from surrender of the child, exposure to sexually transmitted diseases, and complications associated with various ART methods.¹¹⁹

In addition to these health issues, opponents of commercial surrogacy agreements argue that the ability of the surrogate to set the terms of the agreement is jeopardized by a negotiation situation controlled by the intending parents.¹²⁰ Relinquishment of the child is usually not the only condition set out in a surrogacy contract. The parties must agree on compensation for carrying the child, compensation for expenses, and medical procedures and tests the surrogate will undergo. Some agreements even dictate the surrogate's lifestyle and health habits or designate which

¹¹⁵ Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811, 1828 (1988).

¹¹⁶ Browne-Barbour, *supra* note 30, at 479.

¹¹⁷ Walker Wilson, *supra* note 111, at 341.

¹¹⁸ *In re Baby M*, 537 A.2d at 1248.

¹¹⁹ Brown-Barbour, *supra* note 30, at 480.

¹²⁰ Walker Wilson, *supra* note 111, at 341.

parties, if any, have discretion to elect abortion of a fetus. In a context created and dominated by the financial resources of the commissioning parents, a potential surrogate who is without independent legal representation could be induced to accept a highly disadvantageous bargain.

4. EVALUATING THE ICMR GUIDELINES AND THE ART BILL

4.1. *Enforceability of Commercial Surrogacy Contracts*

The first question that these considerations prompt is whether commercial surrogacy contracts should be recognized at all. As discussed in the introduction to the Comment, a number of countries and states in the United States have restricted surrogacy to altruistic arrangements, citing public policy grounds.¹²¹ The ICMR Guidelines and the ART Bill clearly contemplate that courts will enforce commercial surrogacy contracts in India. The first hurdle that a party seeking to enforce a surrogacy agreement would need to surmount is whether the contract is opposed to public policy under Section 23 of the Indian Contract Act.¹²²

The two most common “public policies” that surrogacy contracts offend are prohibitions against paid adoption and prostitution. Although these arguments have gained hold in some jurisdictions, they are not so convincing as to compel the result that commercial surrogacy should be banned in India. Gestational surrogacy in particular, where the surrogate is providing her gestational services but not her genetic material, has struck at least some courts and legislatures as distinct from “baby-selling.”¹²³ The gestational surrogate does not accept compensation in exchange for consent to an adoption because she does not possess parental

¹²¹ See *supra* note 32 and accompanying text.

¹²² The Indian Contract Act No. 9 of 1872; INDIA CODE (1872). Section 23 reads:

The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

¹²³ See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (finding the egg donor to be the legal parent on the basis of intent); *Johnson*, 851 P.2d at 776 (holding the genetic parent to be the legal parent).

rights over the child by virtue of gestation alone.¹²⁴ In these cases, it is easiest to see that surrogates are compensated for their services, including becoming pregnant, carrying the child to term, and giving birth, as well as their promise to engage in healthful behavior and their pain and suffering.¹²⁵ Those who object to this service-oriented characterization of surrogacy often do so by way of comparison to prostitution,¹²⁶ but this analogy is equally shaky. Prostitution, like surrogacy, does compensate a woman for the use of her body. However, the underlying objective of prostitution—physical pleasure—is fundamentally different than the objective of a surrogacy agreement—to bring a child into the world.¹²⁷

Supporters of legalized commercial surrogacy argue that surrogacy contracts are less like prostitution and more like other service contracts that individuals enter into for purely financial reasons.¹²⁸ There are numerous jobs that are potentially dangerous to one's physical and mental health, but which the government allows individuals to pursue. Moreover, these jobs are usually filled by people with limited alternatives. The underprivileged should not be denied their freedom to contract for a highly-paid service because their economic situation makes it more likely that they are tempted by financial incentives to do so.¹²⁹ Furthermore, although it is extremely rare that a woman would volunteer to act as a surrogate for stranger without any expectation of a monetary reward, it does not necessarily follow that no woman would be willing to perform these services unless desperate, without alternatives. Underlying the argument that women are unable to make free and informed decisions about how to use their bodies for survival and economic gain is a strain of paternalism that to some ears "hearkens back to the time . . . when married women

¹²⁴ See Suzanne F. Seavello, *Are You My Mother? A Judge's Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211, 211-24 (1992) (advocating for a genetics-based definition of motherhood).

¹²⁵ See Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 529, 545 (2007) (noting that commercial surrogacy provides women with "a unique employment opportunity and a chance to earn money to supplement their regular incomes.").

¹²⁶ Browne-Barbour, *supra* note 30, at 477.

¹²⁷ Watson, *supra* note 125, at 546.

¹²⁸ See Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 25 (1989).

¹²⁹ *Id.*

were deemed legally incompetent to make enforceable contracts."¹³⁰

There are many reasons why a society might want to draw a line between market transactions that are acceptable and those that "offend human dignity,"¹³¹ but it is far from evident that surrogacy arrangements demean women. Though the introduction of a commercial element into motherhood and childbearing is intuitively unsettling to many critics,¹³² these critics fail to explore whether surrogacy differs substantially from acceptable instances of mixing economics with motherhood (for example, the exchange of childbearing for economic support through marriage, other forms of ART, and daycare). Surrogacy defenders argue that while it is important to recognize the risks attendant to pregnancy and the emotional challenges for the surrogate that come with relinquishing a child whom she has gestated for nine months, it is not a foregone conclusion that surrogates will feel degraded by their services. In fact, surrogates report that they find it rewarding to assist infertile couples in conceiving children of their own.¹³³ Particularly in a culture that understands infertility as a misfortune, surrogates can find much to embrace in their role of assisting a couple escape a childless fate.¹³⁴

A final defense of surrogacy highlights the enormous economic benefits of the industry for the gestational mothers. The income a gestational mother earns from helping to create one child can represent up to fifteen years of work at another, potentially no less "demeaning" or exploitative, job.¹³⁵ Surrogates point to the ways that there are able to improve their lives and the lives of their

¹³⁰ *Id.* at 27.

¹³¹ Browne-Barbour *supra* note 30, at 475.

¹³² See *id.* ("Applying contract principles to agreements concerning conception, gestation, birth, and adoption of a baby devalues human life.").

¹³³ See, e.g., Henry Chu, *Wombs for Rent, Cheap*, L.A. TIMES, Apr. 19, 2006, at A1 (noting "the reward of bringing happiness to a childless couple in the United States").

¹³⁴ See *Assisted Reproduction in Developing Countries—Facing Up to the Issues*, 63 PROGRESS REPRODUCTIVE HEALTH RESEARCH 1, 3 (2003) (referring to a "huge stigma" attached to childlessness in India), available at <http://www.who.int/reproductive-health/hrp/progress/63/63.pdf>.

¹³⁵ See Dolnick, *supra* note 32 ("Suman Dodia, a pregnant, baby-faced 26-year-old, said she will buy a house with the \$4,500 she receives from the British couple whose child she's carrying. It would have taken her 15 years to earn that on her maid's monthly salary of \$25.").

children as a result of their work.¹³⁶ Judith Warren, in her editorial on Indian surrogacy arrangements, posed the question succinctly: "In an awful world, where many women are in awful circumstances, how do you single out for condemnation an awful-seeming transaction that yields so much life betterment?"¹³⁷ Richard Posner goes even further, arguing that surrogates and intending parents enter these contracts because they are mutually beneficial: "the surrogate must believe that she will derive a benefit from the [payment] (more precisely, from what she will use the money for) that is greater than the cost to her of being pregnant and giving birth and then surrendering the baby. So . . . all the parties to the contract are made better off."¹³⁸

4.2. Regulatory Limits on Surrogacy Contracts

The commercial surrogacy debate is polarized between two positions: One side views commercial surrogacy as exploiting the limited choices of impoverished women, who would not "choose" to gestate another couple's child were it not for their lack of alternatives;¹³⁹ the other side views surrogacy as a voluntary exercise of a woman's right to work and perceives efforts to restrict it as paternalistic attempts to curtail women's economy agency.¹⁴⁰ This dichotomy makes it difficult to imagine how a country like India can move towards meaningful protection for gestational mothers without imposing an outright ban on the practice—something which the Indian Health Ministry, judging by the ICMR Guidelines and ART Bill, does not appear prepared to do. Although this Comment finds support for the view expressed in the ICMR proposals that it is not unethical for surrogates to receive

¹³⁶ See Haworth, *supra* note 7, at 5 (quoting a surrogate mother: "This is not exploitation. Crushing glass for 15 hours a day is exploitation. The baby's parents have given me a chance to make good marriages for my daughters. That's a big weight off my mind.").

¹³⁷ Warren, *supra* note 98.

¹³⁸ Posner, *supra* note 128, at 22–23.

¹³⁹ See Ruth Maklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis* 16 L. MED. & HEALTH CARE 57, 62 (1988) (contending that surrogacy agreements are exploitative of poor women).

¹⁴⁰ Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 740 (2003) (expressing concern that the "protectionism that some courts use to invalidate surrogacy contracts creates a danger that notions of women's inability to make informed, accurate decisions will resurface").

compensation for their services, it does not endorse the view that these agreements should be dictated purely by free market forces.¹⁴¹

One way out of this binary is to approach surrogacy regulation through the lens of labor rights. Berta Hernandez-Truyol and Jane Larson have advocated for this perspective in the context of debates over the legalization of prostitution.¹⁴² Evaluating surrogacy under a labor framework does not force lawmakers to choose between embracing “freedom of contract” and individual consent justifications or imposing an absolute prohibition against the practice because of its potential for abuse.¹⁴³ Theories of labor rights provide tools for analyzing, from a moral and legal perspective, conditions under which certain kinds of work may become an offense to human dignity.¹⁴⁴ The underlying idea is that voluntary consent to perform work does not automatically render that work acceptable.¹⁴⁵ It is in the labor context that we find the recognition of an individual’s freedom to contract checked by the conviction that there are “baseline rules below which no worker, however disempowered, should fall.”¹⁴⁶ As Hernandez-Truyol and Larsen write, “We may accept that a laborer is making the best choice she can and still acknowledge that she lacks the bargaining power to insist upon standards of decent work.”¹⁴⁷

The serious ethical implications of commercial surrogacy arrangements suggest that a certain amount of government paternalism is necessary to protect those women who serve as surrogates from the potentially predatory effect of a globalized open market. It is important that a government which permits hired maternity also recognize the very real possibility the rights and interests of women who provide these services will be marginalized in a process controlled by the intended parents. The current ICMR Guidelines and the proposed ART Bill do not

¹⁴¹ For an example of this view, see Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) (arguing for a free market in reproductive services).

¹⁴² Berta E. Hernandez-Truyol and Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391 (2006).

¹⁴³ *Id.* at 418–29.

¹⁴⁴ *Id.* at 428 (“[T]he conception of labor rights as human rights means that consent does not insulate a labor practice from critique or abolition.”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 395.

¹⁴⁷ *Id.*

sufficiently protect these women from potential abuses. But prohibition of the practice is not the only answer that can guard against exploitation of women who serve as surrogates. Comprehensive, binding regulations which recognize surrogacy as an legalized service but establish minimum standards of care, limits on the contractual obligations to which a gestational mother can be held, and rights of the surrogate which must be observed would allow economically disadvantaged women to benefit from these arrangements without compromising their fundamental human dignity.

4.2.1. *The Surrogate's Rights to Bodily Autonomy*

One important factor that differentiates most labor from the illegal activities to which surrogacy is sometimes compared—prostitution, organ sales, and slavery—is that these activities all involve allowing someone else to use one's body for their own benefit.¹⁴⁸ The distinction between agreeing to use your body in a way that benefits someone else and allowing someone else to use your body in a way that benefits them is an important one for drawing the line between acceptable and unacceptable exchanges.¹⁴⁹

It is necessary that if commercial surrogacy arrangements purport to compensate surrogate mothers for their gestational services, they do not condition this on a waiver of the woman's right to use her body as she chooses. A contract for surrogacy services must not shade into servitude by violating principles of bodily integrity. The gestational mother should neither be prohibited from terminating her pregnancy nor forced to do so. Furthermore, she must not be forced to submit to medical tests or other physician recommended procedures, such as a caesarean section or bed-rest, against her will.

The Guidelines do not address the issue of surrogate bodily autonomy. The ART Bill, however, contemplates restrictions of this nature under "Form J, the Agreement for Surrogacy." Form J stipulates that the surrogate mother "agree[s] to fetal reduction if asked by the party seeking surrogacy, in case [she] happen[s] to be carrying more than one fetus." Furthermore, the agreement

¹⁴⁸ McEwan, *supra* note 105, at 292.

¹⁴⁹ *Id.* ("Because a surrogacy agreement pays a woman for her to use her own body, the arrangement is free of exploitation and does not treat the surrogate's body as an object of commerce.").

acknowledges the surrogate's "the right to terminate the pregnancy at . . . will" but it also requires that the surrogate return "all certified and documented expenses incurred on the pregnancy" if she elects to terminate her pregnancy.¹⁵⁰ No mention is made of the surrogate's rights or obligations with respect to other decisions regarding her body that the surrogate may be forced to make during the course of her pregnancy.

Commissioning couples maintain that they compensate the surrogate mother in part for agreeing to engage in behaviors healthful for the baby and agreeing not to engage in behaviors harmful to the baby. But the law should make clear the surrogate's failure to fully comply with these provisions will not render the contract voidable. Although contracts routinely obligate parties to take actions or refrain from taking actions, surrogacy agreements present a special circumstance where the "employee" cannot easily "quit" her position if she no longer wishes to observe the terms of the contract. Consequently, the surrogate must be free to decide that she does not wish to provide the service without forfeiting her right to compensation for those which she has already provided, and without being required to compensate for expenses that she has no realistic means to repay (this position has found support in several state legislatures).¹⁵¹ Requiring a surrogate mother to repay the expenses associated with the surrogacy surely poses an insurmountable financial obstacle for most women who agree to serve as surrogates, and effectively requires the surrogate mother to relinquish her physical autonomy as a condition of the contract.

Although it is unlikely that any court would enforce a surrogacy agreement through specific performance,¹⁵² one reason to recognize these limits on the contractual control over the surrogate's decision making authority is to make clear to the commissioning parents and the potential surrogate that she cannot contract away her freedom to make her own decisions about her

¹⁵⁰ ART Bill Form J.

¹⁵¹ New Hampshire, Florida and Virginia statutes require that all medical decisions regarding the surrogate and unborn child made by the surrogate. See N.H. REV. STAT. ANN. § 168-B:6 (West 2008); VA. CODE ANN. § 20-163(A) (West 2008); FLA. STAT. ANN. § 742.15(3)(a) (West 2009).

¹⁵² Browne-Barbour, *supra* note 30, at 470 ("[P]reconception arrangements are personal service contracts for which specific performance typically is unavailable.").

body.¹⁵³ At the very least, this may help to reduce the possibility of attempts to threaten and manipulate the surrogate mother into submitting to treatments she does not desire, especially in an environment that favors the interests of the intended parents. A legal policy limiting the enforceable contractual commitments that can be extracted from a surrogate in exchange for money would also help to mitigate concerns of objectification, by safeguarding the autonomy of the gestational woman and recognizing that she cannot be made a mere instrument of the commissioning couple's will.

4.2.2. *Structural Changes to the Surrogacy Transaction*

An equally important problem under the Guidelines regime is the possibility that an industry of "middle-men," in the form of paid agencies, will deplete some of the profits that rightfully belong to either the surrogate or the intended parents. The ICMR Guidelines and ART Bill would allow private, non-medical agencies to profit from the "motherhood for hire" industry. In fact, such agencies are not only permitted, they are virtually required, as ART clinics are banned from advertising surrogates, and couples are left to their own devices to find a willing candidate half-way around the world.¹⁵⁴ Supporters of commercial surrogacy argue that these arrangements have built-in safeguards for the surrogate mother because the commissioning couple's interests are aligned with the surrogate's own: they want the surrogate to make an informed decision so that she does not back out later on, and both are concerned for the surrogate's physical and mental health throughout the pregnancy and birth.¹⁵⁵ Neither the intended parents nor the gestational woman stands to benefit from a malignant or exploitative situation—but a for-profit agency might.

¹⁵³ Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2373-74 (1995) (arguing that both contract law and ethical guidelines of the medical profession would support a surrogate's right to refuse physically invasive procedures).

¹⁵⁴ Guidelines § 3.10.5.

¹⁵⁵ See Andrews, *supra* note 153, at 2354 (describing the care and treatment surrogates receive); Epstein, *supra* note 141, at 2317 ("[The intended parents] vested interest in the health and the welfare of the surrogate mother in turn helps protect against the manifold forms of contractual abuse.").

Middlemen usually reduce transaction costs,¹⁵⁶ but in the surrogacy business some brokers and agents make as much as the surrogate for arranging the transaction.¹⁵⁷ High fees create a dangerous incentive for commercial middlemen to satisfy the demands of infertile couples for “willing” surrogates—incentives not counterbalanced by equal incentives to protect the interests of those surrogates.¹⁵⁸ Intermediaries might be tempted to force or deceive women into contracts if there is profit to be had in setting surrogates up with commissioning couples. Furthermore, third-party profits add fuel to the argument that surrogacy constitutes a “commoditization” of motherhood, creating opportunities for individuals who do not pay the emotional, psychological, and physical costs associated with these agreements to nevertheless profit from them.

Allowing “middlemen” to operate in this field virtually unregulated creates a risk that surrogates will be deceived, ill-cared for, or defrauded.¹⁵⁹ Margaret Brinig has argued, furthermore, that for-profit agencies may “act to reduce the beneficial flow of information between contracting parties, causing some “inefficient contracting.”¹⁶⁰ However, intermediaries do serve some purposes that would make it less than expedient to eliminate them completely. For one, they help couples navigate the complexities of finding and screening a surrogate.¹⁶¹ Agencies do a better job of selecting appropriate candidates for surrogacy; as repeat players, they have both a better sense of who is best qualified to serve as a surrogate and a wider pool of applicants from which to draw.¹⁶² In addition, intermediaries provide a source of legal and medical information that neither the intended

¹⁵⁶ See Margaret Friedlander Brinig, *A Materialistic Approach to Surrogacy*, 81 VA. L. REV. 2377, 2393 (1995) (noting that professional intermediaries “can reduce the transaction costs associated with the search” and are “generally highly desirable.”).

¹⁵⁷ *Id.* at 2396.

¹⁵⁸ See Gentleman, *supra* note 21, at A9 (quoting an Indian doctor) (“Inevitably, people are going to smell the money, and unscrupulous operators will get into the game. I don’t trust the industry to police itself.”).

¹⁵⁹ Janet L. Dogin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 549 (1990) (“The likelihood of exploitation is increased significantly by the presence of commercial intermediaries.”).

¹⁶⁰ Brinig, *supra* note 156, at 2395.

¹⁶¹ Andrews, *supra* note 153, at 2364.

¹⁶² *Id.*

parents nor the surrogate is likely to possess at the outset.¹⁶³ One of the problems that arose when Great Britain experimented with allowing surrogacy but forbidding payment to lawyers, psychologists, and other professionals was that a woman wanting to be a surrogate could not seek third-party assistance.¹⁶⁴ For instance, she could not receive counseling from a lawyer to help her evaluate the legal dimensions of her decision. Intermediaries can serve as invaluable sources of information about the medical and legal ramifications of surrogacy arrangements and help intended parents and surrogates to take appropriate actions.

Caught between the dangers of leaving surrogacy arrangements to private agencies and the dangers of driving the industry underground or leaving the parties in the lurch by prohibiting intermediaries, the best solution may be one that was proposed in the context of New York's debate over its states surrogacy laws: non-profit agencies.¹⁶⁵ A statutory restriction on the organizations that can legally receive payment for arranging surrogacy contracts to non-profit groups, charities, or possibly a governmental organization would dramatically reduce the risk to surrogates that intermediaries introduce. This solution would protect potential surrogates both from the possibility of their exploitation by for-profit private agencies and from the black market industry that would develop if brokering surrogacy contracts was completely outlawed.¹⁶⁶ Non-profit agencies would have less incentive to mislead either party to the agreement about the medical risks of surrogacy or the legal enforceability of their agreement.¹⁶⁷ Legal constraints on the income that these agencies

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2363.

¹⁶⁵ See Elizabeth Kolbert, *Experts Watch Surrogacy Law Debate*, N.Y. TIMES, May 11, 1987, at B2, available at <http://www.nytimes.com/1987/05/11/nyregion/experts-watch-surrogacy-law-debate.html?sec=health&spn=&pagewanted=2> (outlining a bill that was under consideration in New York in 1987 that would have made judicially-approved surrogacy contracts legal and enforceable).

¹⁶⁶ See Leibowitz-Dori, *supra* note 102, at 341 (“[D]ue to the high demand for surrogacy, prohibiting it will only move it to the black market, leaving the parties no legal recourse against potential abuses.”). Because of their interest in the health of the potential surrogate, commissioning parents seeking surrogates internationally would most likely prefer to go through valid channels whereby they are available. Thus, it seems improbable that a black market would develop in a context where non-profit organizations were legally and safely performing this function.

¹⁶⁷ See Brinig, *supra* note 156, at 2394-95 (claiming that intermediaries often mislead couples into believing that they are getting a “watertight” contract).

are permitted to generate may also lead to more reward going to the surrogate and diminish the extent to which surrogate mothers are treated as “commodities” in these transactions. Admittedly, divorcing the brokering of surrogacy agreements from monetary profit may lead to the solicitation of fewer surrogacy contracts, but it might also enable the development of higher standards in the selection of surrogates and intended parents, as the agencies’ goals shift from mere profiteering to generating the most successful and solid arrangements.

4.2.3. *Equalizing Bargaining Power and Guaranteeing Informed Consent*

A final concern raised by critics of commercial surrogacy is whether the surrogate is best positioned to receive full information and a fair deal from the commissioning parents. Under the current ICMR system, surrogate interests are not adequately protected because all parties involved in the arrangement are paid by the commissioning parents. The superior educational and economic resources of the commissioning parents virtually guarantee that the negotiation situation will favor them. Without independent assistance or representation, potential surrogates are susceptible to manipulation and may accept an unfair price or other unfair contractual conditions in response to pressure by the commissioning party or out of a simple lack of understanding. Unless the surrogate herself is proactive in advocating for her interests, no one in the negotiation has an incentive to ensure that the surrogate does not bear the full weight of the risks associated with these agreements. Parties with equal bargaining power would have to grapple, for instance, with the question of what liability the commissioning parents might face in the event that the surrogate mother is permanently injured as a result of the pregnancy.

Recognition of a potential surrogate mother as an autonomous agent free to contract for her reproductive services must be checked by a realistic appraisal of her vulnerability to misinformation and her limited bargaining power. One solution might be to charge non-profit agencies or the governmental organization providing surrogates with the further task of protecting the welfare of the potential surrogate in contract negotiations. This would have the advantage of providing the commissioned woman with a resource for clarifying her legal

rights and medical risks, as well as maximizing her protection and compensation under the agreement. One disadvantage, however, is that intended parents could circumvent this mechanism by seeking a surrogate without the aid of an agency. A surrogate found in this manner would not necessarily have the benefit of agency representation.

Alternatively, India could follow the example of several U.S. states¹⁶⁸ and other countries¹⁶⁹ in requiring court approval for surrogacy arrangements. The requirement of court approval could benefit intended parents by providing legal recognition of the agreement, and potential surrogates by providing objective review of the fairness, clarity, and adequacy of the terms of the contract.¹⁷⁰ Judicial review, however, would undermine one of the advantages of surrogacy arrangements in India: their relative ease and lack of legal entanglements. Moreover, depending on the volume of contracts, judicial review could pose a significant burden on the courts and lead to substantial delays in carrying out these agreements. Finally, absent legislative action, varying interpretations of what constitutes a fair bargain could lead to inconsistent protection for surrogates.

A third possible solution would be for the legislature to enact comprehensive legislation. Illinois provides a pertinent model for legislative efforts to protect gestational surrogates.¹⁷¹ In Illinois, the state with the most permissive statutory regime, a gestational surrogate mother must consult an independent attorney in order to

¹⁶⁸ See, e.g., N.H. REV. STAT. ANN. § 168-B:16(I)(b) (West 2008) (providing that surrogacy agreements must conform to certain minimum requirements before impregnation); VA. CODE ANN. §§ 20-159(B), 20-160(B) (West 2008). In Virginia, a surrogacy contract can be judicially preauthorized if the gestational mother is married, has had at least one successful pregnancy, and all parties (including the gestational mother's husband) sign the contract. The gestational mother is entitled to legal counsel for her petition. See Krim, *supra* note 2, at 212 (recognizing that Virginia recognizes surrogacy contracts that were executed without judicial preauthorization).

¹⁶⁹ Both Argentina and Israel require permission by a special committee before a surrogacy contract can be executed. See IFFS SURVEILLANCE, *supra* note 2, at 50 (outlining the surrogacy contract law in Israel and Argentina).

¹⁷⁰ In Israel, a Special Committee reviews surrogacy agreements to ensure that they have been freely consented to on both sides. See Krim, *supra* note 2, at 219 (noting that Israel was first country to adopt national legislation governing surrogacy).

¹⁷¹ Israel has also enacted comprehensive regulations. Israel's scheme permits the surrogate to receive reasonable compensation for her suffering and loss of work. *Id.*

discuss “the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy;” she also must obtain a health insurance policy or have the intended parents obtain one for her; finally, her compensation must be put in escrow before any procedures commence.¹⁷² Illinois further provides that a contractual breach by the intended parents does not relieve them of their duty to support the resulting child.¹⁷³ India could achieve similar protection by imposing minimum standards for payment to surrogates (unless the arrangement is altruistic) and requiring that such payment be put in escrow, imposing minimum standards of pre- and post-natal care, and requiring compensation for permanent disabling injuries resulting from pregnancy or labor. It could go farther by creating a legal duty on ART clinics to provide full information to the surrogate about the physical and psychological risks of IVF and surrogacy.

Because such legislation would increase the costs and risks associated with surrogacy in India, it might have a chilling effect on the number of arrangements contracted there. But maximum protection for local surrogates should be the first objective of the Indian government. Moreover, these measures would merely tilt the balance of power somewhat in favor of the gestational woman, imposing limits and costs that for many “desperate” would-be parents probably will not outweigh the benefits of a jurisdiction promising ease and enforceability.

5. CONCLUSION

This Comment does not purport to solve the tangle of legal and ethical problems associated with surrogacy agreements in India. Even the foregoing observations leave open the question of how a surrogate’s newly recognized rights would be enforced against foreign commissioning couples.¹⁷⁴ Acknowledging that “[i]t is unrealistic to believe that all of the harms associated with

¹⁷² Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/20(b) (2007).

¹⁷³ *Id.* 47/30(b).

¹⁷⁴ This issue requires the exploration of potentially difficult questions of jurisdiction and conflict of laws. See generally Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399 (1990) (outlining the difficulties faced by states in attempting to limit surrogacy and the inherent difficult policy choices associated with such an approach).

surrogacy can be eliminated,"¹⁷⁵ this Comment simply suggests an approach which would allow India to balance the competing demands of respecting women as autonomous economic agents and protecting them from abuse by a more powerful party. Labor rights provide a framework within which the Indian government can address the exploitative elements of surrogacy arrangements without forbidding women from using their reproductive capacities as they deem suitable. Such a solution strikes this Author, at least, as a happy fit for a country which seeks to provide safe and affordable surrogacy services, while simultaneously protecting surrogates from the potential pitfalls of an unregulated free market in wombs.

¹⁷⁵ Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 232 (1992).