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So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy

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So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy

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I. INTRODUCTION

While placing a monetary value on a product or service seems natural in many areas of society, it presents new challenges when introduced into the reproductive arena.¹ Society has confronted a similar debate before. Life insurance was once viewed as a form of trafficking in human lives.² The acceptance of valuation in this and other areas represents a shift in cultural values that must now confront birthing arrangements.³

The emergence of new reproductive technologies has ushered in new possibilities not only for women unable to bear children, but also for women willing to bear children for another, and for individuals interested in facilitating the introduction of these two groups for a profit. One product of this new technology, gestational surrogacy, has forced society to reconsider established notions about the beginning of life and the identity of the biological mother. In so doing, it has brought into question the ethics of paying women to bear children and the potential for exploiting surrogates through those payments. Faced with international gestational surrogacy arrangements and no corresponding policy to address them, the need for a comprehensive policy is exigent.

Part II of this Note describes the role of gestational surrogacy within the framework of new reproductive technologies. In Part III, a discussion of the international response to gestational surrogacy highlights the domestic approaches various countries have taken to control surrogacy arrangements within their borders (and notes those countries having no policies at all). A review of the transnational challenges presented by gestational surrogacy follows in Part IV, which cites examples of multinational surrogacy arrangements and addresses arguments both for and against enforcing these arrangements. Part V suggests an international approach to regulating gestational surrogacy based on rights and principles set forth in existing conventions and declarations.

1. See CARMEL SHALEV, BIRTH POWER 159 (1989). Shalev notes that many areas of social activity have placed prices on human lives, including tort law, motor vehicle design, medical research, and military tactics. *See id.*

2. *See id.*

3. *See id.*

II. GESTATIONAL SURROGACY

Surrogacy has long been an alternative for women unable to bear children.⁴ Until recently, however, surrogacy never challenged the principle that a woman and the child to whom she gives birth share the same genetic material. Recent advances in reproductive technology shatter this traditional notion by making it possible for a woman to bear a child to whom she has no genetic link.⁵ The modern contracts between surrogate mothers and commissioning parents have become a market-driven event that is much more complicated than simply bringing a new life into the world.⁶

A. Possibilities Raised by New Reproductive Technologies

Some believe that the motivation to become a parent and have biological children is one of the most fundamental desires of human beings.⁷ For those unable to conceive, adoption traditionally has been the only alternative.⁸ The lengthy process of adoption, combined with the shortage of children available to adopt, however, has made it less than the ideal solution.⁹ Although the lack of children available for adoption may be one of the driving forces behind the increased interest in surrogacy, parents' desires for a genetic link with their children makes surrogacy attractive in its own right.¹⁰ The erosion of traditional notions about the structure of the family and the strides in reproductive techniques also contribute to the popularity of surrogacy.¹¹

4. See *infra* notes 18-20 and accompanying text.

5. See *infra* notes 23-25 and accompanying text.

6. See *infra* Part II.B.

7. See Keith J. Hey, *Assisted Conception and Surrogacy—Unfinished Business*, 26 J. MARSHALL L. REV. 775, 776 (1993).

8. See *id.* at 777.

9. See *id.*; Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989).

10. See Hey, *supra* note 7, at 777; Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 39 n.33 (1993); Posner, *supra* note 9, at 22.

11. See Posner, *supra* note 9, at 22. See generally Thomas H. Murray, *New Reproductive Technologies and the Family*, in NEW WAYS OF MAKING BABIES 51, 60-68 (Cynthia B. Cohen ed., 1996) (arguing that commercial surrogacy illustrates the opposition between family values and new reproductive technologies).

Recent advances in reproductive technology have afforded new opportunities to couples who have difficulty conceiving.¹² Means of assisted reproduction are used most frequently with couples who are infertile¹³ or have difficulty conceiving or gestating a child, including women who have no uterus, have miscarried, or have conditions such as hypertension and diabetes that could be worsened by pregnancy.¹⁴ Surrogacy also affords parenting opportunities to women who suffer from illnesses, such as phenylketonuria (PKU), or HIV or AIDS, that could damage the fetus either during gestation or the birthing process.¹⁵ Less than twenty years ago, women facing such problems could either adopt a child or remain childless.¹⁶ However, women now have the benefit of assistive techniques such as artificial insemination, in vitro fertilization, cryopreservation, and surrogacy.¹⁷

B. What is Gestational Surrogacy?

Surrogacy traces its origin back to Biblical times.¹⁸ Sarah, who was barren, asked her husband, Abraham, to lie with her Egyptian handmaid, Hagar, so they could establish a family through her.¹⁹ Likewise, when Rachel and Leah were unable to

12. See John Parsons, *Assisted Conception: The State of the Art*, in *CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION* 15, 15-27 (Donald Evans ed., 1996) [hereinafter *CREATING THE CHILD*]. See generally Laura R. Woliver, *Reproductive Technologies, Surrogacy Arrangements, and the Politics of Motherhood*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 346, 346-59 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (discussing the feminist view of the impact of new reproductive technologies) [hereinafter *MOTHERS IN LAW*].

13. An infertile couple is defined as one which does not conceive after twelve months of unprotected intercourse. See Parsons, *supra* note 12, at 15.

14. See Gian Carlo Di Renzo et al., *Control of Human Reproduction: A Clinical Perspective on Bioethical Problems*, in *CREATING THE CHILD*, *supra* note 12, at 29, 38.

15. See Bernard Dickens, *Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction*, in *LAW REFORM AND HUMAN REPRODUCTION* 47, 87-88 (Sheila A.M. McLean ed., 1992).

16. See Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 *WIS. WOMEN'S L.J.* 113, 113 (1997).

17. See Parsons, *supra* note 12, at 16-25.

18. See JULIA J. TATE, *SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH!* 1 (1995); Kenneth Norrie, *United Kingdom: Legal Regulation of Human Reproduction*, in *LAW REFORM AND HUMAN REPRODUCTION*, *supra* note 15, at 201, 208-09; Erika Hessenthaler, *Gestational Surrogacy: Legal Implications of Reproductive Technology*, 21 *N.C. CENT. L.J.* 169, 170 (1995).

19. See *Genesis* 16:1-2 (King James).

bear children, they gave their maids to their husbands to bear children for them.²⁰ These slave women gave birth to children for their mistresses involuntarily, receiving no payment for their efforts.²¹ Some suggest that the role of the surrogate now, as in Biblical times, is still primarily occupied by women of color.²²

Although there are various types of surrogate mothers, all are women who bear a child for someone else.²³ As opposed to traditional or genetic surrogacy, in which a woman gives birth to a child formed from her own egg, gestational surrogacy involves a woman giving birth to a child formed from the fertilized egg of another woman.²⁴ In gestational surrogacy, a woman's own eggs are retrieved and fertilized with sperm in a laboratory, and the resulting embryos are implanted in the uterus of another woman who then bears the child.²⁵ In traditional surrogacy, then, the surrogate bears a child with a genetic link to only one of the

Now Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her.

Id. See generally Baruch Brody, *Current Religious Perspectives on the New Reproductive Techniques*, in BEYOND BABY M 45, 45-64 (Dianne M. Bartels et al. eds., 1990) (describing the current position of specific religious communities on the use of new reproductive technologies).

20. See Genesis 30:1-4, 9-10 (King James). "And she said, Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her." *Id.* at 3. "When Leah saw that she had left bearing, she took Zilpah her maid, and gave her Jacob to wife." *Id.* at 9.

21. See TATE, *supra* note 18, at 1.

22. See Sherrie Lynne Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 542-43 (1992).

23. See GREGORY E. PENCE, CLASSIC CASES IN MEDICAL ETHICS 120 (2d ed. 1995). The American Bar Association's proposed Model Surrogacy Act defines a surrogate as the "gestational carrier of an embryo, a fetus, or a child." A.B.A., Model Surrogacy Act § 2(g), in SURROGATE MOTHERHOOD 270, 271 (Larry Gostin ed., 1990). While "surrogate" may also be used to describe a woman who raises a child for someone else, this Note will refer to "surrogate" as someone who bears a child for another.

24. See PENCE, *supra* note 23, at 121. One woman's egg is fertilized in vitro and then implanted in the surrogate's womb. See *id.*; see also CHERYL L. MEYER, THE WANDERING UTERUS: POLITICS AND THE REPRODUCTIVE RIGHTS OF WOMEN 70 (1997). Meyer notes that traditional surrogacy is also referred to as "partial surrogacy" because the surrogate supplies the egg and is therefore "partially" the mother. See Meyer, *supra*. Gestational surrogacy is also known as "full surrogacy" since the surrogate gestates the fetus but has no genetic connection to it. See *id.*

25. See MEYER, *supra* note 24, at 70; *Third-Party Parenting with In Vitro Fertilization Turns Back the Biological Clock*, Canada Newswire, July 16, 1992, available in LEXIS, NEWS Library, CNW File.

donors, the husband,²⁶ while in gestational surrogacy, the surrogate bears a child genetically related to both donors.²⁷ Surrogacy can be motivated by either commercial or altruistic impulses.²⁸ While a commercial surrogate receives payment for donating her egg or gestating the fetus, an altruistic surrogate donates her egg or gestates the fetus as a gift.²⁹

Gestational surrogacy involves a written contract whereby the surrogate agrees to carry the fetus to term and give birth to the child, thereafter relinquishing her parental rights to the "commissioning" mother or couple.³⁰ The fee typically paid to a surrogate in the U.S. is ten thousand dollars,³¹ in addition to payment for other expenses such as life and disability insurance, medical bills, maternity clothes, and transportation.³² For those who use the services of a surrogacy brokerage agency in making their arrangements, the cost of participation is usually twenty thousand to thirty-five thousand dollars,³³ with some fees running more than fifty thousand dollars per child.³⁴ Despite the fact that these contracts describe the "service" the surrogate will perform, the commissioning individuals are typically required to

26. See Di Renzo, *supra* note 14, at 39.

27. See Dianne M. Bartels, *Surrogacy Arrangements*, in *BEYOND BABY M*, *supra* note 19, at 173, 175. Most individuals who choose to raise children prefer to have a biological child, meaning that the parents will not only have a genetic link with their child, but will also be able to participate in the process of pregnancy and childbirth. See LAURA M. PURDY, *REPRODUCING PERSONS* 80 (1996); Barbara J. Berg, *Listening to the Voices of the Infertile*, in *REPRODUCTION, ETHICS, AND THE LAW* 80, 81 (Joan C. Callahan ed., 1995).

28. See PENCE, *supra* note 23, at 121.

29. See *id.*

30. See di Renzo, *supra* note 14, at 38.

31. See Bartels, *supra* note 27, at 176; Ruth Macklin, *What is Wrong with Commodification?*, in *NEW WAYS OF MAKING BABIES*, *supra* note 11, at 106, 111 (Macklin does not believe that \$10,000 is an adequate fee for surrogacy).

32. See Susan A. Ferguson, *Surrogacy Contracts in the 1990's: The Controversy and Debate Continues*, 33 *DUQ. L. REV.* 903, 904 n.11 (1995). Life and disability insurance reduces the financial risk of the commissioning parents by protecting the gestational surrogate in the event she is injured either by the fertility procedures or the pregnancy. See David E. Loder & Lisa W. Clark, *In Gestational Surrogacy, All Parties Must Bear Risk*, *NAT'L L.J.*, Sept. 9, 1996, at B7.

33. See Bartels, *supra* note 27, at 176.

34. See Maureen Downey, *A Site for Surrogacy*, *ATLANTA J. & CONST.*, July 22, 1997, at 1C, available in *LEXIS*, *NEWS* Library, *ATLJNL* File. The £35,000-£40,000 (roughly \$58,000-\$66,000) fee to one surrogacy center breaks down as follows: £9,000 (\$15,000) to the surrogacy agency; £10,000 (\$16,500) for medical expenses, including doctors, labs, and fertility drugs; £10,000 (\$16,500) to the surrogate mother; £4,000 (\$6,500) to psychologists; £3,000 (\$5,000) to lawyers; £500 (\$800) for court fees; £2,000 (\$3,000) for insurance costs. See Jo Revill, *In Whirls the Man Who Will Sell You a Baby for Pounds 40,000*, *EVENING STANDARD* (London), Jan. 28, 1997, at 18, available in *LEXIS*, *NEWS* Library, *TXTNWS* File.

pay only ten percent of the total fee if the surrogate does not provide them with a live infant from the pregnancy.³⁵

In return for this compensation, the surrogate is expected to meet certain obligations, usually relating to specific conduct both during and after pregnancy.³⁶ During pregnancy, the gestational surrogate usually agrees to include the intended parents in her obstetrical visits, to consider an abortion if fetal abnormalities are detected, and to allow the intended parents to be present during the delivery.³⁷ In addition, the agreement may require the gestational surrogate to refrain from smoking, consuming alcohol, or using unnecessary drugs during the pregnancy.³⁸ After pregnancy, gestational surrogacy contracts require the surrogate, as well as her husband if she is married, to surrender all parental rights to the child and to allow the intended parents to take custody of the child at birth.³⁹ To facilitate this transfer of custody, the agreement may require the surrogate to assist the intended parents, through the adoption process, in obtaining a birth certificate naming the intended parents as the legal parents if they are not so named on the birth certificate.⁴⁰

The typical traditional or genetic surrogate is a white woman between twenty-six and twenty-eight years old who is married and has had a prior pregnancy.⁴¹ Fewer than thirty-five percent of those interested in serving as surrogates have attended college, and sixty-six percent earn an annual income of less than thirty

35. See Carol Tower, *Essential Ethical Considerations for Public Policy on Assisted Reproduction*, in BEYOND BABY M, *supra* note 19, at 80, 81. The agreement in *In re Baby M*, 537 A.2d 1227 (N.J. 1988), for example, provided that the surrogate was to receive \$10,000 for bearing a child for the commissioning parents. See Janna C. Merrick, *The Case of Baby M*, in BEYOND BABY M, *supra* note 19, at 183, 185. The surrogate would not receive any compensation if she miscarried prior to the fifth month of pregnancy, and she would receive \$1000 if she miscarried after that time, or if the baby was stillborn. See *id.*

36. See R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in SURROGATE MOTHERHOOD, *supra* note 23, at 88, 93-94; Loder & Clark, *supra* note 32, at B7. Enforcement of such behavioral restrictions is difficult, however, since it is not feasible to continually monitor a surrogate's behavior. See *id.* Furthermore, it would be troublesome to assess damages for minor breaches of behavioral restrictions, and specific performance may be constitutionally barred by a woman's right to privacy, personal autonomy, and bodily integrity. See *id.*

37. See Loder & Clark, *supra* note 32, at B7.

38. See *id.* Some courts have held that, in addition to refraining from certain harmful behaviors, a surrogate may also have a duty to take affirmative steps to prevent harm, such as undergoing a Cesarean section. See Charo, *supra* note 36, at 93.

39. See Loder & Clark, *supra* note 32, at B7.

40. See *id.*

41. See Charo, *supra* note 36, at 89. Approximately sixty percent are married and forty percent have either never been married or are divorced. See *id.* at 90.

thousand dollars.⁴² The typical profile of those seeking to hire a surrogate is a white married person in his or her late thirties or early forties.⁴³ Most are more financially stable and better educated than the surrogates they hire, with approximately sixty-four percent of commissioning parents having a household income of over fifty thousand dollars—fifty-four percent having attended graduate school and another thirty-seven percent having attended college.⁴⁴

With the new developments in reproductive technologies that make gestational surrogacy possible, however, come an array of social, ethical, and legal dilemmas. Two concerns raised by gestational surrogacy are commercialization and exploitation. Commercialization is an opposition to a surrogacy arrangement in which the surrogate receives *any* type of compensation for her services.⁴⁵ Exploitation, in contrast, is the idea that women are forced into serving as surrogates because of their low economic status, or are paid too little for their services.⁴⁶

III. INTERNATIONAL RESPONSE TO GESTATIONAL SURROGACY

Regulation of surrogacy arrangements varies considerably from nation to nation, both in content and in quickness of response. While the United States has not adopted any national surrogacy legislation,⁴⁷ other nations have appointed task forces which have already completed extensive studies of the issue. Of these nationwide regulations, some reflect policies aimed at restricting surrogate arrangements⁴⁸ while others represent controlled endorsements of the practice and attempt to define its acceptable boundaries.⁴⁹

A. *The United States*

In 1987, a United States court considered for the first time, in the case of *In re Baby M*,⁵⁰ a surrogate motherhood contract.⁵¹

42. See *id.* at 89.

43. See *id.* at 88.

44. See *id.* at 89.

45. See PENCE, *supra* note 23, at 121; see also Macklin, *supra* note 31, at 115 (referring to commercial surrogacy as commodification).

46. See PENCE, *supra* note 23, at 139; see also Macklin, *supra* note 31, at 111.

47. See discussion *infra* Part III.A.

48. See discussion *infra* Part III.B.

49. See discussion *infra* Part III.C.

50. 537 A.2d 1227 (N.J. 1988).

51. See BEYOND BABY M, *supra* note 19, at 263, 263-68 app. (reproduction of the Baby M surrogate parenting agreement); Ian McCallister, *Modern Reproductive*

Contracted through the Infertility Center of New York, this agreement provided that Mary Beth Whitehead was to be implanted with the sperm of William Stern, the natural father who would subsequently pay Whitehead ten thousand dollars and take custody of the child.⁵²

Upon the child's birth, Stern and his wife named "Baby M" Melissa Stern, while Whitehead and her husband named her Sarah Elizabeth Whitehead.⁵³ Because Whitehead did not want the hospital staff to know about the surrogacy arrangement, she listed her husband, and not William Stern, as the father of the child on the birth certificate.⁵⁴ Although most commissioning parents usually take the child home from the hospital with them, Stern was not allowed to do so because he was not listed as the child's father.⁵⁵ Whitehead relinquished Baby M to the Sterns a few days later but then decided she wanted to keep the baby.⁵⁶

The New Jersey Supreme Court found the surrogacy contract over Baby M illegal and invalid under the governing law.⁵⁷ Specifically, the Court stated that

[t]he surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.⁵⁸

The Court found that a voluntary surrogacy arrangement not involving payment did not violate existing laws as long as the surrogate was not bound to surrender her child. However, the agreement in *Baby M* was illegal and invalid because it did not fit these criteria.⁵⁹ In addition, the Court indicated that a future legislative change in current statutory law could authorize such surrogacy agreements, provided those revisions comported with constitutional strictures.⁶⁰

Two unsuccessful bills that would have either limited or entirely prohibited surrogacy arrangements in the United States were introduced in Congress in 1989, and although they did not mention the *Baby M* case as their impetus, the timing suggests

Technology and the Law: Surrogacy Contracts in the United States and England, 20 SUFFOLK TRANSNAT'L L. REV. 303, 304 (1996).

52. See *In re Baby M*, 537 A.2d at 1235.

53. See *id.* at 1236.

54. See *id.*

55. See TATE, *supra* note 18, at 14.

56. See *In re Baby M*, 537 A.2d at 1236.

57. See *id.* at 1235.

58. *Id.* at 1240.

59. See *id.* at 1235.

60. See *id.*

they were intended as the legislative response to the case.⁶¹ The Surrogacy Arrangements Act of 1989,⁶² sponsored by Representative Thomas Luken (D-Ohio), sought to impose criminal penalties on those who participated in surrogacy arrangements on a commercial basis.⁶³ Also introduced the same year, the Anti-Surrogate-Mother Act of 1989,⁶⁴ introduced by Representative Robert Dornan (R-California), would have reached even farther, outlawing both commercial and noncommercial surrogacy arrangements.⁶⁵ Neither of these proposals, however, moved beyond their respective committees.⁶⁶

In the absence of federal surrogacy legislation, then, the case of *Johnson v. Calvert*⁶⁷ constituted one of the first formal legal challenges to gestational surrogacy. In *Johnson*, a husband and wife brought suit seeking a declaration that they were the legal parents of a child born to a surrogate mother in whose womb their fertilized egg had been implanted.⁶⁸ After undergoing a hysterectomy, Crispina Calvert remained able to produce her own eggs but could not gestate a fetus.⁶⁹ Hearing of this, Anna Johnson volunteered to bear the Calverts' child.⁷⁰ In 1990, Johnson signed a contract with the Calverts agreeing that the Calverts' fertilized egg would be implanted in her and the child born to her would be taken into the Calverts' home "as their own."⁷¹ In return for a payment of ten thousand dollars and a two hundred thousand dollar insurance policy on her life, Johnson agreed to relinquish "all parental rights" to the child.⁷² Before the birth of the child, however, Johnson threatened not to relinquish her rights to the Calverts.⁷³

According to the Uniform Parentage Act,⁷⁴ maternity could be established either by genetic relationship to the child or by proof of having given birth to the child.⁷⁵ Because both Johnson and

61. See Hey, *supra* note 7, at 799-809; Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 213 (1996); see also McCallister, *supra* note 51, at 308.

62. H.R. 275, 101st Cong. (1989).

63. See *id.*

64. H.R. 576, 101st Cong. (1989).

65. See *id.*

66. See Krim, *supra* note 61, at 214.

67. 851 P.2d 776 (Cal. 1993).

68. See *id.* at 778.

69. See *id.*

70. See *id.*

71. *Id.*

72. *Id.*

73. See *id.*

74. CAL. FAM. CODE §§ 7600-7620 (West 1994).

75. See *Johnson*, 851 P.2d at 780.

Calvert presented proof of maternity—Johnson by having given birth to the child, and Calvert through her genetic relationship to the child—the court found that the case could not be decided without reference to the parties' intentions as evidenced in the surrogacy contract.⁷⁶ When the proof of maternity is present in two different women, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother. . . ." ⁷⁷

While the court in *Johnson* dealt with the standards for determining maternity in cases of gestational surrogacy, it did not address issues of race and economics.⁷⁸ In *Johnson*, the gestational surrogate is African-American, the commissioning mother is Filipino, and the commissioning father is Caucasian.⁷⁹ The opinion did not emphasize the economic status of the parties either. The opinion revealed only that the Calverts agreed to pay Johnson a contract price of ten thousand dollars and to purchase a two hundred thousand dollar insurance policy on Johnson's life.⁸⁰ Although the *Johnson* case contained no allegation that Johnson was coerced into serving as a gestational surrogate because of her race or economic status, such a possibility is not far-fetched,⁸¹ and indeed legal commentary and developments on the international scene suggest that future gestational surrogacy cases before the courts may involve precisely these issues.

B. Countries with Restrictive Legal Guidelines

Several countries follow the growing international trend toward prohibiting commercial surrogacy.⁸² Countries that ban this arrangement include Britain, France, Germany, Switzerland, Norway, Greece, Spain, and Israel.⁸³ Germany prohibits the implantation of an egg that is not provided by the woman undergoing the treatment, and those who violate the reproductive technology laws will be subject to a prison term or fine.⁸⁴ Similarly, Sweden bans the use of both donated sperm and donated eggs, only allowing fertilization between partners.⁸⁵

76. See *id.* at 782.

77. *Id.*

78. See TATE, *supra* note 18, at 32.

79. See *id.*

80. See *Johnson*, 851 P.2d at 778.

81. See TATE, *supra* note 18, at 32-33.

82. See Krim, *supra* note 61, at 215.

83. See *id.*

84. See *id.*

85. See *id.* at 216.

France and Australia also have supported measures restricting access to in vitro fertilization to heterosexual couples.⁸⁶

The French government, in 1987, decided to prohibit private agencies from coordinating surrogacy agreements.⁸⁷ The National Ethical Committee recommended that surrogacy be banned, and the Supreme Court of Appeals (Cour de Cassation) found surrogacy to be illegal because it is both contrary to the adoption statutes and violative of the doctrine that the human body is inalienable.⁸⁸ France has called for the European Community to coordinate its laws on artificial insemination to avoid "medical tourism" by women seeking medically-assisted procreation where the laws are least strict.⁸⁹ This request came after a fifty-nine-year-old British woman gave birth to twins through artificial insemination, and after a Black woman was implanted with an embryo from a white woman, both of whom underwent the procedures in Italy.⁹⁰

In the mid-1980's, Australia began to take a comprehensive approach to the issues presented by surrogacy, as the State of Victoria addressed both the new reproductive technology of in vitro fertilization and the legal arrangements stemming from it.⁹¹ This legislative action was sparked by an instance of gestational surrogacy between two sisters, resulting in a successful birth despite the refusal of the first hospital to perform the procedure for ethical reasons.⁹² The legislation adopted in Victoria, the Infertility Medical Procedures Act of 1984, declared surrogacy contracts void and imposed criminal penalties on those who solicited participation in surrogacy arrangements, or who either gave or received payment in connection with such an

86. See *id.*

87. See Christian Byk, *France: Law Reform and Human Reproduction*, in LAW REFORM AND HUMAN REPRODUCTION, *supra* note 15, at 131, 157.

88. See *id.* at 156-57.

89. Francois Raitberger, *France Seeks Joint EC Rules on Artificial Births*, REUTER EUR. COMMUNITY REP., Jan. 6, 1994, available in LEXIS, NEWS Library, REUEC File.

90. See *id.*

91. See Hey, *supra* note 7, at 790-92. See generally Louis Waller, *Australia: The Law and Infertility—the Victorian Experience*, in LAW REFORM AND HUMAN REPRODUCTION, *supra* note 15, at 17, 17-45. Louis Waller served as chairperson of the committee appointed by the Australian government to study the issues raised by new reproductive technologies. See Hey, *supra* note 7, at 791.

92. See Waller, *supra* note 91, at 29-30. The Ethics Committee of Epworth Hospital refused to approve the embryo transfer for ethical reasons, but another Melbourne hospital did perform the procedure, resulting in the birth of Alice Kirkman in May 1988. See *id.* at 29.

agreement.⁹³ This act was later replicated in other Australian states.⁹⁴

C. Countries with Less Restrictive Guidelines

Britain and Israel, in contrast, have passed legislation increasing access to reproductive technology and surrogacy.⁹⁵ In Britain, surrogacy is legal as long as it is on a voluntary basis; compensation, other than for minimal expenses, is not allowed.⁹⁶ After the birth of the first test-tube baby in Britain, the government organized the Committee of Inquiry into Human Fertilisation and Embryology, or the Warnock Committee, to analyze the implications of the new reproductive technologies.⁹⁷ Citing the potential of surrogate arrangements to exploit women, the Committee recommended the adoption of statutes that would make all surrogacy contracts unenforceable and criminally punish agencies that recruited women as surrogates.⁹⁸

The *Baby Cotton Case*⁹⁹ sparked national controversy when Kim Cotton became the first surrogate mother in Britain to be paid for having a baby for an infertile couple.¹⁰⁰ The child born to Cotton was conceived with her own egg and the sperm of an American man whom she had never met; the contract was arranged by an agency in the United States.¹⁰¹ Cotton left the baby at the hospital, as agreed, and the father initiated wardship proceedings requesting that he and his wife be granted custody of the child.¹⁰² The court granted this request only ten days after the child's birth, and the father took the child back to the United States with him.¹⁰³

The public outrage that ensued was not a response to the mother giving up the child to whom she had just given birth, but rather over the fact that she had been paid to do so.¹⁰⁴ Around

93. See Hey, *supra* note 7, at 791.

94. See *id.*

95. See Krim, *supra* note 61, at 217.

96. See Nicci Gerrard, "Blue Eyes, Blond Hair and a Top IQ, Please;" OBSERVER, Feb. 2, 1997, available in LEXIS, WORLD Library, TXTLNE File.

97. See Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 344 (1997); see also McCallister, *supra* note 51, at 311.

98. See Leibowitz-Dori, *supra* note 97, at 344.

99. See [1985] Fam. 846.

100. See Emily Hohler, *Baby Love and Baby Law*, SUNDAY TELEGRAPH (London), Mar. 16, 1997, at 4, available in LEXIS, WORLD Library, TXTLNE File.

101. See *In re C (A Minor)*, [1985] Fam. 846 (Eng.).

102. See *id.*

103. See *id.*

104. See Norrie, *supra* note 18, at 211.

the same time as the *Baby Cotton Case*, it became public knowledge that American surrogacy organizations were recruiting surrogates in Britain.¹⁰⁵ The prospect of commercial surrogacy swept the government into action, and as a result, the Parliament instituted national surrogacy legislation.¹⁰⁶

In response to the public outcry over the *Baby Cotton Case*, the proposed recommendations were packaged into an act that was rushed through Parliament without the benefit of any amendments.¹⁰⁷ Although the suggestions of the Warnock Committee did become law, as embodied in the Surrogacy Arrangements Act of 1985, the effort was only partially successful, as the resulting measures sanctioned only third parties that engaged in commercial surrogacy arrangements.¹⁰⁸ Sanctions are not imposed for private transactions.¹⁰⁹ However, a government-appointed review committee is currently considering a ban on all payments to surrogate mothers and the establishment of an organization to monitor surrogacy arrangements.¹¹⁰ The Committee harbors concerns over the tighter regulation of surrogacy arrangements, as the regulation might be seen as an endorsement of surrogacy and result in Britain becoming the European center for surrogacy because of the more stringent prohibitions on these arrangements in other European countries.¹¹¹

Although cognizant of the publicity given to surrogate motherhood in the late 1970s, Canadian citizens had not addressed the potential for such surrogate agreements in their country until 1982, when a couple from a Toronto suburb arranged for an

105. See *id.*

106. See *id.*; see also *supra* notes 99-103 and accompanying text (discussing the facts of the *Baby Cotton Case*).

107. See Norrie, *supra* note 18, at 211. The *Baby Cotton Case* was decided on January 4, 1985, soon to be followed by the Surrogacy Arrangements Act, which became effective on July 16, 1985. See *id.* The measure was "unashamedly a stop-gap measure and there is no doubt that the Government was panicked into legislative action by a vociferous media and populist demand." *Id.* (quoting Freeman, Current Law Annotations: Surrogacy Arrangements Act 1985, c. 49).

108. See McCallister, *supra* note 51, at 312; Leibowitz-Dori, *supra* note 97, at 345. Parties, therefore, are free to enter into surrogacy contracts without third-party representation. See Leibowitz-Dori, *supra* note 97, at 345. Contrary to its intent, then, the adopted legislation might actually encourage financially needy women to enter into such contracts without legal, medical, and psychological assistance. See McCallister, *supra* note 51, at 315; Leibowitz-Dori, *supra* note 97, at 345.

109. See McCallister, *supra* note 51, at 315.

110. See David Fletcher, *Surrogacy Pay to Mothers May Be Banned*, DAILY TELEGRAPH (London), Oct. 10, 1997, at 7, available in LEXIS, NEWS Library, TXTNWS File.

111. See *id.*

American attorney to assist them in negotiating an agreement with a surrogate mother in the United States.¹¹² A Florida woman who, in return for payment, agreed to serve as the couple's surrogate, successfully conceived from the commissioning husband's sperm and gave birth to a child in a Canadian hospital.¹¹³ The surrogate left the child at the hospital as agreed, but the hospital staff refused to allow the husband of the commissioning couple to take custody, maintaining that the child had been abandoned by its mother.¹¹⁴ After the husband obtained custody of the child through adoption, the Ministry concluded that no legal action could be taken against the couple.¹¹⁵ This lack of action was consequently viewed as an indication that surrogacy agreements were lawful.¹¹⁶ Questions concerning the legality of surrogate arrangements were soon directed to the Ontario Law Reform Commission (OLRC) as part of its Project on Human Artificial Reproduction and Related Matters.¹¹⁷ The report of the OLRC advocated that surrogate arrangements be legitimized and facilitated pursuant to provincial regulation.¹¹⁸ While the OLRC proposals were, as the name suggests, limited in application to Ontario, they could also serve as a foundation for legislation at the national level.¹¹⁹

Although Canada has not passed legislation facilitating access to surrogacy, "preconception arrangements" as they are called, are not specifically prohibited anywhere in the country except the province of Quebec.¹²⁰ In 1989, the Canadian government formed a national task force, the Royal Commission on New Reproductive Technologies, to suggest guidelines for dealing with surrogacy and other bioethical issues.¹²¹ After a four-year study, the Commission's 1993 report recommended a ban on commercial surrogacy and suggested accompanying criminal sanctions on intermediaries participating in preconception arrangements.¹²² Bill C-47, the Human Reproductive and Genetic Technologies Act, which would ban

112. See Dickens, *supra* note 15, at 48.

113. See *id.*

114. See *id.*

115. See *id.* at 48-50.

116. See *id.*

117. See *id.* at 47-48, 51-52.

118. See Arthur Serratelli, Note, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GEO. WASH. J. INT'L L. & ECON. 633, 634 (1993).

119. See *id.* at 634.

120. See Dennis Bueckert, *Growing Rent-A-Womb Business Proves Profitable for Some Buying Baby*, EDMONTON J., Aug. 31, 1994, at A3, available in WESTLAW, PAPERSCAN database.

121. See Krim, *supra* note 61, at 216-17.

122. See *id.* at 217.

both commercial surrogacy and the selling of eggs and sperm, is being rushed through Parliament in response to the successful cloning of sheep because it also contains provisions that would prohibit human cloning.¹²³

Israel, like Canada and Britain, also designated a committee to suggest changes to its fertility laws.¹²⁴ Released in 1994, the Committee's report proposed the legalization of surrogate motherhood.¹²⁵ Based on these recommendations, the Israeli Parliament's passage of a bill in 1996 to legalize surrogacy agreements made Israel the first country to have a nationwide policy addressing surrogacy.¹²⁶

IV. TRANSNATIONAL CHALLENGES PRESENTED BY GESTATIONAL SURROGACY

Traditional and gestational surrogacy arrangements that have been negotiated between individuals in different countries point to both the potential and reality of exploitation. The absence of an international policy regulating transnational surrogacy arrangements, combined with varying policies in individual countries, creates the possibility of inequity and overreaching in surrogacy. Debate centers around two distinct issues: commercialization, or the fact that a surrogate is paid for her services, and exploitation, which is the idea that surrogates are paid too little for their services. Resolving this struggle requires a reconciliation of competing ethical and economic considerations.

A. *Examples of Inequity and Overreaching in Gestational Surrogacy*

Examples of surrogacy arrangements making headlines around the world illustrate the considerations and potential complications inherent in these situations. One such agreement resulted in three "mothers" on both sides of the Pacific Ocean: the Chinese-American student who donated the egg, the Caucasian-

123. See *Woolly Thinking: Canada Shouldn't Ban Genetic Research*, VANCOUVER SUN, Apr. 2, 1997, at A12, available in WESTLAW, PAPERSCAN database.

124. See Krim, *supra* note 61, at 218.

125. See *id.*

126. See *id.* at 219. The legislation would require the surrogate and the commissioning couple to sign a contract, which would then be subject to approval by a committee appointed by the health minister. See *id.* The sperm must be furnished by the commissioning father, and the surrogate may be compensated for her suffering, time, legal expenses, and insurance. See *id.*

American woman into whom the egg was implanted, and the legal Japanese mother whose husband's sperm was airlifted to the United States for implantation.¹²⁷ Not only are transnational surrogacy arrangements a reality, but some individuals have already designed plans to profit from these arrangements. A British adoption specialist, for example, reportedly plans to set up a "baby farm" in Hungary on which Eastern European women, supposedly victims of ethnic cleansing, would be impregnated with sperm from American men.¹²⁸ Taking advantage of lenient U.S. surrogacy laws, the broker then planned to bring the surrogates to the United States during the later stages of pregnancy to give birth to their children in American clinics.¹²⁹

Reports of such transnational surrogacy arrangements originate from countries around the world. The President of the Bioethics Foundation announced plans to open a surrogacy center in Mexico that would supply clients to couples in the United States.¹³⁰ In 1995, Polish newspapers solicited women to serve as surrogates for infertile couples in Holland, Belgium, and Germany; the fee for serving as a surrogate is estimated to be the equivalent of two years' salary for the average Pole.¹³¹ In addition, Guatemalan police report that child-buyers in their country arrange for prostitutes and young women in need to serve as surrogates.¹³² A woman from Chandigarh, India, also sparked debate in her country when she announced her desire to raise money for medical help for her paralyzed husband by renting out her womb for fifty thousand rupees.¹³³ A doctor with a Taiwanese medical association asserts that his country's ban on surrogate contracts forces infertile women to seek assistance abroad, resulting in Taiwanese women comprising the second largest

127. See *Three "Mothers" to Have Single Baby*, MAINICHI DAILY NEWS, Nov. 18, 1994, at 12, available in LEXIS, WORLD Library, MAINWS File.

128. Leonard Doyle, *Dealer in Babies Planned a Global Market*, INDEPENDENT (London), Mar. 18, 1995, at 5, available in LEXIS, NEWS Library, INDPNT File.

129. See *id.* His business plans also included networking with service providers worldwide to establish additional surrogacy centers in both Cyprus and Russia. See *id.*

130. See Janice G. Raymond, *Women as Wombs: International Traffic in Reproduction*, Ms., May/June 1991, at 28, 31.

131. See Abi Daruvalla, *Poles Hired as Surrogate Mums in Illegal Trade*, INDEPENDENT (London), June 4, 1995, at 16, available in LEXIS, NEWS Library, INDPNT File.

132. See F. Colindres & C. Morales, *Guatemala: Babies for Sale*, WORLD PRESS REV., May 1994, at 45, available in LEXIS, NEWS Library, ASAPII File.

133. See *Pay Money, Have Baby*, HINDU, July 27, 1997, at 25, available in LEXIS, NEWS Library, HINDU File.

group of customers at a California facility that provides surrogate services.¹³⁴

The director of the largest surrogacy clinic in the world, Surrogate Parenting and Egg Donation Incorporated, based in Beverly Hills, California, has reportedly negotiated, or at least attempted to negotiate, surrogacy agreements between British couples and surrogates from his clinic in the United States.¹³⁵ Because Britain prohibits commercial surrogacy contracts, the director of the American clinic scheduled a meeting at a secret London location with British couples interested in traveling to California to hire a surrogate mother for forty thousand pounds.¹³⁶ The director was undeterred by the prospect of being arrested for violating the Surrogacy Arrangement Act of 1985, contending that he would merely be hosting an educational seminar for couples who had personally contacted him.¹³⁷

An early, but poorly-publicized case of a transnational surrogacy arrangement resulted in the case of *Muñoz v. Haro*.¹³⁸ At the time, it was the first known arrangement in which a socioeconomically disadvantaged woman served as a surrogate for an American couple.¹³⁹ Here, Alejandra Muñoz, a nineteen-year-old Mexican woman, was illegally brought into the United States to be impregnated with the sperm of her cousin's husband.¹⁴⁰ Nattie and Mario Haro, the commissioning couple, maintained that Muñoz agreed to conceive and carry the child, which she would give to the Haros at birth.¹⁴¹ Muñoz, however, contended that she agreed only to be inseminated with Mario's sperm and to carry the fetus for a few weeks, at which time it would be transferred to Nattie's uterus for the remainder of its

134. See Ken Chiu, *Infertile Women Want Ban on Surrogate Mothers Lifted*, FREE CHINA J., May 17, 1996, at 4, available in 1996 WL 8019588. This ban, combined with the ostracism infertile women feel in Chinese society, makes surrogacy their only option. See *id.*

135. See Revill, *supra* note 34, at 18. Of the eight programs in the United States that coordinate surrogate birthing arrangements, the Center for Surrogate Parenting in Beverly Hills, California, has been in operation the longest, arranging the births of more than 400 babies. See *More Parents Choosing Surrogate Motherhood as an Option* (CNN television broadcast, May 11, 1996).

136. See Revill, *supra* note 34, at 18.

137. See *id.*

138. See TATE, *supra* note 18, at 20.

139. See Patrick McDonnell, *Surrogate Motherhood Draws New Fire; U.S. Case Raises Spectre of Third World Poor Becoming 'Baby Factories' for the Rich*, MONTREAL GAZETTE, Jan. 6, 1989, at C9, available in 1989 WL 5643529.

140. See Uma Narayan, *The "Gift" of a Child: Commercial Surrogacy, Gift Surrogacy, and Motherhood*, in EXPECTING TROUBLE 177, 180 (Patricia Boling ed., 1995).

141. See TATE, *supra* note 18, at 21.

development.¹⁴² As a result of this confusion, Nattie Haro produced a handwritten document that she asked Muñoz to sign, stating that Muñoz would relinquish all rights to the child upon birth in return for a payment of approximately one thousand five hundred dollars.¹⁴³ Although Muñoz could not read written Spanish, she signed the document.¹⁴⁴

Disturbed by these circumstances, Muñoz sought to have the surrogacy arrangement declared invalid.¹⁴⁵ The trial judge found that the permissibility of a surrogacy contract has its foundation in the Supreme Court's determination that the right to procreation is protected under the constitutional right to privacy.¹⁴⁶ Therefore, surrogacy contracts are *conceptually* valid, and there is a constitutional right to enter into surrogacy contracts in the United States.¹⁴⁷ However, the judge stated that, as in all contracts, the validity of the agreement must be determined by the circumstances surrounding its formation, and in this case, issues of fraud, duress, undue influence, and mistake in the formation of the contract cast doubt on its validity.¹⁴⁸ While the judge was also concerned that the payment involved in the contract made it a contract for an illegal purpose, as it represented the purchase of an adoption, he was not forced to rule on the contract's enforceability because the commissioning couple withdrew its contract claim.¹⁴⁹

In addition to the fact that surrogacy arrangements have already taken on a transnational character, the international community should address this issue to prevent a single nation from becoming a breeding ground for babies by allowing gestational surrogacy to exist unregulated within its borders.¹⁵⁰ Because most European countries have laws prohibiting commercial surrogacy, and the United States has no federal legislation addressing surrogacy, the United States might become the center of transnational surrogacy.¹⁵¹ Britain, for example,

142. *See id.*

143. *See id.*; LORI ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES 116 (1989).

144. *See TATE, supra note 18, at 22.*

145. *See id.* at 23.

146. *See id.* at 24.

147. *See id.*

148. *See id.*

149. *See id.*

150. *See Krim, supra note 61, at 215.*

151. *See id.* In calling for action at the federal level, Krim notes that the "current patchwork of state laws is no longer effective given the global surrogacy market that is quickly emerging." *Id.* at 225. He suggests that the first step in formulating policy is to initiate a debate similar to those that took place in Canada and Israel. *See id.*

has moved quickly to implement a nationwide system to regulate surrogacy; the United States, in contrast, has left this area open to regulation by the individual states.¹⁵² While the lack of a uniform policy supports the ideals of federalism, it also encourages "forum shopping for the most receptive jurisdiction for a particular surrogacy arrangement," a potential danger that exists at both the national and international levels.¹⁵³ In particular, this potential increase in international surrogacy arrangements could lead to concerns over the commercialization and exploitation of women.¹⁵⁴

B. *Analysis of Commercialization in Surrogacy Arrangements*

In addition to producing an undeniable source of income for women who choose to serve as surrogates, advocates of gestational surrogacy point out that "[g]estational surrogacy" arrangements allow "women who are unable to carry their own child to realize the gift of life."¹⁵⁵ Some contend that the exploitation in gestational surrogacy begins before a surrogate agreement is even contemplated, as the surrogacy industry preys upon the emotional character of this situation by encouraging the belief that "children genetically related to their parents are 'more valuable' than those who are not."¹⁵⁶ This belief, in the context of the capitalist system, has resulted in the development of a market for both infertile couples and surrogates, in which the brokers often earn as much or more than the surrogates themselves.¹⁵⁷

One debate over surrogacy focuses on commercialization, or whether it is permissible for a surrogate to be paid for her services.¹⁵⁸ Opponents argue that such payment constitutes "baby selling" and amounts to a commodification of women and children.¹⁵⁹ Viewed from this perspective, the fee paid to the surrogate is for the termination of her parental rights to the child to whom she gave birth.¹⁶⁰ This argument equates such a payment to a sale of a human being, which is prohibited by law in most countries.¹⁶¹

152. See McCallister, *supra* note 51, at 313-14.

153. *Id.* at 314.

154. See Krim, *supra* note 61, at 221.

155. *Id.* at 225.

156. *Id.* at 224.

157. See *id.*

158. See Kerian, *supra* note 16, at 153-58; Krim, *supra* note 61, at 224-25.

159. See Kerian, *supra* note 16, at 153-54; Krim, *supra* note 61, at 224-25.

160. See Russell-Brown, *supra* note 22, at 527, 539-40.

161. See Krim, *supra* note 61, at 224.

The basis underlying this argument is the realization that public policy may ban certain types of agreements even though all participants agree to their terms.¹⁶² Opponents of commercial surrogacy view the sale of human beings as a "blocked exchange," as humans represent commodities that cannot be exchanged in a market.¹⁶³ This argument applies with equal force whether it is regarded as the sale of children or the sale of women's bodies.¹⁶⁴ As with slavery and prostitution, human dignity prevents the sale of certain services, and contracts to enter into such activities are legally void.¹⁶⁵

The counter-argument, however, is that the fee paid to the surrogate is neither for the child nor the surrogate's body, but to compensate the surrogate for her *services* in carrying the child and undergoing labor.¹⁶⁶ The payment structure of surrogate contracts supports this view, as the contracts provide for payment in installments during the course of the pregnancy.¹⁶⁷ Under this system, the surrogate would receive payments throughout the pregnancy, and would receive a percentage of the agreed fee if she miscarried,¹⁶⁸ but would be entitled to the entire amount upon carrying the fetus to term, even if the child was stillborn.¹⁶⁹ If the payment were solely for the services rendered, the surrogate would have fulfilled her duty by carrying the child to term.¹⁷⁰

162. See Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges of Reproductive Technology*, 29 U. MICH. J.L. REFORM 671, 696-97 (1996).

163. Kerian, *supra* note 16, at 154. Objects of "blocked exchange[s]" are those which are "so close to one's personhood" that they cannot be "barter[ed] without denigrating personhood." SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES?* 61 (1994). Some, therefore, view surrogacy as a "blocked exchange" because it assigns a market value to renting a womb and obtaining a child, thereby violating human dignity. See Kerian, *supra* note 16, at 154.

164. See RAE, *supra* note 163, at 54.

165. See *id.* at 54-55.

166. See Kerian, *supra* note 16, at 154; Krim, *supra* note 61, at 225.

167. See Kerian, *supra* note 16, at 154; Krim, *supra* note 61, at 225. Most surrogacy contracts specify that the fee will be provided in return for gestational services rendered by the surrogate, and are careful not to refer to the surrender of parental rights as one of these services. See RAE, *supra* note 163, at 30.

168. *But see* MARTHA A. FIELD, *SURROGATE MOTHERHOOD* 28 (1988) (arguing that partial fees for miscarriages further commodify women).

169. See Krim, *supra* note 61, at 225. *But see* FIELD, *supra* note 168, at 26 (arguing that lucrative surrogacy contracts only further exploit poor women by increasing the temptation to enter into one). Field also notes the commercialization element present in "attach[ing] 'a Saks Fifth Avenue price tag' to one woman because she is intelligent and attractive, while another woman receives 'a K-Mart price tag.'" *Id.* at 28-29. This contrast in traditional surrogacy is also applicable to gestational surrogacy, as it presents the possibility of creating two classes of surrogates divided according to socioeconomic status.

170. See Kerian, *supra* note 16, at 154.

However most surrogacy contracts are not complete until the surrogate delivers the child to the intended parents. Therefore, at least a portion of the payment must be for the baby. This would make the surrogacy agreement a contract for both a service and a product, hence raising accusations of baby-selling.¹⁷¹

One criticism of the commercialization argument against surrogacy is that it does not appreciate the distinction between compensating a person for her labor and acquiring rights over that person in the process.¹⁷² Paying a woman for *her* to use her body in a way that benefits someone else is not the same as paying a woman to allow *someone else* to use her body in a way that benefits him or her.¹⁷³ Because a surrogacy arrangement pays a woman for her to use her own body, the arrangement is free of exploitation and does not treat the surrogate's body as an object of commerce.¹⁷⁴

C. Analysis of Exploitation in Surrogacy Arrangements

Assuming that the payment of a fee to the surrogate presented no problems, the issue of exploitation, which argues that the fee paid to surrogates is too low, still exists.¹⁷⁵ Considering surrogacy to be a twenty-four-hour-a-day job for nine months, the typical ten thousand dollar fee paid to a surrogate would amount to an hourly wage of \$1.54.¹⁷⁶ Some theorize that the average surrogate fee will decrease if the gestational mother is not legally recognized as the mother of the child born to her, as she will have little bargaining power over the commissioning couple.¹⁷⁷ By increasing the fee paid to surrogates, however, the exploitation argument would lose much of its force, as the wealthy would no longer be taking advantage of the poor.¹⁷⁸ At the same time, however, higher fees could make surrogacy a more

171. See RAE, *supra* note 163, at 33; Kerian, *supra* note 16, at 154.

172. See RAE, *supra* note 163, at 55.

173. See *id.* at 55-56.

174. See *id.* at 56.

175. See *supra* text accompanying note 46.

176. See Kerian, *supra* note 16, at 164; Russell-Brown, *supra* note 22, at 541 & n.62. This same number of hours, if compensated at the rate of a minimum wage of \$5.15 an hour, would mean that a surrogate should be paid approximately \$33,440 for her services. Further assuming that overtime is compensated at time and a half, the surrogate fee should be approximately \$44,610. See Fair Labor Standards Act of 1996, 29 U.S.C. § 206 (1998), for minimum wage as of the date of this writing.

177. See Russell-Brown, *supra* note 22, at 543; see also Horsburgh, *supra* note 10, at 52 (describing how bargaining power is contingent upon socioeconomic factors).

178. See Kerian, *supra* note 16, at 164.

appealing option for women who have no other way to earn a comparable sum of money.¹⁷⁹

Arguments favoring the enforcement of surrogacy agreements point out that they are not exploitive, as they represent contracts which are mutually beneficial to both parties.¹⁸⁰ Couples would not enter into surrogacy contracts if they did not believe they would derive a value from having the baby which would be greater than the fee paid to the surrogate.¹⁸¹ Likewise, women serving as surrogates must also believe that the experience of giving birth to a child for another couple will be worth the payment received.¹⁸²

Opponents of commercial gestational surrogacy argue "that the fee paid to [a] surrogate[] constitutes an undue inducement," forcing the woman "to do something [that she] ordinarily would not do."¹⁸³ However, commentators point out that the prospect of compensation is an inducement to virtually all potential surrogates, except perhaps for close friends and family, since it is rare for a woman to serve as a surrogate voluntarily.¹⁸⁴ Furthermore, it is not in the commissioning couple's interests to find a surrogate whom they can exploit, as they do not want the surrogate engaging in behavior that could harm the child, or reconsidering her decision mid-course.¹⁸⁵ Also, commissioning couples are certainly aware that the traditional remedies of fraud and misrepresentation are available to the surrogate if some type of exploitation does occur;¹⁸⁶ the determinative factor here is

179. See FIELD, *supra* note 168, at 26. Although \$10,000 is a typical surrogacy fee, some have offered considerably higher sums to potential surrogates. See *id.* An advertisement in *Boston Magazine* offered \$50,000 to a suitable surrogate, and a *New York Times* article mentioned \$75,000 as a possible payment. See *id.* at 26, 166 n.4.

180. See Posner, *supra* note 9, at 22.

181. See *id.*; Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2319-20 (1995) (pointing out that empathetic surrogate mothers might derive an emotional satisfaction in addition to and in lieu of monetary compensation).

182. See Posner, *supra* note 9, at 22.

183. RAE, *supra* note 163, at 56. See also Woliver, *supra* note 12, at 350, discussing the impact of socioeconomic conditions on a woman's decision to serve as a surrogate. Woliver notes:

We are asked not to look behind the resulting children to see their lower-middle-class and lower-class mothers. But the core reality of surrogate motherhood is that it is both classist and sexist: a method to obtain children genetically related to [both parents, in the case of gestational surrogacy,] by exploiting poor women.

Id. (quoting George J. Annas, *Fairy Tales Surrogate Mothers Tell*, in SURROGATE MOTHERHOOD, *supra* note 23, at 43, 43).

184. See RAE, *supra* note 163, at 56.

185. See Epstein, *supra* note 181, at 2317-18.

186. See *id.* at 2318.

whether the surrogate herself is aware of the forms of recourse that may be available to her.

Another argument addressing exploitation asserts not that surrogacy arrangements are not exploitive, but rather that they are justified in their exploitation because they reflect the conscious decision of the surrogate to engage in a particular type of work.¹⁸⁷ Commentators point out that a court that prohibits a woman who is willing to serve as a surrogate and who greatly needs the money is demonstrating a hypocritical concern for her interests since it has no other way to provide relief from her financial constraints.¹⁸⁸ This discrepancy has been viewed as patronizing to women because it purports to protect them from doing what they want to do.¹⁸⁹ Moreover, a woman's overall right to contract might be endangered if surrogacy contracts, involving her own body, are not enforced.¹⁹⁰

The cases of *Baby M*, *Calvert v. Johnson*, and *Muñoz v. Haro* illustrate the socioeconomic divide in surrogacy. *Baby M* illustrates the reality of the disparity in economic circumstances between the parties in surrogacy arrangements.¹⁹¹ This case involved a middle-class commissioning couple, both of whom held doctorate degrees, with a reported income of approximately ninety thousand dollars; William Stern was a forty-year-old biochemist and Elizabeth Stern was a pediatrician.¹⁹² The surrogate, Mary Beth Whitehead, was a twenty-nine-year-old homemaker who quit high school at age fifteen.¹⁹³ She married shortly afterwards and had two children, but then separated from her husband and began to receive public assistance.¹⁹⁴ Once reunited with her husband, a sanitation worker who supported the family on a twenty-eight thousand dollar salary, Mary Beth Whitehead filed for bankruptcy, as a result of which she was forced to fight the foreclosure of her home during the *Baby M* trial.¹⁹⁵

187. See FIELD, *supra* note 168, at 29.

188. See Posner, *supra* note 9, at 25.

189. See FIELD, *supra* note 168, at 29; MEYER, *supra* note 24, at 81 (noting the feminist fear that the regulation of surrogacy would "undermine the right to bodily autonomy that women fought so hard to acquire").

190. See MEYER, *supra* note 24, at 81. See generally Mary Lyndon Shanley, "Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction, in EXPECTING TROUBLE, *supra* note 140, at 156, 156-68 (weighing the cases both for and against enforcement of pregnancy contracts in terms of individual autonomy and human interdependencies).

191. See Merrick, *supra* note 35, at 184.

192. See *id.*

193. See *id.*

194. See *id.*

195. See *id.*

Johnson v. Calvert exemplifies the effect of both economic and racial factors on the surrogacy agreement.¹⁹⁶ Here, the gestational surrogate, Anna Johnson was African-American, the commissioning father was Caucasian, and the commissioning mother was of Filipino descent.¹⁹⁷ In finding that the commissioning couple were the legal parents of the child based on the genetic link between the couple and the child, the court does not address the relationship between race and genetics.¹⁹⁸ Couples who have children through surrogacy tend to be not only affluent, but also white, as are the surrogates they choose for traditional surrogacy arrangements.¹⁹⁹ A couple pursuing traditional surrogacy would not be likely to choose a poor woman as their surrogate because of concerns about how her health might affect that of their child.²⁰⁰

However, in gestational surrogacy arrangements, the surrogate does not donate her own egg, so the race or genetic characteristics of the surrogate are immaterial to the contracting couple.²⁰¹ Therefore, couples are more likely to hire non-whites as gestational surrogates, both because women of color may be more willing economically to serve as surrogates and because the color of the gestational surrogate will readily reveal that she is not the genetic mother of the child born to her.²⁰² This situation, then, increases the likelihood that poor women and women of color will be chosen by white couples as the surrogates of choice.²⁰³ According to some commentators, growth in the international surrogacy industry will be spurred by poor women in developing countries who will eagerly serve as surrogates for much less than the ten thousand dollars typically paid in the United States.²⁰⁴

196. See TATE, *supra* note 18, at 32-33.

197. See *id.* at 32.

198. See Horsburgh, *supra* note 10, at 38.

199. See *id.* at 39; Russell-Brown, *supra* note 22, at 542 (noting that the typical woman serving as a traditional surrogate is white, married, and has attended two years of college).

200. See Posner, *supra* note 9, at 25.

201. See Russell-Brown, *supra* note 22, at 542-43.

202. See Horsburgh, *supra* note 10, at 39; Russell-Brown, *supra* note 22, at 543.

203. See Russell-Brown, *supra* note 22, at 543 (referring to poor women and women of color serving as "incubators" for white couples); see also Krim, *supra* note 61, at 223 (describing the potential for gestational surrogacy, but not traditional surrogacy, to create a two-tiered class of women, with socioeconomic status serving as the dividing line).

204. See GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 214 (1985); see also JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S*

Socioeconomic factors again played a role in *Muñoz v. Haro*, as Muñoz, the surrogate, was a Mexican national, had entered the United States illegally, and could not speak English.²⁰⁵ She had given birth to a child while still a teenager, was unmarried, lived with her parents, and supported both herself and her child through a cleaning job at a bank.²⁰⁶ The commissioning couple, however, was married, and the husband was a math and science teacher.²⁰⁷ In this arrangement, the commissioning couple offered to pay the surrogate one thousand five hundred dollars.²⁰⁸ *Muñoz v. Haro*, then, exemplifies the disproportionality of payment currently possible in gestational surrogacy arrangements.

While surrogacy brokers will have to abide by domestic laws, both state and national, they will inevitably resort to canvassing the globe for the countries with the least restrictive regulations.²⁰⁹ Some commentators have suggested that if the woman is only going to serve as an "incubator" (gestational surrogate), then payment for her services would be lower than if she contributed half of the child's genetic material (as with a traditional surrogate).²¹⁰ Fees paid to gestational surrogates would also vary according to country, but the potential for abuse exists. Some speculations have arisen that Mexican-Americans, for example, would be willing to serve as surrogates for five thousand dollars, and Mexicans would be willing to be surrogates for as little as two thousand five hundred dollars.²¹¹

V. EXISTING FRAMEWORKS THAT COULD BE USED TO ADDRESS THE ISSUE

The idea of an international market in surrogacy is intuitively troublesome—perhaps because the traditional attributes of consumer transactions like prices, advertising, and the extension of credit seem inappropriate in the context of reproductive

FREEDOM 140-44 (1993) (comparing reproductive trafficking with the sexual trafficking which is established in certain regions around the world).

205. See TATE, *supra* note 18, at 20.

206. See *id.* at 21.

207. See *id.*

208. See ANDREWS, *supra* note 143, at 115, 116.

209. See Leibowitz-Dori, *supra* note 97, at 334 n.30.

210. Gena Corea, *The Reproductive Brothel*, in MAN-MADE WOMEN 38, 43 (1985) (citing VANCE PACKARD, *THE PEOPLE SHAPERS* 268-69 (1979)).

211. See *id.* The president of a U.S. surrogacy agency allegedly asserted that "[i]f we could cross international lines, then \$1,000 is a significant sum of money, whereas here [in the U.S.], it's just a week or a month's wages." See *id.* at 44. When asked which countries he planned to target, the broker indicated a preference for Central America. See *id.* at 43-44.

services.²¹² Differences in prices paid to surrogates could fall along racial lines, thereby relegating poor women to an oppressed occupation.²¹³ Because a market free of regulation does nothing to prevent future discrimination or rectify existing discrimination, legal supervision is necessary to protect the interests of surrogates involved in surrogacy arrangements.²¹⁴

Because of the widely different approaches individual countries have taken in regulating surrogacy arrangements within their borders, it is unlikely that an international agreement recognizing surrogacy will be adopted in the near future.²¹⁵ However, individual aspects of this arrangement are governed by international declarations and conventions, which, when assimilated, form a foundation for future action. Until the international community can formulate a comprehensive policy on surrogacy arrangements that extend beyond the borders of an individual country, principles found in existing documents may be applied to surrogacy arrangements to ensure basic protections for surrogates.

The first step in regulating transnational gestational surrogacy arrangements is to recognize a woman's right to serve as a gestational surrogate.²¹⁶ Next comes a recognition of not only the right to receive compensation for serving as a surrogate,²¹⁷ but also the right to receive adequate compensation. An analysis of current adoption provisions also suggests a useful framework for structuring an international policy on gestational surrogacy. The foundational principles for such regulation may be found in existing United Nations documents and other international agreements.

A. *Fourth World Conference on Women*

A woman's right to serve as a gestational surrogate derives from her right to decide whether to procreate.²¹⁸ The United

212. See SHALEV, *supra* note 1, at 159.

213. See *id.*

214. See *id.*; see also Krim, *supra* note 61, at 226 (articulating the need for the United States to work with other nations in developing an international regulatory policy because "[a]s long as one country allows for unregulated surrogacy, the threat of baby trafficking and exploitation of women will exist").

215. See Leibowitz-Dori, *supra* note 97, at 350.

216. See *id.* at 346.

217. See *id.* at 347.

218. See *id.* (discussing the fact that a woman's right to procreate "was first declared a private human right in 1968 in the Proclamation of Teheran"). Reproductive rights were also noted in the 1969 Declaration on Social Progress and Development, however, the right to decide the number and spacing of one's children did not become enforceable until the 1981 ratification of the Convention

Nation's dedication to this principle was recently expressed in the Fourth World Conference on Women.²¹⁹ The Conference Report states that women have the right to the highest possible level of health, including reproductive health.²²⁰ "Reproductive health therefore implies that people . . . have the capability to reproduce and the freedom to decide if, when and how often to do so."²²¹ Further, men and women are to have access to methods of family planning of their choice, as well as to "other methods of their choice for the regulation of fertility which are not against the law."²²² To accomplish this, people should be guaranteed certain already-recognized human rights, such as the right to "decide freely and responsibly the number, spacing, and timing of their children," making their reproductive decisions free of discrimination and coercion.²²³

These procreative liberties must certainly encompass the right to serve as a gestational surrogate, as the decision to procreate itself lies at the heart of a decision to serve as a surrogate. In regulating her fertility, and deciding when and how often to reproduce, a surrogate is exercising one of her procreative liberties, the exercise of which is not challenged in contexts outside of surrogacy. To allow a woman the freedom to make such decisions for herself only outside the framework of surrogacy is to deny her the ability to exercise the procreative freedom she has ostensibly been granted.

on the Elimination of All Forms of Discrimination Against Women. *See id.* at 347 & n.115.

219. *U.N. Report on the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 (1995), reprinted in 35 I.L.M. 401 (1995) [hereinafter *Fourth World Conference Report*]. The Conference focused on twelve specific areas concerning women: (1) women and poverty, (2) education and training of women, (3) women and health, (4) violence against women, (5) women and armed conflict, (6) women and the economy, (7) women in power and decision-making, (8) institutional mechanisms for the advancement of women, (9) human rights of women, (10) women and the media, (11) women and the environment, and (12) issues surrounding the female child. *See id.* at 402-03.

220. *See id.* at 423. *But cf.* Valerie A. Dormandy, *Women's Rights in International Law: A Prediction Concerning the Legal Impact of the United Nations' Fourth World Conference on Women*, 30 VAND. J. TRANSNAT'L L. 97, 101-02, n.31 (1997) (discussing debate over platform objectives, including provisions relating to reproductive health).

221. *Fourth World Conference Report*, *supra* note 219, at 423.

222. *Id.*

223. *Id.* at 424.

B. *Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of All Forms of Racial Discrimination*

The Convention on the Elimination of All Forms of Discrimination Against Women also supports the right of women to decide the number, spacing, and timing of their children by calling for women to have access to the information, education, and means to enable them to exercise this and other procreative rights.²²⁴ Further, the Convention on the Elimination of All Forms of Racial Discrimination²²⁵ requires states to guarantee economic rights, including just and favorable remuneration, to all individuals "without distinction as to race, colour, or national or ethnic origin."²²⁶ Therefore, these two conventions sanction against the exploitation of surrogates based on both gender and race, which is a factor that often contributes to the surrogate having a lower socioeconomic status than the commissioning couple.

C. *International Convention on Economic, Social, and Cultural Rights*

Other documents that support a woman's right to be compensated for her labor may be read to grant her the right to receive compensation for serving as a surrogate. The International Convention on Economic, Social and Cultural Rights,²²⁷ for example, provides that all people may "freely dispose of their natural wealth and resources . . . based upon the principle of mutual benefit."²²⁸ This indicates that those seeking to pay a surrogate for her services may be able to do so. In addition, it recognizes the right of workers to receive remuneration that provides them with "fair wages and equal remuneration for work of equal value."²²⁹ This provision, then, supports a woman's right to receive fair compensation for her efforts

224. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, art. 16, & 1(e), U.N. Doc. A/RES/34/180 (1979). International dedication to this right is evidenced by the fact that the resolution was adopted by a vote of 130 in favor, none against, and only ten abstentions. *See id.*

225. *Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res 2106, U.N. GAOR, 21st Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965).

226. *Id.* at art. 5(e)(i).

227. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter International Covenant].

228. *Id.* at 5.

229. *Id.* at 6.

in serving as a surrogate.²³⁰ Further, the parties to the Convention also guarantee that the rights enunciated in the Convention "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²³¹ Since the right to fair wages is subject to this non-discriminatory provision, a woman should be able to receive fair wages for her work as a surrogate regardless of her race, color, or other status. The enforcement of a fair wage policy for surrogate payments would therefore prevent the fees paid to women from low socioeconomic backgrounds from being vastly disproportionate from those paid to their more well-to-do counterparts.

D. *Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy*

The International Labor Organization's Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy, which is directed at setting policy and resolving difficulties between governments, employers, and workers, also discusses issues pertinent to regulating gestational surrogacy.²³² The Tripartite Declaration recognizes that the extension of an organization's operation beyond the national context may lead to an "abuse of [the] concentrations of economic power and to conflicts with national policy objectives and with the interests of the workers."²³³ This policy statement, then, parallels the concern in gestational surrogacy that the interests of socioeconomically disadvantaged women will be compromised, as they are disproportionately targeted as surrogates by economically powerful intermediaries.²³⁴

Although transnational gestational surrogacy intermediaries fit within the definitional guideline of multinational enterprises to which the Tripartite Declaration applies, as they are enterprises which control services outside the country in which they are

230. See Leibowitz-Dori, *supra* note 97, at 347-48. Leibowitz-Dori asserts that a woman should be "entitled to compensation for the physical changes in [her] body[,] the changes in lifestyle, the work of carrying a fetus, and the pain and medical risk of labor and partition." *Id.*

231. International Covenant, *supra* note 227, at 5.

232. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422 (1978) [hereinafter Tripartite Declaration].

233. *Id.* para. 1, at 423.

234. Compare Muñoz v. Haro, *in* Tate, *supra* note 15, at 20 (in which the surrogate received \$1,500), with Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (the surrogate received \$10,000), and *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (the surrogate received \$10,000).

based,²³⁵ the social policies of the Declaration apply to surrogacy arrangements even if they are not construed to involve multinational enterprises. The Tripartite Declaration requires that “[a]ll governments . . . pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin.”²³⁶ The elimination of discrimination in payments provided to surrogates would prevent women of particular races or lower socioeconomic statuses from becoming the targets of exploitation in surrogacy agreements.

In addition, the Tripartite Declaration also provides that multinational enterprises operating in developing countries “should provide the best possible wages, benefits and conditions of work[,]” consistent with the economic position of the enterprise, as are within governmental policies.²³⁷ Economically successful surrogacy agencies operating in developing countries would therefore be required to share this wealth with surrogates by compensating them an amount commensurate with the agencies’ positions. For example, an agency that pays a surrogate a fee less than the one received by the agency itself could be compelled to reallocate the funds received from the commissioning couple so as to compensate the surrogate in a manner at least commensurate with, if not in excess of, the fee retained by the agency.

Moreover, the Declaration Concerning the Aims and Purposes of the International Labor Organization,²³⁸ which sets forth the fundamental principles upon which the ILO is based, also supports the idea of economic nondiscrimination. The Declaration promotes the tenet that all national and international policies, and particularly those of an economic nature, should be accepted only to the extent that they promote and do not hinder the achievement of economic security for all human beings irrespective of race, creed, or sex.²³⁹ Also aimed at encouraging the economic advancement of less-developed regions of the world, the Declaration bolsters the argument that women of color or from less-developed countries should be protected from the economic overreaching that accompanies their susceptibility to disproportionate targeting as gestational surrogates.

235. See Tripartite Declaration, *supra* note 232, at para. 6.

236. *Id.* at para. 21.

237. *Id.* at para. 34.

238. CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION, *reprinted in* G. A. JOHNSTON, THE INTERNATIONAL LABOUR ORGANISATION 285 (1970).

239. See *id.* annex II(a), (c) at 303.

E. Hague Conference on Intercountry Adoption

By analogy, the Hague Conference on Intercountry Adoption²⁴⁰ provides possible guidelines for an international agreement on gestational surrogacy.²⁴¹ The Conference provides that “[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption.”²⁴² Further, it restricts employees of adoption agencies from “receiv[ing] remuneration which is unreasonably high in relation to services rendered.”²⁴³ Applying these standards to surrogacy arrangements might require a reduction in the proportion of the total fee in a surrogacy arrangement²⁴⁴ which may be paid to the surrogacy agency, as that fee is nearly equal to the one paid to surrogates at present. The Hague Conference’s prohibition against improper financial gain in the adoption context, however, should not be interpreted in the context of surrogacy to mean that surrogates may not receive payment for their work; compensation for nine months of undeniable labor is certainly not “improper.” An emergent transnational policy addressing gestational surrogacy should define its equivalent of “improper financial gain” so as not to restrict gain to the surrogate, but to prohibit gain to intermediaries resulting from the exploitation of the surrogates involved.

Further, the Hague Convention permits only the payment of “costs and expenses, including reasonable professional fees of persons involved in the adoption.”²⁴⁵ In the context of surrogacy, this provision could be interpreted to prohibit payment to a surrogate, unless her payment could be construed to be a

240. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (1993) [hereinafter Hague Conference on Intercountry Adoption].

241. See Leibowitz-Dori, *supra* note 97, at 352-53, for a discussion of how the three objectives of the Hague Conference could be modified to accommodate surrogacy. First, the Hague Conference reflects the goals of surrogacy by ensuring that intercountry adoptions accord with the best interests of the child. See *id.* at 352. Second, it calls for cooperation among the states to prevent the abduction, sale of, or traffic in children. See *id.* at 353. Third, the Hague Conference undertakes to ensure that member states recognize those adoptions complying with its guidelines. See *id.*

242. Hague Conference on Intercountry Adoption, *supra* note 240, art. 32, para. 1, at 1143.

243. *Id.* para. 3, at 1143.

244. For a breakdown of the costs involved in using a surrogacy agency see *supra* note 34.

245. Hague Conference on Intercountry Adoption, *supra* note 240, art. 32, para. 2, at 1143.

“professional” fee. It is here that surrogacy and adoption diverge, for while the goal of prohibiting certain payments remains the same, the wording of the regulations must differ.²⁴⁶ Such payment is prohibited in the adoption context because the child is already in existence and there is no role equivalent to that of the surrogate still to be performed. In surrogacy, however, the child at issue has not been born, and the role of the surrogate should be considered “professional,” as the gestation of the fetus by the surrogate is the most crucial aspect of the contemplated birth, without which the services of other so-called “professionals” would be unnecessary. Again, as with the preceding provision, this may be more plausibly construed as a limitation on the types of payments that may be given in an effort to prevent exploitive payments. By implication, the authorization of payment for “reasonable professional fees” supplies surrogates measured protection by suggesting that allowable fees must, in fact, be reasonable.

The Hague Conference has the potential of affording the surrogate yet additional protection. It authorizes the production of a certified translation of original documents upon request.²⁴⁷ Such an option would help to prevent situations like those in *Muñoz v. Haro*, in which the intended parents allegedly took advantage of the surrogate, by resolving any questions about the provisions of the agreement into which the parties are entering.²⁴⁸ Making the intended parents responsible for the cost of the translation, as are the adoptive parents under the Hague Conference,²⁴⁹ further ensures that any needed translations are actually obtained.

VI. CONCLUSION

Gestational surrogacy catches society unprepared to deal with the ramifications of its own advancing technology. The genetic link between mother and child assumes a new role in birth, existing not as a characteristic shared by birth mother and child, but instead serving as an economic incentive to choose one surrogate over another. With genetic and health concerns about the surrogate now aside, the barriers to exploiting poor women

246. See Leibowitz-Dori, *supra* note 97, at 338-41 (presenting a case study of the adoption market).

247. See Hague Conference on Intercountry Adoption, *supra* note 240, art. 34, at 1143.

248. See *supra* text accompanying notes 143-49.

249. See Hague Conference on Intercountry Adoption, *supra* note 240, art. 34, at 1143.

and women of color as gestational surrogates are few. An international policy regulating gestational surrogacy agreements, however, could be just such a barrier.

Inconsistent or nonexistent national policies, combined with the lack of an international response to the challenges presented by gestational surrogacy, places surrogates in economic jeopardy. The international community must act quickly to adopt a policy that recognizes the legality of gestational surrogacy arrangements and regulates them with an eye toward protecting the rights of the surrogates involved. Established international conventions and declarations support the fundamental rights at issue in gestational surrogacy: the right to serve as a surrogate, the right to receive compensation for this service, and the right for such compensation to be adequate. Reference to these rights, as well as analogy to international agreements on adoption, provides a framework for constructing an interim protective measure until the international community can adopt a more comprehensive and lasting solution.

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