INTERNATIONAL COMMERCIAL SURROGACY AND ITS PARTIES

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ABSTRACT

When discussing international commercial surrogacy, it is essential to remember that at the heart of this market are women and children, which requires an in-depth analysis of the issues that implicate these parties to a commercial surrogacy. In undertaking such an analysis, this Article considers the rights, interests, and obligations of these parties to a surrogacy, as well as the various opportunity costs of international commercial surrogacy in regard to them. This framework is particularly relevant today as India, an international surrogacy hotspot for American couples, begins to legislate on the subject, and relatedly, as American states continue to grapple with issues regarding surrogacy.

I. INTRODUCTION

Many proposals on both reproduction and children have been made over the years, varying in modesty. Often, these proposals reflect and integrate economic realities, as well as people’s biological desire to have children. They have ranged from the satirical—Jonathan Swift proposed that children be consumed to fight poverty—¹ to the theoretical—Elisabeth Landes and Judge Richard Posner proposed that children be sold on a baby market.² However, it would require significant imagination to predict that embryos would eventually be implanted in foreign women in far 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 woman,

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¹ Jonathan Swift, A Modest Proposal (1729).
have arisen as a solution to infertility, which affects approximately 10% of Americans.\(^3\) Specifically, 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 such surrogacy: the post-industrial, changed value of a child that permits infertile couples to spend a small fortune on conception,\(^5\) and the advancement of reproductive technologies.\(^6\)

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\(^3\) 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.


\(^5\) 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. See, e.g., HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 8 (2002). 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 was $221,190 in 2008, versus $183,509 (in 2008 dollars) in 1960. United States Department of Agriculture, Miscellaneous Publication Number 1528-2008, Expenditure on Children by Families, 2008, available at http://www.cnpp.usda.gov/Publications/CRC/crc2008.pdf. Such a trend therefore might have enabled the payment of significant sums for the conception of a child.

\(^6\) Reproductive technologies have given infertile couples numerous ways to have children alternatively. Most recently, researchers at Stanford have 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
The latter trend—reproductive technologies—has advanced simultaneously in many countries, providing Americans seeking to commission surrogacies with many international choices. The result has been rampant forum shopping by couples seeking the best surrogacy prices and conditions.

Forum shopping for surrogacy has additionally been facilitated by the differences among jurisdictions’ legal and policy approaches to surrogacy, which, given the unique nature of surrogacy, have unsurprisingly differed. Interestingly, most legal systems around the world have already 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, but not yet surrogacy.

In the meantime, India, to which already much is outsourced, has emerged as a leading fertility tourism destination for many commissioning American couples. This status has been made possible by the lack of American legal obstacles to international surrogacies, the ease in acquiring American citizenship for the resulting child, and the low prices of the burgeoning surrogacy business in India. However, the poverty many Indian women face,
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 the approaches in the United States and India—the latter likely undergoing legislative review in the near future. Part III then evaluates the rights and interests of the surrogate, the couple seeking surrogacy, and 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 industry.

II. THE CURRENT LEGAL FRAMEWORK ON SURROGACY

When analyzing the business of surrogacy, it is necessary to remember the international nature of many surrogacies. As a result, when considering the legal frameworks governing surrogacy, one must include all of the frameworks most relevant to American couples, which include those of the United States and India—two surrogacy hotspots. Of course, only one framework applies, depending on the place of the surrogacy.¹² Increasingly, however, it is that of 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 even be desirable. Although unlikely, the federal Supreme Court could nonetheless determine, for example, that the right to procreate includes the right to commission surrogacy,¹³ that the commerce clause may be used in federally regulating surrogacy,¹⁴ or that substantive due process protects surrogacy from governmental

¹² See supra note 9 and accompanying text.
¹³ See infra note 76.
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).
The lack of such determinations to date, however, has left the matter of surrogacy to the states, which have differed in their approaches to the issue.

State action, whether judicial or legislative, on surrogacy agreements can particularly impact the practice of surrogacy in those states because most surrogacies are contracted. States can either declare surrogacy contracts enforceable, void and unenforceable, or enforceable only if noncommercial.

Some state legislatures, however, have entirely abstained from action, leaving the matter to the courts. Other state legislatures have been active on the subject. Florida, Nevada, New Hampshire, and Virginia, for example, have statutorily permitted the enforceability of surrogacy contracts, but not the payment of surrogates. Illinois permits both surrogacy contracts and reasonable compensation. 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. However, an Arizona Appellate Court

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15 SPAR, supra note 14, at 95.
16 Although difficult to estimate, there were, for example, 571 recorded surrogate contracts in the United States in 2001. SPAR, supra note 14, at 94.
18 Drabiak et. al, supra note 17, at 303.
20 For a helpful graphic depiction of the states’ approach to surrogacy, see SUSAN MARKENS, SURROGATE MOTHERHOOD 28-29, table 2 (2007).
21 5-91 FLORIDA FAMILY LAW § 91.14, REV. STAT. § 126.045, RSA 168-B:16 (2009); N.H. REV. STAT. ANN. §§168-B:1 to 168-B:32; VA. CODE ANN. § 20-160. For further background on these states’ differing approaches to surrogacy, see Kevin Tuininga, The Ethics of Surrogacy Contracts and Nebraska’s Surrogacy Law, 41 CREIGHTON L. REV. 185 (2008).
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
subsequently declared the parentage definitions in Arizona’s surrogacy statute unconstitutional, while a federal district court overruled the Utah legislature’s attempt to provide for criminal sanctions in surrogacy cases.

State courts have also played significant roles in resolving issues associated with surrogacy. In the relevant court decisions, one pattern noted by commentators is judicial reluctance to uphold commercial surrogacy agreements as against public policy. 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.” 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.

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 surrogacy parentage contract is void and unenforceable as contrary to public policy.”); 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).

24 Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (determining 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).


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. See also 152-55 and accompanying text.
and to surrender the baby to him and his wife. Nonetheless, the commissioning parents received custody of the child because it was in the best interests of the child, while the surrogate mother potentially received visitation rights. No doubt, domestic cases like this one have increased the appeal of international commercial surrogacy.

State courts have also been called upon to determine the parentage of children resulting from surrogacy, often being requested to issue prebirth parentage orders declaring the commissioning parents to be the legal parents before the child is born. One California court, for example, facilitated the state’s status as a surrogacy-friendly jurisdiction by concluding that “although the [Uniform Parentage Act] 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.”

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


33 Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993). 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. For a graphic depiction of the introduction of various surrogacy legislation in California in 1981-92, both successful and unsuccessful, see MARKENS, supra note 20, at 32-33, table 3. For the same in New York in 1983-92, see id. at 35-37, table 4.
evidence showed that the commissioning husband signed the surrogacy contract.  

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

Despite these model acts, legal inconsistencies continue to abound among states, which, when coupled with the lack of federal legislation, facilitate much interstate travel by infertile couples into surrogacy-friendly states. This very acceptance of commercial surrogacies in some states, however, remains relatively unique. Surrogacy contracts are entirely prohibited in, for example, Austria, Egypt, France, Germany, Italy, Japan, Netherlands, Norway, Spain, Sweden, and Switzerland. Surrogacy is also banned in certain regions of Australia. Meanwhile, Canada, Denmark, Hong Kong, and Great Britain have national laws banning commercial surrogacy.

Other countries, however, permit and encourage surrogacy—providing very favorable conditions for commissioning couples that appeal to many American couples. These countries include the

36 Id. art. 7.
37 Id. art. 8.
38 UNIFORM PARENTAGE ACT (2000), art. 8.
39 MARKENS, supra note 20, at 23.
40 MARKENS, supra note 20, at table 1.
42 ASSISTED HUMAN REPRODUCTION TECHNOLOGY ACT, Canada, 2004. The Act imposes a $500,000 fine or up to 10 years in jail for engaging in commercial surrogacy.
43 See Re: X & Y (Foreign Surrogacy), [2008] EWHC 3030 (Fam) (UK).
44 MARKENS, supra note 20, at table 1.
Ukraine and India. 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. Included in this strategy has been an effort to increase medical tourism, or the travel of people for medical treatment. The Indian government has even begun issuing medical visas. An important subset of this medical tourism includes fertility tourism, which has become a $500 million industry in India.

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 ART Clinics in India, but these are not enforceable in courts of law. 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. Nonetheless, the lack of legal regulation of

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45 See, e.g., Re: X & Y (Foreign Surrogacy), [2008] EWHC 3030 (Fam) (describing the surrogacy process in the Ukraine); infra Part II.B. (analyzing the surrogacy process in India).
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.”).
49 Krawiec, supra note 2, at 225.
51 Law Commission Report, supra note 4, at [3.5(b)].
commercial surrogacy in India has led many fertility doctors in India to self-regulate. In fact, there have been several, recognizably legitimate clinics that attract significant fertility tourism, such as those in Anand, a small town in Gujarat.\textsuperscript{53}

While a casual legal environment would ordinarily be highly problematic in the surrogacy context, particularly when it comes to guaranteeing the enforceability of surrogacy agreements,\textsuperscript{54} many factors might prevent such problems from arising in India. First, these surrogate mothers become surrogates due to their poverty and usually cannot afford to keep the resulting child.\textsuperscript{55} Second, surrogates are typically selected only if they already have children.\textsuperscript{56} Third, because these surrogacies are strictly commercial—with the child being a sort of product—and because the surrogates seldom contribute their genetic material,\textsuperscript{57} Indian surrogates do not often

\textsuperscript{53} Law Commission Report, \textit{supra} note at 4, at [1.7]. One of the most recognized fertility doctors in Gujarat is Nayna Patel, who runs a fertility clinic. “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 . . .” \textit{Poverty Makes Surrogates of Indian Women in Gujarat}, \textit{REUTERS} (Apr. 8, 2009), available at http://www.reuters.com/article/healthNews/idUSBOM1574520090408?pageNumber=2&virtualBrandChannel=0.

\textsuperscript{54} See \textit{SPAR}, \textit{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.”).

\textsuperscript{55} See \textit{infra} notes 61, 67 and accompanying text.

\textsuperscript{56} See, e.g., \textit{SPAR}, \textit{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. \textit{AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY}, \textit{supra} note 35, at art. 7, §702, alternative B.

\textsuperscript{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, \textit{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, \textit{Mediating Intimacy: Black Surrogate Mothers and the Law}, 24 \textit{CRITICAL INQUIRY} 540 (1998).
litigate to keep the resulting child. Therefore, couples commissioning surrogates in India seldom encounter a surrogate who resists the surrogacy agreement and refuses to relinquish the child.58 Accordingly, the Indian lack of 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 could afford the absolute costs of surrogacy in India, which are relatively low because of intercountry competition for the surrogacy business.60 And, although demand for surrogates can be fairly described as good, there is a significant supply of Indian women willing to commercially serve as surrogates, often for financial reasons.61

This maintains low prices of surrogacy, particularly when compared to those in the United States. The typical surrogacy fee in India has been around $25,000 to $30,000, which is approximately a third of that in developed countries such as the United States.62 The

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] 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, Surrogacy in India Is Not All That It Is Cracked Up To Be....Laws Appear To Be Non-Existen, PROUD PARENTING, available at 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 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.

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 2007), available at 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.”).

62 Law Commission Report, supra note at 4, at [1.7].
surrogate is paid only between $6,000 and $10,000 of the sum, with the fertility clinics or other middlemen receiving the balance.\textsuperscript{63}

Such low 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,\textsuperscript{64} even though living outside the marital home in itself may have a social stigma.\textsuperscript{65} The particular stigma attached to surrogacy, however, may partially result from surrogacy’s certain parallels with sex work.\textsuperscript{66} Nonetheless, with thirty-five percent of Indians living on less than one dollar per day, many commit to becoming surrogates.\textsuperscript{67}

However, 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.”\textsuperscript{68} In this report, the Law Commission recognizes that India has become a reproductive tourism destination.\textsuperscript{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.\textsuperscript{70}

\textsuperscript{63} Krawiec, \textit{supra} note 2, at 226.
\textsuperscript{64} Lee, \textit{supra} note 58, at 280.
\textsuperscript{67} Krawiec, \textit{supra} note 2, at 226. \textit{See also supra} note 61 and accompanying text.
\textsuperscript{68} Law Commission Report, \textit{supra} note 4.
\textsuperscript{69} Law Commission Report, \textit{supra} note 4, at [1.7].
\textsuperscript{70} Law Commission Report, \textit{supra} note 4, at [1.8].
Finally, the Report 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 legally complex issue.\textsuperscript{71}

Nonetheless, the Report concludes that surrogacy is legal, as well as protected under both international and domestic law. 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.”\textsuperscript{72} The Law Commission suggests that this right includes protection of surrogacy.\textsuperscript{73} Nonetheless, the Commission concedes that many countries, despite being bound by similar law, have not recognized the right to reproduce to include the right to surrogacy.\textsuperscript{74}

The Commission therefore seeks support for surrogacy in domestic law. Specifically, the Commission cites \textit{B. K. Parthasarathi v. Government of Andhra Pradesh},\textsuperscript{75} in which the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy.”\textsuperscript{76} The Law Commission reasoned that, “Now, if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection.”\textsuperscript{77}

\textsuperscript{71} Law Commission Report, \textit{supra} note 4, at [4.1].
\textsuperscript{72} Law Commission Report, \textit{supra} note 4, at 11-12 (citing \textsc{Universal Declaration of Human Rights} 1948, United Nations).
\textsuperscript{73} Law Commission Report, \textit{supra} note 4, at [1.9].
\textsuperscript{74} Law Commission Report, \textit{supra} note 4, at [1.11-1.13].
\textsuperscript{75} Law Commission Report, \textit{supra} note 4, at [1.9] (citing \textsc{AIR} 2000 A. P. 156).
\textsuperscript{76} \textit{Id.} The Law Commission Report stated that this Indian case agreed with \textit{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, \textit{supra} note 4, at [1.9]. However, \textit{Skinner} does not necessarily support surrogacy as the case dealt with sterilization, not assisted reproductive techniques. In fact, the Supreme Court decided \textit{Skinner} several decades before the advent of assisted reproductive technologies, and has not yet addressed the constitutionality of surrogacy.
\textsuperscript{77} Law Commission Report, \textit{supra} note 4, at [1.10]. 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 the third party surrogate mother. Indian Surrogacy Law Center Report, \textit{supra} note 11, at [8].
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 commissioning couple.\(^78\) Furthermore, one of the commissioning parents should be the genetic donor as well, to reduce the chance of child abuse.\(^79\) 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.\(^80\)

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.”\(^81\) However, this recommendation might not result in the complete bar of commercial surrogacies.\(^82\) Instead, it is more likely that the industry will soon be regulated, resulting in an elimination of illegitimate fertility clinics engaging in commercial surrogacies.\(^83\)

The Indian Council of Medical Research has also recently released a draft Assisted Reproductive Technology Bill and Rules 2008.\(^84\) The proposed bill recognizes the legality of surrogacy and the enforceability of surrogacy agreements.\(^85\) 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.\(^86\) Under the proposed bill, a surrogate mother must also relinquish her parental rights; the child is presumed to be the legitimate child of the commissioning parents, which would be reflected in the child’s birth

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\(^{78}\) Law Commission Report, \textit{supra} note 4, at [4.2].
\(^{79}\) \textit{Id.} at [4.2(4)].
\(^{80}\) \textit{Id.} at [4.2(5)].
\(^{81}\) \textit{Id.} at [4.1].
\(^{82}\) Indian Surrogacy Law Center Report, \textit{supra} note 11, at [18].
\(^{83}\) A complete bar to commercial surrogacy would undermine India’s strategy of aggressively recruiting medical tourism. \textit{See supra} notes 46-49 and accompanying text.
\(^{84}\) Law Commission Report, \textit{supra} note 4, at [2.1]-[2.6].
\(^{85}\) \textit{Id.}
\(^{86}\) \textit{Id.}
certificate.87  Other chapters of the proposed bill deal with the fertility clinics themselves.88  A subsequent conference on surrogacy also seemed preoccupied with waiving or restricting all rights to the child, other than those of the commissioning parents.89

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.90 However, the extent to which surrogacy is regulated in India may change under the impending legislation—particularly 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.91 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, ultimately directing her to the National Commission for Protection of Child Rights.92 Nonetheless, Indian courts have not yet comprehensively addressed surrogacy, leaving the task to the legislature.93

In sum, while some attempts have been made to usher in legislation on the topic of surrogacy through the Law Commission and the Indian Council of Medical Research, 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 attracted many American couples.94 Although the legal framework governing these international surrogacies remains relatively straightforward both in the United

87 Id.
88 Id.
89 Id. at [3.1]-[3.5].
90 See supra notes 72-77 and accompanying text.
92 Yamada v. Union of India, 2008 INDLAW SC 1554, 13 (Sept. 29, 2008) (India); Law Commission Report, supra note 4, at [1.15]. For further background on the Baby Manji case, see Smerdon, supra note 10, at 69-72.
93 Indian Surrogacy Law Center Report, supra note 11, at [10].
94 See, e.g., Lee, supra note 58, at 277.
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. It is therefore vital to analyze the rights, interests, and obligations of these parties. Naturally, they 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 them are determining the reason for surrogacy, facing the possibility of the surrogate’s abortion, and selecting surrogacy out of many reproductive options.

International commercial surrogacy arose mainly as a reproductive option for infertile couples and often, for this very reason, receives much sympathy. However, a couple occasionally commissions surrogacy not because of infertility, but because the wife chooses to avoid pregnancy for career, or other personal, reasons. Some fertility clinics in India have barred such couples

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95 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 particular or personal stake in the transactions. Therefore, they will not be considered in this Part. For more on these third parties, however, see Landes & Posner, supra note 2; Posner, supra note 2; and Krawiec, supra note 2.


97 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
from commissioning surrogacies, but, in the absence of legislation, this decision is currently made on the level of the individual clinics.98

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 husband’s infertility. Furthermore, because much infertility results from people’s delay of childbearing for career-oriented reasons,99 such a 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.100

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, for example, 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 until an older, and less fertile, age.101

Nonetheless, surrogacy remains a solution typically for the infertile, which includes 10% of Americans.102 The frequency of

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98 See supra note 53. See also infra notes 99, 104-06 and accompanying text.
100 See supra note 24.
101 See supra note 99 and accompanying text, as well as infra notes 104-06 and accompanying text.
102 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
infertility, however, prompts the need to reexamine its causes. Although certain sexually transmitted diseases may contribute, much of the infertility among American couples results from delaying child bearing. Women in particular may choose to do so for career reasons, perhaps thinking that artificial reproduction might resolve any subsequent fertility problems. Accordingly, researchers predict that infertility rates will continue increasing as more people delay childbearing.

However, reliance on surrogacy and other artificial techniques might facilitate societal intolerance of younger parenthood. Instead of continuing to create 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 artificial 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.

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. Although a health reason may justify abortion without

103 JANICE RAYMOND, WOMEN AS WOMBS 6 (1995).
104 See infra notes 105-106.
105 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 See supra Part III.
108 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 105, at 5.
109 For a framework of American abortion rights, see Yamamoto & Moore, supra note 3, at 131-43.
significant controversy, there is a range of potential reasons a surrogate might choose to abort, such as to threaten the commissioning couple or to end the surrogacy in a change of heart. On the flip side, however, commissioning parents, unhappy with a particular fetus, may want the surrogate to abort even when she may not want to do so.

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

In any jurisdiction’s debate on abortion during surrogacy, however, some may argue that the surrogate, commodified in the process, has no right to abort the baby of another. Others, however,

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110 The mother’s health is recognized as a justification for many abortion procedures. “[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.” Roe v. Wade, 410 U.S. 113, 163-64 (1973).
111 For example, an Ohio woman involuntarily become a surrogate through a mistaken implantation of strangers’ 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), available at http://www.cnn.com/2009/HEALTH/09/22/wrong.embryo.family/index.html.
112 For a discussion of such a situation, see Tuininga, supra note 21, at 203.
113 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”).
114 Law Commission Report, supra note 4, at [4.2(9)]; Medical Termination of Pregnancy Act 1971 (India).
115 See supra notes 54-58 and accompanying text.
may argue that the baby is only a product of the surrogacy and therefore may be aborted by the surrogate. Abortion is thus a significant 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. While 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 more true in foreign countries, as seen in India’s Commission Law Report, which hypothesizes 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.” When commissioning mothers feel this way, however, counseling should be provided. If couples approach surrogacy with significant emotion, others might take advantage of them.

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. It has

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116 For arguments on the commodification of the child, see infra Part III.C.1., and on the commodification of the surrogate, infra Part III.B.

117 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 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.

118 Law Commission Report, supra note 4, at [1.2] (italics in original).


120 “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
also 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.”\footnote{Spar, supra note 14, at 93-94.} 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.”\footnote{Elizabeth Bartholet, Beyond Biology: The Politics of Adoption & Reproduction, 2 DUKE J. GENDER L. & POL’Y 5, 9 (1995).} 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 their reasons for surrogacy, potential abortions, and reproductive 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 desperate for income.

The first, and most obvious, issue implicates the inevitable argument that surrogacy commodifies the surrogates.\footnote{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.”).} This concern invariably arises given the exchange of money for the surrogacy, prompting the use of such terms as “wombs for rent.”\footnote{See Law Commission Report, supra note 4, at [1.7].} Gestational surrogacy, wherein the surrogate contributes no genetic cognizant of the full range of their reproductive and childrearing options, including adoption.” \textit{Id.} at 883.
material, particularly treats the transaction as money in exchange for a womb. In the international context, furthermore, the commodification concern has been extended to concerns of the trafficking of women.\textsuperscript{125}

International commercial surrogacy is also problematic for those working to eliminate “the perception and use of women exclusively as child bearers.”\textsuperscript{126} Feminists may especially oppose this exclusive use of women by society, as well as the idea of a childless man pressuring his infertile wife to accommodate his reproduction.\textsuperscript{127} 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.\textsuperscript{128} Nonetheless, both 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.\textsuperscript{129} While “[s]ome of these poor, young 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.”\textsuperscript{130} 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.”\textsuperscript{131}

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.\textsuperscript{132} Despite a potential stigma, it is suspected that some surrogates are pressured into this business by their husbands and families for

\textsuperscript{125} Gena Corea, The Mother Machine 245 (1985).
\textsuperscript{126} Hollinger, supra note 120, at 913.
\textsuperscript{127} Hollinger, supra note 120, at 913.
\textsuperscript{128} See, e.g., Hollinger, supra note 120, at 913.
\textsuperscript{129} Spar, supra note 14, at 87.
\textsuperscript{130} Spar, supra note 14, at 87.
\textsuperscript{131} Spar, supra note 14, at 82.
\textsuperscript{132} See supra note 66 accompanying text.
financial reasons. 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 India, wherein each spouse solely owns the property to which she has legal title, both during the marriage and upon potential divorce. 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. 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.

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. Furthermore, there are health consequences to recurring or multiple pregnancies. Finally, postpartum depression, which affects 10%-20% of women giving birth, may affect the surrogate, being complicated by the relinquishment of the child.

136 Indian Surrogacy Law Center Report, supra note 11, at [13]-[14] (describing India as a patriarchal society).
137 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 927 (1992) (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.”).
There may also be psychological consequences to serving as a surrogate. For many, relinquishing a child upon birth may be difficult.\(^{140}\) English law therefore provides that the surrogate mother is always the legal mother, even if her genetic material was not used.\(^{141}\) Similarly, her husband is always the legal father unless it can be shown he did not consent to the surrogacy arrangement.\(^{142}\) Meanwhile, the National Guidelines in India, in a legal void, provide the opposite—that Indian surrogates are not the legal mothers.\(^{143}\) Proposed legislation in India would guarantee the same.\(^{144}\) 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’ reluctance to uphold surrogacy contracts.\(^{145}\) Regardless of the law’s position, however, many surrogates may experience difficulty in surrendering the child.\(^{146}\)

In those jurisdictions that aim to aggressively build their surrogacy business, the concept of opportunity cost also arises. For example, the Indian government has expended many resources to generate medical tourism, which includes commercial surrogacy.\(^{147}\)

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\(^{140}\) For an account of surrogacy from the perspective of the first American surrogate, see Elizabeth Kane, Birth Mother: The Story of America’s First Legal Surrogate Mother (1988). Kane subsequently joined the National Coalition Against Surrogacy. Edwin McDowell, Surrogate Mother’s Story, NEW YORK TIMES (June 23, 1988), available at http://www.nytimes.com/1988/06/23/books/surrogate-mother-s-story.html. See also infra note 146 and accompanying text.

\(^{141}\) Re: X & Y (Foreign Surrogacy), [2008] EWHC 3030 (Fam) (U.K.); Human Fertilisation and Embryology Act 27(1).

\(^{142}\) Re: X & Y (Foreign Surrogacy), [2008] EWHC 3030 (Fam) (U.K.); Human Fertilisation and Embryology Act 27(1). However, the Act permits a court to make a different parental order if the surrogate permits it. Id. §30.

\(^{143}\) Law Commission Report, supra note 4, at [1.14].

\(^{144}\) See supra note 87 and accompanying text.


\(^{146}\) “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 140 and accompanying text.

\(^{147}\) See supra notes 46-49 and accompanying text.
Importantly, however, the opportunity costs of these efforts 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 the commissioned surrogacy, and, less obviously, 2) the existing children awaiting adoption all across the globe. Although the consequences of commercial surrogacy for 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 are those resulting from it. 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

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148 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); Shari O’Brien, Commercial Conceptions: A Breeding Ground for Surrogacy, 65 N.C.L. REV. 127, 144 (1986).
Proceedings. This standard has also been invoked in the surrogacy debate, although its flexibility has enabled both sides to rely on it. Nonetheless, it is important to continue determining the best interests of the child in the debate on surrogacy, without which the process risks objectifying children in the advent of markets trading in wombs, genetic material, and embryos.

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. Although baby M had gone home with the commissioning couple after the birth, four days later, the surrogate visited and disappeared with the baby. The


150 “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. Prob. 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, at 91 (“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.”).

151 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.”).

152 In re Baby M, 537 A.2d 1227, 1234 (N.J. 1988). See also supra notes 28-30 and accompanying text.

153 SPAR, supra note 14, at 70.
commissioning parents called the police, while the surrogate threatened to leave the country with the baby. 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 best interests.

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, which is more 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, however, 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 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. However, the wife asserted in her response that the “[p]arties were expecting a child by way of surrogate contract" and sued for child support. The court, in reversing the trial court, granted temporary child support until parentage could be established. 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,

154 SPAR, supra note 14, at 70.
156 Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993); see supra note 33 and accompanying text. Countries that treat the intended parents as the legal parents include Hong Kong, Israel, and Russia. Countries where the surrogate and her husband are treated as the legal parents include Australia. MARKENS, supra note 20, at 24-25, table 1.
supporting the resolution of such issues in surrogacy free markets such as India.

Even in the smoothest enforcements of surrogacy agreements, however, 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. One study has also suggested higher rates of birth defects among babies conceived by assisted reproduction. Finally, suspected developmental delay increased four-fold in children born after IVF, which is frequently used in commercial surrogacy.

There are also potential psychological difficulties for children resulting from commissioned surrogacy, particularly those resulting 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.” Furthermore, it may be psychologically difficult for an infant to be severed from the birth mother. 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 their identities and origins. While surrogacies in India are not necessarily done anonymously, the international and commercial nature of the transaction may reduce

161 Darine El-Chaar et al., Risk of Birth Defects Increased in Pregnancies Conceived by Assisted Human Reproduction, 92 FERTILITY AND STERILITY 1557 (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, available at http://www.timesonline.co.uk/tol/life_and_style/health/article7017969.ece.
163 Hollinger, supra note 120, at 917.
164 Serratelli, supra note 119, at 645.
165 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).
the commissioned person’s ability to explore her origins, the inability of which has frustrated many adoptees.\textsuperscript{166}

Nonetheless, the fertility business, including international commercial surrogacy, continues to thrive and raise, for many, the argument that children are mere commodities in the market,\textsuperscript{167} with their interests neglected by the fertility business.\textsuperscript{168} It is therefore vital to mind the interests of children when institutionalizing commercial surrogacy legislatively, which should aim to protect those most vulnerable.

In sum, there are many unique issues concerning children resulting 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 can either result from adoption or from assisted reproductive techniques.\textsuperscript{169} 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 no doubt a negative effect of this symbiotic relationship. While

\textsuperscript{166} Id.
\textsuperscript{167} But see McLachlan & Swales, supra note 25, 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.
\textsuperscript{168} RAYMOND, supra note 103, at xxii.
\textsuperscript{169} “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.
much money is spent on artificial conception, 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 racial preferences for their children. Gestational surrogacy, wherein the surrogate does not contribute her genetic material, fulfills both 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. China, the source of many American adoptions, 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. 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.

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170 The most popular infertility treatment is IVF, which costs anywhere from $8,000 to $11,000. A live birth, however, is often achieved only after three or four treatment cycles. Yamamoto & Moore, supra note 3, 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.

171 “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), http://www.harvardilj.org/online/112. Surrogacy and other assisted reproductive techniques, however, might reduce the adoption of Chinese children by Americans. The relationship between infertility in the Western world and fertility in the Eastern world has also been noted by Dr. Janice Raymond. Raymond, supra note 103, 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.

172 See U.S. Dep’t of State, Requirements for Intercountry Adoption from the Republic of China to Take Effect on May 1, 2007, http://travel.state.gov/family/adoption/intercountry/intercountry_3110.html [hereinafter Requirements for Intercountry Adoption].

173 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).
not be deformed, mentally ill, blind in either eye, or have a body mass index over 39. Meanwhile, an international surrogacy arrangement requires no income or weight checks, presenting an attractive alternative to international adoption. This might drive couples away from adopting 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.” 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 highly favors international adoption over domestic adoption, 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 adoptions, while maintaining the country’s one-child policy. 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.

175 See supra Part II.
176 Bartholet, Beyond Biology, supra note 122, at 9.
177 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.”).
178 See, e.g., Meier & Zhang, supra note 177, at 106 (noting the Chinese orphanage system’s reliance on revenues from international adoption).
180 Meier & Zhang, supra note 177, at 87-88.
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 children’s identities and their retention of their homeland.  

In conclusion, the impact of international commercial surrogacy may have a multifaceted effect on international adoption, both negative and positive. On the one hand, the primary opportunity cost to growing the international commercial surrogacy business is the reduction of international adoption. Children are being scientifically created while existing children face their “real-world alternative to adoption [of] life or death on the streets or in orphanages.” 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 on 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.

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 that any discussion of surrogacy includes an in-depth analysis of the issues

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182 Bartholet, Beyond Biology, supra note 122, at 11.

183 See Yamamoto & Moore, supra note 3, at 96.
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.

This framework is particularly important as India begins to legislate on the subject and as the American states continue grappling with the issues related to surrogacy. Given the now international nature of commercial surrogacy, these two commercial surrogacy hot spots 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 business, 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.