

A COMPARISON OF SURROGACY LAWS OF THE U.S. TO OTHER COUNTRIES: SHOULD THERE BE A UNIFORM FEDERAL LAW PERMITTING COMMERCIAL SURROGACY?

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I. INTRODUCTION

Renewed attention has been given lately to the law of surrogacy as the result of a recent high-profile scandal that dominated headlines throughout the summer last year.¹ The so-called Baby Gammy case stirred emotions and a demand for reform after an Australian couple refused to take home the twin brother of babies born to a Thai surrogate mother because the child had Down syndrome, leaving the birth mother to care for a baby she had never intended to raise.² The many twists and turns of the scandal – from the adoptive mother demanding the agency return their money to the discovery that the adoptive father had been previously convicted of child sexual abuse³ – prompted lawmakers in both countries to push for a reform to prevent such cases from reoccurring.⁴ The Thai government called for a ban on the international commercial surrogacy that had flourished in the absence of regulation.⁵ Meanwhile, in Australia, lawyers and lawmakers proposed the ban on commercial surrogacy inside Australia be lifted in an attempt to

1. Thomas Fuller, *Thailand's Business in Paid Surrogates May Be Foundering in a Moral Quagmire*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/world/asia/in-thailands-surrogacy-industry-profit-and-a-moral-quagmire.html?_r=0.

2. *Id.*

3. *Id.*

4. See Nicolas Perpetch, *Gammy Case: Commercial Surrogacy Should Be Legalised*, *Lawyers Say*, ABC NEWS (Aug. 12, 2014, 6:06 PM), <http://www.abc.net.au/news/2014-08-12/advocates-call-for-commercial-surrogacy-to-be-legalised/5666206> (highlighting the differing views of politicians in Australia and positives and negatives of banning commercial surrogacy); Lindsay Murdoch, *Thailand Bans Foreign Surrogacy After Baby Gammy Affair*, SYDNEY MORNING HERALD (Feb. 20, 2015), <http://www.smh.com.au/world/thailandbansforeignsurrogacyafterbabygammy-affair2015022013ksrm.html> (“Thailand’s military-dominated parliament has passed a law criminalising and banning foreigners from seeking surrogacy services in the South-East Asian country following last year’s Baby Gammy scandal.”).

5. Fuller, *supra* note 1; *Law Banning Commercial Surrogacy Takes Effect*, BANGKOK POST (July 30, 2015), <http://www.bangkokpost.com/news/general/638264/law-banning-commercial-surrogacy-takes-effect>; Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBR. OF CONG. – GLOB. LEGAL MONITOR (Apr. 6, 2015), <http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/> (“On February 19, 2015, the National Assembly of Thailand enacted the Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act).”).

discourage Australians from seeking surrogacy abroad.⁶ The Baby Gammy scandal highlights the need for reform and the difficult task the law faces in resolving the thorny issues arising from the practice of surrogacy.⁷

Surrogacy lies in an area where a new technology collides with old laws, challenging our notions of maternity and parenthood in ways that were inconceivable in the past.⁸ Laws must adapt in order to manage the complexities resulting from its use.⁹ Further complicating the matter is the ever-growing demand for surrogacy as more couples than ever before seek surrogacy and other forms of reproductive assistance as a means to start a family due to increasing rates of infertility and

6. See Perpitch, *supra* note 4 (discussing Australia lawyers who are advocating for a regulated commercial surrogacy framework); Bridget Brennan, *Commercial Surrogacy Should Be Legalised, Family Court Chief Justice Diana Bryant Says*, ABC NEWS (Apr. 17, 2015, 9:25 PM), <http://www.abc.net.au/news/2015-04-18/commercial-surrogacy-should-be-legalised-family-court-justice/6402924> (emphasizing that Australian couples are entering unethical arrangements overseas because of the domestic ban); Media Release, Att'y-Gen. for Austl. Senator the Hon George Brandis QC, Inquiry Into Surrogacy (Dec. 3, 2015) <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2015/FourthQuarter/3-December-2015-Inquiry-into-surrogacy.aspx> (announcing that the House of Representatives Standing Committee on Social Policy and Legal Affairs would consider the feasibility of regulating surrogacy arrangements).

7. See Perpitch, *supra* note 4 (discussing the possibility of a regulated surrogacy framework following the Baby Gammy case and the issues that may arise from the legalization of surrogacy agreements, such as the exploitation and commodification of women and children).

8. FAITH MERINO, ADOPTION AND SURROGACY PREGNANCY 4-6, 16 (2010) (discussing advances in reproductive technology and providing historical background on the earliest examples of both adoption and surrogacy).

9. The phrase *quia mater semper certa est* was used to mean that the maternity of a child was certain from the fact of childbirth. Daniel Gruenbaum, *Foreign Surrogate Motherhood: Mater Semper Certa Erat*, 60 AM. J. COMP. L. 475, 475-76 (2012). For example, the Immigrant and Nationality Act of 1965 extends citizenship at birth to a child born out of wedlock outside of the United States to a U.S. citizen mother provided the mother has been present in the United States for a continuous period of one year; but a child born abroad and out of wedlock to a U.S. citizen father attains citizenship at birth only if four additional requirements are fulfilled. Immigration and Nationality Act, 8 U.S.C. § 1409 (2012) (upheld against challenges on Fifth Amendment and Fourteenth Amendment grounds in *Nguyen v. INS*, 533 U.S. 53). The presumption is that a birth mother must be genetically related to the child but with the advent of assisted reproduction and surrogacy, this assumption is no longer sound. See Gruenbaum, *supra*, at 475-76.

delayed parenting.¹⁰ Adoption may not be a realistic option for many due to prejudice against those seeking to adopt, a lack of adoptable infants, and long waiting periods.¹¹ A complete prohibition on surrogacy as a practice would therefore effectively foreclose the possibility for many couples to have children altogether¹² and may give rise to constitutional challenges.¹³ Contrasted against this, however, are opponents who view surrogacy, and in particular commercial surrogacy, as a gendered practice akin to prostitution that exploits vulnerable and impoverished women.¹⁴

Balancing these considerations, Part II will provide a brief background and examine surrogacy from global and domestic views. Part III explores how other countries have dealt with a lack of regulation directly addressing surrogacy and responds to criticism that commercial surrogacy is exploitive. Part IV considers four different foreign surrogacy law models and proposes the ideal combination of models that the United States

10. See Austin Caster, Comment, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 481-85 (2011) (noting several factors that contribute to infertility, such as “the increasing tendency to delay parenting, the escalating prevalence of obesity and the high level of sexually transmitted infections”); see also HARRY D. KRAUSE ET AL., FAMILY LAW CASES, COMMENTS, AND QUESTIONS 431 (7th ed. 2013) (noting that the rate of assisted reproduction in the United States in 2008 was double that of 1999).

11. Caster, *supra* note 10, at 482-83. Bias against prospective parents can take many forms, such as costs, time constraints, age, sexual orientation, and religion. *Id.*

12. *Id.*

13. See Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L., 557, 563-65 (1999) (noting the Supreme Court has disfavored governmental interference and restrictions on an individual's reproductive choices).

14. April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 269-71 (2014); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. Med. & Health Care 72, 74 (1988) (reviewing the “[s]ymbolic arguments and pejorative language [that] seem to make up the bulk of the policy arguments and media commentary against surrogacy,” which include characterizing women who are surrogates as “breeder women, reproductive meat, interchangeable parts in the birth machinery, manufacturing plants, human incubators, incubators for men's sperm, a commodity in the reproductive marketplace, and prostitutes.” (internal quotation marks and footnotes omitted)). Cherry also argues that some instances of commercial surrogacy are a permitted and legal form of racism. Cherry, *supra*, at 270.

should implement. Finally, Part V concludes by suggesting that the United States should legalize gestational commercial surrogacy at the federal level and adopt a combination of Israel's and Ukraine's models with intent-based parentage as the basis for a uniform, federally-regulated surrogacy law.

II. BACKGROUND – FOUNDATIONS OF SURROGACY

Surrogacy is a form of assisted reproduction where a woman agrees to carry to term a child that will be raised by another person or persons – commonly referred to as the intended parents or commissioning parents.¹⁵ Surrogacy can be either traditional or gestational.¹⁶ Traditional surrogacy occurs when the egg of the birth mother is used and creates a genetic tie between surrogate and child.¹⁷ In gestational surrogacy, the birth mother is implanted with an embryo and is, therefore, not genetically related to the child.¹⁸ The child could be genetically related to one or both of the intended parents or neither, if both the egg and sperm are from donors.¹⁹ The majority of surrogacy agreements are gestational.²⁰

15. KRAUSE ET AL., *supra* note 10, at 458.

16. Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 68-69 (2013).

17. *Id.* at 68.

18. *Id.* at 68-69.

19. See Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 451 (2009) (listing the various combinations of surrogacy arrangements).

20. Ninety-five percent of surrogate mothers carry fetuses with whom they share no genetic material. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1260 (2013); see also Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 17-18 (2008) (remarking that in the United States, gestational surrogacy makes up ninety-five percent of surrogacy cases and that clinics in India operate exclusively with gestational surrogacy). One reason for this may be the fact that a surrogate mother is less likely to experience a bond with the child and may, therefore, be more willing to relinquish custody post-birth, although she may still experience a sense of loss. Policy Dep't C: Citizens' Rights & Const'l Affairs, Directorate-Gen. for Internal Policies, A Comparative Study on the Regime of Surrogacy in EU Member States, at 33, PE 474.403 (2013) [hereinafter EU Surrogacy Study].

A surrogacy agreement can further be classified as altruistic or commercial.²¹ In an altruistic surrogacy agreement, the surrogate mother is not paid, although she may be reimbursed for medical costs; a commercial surrogacy agreement, on the other hand, is more similar to a contract, wherein the surrogate mother will be paid a fee.²² Commercial surrogacy, being the more controversial of the two classifications, is the focus of this comment.

A. Surrogacy: Global View

The issue of how the law can best address the competing interests of an infertile individual's innate desire to have children and the concerns of exploitation is a hotly contested subject. Currently, there is no general consensus on an international level regarding the ethics of surrogacy and whether it is acceptable in all forms.²³ The laws of foreign countries are wide ranging – from complete prohibitions of the practice to a thriving and legal industry operating without any regulation or oversight.²⁴ Many countries, such as Portugal,²⁵ Italy,²⁶ Spain,²⁷ Switzerland,²⁸ and France,²⁹ have a ban on both

21. Gruenbaum, *supra* note 9, at 479.

22. Tina Lin, Note, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 *CARDOZO J. INT'L & COMP. L.* 545, 551 (2013).

23. See Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L.J.* 665, 678-86 (2012) (lambasting current reform efforts and challenges to implementing an international surrogacy agreement and regulating it).

24. See Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 *MINN. J. INT'L L.* 120, 125 (2012) (contrasting India, China, and Thailand's sparse or absent regulations to the United Kingdom's total prohibition).

25. Lei no. 32/2006, de 26 de Julho (Port.).

26. Legge 19 febbraio 2004, n.40, in G.U. Feb. 24, 2004, n.45 (It.); EU Surrogacy Study, *supra* note 20, at 107-08.

27. Ley sobre técnicas de reproducción humana asistida [Law on Assisted Human Reproduction Techniques] art. 10 (B.O.E. 2006, 126) (Spain); EU Surrogacy Study, *supra* note 20, at 108.

28. BUNDESGESETZ ÜBER DIE MEDIZINISCH UNTERSTÜTZTE FORTPFLANZUNG [FEDERAL ACT ON MEDICALLY ASSISTED REPRODUCTION], Dec. 18, 1998, SR 810.11, art. 4 (Switz.).

29. CODE CIVIL, art. 16-7 (Fr.).

commercial and altruistic surrogacy, while Russia,³⁰ India,³¹ and Ukraine³² embrace both forms and view commercial surrogacy as a lucrative market.

South Africa has legalized altruistic surrogacy with laws specifically addressing who can and cannot enter into a surrogacy agreement.³³ The United Kingdom has outlawed commercial surrogacy and held all surrogacy agreements to be unenforceable³⁴ but still allows citizens to form surrogacy agreements abroad.³⁵ Other countries have no laws regarding the practice, while Israel has a state-controlled surrogacy scheme,³⁶ which is discussed in greater detail below. The lack of uniformity between countries on surrogacy is further compounded by the lack of any international agreement directly addressing its use.³⁷

30. SEMEINYI KODEKS ROSSIJSKOI FEDERATSII [SK RF] [Family Code] art. 51 (Russ.); Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 439 (2014); EU Surrogacy Study, *supra* note 20, at 53.

31. Smerdon, *supra* note 20, at 22, 33-43 (citing INDIAN COUNCIL OF MED. RESEARCH, NAT'L COUNCIL OF MED. SCIENCES, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA (2005); Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE (July 29, 2007, 3:00 PM), <http://www.marieclaire.com/world-reports/news/surrogate-mothers-india>.

32. Margalit, *supra* note 30, at 439; *Legislation of Ukraine*, INT'L REPROD. TECHS. SUPPORT AGENCY, <http://www.irts.com.ua/en/legislation/ukraine.html> (last visited Mar. 26, 2016).

33. Children's Act 38 of 2005 (S. Afr.). The act specifies, for example, that the agreement is considered invalid if the child is not genetically related to at least one of the intended parents. *Id.* § 294. This aspect of the law has been successfully challenged as an unconstitutional infringement on the rights of infertile individuals. *AB v Minister of Social Development As Amicus Curiae: Centre for Child Law 2015 (4) SA 24 (N. Gauteng H.C., Pretoria) (S. Afr.)*; Aarti J. Narsee & Jerome Cornelius, *Childless Couples Thrown a Lifeline*, TIMES LIVE (Aug. 14, 2015), <http://www.timeslive.co.za/thetimes/2015/08/14/Childless-couples-thrown-a-lifeline>.

34. Surrogacy Arrangements Act 1985, c. 49, § 2 (U.K.).

35. Davis, *supra* note 24, at 125.

36. Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2271, 2288 (2012).

37. Brugger, *supra* note 23, at 669. An instrument similar to the Hague Adoption Convention has been suggested as one possibility for resolving the confusion and promoting uniformity among countries. Helier Cheung, *Surrogate Babies: Where Can You Have Them, and Is It Legal?*, BBC NEWS (Aug. 6, 2014), <http://www.bbc.com/news/world-28679020>.

B. Surrogacy: U.S. View

The United States is one of the only countries with no national law specifically addressing surrogacy.³⁸ Because the United States leaves the development of surrogacy laws to the states, it lacks the uniformity seen in many countries abroad.³⁹ Some states enforce a complete prohibition against all forms of surrogacy while others are more willing to embrace its use.⁴⁰ For example, Washington,⁴¹ the District of Columbia,⁴² Arizona,⁴³ Michigan,⁴⁴ North Dakota,⁴⁵ and Indiana⁴⁶ have statutes banning surrogacy as against public policy and may even impose criminal or civil penalties on those found to have entered into such agreements. Kentucky prohibits compensating the surrogate mother or an agency for agreeing to terminate parental rights.⁴⁷ Louisiana,⁴⁸ Nebraska,⁴⁹ and New York⁵⁰ have codified their opposition to surrogacy by refusing to enforce surrogacy agreements but have not banned surrogacy or made it criminal. Arkansas law provides guidance on parental rights arising under surrogacy agreements depending on the marital status of the intended parents.⁵¹ Some states, in an effort to regulate surrogacy agreements, have strict statutes identifying who can enter into surrogacy agreements.⁵² For example, in

38. Smerdon, *supra* note 20, at 25-27.

39. Davis, *supra* note 24, at 125.

40. Conklin, *supra* note 16, at 68-69.

41. WASH. REV. CODE §§ 26.26.230-.240 (2012).

42. D.C. CODE § 16-402 (2012).

43. ARIZ. REV. STAT. ANN. § 25-218(A) (2006). However, this statute was held unconstitutional as a violation of the equal protection clause by the Arizona Court of Appeals. *Soos v. County of Maricopa*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994).

44. MICH. COMP. LAWS § 722.855 (2014).

45. N.D. CENT. CODE ANN. § 14-18-05 (2012).

46. IND. CODE § 31-20-1-2 (2015).

47. KY. REV. STAT. ANN. § 199.590(4) (West, Westlaw through 2015 Sess.).

48. LA. STAT. ANN. § 9:2713 (West, Westlaw through 2014 Sess.).

49. NEB. REV. STAT. § 25-21,200 (2008).

50. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

51. ARK. CODE ANN. § 9-10-201(b)(1)-(3) (2009).

52. *See, e.g.*, TEX. FAM. CODE ANN. § 160.754(b) (West 2014) (requiring that the intended parents be married to each other); FLA. STAT. § 742.15 (2012) (requiring that the commissioning couple are legally married and both 18 years of age); 750 ILL. COMP.

Texas, the intended parents of a child born to surrogacy must be married⁵³ and the intended mother must either be incapable of having children naturally or be incapable of carrying a child without risking the health of the child or herself.⁵⁴ The surrogate cannot be the genetic mother⁵⁵ and has to have had at least one successful pregnancy.⁵⁶ In addition, the court must approve the petition for a surrogacy agreement.⁵⁷ Florida,⁵⁸ Illinois,⁵⁹ and California⁶⁰ have statutory requirements that must be satisfied before a surrogacy agreement is deemed valid. The remaining jurisdictions have unclear or absent laws and leave children, surrogates, and intended parents with uncertain rights.⁶¹

The Uniform Parentage Act (“UPA”) proposed one solution to the lack of uniformity of U.S. surrogacy laws. The UPA would resolve issues of legal parentage by requiring the intended parents receive a court order stating that they are the legal parents of the resulting children as stated in the surrogacy contract for the agreement to be held enforceable.⁶² The UPA would allow compensating surrogates⁶³ and would require

STAT. 45/6 § 6(E) (2014) (requiring that at least one of the parents be genetically related to the child).

53. TEX. FAM. CODE ANN. § 160.754(b) (West 2014).

54. § 160.756(b)(2).

55. § 160.754(c).

56. § 160.756(b)(5).

57. § 160.755.

58. FLA. STAT. §§ 63.212-.13, 742.15-.16 (2012).

59. 750 ILL. COMP. STAT. 47/25 (2014).

60. CAL. FAM. CODE § 7962 (West, Westlaw through 2015 Reg. Sess.); *see also* Joshua J. Bryant, *A Baby Step: The Status of Surrogacy Law in Wisconsin Following Rosecky v. Schissel*, 98 MARQ. L. REV. 1729, 1749 (2015) (noting requirements for surrogacy contracts under California law, including requirements that parties be identified, a disclosure is made of how medical expenses are to be paid, and parties must be represented by separate counsel).

61. Margalit, *supra* note 30, at 425. Twenty states fall under this category. KRAUSE ET AL., *supra* note 10, at 470.

62. UNIF. PARENTAGE ACT § 803(a) (amended 2002), 9B U.L.A. 90 (Supp. 2015); *see also* Brock A. Patton, *Note, Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. Rev. 507, 520 (2010) (discussing requirements of surrogacy contracts under the Uniform Parentage Act).

63. UNIF. PARENTAGE ACT § 801(e) (amended 2002), 9B U.L.A. 88 (Supp. 2015) (“A gestational agreement may provide for payment of consideration.”). This would make

parties to a surrogacy contract to have been present in the state for ninety days to deter forum shopping.⁶⁴ However, only a handful of states have adopted this approach, and, even then, they have adopted a modified version.⁶⁵

III. ANALYSIS

A. *Lack of Regulation Leads to an Uncertainty of Rights*

The current silence and lack of coherence of surrogacy laws in the United States will lead to confusion, heartache, and unnecessary litigation.⁶⁶ Regulation would protect surrogates from abuse and ensure proper medical care and standards.⁶⁷ Additionally, absent clear guidelines, intended parents are forced to gamble with their parental rights.⁶⁸

The lack of cohesion among the states encourages forum shopping and forces individuals to cross state-lines to become parents in an effort to take advantage of the friendlier surrogacy laws.⁶⁹ Alternatively, it may incentivize them to go abroad to enter into international surrogacy agreements that have the potential to create confusion regarding the citizenship of any resulting children and may be formed in countries lacking

surrogacy contracts enforceable against public policy defenses. Patton, *supra* note 62, at 520.

64. UNIF. PARENTAGE ACT § 802(b)(1) (amended 2002), 9B U.L.A. 363 (2001) (“A proceeding to validate a gestational agreement may not be maintained unless . . . the mother or intended parents have been residents of this State for at least 90 days . . .”).

65. UNIF. PARENTAGE ACT §§ 801-03 Action in Adopting Jurisdictions (amended 2002), 9B U.L.A. 87-93 (Supp. 2015); Patton, *supra* note 62, at 519-21.

66. See Anita Wadhvani, *Vague Surrogacy Laws Can Lead to Heartache*, USA TODAY (Oct. 20, 2014, 10:10 PM), <http://www.usatoday.com/story/news/nation/2014/10/20/vague-surrogacy-laws-heartache/17643529/%20> (discussing a custody battle between a Tennessee surrogate mother and an Italian couple, and attributing the lengthy litigation to Tennessee’s unclear surrogacy laws).

67. EU Surrogacy Study, *supra* note 20, at 27-28.

68. See Conklin, *supra* note 16, at 93 (emphasizing the risky uncertainty of surrogacy contracts for intended parents, because the parents cannot be sure that they will be given custody of the child).

69. See Patton, *supra* note 62, at 515 (arguing that legislation prohibiting or punishing parties involved in commercial surrogacy contracts drives individuals to states with more favorable laws); see also Davis, *supra* note 24, at 123 (noting that California and Florida are common destinations for couples seeking surrogacy).

protective laws for surrogate mothers.⁷⁰ Furthermore, absent uniform laws, where surrogacy agreements are made and performed in one state, the parents who then bring the child to another state, where such agreements are not recognized or are potentially criminalized, could face uncertain parental rights.⁷¹ Finally, judges would be tasked with the difficult job of deciding parental rights and whether to enforce a surrogacy contract – among other issues arising from surrogacy agreements that must be resolved – sometimes without the assistance of legal precedent.⁷²

A number of controversies have taken place abroad, where surrogacy laws are either non-existent or insufficient, and show how complications can arise in an unregulated surrogacy market.⁷³ The most current example is the above-mentioned ban on commercial surrogacy agreements in Thailand as part of the backlash to the Baby Gammy scandal.⁷⁴ Similar cases in

70. See Caster, *supra* note 10, at 484-85 (“If the laws in the United States regarding surrogacy were clear, uniform, and less restrictive, then perhaps fewer American couples would turn to these exploitative international surrogacy agreements.”).

71. See Amanda Mechell Holliday, Comment, *Who’s Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1126 (2003) (asserting that children born through surrogacy are at risk because of uncertain rights and lengthy litigation to determine the legal parents).

72. Davis, *supra* note 24, at 123; see also Leora I. Gabry, Note, *Procreating Without Pregnancy: Surrogacy and the Need for A Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 417 (2012) (noting many states lack statutes addressing surrogacy and will be uncertain how to handle such cases when they arise); Kathianne Boniello, *New York’s Craziest Custody Case: Four Parents, One Child*, N.Y. POST (Aug. 30, 2015, 6:00 AM), <http://nypost.com/2015/08/30/inside-new-yorks-complicated-new-world-of-custody-cases/> (describing several complex custody cases in New York, one of which involves an agreement that fell apart between two male partners and one of the partner’s sister to create a child from the sperm of one of the men and the eggs of the other man’s sister, who would also serve as the surrogate and help raise the child).

73. See Davis, *supra* note 24, at 126 (commenting that India has dealt with several cases as a result of not having adequate regulations in place).

74. *Law Banning Commercial Surrogacy Takes Effect*, *supra* note 5. Further provoking the government’s response was the discovery that the son of a Japanese billionaire had been using Thai surrogate mothers to father dozens of children throughout Thailand. Fuller, *supra* note 1.

countries such as India⁷⁵ and Ireland⁷⁶ further illustrate the urgent need for regulation.

1. India

India is an extremely popular destination for foreign couples seeking surrogacy arrangements.⁷⁷ The industry makes \$445 million annually because the practice is neither illegal nor subject to regulations.⁷⁸ Absent such regulations, fertility clinics in India must adopt ethical medical standards on a voluntary basis.⁷⁹ Due to this unregulated environment and the fact that surrogate mothers are paid so little compared to their western counterparts,⁸⁰ critics have decried the practice as an unethical exploitation of lower-income women.⁸¹

Draft legislation has been proposed in response to these concerns.⁸² Rather than outlaw commercial surrogacy as the Thai government proposed, the bill attempts to balance

75. Smriti Kak Ramachandran, *Legal Tangles Hurdle to Commissioning Couples*, THE HINDU (Sept. 28, 2014, 2:14 IST), <http://www.thehindu.com/sunday-anchor/sans-parents-sans-nation-sans-protection/article6453321.ece>.

76. Christina Finn, *Surrogacy Under the Spotlight: How Ireland Plans to Handle This Legal Minefield*, THE JOURNAL.IE (Aug. 10, 2014, 7:45 AM), <http://www.thejournal.ie/surrogacy-law-ireland-1610184-Aug2014/> (discussing problems caused in Ireland by the lack of surrogacy laws).

77. See Davis, *supra* note 24, at 125.

78. *Id.* at 125-26.

79. The Indian Council of Medical Research has issued non-binding guidelines that clinics providing surrogacy services are encouraged, but not obligated, to follow. INDIAN COUNCIL OF MED. RESEARCH, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA 126 (2005), http://icmr.nic.in/art/art_clinics.htm; see also Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 281 (2009) (noting that the absence of national regulation requires the private surrogacy industry to self-regulate); Patton, *supra* note 62, at 525-26.

80. See Smerdon, *supra* note 20, at 32 (noting that an Indian surrogate is typically compensated \$2,500 to \$7,000 while an American surrogate is paid approximately \$14,000 to \$18,000).

81. See Haworth, *supra* note 31 (“The system certainly lends itself to the criticism that foreign women . . . exploit poor women at a 10th of the price [surrogacy] would cost back home.”); Cherry, *supra* note 14, at 269-70 (arguing that commercial surrogacy in foreign countries is gendered and exploitive and should be prohibited).

82. The Assisted Reproductive Technology (Regulation) Bill, 2010 (as drafted by the Ministry of Health & Family Welfare & Indian Council of Medical Research), <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

competing interests by recognizing both the need to protect the right of Indian citizens to bear children as well as the obligation to ensure the safety and wellbeing of surrogate mothers.⁸³ The bill acknowledges that in the current state of the industry anyone can open a fertility clinic without approval from the government or any supervision and, proposes to remedy this in three ways: 1) establishing a national board charged with regulating the industry and promulgating rules; 2) creating state boards to set policies and plans; and 3) requiring clinics to attain accreditation.⁸⁴ However, the industry remains in its unregulated state, as the bill has not acquired the support necessary to pass.⁸⁵

The 2014 version of the proposed bill requires, as a condition to forming a surrogacy agreement, commissioning couples who are not citizens of India to produce a letter stating that the couple's home country permits surrogacy and that the resulting child will be recognized and admitted as their own biological child.⁸⁶ It further mandates that the foreign commissioning parents must appoint a local guardian to provide for the child's care if they cannot do so themselves.⁸⁷ These conditions were added to the bill in an attempt to resolve specific citizenship dilemmas that arose in two cases.⁸⁸

In the first of such cases, referred to as the Baby Manji case,⁸⁹ a couple from Japan sought to have a child through gestational surrogacy in India using an embryo created from the

83. The bill notes that eighty-five percent of infertility cases can be resolved through reproductive assistive technology and recognizes the right of every Indian couple to bear a child, noting that infertility carries a social stigma in India. *Id.* pmb1.

84. *Id.* §§ 2(5)(1), 8(2)(a)-(d) & 13.

85. Tarig Ahmad, *India: Draft Legislation Regulating Assisted Reproductive Technology Published*, GLOBAL LEGAL MONITOR (Nov. 2, 2015), <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/>.

86. The Assisted Reproductive Technologies (Regulation) Bill, Bill No. 61 of 2014 (as introduced in Lok Sabha) (India), § 13(iii), <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/1310LS.pdf>.

87. *Id.* § 13(i).

88. Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 135-36 (2013).

89. *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India).

egg of an anonymous woman and the sperm of the intended father.⁹⁰ Because a donor's egg was used and therefore the child was only related to the intended father, the baby, named Manji, had no mother listed on her birth certificate.⁹¹ Before the birth of their child the couple separated and the intended mother no longer wanted to raise Manji.⁹² Because the terms of the surrogacy agreement stated that the father would have custody in the event the couple separated, neither the birth mother nor the former spouse had any parental rights to the child.⁹³ The intended father and Manji's paternal grandmother tried unsuccessfully to take Manji home to Japan,⁹⁴ but Manji was unable to obtain a passport⁹⁵ because she had no mother listed on her birth certificate, despite being required by law.⁹⁶

To make matters worse, Manji essentially did not have a nationality.⁹⁷ She could not get Japanese citizenship as citizenship in Japan would be based on the birth mother's nationality because the intended mother and father were not married.⁹⁸ Manji could not be an Indian citizen because she would need at least one parent who was an Indian citizen to obtain citizenship according to Indian law, and, even though she was born to an Indian woman, Indian authorities were unsure

90. Lin, *supra* note 22, at 557.

91. *Id.* at 557-58. Non-binding guidelines suggest the parents listed on the birth certificate should be decided based on genetic ties. INDIAN COUNCIL OF MED. RESEARCH, *supra* note 82, at 63.

92. Lin, *supra* note 22, at 557.

93. *Id.*

94. Mortazavi, *supra* note 36, at 2274. Further complicating the matter was the fact that the intended father's tourist visa expired in the midst of trying to care for and remove Manji from India. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 419 (2012). His mother arrived in India shortly afterwards to continue caring for Manji and eventually took the case to the Indian Supreme Court. *Id.* at 419-20.

95. Mortazavi, *supra* note 36, at 2274.

96. Kristine S. Knaplund, *Baby Without A Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. U. L. REV. 335, 355 (2014).

97. *Id.*

98. *Id.* In addition, Japan would not recognize the child as Japanese because no law existed in Japan addressing surrogacy. *Id.* Japan also will not recognize children born to surrogacy agreements. *Id.*

which woman should be listed on Manji's birth certificate.⁹⁹ In addition, the father could not adopt Manji due to an Indian law prohibiting single fathers from adopting female children.¹⁰⁰ Ultimately, however, the highest court of India resolved the case, by which time Manji was already three months old,¹⁰¹ granting the necessary documents on a one-time basis.¹⁰²

A similar one-time exception was made in a case that dealt with the same problem of the nationality of children born pursuant to an international surrogacy agreement.¹⁰³ In *Balaz v. Union of India*,¹⁰⁴ Jan Balaz, the intended father to whom the children were related, was stuck in India for two years with twins born to an Indian surrogate mother while the court resolved passport issues.¹⁰⁵ His home country of Germany did not recognize surrogacy agreements and refused to issue the documentation required to leave.¹⁰⁶ India refused to issue a passport as the children were not related to an Indian citizen¹⁰⁷ because a donor egg was used.¹⁰⁸ The case was only resolved after the court granted a one-time exception, similar to the one in *Baby Manji*, and the children were formally adopted.¹⁰⁹

Despite the highly publicized issues illustrated in the *Baby Manji* and *Balaz* cases, commercial surrogacy continues to flourish in India's unregulated market, where dilemmas concerning the nationality of the resulting children will continue until the bill requiring proof of citizenship passes.¹¹⁰

99. *Id.* ("India would not issue a birth certificate because Indian law requires both the mother and father to be named, and authorities were unsure whether the gestational carrier, the egg donor, or the intended mother was the mother of the child . . .").

100. *Id.*

101. Trisha A. Wolf, *Why Japan Should Legalize Surrogacy*, 23 PAC. RIM L. & POL'Y J. 461, 474 (2014).

102. Ergas, *supra* note 88, at 131. The ruling was made cautiously on the condition that it not set any legal precedent. *Id.*

103. Smerdon, *supra* note 20, at 64.

104. *Balaz v. Anand Municipality*, LPA 2151/2009 (Gujarat HC 2009).

105. Mortazavi, *supra* note 36, at 2275.

106. *Balaz*, ¶ 5.

107. *Id.* ¶ 4.

108. *Id.* ¶ 6; Smerdon, *supra* note 20, at 63.

109. *Balaz*, ¶¶ 20-22 ; Mortazavi, *supra* note 36, at 2275-76.

110. See Laufer-Ukeles, *supra* note 20, at 1265-66 ("[B]usiness in reproductive tourism is thriving in India, growing at some seven percent annually"). Letters were sent

2. Ireland

In a more recent case, the Supreme Court of Ireland grappled with the difficult question of whether genetics or birth is determinative of motherhood in deciding who should be listed on a child's birth certificate in the absence of clear laws addressing the issue.¹¹¹ The surrogate mother and the genetic mother in this case were sisters who both sought the change to the birth certificate but were refused by the registrar.¹¹² The Court noted that there was no definition of "mother" in the Constitution and therefore nothing prevents the State from legislating regulation on surrogacy.¹¹³ However, the Court ultimately decided the birth mother should remain on the birth certificate as the child's official mother.¹¹⁴ The decision is not just symbolic; the name listed on the birth certificate controls inheritance rights, custody determinations, and authority to make medical decisions.¹¹⁵ As a result, legislators, concerned that the lack of a legal framework may leave children of surrogacy agreements unprotected, promised to introduce a bill addressing legal parentage before the end of 2014.¹¹⁶ However, no such law has yet to be passed.¹¹⁷

These cases illustrate that surrogacy, particularly when it involves multination parties, is a complex, new technology with far too many complications and too high of stakes to remain

from the Consuls General of eight European nations asking that clinics in India refuse to provide surrogacy services to their citizens, but citizens of these eight nations are still using Indian surrogacy as a means to start a family. Lin, *supra* note 22, at 562-63.

111. See M.R. and D.R. (suing by their father and next friend O.R.) & ors. v. An t-Ard-Chláraitheoir & ors [2014] IESC 60 (Ir.) ("The core issue in this appeal is the registration of a 'mother' under the Civil Registration Act . . .").

112. *Id.*

113. *Id.*

114. *Id.*

115. Deirdre Madden, *Legal Limbo Continues for Surrogate Children*, IRISH EXAMINER (Nov. 8, 2014), <http://www.irishexaminer.com/viewpoints/analysis/legal-limbo-continues-for-surrogate-children-296913.html>.

116. *Bill Addressing Assisted Reproduction to be Drawn up by End of the Year*, RTÉ NEWS (Nov. 7, 2014, 11:27 PM), <http://www.rte.ie/news/2014/1107/657487-supreme-court-surrogacy/>.

117. Christina Finn, *Surrogacy in Ireland: Where Do We Stand?*, THE JOURNAL.IE (May 17, 2015), <http://www.thejournal.ie/surrogacy-in-ireland-marriage-ref-2089158-May2015/>.

unregulated.¹¹⁸ Laws ought to be put in place to address, first, the issue of whether surrogacy is a legal form of assisted reproduction and, then, issues of parental rights and obligations, citizenship of resulting children, compensation, and other issues necessary to achieve a mutually beneficial legal framework.¹¹⁹

B. *Is Surrogacy Exploitation?*

Before deciding on an appropriate legal framework for surrogacy, the question of whether or not domestic commercial surrogacy ought to be legalized must be resolved. Surrogacy is a controversial subject, drawing support and opposition from both sides of the political spectrum.¹²⁰ One common reason for opposing legalized and regulated commercial surrogacy is the fear that the practice exploits vulnerable and impoverished women¹²¹ and creates a class of “baby-making machines.”¹²² Proponents argue, however, that such a viewpoint is based on the paternalistic assumption that women need to be saved from themselves¹²³ and minimizes the autonomy in a surrogate mother’s reproductive choices.¹²⁴ Furthermore, they argue that

118. See Davis, *supra* note 24, at 143-44 (arguing that surrogacy will never reach its “full potential” to help couples have children unless the myriad of associated problems are addressed).

119. See Conklin, *supra* note 16, at 92-93.

120. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), <http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html>.

121. See Cherry, *supra* note 14, at 269-71 (likening commercial surrogacy to prostitution); EU Surrogacy Study, *supra* note 20, at 24 (noting the argument that commercial surrogacy is no different than selling body parts and its legalization will result in a “caste of pregnancy carriers”).

122. Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L L. 1429, 1444-46 (2009).

123. Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 238 (2012); see also Rimm, *supra* note 122, at 1447 (“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.”).

124. SAMA RES. GRP. FOR WOMEN & HEALTH, BIRTHING A MARKET: A STUDY ON COMMERCIAL SURROGACY 17-18 (2012), <http://www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf>. Proponents of commercial surrogacy maintain that women have a right to make decisions regarding childbearing, ostensibly invoking the privacy interest of the woman in her own private affairs. The historical significance of

not compensating the surrogate mother devalues the work she has done.¹²⁵

From the international surrogacy perspective, the argument that a surrogate mother has made a choice and is autonomous in her decision-making is undermined to a certain degree (at least in India) by the practice of housing surrogates in dormitory-style living quarters, where the women are isolated from their families for the duration of the pregnancy.¹²⁶ However, some surrogates view this requirement as an enjoyed vacation from the normal rigors of family life.¹²⁷ Strengthening the argument that commercial surrogacy is exploitive is the standing of the surrogate mother compared to the intended parents.¹²⁸ In India, surrogate mothers are generally impoverished women with little

this argument is outside the scope of this writing, but for more information on the matter, see generally CTR. FOR REPRODUCTIVE RIGHTS, *ROE V. WADE AND THE RIGHT TO PRIVACY* (3d ed. 2003). The work notes that:

Roe [v. Wade] not only moved abortions out of the back alleys, but it also helped define the contours of the right to privacy, which protects individuals from unwarranted governmental interference in private affairs. In addition, this decision, and those that followed, recognized that the right to make childbearing choices is central to women's lives and their ability to participate fully and equally in society.

Id. at 5; see also Purvis, *supra* note 123, at 238 (comparing arguments against abortion to arguments against surrogacy, and concluding that both are paternalistic, traditional, and aimed at eliminating women's choices); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 131 (discussing a feminist who argued during the Baby M case that "paternalistic restrictions on surrogacy contracts were dangerous incursions into women's procreative freedom").

125. See Jenni Millibank, *Paying For Birth: The Case for (Cautious) Commercial Surrogacy*, THE GUARDIAN (Sep. 1, 2013, 11:05 PM), <http://www.theguardian.com/commentisfree/2013/sep/02/australia-commercial-surrogacy> ("Women who undertake pregnancies for others in surrogacy arrangements are performing labour . . . and they are undertaking risks. Paying nothing does not protect or value this role."); Laufer-Ukeles, *supra* note 20, at 1235 (arguing that payment is an essential part of surrogacy arrangements because it provides "due compensation for extremely hard work").

126. Mohapatra, *supra* note 94, at 435-36.

127. *Id.*

128. Margalit, *supra* note 30, at 431-32 (discussing the view that intended parents and surrogate mothers come from different socioeconomic statuses, and the surrogate mother will therefore be exploited).

to no education,¹²⁹ while the intended parents are wealthier,¹³⁰ more educated,¹³¹ and more likely to obtain legal counsel during the process.¹³² Adding to the exploitation argument is the fact that American surrogates are paid more for their services than Indian surrogates.¹³³

In spite of this, some surrogate mothers in India are firm in their opposition to the notion that their reproductive capabilities are being exploited and instead view the practice as having changed their lives for the better.¹³⁴ Furthermore, there are some who argue that commercial surrogacy does more good than harm by providing women with a major source of income in a job valued by society and in a market free of male competition.¹³⁵

While the situation in India may be called exploitation by some, the same cannot be said of surrogacy in the United States, where a surrogate is generally “married, between twenty-one

129. Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 198 (2012). The majority of surrogates in India are illiterate. Wolf, *supra* note 101, at 483. This fact supports the notion that Indian surrogates are taken advantage of because many cannot read the contract they have agreed to and often sign with a thumbprint as they cannot write. Mohapatra, *supra* note 94, at 445-46.

130. Gabry, *supra* note 72, at 440.

131. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 480 (2004).

132. Wolf, *supra* note 101, at 483.

133. Rimm, *supra* note 122, at 1444-45. However, the amount that Indian surrogates are paid is three to four times greater than what is normally earned yearly and represents an important source of income. Mohapatra, *supra* note 94, at 436. Some argue that a higher amount of compensation may actually lead to increased exploitation because low-income women will be coerced by the larger payment. Rimm, *supra* note 122, at 1444-45.

134. Kevin Voigt et al., *Wombs for Rent: India's Surrogate Mother Boomtown*, CNN (Nov. 3, 2013), <http://www.cnn.com/2013/11/03/world/asia/india-surrogate-mother-industry/>. For example, one interviewed surrogate mother defended her participation in surrogacy by stating, “This is not exploitation. Crushing glass for fifteen hours a day is exploitation.” Haworth, *supra* note 31.

135. Mohapatra, *supra* note 129, at 199; Mohapatra, *supra* note 94, at 439 (arguing that surrogacy could be thought of as employment and noting sociologist Amrita Pande’s argument that criticism of Indian surrogacy ignores the reality of life for Indian surrogates, “namely, that women who serve as surrogates may not have comparable job or income opportunities”); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. OF WOMEN IN CULTURE & SOC. 969, 971-72 (2010).

and thirty-seven years old, a high school graduate, a stay-at-home mother, and dependent on her husband's income."¹³⁶ Some research suggests American surrogates enjoy their experience as a surrogate, feel as though they are doing something beneficial, use it as an extra source of income rather than their sole income, and are rarely impoverished.¹³⁷ However, many critics of surrogacy view the entire practice as exploitation of a woman's reproductive capacities.¹³⁸ But, proponents of surrogacy counter that if a woman is agreeing to endure the difficulty of nine months of pregnancy and the arduous task of giving birth in order to allow infertile couples to become parents, then she should be compensated.¹³⁹

At any rate, although the potential for exploitation is a reality, through adequate screening and counseling beforehand, the possibility that a woman may become a surrogate out of financial desperation or coercion could be reduced.¹⁴⁰ For example, reputable clinics in India make an effort to refuse a

136. Mohapatra, *supra* note 129, at 198.

137. Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of the Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 30-31 (2005); Alyssa James, Comment, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 192 n.89 (2013) ("[S]urrogates view themselves as performing a service of great social value for the benefit of others . . ."); Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 376 (2012) (noting research in Canada, the United Kingdom, and the United States indicating surrogates from these countries are neither coerced nor impoverished).

138. *E.g.* Cherry, *supra* note 14, at 288-89 (arguing that autonomy and reproductive justice weigh against commercial surrogacy); Scott, *supra* note 128, at 112 (discussing the Baby M case, during which "critics . . . claimed that surrogacy degraded children and women by treating children as commodities, to be exchanged for profit and women's bodies as childbearing factories . . .").

139. *Cf.* Laufer-Ukeles, *supra* note 20, at 1236 (acknowledging that surrogacy requires intense bodily involvement); Pande, *supra* note 135 (arguing that surrogacy should be viewed as a form of labor deserving of compensation).

140. Reputable surrogacy agencies already require psychological screening and counseling as safeguards against women experiencing mental instability after being required to turn the baby over to the intended parents. Caster, *supra* note 10, at 509. Israel already has a system in place whereby potential surrogates are required to undergo psychological testing to qualify. Wolf, *supra* note 101, at 489. Another potential benefit of psychological screening is that it could prevent the surrogacy agreement from being held unenforceable on the grounds of duress or coercion. Caster, *supra* note 10, at 509.

woman's wish to become a surrogate if they note any sign of hesitation, unwillingness, or coercion.¹⁴¹ For many American clinics, these practices are already in place,¹⁴² and, as a result, research indicates American surrogates do not use commercial surrogacy as a desperate means to make ends meet.¹⁴³ In fact, a significant portion of American surrogates are military wives, who view surrogacy as a way to earn additional income while taking care of their children and doing something they view as a good deed for another person.¹⁴⁴

If one accepts that commercial surrogacy is exploitive both at an international and domestic level, the remedy must necessarily be a ban on its practice.¹⁴⁵ But the corollary of such a conclusion is that couples seeking surrogacy as a last resort to start a family will be incentivized to engage in reproductive tourism¹⁴⁶ in countries that have fewer regulations in place to protect both themselves and the surrogate mother.¹⁴⁷ As a result, cases similar to those of *Baby Gammy*, *Baby Manji*, and *Balaz* will reoccur.¹⁴⁸ Although India and Thailand are

141. Haworth, *supra* note 31.

142. Millibank, *supra* note 125.

143. *Id.*; see also Laufer-Ukeles, *supra* note 20, at 1234-35 (remarking that U.S. surrogates are neither impoverished nor vulnerable and tend to have a high school or college education).

144. Caster, *supra* note 10, at 499; see also James, *supra* note 137, at 197-98 (discussing a variety of reasons why women become surrogates, despite preconceptions); Laufer-Ukeles, *supra* note 20, at 1235 (asserting that many military wives become surrogates because they have good health benefits but move around too frequently to hold steady jobs).

145. See Cherry, *supra* note 14, at 288-89 (advocating banning gestational surrogacy as a practice because it exploits and commodifies disadvantaged women).

146. Reproductive tourism occurs when one travels abroad for assistive reproductive technologies to take advantage of the lower costs or because one's home country does not permit surrogacy or has vague or unfavorable laws. Davis, *supra* note 24, at 125.

147. Mohapatra, *supra* note 129, at 195-98; see Caster, *supra* note 10, at 484-86 (arguing that couples who live in jurisdictions where surrogacy is prohibited or where the laws are unclear are motivated to travel to countries with fewer or no laws, which increases the risk that the surrogate will be taken advantage of or unfairly treated).

148. See, e.g., Avianne Tan, *Why California Couple Refuses to Leave Mexico Following Surrogate Birth of Son*, ABC NEWS (May 7, 2015, 8:18 PM), <http://abcnews.go.com/US/california-couple-refuses-leave-mexico-surrogate-birth-son/>

beginning to provide a legal framework for surrogacy in the aftermath of such cases, foreign couples can always find a new country where surrogacy is legal, exploitation is possible, and restrictions are few.¹⁴⁹

IV. PROPOSAL

The implementation of a national uniform regulatory scheme that is mutually beneficial for all parties involved would resolve the “jurisdictional chaos”¹⁵⁰ currently representative of U.S. surrogacy law.¹⁵¹ The law must take into account protections for the intended parents, the surrogate mother, and the child that is the result of the agreement.¹⁵² In achieving this balance, an examination of several models from abroad is instructive.

A. *Commercial Surrogacy Should Be Legalized*

Some have argued in favor of adopting a prohibition, citing in particular the United Kingdom’s model of prohibition.¹⁵³ The U.K.’s Surrogacy Arrangements Act bans commercial surrogacy but permits altruistic surrogacy.¹⁵⁴ Additionally, the Human Fertilisation and Embryology Act of 2008 gives more assurance to intended parents of their rights by allowing the reissuing of a

story?id=30886512 (reporting the case of a U.S. couple unable to leave Mexico with their surrogate-born son due to local government refusing to issue a birth certificate).

149. See *Another Step to Ban Commercial Surrogacy*, THE NATION (Nov. 28, 2014, 8:06 PM), <http://www.nationmultimedia.com/breakingnews/Another-step-to-ban-commercial-surrogacy-30248827.html> (noting Thailand’s ban has encouraged foreign couples to travel to Nepal and Mexico). Doors may be closing to couples seeking surrogacy in many countries, however. See Ana Ilic, *Nepalese Court Suspends Commercial Surrogacy*, BIONEWS (Sept. 1, 2015), http://www.bionews.org.uk/page_561682.asp (reporting on an injunction issued by the government of Nepal to stop the practice of surrogacy in the country).

150. Margalit, *supra* note 30, at 425.

151. Patton, *supra* note 62, at 530.

152. Gabry, *supra* note 72, at 416.

153. See Caster, *supra* note 10, at 491-92 (praising the U.K.’s model for its uniformity, but acknowledging that other regulatory frameworks may also protect the rights of all parties).

154. Surrogacy Arrangements Act 1985, c. 49, § 2 (U.K.).

birth certificate to include the names of the intended parents¹⁵⁵ and permitting a judge to issue a parental order in the best interests of the child.¹⁵⁶ However, this model is insufficient as an adoptable scheme because it operates under the assumption that commercial surrogacy is an unethical practice that ought to be prohibited.¹⁵⁷ As noted above in part III, such conclusions are untenable when applied to American domestic surrogacy.¹⁵⁸

Furthermore, because the law allows U.K. citizens to seek surrogacy abroad, the law, established to protect women from unethical practices, consequently accomplishes the opposite of its intended purpose by encouraging and enabling reproductive tourism to countries such as India where surrogates are more likely to be taken advantage of in the absence of protective laws.¹⁵⁹ Moreover, the incentive to seek international surrogacy agreements caused by the ban will give rise to the same citizenship issues of *Baby Manji* and *Balaz*.¹⁶⁰

An additional criticism of this model is that it is inconsistent to ban commercial surrogacy for fears of exploitation of women and children but not ban altruistic surrogacy as well.¹⁶¹ The U.K. law could be criticized as a hasty and reactionary response to the premier surrogacy cases at a time, when no law had

155. Human Fertilisation and Embryology Act 2008, c. 22, §54 (U.K.); *see also* Caster, *supra* note 10, at 494-95.

156. *E.g.*, *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73; *see also* Caster, *supra* note 10, at 495.

157. Caster, *supra* note 10, at 493.

158. *See supra* Part III (discussing research indicating that most American surrogate mothers are not being exploited); *see also* James, *supra* note 137, at 192 n.89 (stating that surrogates are rarely poor and enjoy the benefits they are able to give to both their family and others); *see also* Stark, *supra* note 137, at 376 (emphasizing that surrogates enjoy the benefits of pregnancy beyond that of getting paid).

159. Davis, *supra* note 24, at 125.

160. *See* Pamela Laufer-Ukeles, *The Lost Children: When the Rights to Children Conflicts with the Rights of Children*, 8 L. & ETHICS HUM. RTS. 219, 262-63 (2014) (recalling a conflict of law case in which British intended parents were denied parental status of a child born to a Ukrainian surrogate, rendering the child effectively stateless and stranded).

161. Caster, *supra* note 10, at 496.

previously addressed the matter.¹⁶² Furthermore, the U.K. model suffers criticism that it unfairly punishes infertile couples by imposing the burden of finding altruistic surrogacy arrangements in order to become parents – on the assumption it is in the best interests of the child – while there is no similar prohibition on individuals who abuse their children from continuing to reproduce.¹⁶³

Finally, an additional reason not to adopt the United Kingdom's model is that a prohibition on commercial surrogacy in the United States may not be feasible in light of constitutional concerns.¹⁶⁴ Although within the realm of family law and therefore left to the states to decide, surrogacy could be brought within the jurisdiction of the federal courts due to constitutional issues.¹⁶⁵ While some argue that the right to surrogacy is part of the right to privacy upheld by prior Supreme Court decisions regarding reproductive choices,¹⁶⁶ lower courts note that the Equal Protection Clause may be used to justify its practice.¹⁶⁷ Others frame the issue as a fundamental right to procreate regardless of whether or not they are fertile.¹⁶⁸ Nevertheless, although the constitutionality of surrogacy bans is

162. See, e.g., *id.* at 492 (noting that the first surrogate birth in the UK created such a “controversy . . . that within six months the British government passed the Surrogacy Arrangements Act”).

163. *Id.* at 496.

164. See *id.* at 501-03 (“Constitutional arguments in favor of upholding surrogacy arrangements include the right to privacy under the Fifth Amendment, the penumbra of the Bill of Rights, and the Fourth Amendment.”).

165. See Mortazavi, *supra* note 36, at 2267 (arguing that, although family law issues are generally reserved to the individual states to decide, surrogacy law may fall under federal jurisdiction as a constitutional issue).

166. *Id.* at 2267-68.

167. See Caster, *supra* note 10, at 502 (asserting that *Johnson v. Calvert* provides persuasive authority for the Equal Protection argument). Proponents of the Equal Protection Clause argument state that while male infertility can be remedied through in vitro fertilization, remedies to female infertility through surrogacy are not permitted in some states. Mortazavi, *supra* note 36, at 2268.

168. See Irit Rosenblum, *Being Fruitful and Multiplying: Legal, Philosophical, Religious, and Medical Perspectives on Assisted Reproductive Technologies in Israel and Internationally*, 36 SUFFOLK TRANSNAT'L L. REV. 627, 628 (2013) (“The right to procreate, which any person should have, is the right to bring children into the world regardless of their medical or social ability to conceive, carry a pregnancy, or deliver a baby.”).

undecided,¹⁶⁹ the federal government has, in the past, taken up family law issues to further an important public policy and could again if surrogacy were to present such an issue.¹⁷⁰

B. Commercial Surrogacy Should Be Regulated

Commercial surrogacy cannot remain in an unregulated state similar to that of India. India's model of encouraging an ever-growing legal surrogacy market with no regulations is insufficient as an adoptable model due to its lack of legal protections for all three parties.¹⁷¹ As noted above, the unregulated surrogacy market of India leaves children potentially stateless¹⁷² and facilitates a breeding ground for unethical practices.¹⁷³ However, many of these concerns could be resolved in the future if the proposed regulatory scheme were passed.¹⁷⁴ Until then, because a commonly cited reason to engage in reproductive tourism is that the practice is banned in home countries,¹⁷⁵ uniform, nationwide legislation of commercial surrogacy could provide the legality and certainty needed to keep infertile American couples from using surrogacy in countries such as India where unethical practices are known to

169. Mortazavi, *supra* note 36, at 2267.

170. See Caster, *supra* note 10, at 504 (reviewing federal legislation creating mandates for property distribution and child support). Attorneys should, as a matter of good practice, advise clients of the risks of getting involved in the commercial surrogacy industry due to the uncertainty: new technologies raise new legal questions.

171. See Lin, *supra* note 22, at 554 (arguing the lack of regulation leaves Indian surrogates vulnerable to manipulation and exploitation).

172. See *id.* at 557-58 (recounting the details of the *Baby Manji* case in India and Manji's resulting stateless status).

173. See Gabry, *supra* note 72, at 440-41 (noting the ways Indian surrogates are thought to be exploited because of the lack of regulation in the industry).

174. See Lin, *supra* note 22, at 561-63 (discussing India's attempt to set forth uniform guidelines in the Assisted Reproductive Technologies (Regulation) Bill and Rules which "aims to regulate legal and medical aspects of surrogacy by establishing a National Advisory Board and setting out the guidelines for clinic accreditations").

175. See Caster, *supra* note 10, at 484 (noting acceptance of the fact that reproductive tourism is encouraged when bans on the practice of surrogacy are in place); see also Hague Conference on Private International Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements ¶ 12, Prel. Doc. No. 11 (Mar. 2011) [hereinafter Hague Conference] (noting the growth of international surrogacy arrangements is due to bans in many countries and the ease of modern communication and travel).

occur.¹⁷⁶ Australia has experienced this correlation first hand in the *Baby Gammy* case, and, as a result, lawmakers are calling for the legalization of surrogacy in Australia.¹⁷⁷ Although the cheaper cost of surrogacy abroad is an additional lure,¹⁷⁸ a potential way to alleviate this concern could be to place restrictions on the ability of U.S. couples to engage in reproductive travel to countries identified as engaging in unethical practices.¹⁷⁹ The reduction in reproductive travel to destinations such as India would incentivize the government to act to protect the livelihoods of surrogate mothers because international surrogacy is a significant source of income to these nations.¹⁸⁰

However, it is possible that such a restriction may not be feasible in light of attempts at the same restriction in the United Kingdom, where efforts to control citizens going abroad for fertility treatment were abandoned because legislators ultimately felt the ends did not justify the means and such restrictions would be difficult to enforce.¹⁸¹

176. See Gabry, *supra* note 72, at 450 (concluding that legal uncertainties make the international surrogacy market attractive to American parents); Conklin, *supra* note 16, at 91 (suggesting the United States follow the Ukrainian example in regulating surrogacy to deter forum shopping).

177. See Perpich, *supra* note 4 (reporting the *Baby Gammy* case in which a surrogate child with down syndrome was abandoned while his twin sister was taken home by the parents, prompting lawmakers to argue for a “regulated and transparent system” to open up commercial surrogacy so that “women are not exploited, intended parents are not exploited and above all children are protected”).

178. See Mohapatra, *supra* note 129, at 194 (noting Indian surrogacy costs a fraction of what American surrogacy costs); see also Hague Conference, *supra* note 175, ¶ 12 (citing lower costs of surrogacy as an extra incentive for international intended parents).

179. For an example of such a measure see Richard F. Storrow, *Travel into the Future of Reproductive Technology*, 79 *UMKC L. REV.* 295, 302 (2010) (discussing the Turkish statute criminalizing women who undergo artificial insemination abroad); see also *Health Minister Leo Varadkar: ‘Commercial Surrogacy Will Be Banned in Ireland Under New Law’*, *INDEPENDENT.IE* (Feb. 25, 2015, 9:19), <http://www.independent.ie/irish-news/politics/health-minister-leo-varadkar-commercial-surrogacy-will-be-banned-in-ireland-under-new-law-31020930.html> (reporting an Irish lawmaker’s proposed bill that would impose penalties on those who engage in commercial surrogacy abroad).

180. See Davis, *supra* note 24, at 125-26 (stating that as of 2011, surrogacy was a \$445 million a year industry in India).

181. See Storrow, *supra* note 179, at 304 (quoting the British House of Commons which remarked, “We believe that any attempts to curtail reproductive tourism would

C. How Should Commercial Surrogacy Be Regulated?

1. Protection of the Child – Ukraine

Ukraine avoids the issues that arose in *Baby Manji*, *Balaz*, and Ireland by considering the intended parents as the legal parents for purposes of the birth certificate from the moment of conception.¹⁸² Ukrainian law also treats intended parents who are genetically related to the resulting children and those that use donor eggs and sperm in the same manner,¹⁸³ eliminating the kind of issue that arose in the *Baby Manji* case where only the father was listed on the birth certificate because a donor egg was used¹⁸⁴ and the issue in *Balaz* where the resulting child was not issued a passport because the child was the result of donor genetic material.¹⁸⁵ Furthermore, Ukraine law requires that the intended parents be married,¹⁸⁶ resolving another problem encountered in *Baby Manji* where Manji could not be the intended father's child because he was unmarried.¹⁸⁷ Additionally, because the intended parents are listed on the birth certificate, there is no need for the intended parents to

not be justified by the seriousness of the offence . . . moreover, it would be impossible to enforce if the treatment was legal in the country concerned”).

182. See Conklin, *supra* note 16, at 92 (noting that Ukrainian legislation allows intended parents to have legal guardianship from conception, and because the surrogate's name is never listed on the birth certificate she cannot rescind the agreement).

183. See *id.* at 91 (“Ukrainian law allows the issuing of birth certificates with the intended parents’ names, regardless of the genetic link to the child . . .”); *Ukrainian Surrogacy Laws*, UKRAINIAN FAMILY LAW, http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=68&Itemid=97&lang=en (last visited Sept. 9, 2015) (“Donor or a surrogate mother has no parental rights over the child, who is legally the child of the prospective parents from the moment of conception.”).

184. See Lin, *supra* note 22, at 557 (discussing the case of *Baby Manji* who became stateless because Manji's mother was not listed as a parent and her father was not a citizen of India).

185. See Smerdon, *supra* note 20, at 63-65 & n.313 (explaining the difficulty of determining the “mother” for the birth certificate of surrogate twins which led to confusion regarding the issuance of visas and passports for the newborns).

186. See *Outsourcing Surrogacy: It Takes a Global Village*, AL JAZEERA AM. (Feb. 13, 2015, 11:59 AM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/15/outsourcing-surrogacyittakesaglobalvillage.html> (“As long as parents are infertile, legally married and straight, the laws in the post-Soviet nation are stacked to protect the rights of the intended parents.”).

187. Knaplund, *supra* note 96, at 355.

resort to adopting the child in order to be the legal parents, as the father in *Baby Manji* attempted but was ultimately not permitted to do.¹⁸⁸

2. Protection of the Surrogate – Israel

The Ukraine's model of an intent-based system will alleviate the fears of intended parents that their rights will be terminated and resolves issues affecting the child such as statelessness, but the lack of legal oversight raises questions regarding the rights of surrogates.¹⁸⁹ This is where adoption of certain features of Israel's model can be instrumental. Israel's state-controlled surrogacy scheme¹⁹⁰ emerges from the staunchly pro-natalist policy and family-centered culture of Israel.¹⁹¹ A surrogacy agreement is not valid unless it is affirmed by the Approvals Committee – a group composed of legal and medical professionals and clergy tasked with ensuring that all surrogacy agreements are in the best interests of all parties, including society at large¹⁹² – and that potential surrogates and intended

188. See *id.* (“India would not issue a birth certificate because Indian law requires both the mother and father to be named . . . and Mr. Yamada did not have the option to adopt his own genetic child [because] an 1890 law prohibits single men from adopting baby girls.”).

189. See *Outsourcing Surrogacy: It Takes a Global Village*, *supra* note 186 (stating the negative side of Ukraine's regulatory framework because it “essentially extinguish[es] the rights of the surrogate mother entirely”).

190. See Mortazavi, *supra* note 36, at 2271 (describing the Israeli Embryo Carrying Agreement, which “permits only altruistic gestational surrogacy agreements and includes additional protections, such as permitting the birth mother to claim parental rights up to a week after giving birth”).

191. See Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 *HEALTH MATRIX* 65, 70-72 (2006) (noting religious texts encouraging childbearing and viewing infertility as a curse).

192. See Emily Gelmann, “*I’m Just the Oven, It’s Totally Their Bun*”: *The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 *WOMEN’S RTS. L. REP.* 159, 189 (2011) (describing the make-up of the Committee appointed by the Health Minister, which includes “two physicians qualified in obstetrics and gynecology, one physician qualified in internal medicine, a clinical psychologist, a social worker, a lawyer, as public representative, and a clergyman, according to the religion of the parties involved”).

parents are evaluated by a professional.¹⁹³ The Approvals Committee looks over the contract to ascertain that all potential problems and aspects that may arise in the process have been fully considered and that there is fairness for both parties and adequate legal representation.¹⁹⁴

Because the Approvals Committee reviews the terms for fairness, there is no intervening third party clinic. Since the Israeli model provides many resources for surrogates, they are unlikely to be exploited and under- or un-paid due to the regulatory framework and review process.¹⁹⁵ Furthermore, the surrogates have bodily autonomy and privacy as well as the right to refuse any medical treatment throughout their pregnancy.¹⁹⁶ Surrogates have the right to an abortion and may keep the child only if the court approves.¹⁹⁷

Although some argue that requiring approval from the government in order to validate a surrogacy agreement intrudes unnecessarily on the freedom to contract,¹⁹⁸ one need only look at the unregulated results of India¹⁹⁹ and Thailand²⁰⁰ to see the

193. See Lee, *supra* note 79, at 296-97 (describing the safeguards Israel has established including comprehensive screening of potential candidates including “suitability of the parties, voluntary and informed consent, physical and mental precautions, as well as financial safeguards”).

194. See *id.* at 297 (describing the Approval Committee’s review process, which ensures that “all of the necessary aspects of the surrogacy agreement are considered in the contract”).

195. See *id.* at 297-98 (describing the “proactive approach” of Israel’s Approvals Committee review, which ensures that the “surrogate is not the most vulnerable party to the transaction”).

196. See Gelmann, *supra* note 192, at 190 (stating that the Approvals Committee requires surrogacy agreements to contain a clause “confirming that the birth mother may refuse any medical procedure during the process, and must have her dignity and privacy respected during all medical treatment”) (internal quotations omitted).

197. K. Svitnev, *Legal Control of Surrogacy – International Perspectives*, in *ETHICAL DILEMMAS IN ASSISTED REPRODUCTIVE TECHNOLOGIES* 149, 152 (Joseph G. Schenker ed., 2011).

198. See Gelmann, *supra* note 192, at 190 (arguing that a similar system to Israel would not be possible in the United States because it would be “too great a burden on freedom to contract”).

199. See *Baby Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India) (finding a child stateless because the father was unable to claim guardianship of the child under Indian law); see also *Balaz v. Anand Municipality*, LPA 2151/2009 (Gujarat

potential for exploitation and harms to the surrogate and children born to such agreements justifies these measures. Furthermore, such requirements have already been adopted and practiced in Texas, Florida, and Illinois, where the state must give its approval of a surrogacy arrangement.²⁰¹

3. Protection of the Intended Parents – Intent-Based Parentage: U.S.

A combination of Israel's approval requirement and surrogate autonomy and the Ukraine's protection of surrogate children from situations like *Baby Manji* may be the best model for the United States to adopt in order to regulate legalized commercial surrogacy. Having decided to legalize the practice of commercial surrogacy and how to regulate in favor of the surrogate and the resulting child's interests, the issue of how best to protect the intended parent's rights must be addressed.

The best solution to determine who is the legal parent or parents of the resulting child is to adopt an intent-based standard which identifies the legal parent of the child as the person who caused the resulting child's birth to occur, as has already been adopted by some American courts.²⁰² Continued reliance on who gave birth to the child as a method of determining parentage is an antiquated and insufficient test in light of the modern methods of assisted reproduction that are

H.C. 2009) (discussing whether a child born in India to a surrogate mother whose biological father is a foreign national is entitled to Indian citizenship at birth).

200. See Fuller, *supra* note 1 (discussing recent scandals due to the unregulated surrogacy industry in Thailand).

201. See TEX. FAM. CODE ANN. § 160.755 (West 2014) ("The intended parents and the prospective gestational mother under a gestational agreement may commence a proceeding to validate the agreement."); FLA. STAT. § 742.15 (2012) ("Prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gestational surrogate."); 750 ILL. COMP. STAT. ANN. 47/25 (West 2005) ("A gestational surrogacy contract shall be presumed enforceable for purposes of State law only if: (1) it meets [certain] contractual requirements . . . and (2) it contains at a minimum each of the terms set forth in subsection (c) of this Section.").

202. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App.) (1998) (following a formula for deciding parenthood by examining who initiated the process and intended to be the parents); see also Caster, *supra* note 10, at 508 (noting the intent-based system was adopted in a Minnesota court decision and is in place in an Arkansas statute).

steadily becoming normal practice.²⁰³ Additionally, basing parentage on who gives birth can lead to results directly contravening the intentions of both contracting parties, as can be seen in the Ireland case noted in Part III of this comment.²⁰⁴ Surrogates contract for the express purpose of relinquishing custody to willing parents, with no intention to be responsible for the resulting child.²⁰⁵ Finally, a judgment of parental rights based on genetics is similarly inappropriate because donor eggs and sperm are becoming more frequently used.²⁰⁶

Such a formula is subject to the criticism that it ignores the reality that a surrogate may suffer contractual regret, wishing to renege on the agreement and retain custody of the resulting child, but the potential for such to occur can be reduced by permitting only the practice of gestational surrogacy and prohibiting the practice of traditional surrogacy.²⁰⁷ This is

203. See Mortazavi, *supra* note 36, at 2279 (noting that intended parents must adopt their own children in states where childbirth determines parentage); see also Caster, *supra* note 10, at 510 (arguing a post-birth determination of parental rights is unnecessary in surrogacy arrangements because the parties have already agreed in advance what their rights will be).

204. See M.R. and D.R. (suing by their father and next friend O.R.) & ors. v. An t-Ard-Chláraitheoir & ors [2014] IESC 60 (Ir.) (holding that the genetic mother could not be named as the legal mother on the birth certificates of surrogate twins).

205. Surrogate mothers enter contracts expecting to relinquish rights and most do not change their minds; thus, should the intended parents renege on the agreement, the surrogate mother will be stuck raising a child she never intended to raise. Mortazavi, *supra* note 36, at 2279.

206. See *id.* at 2280 (arguing that using genetics to determine the parentage of a child would be problematic for children conceived through the use of anonymous egg and sperm donors); see also James, *supra* note 137, at 206 (arguing that using a genetics-based test as the sole determining factor of parentage would cause less intended parents to use donor eggs and sperm). In addition, a genetics-based parental rights test may eventually become even more outdated and complicated in the future if mitochondrial DNA transfers, a practice that results in a child with three genetic parents, become widespread. See Rachel Feltman, *The UK Voted Yes On 'Three-Parent Babies' Today*, WASHINGTON POST (Feb. 3, 2015), <http://www.washingtonpost.com/news/speaking-of-science/wp/2015/02/03/british-parliament-is-voting-on-three-parent-babies-today-heres-how-one-baby-can-have-three-peoples-dna/> (describing the process and controversy behind mitochondrial DNA transfers).

207. See Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 320-21 (2013) (remarking that practitioners of surrogacy prefer gestational to traditional surrogacy because it provides more legal certainty and because gestational surrogates

because with gestational surrogacy there is no genetic link between birth mother and child and surrogates have reported feeling less of an emotional connection with a child that is not genetically their own.²⁰⁸ Such a law is already a reality in Israel, where traditional surrogacy is not legal,²⁰⁹ and should be adopted into the U.S. regulatory scheme.

Similarly, a law requiring that a surrogate have had a child beforehand could help eliminate the possibility that the surrogate mother would feel distress from having to relinquish custody of a child with whom she has formed an attachment.²¹⁰ Psychological testing could further eliminate from the pool of potential surrogates a woman who may wish to keep the child after birth, as is already done in countries where surrogacy is legalized and regulated.²¹¹

Finally, the argument that a woman may regret her decision to become a surrogate has been rejected as outdated and paternalistic by some courts in assessing the public policy implications of gestational surrogacy.²¹²

are less likely to renege on the surrogacy agreement); *see also* Mortazavi, *supra* note 36, at 2281-82 (suggesting a potential solution for countries to “prohibit traditional surrogacy when genetic relation is not possible or desirable”).

208. *See* Bernstein, *supra* note 207, at 320-21 (describing how gestational surrogates “appear to share the view that they are not connected to a baby that is not genetically theirs”); *see also* Laufer-Ukeles, *supra* note 20, at 1261 (noting studies have found that there is less of an attachment to the child post-birth in gestational surrogates). Researchers have also been surprised to find that many surrogates have developed a stronger and continuing attachment to the intended parents rather than the resulting child. *Id.* at 1231-33; *see also* Haworth, *supra* note 31 (noting the experience of one Indian surrogate who believes she would not feel attached to the baby she birthed because it would not bear any resemblance to herself).

209. Rosenblum, *supra* note 168, at 637.

210. *See* Haworth, *supra* note 31 (discussing an Indian clinic which requires surrogates “already be mothers so they understand what’s involved physically and will be less likely to become emotionally attached to the babies they bear”).

211. *See* Wolf, *supra* note 101, at 489 (describing Israel’s surrogacy law which requires surrogates and intended parents undergo medical and psychological screenings); *see also* Caster, *supra* note 10, at 509 (noting the use of psychological testing could prevent contractual defenses such as duress from being used to void the agreement); Conklin, *supra* note 16, at 92-93 (advocating the use of testing to address concerns of exploitation by screening out those whose motives are based in financial desperation).

212. *See* *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993) (“The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for

V. CONCLUSION

The current climate of American surrogacy law presents a perplexing mismatch of prohibitions, regulations, and absent laws that leads to confusion, forum-shopping, reproductive tourism, and questionable rights for the intended parents, surrogates, and children born to surrogacy.²¹³ A lack of legal oversight causes a dearth of ethical practices leaving surrogates vulnerable and children potentially stateless and stranded.²¹⁴ Meanwhile, a prohibition on the practice is unnecessarily reactionary and shuts out a growing portion of the population from parenthood.²¹⁵ Moreover, a prohibition would only incentivize reproductive travel abroad to countries with no restrictions and exploitive practices.²¹⁶

Therefore, the United States should implement the intent-based model already in place in a handful of American jurisdictions, combined with certain aspects of Israel's and the Ukraine's surrogacy regulations. The Ukraine's method of putting the intended parents on the birth certificate and treating children resulting from donor genetic material in the same manner as children genetically related to their intended parents avoids problems of statelessness and refusal to issue passports.²¹⁷ Additionally, the adoption of Israel's requirement of pre-approval would ensure the surrogate of her bodily autonomy and guarantees she will receive just compensation.²¹⁸ Such a system alleviates concerns that a surrogate's

intending parents carries overtones of the reasoning that for centuries prevented woman from attaining equal economic rights and professional status under the law.”).

213. See Patton, *supra* note 62, at 530.

214. See Lee, *supra* note 79, at 298 (arguing that the lack of regulations in the United States exposes “surrogates, intending parents, and the children conceived to the highest risks”).

215. See Caster, *supra* note 10, at 481-83 (describing the challenges many infertile couples face, leaving surrogacy as their only option).

216. See *id.* at 485 (stating that an Australian journalist warned that “restrictive and intrusive new laws on surrogacy may perversely fuel the worst kind of exploitative surrogacy arrangements overseas”) (internal quotations omitted).

217. See Conklin, *supra* note 16, at 92 (stating that Ukrainian law allows intended parents' names to be immediately on the birth certificate).

218. See Mortazavi, *supra* note 36, at 2271 (describing Israel's safeguards for surrogates).

reproductive capabilities will be exploited. Finally, an intent-based scheme of determining parental rights, requirements of psychological testing, and permitting only gestational surrogacy can adequately safeguard the interests of the intended parents.²¹⁹ With a combination of these three approaches, a federal uniform surrogacy law in the United States could ensure the rights of all three parties to the transaction are respected in a way that prevents needless litigation and reproductive tourism while promoting uniformity and consistency among the states.

219. See Caster, *supra* note 10, at 509 (noting that reputable surrogacy agencies already use psychological examinations before conception as a safeguard to avoiding a situation where the surrogate mother would suffer if she is forced to give up the child she carries).