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Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy

By
Seema Mohapatra*

I.
INTRODUCTION

Truth is often stranger than fiction, and nowhere is this more evident than when examining real stories from international commercial surrogacy that have occurred in the last few years. This Article uses these cases[1] to analyze this industry through a bioethical lens. Bioethicists use stories to demonstrate how theory and normative ideals apply to real-world situations.[2] By detailing examples of the unique scenarios that have arisen in cities in India, the United States, and Ukraine, this Article highlights some of the ethical and legal dilemmas such stories raise. Additionally, this Article examines these stories using a classic bioethics framework[3] to demonstrate the need for clarification of

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1. The term "stories" is often used interchangeably with "cases" in bioethical analyses. *See* Sidney Dean Watson, *In Search of the Story: Physicians and Charity Care*, 15 ST. LOUIS U. PUB. L. REV. 353, 355 (1996) (stating that "bioethics attempts to define ethical behavior in the context of concrete, often complex, real life stories.")

2. *Id.* (noting that storytelling has long been a tool by bioethicists.)

3. *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 15-16, 166 (5th ed. 2001) (defining the classic principles of bioethics as beneficence, nonmaleficence, autonomy, and justice.)

the regulations related to international surrogacy, and to suggest the form that these regulations might take.[4]

Global surrogacy has achieved unprecedented popularity due to advances in technology that allow for gestational surrogacy and greater acceptance in public opinion. In a traditional non-gestational surrogacy arrangement, a surrogate becomes pregnant via artificial insemination by sperm from the intended father or a sperm donor.[5] Because her own egg contributes to the embryo, a traditional surrogate carries her own genetically related child and agrees to give it up upon the baby's birth.[6] In contrast, gestational surrogacy refers to the process whereby scientists create an embryo with an egg and sperm from the intended parents (or from donor eggs and sperm) through an in vitro fertilization (IVF) procedure and then transfer it into the uterus of a genetically unrelated surrogate.[7] After a combination of well-publicized cases where traditional surrogates decided they wished to raise the infant that they carried, and the public sympathy these surrogates received due to their genetic tie to the infant, the absence of a genetic tie has made gestational surrogacy vastly more popular than traditional surrogacy.[8] Consequently, medical tourism, whereby consumers of health care travel around the world to receive cheaper medical care,[9] now includes reproductive tourism.

International, or global, surrogacy is a booming business. Despite many countries' prohibitions or restrictions on surrogacy arrangements, the market for international surrogacy has grown to an estimated size of six billion dollars annually worldwide.[10] Some countries, such as India and Ukraine, wish to build a reputation as international surrogacy meccas by providing quality medical care at a low cost and by attempting to provide the most comprehensive legal protections for intended parents.[11] In the United States and some European countries, the stigma associated with using a surrogate that existed a few decades ago appears to have dissipated as these arrangements become more common.[12] Additionally, intended parents who were previously unable to consider a surrogacy arrangement due to financial constraints have become

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4. *See* Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO.J. LEGAL ETHICS 1, 10 (2000) (arguing that stories may be preferable to traditional methods of legal analysis to understand legal issues in context).

5. Usha Regachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 17 (2008-09).

6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71, 79 (2008).

10. Smerdon, *supra* note 5, at 24.

11. *See generally id.*

12. *See generally* Lorraine Ali & Raina Kelly, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, http://www.newsweek.com/2008/03/29/the-curious-lives-of-surrogates.html.

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viable fertility tourists as the competitive global marketplace drives costs down and enhances access to information about foreign countries. Although some have written with concern about the potentially exploitative nature of international surrogacy,[13] the Western press has generated mostly positive reports about success stories in international surrogacy.[14]

This Article uses surrogacy cases in Ukraine, India, and the United States to highlight similarities and differences in the surrogacy experience in countries active in the international surrogacy market. Although international surrogacy is a relatively new market in which participant countries compete to establish their reputations as leaders, Ukraine, India and the United States have been at the forefront of the booming international surrogacy industry. Within the United States, California has a long history with surrogacy. Due to its developed surrogacy system, it is perceived as an attractive international surrogacy option for those who can afford the high cost of surrogacy in the United States.[15] India also has emerged as a global leader in surrogacy in the developing world. Ukraine is quickly gaining traction as a destination of choice.

This Article first describes the story of a baby-selling ring that exploited the mismatch between surrogacy and adoption law between the United States—California specifically—and Ukraine. Then, this Article explores stories in India and Ukraine involving babies "lost" in legal limbo due to the inconsistencies between the surrogacy laws of different countries. Next, this Article discusses the gestational surrogacy landscape in the United States, India, and Ukraine and examines the laws and regulations related to surrogacy that exist in each country. Finally, this Article discusses bioethical concerns raised by the stories as they relate to intended parents and the surrogates. I use this bioethical framework to analyze the stories of commercial surrogacy and identify areas where better regulations could improve the current global surrogacy market.

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13. *See generally* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 83 (2006) (noting that surrogacy has been thought of as baby selling, prostitution, and rape).

14. *See, e.g.*, *Oprah Winfrey Show* (CBS television broadcast Jan. 1, 2006), http://www.oprah.com/world/Wombs-for-Rent/6. (Lisa Ling, who as an investigative reporter on the Oprah Winfrey Show featured the Akanksha Infertility Clinic, stated, "So many people from Europe and other countries come to the United States, but it's so expensive. No one says that American women are being exploited when they become surrogates . . . Now this baby and this couple will have this bond with this country. And in a way, become these sorts of ambassadors, these cultural ambassadors. It is confirmation of how close our countries can really be.").

15. *See* Alex Barnum, *For Infertile Couples, It's California or Bust*, SAN FRANCISCO CHRONICLE, Aug. 15, 2005, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/08/15/MNG0NE81BB1.DTL&ao=all.

A. Accounts of International Commercial Surrogacy Gone Awry: Baby Selling Enabled by Different Legal Regimes for Adoption and Surrogacy in California

In what has been described as a "baby-selling ring," Theresa Erickson[16] and Hillary Neiman,[17] two well-known surrogacy law attorneys, and Carla Chambers,[18] a six-time surrogate, recruited American and Canadian women between the years 2005 and 2011 to purportedly serve as surrogates.[19] According to Erickson, Chambers, and Neiman's admissions in plea agreements with federal prosecutors,[20] the three women arranged for the surrogates to fly to Ukraine to be implanted with embryos from donor eggs and donor sperm.[21] Erickson, Chambers, and Neiman also promised these recruits between $38,000 and $45,000 for their services,[22] which is a much higher rate than is typical for

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16. Erickson was extremely well known and well regarded in the surrogacy community. She had appeared on national television and authored a book entitled "Assisted Reproduction: The Complete Guide to Having a Baby with the Help of a Third Party." *See* Alyssa Newcomb, *Baby-Selling Enterprise Busted, Three Plead Guilty,* (ABC News broadcast Aug. 10, 2011), http://abcnews.go.com/US/attorney-pleads-guilty-baby-selling-ring/story?id=14274193. She was the host of her own radio show, The Surrogacy Lawyer: Your Guide to IVF & Third Party Family Building Surrogacy Law Radio on Voice America. Erickson served as an executive board member and a member of the Legal Council of the American Fertility Association, Board Member and the Legal Director of Parents via Egg Donation. Ironically, Erickson often gave talks about "how prospective parents can best protect themselves and their families legally, financially and emotionally" in international "family building" arrangements. She was set to speak on this topic at the 2012 Exotic Medical Tourism Congress & Expo. *See* http://www.fertility-tourism.com/agenda/ (last visited Aug. 29, 2011).

17. Neiman founded The National Adoption and Surrogacy Center in Rockville, Maryland and joined the baby-selling operation in 2008, according to federal court filings. Danielle E. Gaines, *Former Attorney from Chevy Chase Sentenced to Prison for Baby-Selling Conspiracy*, GAZETTE (Dec. 2, 2011), http://www.gazette.net/article/20111202/NEWS/712029586/former-attorney-from-chevy-chase-sentenced-to-prison-for-baby-selling&template=gazette.

18. *See* Kate Sheehy, *Black-market babies may have had same mom and dad*, NEW YORK POST, Aug. 18, 2011, http://www.nypost.com/p/news/local/ma_and_pa_operation_5T6oMVXk5I15kVt6buVl6H?CMP=OTC-rss&FEEDNAME=.

19. *See* Alan Zarembo, *Women deceived in surrogacy scam*, LOS ANGELES TIMES, Aug. 13, 2011, http://articles.latimes.com/2011/aug/13/local/la-me-baby-ring-20110814. The term "surrogate" means "to take the place of another" and in the context of gestational surrogacy arrangements, the surrogate is meant to carry a baby for another person or couple. In this case, however, there was no one for whom the "surrogates" were actually carrying these fetuses.

20. FED. BUREAU OF INVESTIGATION, BABY-SELLING RING BUSTED, Aug. 9, 2011 http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted [hereinafter FBI].

Under their plea deals, Erickson and Neiman were charged with one count of conspiracy to commit wire fraud each. Under her plea deal, Chambers was charged with "monetary transactions in property derived from illegal activity." Each woman faces a maximum sentence of five years in federal prison and a fine of up to $250,000. Erickson has agreed to pay $10,000 restitution to each family who received a baby under their scheme.

21. *Id.*

22. *See* Zarembo, *supra* note 19.

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surrogates in the United States. Erickson, Chambers, and Neiman likely picked Ukraine as a destination because of its lax regulations,[23] the availability of white egg and sperm donors,[24] and willingness of local clinics to implant women with embryos without proof of a surrogacy agreement.[25] At the time these embryos were implanted and for months afterward, these "surrogates" carried fetuses for which there were no intended parents or surrogacy agreements.[26] Instead, Erickson, Chambers, and Neiman waited until the women were in their second trimester of pregnancy, when the chance of miscarriage was smaller, and advertised to potential adoptive parents that a "Caucasian" infant was available, with "high expenses" due to a surrogacy arrangement that "fell through."[27] The women told the same story—that the intended parents no longer wanted the baby—to numerous potential adoptive parents over six years.[28] Additionally, they informed prospective parents that the parents would be able to choose their not-yet-born child's gender.[29] This arrangement led to the placement of at least a dozen babies, and potential adoptive parents paid from $100,000 to $150,000

23. *Id.*; *See also* Emily Smith, *How Socialite Brought Down Black-Market Baby Brokers,* NEW YORK POST, Aug. 16, 2011. According to press reports, the Intersono Clinic in Lviv, Ukraine was the location where the imported surrogates had their IVF treatments and became impregnated. In a recent newspaper article, the manager of the Intersono Reproductive Clinic in Lviv, Ukraine, where the surrogates were implanted, reported that there "a lower demand for surrogacy." This may be a reason why the Clinic chose to impregnate American and Canadian women who did not have proof of surrogacy arrangements. These arrangements break Ukrainian family law but, to date, no charges have been brought against the clinic or its affiliates.

24. *See* Sheehy, *supra* note 18. (stating that all of the "designer babies" were white and the most marketable with fair hair and light eyes); *See also* Bonnie Rochman, *Baby-Selling Scam Focuses Attention on Surrogacy*, TIME HEALTHLAND, Aug. 19, 2011, http://healthland.time.com/2011/08/19/baby-selling-scam-focuses-attention-on-surrogacy/. (noting that white babies are sought after and hard to come by in the adoption market); Smith, *supra* note 23. Each of the advertisements related to these arrangements emphasized that the babies were Caucasian. For example, one Internet advertisement posted by Chambers stated "Lawyer currently has a adoption situation available…originally a surrogacy situation, baby conceived via IVF and donor embryos…Caucasian Infant…This situation has high expenses." *See* Carla Chambers, Hilary Neiman, Theresa Erickson, *Baby for sale ads, IVF Land at Surrogacy Land on Surrogacy World*, http://ivflandonsurrogacyworld.blogspot.com/2011/08/carla-chambers-hilary-neiman-theresa.html (last visited Aug. 28, 2011) (providing excerpts of advertisements for adoptive parents placed by Chambers and Nieman to popular adoption websites). *See also* Anthony Barnett & Helena Smith, *Cruel Cost of the Human Egg Trade*, OBSERVER, Apr. 30, 2006, at 6, http://www.guardian.co.uk/uk/2006/apr/30/health.healthandwellbeing (stating that, because of their light complexion, Eastern European women egg donors are sought after in Ukraine and are even imported to other countries).

25. *See* Zarembo, *supra* note 19.

26. *Id.*

27. *See* CHAMBERS ET AL., *supra* note 24.

28. *See* Zarembo, *supra* note 19.

29. Bonnie Rochman, *Baby-Selling Scam Focuses Attention on Surrogacy*, TIME HEALTHLAND, Aug. 19, 2011, http://healthland.time.com/2011/08/19/baby-selling-scam-focuses-attention-on-surrogacy/. *See also* Smith, *supra* note 23.

to assume the supposedly failed surrogacy arrangements.[30]

Under California law, it is legal to pay a surrogate to carry a child as long as a surrogacy agreement is in place prior to conception.[31] However, if a woman is carrying a child and wishes to give it up for adoption, it is illegal to pay her beyond her medical expenses.[32] The reason for the distinction is that it is considered human trafficking to seek to adopt a baby for a price after its conception. To avoid these regulations, the women flew the "surrogates" to Ukraine for their implantation. Erickson then pre-dated the surrogacy agreements and falsely represented to the San Diego Superior Court that the infants were the result of surrogacy arrangements in place at the time of conception.[33] Although California has a very sophisticated legal system relating to family building via surrogacy and adoption, the women picked California as the place where the surrogates would give birth because of one particularly permissive requirement. Unlike in most US states, in California intended parents of a biologically unrelated baby carried by a surrogate may be listed on a birth certificate without going through a legal adoption.[34]

These attorneys capitalized on their knowledge of inconsistencies between adoption and surrogacy laws in two countries to profit from baby-selling transactions. The lack of oversight in Ukraine allowed the implantation to take place. Despite California's very sophisticated legal system relating to family building via surrogacy and adoption, the permissive birth certificate requirements nevertheless allowed Erickson to defraud the system. While there are many disturbing aspects of this case, this Article will focus on the way inconsistencies between adoption and surrogacy laws in California and the lack of oversight in Ukraine enabled this scheme.

B. The Case of Baby Manji: A Legal Limbo Causes Great Delay

The story of Baby Manji further demonstrates the kinds of bioethical dilemmas that commercial surrogacy raises. Baby Manji's birth to a surrogate sparked a controversy about how to best determine the legal parentage of a baby

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30. Rochman, *supra* note 29.

31. According to prosecutors, the attorneys also misrepresented that they knew the identities of the anonymous sperm and egg donors and "fraudulently obtained more than $20,000 in state insurance coverage for the surrogates, who were ineligible to receive the benefits." There is also some concern that at least some of the babies involved in the scheme may be "full brothers and sisters" because they may be from the same egg and sperm donors. *See* Kate Sheehy, *'Ma And Pa' Operation - Black-Market Siblings*, NEW YORK POST, Aug. 18, 2011. *See also*, FBI, *supra* note 20 (stating that California law permits surrogacy arrangements if the women who will carry the babies "enter into an agreement prior to the embryonic transfer").

32. *See* CAL. PENAL CODE § 273 (2012).

33. *See* Kate Sheehy, *'Ma And Pa' Operation - Black-Market Siblings*, NEW YORK POST, Aug. 18, 2011.

34. *Id.*

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born to a surrogate and whether it was wise to allow the commercial surrogacy market to grow unfettered by regulations. Born in 2008 to a surrogate mother in India, the media regularly referred to her as "Baby M."[35] (The Baby M. case from India discussed here should not be confused with the Baby M. case that occurred three decades ago in New Jersey.[36])

The Baby Manji case was controversial, bringing up novel issues and demonstrating gaps in the current surrogacy laws and regulations. In 2007, Baby Manji's intended parents, Ikufumi and Yuki Yamada, traveled from their home in Japan to the Akanksha Infertility Clinic in Anand, Gujarat,[37] to arrange for a gestational surrogacy with an Indian surrogate. Akanksha Infertility Clinic paired the Yamadas with an Indian woman, Pritiben Mehta, who agreed to serve as their surrogate.[38] Pritiben Mehta was from Ahmadabad, Gujarat, and had two children of her own.[39] Under the Yamadas' agreement with the Akanksha Infertility Clinic, Pritiben Mehta would be implanted with an anonymous donor egg fertilized by Ikufumi's sperm.[40] Under the contract that the Yamadas and the gestational surrogate signed, Pritiben Mehta would carry the baby to term and then relinquish all rights and responsibilities for the baby to the Yamadas.[41]

However, the Yamadas divorced one month prior to Baby Manji's birth, which complicated the legal determination of her rightful parents.[42] The intended father, Ikufumi Yamada, still wished to raise Baby Manji, but the intended mother Yuki Yamada did not.[43] First, Ikufumi Yamada petitioned the

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35. *See* Dhananjay Mahapatra, *Baby Manji's Case Throws Up Need For Law On Surrogacy*, TIMES OF INDIA, Aug. 25, 2008, http://articles.timesofindia.indiatimes.com/2008-08-25/india/27946185_1_surrogacy-agreements-surrogate-mother-surrogate-contract.

36. *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988); *see generally* J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M*, 39 CAP. U. L. REV. 345, 346 (2011). The Baby M case involved a traditional surrogate, Mary Beth Whitehead, who was artificially inseminated with the sperm of William Stern, the intended father. Mary Beth Whitehead was supposed to give up all rights to the baby she was carrying upon delivery in exchange for $10,000. However, she had a change of heart and wanted to raise the child. This decision began a drawn-out battle in both the courts and media that raised questions of class and privilege. Many scholars saw the surrogacy contract between the college-educated and wealthy Sterns (a biochemist and pediatrician), and the high school dropout Whitehead (who was married to a sanitation worker), as unseemly, and even exploitative. Volumes have been written about this famous case, and it highlighted some of the problems that may arise with commercial surrogacy. Additionally, as discussed later, as a result of controversy over the Baby M case, states developed various laws related to surrogacy, ranging from banning it outright to being very permissive. *See* discussion *infra* Part II.A.

37. *See* discussion, *infra* Part II.C.2

38. *See* Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, KENAN INST. FOR ETHICS AT DUKE UNIV., (2009), http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf.

39. *Id*. at 10.

40. *Id*. at 4.

41. *Id*.

42. *See id*. at 5.

43. Additionally, Yuki Yamada refused to accompany Ikufumi Yamada to India to claim her.

Japanese embassy in India for a Japanese passport for Baby Manji, but the embassy would not issue the baby a Japanese passport because of Japan's requirement of birth citizenship.[44] Then Ikufumi Yamada approached the Indian embassy for an Indian passport for Baby Manji in order to take the baby back to Japan. However, Indian law did not recognize Ikufumi Yamada's status as a single adoptive father.[45] Thus, the Indian embassy was unable to issue a passport for the baby because, in India, a child is issued a passport based upon the child's mother's citizenship.[46] None of the potential mothers—the surrogate, the intended mother, or the egg donor—would claim Baby Manji as her own.[47] While the city of Anand issued a *birth certificate* for Baby Manji, indicating that Ikufumi Yamada was her father,[48] the slot for the name of Baby Manji's mother remained blank.[49] Although Ikufumi Yamada was the biological father of Baby Manji, he now confronted the potential need to legally adopt her because of the unique legal situation he and the baby faced. Again, Indian law presented a barrier: India's adoption laws prevent a single male from adopting a female child.[50]

While Ikufumi Yamada worked to resolve this legal disarray, political turmoil and bombings in Baby Manji's birthplace required that she be moved to another hospital shortly after her birth.[51] Simultaneously, doctors treated her for a variety of hospital-borne illnesses, including septicemia.[52] Adding yet another "mother" to her life, Ikufumi Yamada's friend's wife temporarily housed and breastfed Baby Manji.[53]

Eventually, Ikufumi Yamada prevailed in taking Baby Manji home to Japan, but not before his Indian tourist visa expired. Instead, he returned to Japan and left the care of Baby Manji to his mother, Emiko Yamada.[54] Emiko

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The surrogacy contract that the Yamadas had entered into at the Akanksha Infertility Clinic in Anand, Gujurat did not directly address this issue, but it did state that the intended father would raise the child if the intended mother did not wish to. This contractual provision did not prevent the legal turmoil that resulted from this unique situation, which neither Indian nor Japanese law was equipped to handle. *See id*. at 4–6.

44. *See* Rohit Parihar, *Identity Crisis*, INDIA TODAY, Aug. 9, 2008, , http://indiatoday.intoday.in/site/story/Identity+crisis/1/12831.html; *India-Japan Baby in Legal Wrangle*, BBC NEWS, Aug. 6, 2008, http://news.bbc.co.uk/2/hi/7544430.stm.

45. Points, *supra* note 38, at 5.

46. The Japanese embassy insisted that Baby Manji needed travel documents from India, her birthplace. Parihar, *supra* note 45.

47. Points, *supra* note 38.

48. *Id*.

49. *See id*.

50. The Hindu Adoptions and Maintenance Act, No. 78 of 1956 (1956), vol. 7, http://punjabrevenue.nic.in/hadoptact(1).htm#_ftnref1.

51. Points, *supra* note 38, at 5.

52. *See id*.

53. *Id*. at 4.

54. *Id*. at 6.

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Yamada petitioned to adopt Baby Manji, and the case went up to the Supreme Court, the highest court in India.[55] The court referred Emiko Yamada to the National Commission for Protection of Child Rights.[56] After much legal wrangling, the state finally issued Baby Manji a certificate of identity, a legal document given to those who are stateless or cannot get a passport from their home country.[57] With this certificate, Ikufumi Yamada was able to obtain a Japanese visa to bring Baby Manji home to Japan.[58]

The Baby Manji case demonstrates the complexity of international surrogacy. Laws and regulations concerning adoption, surrogacy, and citizenship have not been able to accommodate international arrangements borne out of the rapidly emerging technology used to create babies such as Baby Manji. Although the Indian Courts finally allowed Baby Manji to leave India with her biological father, the case exposed the lack of clear guidelines and laws related to international surrogacy in India.

C. A Stateless Baby, Criminal Charges and Exile in Ukraine

Patrice and Aurelia Le Roch, citizens of France, traveled to Ukraine to hire a gestational surrogate in 2010.[59] Surrogacy is illegal in France and the country does not grant French citizenship to surrogate-born babies.[60] However, the Le Roches desired to have a biologically related baby through surrogacy. Since Ukrainian law allows intended parents of surrogate-born babies to be listed as birth parents, Patrice and Aurelia travelled to Kyiv, Ukraine to arrange for a gestational surrogate through an agency.[61] The Ukrainian surrogate then delivered twins for the couple.[62] After, the Le Roches followed the agency's suggestion to hide the details of the surrogacy from the French embassy in Ukraine so as to obtain French passports for the babies.[63] The couple then filed for French passports at the French Embassy and apparently claimed that the

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55. In the meantime, Satya, a non-governmental organization based in Jaipur, attempted unsuccessfully to petition a lower court, the Rajasthan High Court, claiming that Emiko Yamada's custody of Baby Manji was illegal due the lack of laws on surrogacy in India and Japan. *See Japan Gate-Pass For Baby Manji*, THE TELEGRAPH, October, 17, 2008, http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp.

56. *See* Yamada v. Union of India, 2008 S.C.A.L.E. 76, 13 (India), http://judis.nic.in/supremecourt/helddis.aspx.

57. *Id*.

58. Karen Bushy & Delaney Vun, *Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 84 (2010).

59. *See* Kateryna Grushenko, *French Couple's Desire for Child Brings Trouble*, KYIV POST, April 15, 2011, http://www.kyivpost.com/news/nation/detail/102433/#ixzz1WM80ko3W.

60. *See id*.

61. *Id.*

62. *Id*.

63. *Id.*

babies were naturally born to the mother.[64] The French embassy suspected surrogacy and requested medical records and supporting documentation.[65] When the Le Roches could not produce these, the French Embassy rejected the passport applications and the babies were refused entry to France.[66]

Ukrainian law recognizes married couples that hire surrogates as the only lawful parents of a surrogate-born child.[67] But conversely, Ukraine does not recognize such children as enjoying birth citizenship through the surrogate mother. Thus, the twins also could not obtain Ukrainian passports. Under Ukrainian law, the twins were French because their legal parents were French.[68] Since France would not recognize the twins, the babies were effectively stateless. It is worth mention that, at the time, the French Embassy in Kyiv, Ukraine warned French citizens on its website against engaging in local surrogacy to prevent exactly this type of scenario.[69]

Facing this legal limbo, Patrice Le Roch, and his father Bernard Le Roch, hid the twins under a mattress in their Mercedes and attempted to cross into Hungary at the Ukrainian border without proper documentation.[70] Upon discovery, Ukrainian authorities charged both men with attempting to illegally transport children without proper documentation under Ukrainian child trafficking laws.[71] Initially, the babies were taken away from the Le Roches but have since been returned to them.[72] Ukraine fined both men $2,130 for the smuggling attempt.[73] Patrice and Aurelia Le Roch have tried to petition other European countries to give their twins a passport and remain in Kyiv with their twins waiting for French authorities to rule on their daughters' status.[74]

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64. *Id*.

65. *Id*.

66. *See id*. Apparently, this situation is not unique and occurs to an estimated 400 French couples each year. *See* Richard F. Storrow, *Travel into the Future of Reproductive Technology*, 79 UMKC L. REV. 295, 305 (2010).

67. *See The baby smugglers: French family arrested trying to sneak two-month-old surrogate twins out of Ukraine in a chest*, DAILY MAIL, March 24, 2011, http://www.dailymail.co.uk/news/article-1369561/French-family-arrested-trying-smuggle-month-old-surrogate-twins-Ukraine.html#ixzz1WM0sAKqe.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Frenchman Faces Fine In Ukraine For Baby Smuggling*, KYIV POST, May 5, 2011, http://www.kyivpost.com/news/nation/detail/103727/#ixzz1WON0LZ0.

72. *Id.*

73. *Id.*

74. *Id.*

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D. A Case of Successful International Commercial Surrogacy Despite Ambiguities About Payment

In the recent documentary film *Made in India*, the filmmakers followed an American couple, Lisa and Brian Switzer, who sold their house and spent their savings to go through a surrogacy process in India.[75] The Switzers could not afford the cost of surrogacy in the United States and decided to enter into an international surrogacy arrangement facilitated by Planet Hospital, a California based surrogacy broker. The surrogate, Aasia Khan, a 27-year-old Muslim woman living in the Mumbai slums, became a surrogate to provide for her three children and thereby offset the financial instability of her husband's mechanic business. She signed the agreement with the surrogacy clinic Rotunda without informing her husband. She did not appear to understand the IVF procedure and thought it was comical that a baby could be created "without a man." Intermediaries told the Switzers that Aasia was paid $7,000, although she was actually promised around $2,000.[76] Aasia carried twins for the Switzers successfully, yet she felt it was unfair that she was not paid more for carrying two babies instead of one.[77] Aasia met with the Switzers to solicit their goodwill in providing additional compensation, despite a contract prohibiting her from such action.[78] The Switzers promised Aasia additional compensation.[79]

II.
THE INTERNATIONAL SURROGACY LANDSCAPE

This Section examines how international surrogacy differs in various countries and centers on the laws related to surrogacy, the surrogacy process, and the surrogates themselves. This analysis will focus on three leaders in this area—the United States, India, and Ukraine.

A. The United States

When one thinks about international surrogacy, the typically scenario involves a couple from a more developed country, such as the United States, traveling to a less developed country, such as India, to have a surrogate bear a child on their behalf. Although that scenario is common in the rapidly growing surrogacy market, the United States has also emerged as an international surrogacy destination.[80] Sir Elton John and his partner, arguably the most

75. MADE IN INDIA (Rebecca Haimowitz & Vaishali Sinha 2011) at minute 12:16.

76. *Id*. at minute 31:15.

77. *Id*. at minute 1:22:19.

78. *Id*. at minute 1:25:14.

79. *Id*. at minute 1:14:30.

80. Spar, *supra* note 13, at 84-86 (noting that California is a surrogacy destination spot within the United States and internationally). The United States has also long been an international

famous reproductive tourists, recently made international headlines by traveling from their native England to California to commission a child using a gestational surrogate.[81] Elton John chose California as his surrogacy destination because England does not allow commercial surrogacy. Despite the high costs for commercial surrogacy in California, many regard the state as "the nation's hub for surrogate pregnancies" because of "its well-established network of sperm banks, fertility clinics and social workers" and regulations favoring intended parents.[82]

Unlike many countries, the United States has not banned surrogacy on a national level.[83] Each state has its own policy on surrogacy. This regulatory environment reflects mixed public sentiment regarding whether it is realistic for a mother to relinquish rights to a biological baby that she has carried to term as a surrogate, regardless of earlier contractual and monetary agreements. This mixed sentiment arose in connection with a prominent, controversial case from 1985, the New Jersey Baby M case.[84] The Baby M case involved a traditional surrogacy arrangement in which the surrogate mother, Mary Beth Whitehead, refused to give up the baby.[85] Experts predicted that the case was the beginning of the end of surrogacy; but although the Baby M case caused an uproar among the public and may have led to two failed federal attempts to prohibit or restrict surrogacy arrangements, surrogacy regulations continue to be governed at the state level.[86]

The advent of gestational surrogacy technology has diminished some of the concern surrounding a surrogate's possible refusal to give up the baby that

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destination for high quality health care, with wealthy medical tourists seeking out renowned facilities such as the Cleveland Clinic and Massachusetts General Hospital for certain procedures. *See* Leigh Turner, *'First World Health Care at Third World Prices': Globalization, Bioethics and Medical Tourism*, 2 BIOSOCIETIES 303, 307 (2007).

81. *See* Laura Roberts & Nick Allen, *Elton John Uses a Surrogate to Become a Father for the First Time*, THE TELEGRAPH, Dec. 29, 2010, http://www.telegraph.co.uk/news/celebritynews/8228152/Elton-John-uses-a-surrogate-to-become-a-father-for-the-first-time.html (noting that the couple may have spent paid the California based surrogacy agency more than £100,000 for the transaction).

82. *See* Julie Watson, *Surrogacy Scandal Raises Questions On Regulation Woman Used Flawed System To Broker Babies, Dupe Couples.* HOUSTON CHRONICLE, August 12, 2011.

83. Many countries including Germany, Sweden, Norway, and Italy have banned all forms of surrogacy. Australia, Greece, Denmark and the Netherlands ban all commercial surrogacy. J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL'Y 241, nn.117–18 (2011).

84. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

85. *Id.*

86. Todd M. Krim, *Comparative Health Law: Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 213 (1996). The "Surrogacy Arrangements Act of 1989" proposed imposing criminal penalties on anyone who knowingly engaged in commercial surrogacy. *Id*. at 214. The "Anti-Surrogate-Mother-Act of 1989," sought to criminalize "all activities relating to surrogacy . . . ." *Id*. Neither bill received much support. *See id*.

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existed at the time of the Baby M case.[87] In the last half-decade, gestational surrogacy rates in the United States have risen almost 400%.[88] Estimates compiled in 2010 suggest that 1,400 babies are now born via surrogacy in the United States each year.[89] Not only do a large number of Americans decide that surrogacy is the right option for them, but a sizeable number of international couples choose to utilize American surrogate mothers to give birth to their children as well.

Currently, no regulatory body tracks exactly how many international parents commission surrogate babies in the United States. Recent accounts suggest that this practice represents a growing portion of the surrogacy market in the United States. One large surrogacy agency, the Center for Surrogate Parenting in Encino, California, reports that approximately half of its 104 births in 2010 were for international parents.[90]

1. The Legal Landscape of Surrogacy in the United States

This section provides an overview of the regulations and laws related to surrogacy in different states. There is no federal law that regulates surrogacy in the United States.[91] Instead, states determine how and whether to allow surrogacy, creating a patchwork of laws regulating surrogacy throughout the United States.[92] Some states specifically prohibit gestational surrogacy.[93] Other states only recognize surrogacy that is noncommercial[94] or "altruistic."[95] Some states allow commercial surrogacy, i.e., where surrogates may be paid

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87. *See supra* notes 7-8 and accompanying text (describing gestational surrogacy arrangements).

88. In 2006, the Society for Assisted Reproductive Technology estimated that the total number of surrogate mothers in the United States was 260. Ali, *supra* note 12. In 2008 SART estimated this number to be 1000. *Id.* However, the number is certainly higher than that because at least 15 percent of clinics do not report their numbers to SART and because private agreements made outside of an agency are not counted. Additionally, SART figures do not factor in pregnancies in which one of the intended parents does not provide the egg – for example, where a male couple will raise the baby. *Id.*

89. Nara Schoenberg, *Growing Number of Surrogates Carry Babies for Foreign Clients*, THE TIMES, April 19, 2011, *available at 2011* WLNR 7629757.

90. *Id.*

91. 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, 505 (2011).

92. *See* SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION, 28-29 (2007).

93. *Id.* at 46.

94. Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1435 (2009). In these noncommercial agreements, the intended parents may pay for the expenses that occurred as a result of the pregnancy but no additional compensation is provided to the surrogate. *Id.*

95. *Id.*

compensation over and above medical expenses.[96] Finally, numerous states have yet to address surrogacy agreements in either case law or by statute.[97] In these states it is unclear precisely how surrogacy contracts would be handled in a legal dispute.[98]

Although commercial surrogacy is accepted in many states, some states still hold the practice to be illegal.[99] Among those states, some impose criminal sanctions,[100] while others merely refuse to enforce commercial surrogacy arrangements.[101] For example, New York has ruled all surrogacy agreements void, unenforceable, and contrary to the public policy of the state regardless of their commercial or altruistic nature.[102] Nevertheless, the New York Supreme Court recently held that a genetic mother who used a gestational carrier could place her own name on her child's birth certificate.[103] This could be a sign that New York is beginning to soften its prohibition against surrogacy. All types of surrogacy remain illegal in Delaware, Indiana, Louisiana, Michigan, Nebraska, North Dakota, and Washington DC.[104]

Other states differentiate between commercial and altruistic gestational surrogacy contracts. In Nevada, "it is unlawful to pay or offer to pay . . . the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract."[105] Likewise, in Florida, a surrogate mother can only receive the "reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intra-partum, and postpartum periods."[106]

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96. *Id.* at 1436.

97. Caster, *supra* note 91, at 489.

98. *Id.*

99. Brock A. Patton, Comment, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 514 (2010). For example, Kentucky has taken this stance by enacting a statute that carries a fine of $2000 and/or up to 6 months in prison for any party who contracts to "compensate a woman for her artificial insemination and subsequent termination of parental rights." KY. REV. STAT. ANN. § 199.590(4) (West 2011).

100. *Id*.

101. Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1014 (2010) (citing the Baby M case). In the Baby M case, New Jersey determined that "the payment of money to a 'surrogate' mother [is] illegal, perhaps criminal, and potentially degrading to women." *In re Baby M*, 537 A.2d 1227, 1234. To date, New Jersey forbids commercial surrogacy. *New Jersey Surrogacy Law,* HRC.ORG, http://www.hrc.org/laws-and-legislation/entry/new-jersey-surrogacy-law (last visited Jan. 18, 2012).

102. *See* N.Y. DOM. REL. LAW § 122 (Gould 2011). Indiana has taken this same approach. *See* IND. CODE ANN. § 31-20-1-1 (West 2011).

103. *See T.V. (Anonymous), v. New York State Dep't of Health,* 88 A.D. 3d 290 (N.Y. App. Div. 2011).

104. *See* Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609, 671-672 (2011).

105. *See* NEV. REV. STAT. § 126.045(3) (2011).

106. FLA. STAT. § 742.15(4) (2011).

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Although some states see a clear line between commercial and altruistic surrogacy, others do not differentiate between the two and consider both types to be legal and contractually enforceable. For example, Arkansas state law specifically mandates that when a surrogacy agreement is in place, the intended parents, not the surrogate, are the legal parents of the child.[107] Arkansas law enforces surrogacy contracts and provides no indication that surrogate mothers may not be paid for their role.[108] Arkansas thus has "some of the most liberal laws in the country with regard to surrogacy agreements . . .."[109] Illinois similarly permits commercial surrogacy agreements. In 2004, the Illinois state legislature passed the Gestational Surrogacy Act,[110] which allows the surrogate mother to receive reasonable compensation.[111]

Some states, such as Massachusetts, do not have a specific statute that legalizes commercial gestational surrogacy.[112] However, Massachusetts' courts look favorably on commercial surrogacy agreements.[113] In at least one case, the court recognized a paid surrogacy agreement as legally enforceable.[114]

California is the capital of commercial surrogacy in the United States, and many California courts have upheld surrogacy agreements.[115] In one of the most notable cases, *Johnson v. Calvert*, 851 P.2d 776, 782 (1993), the Supreme Court of California ruled that commercial surrogacy agreements were enforceable.[116] In *Johnson*, the court determined that in cases of gestational surrogacy agreements, the conflict of rights to the child between the egg donor and the surrogate must be resolved by looking to the intent of the parties at the time of

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107. ARK. CODE ANN. § 9-10-201(b)(1)-(3) (2011).

108. *See Id.*

109. *Arkansas Surrogacy Law*, HRC.ORG, http://www.hrc.org/laws-and-legislation/entry/arkansas-surrogacy-law (last visited Sept. 21, 2011).

110. *See* 750 ILL. COMP. STAT. ANN. 47/1 (2005).

111. *See* 750 ILL. COMP. STAT. ANN. 47/25 (2011). Compensation is defined in the Act as payment of any valuable consideration for services in excess of reasonable medical and ancillary costs. *Id.*

112. *Massachusetts Surrogacy Law*, HRC.ORG,, http://www.hrc.org/laws-and-legislation/entry/massachusetts-surrogacy-law (last visited Sept.. 21, 2011).

113. *Id.*

114. *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (2001). However, in writing this decision, the court did not allow all surrogacy agreements to be enforceable. The court instead set forth criteria under which lower courts may review requests for atypical birth-certificate assignations in surrogacy cases. *Id.* These criteria are, whether "(a) the plaintiffs are the sole genetic sources of the twins; (b) the gestational carrier agrees with the order sought; (c) no one, including the hospital, has contested the complaint or petition; and (d) by filing the complaint and stipulation for judgment the plaintiffs agree that they have waived any contradictory provisions in the contract . . . ." Id. at 1138.

115. *California Surrogacy Law,* HRC.ORG,, http://preview.hrc.org/laws-and-legislation/entry/california-surrogacy-law (last visited Sept. 21, 2011).

116. *See* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 121-23 (2009) (noting that *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), helped increase California's appeal as a surrogacy- friendly state).

the surrogacy arrangement.[117] California statutory law also accepts parenthood as determined by a surrogacy agreement.[118] Therefore, the names of unrelated intended parents may be placed on a birth certificate without an adoption procedure. Additionally, California law provides a variety of procedures prior to the finalization of a surrogacy arrangement. For example, a surrogacy facilitator[119] directs the intended parents to place funds in either an independent, bonded escrow depository or a trust account maintained by an attorney.[120]

Some states require that an applicable court approve surrogacy contracts in advance to ensure that all contingencies are considered prior to the finalization of an arrangement.[121] Additionally, some states both allow gestational surrogacy agreements and provide legal protections for the surrogate mothers.[122]

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117. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

118. *See* CAL. FAM. CODE § 7648.9 (West 2004); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998) (which held that the California statute, which makes a husband the lawful father of a child unrelated to him if he causes it to be created by artificial insemination, also applies to intended parents).

119. California statute defines a surrogacy facilitator as "a person or organization that engages in either "[a]dvertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement, or charging a fee or other valuable consideration for services rendered relating to an assisted reproduction agreement." *See* CAL. FAM. CODE § 7960(a)(1), (2) (West 2011).

120. CAL. FAM. CODE § 7961(a) (West 2011). California law also makes clear that the surrogacy facilitator may not have a financial interest in the escrow company, and that the funds may only be disbursed in accordance with the reproduction agreement. CAL. FAM. CODE § 7961(b) (West 2011). In addition to this funds regulation, legislation has been introduced in California that would further regulate surrogacy agreements. *See* An Act to Amend Section 7613 of, and to Add Section 7613.5 and 7962 to, the Family Code, Related to Assisted Reproduction, H.R. 1217, 2011-12 Sess. (Cal. 2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1201-1250/ab_1217_bill_20110620_amended_sen_v95.pdf. If approved, this bill would enact a new section to the California Family Code that would forbid any medical or legal professional from medically evaluating or legally representing an intended parent or surrogate while acting as a surrogacy facilitator. This legislation seeks to prevent the conflict of interest that occurs when a surrogacy agency recruits, legally represents, and medically evaluates a surrogate. Although these protections are admirable, the Erickson admission suggests that someone intent on conducting unethical activity will actively sidestep such protections. *See infra* Part 1.A (discussing the Erickson baby-selling scheme).

121. Caster, *supra* note 91, at 487-88. For example in Virginia, "[p]rior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court" for the court to approve the contract. VA. CODE. ANN. § 20–160(a) (2011). At this time the court appoints "a guardian ad litem to represent the interests of any resulting child" and also appoints counsel to represent the surrogate. *Id*. In order to approve the contract, the court must find that the pregnancy does not impose an unreasonable risk of mental or physical harm to the surrogate. *Id*. at § 20–160(b)(6). Additionally, a home study must be conducted of the intended parents, the surrogate and, if she is married, the surrogate's husband. *Id*. at § 20–160(b)(1). Virginia law also mandates that if the surrogate is married, the surrogate's husband must be a party to the contract. *Id*. at § 20-160(b)(10).

122. For example in New Hampshire, a state statute seeks to protect the health of the surrogate by specifically stating the prerequisites to becoming a surrogate in that state. According to the statute, "[n]o woman shall be a surrogate, unless the woman has been medically evaluated and the results, documented in accordance with rules adopted by the department of health and human

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Of those states that allow surrogacy, many require that the intended parents be married. That leaves many single women and men, along with lesbian and gay couples, unable to utilize surrogacy in numerous states, such as Florida, Nevada, New Hampshire, Oklahoma, Texas, Utah, and Virginia.[123] Other states, such as California and Illinois, have surrogacy statutes that do not require an intended parent to be married.[124] This is another reason why California has been a leader in commercial surrogacy in the United States.

A final approach that states have taken to gestational surrogacy agreements is not to address the practice.[125] Many states lack statutes that explicitly address the validity or legality of surrogacy agreements, nor is their case law that indicates how their courts will handle the issue.[126] For example, Wisconsin is one state that has yet to speak on the issue of surrogacy,[127] leaving the issue of whether surrogacy agreements will be enforced in the event of a conflict an open question. However, this uncertainty has not deterred hopeful parents and potential surrogates from contracting with one another for the purposes of creating a child.[128]

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services, demonstrate the medical acceptability of the woman to be a surrogate." *See* N.H. REV. STAT. § 168-B:16(III) (2011). Illinois also provides legal protections for surrogates. *See* 750 ILL. COMP. STAT. ANN. 47/20(a) (2011). Within the states' Gestational Surrogacy Act, Illinois has set requirements for a surrogate to be eligible to enter a surrogacy agreement. These requirements include that the surrogate must be at least 21 years of age, she must have given birth to at least one child and she must have completed a medical as well as a mental health evaluation. See 750 ILL. COMP. STAT. ANN. 47/20(a) (2011). Additionally, she must also have "undergone [a] legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy." *Id*. Finally, the surrogate must have a health insurance policy that covers major medical treatments and hospitalization. *Id*. This policy must "extend throughout the duration of the expected pregnancy and for 8 weeks after the birth of the child." *Id*. However, Illinois' Gestational Surrogacy Act allows this policy to be purchased for the surrogate by the intended parents pursuant to the gestational surrogacy contract. *Id*.

123. *See* Morrissey, *supra* note 104, at 671.

124. *Id*. Other states that have surrogacy statutes without a marriage requirement are: Connecticut, Kentucky, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Washington, and West Virginia. *Id*.

125. Caster, *supra* note 91, at 486.

126. In the following states, the legal status of surrogacy is unclear: Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming. Morrissey, *supra* note 105 at 672.672 (2011); *See also* Magdalina Gugucheva, *Surrogacy in America,* COUNCIL FOR RESPONSIBLE GENETICS (2010), http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf.

127. *Wisconsin Surrogacy Law*, HRC.ORG, http://preview.hrc.org/laws-and-legislation/entry/wisconsin-surrogacy-law (last visited Sept. 21, 2011).

128. Many surrogacy agencies operate in Wisconsin. *See e.g.*, Pink & Blue Surrogacy and Fertility, LLC, http://www.pinkandbluesurro.com/Pink_and_Blue_Surro/Welcome.html (last visited Mar. 4, 2012); New Hope Surrogacy Center, http://www.newhopesurrogacy.com; The Surrogacy Center, LLC , http://www.surrogacycenter.com (last visited Mar. 4, 2012).

2. *Surrogates in the United States*

The surrogacy industry in the United States consists of different private clinics, usually located in the states with the most developed, permissive surrogacy laws. Agencies work independently, leading to a wide variety of practices, but agencies typically require a screening process to ensure that the surrogate mother is physically and emotionally suitable for the position.[129]

Most women decide to become a gestational surrogate for the income.[130] Estimates vary, but the typical cost for a surrogacy arrangement in the United States ranges from $80,000 and $120,000, of which the surrogate receives between $14,000 and $18,000.[131]

Although a diverse group of women in the United States become surrogate mothers, many are "military wives," i.e., women who are married to someone in the armed services.[132] In fact, many surrogacy agencies actively attempt to recruit these women,[133] who often live on or near army bases where employment is scarce. Military wives can often make more as a surrogate mother than their husbands' income from serving in the armed forces.[134] Additionally, the armed forces' very comprehensive insurance provider, Tri-Care, which pays for most pregnancy related expenses, including in vitro

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129. *See* Ali, supra note 12. The screening process differs for each agency but, typically, before any progress is made, a woman who wants to be a surrogate must complete an application provided by the agency with whom she would like to work. These applications ask basic questions concerning the pregnancy history, lifestyle and medical and work history of the surrogate. If the answers are satisfactory, an employee visits the applicant to evaluate her. Upon the approval of the employee, the surrogate is accepted into the agency's program. Once a member of the program, the surrogate and the intended parents select who they would like to work with, and a meeting is arranged. If the agency, the surrogate and the intended parents are satisfied that each of their goals for the endeavor will be met, then they sign the appropriate documentation and the procedure begins. *See e.g.*, CSP Registration Page, https://www.creatingfamilies.com/SM/SM_app_request.aspx (last visited Aug. 9, 2011); West Coast Surrogacy Inc., http://www.westcoastsurrogacy.com/surrogates.php (last visited Aug. 9, 2011); Become a Surrogate Mother with Conceiveabilities, http://www.conceiveabilities.com/surrogate_application.htm (last visited Aug. 9, 2011); SSA Surrogate Application, http://www.ssa-agency.com/showhtml.aspx?html=surrogatebriefapplication.htm (last visited Aug. 9, 2011); Creating Families Surrogate Mother Process, http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=117 (last visited Aug. 9, 2011); Conceivabilities Surrogate Mother Process, http://www.conceiveabilities.com/surrogate_process.htm (last visited Aug. 9, 2011).

130. *See* Ryznar, *supra* note 101, at 1028.

131. *See also* Smerdon, *supra* note 5 (noting a lower estimate).

132. Ali, *supra* note 12.

133. Habiba Nosheen & Hilke Schellmann, *The Most Wanted Surrogates in the World*, GLAMOUR, Oct. 2010, http://www.glamour.com/magazine/2010/10/the-most-wanted-surrogates-in-the-world? (surrogate agencies often market to military wives when seeking surrogates due to their desire to help other couples and their financial situations); *See also* Caster, *supra* note 91, at 505.

134. *See* Ali, *supra* note 12. In addition to compensation, some women indicate that, by becoming a surrogate, they hope to help another family have a child. Others admit to choosing surrogacy to afford luxuries that they otherwise could not, such as a big screen television or a Disney vacation.

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fertilization, covers these women.[135] As a result, military spouses reportedly comprise half of the surrogate mothers population for certain surrogate agencies and fertility clinics in Texas and California.[136]

Accounts differ concerning the proper amount of interaction between an American surrogate mother and the intended parents of the child. Some surrogates and intended couples agree that the main purpose of their relationship is to create a baby, not to bond with one another.[137] Couples and surrogates that adopt this attitude keep their interactions brief.[138] However, some agencies encourage or even require that bonds be formed between the parties, sometimes creating lasting relationships long after the child has been given to the intended parents.[139]

B. Ukraine

Ukraine's liberal surrogate laws have helped the country emerge as an important destination for international surrogacy in recent years. Numerous surrogacy clinics operate in Ukraine and advertise the lax regulations and favorable policies toward intended parent as selling points.[140] It is nevertheless difficult to determine how many surrogacy arrangements take place annually

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135. *Id.* (noting an increase of surrogates who are military wives after the Iraq war).

136. *Id.*

137. Ali, *supra* note 12.

138. *Id.*

139. For example, the Center for Surrogate Parenting, Inc. requires that the intended parents at a minimum send a note and photo of the baby at three, six and twelve months of age to the surrogate. In fact, many surrogacy agencies encourage interaction between the surrogate and the intended parents. *See e.g.*, http://www.conceiveabilities.com/surrogate_process.htm ("This pregnancy is shared with the loving intended parents, and therefore there needs to be ongoing communication about the developing fetus, your health status, needs for support, or other matters."); http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=20#8 ("[Y]ou will be overwhelmed at times by having a newborn at home, it is important to take time to contact your surrogate mother at least once every five days for the first month. It is also very important that you send her pictures of the baby as agreed upon in your contract.") It appears that Elton John is maintaining a relationship with his surrogate. According to an interview, the surrogate is mailing her breast milk via FedEx so that John and his partner can use it to feed the baby she carried. *See* Stephen M. Silverman, *Elton's John's Son's Breast Milk Comes via Fedex*, PEOPLE, April 25, 2011, http://www.people.com/people/article/0,,20484504,00.html.

140. Numerous surrogacy agencies and brokers have websites that tout the advantages of pursuing surrogacy in Ukraine. *See e.g.*, *Advantages*, NEW LIFE UKRAINE.COM, http://www.ukraine-surrogacy.com/advantages (noting some of the advantages of surrogacy in Ukraine including "[1]gestational surrogate mothers cannot legally keep the baby after delivery,""[2]only the names of the intended parents are written on the birth certificate," "[3]the cost of surrogacy and embryo adoption/egg donation is 60-70% less . . . than the cost of the same programs in the United States," "[4]the availability of young, healthy egg donors and surrogate mothers," and "[5]no waiting time for our clients."). Also, the site notes that "gender selection is legal in Ukraine." http://www.ukraine-surrogacy.com/Sex_selection.

because there is no regulatory body to track surrogacy in Ukraine.[141] One news source recently reported 120 successful surrogate pregnancies in Ukraine in 2011.[142] The true number is likely much higher as surrogacy agencies do not have to report surrogacy arrangements.[143] Approximately half of the surrogacy arrangements in Ukraine are for foreign couples.[144]

In Ukraine, a surrogacy arrangement costs approximately "$30,000 and $45,000 for foreign parents . . . with $10,000 to $15,000 going to the surrogate mother."[145] But the costs of surrogacy in Ukraine will likely decrease because there is a surplus of women who desire to be surrogates.[146] That would make Ukraine an even more attractive fertility tourism destination.

1. The Legal Landscape of Surrogacy in Ukraine

In Ukraine, only infertile, legally married couples are able to participate in a surrogacy arrangement.[147] Nevertheless, otherwise liberal surrogacy laws attract many surrogate tourists. Only the intended parents receive recognized rights: the Family Code sanctions surrogacy and allows married couples that hire a surrogate to be legal parents of the resulting offspring.[148] According to Ukrainian law, the intended parents are registered as the legal parents of the child upon the notarized written consent of the surrogate.[149] The Ministry of Health requires that only accredited healthcare establishments engage in assisted

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141. *See* Ohla Zhyla, *More Women in Ukraine Want To Be Surrogate Mothers*, THE DAY WEEKLY DIGEST, Dec. 15, 2009, http://www.day.kiev.ua/289226. In this newspaper article, a representative of the Association of Reproductive Medicine of Ukraine estimated that there were around sixty couples utilizing surrogate mothers in 2009, and theorized that the numbers went down from an estimated 90 couples in 2007 due to hassles with several European couples not being granted passports for their babies to return to their home country. *See id*.

142. Claire Biggs & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE, June 4, 2011, http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html [hereinafter *Biggs*].

143. Zhyla, *supra* note 141. He estimates that the number is likely thirty percent higher and predicts that the number will be forty percent higher in 2011 due to the opening of several large surrogacy clinics.

144. *Id*.

145. Biggs, *supra* note 142.

146. *See* Zhyla, *supra* note 141.

147. *Id.*

148. *See* Family Code of Ukraine, Dec. 26, 2002, http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family_kideks_engl.pdf (The Family Code of Ukraine, Article 123.2, states "If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child.").

149. *See* Order #140/5 dated November 18th, 2003, Ukrainian Legislation, European Society of Human Reproduction and Embryology, http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Ukraine/Embryo-research/page.aspx/578.

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reproduction, but it does not specify what type of accreditation is required.[150] This permits a larger number of surrogacy providers to enter the market.

Ukrainian law does not mention any rights that the surrogate mother may have.[151] Its focus is to "protect[] the family and the child, but not the surrogate mother."[152] Although a surrogate may technically insist on a surrogacy contract to protect her interests prior to conception, the enforceability of such agreements remains unclear. Also, the surrogate would require an attorney to execute such an agreement, which may not be financially feasible for most surrogates. Although surrogacy bills have been drafted to protect surrogate mothers, they have received no government support.[153]

Ukraine's liberal surrogacy laws have attracted many fertility tourists, but the lack of clear national and international guidelines has left some children in legal flux, as the aforementioned Le Roche story illustrates. Nevertheless, Ukraine has emerged as a popular surrogacy destination due to its low costs, European location, Caucasian population, and laws favoring intended parents.

2. *Surrogates in Ukraine*

To summarize, surrogates typically earn between $10,000 and $15,000.[154] In addition, Ukraine does not appear to have the same social stigma associated with surrogacy that exists in countries such as India.[155] Although Ukraine has a booming surrogacy business, there has not been as much written about the backgrounds and experiences of surrogates in Ukraine, as compared with India and the United States.

C. *India*

India actively pursues fertility tourists to hire Indian surrogates. In 2002, India became the first country to explicitly legalize commercial surrogacy, and

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150. *See* Order # 771 dated December 23rd, 2008 issued by the Ministry of Health of Ukraine and titled "About approval of instruction of the order to apply assisted reproductive technologies" regulates the order of usage of reproductive techniques and surrogacy. Ukrainian Legislation, European Society of Human Reproduction and Embryology, http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Ukraine/Embryo-research/page.aspx/578.

151. *See id*. (identifying no such rights).

152. Zhyla, *supra* note 141.

153. *Id.* Some aspects of a recent bill proposed by a member of Parliament include: "paying tax-free honorariums to surrogate mothers," conferring the status "heroic mother," paid maternity leave, and training courses for government employees and law enforcement agencies (about surrogacy). The estimated cost of the proposed bill totaled 200 million hryvnias (about twenty five million US dollars per year).

154. *See* Biggs, *supra* note 142. Note that elsewhere it has been reported that some surrogates only earn $6,000. *See* Zhyla *supra* note 141.

155. *Id.*

the floodgates opened.[156] The Indian government encourages surrogacy by granting tax breaks to hospitals that treat international patients,[157] including those that provide surrogacy related services, such as egg removal and IVF techniques used in gestational surrogacy.[158] Although "there are no firm statistics on how many surrogacies have been arranged in India,"[159] surrogacy cases appear to have more than doubled in recent years.[160] One Indian physician claims to have delivered over 3,000 surrogate babies in the last ten years.[161] This increase corresponds to an increase in customers from outside of India.[162] Such fertility tourists benefit from India's world-class medical facilities and technical capabilities, combined with the lower costs of surrogacy than are available in their home country.[163] The Indian Council of Medical Research estimates that surrogacy is almost a $450 million a year industry in India.[164]

As of 2009, India had 350 facilities that offered surrogacy as a part of a broader array of infertility-treatment services, triple the number in 2005.[165] Also in 2009, approximately 1,500 pregnancy attempts using surrogates were made at these clinics.[166] A third of those were made on behalf of foreign parents who hired surrogates.

1. The Legal Landscape of Surrogacy in India

India currently does not regulate the fertility industry, although the Indian Council of Medical Research made efforts to suggest guidelines and propose legislation. In 2005, The Indian Council of Medical Research suggested voluntary guidelines for surrogacy clinics.[167] These guidelines are designed to

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156. *See* Audrey Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9, http:// www.nytimes.com/2008/03/10/world/asia/10surrogate.html.

157. *Id.*

158. *Id.*

159. Rimm, *supra* note 95, at 1432.

160. *Id.*

161. Patton, *supra* note 99, at 525.

162. Smerdon, *supra* note 5, at 45.

163. *Id.* at 32.

164. *Id.*

165. These numbers are estimates, which are difficult to substantiate because there is no registry or any licensure required to operate a clinic that offers surrogacy services. *See* Shilpa Kannan, *BBC News, Regulators eye India's surrogacy sector*, BBC NEWS, March 19, 2009, http://news.bbc.co.uk/2/hi/business/7935768.stm. *See also*

Sarmishta Subramanian, *Wombs for rent: Is paying the poor to have children wrong when both sides reap such benefits?,* MACLEAN'S, July 2, 2007, http://www.macleans.ca/article.jsp?content=20070702_107062_107062&page=2 (estimating that there were 600 IVF clinics in India in 2007 with over 200 offering surrogacy).

166. *Id.*

167. *See* Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), http://icmr.nic.in/art/art_clinics.htm. *See*

DOI: doi:10.15779/Z380Q00

protect the interest of the intended parents. Critics have attacked these guidelines as vague with respect to the rights of Indian surrogate mothers.[168] For example, the guidelines fail to specify a maximum number of embryos with which a surrogate mother may be implanted at one time.[169]

The Indian Council of Medical Research also has urged the government to enact legislation to protect the rights of all parties in a surrogacy arrangement.[170] However, the Indian surrogacy industry significantly influenced the drafting of the Assisted Reproductive Technology Regulation Bill-2010.[171] Thus, the bill only addresses gestational surrogacy, and it makes clear that such surrogacy is available to both single parents and married couples.[172] The legislation also states that the intended parents shall pay all expenses incurred during pregnancy and after delivery as per medical advice.[173] The legislation allows the surrogate to receive compensation but does not specify a minimum amount or percentage. Under the draft bill, the surrogate relinquishes all parental rights.[174] In addition, the bill gap-fills the situation illustrated as the Baby Manji case by allowing the issuance of birth certificates in the names of the intended parents, who then automatically become the child's legal parents.[175] Moreover, the legislation requires that the surrogacy clinic and intended parents obtain a certificate of approval from the intended parent or parents' corresponding embassy in India prior to initiation of the surrogacy procedure.[176]

While the proposed legislation seeks to address many issues in the surrogacy process, it falls short in several ways. Although reproductive clinics with different standards have proliferated throughout India,[177] the proposed legislation does not address this heterogeneity, nor does it enact a meaningful screening process when searching for surrogate mothers.[178]

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also Points, *supra* note 38.

168. Points, *supra* note 38.

169. Diana Farrell, *IVF in India - Why You Should Look Into This*, EZINE ARTICLES, http://ezinearticles.com/?IVF-in-India---Why-You-Should-Look-Into-This&id=3586089.

170. *See* Indian Council of Medical Research, The Assisted Reproduction Technologies Bill (2010) [herein after Draft Bill], http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf.

171. *Id*.

172. *Id*. at 17–18 (stating "[i]n India, the non-binding guidelines and proposed legislation covering commercial surrogacy arrangements define only gestational surrogacy."); Draft Bill *supra* note 170, at §32(1) (stating "ART shall be available to all persons including single persons, married couples and unmarried couples.").

173. Draft Bill, *supra* note 170, at §34(2).

174. *Id*. at § 34(4).

175. *See id*. at § 34(10).

176. *See id*. at § 34(19).

177. *See* Smerdon, *supra* note 5, at 44–45.

178. Patton, *supra* note 99, at 526.

2. *Surrogates in India*

The typical surrogacy in India costs $12,000, which is a fraction of the cost in the United States.[179] Of that amount, the surrogate is paid $2,500 to $7000.[180] There are over 200 clinics and agencies offering gestational surrogacy services in India.[181] Often, intermediaries recruit women to serve as surrogates; the fertility clinics or surrogates pay these intermediaries.[182] Recruiters include "former surrogates, women who could not become surrogates for medical reasons, and midwives."[183] Such brokers recruited over half of the women interviewed in at least one investigation.[184]

The media attention and sociological studies on Akanksha Infertility Clinic, located in Anand, Gujarat, enable a more detailed description of the surrogacy process in India than that available for Ukraine. Akanksha Infertility Clinic appeared on both the Oprah Winfrey Show and Good Morning America.[185] It became home to India's first international gestational surrogacy arrangement, when an Indian woman decided to be the gestational carrier for her daughter, who resided in England.

Dr. Nayna Patel, the director and obstetrician at the clinic, arranges and delivers surrogate babies for approximately 130 couples a year.[186] According to Dr. Patel, her clinic only accepts potential surrogates who are between 18 and 45 years of age, in good health, and already have children.[187] Akanksha Infertility Clinic requires a signed contract between parties in which intended parents pay for medical care and surrogate mothers renounce any rights to the baby or babies.[188]

Surrogates live in dormitory-like group homes for the entirety of their

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179. Abigail Halworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, Jul. 29, 2007, http://www.marieclaire.com/world-reports/news/international/surrogate-mothers-india

180. Smerdon, *supra* note 5, at 32.

181. Subramanian, *supra* note 165.

182. Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 282 (2009).

183. *See* Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 969, 975 (2010) [hereinafter Pande Manufacturing].

184. *Id.* (noting that one of the recruiters she met charged the surrogates around $200 for driving them to the clinic and driving them back after the medical tests.).

185. *Id. at* 278. For example, in the *Made in India* documentary, the fertility clinic in Mumbai hired an older woman who lived in the slums to help identify and convince young women in the slums to consider becoming a surrogate. MADE IN INDIA *supra* note 75.

186. Cynthia Vukets, *Single Man Wanted A Child, Hired A Surrogate, Had A Baby*, THE STAR, August 12, 2011, http://www.thestar.com/iphone/Living/article/1038283.

187. Scott Carney, *Inside India's Rent-A-Womb Business*, MOTHER JONES, March/April 2010, http://motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel [hereinafter Carney Rent-A-Womb].

188. *Id.*

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pregnancy at Akanksha, as they do in many of the clinics in India.[189] Because women are often the last to eat in traditional Indian households and might have limited access to food,[190] these residential arrangements ensure that surrogates enjoy proper meals and nutrition. In addition, the clinic restricts the surrogates' daily activities.[191] For example, unless the surrogate has a doctor's appointment or permission to visit family, she spends most of her time in the group home.[192]

Sociologist Amrita Pande interviewed 42 gestational surrogates, their husbands, and their in-laws from Akanksha, and clinic director Dr. Patel.[193] According to Pande's report, although relatives are free to visit surrogates, the prohibitive cost of travel ensures that many surrogates do not see their families while pregnant.[194] Some surrogates reported missing their children.[195] Others reported enjoying the respite from caring for their household or other work.[196]

The payments that surrogates receive for carrying a baby often equals four or five times their annual household income.[197] Although payments in India are much less than in other countries, such as the United States, the sum is significant in the lives of these surrogates. Surrogates state that this income allows them to provide an education for their children or to purchase a home.[198] Akanksha Infertility Clinic facilitates this possibility for surrogates by placing her payments in a separate bank account under the surrogate's name or those of children, thereby reducing the possibility that the surrogate's husband or in-laws obtain control of her earnings.[199] Alternatively, the Clinic will buy a house in the woman's name.[200] As a part of the surrogacy agreement, intended parents also cover the cost of the surrogates' room and board, which is approximately $100 per month.[201]

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189. Marcy Darnovsky, *"Moral Questions of an Altogether Different Kind:" Progressive Politics in the Biotech Age*, 4 Harv. L. & Pol'y Rev. 99, 111–12 (2010).

190. Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 738 at FN219 (2010) (citing a UNICEF report noting that women and girls in India are often amongst the last to eat).

191. *See* SCOTT CARNEY, THE RED MARKET, 135-138 (2011) (noting that, while the surrogates at the Akanksha Infertility clinic are not prisoners, they cannot leave either) [hereinafter Scott Carney].

192. According to Scott Carney's experience, the surrogates were in the group home almost all day, without the opportunity to go outside unless they had doctors' appointments. Scott Carney, *supra* note 191.

193. *See* Pande Manufacturing, *supra* note 183, at 974.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

In India, the interaction between the intended parents and the surrogate is usually limited.[202] Before the surrogate is implanted with embryos, the foreign couple may only meet the surrogate briefly during a short session with the fertility doctor.[203] However, some intended parents do stay in touch with the Indian surrogate and even plan to bring the baby back to India to visit her.[204]

III.
A BIOETHICAL ANALYSIS OF INTERNATIONAL SURROGACY

Scholarly responses to international surrogacy vary widely. Some commentators espouse a laissez-faire attitude regarding the surrogacy market.[205] These scholars advocate for minimal governmental regulation because they fear paternalistic limitations on a competent woman's choice to become a surrogate. They also believe that prohibitions on surrogacy would adversely affect certain already disadvantaged groups, e.g., infertile individuals or gay and lesbian couples who want to be parents.[206] Some also believe that surrogacy is not inherently exploitative and that proper regulation could minimize potential exploitation.[207] Others advocate against an outright ban on international surrogacy—which some commentators compare to slavery or prostitution[208]—because of the potential of creating a black market in surrogacy with even fewer protections for the parties involved.[209]

Rather than advocate for any one of these perspectives, this Article attempts to locate the problems in international surrogacy as a starting point for policymakers.[210] These stories serve as a vehicle through which to explore the

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202. CHRISTINE WILLIAMS, GENDER AND SEXUALITY IN THE WORKPLACE 273 (2010).

203. *See* Halworth, *supra* note 179.

204. *Id*.

205. Patton, *supra* note 99, at 514 (noting the existence of various approaches to international surrogacy).

206. For example, there may be concerns that such restrictions may disadvantage the infertile, the potential single parents, or gay or lesbian intended parents. Many regulatory schemes that are currently in place restrict surrogacy to those in a married, heterosexual relationship.

207. Patton, *supra* note 99, at 514 (noting the existence of various approaches to international surrogacy).

208. *See generally* Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL MED. & BIOETHICS 153 (2000) (comparing gestational surrogacy to slavery and prostitution). *See also* DEBORAH L. SPAR, THE BABY BUSINESS 85-86 (Harvard Business School Press 2005) (noting that the bans on surrogacy in some countries may have spurred the international surrogacy market). Many countries, such as France and Japan, have banned surrogacy or commercial surrogacy. However, as seen in the Ukrainian and American examples I described, that has not stopped those interested in having a child through a surrogate from seeking a surrogate from another country.

209. *See generally* Lisa Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility*, 27 LAW & INEQ. 277, 295-08 (2009) (arguing that the international reproductive tourism industry promotes inequality due to the lax regulations in developing countries).

210. I offer a more detailed discussion of a need for consistency in international regulations related to commercial surrogacy in my forthcoming article, *A Race To The Bottom? The Need For*

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bioethical ramifications of the international surrogacy market. Although there are numerous ways to conduct a bioethical analysis,[211] this Article does so via the baby stories of global surrogacy through the lenses of beneficence, nonmaleficence, justice, and autonomy.[212] These principles are set forth in Principles of Biomedical Ethics by Tom L. Beauchamp and James F. Childress and are intended to aid clinical decision making. But these principles also provide an analytical framework for a wide variety of social issues related to health care, such as adoption and assisted reproduction.[213] This Article pushes this framework further by applying these principles to the stories of international gestational surrogacy, while considering race, gender, and culture as part of the analysis. Through examining these stories in this framework, this Article achieves a richer, more nuanced look into global surrogacy. This type of theoretical bioethical examination is absent from the legal literature related to international surrogacy. Since bioethical analyses impact the formation of health policy and law, this Article begins to correct the oversight in legal literature concerning international surrogacy.

A. Beneficence: Does International Surrogacy Promote Well Being?

Beneficence refers to the concept of promoting well-being.[214] In the context of surrogacy, the question is whether international surrogacy serves the best interests of intended parents, surrogates, and the babies born out of the surrogacy arrangement.

1. Benefits to Intended Parents

Sociological literature suggests that intended parents fare well in the current system of international surrogacy, as parents are able to have their child and can sometimes escape the legal and financial constraints of national surrogacy programs.[215] In the case of surrogacy in the Global South, parents obtain the services of surrogates at a significantly lower cost, as illustrated by both the Switzers and the Yamadas experiences in India. The international,

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International Regulation Of The Rapidly Growing Global Surrogacy Market? (work in progress, on file with author) (advocating for consistency through additions to the Hague Convention on Private International Law).

211. *See* Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J.L. & MED. 395, 401 (1994) (noting modern approaches to bioethics that incorporate race, feminist theory, empiricism, and narratives).

212. *See id.* at 400.

213. *Id.* at n.1 (stating that bioethics is "the study of ethical problems in health care and the biological sciences").

214. BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 4 (6th ed. 2008) (noting that beneficence requires acting in the benefit of others).

215. Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEVELOPING WORLD BIOETHICS, 112, 2009: no.3 p. 113.

commercial surrogacy market also enabled the Le Roches to have a biological child, thereby avoiding the French prohibition on surrogacy. Although it is difficult to determine the value that intended parents place on having a child by surrogacy, the prices that these parents paid, as well as those charged by the baby-selling ring in California serve as a benchmark of the value that potential parents place on adopting Caucasian children at birth.

2. *Benefits to Surrogates*

International surrogacy promotes the well-being of surrogates by generating income, spurring a reevaluation of the worth of pregnancy, and sometimes offering fringe benefits. Compared to the limited economic opportunities available, surrogates usually earn a comparatively high income.[216] In the United States, Ukraine, and India, many women's decision to become gestational surrogates stems primarily from the corresponding financial benefits. The surrogate relationship could be framed as a job, whereby the surrogate mother is an employee of the surrogacy agency and, by extension, the intended parents. Intended parents can also be cast as customers of the business operated by the surrogacy agency. Sociologist Amrita Pande takes the former approach and stresses that surrogacy should be compared to these women's other job prospects.[217] Pande observes that the ethical critiques of surrogacy ignore the reality that surrogate mothers live,[218] namely that women who serve as surrogates may not have comparable job or income opportunities.[219]

The aforementioned documentary, *Made in India*, illustrates the importance of financial incentives to surrogate mothers by relating the story of Aasia.[220] Aasia clearly states that the financial benefits are the only reason she chose to become a surrogate.[221] The fee she received of $2,000 is much higher than the average Indian family income of $60 per month.[222] Surrogacy enables women like Aasia to provide for their families and save for their children by earning almost five years of total family income in less than one year.[223]

Not only does the international surrogacy market greatly value

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216. *See infra* notes 222–24.

217. *See* Pande Manufacturing, *supra* note 183, at 971–72.

218. *Id*.

219. The most common reason why men and women work outside the home is financial necessity. PEW RESEARCH CTR., AMERICA'S CHANGING WORKFORCE: RECESSION TURNS A GRAYING OFFICE GRAYER 25 (2009), http:// pewsocialtrends.org/files/2010/10/americas-changing-workforce.pdf (stating that "the single biggest reason [men and women] work is to support themselves and their families.")

220. *See supra* PART 1.D.

221. MADE IN INDIA, *supra* note 75.

222. *See* Pande Manufacturing, *supra* note 183, at 974.

223. See *id.*

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pregnancy,[224] only women can be surrogates. This may be one of the few jobs where women face no competition from men. Unlike other jobs that are devalued and underpaid as "female" jobs, such as teaching and nursing, surrogacy fetches a relatively large sum. Although a lack of data exists as to broad cultural trends in framing pregnancy, international commercial surrogacy could conceivably spur cultural recognition in the developing world in particular of the tremendous value of the labor involved in pregnancy. If society in these countries were to value pregnancy more highly because of its potential for income-generation, this could lead to general, incremental improvement of women's lives and status.

Finally, it seems that this practice can generate real benefits for surrogates. For example, the Akanksha Infertility Clinic educates surrogates who are living in the surrogate group home. Surrogates receive English and computer lessons,[225] thereby developing skills transferable to non-surrogacy employment.

B. Nonmaleficence: Does International Surrogacy cause harm?

The principle of nonmaleficence stipulates that the set of actors who make international surrogacy possible have a duty to do no harm.[226] But international commercial surrogacy potentially causes harm on multiple levels. Harm may occur to intended parents, surrogates, and the babies born from these arrangements.

1. Harm to Intended Parents

The stories in this Article demonstrate that the laws addressing surrogacy in different nations differ to "the point of mutual contradiction"[227] and can cause harms ranging from substantial emotional turmoil to criminal sanctions on intended parents.

In the California baby-selling scandal, the intended parents thought they were adoptive parents.[228] They did not realize that the babies they adopted were conceived for the sole purpose of adoption. These intended parents became the unintended victims of an illegal scheme, and thus suffered harm.

Dr. Yamada, the biological father of Baby Manji, suffered emotional turmoil and an administrative burden because both Indian and Japanese law

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224. *See id.*

225. *Id.* at 970.

226. According to Beauchamp and Childress, one "ought not to inflict evil or harm." Beauchamp, *supra* note 3, at 151. They apply this principle in the clinical decision making context. However, I use it here as an analytical framework to highlight the legal problems the stories described in this Article.

227. *In re* X & Y, [2008] EWHC 3030 (Fam.) (U.K.), http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html (United Kingdom).

228. *See supra* Part I.A.

temporarily deprived him of his parental rights to his biologically related child.[229] As a result of Indian and Japanese laws related to citizenship, he spent time and money appealing to the Indian courts to allow him to take Baby Manji back to Japan.

The Le Roches clearly suffered harm because the Ukrainian surrogacy agency with which they dealt misled them as to the ease of returning with their surrogate babies.[230] The agency reassured them that they would be able to take their babies to France with legal papers as long as they hid the facts of their conception and birth. When the Le Roches were unable to return to France with their twins, they attempted to smuggle their babies out of Ukraine. When caught they faced monetary penalties and criminal charges under child trafficking laws. They continue to live in Ukraine because their babies do not have legal paperwork to return to their home in France.[231]

In *Made in India*, the Switzers seemed to have a mostly positive experience but even they encountered financial and administrative obstacles that caused them harm. They paid more than they initially intended to intermediaries, the surrogacy mother, and as a result of the failure to contract for certain possibilities.[232] Some of the additional payment was voluntary, arising from their false belief that Aasia had been paid $7,000 rather than $2,000[233] and the fact that Aasia believed that the Switzers should pay her more because she bore them twins.[234] The Switzers faced administrative burdens associated with ensuring that the twins' birth certificates bore their names and in obtaining US passports for their babies. Such burdens were minor compared to those of the Le Roches and Ikufumi Yamada.

2. *Harm to Surrogates*

International commercial surrogacy might cause harm to surrogate mothers with respect to the commodification of their bodies, physical health, and even mortality. India, for instance, has the highest number of maternal deaths in the world and a very high incidence of maternal mortality.[235] The Indian surrogates therefore face greater risks from childbirth compared with the risks experienced by mothers elsewhere in the world.

Additionally, in each of the stories, the surrogates are gestational surrogates, meaning that they are implanted with the embryo via in vitro

229. *See supra* Part I.B.

230. *See supra* Part I.C.

231. *See supra* text accompanying note 74.

232. MADE IN INDIA *supra* note 75.

233. *See supra* text accompanying note 76.

234. *See supra* text accompanying note 77.

235. Transcript, *What to Expect: Legal Developments and Challenges in Reproductive Justice*, 15 CARDOZO J.L. GENDER , 585 (2009).

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fertilization. There are health risks inherent to the in vitro implantation procedure, especially the common practice of implanting a single surrogate with multiple embryos.[236] Most surrogacy clinics in Ukraine and India implant the surrogates with multiple embryos to boost their success rate.[237] However, pregnancy with multiple embryos exposes surrogates to increased risks, such as "hypertension, gestational diabetes, and excessive bleeding in labor and delivery."[238] Additionally, studies have shown that women who become pregnant via IVF have twice the risk of an ectopic pregnancy, which can require surgery or cause death.[239]

Further, it is not clear what recourse surrogates have in India or Ukraine should they be harmed in the course of their surrogacy arrangement. *Made in India* reveals that Aasia was not fully informed about what surrogacy entailed. She did not understand the science of IVF, the increased risk of multiple fetuses, or the lack of payment in the event that she bore twins.[240] In Sociologist Amrita Pande's interviews of surrogates from Akanksha Infertility Clinic, which is where the Yamadas contracted with their surrogate, a surrogate reported that "we were told that if anything happens to the child, it's not our responsibility but if anything happens to me, we can't hold anyone responsible."[241] There appears to be no protection for surrogates in this regard. The power dynamic favors surrogacy agencies over surrogates, who could potentially be misled or coerced into giving up rights and remedies in the case of harm to health.

There is further concern over the potential commodification of surrogates, where a surrogate's womb is essentially available for a rental fee.[242] Some argue that these arrangements reduce a surrogate to a reproductive vessel.[243] In countries where high paying jobs for women are scarce, as in India, surrogate

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236. *See* Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y L. & ETHICS 283, 290-91 (2008).

237. *See* Carney Rent-A-Womb, *supra* note 187 (noting that Akanksha Clinic "routinely uses five or more embryos at a time"). Some agencies even offer two surrogates per client to increase the chance of a successful implantation. If both surrogates successfully become pregnant, doctors perform selective reduction or abortion on the less desirable embryo(s). *See* Tamar Audi & Arlene Chang, *Assembling a Global Baby*, Wall St. J., (Dec. 11, 2010), http://online.wsj.com/article/SB10001424052748703493504576007774155273928.html.

238. King, *supra* note 236, at n.115 (stating that "the risk of pregnancy-induced hypertension doubles from just under 4% in women pregnant with one fetus to just under 8% in those carrying twins and over 11% in those carrying triplets").

239. *Id*. at 308.

240. MADE IN INDIA, *supra* note 75.

241. Pande Manufacturing, *supra* note 183, at 977.

242. Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEVELOPING WORLD BIOETHICS 112, 2009: no.3 at 112.

243. *See* Ailis L. Burpee, Note, *Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy*, 37 GA. J. INT'L & COMP. L. 305 at 324–25 (2009); *see also* Bushy & Von, *supra* note 59, at 59-60 (noting concern that commercial surrogacy reduces women to reproductive vessels).

agencies wield substantial power over surrogates, which may force surrogates to accept lower pay and fewer protections. Some feminists worry about racial and class discrimination if minority women are sought "to serve as 'mother machines' for embryos of middle and upper-class clients."[244] Additionally, there is concern that the science fiction notion of a "breeder class" of women who bear babies for richer, often white women, may actually come to fruition as the popularity of international surrogacy builds.[245] Critics of international surrogacy, such as Barbara Katz Rothman, predicted even before international surrogacy's rise in popularity that "[p]oor, uneducated third world women and women of color from the United States and elsewhere, with fewer economic alternatives, can be hired more cheaply."[246] Rothman's hypothesis appears to be correct, especially in the case of Indian surrogates like Aasia.

3. Harm to Children Born From the Surrogacy Arrangement

Children born of surrogacy face potential health risks as a result of the IVF techniques used for gestational surrogacy.[247] Studies have showed that babies born via IVF have "higher incidences of perinatal problems, congenital malformations and problems of the genitourinary system than naturally conceived children."[248] These babies also experience higher rates of mortality, low birth weight, and more frequent preterm delivery than naturally conceived children. These issues arise in part due to their increased likelihood of being a multiple birth pregnancy.[249]

Babies born of surrogacy also experience potential non-physical harm, as illustrated by the Le Roches' twin babies and Ikufumi Yamada's Baby Manji. These babies face the legal harm of lack of citizenship as a result of inconsistencies in the laws among Ukraine, France, India, and Japan. In particular, Baby Manji did not have a legal mother because of Indian laws regarding parental rights.

C. Autonomy in the International Surrogacy Relationship

With respect to international surrogacy, autonomy ought to refer to the idea that intended parents should be able to freely choose to participate in surrogacy arrangements and that a competent woman should be able to make her own

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244. Bushy & Von, *supra* note 58 at 41.

245. *Id*. at 41–42.

246. *Id.* Rothman compares advertisements for Purdue chickens to advertisements to babies in a tongue-in-cheek fashion.

247. King, *supra* note 236 at 305.

248. *Id.* at n.14 (citing to Reija Klemetti ET AL., *Health of Children Born as a Result of In Vitro Fertilization*, 118 PEDIATRICS 1819 (2006)).

249. *Id*. at 305.

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decision to become a surrogate.[250]

1. *Autonomy for Intended Parents*

The actors that enable and regulate international commercial surrogacy encroach on the autonomy of the intended parents in two important ways. First, the accounts above demonstrate that intended parents are sometimes unclear about the terms of their surrogacy contracts.[251] Second, the different norms and laws around surrogacy in each country (or state in the case of the United States, which does not regulate surrogacy at the federal level) often subvert the surrogacy arrangements made by intended parents.[252] For example, the Switzers did not know that their surrogate, Aasia, was underpaid.[253] The agency misled them into believing that Aasia received a larger share of the fees that they paid the surrogacy agency.[254]

Intended parents also may lack autonomy vis-à-vis surrogacy companies, as in the California baby-selling scam.[255] The reproductive law attorneys lied to the intended parents by mischaracterizing the situation as one where the original intended parents had "dropped out."[256] Thus, the intended parents lacked meaningful autonomy because they lacked the necessary facts with which to make an informed decision.[257]

In addition, the accounts of surrogacy presented in this Article demonstrate that the patchwork of different or even contradictory laws on surrogacy, adoption, and citizenship may potentially unravel many international surrogacy arrangements. The Yamadas and the Le Roches initially exercised autonomy by deciding to seek a gestational surrogacy arrangement outside their home countries. But the laws curtailed their decisions because of the legal uncertainty or illegality of such arrangements in Japan and France, respectively, and the laws in Ukraine and India about parental rights and citizenship. In these cases,

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250. I do not analyze autonomy in the context of babies born from surrogacy arrangements because babies do not have autonomy to make decisions. Rather, their lives are dictated by the decisions of their intended parents and surrogate mother.

251. *See supra* text accompanying notes 76.

252. See *supra* text accompanying notes 44–58 (describing the legal predicament involved in the Baby Manji case); and notes 68–70 (describing the legal problems the Le Roch's faced).

253. *See supra* text accompanying note 76.

254. MADE IN INDIA, *supra* note 75.

255. *See infra* Part I.A.

256. Greg Moran, *Woman Gets Prison In Baby-Selling Fraud*, San Diego Union-Tribune, December 2, 2011 (hereinafter Baby-Selling Fraud); *see also Unborn babies sold to highest bidder*, CNN, October 21, 2011, http://www.cnn.com/video/#/video/crime/2011/10/21/pkg-endo-black-market-babies.cnn; *see also* KTLA Special Report: *Made to Order Babies* (KTLA-TV television broadcast Feb. 14, 2012) (noting that the surrogates were told that intended parents were already in place and intended parents were told that the baby was to be adopted, not part of a surrogacy arrangement).

257. *See infra* Part I.A.

although the parents attempted to make decisions to control their reproductive destinies by ignoring their respective country's prohibitions against surrogacy, they found themselves in compromising situations with stateless babies.

2. *Autonomy for Surrogates*

Although international commercial surrogacy enables surrogates to gain some financial independence, thereby enhancing one aspect of these women's autonomy, the outsized economic rewards of serving as a surrogate might also result in coercion and prevent surrogates from meaningfully negotiating the terms of their surrogacy.

One of the most important indicators of autonomy is voluntariness. In the Baby Manji case and the documentary *Made in India,* it is not clear whether the women may be characterized as truly having made a voluntary choice to serve as surrogates. Similarly, sociologist Amrita Pande reports that the majority of surrogates in her study were recruited.[258] In an interview, one recruiter shared a strategy of targeting women "who have very young children and ones . . . in desperate need of money."[259] The recruiter admitted to making women feel badly about being "unable to provide for their children."[260] For example, some surrogates felt pressure about being "unable to get their daughters married" because of a lack of income.[261] This assertion seems to ring true in *Made in India* where recruiters visit slums to find women in desperate financial need.[262] The movie detailed, for example, that Aasia was able to earn $2,000 in less than a year, while typical wages for a family are around $60 a month in poor Indian communities like hers.[263]

Additionally, in India, many surrogate mothers are unable to read the contract,[264] let alone bargain over the terms.[265] Surrogates sometimes authorize

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258. Pande Manufacturing, *supra* note 183, at 975.

259. *Id.*

260. *Id*.

261. *Id*. at 975–76.

262. MADE IN INDIA, *supra* note 75.

263. *See supra* note 221 and accompanying text. Because of the competitive nature of the surrogacy market, stakeholders in competing countries such as the United States are often the loudest critics of international surrogacy in less developed countries. For example, John Weltman, the President of Circle Surrogacy, a surrogacy broker that matches intended parents from countries around the world to surrogates in the United States, has been quoted stating, "Surrogate mothers in India are 'milk-fed veal, kept apart from their families and communities' while being kept under close monitoring. They're saying 'I want my woman in a closet,' but wait a minute, that's slavery." Surrogacy Abroad Inc., *More Seek Surrogacy in India as an Available Destiny for International Surrogate Mothers*, SURROGACY ABROAD BLOG, May 9, 2011, http://egg-donors.blogspot.com.

264. Pande Manufacturing, *supra* note 183 at 976–77 (noting that the essential points of the contract are translated for the surrogates and quoting an Indian surrogate who says that "[t]he only thing they told me was that this thing is not immoral, I will not have to sleep with anyone, and that the seed will be transferred into me with an injection").

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contracts with a thumbprint because they are illiterate.[266] Also, some women become surrogates with a limited general education, and are thus uninformed as to what the IVF procedure entails.[267] For example, Aasia is not familiar with the IVF procedure and does not seem to be able to foresee the higher risk of bearing twins, although multiple gestations are more common with the IVF procedure.[268] Had she been fully informed about the increased risks, she may have been able to negotiate additional payment in the contract for that possibility. Instead she agreed to the contract without the full information required to make a truly autonomous decision. Thus, it is unlikely that surrogates in places like India may freely negotiate the terms of their surrogacy arrangements because of the financial need of the surrogates and their relative lack of legal sophistication.

Just as Indian surrogates are drawn into surrogacy by the relatively high compensation, attorneys Erickson and Neiman enticed the American and Canadian surrogates involved in the baby selling scandal with higher than typical surrogate compensation. One surrogate involved in the scheme was paid $38,000 to travel to Ukraine to serve as a surrogate, which was nearly double what she had made the previous time she had been a surrogate.[269] The surrogate seemed to have some initial doubts about this unusual arrangement, which involved traveling to Ukraine to be implanted.[270] However, her fears were quelled after speaking to the lawyer Neiman, who assured her that the arrangement was legal.[271] Some of these surrogates believed that there were intended parents in place prior to their implantation.[272] Others knew that there were no intended parents yet but did not know that the arrangement was illegal.[273] Presumably, all of these women were drawn into the surrogacy arrangement by the promise of high compensation. In one interview, one surrogate states "how "desperate [she] was" to become a surrogate.[274] This statement seems to demonstrate that even surrogates in the United States are drawn in by the compensation. In the baby-selling example, although the surrogates were tempted by the high compensation, most of them ended up receiving no or very little payment after the court found the arrangements illegal.[275]

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265. *See* Pande Manufacturing, *supra* note 183, at 971.
266. Gentleman *supra* note 156.
267. *See generally id*. at 976-77.
268. MADE IN INDIA, *supra* note 75.
269. Zarembo Scam, *supra* note 19.
270. *Id.*
271. *Id.*
272. Baby-Selling Fraud, *supra* note 256.
273. Zarembo Scam, *supra* note 19.
274. *Id.*
275. *See id.*

D. Does International Surrogacy Promote Justice?

Although justice is a broad and complex concept, in bioethics literature, justice refers to the goal of achieving equal access to health care services by various subpopulations.[276] In the case of surrogacy, instead of health care services, the issue is access to services that allow one to have a child via a surrogate. This Section contends that intended parents who choose to use surrogacy rather than adoption are treated inequitably by the varying legal schemes for adoption and surrogacy. In addition, there is another broad justice concern that the above stories reveal—the way international surrogacy might reinforce particular racial hierarchies.

In the baby-selling scam, the intended parents were actually adoptive parents who were misled into believing that they were adopting a baby because the intended parents in a surrogacy arrangement withdrew from the arrangement. This story reveals that intended parents who decide to seek surrogacy services and intended parents who adopt are similarly situated. Both sets of parents desire to have a baby, often due to infertility.[277] Most cases of surrogacy now involve gestational surrogacy,[278] so the baby is genetically related to one or both intended parents in a surrogacy arrangement. However, it is not clear that this minor difference is enough to justify such different legal regimes between adoption and surrogacy. The baby-selling scam demonstrates the similarity of the two scenarios and how unscrupulous agents might take advantage of the different laws governing each practice despite this similarity.

Through scams like this, and as a result of the developed/developing world power dynamic, international surrogacy might play a harmful role in reinforcing certain racial hierarchies.[279] The majority of couples who use surrogacy and other assisted reproductive technologies to achieve fertility are white.[280] Such use of assisted reproductive technologies "has become a racially-specific, class-based method of family formation."[281] Consequently, the surrogacy market

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276. *See generally* Beauchamp & Childress, *supra* note 3, at 326-87 (discussing justice concept); Judith C. Ahronheim et al., ETHICS IN CLINICAL PRACTICE 34-37 (1994) (noting the importance of justice considerations in determining how to allocate medical resources).

277. *See* Patton, *supra* note 99, at 512 (noting that the difficulty of the adoption process has led more couples to commercial gestational surrogacy).

278. Diane S. Hinson & Maureen McBrien *Surrogacy Across America*, FAM. ADVOC. 32, 34 (noting that 95% of surrogacies in the United States are gestational surrogacies).

279. Some have suggested that, as the "supply of adoptable children, especially healthy white infants, diminished," more white families have sought treatment for infertility. *See* J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M*., 39 CAP. U. L. REV. 345, 350-351 (2011) (noting that, in the United States, "by the end of the twentieth century, the combined annual birth rate from donor insemination, IVF, and surrogacy arrangements was 76,000 while only 30,000 healthy children were available for adoption").

280. Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1030 (1996).

281. *Id.*

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appears to be geared toward white customers and values white egg donors, white sperm, and white babies.[282] Planet Hospital, the surrogacy agency featured in *Made in India*, reported a "growing demand from clients for [donor] eggs from Caucasian women."[283] In response to this demand, the agency transports eggs from white donors from the former Soviet Republic of Georgia to India and charges intended parents an extra $5,000 for a Caucasian egg donor.[284] The baby-selling case similarly showed that some intended parents were willing to pay the higher than usual price for a white surrogate child.[285] This concrete signaling that non-white lives are less valuable may be serious unintended consequence of the international surrogacy marketplace. This reinforcement of racial hierarchies is especially acute and immediate when poorer, non-white surrogates carry fetuses for white intended parents.

IV.
CONCLUSION

This bioethical analysis based on Beauchamp and Childress' principles reveals certain problems created by the lack of international regulations related to surrogacy. Although the stories demonstrate that surrogates, intended parents, and children born from surrogacy arrangements do receive some benefit, these benefits seem to be diminished by the harms these parties face and ways in which the system undercuts the autonomy of parties and broader distributive justice.

As the discussion of the laws related to surrogacy in the United States, India, and Ukraine demonstrates, domestic law regarding surrogacy varies greatly and encourages forum shopping in the jurisdiction that is most favorable to intended parents. The best way to avoid such forum shopping and to adequately address the ethical problems, which surround international surrogacy practices, is by developing a set of international guidelines and regulations regarding international surrogacy. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague

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282. Although rates of infertility are similar between all races, the majority of those who seek assisted reproductive technologies are white. *See* Dorothy Roberts, *Racial Disparity in Reproductive Technologies*, Chi Trib., Jan. 29, 1998, at 19N. Although beyond the scope of this article, it is worth exploring the reasons for this disparity. Is access to the surrogacy and assisted reproductive technology market in general limited to only middle and upper class white men and women? *See also* John A. Robertson, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES at 97 (1994) ("Black and poorer women have higher rates of infertility than white, middle-class women . . . .").

283. Margot Cohen, *A Search for a Surrogate Leads to India*, Wall St. J.,Oct. 9, 2009, http://online.wsj.com/article/SB10001424052748704252004574459003279407832.html.

284. *Id.*

285. *Unborn babies sold to highest bidder through unknown surrogates*, CNN, Oct. 21, 2011, http://www.cnn.com/video/#/video/crime/2011/10/21/pkg-endo-black-market-babies.cnn.

Adoption Convention") raised and addressed similar ethical concerns in the context of international adoption decades ago.[286] The Hague Adoption Convention represented a "dramatic step forward in at least symbolic support for international adoption . . . ."[287] Sixty-six countries, including most of those who exported and imported babies in international adoption, approved it.[288]

A similar surrogacy convention could be negotiated and adopted by the countries active in international surrogacy. The details of such a convention appear in another article, *A Race To The Bottom? The Need For International Regulation Of The Rapidly Growing Global Surrogacy Market?*,[289] but in conclusion this Article summarizes the key points of this proposal. Just as the Hague Adoption Convention set forth standards and safeguards to protect intercountry adoptions,[290] the surrogacy convention should set forth safeguards and minimum standards for international surrogacy.[291]

One of the primary benefits of such a convention would be to give intended parents notice that surrogacies occurring in countries that have signed the convention would be recognized and given effect in other party countries. That would help avoid the situation of stateless babies, like the Le Roches' twins or Baby Manji. Of course, the creation of such a convention could not require countries that outlaw surrogacy to recognize it. However, intended parents will be on notice that participating in international surrogacy in countries not party to such a convention would subject them to uncertainty and risk. Additionally, the mere existence of such a convention would reduce the influence of surrogacy agencies that may falsely assure intended parents of the legality of certain arrangements.

An international surrogacy convention must require that accredited surrogacy agencies itemize and disclose in writing the fees and estimated expenses associated with the surrogacy ahead of time. This disclosure should include the fees paid to the surrogates. Such transparency would help intended parents and surrogates make autonomous choices. The surrogacy convention should ensure that payments to surrogates not vary based on their race, nor

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286. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995), http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

287. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 172 (2007).

288. *Id.*

289. Seema Mohapatra, *A Race To The Bottom? The Need For International Regulation Of The Rapidly Growing Global Surrogacy Market?* (work in progress, on file with author).

290. *Id.* The United States signed the Convention in 1994, and the Convention entered into force for the United States in April 2008. *See* U.S. Dept. of State, *Understanding the Hague Convention*, http://adoption.state.gov/hague_convention/overview.php.

291. *See* Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. INT. PRIV. LAW 1, 10 (2011) (suggesting a sample framework for such a convention).

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should charges to surrogates vary based on the race of the baby the surrogate is carrying. That would help address some of the racial justice concerns discussed earlier.

An international surrogacy convention also must set forth minimum standards for surrogate contracts and intended parent contracts. All payments should be negotiated in advance of the arrangement. Additionally, there need to be safeguards to ensure that the surrogates have an understanding of what is in their contract in their mother tongue.

A surrogacy convention must also ensure that every baby created through surrogacy in a convention country receives some sort of certification or declaration, similar to the Hague Adoption Certificate or a Hague Custody Declaration delineated by the Hague Adoption Convention. Such a procedure would help prevent the citizenship and birth certificate issues that frequently arise in international surrogacy cases. Such certificate would ensure that the surrogacy agency has already contacted and pre-arranged with the home country consulate and embassy, and ensure that the child born from the surrogacy arrangement will have the necessary passport, birth certificate, and visas. That would allow the intended parents to know ahead of time whether the child appears to be eligible to enter their home countries.

From Baby Manji to the baby-selling scandal in California, we are reminded that tremendous ethical concerns surround international commercial surrogacy. The international surrogacy industry will continue to grow, and regulators and scholars will need to be prepared with thoughtful, nuanced responses. The bioethical framework of beneficence, nonmaleficence, autonomy, and justice enables us to begin to think about the form that an international response to surrogacy arrangements might take.