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The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor

Cyra Akila Choudhury[*]

"Any fool can have a baby; it takes a smart woman to get paid for it."[1]

ABSTRACT

India's commercial surrogacy business has been the focus of intense media scrutiny for the past decade. In that time, it has grown from a $400 million industry to over $2 billion. While the growth in the surrogacy market has been rapid and widespread, the Indian government has struggled to regulate it as a business, as a medical practice and for the protection of

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* Associate Professor of Law, Florida International University College of Law. Particular thanks are due to Libby Adler, Aziza Ahmed, Janet Halley, Lisa Kelly, Rachel Rebouché, and Hila Shamir of the Governance Feminism Study Group for their comments on the early draft of this Article. The Article also benefitted from the comments of participants in the 2013 Feminist Legal Theory-Collaborative Research Network panels at the Law and Society conference; the 2013 Harvard Institute for Global Law and Policy conference; and the *Beyond Roe* conference at Rutgers University School of Law-Camden. I also thank Jesica Geevarghese and Sheri-Gaye Powell for their excellent research assistance. For insights into healthcare and comments on this Article, thanks are also due to Benjamin N. Hamlin, MPH.

1. Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES (Oct. 4, 2011), http://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html?_r=1& [http://perma.cc/G2QK-D5MX] (archived Sept. 26, 2014).

surrogates. After nearly a decade of proposed draft bills, the government has yet to enact comprehensive regulation. It is now clear that the state will not ban such a lucrative source of income.

Scholars of surrogacy have begun to take note of the Indian market. In the United States, where surrogacy has provoked debate and theorizing among feminists, scholars are increasingly interpreting the meaning and the effects of surrogacy in other countries using theories developed from the experience with surrogacy and assisted reproductive technology (ART) in the United States. Despite the academic discourse, no proposals for regulation of Indian surrogacy have been forthcoming. The discussions remain theoretical and decontextualized, with Indian surrogacy described with generalizations and media-driven stereotypes. More importantly, scholars consistently fail to incorporate the emerging ethnographic accounts of surrogate lives or to contemplate a regulatory agenda based on the lived realities and the political economies of family and state in which poor Indian women become surrogates.

This Article breaks new ground by closely reading the emerging ethnographic accounts of surrogacy to establish that current feminist frames are incomplete. It incorporates the political economy of surrogacy, the economic relationship of surrogacy to the Indian state, and the political economy of surrogates' families, which have all been missing from the current dialogue. The Article concludes that the benefits of surrogate labor outweigh its disadvantages and develops a new framework—of surrogacy as labor—that will, for the first time, protect the surrogate as a worker.

Surrogacy, as a fairly open regulatory field, provides feminists with a unique opportunity to devise appropriate legislation. In order to inform that legislation, the Article explores regulations in the United States and South Africa and argues that, given the unique political economy of Indian surrogacy and the commercial nature of the surrogacy market, broader labor protections are required to undergird the current private contract regime. In other words, legislation must take the business of surrogacy seriously as a business and treat Indian women who engage as surrogates as its workers. Only by marrying labor regulations and standard contract terms will surrogates be protected from exploitation and able to demand fairer terms and conditions from affluent commissioning parents and local clinic owners who currently profit from their labor.

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I. INTRODUCTION

Surrogacy is the stuff of legend and nightmare. From the Bible's story of Hagar, Sarah, and Abraham to *The Handmaid's Tale*, the prospect of one woman giving birth for another has raised questions of morality, ethics, power, and legality. [2] With innovations in reproductive medicine, traditional surrogacy involving the donation of eggs from the gestational mother (making her both the genetic and gestational mother) is no longer necessary.[3] Due to advances in in vitro fertilization (IVF), the production of genetic children has been decoupled from gestation and can now occur outside the marital family. One can engage a woman for the services of her womb. However, the costs associated with this sort of surrogacy are beyond the reach of many families.[4] Reproductive healthcare services in the United States are exorbitantly expensive, particularly for those who do not have insurance coverage.[5] And insurance companies do not uniformly provide coverage for IVF.[6] Those who desire a genetic child often undertake private contracts through agencies with costs that can reach up to $100,000.[7]

Fortunately for those who are looking for more affordable surrogacy services, globalization and advances in medical science have opened up the market in countries where the costs are much less onerous. India has entered the ART market with alacrity.[8] With its advanced education system and low cost of living, it is ideally poised to provide high-quality care at a fraction of the cost charged by

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2. *See generally* Genesis 16:1–15 (King James) (presenting the biblical story of Hagar as a surrogate for Abraham and Sarah); MARGARET ATWOOD, THE HANDMAID'S TALE (1998) (dystopian novel where some women are subordinated to the sole purpose of being a surrogate).

3. *See, e.g.*, Paul R. Brezina et al., *Recent Advances in Assisted Reproductive Technologies*, 1 CURRENT OBSTETRICS & GYNECOLOGY REP. 166, 167 (2012) (discussing the advances in IVF and gestational pregnancy); Angie Godwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 273–78 (1999) (describing the process of gestational surrogacy).

4. *See* Meghan Boone, *It's Only Covered if You Keep It: The Legality of Surrogate Pregnancy Exclusions in Health Insurance Policies*, 14 GEO. J. GENDER & L. 677, 682 (2013) (noting that "surrogacy is prohibitively expensive," with costs estimated to range from $25,000 to $150,000).

5. *See id.* at 685–86 (noting that the high cost of a birthing procedure makes it difficult for families without insurance).

6. *See id.* at 686 (explaining that insurance plans offering infertility treatments vary widely in coverage and eligibility).

7. See *infra* notes 63–66 and accompanying text, discussing costs of surrogacy in the United States.

8. *See* Amelia Gentleman, *India Nurtures the Business of Surrogate Motherhood*, N.Y. TIMES (Mar. 10, 2008), http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html?pagewanted=all&_r=0 (describing the surrogacy industry in India as a "new but rapidly expanding business").

providers in the United States.[9] Surrogacy providers are experiencing a boom in growth.[10] Current estimates suggest that the business brings in over $2 billion.[11] Approximately 25,000 children are born from surrogacy, and half of these children are for commissioning parents in the West.[12] This expansion of surrogacy providers in India has been deemed by some as a benefit both to Indian women who seek to earn money through providing services and to childless families who desperately want children.[13] However, the rate of growth in the market for these services has far outpaced their regulation.[14] That gap has given rise to controversial situations in which the law has had to play catch-up. The Baby Manji case, for instance, raised the specter of stateless children.[15] In that case, when

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9. *See id.* (noting that India's skilled medical professionals and low cost has attracted numerous requests for surrogates from the United States and Europe).

10. *See* Roy, *supra* note 1 ("Since 2002, when commercial surrogacy was legalized in India, the surrogacy industry has boomed.").

11. *See* Priya Shetty, *India's Unregulated Surrogacy Industry*, 380 LANCET 1633, 1633 (2012).

12. *See id.*

13. *See* Judith Warner, Op-Ed., *Outsourced Wombs*, N.Y. TIMES (Jan. 3, 2008), http://opinionator.blogs.nytimes.com/2008/01/03/outsourced-wombs/?_php=true&_type=blogs&_r=0 [http://perma.cc/946S-KGWQ] (archived Sept. 27, 2014) (stating that Indian surrogate providers receive about 10 to 15 years' worth of income); *see also* Nita Bhalla, *India's Surrogacy Tourism: Exploitation or Empowerment?*, THOMSON REUTERS FOUND. (Oct. 4, 2013), http://www.trust.org/item/20131004162151-r5i0w/ [http://perma.cc/HV2K-YBFJ] (archived Sept. 27, 2014) (stating that surrogacy helps childless couples realize their dream of a genetic child).

14. *See* Shetty, *supra* note 11, at 1633 (recognizing the unregulated nature of India's surrogacy market as a concern for the treatment of surrogate mothers); *see also* Roy, *supra* note 1 (describing proposed legislation to address emerging ethical issues regarding surrogate mothers in India).

15. *See* Anika Keys Boyce, *Protecting the Voiceless*, 36 SUFFOLK TRANSNAT'L L. REV. 649, 650 (2013) (explaining that some countries do not recognize surrogacy as a legal means of reproduction and establishing citizenship); *see also* Baby Manji Yamada v. Union of India & ANR, (2008) I.N.S.C. 1656 (India) (describing the disposition of Indian law on surrogacy); Liz Bishop, *India's New Surrogacy Laws are Only Part of the Equation*, MONASH UNIV. (Mar. 14, 2013), http://www.monash.edu.au/news/show/indias-new-surrogacy-laws-are-only-part-of-the-equation [http://perma.cc/H2F3-K5FQ] (archived Sept. 27, 2014) (outlining the legal issues of surrogacy in Australia); Kari Points, *Commercial Surrogacy and Fertility Tourism in India*, THE KENAN INST. FOR ETHICS 1, 5 (2009), https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/Case-Study-Surrogacy.pdf [http://perma.cc/33JP-ZKEK] (archived Sept. 27, 2014). Under Japanese law, the mother of a child is the person who gives birth. There is no legal recognition that intentional mothers are legal mothers. *See id.* at 5. Because Baby Manji was born to an Indian surrogate mother, the baby had no genetic ties to Mrs. Yamada, who no longer wanted to be a parent. *See id.* The breakup of the marriage and the refusal of the intentional mother to continue in the role rendered the baby an Indian in the eyes of Japanese law and ineligible for a Japanese passport. *Id.* On the other hand, India refused to give the baby any rights because Indian authorities could not determine which person to put on the birth certificate as the mother. *Id.* As Kari Points states:

> According to Indian law, a birth certificate requires the names of both mother and father. Although Akanksha Infertility Clinic certified that Yamada was

a divorce destroyed the commissioning family and left the baby without a legal mother, neither Japan nor India was initially willing to give the child nationality.[16] Eventually, the case was settled, giving the biological father custody of the child and the child Japanese citizenship; but the case nonetheless served to focus attention on commercial surrogacy and its many issues.[17]

The debate continues, and many sides have weighed in to frame surrogacy and give meaning to its practices and consequences.[18] For proponents of surrogacy, the ability of couples desiring children to fulfill that wish through surrogacy is a benefit that outweighs the costs.[19] For those who construe surrogacy as a primarily commercial transaction, the fear that women's reproductive abilities will be marketized and the product of their labor—children—commodified is cause for anxiety.[20] Others are willing to let women decide to enter into surrogacy and reap economic benefits from their reproductive

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Manji's genetic father, the vital records registrar was uncertain which mother should appear on the document: Yuki Yamada, Pritiben Mehta, or the anonymous egg donor. On these grounds, the Municipal Council of Anand refused to grant Manji a birth certificate and referred the case to the national level for advice. Since Yamada is not Indian, and it was unclear whether Manji's mother should be considered Indian, national offices also refused to issue a passport.

Id. at 5.

16. *See* Points, *supra* note 15, at 5–7.

17. *See* Points, *supra* note 15, at 6. Most of these issues have been about parentage and transnational surrogacy. *See id.*; *see, e.g.*, Balaz v. Anand Municipality, (2009) LPA/2151/2009 (India) (Gujarat H.C.) (discussing the nationality of a child born by an Indian surrogate under contract with a German couple); Yasmine Ergas, *Babies Without Border: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 131–36 (2013) (describing the citizenship implications in commercial surrogacy); Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 372–77 (2012) (illustrating the difficulties of surrogacy in relation to children's and parents' rights).

18. *See, e.g.*, Boyce, *supra* note 15, at 661–70 (illustrating issues with surrogate child's rights); McEwen, *supra* note 3, at 278–303 (highlighting domestic approaches and challenges of gestational surrogacy in different countries); Points, *supra* note 15, at 8 (describing social and ethical concerns of cross-border surrogacy).

19. *See* Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 55–59 (2003) (arguing that parenthood in a commodification analysis carries meaning and value beyond mere money); Elizabeth S. Scott, *Surrogacy and Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 136–42 (2009) (discussing the changing frameworks surrounding surrogacy, ranging from the fairly mainstream view that surrogacy involves harmful commodification, to the view that surrogacy is altruistic and benefits people desiring to parent).

20. *See* Scott, *supra* note 19, at 125–137 (highlighting the moral panic that arose surrounding a major American case regarding the legitimacy of surrogacy); *see also* Trevor Allis, *The Moral Implications of Motherhood by Hire*, 5 INDIAN J. MED. ETHICS 21, 21 (1997), *available at* http://www.issuesinmedicalethics.org/~ijmein/index.php/ijme/article/view/1540/3343 [http://perma.cc/Q3MV-CSFG] (archived Sept. 27, 2014) ("What we may see in the future is a class of breeder women, probably poor women, who rent their wombs to wealthy people.").

capabilities.[21] When the debates enter the transnational arena, they are complicated further. For instance, the discourse surrounding Indian surrogacy is not primarily about altruism but about commerce and financial gain.[22] Indian surrogates can earn a great deal of money relative to their yearly family income from one surrogacy.[23] Yet, the cost to those commissioning couples or individuals coming from the United States is comparatively modest.[24] And the clinics in India arranging and supervising the services are also profiting.[25] This seems like a win-win solution for all. At least economically, everyone is better off. However, as the clinics grow and expand, issues surrounding surrogacy have also expanded. Baby Manji mentioned above is just one example. Domestic regulation has been minimal and haphazard.[26] Recently, for instance, the Indian government, through a directive to its diplomatic missions, has banned the provision of services to foreign unmarried and same-sex couples through

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21. *See* Ertman *supra* note 19, at 5 (arguing that it is possible to embrace commodification for its benefits in certain situations without the need to account for power imbalances).

22. Indeed, almost all treatment of surrogacy by both mainstream media as well as by scholars has downplayed any sense of altruism expressed by surrogates in order to highlight the commercial nature of the agreement. *See* Amrita Pande, Commercial Surrogacy in India: Nine Months of Labor?, 136–37 (Jan. 1, 2010) (unpublished Ph.D. dissertation, University of Massachusetts Amherst) (on file with author) (illustrating a broker's view of commercial surrogacy as an investment similar to renting out a house); Usha Regachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 17 (2008) (describing the treatment of surrogate motherhood as an emerging market rather than technological innovation); Boyce, *supra* note 15, at 651–69 (analyzing issues of the legal treatment of surrogacy as commercial rather than altruistic); Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 276–77 (2009) ("The prevailing stereotype of American women who opt to become gestational surrogates is that they are motivated primarily by financial considerations, which is not true."); Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107, 123–24 (1992) (arguing that pregnancy contracts partly derive from socioeconomic gender inequality).

23. *See* Warner, *supra* note 13.

24. The costs for surrogacy in India are estimated to be about one-third the amount of the total procedure costs in the United States. *See* Ashok Kumar, *Surrogacy on the Rise in North India*, HINDU (Nov. 3, 2013), http://www.thehindu.com/news/cities/Delhi/surrogacy-on-the-rise-in-north-india/article5309126.ece [http://perma.cc/X6M6-ASNY] (archived Sept. 28, 2014).

25. *See* Shetty, *supra* note 11, at 1634 (suggesting that many healthcare clinics are transforming into surrogacy agencies because of financial incentives); *see also* Bhalla, *supra* note 13 (explaining that commercial surrogacy is a $400 million per year industry for fertility clinics).

26. *See* Shetty, *supra* note 11, at 1633 (describing the surrogacy industry as completely unregulated); Smerdon, *supra* note 22, at 33–34 ("[E]thics regulation of assisted reproduction technologies in India was guided solely by customary social practices within the community, the norms of human rights, and, in some cases, religious principles . . . .").

surrogacy.[27] While the latest proposed draft bill removes these barriers, it has not become law yet.[28] Current regulation jeopardizes the status of children commissioned by single and gay parents from abroad but is silent about Indian gay parents (if any).[29] To date, the government's regulation has been outward looking, more concerned with the demand-side of the business and parentage rather than the labor and supply-side.[30] The result is that there is a gap between what is occurring in the commerce of surrogacy and what is occurring in the law.

This Article seeks to explore the market for transnational surrogacy, the discourses framing surrogacy, and the specific context of Indian commercial surrogacy with the aim of proposing that surrogacy be regulated as work. It does not take up the ethics of surrogacy, on which there is a substantial literature. There are a number of normative positions on whether surrogacy is "good" or "bad" for women.[31] Here, the concern is for the surrogates, as poorer women who may benefit from surrogacy but who are most certainly being exploited as well. As such, this Article's main purpose is to better the circumstances of these women through a pragmatic feminist agenda for legal regulation that takes as given and immediately irremediable the constrained choices and lack of alternatives to commercial surrogacy. It acknowledges that the context of the Indian antinatalist developmental state is highly problematic and complicates the discussion of how best to understand commercial surrogacy. And it is likely that if the Indian state and society provided more opportunities for women, distributed wealth more evenly, and were structurally more gender equitable, then poor women might not resort to surrogacy or sex work or other forms of

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27. *See Surrogacy*, BUREAU OF IMMIGRATION, GOV'T OF INDIA, http://boi.gov.in/content/surrogacy (last visited Sept. 28, 2014) [http://perma.cc/VJ92-F9XN] (archived Sept. 28, 2014).

28. *See* The Assisted Reproductive Technologies (Regulation) Bill, INDIAN COUNCIL OF MED. RESEARCH 25 (Proposed Draft 2010) [hereinafter ART Draft Bill], http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf [http://perma.cc/39AK-USV6] (archived Sept. 28, 2014) (outlining rights for prospective donors and parents and duties for surrogates).

29. *See Surrogacy*, *supra* note 27.

30. *See* ART Draft Bill, *supra* note 28, at 25; *see also infra* note 39 and accompanying text.

31. *See, e.g.*, Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption*, 88 IND. L.J. 1223, 1278–79 (2013) (recognizing that surrogacy has great benefits and should not be prohibited); Michele Goodwin, *Reproducing Hierarchy in Commercial Intimacy*, 88 IND. L.J. 1289, 1296–97 (2013) (arguing commercial surrogacy in developing countries features an inherent economic and power imbalance between the contracting parties); Ertman, *supra* note 19, at 1 (describing surrogacy arrangements as valuable because they aid the development of families).

highly gendered, exploitative embodied labor.[32] However, the full critique of the neoliberal state cannot be undertaken here but should be understood as implicit in this work. Where it is examined explicitly is in the discussion of the economy of the surrogate family and the role of the developmental, antinatalist state in regulating surrogacy. The societal and political backgrounds have to be taken into consideration in understanding the practice and effects of surrogacy and in suggesting legal regulation.

This Article takes as given that the current social and state conditions will prevail at least in the midterm and, as such, the project is to improve the conditions of surrogates in the present. In order to achieve this, it argues that the best way to understand surrogacy is as hazardous work. This Article disagrees with calls for banning surrogacy outright because a ban forecloses a means of obtaining large financial remunerations for women who otherwise do not have such opportunities.[33] And as the ethnographies show, surrogates, though vulnerable, are not the abject, helpless victims that pro-ban advocates seem to imagine.[34] Indeed, the ethnographies reveal that none of the major frameworks used to understand surrogacy are good or complete fits for Indian surrogates.[35] In terms of regulation, then, the usefulness of the suggestions that follow from these frameworks is limited. As stated above, banning the practice or regulating it out of existence may not achieve the result desired for women's advancement. This Article also disagrees with the free market approach or the approach that simply regulates the business as healthcare or private contract. Neither of these protects surrogates sufficiently.

In suggesting regulation for the surrogacy industry, this Article looks to two countries—the United States and South Africa—to consider whether their regulatory frameworks might inform India's

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32. *See* Warner, *supra* note 13 ("And poor Indian women don't have an awful lot of choices so far as real moneymaking – to pay for school, to pay for a home – is concerned.").

33. *See* Pande, *supra* note 22, at 4 (noting that commercial surrogacy has become a survival strategy and temporary occupation for some poor rural women).

34. See *infra* note 35 and accompanying discussion on the variation in circumstances and agency among surrogates.

35. *See* Pande, *supra* note 22, at 3 ("Most empirical studies have focused narrowly on the motivations of surrogates for engaging in surrogacy and the psychosocial consequences of their actions . . . [.] An underlying reason for this narrow focus is the paucity of ethnographic material on the subject . . . . The only comprehensive ethnographies of surrogacy are Helena, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART (1994) (discussing Ragonè's (1994) study of the surrogacy programs of six US surrogacy agencies and more recently Elly Teman's work on state-controlled surrogacy in Israel."). *See generally* HELENA RAGONÈ non-economic motivations for surrogate mothers); ELLY TEMAN, BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF (2010) (exploring motivations of motherhood and surrogates).

regulation.[36] It argues that these countries' approaches have already been included to some degree in the proposed regulation in India but that they do not go far enough. India's unique context—its highly industrialized and increasingly Taylorized surrogacy industry—requires additional regulation.[37] Ultimately, it argues for a limited contract-labor approach that aims to protect the wage bargain made by surrogates while recognizing surrogacy as uniquely hazardous work that requires some specific contractual and labor protections.

Part II of this Article will examine the various discursive frameworks that have been used to understand surrogacy. These range from the extremely negative "baby-selling" frame to the positive "fulfilling dreams" frame, in which the surrogate is engaging in surrogacy as a purely altruistic venture. The different frameworks suggest different forms of regulation. As such, this section will argue that none of these frames fully capture the reality of surrogacy in India. They fail to capture the unique Indian context or account for benefits and pitfalls of that confront surrogates. Moreover, in some cases, they fail to identify the surrogate, rather than the child, as the vulnerable subject of surrogacy regulation.

Part III of the Article offers an exploration of the political economies in which Indian surrogates enter into and perform their work. Engaging in reproductive labor in an antinatalist development state, which has always viewed reproduction as a problem, creates ambivalences and may explain why the current regulation of the industry in favor of poor women is so anemic. Yet at the same time, it is important to understand also the economic context of the surrogate's family and her role as productive and reproductive agent. Relying on the development literature, Part II argues that surrogates benefit from the wages they earn through surrogacy beyond just the monetary remuneration. As such, it is important to keep in mind the economic and social effects of surrogacy on the family when proposing regulation.

Part IV of the Article looks to the United States and South Africa as examples of regulatory regimes that might inform India's lawmaking. While both of these states provide useful elements of regulation, neither country is really comparable insofar as the

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36. *See* ELLY TEMAN, THE BIRTH OF A MOTHER: MYTHOLOGIES OF SURROGATE MOTHERHOOD IN ISRAEL (2006); Pande, *supra* note 22, at 29–32 (describing the structure of India's surrogacy market); *see also* Suzanne Rico, *Surrogacy: Joyful, Frightening, Always Risky*, ATLANTIC (Apr. 17, 2013), http://www.theatlantic.com/sexes/archive/2013/04/surrogacy-joyful-frightening-always-risky/274928/ [http://perma.cc/DV43-5N27] (archived Sept. 28, 2014) ("Some states, like Arizona, Michigan and New York, don't recognize gestational surrogacy contracts, while others, like Connecticut, do. Still others, like Oklahoma and Idaho, take no stand at all[.]").

37. See *infra* notes 90–96 and accompanying discussion about the media depictions of the industrialization of surrogacy in India.

business of surrogacy is not as highly industrialized, in some cases is not commercial, and is far less stigmatized than in India. This section clarifies further that India's experience is quite singular.

Part V of the Article then turns to the regulatory framework in existence in India, which is private contractual ordering, as well as the proposed regulation through the Assisted Reproductive Technologies (2010) bill to show that neither of these approaches accounts for surrogacy as work. It makes the argument here that a contract-labor approach that introduces standard requirements into surrogacy contracts and legislates particular labor protections will be more effective in creating greater fairness in contracting, protecting women's autonomy, and reducing exploitation. As argued below, the current frameworks are partial and the failure to recognize the labor of surrogacy also prevents surrogates from being treated as workers. In other words, recognizing that surrogacy is a business should also lead to acknowledging surrogates as workers.

II. BOON/BANE/WORK: DISCURSIVE FRAMINGS OF COMMERCIAL SURROGACY AND REGULATORY APPROACHES

Surrogacy is a difficult subject that inevitably arouses strong emotional reactions whenever it appears in the public discourse. Over the years, a number of different frameworks to understand the practice have emerged and continue to emerge particularly with the growth of transnational markets in surrogacy services. These range from the highly negative "baby-selling"/commodification frame to the polar opposite of a framework that asserts surrogacy as altruism and giving the gift of life.[38] In addition, the transnational market has raised concerns that surrogacy is another form of trafficking or part of a global market of cheap female labor.[39] Invariably, the

38. *See* Ertman, *supra* note 19, at 26–40 (outlining the positive and negative concerns of surrogacy); *see also* SURROGATE MOTHERHOOD: ETHICAL OR COMMERCIAL, CTR. FOR SOC. RESEARCH 3 (2012), *available at* http://www.womenleadership.in/Csr/SurrogacyReport.pdf [http://perma.cc/G52W-KLLY] (archived Sept. 28, 2014) (describing how the contractual form complicates the choice and discretion of the surrogate). An earlier example of this anxiety is manifest in Barbara Katz Rothman, *Reproductive Technology and the Commodification of Life*, 13 WOMEN & HEALTH 95 (1988).

39. *See* Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1028 (2010). As Ryznar notes:

> India has strengthened its economy partly because of its success in attracting outsourced business. Included in this strategy has been an effort to increase medical tourism, or the travel of people for medical treatment. The Indian government has even begun issuing medical visas. An important subset of this medical tourism includes fertility tourism, which has become a $500 million industry in India.

Id. at 1016.

frameworks include a normative assumption that surrogacy is negative or positive, exploitation or selflessness, and certain forms of regulation logically follow.[40]

While many of these frames may be copresent—and they may be equally valid even as they are partial—they risk suppressing creative thinking about nuanced regulation. When offered as "the" way to understand surrogacy as they often are, they obscure the ways in which frames can intersect. In other words, no single frame captures the entire story of surrogacy as it occurs transnationally and, therefore, a more complicated picture is critical to regulatory suggestions that work for the protection of the surrogates' interests as well as that of the other parties. Although this Article will discuss the trafficking and outsourced labor frame briefly, the most important framework that is in currency is the baby-selling construction of surrogacy, attended by demands for a ban of the commercial surrogacy at both the local and international levels. Furthermore, the end of this section will take up a recurring theme that has emerged in the discourse: the (re)emergence of neocolonial oppression of third-world women—a charge that has some merit to it in today's neoliberal global economy but that fails to suggest any alternative to the structural problems it posits.[41]

A. *Baby Buying/Selling*

The equation of surrogacy with baby selling or the sale of women's reproductive capacities has been the argument made by some feminists who fear the devaluation of women's bodies and reproductive capacities through the work of market forces.[42] The proponents of this frame tend to concentrate on the transactional

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40. *See* John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 638–44 (1994) (citing to a study finding that approximately 40 percent of all surrogate applicants were unemployed or received financial assistance).

41. While we must take the reality that it is poor women, sometimes of a subordinated race, who are engaged in surrogacy into consideration, the mere raising of this point suggests few new insights to the disparities that are not already well theorized in the contexts of domestic work like nannies and maids. *See, e.g.*, Goodwin, *supra* note 31, at 1289–90 ("[R]ace exploitation and poverty are key, tolerated components of assisted reproductive technology."). Goodwin then immediately turns to India where distinctions of race—but not caste—are rendered nearly incomprehensible. *See id.* at 1291. Moreover, it is poverty that is an indispensable component, not merely a tolerated one, of surrogacy in India. *See id.*

42. *See* SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 80–90 (2007); STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE 134–81 (2003) (providing a chapter on arguments against commercial surrogacy); Stephanie Nolan, *Desperate Mothers Fuel India's "Baby Factories"*, GLOBE & MAIL (Feb. 13, 2009), http://www.theglobeandmail.com/news/world/desperate-mothers-fuel-indias-baby-factories/article4201369/ [http://perma.cc/U9TE-T4S3] (archived Sept. 29, 2014).

nature of the surrogacy agreement and the fact that the contract's particular purpose is the production of a child that will ultimately be handed over to commissioning parents.[43] The commissioning parents do not pay the full surrogate's fee until the child is born and handed over to them.[44] While the surrogate is pregnant, the commissioning parents may pay for healthcare and living expenses, but the bulk of the fee for the surrogacy is paid after the child is born and transferred.[45] Because the ultimate purpose is the production of a child through the commodified services of a surrogate's reproductive ability and because there is an exchange of payment for the child, the argument is that commercial surrogacy is, in fact, the sale of children. Whereas in transnational adoption payments to the birthmother are prohibited, commercial surrogacy explicitly allows for such a payment.[46] A classic example of this position is taken by Harvard scholar, Elizabeth Bartholet:

> Surrogacy is by its nature baby-buying, in contrast to adoption which universal law forbids any payment to the birth parents that might induce surrender. While this adoption law is sometimes violated, there is no evidence that it is systematically violated. Surrogacy systematically involves payments to birth mothers, with the payments clearly designed to induce surrender of babies and of parenting rights. Full payment of the fee to the surrogate occurs only after the surrender of parental rights. . . .
>
> Most significant, surrogacy imposes these problems and losses deliberately, creating children designed to be sold and to be cast off by their birth and often their genetic parents for others to raise. Adoption by contrast, gives existing children something hugely important, parenting, and if they suffer losses these are necessary losses, more than made up for by the gain represented by the opportunity to be parented.[47]

Many of the assumptions that are embedded in these arguments derive from the kind of surrogacy engaged in as well as the narratives accompanying U.S. cases in which surrogates asserted parental

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43. *See, e.g.*, MARKENS, *supra* note 42, at 80–85; WILKINSON, *supra* note 42; *see also* Nolan, *supra* note 42 ("The women are just sitting there producing that child with no rights on that child and no rights on their health - the contract says if you don't produce the child, you don't get the money . . . ."). One of the canonical critiques of commodification comes from Radin, who cautions against the commodification of children. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 137–40 (1996).

44. *See* Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction & Child Welfare Policy*, 8 LAW & ETHICS HUM. RTS. 103, 127 (2014); Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 514 (2010).

45. *See* Bartholet, *supra* note 44, at 127; Patton, *supra* note 44, at 512.

46. *See* Bartholet, *supra* note 44, at 127; *see also* Richard John Neuhaus, *Renting Women, Buying Babies & Class Struggles*, 25 SOCIETY 8 (1988).

47. Bartholet, *supra* note 44, at 127–28.

rights against commissioning parents. For instance, in the *Baby M* case, the surrogate was an egg donor as well as the gestator and therefore had genetic ties to the child she was carrying.[48] At the time of birth, she asserted her status as a mother against the commissioning parents.[49] In contrast to this is the classic case of *Johnson v. Calvert*, where the surrogate asserted parental rights and demanded to be declared a mother in spite of having no genetic ties to the child.[50] These cases raise the question of who is a mother, which was later settled by the courts.[51] The fact that the question had to be settled through a judicial process suggests that there is no "natural" answer and that legal status is constructed and conferred rather than based in biology.[52] In both of these cases, the controversy arose because the surrogates themselves believed themselves to be parents with rights to the child.[53] However, this may not always be the case. Many surrogates may not see themselves as "mothers" or as wanting or having any rights to the child.[54] While it is impossible to generalize across a diverse group of women and about such an affective issue as "feelings of motherhood," it is safe to say, based on interviews with surrogates, that some women are decidedly not interested in asserting parental rights or assuming the status of legal mother over the child they carry for commissioning parents.[55] In other words,

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48. *See* In re Baby M, 537 A.2d 1227, 1234 (N.J. 1988). This case generated a large literature in law reviews. *See, e.g.*, Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759 (1988) (analyzing surrogacy under a framework of privacy); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (examining treatment of social roles of parents and families with surrogacy).

49. *See Baby M*, 537 A.2d at 1236–37.

50. *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

51. *See id.*; *see also Baby M*, 537 A.2d at 1251–52; K.M. v. E.G., 117 P.3d 673, 680–81 (Cal. 2005) (making a determination of legal parenthood between a gestational mother and egg donor).

52. *See* Susan Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 291–307 (2002) (analyzing judicial decisions regarding parenthood in cases of surrogacy).

53. *See Johnson*, 851 P.2d at 778; *Baby M*, 537 A.2d at 1236–37.

54. *See* Bhalla, *supra* note 13 (noting numerous successful transactions amounting to hundreds of millions of dollars for surrogates and clinics).

55. *See id.* Even where they do see themselves as mothers, they try distance themselves from the children they are carrying. *See generally*, Amrita Pande, *"It May Be Her Eggs But It's My Blood": Surrogates and Everyday Forms of Kinship in India*, 32 QUALITATIVE SOC. 379, 386–87 (2009) (describing the surrogate's recognition of a bond with the baby and the genetic father's superior claim). Here, the argument depends on kinship that is constructed as the biological function of carrying a child and birthing it without necessarily taking into consideration that there may be other ties that bind. For instance, if the commissioning parents have no genetic ties to the child, perhaps the assertion of baby buying has more traction. However, if there are genetic ties, then is it still feasible to assert that a genetic parent is purchasing their own child from a surrogate as opposed to the service of gestation? Moreover, arguments that

those who argue that commercial surrogacy divests surrogates of their status as mothers assume that that status arises because of their biological role as gestator and in spite of the surrogate's own understanding of her role.

In fact, there is a peculiar emphasis in antisurrogacy arguments on payments to the mother in particular.[56] Commercial surrogacy is negatively contrasted with international adoption. [57] Whereas birthmothers in adoptions are not paid, other intermediaries in the chain of adoption may command sizeable fees, including the state.[58] The birthmother, therefore, has no monetary incentive to "sell" her child, even though undoubtedly she is severing her parental ties because of economic constraints to begin with. In adoption, then, brokers and the state may make money from the process while cutting out the birthmother entirely. The argument goes that because commercial surrogates are able to command some part of the surplus being generated in the surrogacy business, it taints the entire process

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kinship is not merely biological means that affective connections may exist without biology and, therefore, "buying" children may be the wrong way to approach these attempts to form families where the monetary exchange for the commissioning family is less important than the ability to parent a child. *See* 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, 209 (1996); *see, e.g.*, NAOMI R. CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES (2013) (analyzing the construction of family beyond the genetic framework).

56. *See* RADIN, *supra* note 43, at 131–53 (arguing that payment for babies creates an objectionable effect of valuation of babies and degradation of personhood, whereas altruistic adoption and surrogacy does not).

57. *See* Bartholet, *supra* note 44, at 127 (asserting that surrogacy is systemically similar to adoption but additionally requires payment for children); This discourse is evident in the promotional materials of surrogacy agencies such as Circle Surrogacy of Massachusetts:

> The surrogate fees are not about 'buying a baby' or 'renting a uterus'—they are mostly about family. You are offering family to a couple (or a single) who could never realize this dream without you. They cannot repay you in kind. No reward can truly thank you for the enormity of your gift. A thank-you note in the form of the surrogate fee is the best anyone can do. Consider this a family gift for yourself—the money is yours to put into a college fund (maybe even to further your own education), or pay off your mortgage, or take a once-in-a-lifetime vacation, or however you may choose to spend it for yourself and your family. You have changed someone else's life . . . now they want to change yours in some small way. Enjoy it.

The Circle Surrogate Process, CIRCLE SURROGACY, http://www.circlesurrogacy.com/surrogates/surrogacy-fees (last visited Sept. 29, 2014) [http://perma.cc/J94L-7M4W] (archived Sept. 29, 2014).

58. For example, country fees for international adoption can be several thousands of dollars in addition to the costs that the agencies charge for their services. *See Adoption Fees Overview*, HOLT INT'L, http://www.holtinternational.org/adoption/fees.php (last visited Sept. 29, 2014) [http://perma.cc/NK8R-4WW5] (archived Sept. 29, 2014) (describing the different types of costs and fees agencies charge to facilitate adoptions); *see also Latest Adoption Costs and Wait Time Data*, ADOPTIVE FAMILIES, http://www.adoptivefamilies.com/articles.php?aid=2161 (last visited Sept. 29, 2014) [http://perma.cc/WMX6-BGE8] (archived Sept. 29, 2014) (comparing the cost of adoption within the United States and other selected countries).

as impermissibly commodified. On a level, then, the fiction is created that one practice is not commercial or commodified while the other is. That fiction is dependent entirely on who is profiting, who is being paid, and for what service. Ultimately, the outcome of the transaction is the same: a child is transferred from one person to another in the presence or absence of existing genetic ties.

B. *Forming Families for Love and the Altruism of Surrogacy*

Altruistic surrogacy differs discursively from commercial surrogacy because it does not include a payment to the mother for the "sale" of her children.[59] This Article has already argued that this distinction and the construction of commercial surrogacy is problematic in the assumptions that it makes about the nature of the transaction. This section underscores the negative effect of reducing surrogates' bargaining power and consequently depressing wages by defining surrogacy as primarily altruistic. In this framework, the second dominant U.S. discourse on surrogacy, women are not providing services for monetary gain but rather helping those less fortunate to achieve their dream of having children.[60] The proponents who valorize the choice to become a surrogate tend to downplay the commercial nature of the arrangement in a set of moves 180 degrees from many of those resisting surrogacy as commodification.[61] They tend to give less weight to the role of money and remuneration in the decision to become a surrogate while highlighting the benefits to couples who cannot have children without the help of third parties.[62]

While altruism may be part of the reason for entering into surrogacy, it is undeniable that without the material remuneration most women would not enter into surrogacy in India, and they likely

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59. *See* Mary Anne Case, *Pets or Meat*, 80 CHI.-KENT L. REV. 1129, 1143 (2005) ("Much of what women have market power over, such as their . . . reproductive services, they have long been expected not to commodify at all. Even when monetary compensation is allowed, it is often kept low and female providers are expected to be interested in rewards other than money."); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 241–42 (2009) ("[T]he egg market is characterized by an insistence that the primary motivation of egg donors – even those being paid – is, and should be, altruism[.]").

60. *See* Krawiec, *supra* note 59, at 241–42; LISA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD 134–37 (2007) (recounting a college graduate's motivation for becoming a surrogate for a gay couple).

61. *See* MUNDY, *supra* note 60, at 136 (describing the desire of surrogates to be acknowledged for their altruism and the motivation for entering into surrogacy as wanting to do good).

62. *See* Case, *supra* note 59, at 1143–44 (observing that most egg donors list altruism as the motive for donation because agencies reject those who don't have "a good answer").

would not enter into it in the United States either.[63] In those states that allow for altruistic surrogacy, surrogates are still paid substantial money, but the payments are characterized as living subsidies, healthcare stipends, and other benefits that are not tied to the actual production of the child.[64] Surrogacy in the United States costs significantly more that it does in India in spite of it being altruistic.[65] This raises the question whether remuneration is being hidden through terminological sleights of hand. Moreover, given the expense of surrogacy in the United States, would the costs of surrogacy increase if commercial surrogacy were widely available? A cursory survey of surrogacy agencies suggests that there is not much difference in costs by state if a commissioning parent decides to use an established business because the business may operate in multiple states.[66] The only way to reduce the costs is through independent contracting and bearing its attendant risks.[67] An independent

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63. *See id.* (claiming that women are expected to value altruism in surrogacy over financial incentives); ELIZABETH S. F. ROBERTS, EXAMINING SURROGACY DISCOURSES: BETWEEN FEMININE POWER AND EXPLOITATION IN SMALL WARS: THE CULTURAL POLITICS OF CHILDHOOD 104 (Nancy Scheper-Hughes & Carolyn Sargent eds., 1998). One surrogate candidly stated to Roberts that she had a reserve price below which she would not undertake surrogacy:

> I would not have done it for $10,000. It just wasn't enough. $1.50 an hour is nothing and you are pregnant twenty-four hours a day and you cannot sleep nights and there are all kinds of problems. When you are doing it for your own self, you know you get the baby in return. So you suffer all of these things because you are going to profit in the end from this baby. Whereas a surrogate gets nothing at the end. I mean, you don't have that baby. You do need to be compensated for your time and energy and lack of energy. Like I told you, it enabled us to buy this house. At $15,000 that comes out to about $2.32 an hour. And that's not minimum wage in itself.

Id.

64. *See* Sharyn Roach Anleu, *Surrogacy: For Love But Not For Money?*, 6 GENDER & SOC'Y 30, 31–32 (1992) (arguing that the distinction between commercial and altruistic surrogacy is socially constructed rather than based on intrinsic or natural differences).

65. *See* Boone, *supra* note 4, at 683 (suggesting that Americans seek surrogates in India where surrogacy costs are cheaper).

66. *See Estimated Program Expenses*, CIRCLE SURROGACY, http://www.circlesurrogacy.com/costs/3 (last visited Oct. 4, 2014) [http://perma.cc/TQ94-AV5R] (archived Sept. 27, 2014); *see also Agency Fees and Surrogate Mother Costs*, SURROGACY SOURCE, http://www.thesurrogacysource.com/ip_fees.htm?type=Intended%20Parent (last visited Oct. 4, 2014) [http://perma.cc/8QJ6-PRBW] (archived Sept. 27, 2014). The Surrogacy Source provides access to surrogates in a number of states but does not distinguish its fees by state. Growing Generations, which has offices in California, New York, and West Virginia, gives California surrogates an additional $5,000 in compensation. The difference in rate is thus not much different in states that allow for commercial surrogacy versus those that allow only for altruistic surrogacy. *See Compensation*, GROWING GENERATIONS, http://www.growinggenerations.com/surrogacy-program/surrogates/surrogate-mother-pay/ (last visited Oct. 4, 2014) [http://perma.cc/72CA-LZEU] (archived Sept. 27, 2014).

67. In researching means of reducing costs for surrogacy, this forum suggested that independent surrogates were the only real means by which to reduce the costs. *See*

surrogate may be able to charge a bit of a premium, but if the market rate at the upper end is set by surrogacy agencies, she is unlikely to be able to garner a fee higher than that rate. In other words, surrogacy agencies with protections and experience in the field charge a specific amount for their services. A commissioning parent is unlikely to pay as much for an independent surrogate and bear additional risk in addition to the commercial rate. Arguably then, surrogacy agencies already make the market and reduce the ability of independent surrogates to garner a large profit.[68]

However, one ought to question the effect of the narratives and constructions of surrogacy on the material reality of the practice for surrogates. If all the service providers who are involved in surrogacy are receiving remuneration for their services at a market rate, why not surrogates? In other words, altruistic surrogacy might artificially depress the market rate of remuneration for the services provided by surrogates alone while allowing everyone else, including lawyers, doctors, and surrogacy agencies, to be compensated "fairly." At least theoretically, commercial surrogacy would allow surrogates to negotiate better distributions from agencies without facing the legal barriers that reduce their compensation to costs.[69]

Redefining commercial surrogacy as altruistic surrogacy in India might merely shift the distribution of payments without necessarily changing the nature of the transactions that occur. It is clear that fewer women would engage in surrogacy, but that is dependent on how much money is given to them as compensation for their altruistic services. It is entirely conceivable that agreements and payments could be structured to hide the surplus compensation in ways that are more palatable to anti-commercial-surrogacy advocates without

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Can Independent Surrogate Reduce Cost?, SURROGATE MOTHERS ONLINE, http://www.surromomsonline.com/support/showthread.php?141000-Can-Independent-Surrogate-reduce-Cost (last visited Oct. 4, 2014) [http://perma.cc/PVD2-B9BC] (archived Sept. 27, 2014); *see also Low Cost Surrogacy*, INFORMATION ON SURROGACY, http://www.information-on-surrogacy.com/low-cost-surrogacy.html [http://perma.cc/LNY6-JYLM] (archived Sept. 27, 2014) (providing ideas on how to reduce the costs of surrogacy).

68. *See Gestational Surrogacy Estimated Costs*, CTR. FOR SURROGATE PARENTING, http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=42 (last visited Oct. 3, 2014) [http://perma.cc/6PJL-S8ZP] (archived Sept. 27, 2014); *see also* Krawiec, *supra* note 59, at 244–245 (discussing how agencies affect the independent surrogacy market).

69. *See* Kraweic *supra* note 59, at 244–45. Kraweic argues that "legal rules limiting direct surrogate access to the marketplace increase the power imbalance between surrogate and intermediary, contributing to this skewed division of profits." *Id.* In other words, the restrictions amount to the inability of the surrogate to bargain for a part of the surplus generated by the agency, disadvantaging the worker who is producing the child and accepting bodily risk in the process and allowing for the corporation to benefit from her labor. *See* Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2395–96 (1995).

necessarily effecting any real change to the practices.[70] Or, it could curtail the ability of surrogates to bargain fairly for their portion of the surplus, even while they are undertaking the biggest risks and doing the actual work.

C. *Sexploitation: Domestic Work, Sex Work, and Trafficking*

In some quarters, the role of women as gestators has been evacuated of dignity and meaning to the extent that women are seen as merely incubators for babies.[71] Recently, a court battle was required in order for a pregnant woman to be taken off life support even though she was clinically dead. In spite of express wishes not to be placed on artificial support, she was kept on support because a Texas law prevents the withdrawal of life support from pregnant women.[72] The courts ordered the removal of support after the fetus was discovered to be nonviable.[73] While this event has nothing to do with surrogacy per se, the delinking of women from gestation and childbirth and some of the arguments in favor of keeping Mrs. Muñoz on support demonstrate the continued assertion of fetal rights over those of the woman carrying the fetus. In addition, such delinking

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70. *See generally* Anemona Hartocollis, *And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?ref=fashion&_r=0 (last visited Oct. 4, 2014) [http://perma.cc/6ZTD-E8R5] (archived Sept. 27, 2014).

71. For instance, comments made by Virginia Senator Steve Martin (R), referring to women as hosts for babies, drew fire from a number of quarters. *See* Nina Golgowski, *Virginia Senator Under Fire After Calling Pregnant Woman 'Hosts' to Unborn Babies*, N.Y. DAILY NEWS (Feb. 24, 2014), http://www.nydailynews.com/news/politics/va-senator-underfire-calling-pregnant-women-hosts-article-1.1700622 (last visited Oct. 4, 2014) [http://perma.cc/3WW6-3A3F] (archived Oct. 6, 2014); *see also, e.g.*, Brian Anderson, *5 Annoying Questions Same-Sex Parents Are Tired of Hearing*, ADVOCATE.COM (Aug. 7, 2014, 6:00 AM), http://www.advocate.com/commentary/2014/08/07/op-ed-5-annoying-questions-same-sex-parents-are-tired-hearing ("[T]he surrogate is not the mother. Our wonderful surrogate was the incubator."); *Get Off My Daughter's Birth Certificate, Saskatchewan Dads Tell Surrogate*, VANCOUVER OBSERVER (Sept. 13, 2011), http://www.vancouverobserver.com/world/canada/2011/09/13/get-my-daughters-birth-certificate-saskatchewan-dads-tell-surrogate (last visited Oct. 4, 2014) [http://perma.cc/UDR9-ZEFU] (archived Sept. 27, 2014) (reporting on the granting of a couple's request to remove the gestational mother from the birth certificate); *Breeders: A Subclass of Women*, CTR. FOR BIOETHICS & CULTURE (2014), http://breeders.cbc-network.org (last visited Oct. 4, 2014) [http://perma.cc/LL92-BHFG] (archived Sept. 27, 2014) (illustrating how surrogacy involves a women renting out her entire self).

72. *See* Texas Advance Directives Act, TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2003).

73. Manny Fernandez, *Judge Orders Hospital to Remove Pregnant Woman From Life Support*, N.Y. TIMES (Jan. 24, 2014), http://www.nytimes.com/2014/01/25/us/judge-orders-hospital-to-remove-life-support-from-pregnant-woman.html (last visited Oct. 4, 2014) [http://perma.cc/C9EM-ZSWY] (archived Oct. 4, 2014).

advances commodification, in which contract terms might erode women's reproductive rights and autonomy further.[74] There has been an ongoing commodification of women's bodies as purveyors of reproductive services but also as purveyors of raw materials, in the form of eggs.[75] Similar commodification has happened with men in the sale of sperm to sperm banks.[76] There are real concerns that the state will take an argument for commodification in perverse ways that disenfranchise women rather than enhance their autonomy.

Another form of commodification that has provoked concern is prostitution. In spite of surrogates' careful separation of their activities from those of sex work, opponents seeking a ban raise arguments against commodification that sound very much like arguments made by sex-work abolitionists.[77] Indeed, one can envision a spectrum of gendered activity that has been commodified and outsourced, from childrearing and housekeeping to sex work and now childbearing.[78] All the traditional activities of a wife can be found in some market. Furthermore, the fact that wives' economic contributions have received less value precisely because they are not market-determined has been a ground for contestation among

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74. *See id.* Furthermore, on a large canvas, the denigration of women as merely incubators, as one court has framed it, is undeniably misogynistic even while it is challenging stereotypes that may inhibit women from being seen as more than mothers. Nevertheless, that women can be simply hired to do the labor while gay men "parent"—or, as some would have it, "mother"—obscures the very real connection between woman and child that is increasingly finding a biological basis and not just a cultural or social one. Another way to look at it is that, in some versions of this frame, women altruistically perform an instrumental service for families who cannot bear children. Their service is alternatively lauded as selfless or denigrated as "no big deal," where the woman is reduced to a service provider for hire. *See* Darren Rosenblum, *Unsex Mothering: Toward A New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 68–71 (2012) (making the case that the construction of mothering can and ought to be decoupled from biology). This argument is very persuasive in that it challenges the many ways in which social constructions of mothering have been means of disciplining and confining women. However, there are also downsides to the position that mothering can be entirely decoupled from biology, in that it may lead to assertions that there is no biological component to "mothering," as such the affective bonds between woman and child are entirely constructed. This may lead to the view that women can act as "mere" incubators for gay men.

75. *See* MUNDY, *supra* note 60, at 108–26 (discussing sperm and egg donations).

76. *See id.* (describing the evolution of sperm banks).

77. *See* PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 25–26 (2011). In her discussion of the abolitionist position, Kotiswaran notes that the notion of harm is vital to the abolitionist position and that market-mediated objectification where the services are commodified present the greatest form of harm whether violence is involved or not. She says, "[c]ommodification in and of itself is harmful, so that the conditions under which sex workers commodify are irrelevant." *Id.* at 25.

78. *See id.*

feminists who have demanded wages for housework.[79] For decades, the proper valuation of women's work, particularly as it impacts women at divorce and retirement, has been a key focus of activists and academics even if they have not demanded wages.[80] That being the case, what are the viable arguments that formally paying a nanny a market wage is justifiable but not a surrogate? On what philosophical and moral basis should the wages for housework movement from the wages for reproduction claims be separated? At what point is the line drawn between acceptable commodification of particular kinds of gendered and embodied labor and others? If domestic work and sex work can be chosen by women as a form of labor with the recognition that the structures of governance, heavily biased against the poor and women, prevent alternative choices for economic independence and advancement, then why not surrogacy?

Trafficking, like sex work, has become a subset of the "women-for-sale" frame in which Third World or underprivileged women become the purveyors of bodily services through the agency of "traffickers" or other middlemen and women.[81] The recent literature on trafficking is increasingly nuanced, recognizing differences between voluntary migration for sex work and involuntary sex trafficking and servitude. This literature has pushed back on the abolitionist arguments resting on ideals of propriety and morality, which do not stray far from the Dickensian in their preoccupation with redeeming fallen women or preventing them from becoming victims to male predation.[82] Some scholars have argued that the abolitionist position does not sufficiently give weight to the rational choice that women make to do what may be hazardous, morally questionable work. The distinctions that scholars make between voluntary migration and involuntary trafficking complicate the framework.[83] Indeed, there are different approaches suggested by

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79. *See id.*; *see also* SYLVIA FREDERICI, REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION AND FEMINIST STRUGGLE 15–22 (2012) (describing wages for housework as the "only revolutionary perspective from a feminist viewpoint").

80. *See generally* DRUCILLA BARKER & SUSAN FEINER, LIBERATING ECONOMICS: FEMINIST PERSPECTIVES ON FAMILIES, WORK, AND GLOBALIZATION (2004).

81. *See* Michele Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1769–78 (2010) (discussing prohibitions on prostitution and sex trades).

82. *See id.* (discussing what effects criminalization of prostitution has on the women involved); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1663–72 (2010) (comparing neoabolitionist views to nonabolitionist views).

83. *See* Chuang, *supra* note 82, at 1672–77 (discussing whether voluntary migration for sex work should be included in the definition of sex trafficking); *see also* Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J.L. & GENDER 225, 228, 238–39 (2011).

trafficking and migration, ranging from abolition, criminalization of the demand-side, and the rescue of the suppliers to approaches that seek to view sex work primarily as work.[84] As such, the trafficking framework offers twin insights that commercial surrogacy in the developing world could be a form of gender exploitation, but also that it might be redeemed in some measure if women have agency in choosing it and it can be regulated and made safer as "work."

D. *Outsourced and Cheap Labor*

With the increasing globalization of production, focus on sweatshops and factory work and its conditions have been of great interest to feminists.[85] The framework of outsourced labor conjures up visions of women in factory-like conditions producing children.[86] The conditions of their work are perilous and there are no social or labor protections.[87] This framework suggests that women are interchangeable workers that are easily replaceable. In Asia in particular, young, female factory workers are ideal workers, with nimble fingers and docile temperaments, whose ability to negotiate for better conditions and wages is undercut by their gender attributes.[88] Moreover, societal expectations of gendered behavior prevent them from taking stands against the owners and managers of the factories.[89] To some extent, this is the kind of picture put forth by media about surrogates.[90] A number of stories have highlighted the

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84. *See* KOTISWARAN, *supra* note 77, at 212–49.

85. *See* Saskia Sassen, *Global Cities and Circuits of Survival, in* GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 254–74 (Barbara Ehrenreich & Arlie R. Hochschild eds., 2002) (discussing the globalization of production and the role of low wage women workers). *See generally* Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1 (2011) (discussing transnational regulation to prevent child labor).

86. *See* Tracie Egan Morrissey, *Outsourcing Your Pregnancy to India is the Financially Savvy Choice*, JEZEBEL (Apr. 11, 2011, 12:20 PM), http://jezebel.com/outsourcing-your-pregnancy-to-india-is-the-financially-472457746 (last visited Oct. 4, 2014) [http://perma.cc/EV32-GJVD] (archived Sept. 27, 2014); *India's Booming Rent-a-Womb Industry*, DAWN.COM (Oct. 4, 2013, 12:29 PM), http://www.dawn.com/news/1046936/indias-booming-rent-a-womb-industry (last visited Oct. 4, 2014) [http://perma.cc/Y6QJ-SUF3] (archived Sept. 27, 2014) (comparing the conditions surrogates in India experience to baby factories).

87. *See generally* Pande, *supra* note 22.

88. *See generally id.*

89. *See generally id.*

90. *See* Sandra Schulz, *The Life Factory: In India, Surrogacy Has Become a Global Business*, SPIEGEL ONLINE INT'L (Sept. 25, 2008, 12:45 PM), http://www.spiegel.de/international/world/the-life-factory-in-india-surrogacy-has-become-a-global-business-a-580209.html (last visited Oct. 4, 2014) [http://perma.cc/A79W-4REH] (archived Sept. 27, 2014) (providing a further example of how the media portrays Indian surrogacy); *The Baby Factory: In a Huge Clinic in India, Hundreds of Women are Paid £5,000 Each to have Western Couples' Babies*, DAILY MAIL (Oct. 1, 2013, 6:40 PM), http://www

surrogates living in dorms, rows of beds where they are lined up incubating another family's child very much like a factory.[91] And in the discourse, there have been numerous references to "outsourcing," factory work, and globalization.[92] For instance, one author remarks, "Images of pregnant women lying in rows, or sitting lined up, belly after belly, for medical exams look like industrial outsourcing pushed to a nightmarish extreme."[93] News sources have capitalized on surrogacy by sensationalizing it: "*India takes outsourcing to a new level as women rent out wombs to foreigners*"[94] reads one headline, while another proclaims, "*India's new outsourcing business—wombs.*"[95] The use of these particular words ties surrogacy discursively to the other forms of outsourced work that India provides like call centers and customer service or cheap ready-made garments.[96] The discourse metonymically calls up factory work, low wages, and globalized exploitation.

The major problem with this framework is that it does not capture the real benefits that surrogates reap from engaging in this kind of work. It may be true that the conditions of work and the status of surrogates can be improved—this Article will argue as much below—however, they do not suffer the kind of wage exploitation that female garment workers do, for a comparison.[97] The frame is helpful

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.dailymail.co.uk/news/article-2439977/The-baby-factory-In-huge-clinic-India-hundreds-women-paid-5-000-Western-couples-babies.html [http://perma.cc/ QW9S-2Y2H] (archived Sept. 27, 2014) (showing the media's portrayal of Indian surrogacy).

91. *See* Schulz, *supra* note 90; *The Baby Factory*, *supra* note 90.

92. *See* Schulz, *supra* note 90; *The Baby Factory*, *supra* note 90 (giving examples of the many international surrogacy seekers).

93. Warner, *supra* note 13.

94. *See* Ian Leech, *India Takes Outsourcing to a New Level as Women Rent Out Wombs to Foreigners*, DAILY MAIL (Nov. 10, 2007, 12:07 AM), http://www.dailymail.co.uk/news/article-492733/India-takes-outsourcing-new-level-women-rent-wombs-foreigners.html [http://perma.cc/FU4F-T7Y8] (archived Oct. 4, 2014).

95. *See* Sudha Ramachandran, *India's New Outsourcing Business Wombs*, ASIA TIMES (June 16, 2006), http://www.atimes.com/atimes/South_Asia/HF16Df03.html [http://perma.cc/T3N6-RAHB] (archived Oct. 4, 2014).

96. *See India's Outsourcing Business: On the Run*, ECONOMIST (Jan. 19, 2013), http://www.economist.com/news/special-report/21569571-india-no-longer-automatic-choice-it-services-and-back-office-work-turn [http://perma.cc/87PS-HKW8] (archived Sept. 27, 2014); Manu Joseph, *How India Became an Outsourcing Magnet*, N.Y. TIMES (Mar. 28, 2012), http://www.nytimes.com/2012/03/29/world/asia/29iht-letter29.html?_r=0 [http://perma.cc/KQ6G-VFFQ] (archived Sept. 27, 2014).

97. *See, e.g.*, Alessandra Mezzadri, *Indian Garment Clusters and CSR Norms: Incompatible Agendas at the Bottom of the Garment Commodity Chain*, 42(2) OXFORD DEVELOPMENT STUDIES 217, 217–18 (2014), *available at* http://phdtree.org/pdf/43780914-indian-garment-clusters-and-csr-norms-incompatible-agendas-at-the-bottom-of-the-garment-commodity-chain/ [http://perma.cc/VVH9-3SLZ] (archived Sept. 27, 2014) (discussing India's garment industry). *See generally* Gethin Chamberlain, *India's Clothing Workers: 'They Slap Us and Call Us Dogs and Donkeys'*, GUARDIAN (Nov. 24, 2012, 7:06 PM), http://www.theguardian.com/world/2012/nov/25/india-clothing-workers-slave-wages [http://perma.cc/6DM7-8XXF] (archived Oct. 4, 2014) (reporting that garment workers in Bengaluru were paid 22 paisa an hour which amounts to $0.004 an hour); Tripti

in highlighting the problems that surrogates face as a subsection of workers in a highly globalized economic system: the problems of bargaining power and autonomy. However, the fact that surrogates are paid very high sums for their services compared to the workers around them who work in manufacturing or in other service industries undercuts the seamless narrative of exploitation. It complicates the story, and many proponents of the frame have failed to acknowledge this point.

E. *Neocolonial Oppression of Women of Color*

A final word about frames is in order here about an ongoing charge made against commercial surrogacy: that it is a form of neocolonial oppression of women of color.[98] Anecdotally, that claim has been made at a number of presentations of this Article at conferences and it is worth considering. The assumption behind this charge is that the primary consumers of commercial surrogacy in the third world are white women from the Global North.[99] Further, one feels compelled to ask what precisely is meant by "neocolonial" oppression? For postcolonial theorists, that charge has been one aimed at exposing the global economic disparities between North and

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Lahiri, *What to Pay the Maid*, DELHI J. (Aug. 5, 2012, 9:00 AM), http://blogs.wsj.com/indiarealtime/2012/08/05/delhi-journal-what-to-pay-the-maid/ [http://perma.cc/B7MB-4W2V] (archived Sept. 27, 2014) (discussing the lack of a uniform market wage for maids); Anna McMullen, *India Human Rights Trial: Workers Speak Out*, LABOUR BEHIND THE LABEL, http://www.labourbehindthelabel.org/issues/item/1104-india-human-rights-trial-hears-fashion-workers-woes [http://perma.cc/NAZ4-RMH3] (archived Sept. 27, 2014).

98. *See* Monica J. Casper, *Reproductive Tourism*, FEMINIST WIRE (Apr. 13, 2011), http://thefeministwire.com/2011/04/reproductive-tourism/ [http://perma.cc/CN5A-SX6M] (archived Sept. 27, 2014) (expressing criticism of reproductive tourism); Laufer-Ukeles, *supra* note 31, at 1273 (underscoring the colonial legacy of hierarchy between white and brown women by reference to racial difference); Venkatesan Vembu, *Rent-a-Womb Trend is a Form of Neo-Colonialism*, DAILY NEWS & ANALYSIS INDIA (July 24, 2010, 12:47 AM), http://www.dnaindia.com/india/interview-rent-a-womb-trend-is-a-form-of-neo-colonialism-1413754 [http://perma.cc/4Y8Q-GFUJ] (archived Sept. 27, 2014). Interestingly, there are more people coming to the United States for surrogacy than there are Americans going to India for surrogacy. *See* Jennifer Kirby, *These Two Americans Want Babies Through Indian Surrogates. It's Not Been Easy*, NEW REPUBLIC (Dec. 10, 2013), http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico (last visited Oct. 4, 2014) [http://perma.cc/9HTD-PFKA] (archived Sept. 27, 2014) (citing a recent report finding that 4 percent of U.S. births are for foreign parents, whereas the percentage of U.S. parents receiving children from foreign surrogates is much lower); *see also* Gayatri Jayaraman, *The Baby Factory*, INDIA TODAY (Sept. 2, 2013, 1:47 PM), http://indiatoday.intoday.in/story/surrogacy-blooming-business-in-gujarat-shah-rukh-aamir-khan/1/301026.html [http://perma.cc/9L2F-AGBR] (archived Sept. 27, 2014) (noting that a third of the children go to nonresident Indians, another third to Indians, and the remainder to foreign couples).

99. *See, e.g.*, Laufer-Ukeles, *supra* note 31, at 1273; Bhalla, *supra* note 13 (asserting that Indian surrogate clinics service families in the U.S., Britain, and Australia).

South upheld through violence as well as international legal and political means.[100] The term seeks to describe a particular extractive relationship between colonies and their colonial overlords that continued into the period after decolonization in spite of vigorous attempts at restructuring that relationship.[101]

The surrogacy industry is part of a globalized world economic order that continues to be exploitative of the Third World overall. But to assert that all industries that export goods or services are "neocolonial" is too much of a generalization.[102] Furthermore, given that many of the consumers of surrogacy services are either nonresident Indians or resident Indians, it is difficult to sustain such a generalization that flattens out the complexity of the industry and its practices.[103] Certainly, exploitation is occurring on one level. This Article takes that as a given. Its aim is to ameliorate that exploitation. However, it is not a particularly illuminating approach to couch surrogacy as part of a North-South exploitation that fails to take into account the very significant local actors—the clinics, the agents, the surrogates, and the state—that have largely cocreated this industry and are its chief beneficiaries. While families in the West may obtain a child, it is hard to claim that they are *profiting* through surrogacy unless one equates the child to a good that has exchange or even use value.[104] But surely, there is profit, and some are being made enormously wealthy by it. Rather than focusing on the wealth disparities between the Northern commissioning parents and the Southern surrogate, this Article takes a more broad approach to redistribution by examining the role of multiple actors in the business that may not follow such a unilinear geographic trajectory.

None of the above framings of surrogacy provide a complete picture of the reality of surrogates' lives. There are serious

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100. There is a vast literature on postcolonialism. For some canonical examples, see generally PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE (25th ed. 1993); FRANTZ FANON, WRETCHED OF THE EARTH (1963); RANAJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA (1997); EDWARD SAID, ORIENTALISM (1979); GAYATRI SPIVAK, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE (C. Nelson & L. Grossberg eds., 1988). For excellent recent postcolonial contributions, see generally DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000); VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD (Howard Zinn ed., 2007); VIJAY PRASHAD, THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH (2012); ACHILLE MEMBE, ON THE POSTCOLONY (2001).

101. *See* PRASHAD, THE DARKER NATIONS, *supra* note 100, at 62–74 (discussing developmental economics in postcolonialism).

102. Indeed, this would foreclose the possibility of developing countries to enter into global markets at all.

103. *See* Jayaraman, *supra* note 98 (discussing proposed surrogacy regulation).

104. *See, e.g.*, RADIN, *supra* note 43, at 137–40 (discussing the problems of valuing children on the market).

shortcomings to each of them. One does not have to view the services provided by a surrogate to a genetically related parent as baby selling. Nor is the surrogate disinterested in the monetary remuneration she can command for her services. She is not abject and without agency. The majority of surrogates that have been interviewed have not been forced to undertake this work through the kinds of violence that trafficked women may face.[105] Moreover, they are paid a very substantial amount in Indian terms.[106] Yet at the same time, surrogates who are profiting from their reproductive capacities are invariably poor or struggling and undereducated.[107] To fully understand surrogacy and to suggest appropriate regulation, a better grasp of the Indian state's relationship to poor women and reproduction as well as greater sensibility to the lives of surrogates and their economic roles in the family is indispensible. The sections below discuss these contexts in greater detail.

III. THE POLITICAL ECONOMY OF SURROGATE LIVES IN A DEVELOPMENTALIST AND ANTINATALIST STATE

The rise of the Indian surrogacy market is ironic in many ways. India, a country that has spent much of its independence touting the benefits of population control and sometimes forcing measures such as sterilization on men and women, all in aid of economic development, has discovered a source of income in the very reproductive capacity among the very class of women it has

105. *See* Pande, *supra* note 22, at 18–19. There has been some suggestion that the women who are undertaking surrogacy have been pressured to do so by family. However, this seems to be based on stereotypes about Indian women as oppressed by their husbands and extended family and generalized from a few accounts of such pressure without any substantial documentation. *See, e.g.*, Laufer-Ukeles, *supra* note 31, at 1272–73 (citing an article by Ryznar which, in turn, cites a news report, a second news report, and Amrita Pande's work, which collectively presents a very complex picture). This is not to say that Laufer-Ukeles' surmise is entirely wrong. The gender inequalities that exist in India have been well theorized and explored. *See generally* NIVEDETA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004) (addressing core problems in Indian law that create gender inequality); RAJESWARI SUNDER RAJAN, THE SCANDAL OF THE STATE: WOMEN, LAW, AND CITIZENSHIP IN POSTCOLONIAL INDIA (Inderpal Grewal et al. eds., 2003) (describing how the laws of India create gender inequality). However, the generalization misses important nuances within households and among women. Not all women are powerless pawns of their husbands and families, and, indeed, without further study, we cannot assert that a majority of surrogates are such pawns. Even if women undertake surrogacy to help their families, this does not make them necessarily subservient.

106. *See* Pande, supra note 22, at 61, 64, 67–68, 74, 78.

107. *See* Pande, *supra* note 22, at 94.

attempted to curtail.[108] That stance toward lower-income, lower-class/caste women explains the state's ambivalence towards regulating surrogacy and is important to keep in mind when proposing legislation.[109] This section maps out two regulatory terrains on which the struggles over surrogacy occur. The first context is the state itself, which has a stake both in preventing the "rampant" fertility of underprivileged women as well as in the income that might be generated through surrogacy. These mixed motives may make regulation harder depending on which framework is chosen. The second context is the economy of the surrogate's household. The family economy is tied intimately to the larger market and state; exploring this context gives scholars and government regulators a better understanding of why women enter into surrogacy agreements and how to best manage that activity.

A. *Defining the Regulatory Terrain: Globalized Women in an Antinatalist Developmental State*

Surrogates' lives are embedded in a complex web of associations and relationships, including a relationship with the state. If family associations are important to understand before structuring regulation, then so is this relationship of citizen and subject to government and legal authority. For decades, the state has been engaged in a project of development that has at times been carried forward violently on the bodies of poor Indian women.[110] In the 1970s, during the Emergency, for instance, programs of forcible sterilization were undertaken in rural areas that left thousands of men and women unable to bear children.[111] Moreover, the discourse of development has been woven in with discourses of population control. The state, along with international development partners and international financial institutions, has considered population a

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108. *See* S.P. Sathe, *Sexuality, Freedom, and the Law*, *in* REDEFINING FAMILY LAW IN INDIA 193–98 (Parashar & Dhanda eds., 2008); Pande, *supra* note 22, at 89–90 (discussing India's family welfare planning initiatives).

109. *See* Sathe, *supra* note 108, at 193–95.

110. *See* Malika Basu, *Gender Focus in Resettlement Planning*, *in* MANAGING RESETTLEMENT IN INDIA: APPROACHES ISSUES, EXPERIENCES 215–28 (Mathur ed., 2006) (discussing the gendered impact of population displacement as a result of development projects like the Sardar Sarovar dam in the Narmada Valley); Sathe, *supra* note 108, at 193–95; *see also* Bhalla, *supra* note 13; CHANDRA TALPADE MOHANTY, FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY 149–52 (2003) (citing Maria Mies' study on the Narsapur lacemakers and the fact that women bear the impact of development processes).

111. *See* MICHELLE GOLDBERG, THE MEANS OF REPRODUCTION: SEX, POWER, AND THE FUTURE OF THE WORLD 82–83 (2009) (discussing the sterilization requirements put in place in 1975); Sathe, *supra* note 108; Pande, *supra* note 22, at 89–90 (elaborating on the sterilization that took place in the 1970s).

major obstacle to development and poverty reduction. [112] Furthermore, it has actively sought to both disincentivize and punish Indians who have larger families. For instance, the Supreme Court of India has upheld a law that prevents people who have more than two children from holding public office.[113] The pressure to reduce the population has been squarely placed on women of lower caste and poor communities.[114] Health workers that visit rural villages are trained to disseminate information about family planning, sterilization, and other birth control methods. It is in this context of the developmental state that has propagated a formula that development = poverty reduction = population control—in other words, an incredibly antinatalist state—that surrogacy is being practiced.[115] For instance, the Indian judiciary has remarked,

> The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the Development Model adopted by National Public Policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, the population control assumes a central importance for providing social and economic justice to the people of India.[116]

The point here is that women's reproductive capacity, which has been a source of consternation and repeated intervention, has been tied negatively to "social and economic justice."[117] But now, that very same reproductive capacity may be instrumentalized by the state as part of a neoliberal economic agenda that places a premium on producing revenue as long as the children that are born are not part of the surrogates' families. What does it mean for poor women's reproductive capacity when it goes from a negative drain on

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112. *See* Sathe, *supra* note 108, at 193; Jennifer Aimee Sandoval, Labor Pains: An Exploration of the Complex Roles of Identity, The Body, and Policy in Surrogacy Discourses in India, at *12 (July 2010) (unpublished Ph.D. dissertation, University of New Mexico) (on file with author). *See generally* TIM DYSON, ROBERT CASSEN & LEELA VISARIA, TWENTY-FIRST CENTURY INDIA: POPULATION, ECONOMY, HUMAN DEVELOPMENT, AND THE ENVIRONMENT (2005).

113. *See* Javed & Ors v. State of Haryana & Ors, A.I.R. 2003 S.C. 3057 (India).

114. *See* Sathe, *supra* note 108.

115. *See* Pande, *supra* note 22, at 22 (addressing the antinatalist state).

116. Panwar v. State of Rajasthan & Ors, 2013 (Raj.), *available at* http://indiankanoon.org/doc/38693636/ [http://perma.cc/X3EC-KH6L] (archived Jan. 5, 2015) (citation omitted).

117. *See id.*

development and the economy to a possible positive benefit? And it is only positive insofar as the women who produce these children do not keep them within their own family but produce them for another paying family. One possible result of commercial surrogacy is that women who are surrogates may be denigrated for having more than two children of their own but also perversely may be valued as revenue earners for precisely the same ability to reproduce if they decide to bear children for wealthier people. If there has been a commodification or industrialization of women's reproductive capabilities, it does not follow that such a revenue-producing laborer will be protected because reproduction itself is treated ambivalently by the state.[118]

Given that the state has long invested in trying to control reproduction through coercive means and that it has continued to fail to adequately protect poor women in terms of healthcare, maternal mortality, and access to work, feminist notions that the state will intervene positively on behalf of surrogates to provide this support without vigorous advocacy is unrealistic. [119] The kinds of interventions and regulations enacted thus far have not proven to prioritize vulnerable workers at all.[120] To wit, feminist agendas about surrogacy must reflect the realities of a state that does not care about these women nor about regulating the surrogacy market to protect surrogates over the clinic owners or commissioning parents. Because the state benefits economically, feminist calls for bans based on exploitation are unlikely to be convincing or achievable even if they were desirable, which this Article will argue they are not. But this does not mean that calls for prosurrogate, targeted intervention cannot be made. They can and should be made. But before effective regulation can be proposed, it is imperative to understand the view of women as unproductive workers and how this role may change through surrogacy.

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118. *See* Kathleen Parker, Op-Ed., *The Exploitation of Surrogate Mothers*, WASH. POST (May 24, 2013), http://www.washingtonpost.com/opinions/kathleen-parker-the-exploitation-of-surrogate-mothers/2013/05/24/90bc159e-c4b0-11e2-8c3b-0b5e9247e8ca_story.html?hpid=z2 [http://perma.cc/9L2F-AGBR] (archived Sept. 27, 2014).

119. *See* MOHANTY, *supra* note 110, at 145–60 (examining the way poor immigrant women are traditional treated in working environments); Prashant Kumar Singh, Rajesh Kumar Rai & Chandan Kumar, *Equity in Maternal, Newborn, and Child Health Care Coverage in India*, GLOBAL HEALTH ACTION (Sept. 10, 2013), http://www.globalhealthaction.net/index.php/gha/article/viewFile/22217/pdf_1 [http://perma.cc/FP2P-BDCW] (archived Sept. 27, 2014) (discussing the various levels of health care available to those in different economic classes); Maternal and Child Health, POPULATION FOUNDATION OF INDIA, http://www.populationfoundation.in/areas-of-intervention/maternal-and-child-health (last visited Oct. 4, 2014) [http://perma.cc/EW84-DBDN] (archived Oct. 4, 2014).

120. *See* Sandoval, *supra* note 112, at 172 (addressing the weaknesses of current regulations).

B. *The Domestic Economy of the Indian Surrogate's Family*

In order to comprehend the impact of the compensation and benefits earned through surrogacy, the economic circumstances of the majority of poor women must also be understood. The development literature from South Asia provides an excellent background that demonstrates that surrogacy, though dangerous and even exploitative, can nevertheless be a rational and preferable economic choice. The vast majority of women who work in the home are not considered "productive" members of the family in the remunerative sense—that is, their labor is not waged—but rather occupy traditional homemaking roles.[121] The division of labor in the home for most poor Indian women is, therefore, the typical breadmaker/breadwinner dichotomy, with women doing housework and childrearing while husbands are expected to earn a wage outside the home. Women living in extended families may be subordinated to the husband and his family, including mother-in-law, father-in-law, and siblings-in-law. The form of subordination can vary within households, but from the development literature, it is well established that poor women who are primarily engaged in domestic work and reproduction eat fewer calories than their husbands, sometimes forgoing food to feed their children.[122] They may work several more hours at tedious work than men who work outside the house. They are expected to supplement the household income if they can through home crafts, foraging, and growing food in kitchen gardens. The burdens of domestic labor are also borne unequally by girl children, who are required to do labor in the household while brothers may be schooled or put to work outside the home.[123]

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121. *See* NAILA KABEER, REVERSED REALITIES: GENDER HIERARCHIES IN DEVELOPMENT THOUGHT 118–21 (1994) (discussing various roles of women in contributing house work and labour); MOHANTY, *supra* note 110 (discussing how the work of housewives is traditionally treated).

122. *See* SHAHID ASHRAF & TAUQEER ALAM FAROOQI, FOOD SECURITY THROUGH IMPROVING RURAL FEMALE EMPLOYMENT—NEED TO DEVELOP GENDER SPECIFIC STRATEGIES AND INSTITUTIONS IN POVERTY AND FOOD SECURITY IN INDIA: PROBLEMS AND POLICIES 164–66 (M.S. Bhatt ed., 2005) (discussing female involvement in agriculture and food security); KABEER, *supra* note 121, at 103–04 (analyzing the nutritional health of poor females with families); Kiran Sharma, *Women, Poverty and Food Security in India*, COUNTER CURRENTS (Apr. 10, 2012), http://www.countercurrents.org/ksharma100412.htm [http://perma.cc/H6G-39B3] (archived Sept. 27, 2014) (noting that in poor households, women and girls tend to be undernourished). *See generally Gender Equality & Food Security: Women's Empowerment as a Tool Against Hunger*, ASIAN DEVELOPMENT BANK (2013), http://www.fao.org/wairdocs/ar259e/ar259e.pdf (last visited Oct. 4, 2014) [http://perma.cc/AC5H-W26H] (archived Sept. 27, 2014).

123. *See* ASHRAF & FAROOQI, *supra* note 122, at 170–71 (discussing women's participation in decision making).

Because the work that is done within the home produces little if any money, women lack control over household income or decision making about its distribution. Whatever is earned is often aggregated into the income of the male, and its allocation is then decided by the "head" of the household. This reality has been well documented and theorized by development economists.[124] Countering the received wisdom that families work altruistically to distribute resources, feminist economists have shown convincingly that the power dynamics within a traditional gendered household that positions the man as the head of the household more often than not results in the disenfranchisement of women from decision making about those resources.[125] The allocations are not arrived at through consensus but are imposed by the male who controls wages and other earnings. This explains why women consume fewer calories than men while doing more labor, why girl children are often not schooled in favor of boys, and why women and girls perform longer hours of labor than males.[126] This is not to suggest that women have no power within the family. It is to suggest that their power is contingent and subject to that of their husbands in the vast majority of traditional families. The literature shows that circumstances vary with the degree of education and independent wealth of the wife and whether she commands a decent wage of her own. Unlike in industrialized nations, there has been less advancement in understanding work in the home as "work" per se that deserves to be taken into account as material contribution to the family or remuneration at divorce.[127] Rather, these forms of

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124. *See id.*

125. *See* KABEER, *supra* note 121, at 101–15 (discussing economic fallacies about intrahousehold altruism and decision making); Bina Aggarwal, *Bargaining and Gender Relations: Within and Beyond the Household*, 3 FEMINIST ECON. 1, 14–20 (1997) (discussing intrahousehold gender dynamics and bargaining as it pertains to women's role in the household).

126. *See* KABEER, *supra* note 121, at 101–15; Aggarwal, *supra* note 125, at 1, 14–20.

127. The law has recently been amended to allow women to obtain 50 percent of marital property at divorce. *See Woman's Share in Marital Property: Is the Law Women-friendly and Men Un-friendly?*, ECON. TIMES (Sept. 1, 2012, 1:03 PM), *available at* http://articles.economictimes.indiatimes.com/2012-09-01/news/33535349_1_marital-property-hindu-marriage-act-marriage-legislation [http://perma.cc/W9JT-J7VT] (archived Sept. 29, 2014). For a general discussion of the historic law and attitudes towards wages and property, see Jhuma Sen, *Matrimonial Property Rights: Is India Ready for A Law*, 1 J. INDIAN L. & SOC. 129 (2009), http://jils.ac.in/wp-content/uploads/2011/12/jhuma-sen1.pdf [http://perma.cc/64A4-KQSG] (archived Oct. 5, 2014):

> Majority of Indian women are illiterate, the bulk of Indian women work in unorganized sectors and are grossly underpaid. Majority of women also hold almost no property in their own name. Barring some exceptions, majority of Indian women continue to present a deplorable picture of dwindling in the lowest rung of the economic, social and political ladder. Ineffective and inadequate implementation of existing laws results in the inferior status of women in the society. In spite of constitutional guarantee of equality, many

labor that allow for husbands to work and that result in the reproduction of the labor force continue to be undervalued in India.[128]

The benefits of work, wage earnings, and property have been the focus of gender and development studies for the last three decades, and a number of insights from that work are relevant to the surrogacy context. First, there is a well-documented literature that shows women who are able to bring wages or property into a family are better off in terms of household decision making and power than women who are entirely dependent on their spouses or extended families.[129] Doing work that has a market-determined value serves to elevate women's status in their households by giving them access to money that can be controlled and allocated by them. That decisional power is important in the home hierarchy. Second, women who bring property to a marriage similarly enjoy greater status and power within their households.[130] Property ownership has also been shown as protective against domestic violence and divorce; that is, women with property are less likely to face violence in the home or to be divorced by their spouses.[131] Thus, women who either bring property

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gender biased legislations continue to view women through a feudal lens thereby threatening to destroy the very foundation of constitutional mandate of equality.

In the patriarchal Indian society, it is customarily accepted that a woman belongs to her husband's family upon marriage. However, a woman's right to property in her matrimonial home is almost non-existent. The Indian wife is offered little help to be economically independent. This article confines itself to a study of economic rights of Indian women within the family structure especially after the breakdown of marriage. Post-divorce maintenance and property division are of paramount importance because they signify the status of women within marriage and their contribution to the marriage.

Id. at 130.

128. *See* Sen, *supra* note 127, at 130.

129. *See* BIPASHA BARUAH, WOMEN AND PROPERTY IN URBAN INDIA 5–10 (2010) (discussing the empowering effects of property ownership for Indian women).

130. *See* Aggarwal, *supra* note 125, at 7–10 (listing eight factors that may determine women's bargaining position within the family).

131. *See* BARUAH, *supra* note 129, at 5–10 ("Researchers in the southern state of Kerala . . . found that 49 percent of women with no property reported physical violence, compared with only 7 percent of women who did own property."); *see also* INT'L CTR. FOR RESEARCH ON WOMEN [ICRW], *Property Ownership & Inheritance Rights of Women for Social Protection-The South Asia Experience* (2006), *available at* http://www.icrw.org/files/publications/Property-Ownership-and-Inheritance-Rights-of-Women-for-Social-Protection-The-South-Asia-Experience.pdf [http://perma.cc/ZDU7-C5WR] (archived Sept. 29, 2014). In their conclusion, Aparna Mathur and Sita Slavov assert that, "while working is not associated with a reduction in the probability of experiencing violence (and may even be associated with an increase in it), wife beating is less commonly reported by women with higher levels of earnings than women with lower levels of earnings." This finding provides additional evidence to supplement earlier findings which simply focused on whether women worked, rather than their earnings, and concluded that employment was positively related to abuse. Aparna Mathur & Sita Slavov, *Escaping Domestic Violence: Empowering Women Through Employment, Earnings and Wealth in India* 20 (Am. Enter. Inst., Econ. Policy Working Paper Series 2013-03, 2013), *available at* http://www.aei.org/files/2013/08/29/-escaping-domestic-violence-

or are able to acquire property of their own exercise greater power in the household with regard to both their spouses as well as their in-laws. Finally, women who are able to earn wages or have property in their own right have greater decision-making power over not only their own lives but also the lives of their children.[132]

Those who choose to become surrogates are very much a part of this majority of Indian women. They are primarily housewives or menial workers such as housecleaners and domestic workers. A few are college graduates with pink-collar jobs (bank teller, secretary) but this is the exception rather than the norm.[133] Upper-class women with college degrees and professional jobs are not generally engaged in the business of surrogacy; rather, the field in general is populated by women whose access to meaningful and well-remunerated work is severely limited or nonexistent.[134] Even where the surrogate works, that work is paid at such a low rate that accumulation of wealth is rare.[135] The supplemental wage of the woman worker is what is needed to stave off severe poverty and is a necessity rather than a choice, let alone a surplus. Literally, the families are living from payday to payday. In sum, the work that women do, even if waged, is not remunerative enough to improve the wealth of the family significantly enough to allow for saving.[136]

The questions that then arise are, what is the economic impact of surrogacy on the families and the position of the surrogate? Does surrogacy change the dynamic in the family by giving women a better bargaining position? From the ethnographies conducted by Pande, Sama, and Sandoval, it can be surmised that these questions have no easy answers. The lived experience of Indian surrogates varies.[137] Different factors such as education, family form, and class status combine to complicate women's position in their family.[138] And these factors, along with prior experience with surrogacy, make a difference to the ability of surrogates to bargain for the optimal surrogacy

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empowering-women-through-employment-earnings-and-wealth-in-india_090439522399.pdf [http://perma.cc/YXW7-Z6UT] (archived Sept. 29, 2014). One can infer, then, that waged labor is more protective of women in the home than unwaged labor, and, indeed, the higher the earnings, the more social protection women enjoy.

132. *See supra* text accompanying note 131.

133. *See infra* text accompanying note 147.

134. *See* Sandoval, *supra* note 112, at 144 ("In the post-independence years, India has undoubtedly seen significant progress on the economic and industrial fronts, but this progress has been inequitable, with disparities widening between the urban and rural sectors, and between the privileged upper classes and the socially disadvantaged groups."); SAMA-RESOURCE GRP. FOR WOMEN & HEALTH, BIRTHING A MARKET: A STUDY ON COMMERCIAL SURROGACY 50–52 (2012) [hereinafter BIRTHING A MARKET].

135. *See infra* text accompanying note 147.

136. *See* BIRTHING A MARKET, *supra* note 134, at 136.

137. *See generally id.*

138. *See infra* text accompanying note 147.

contract and their ability to control payments, which then have a direct impact on their economic position, at least in the short term.[139]

The economic impact of surrogacy on surrogate's families must be analyzed in the same manner as other waged labor.[140] The significance of this cannot be understated, particularly given that the wage that can be earned within the surrogacy contract period is approximately five years' worth of family income. But there are considerations other than just the money that are also important to take into consideration. Some of these are surprising given the prevailing view that surrogacy is a highly exploitative form of labor. From the ethnographic work, it appears that there is not a straightforward narrative of exploitation that can be given; it is interwoven with narratives of agency, choice, and opportunity.[141]

For instance, because the women are poor, their own pregnancies were not attended with the kind of health care they receive as a surrogate. Their lives during their own pregnancy remained fairly routine, in that they were expected to do whatever housework and other chores they normally did. While a surrogate, they were in effect paid to rest.[142] Some of the women received little to no pre- or postnatal care in their own pregnancies but were able to get both during their surrogacy. One woman was able to negotiate a six-month paid recovery period after giving birth.[143] Others hired domestic workers to take care of the household, a luxury that they would be unable to afford ordinarily.[144] Undoubtedly, these perks are only available because the surrogate is carrying the child/children of upper class families who have an interest in making sure that the surrogate is healthy and comfortable. Moreover, the women are secondary to the child.[145] As a result, a majority of the women undergo cesarean sections rather than birthing naturally in spite of the fact that there have been perfectly normal live births in their past and there is no medical reason for the operation. Nevertheless, depending on the ability to make decisions and negotiate, surrogates are treated quite well while performing their contract.

A number of women entered into surrogacy to ensure the education of their children, including daughters.[146] This generational

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139. *See id.*

140. *See* BIRTHING A MARKET, *supra* note 134, at 50.

141. *See id.* at 51; *see also* Sandoval, *supra* note 112, at 180–82 (describing surrogates' economic and altruistic motivations).

142. One surrogate felt that while the surrogacy was work, it was not hard work. *See* BIRTHING A MARKET, *supra* note 134, at 55; *see also* Pande, *supra* note 22, at 122.

143. *See* Pande, *supra* note 22, at 119–21.

144. *Id.*

145. *Id.* at 189.

146. *Id.* at 61, 64, 67–68, 74, 78; *see also* BIRTHING A MARKET, *supra* note 134, at 52.

impact of economic empowerment should not be missed. From the interviews conducted, some of these benefits can be seen for women who have already completed one surrogacy.[147] Further, although the

147. Pande's interviews with the surrogates reveal a variety of differing positions held by surrogates in terms of decision making and autonomy. For instance, five women serve as examples of this, and it is worthwhile to consider these women's stories. Moreover, I rely on these accounts as basis for my analysis below. First, Hasomati was a 30-year-old surrogate who was a housewife at the time of the interview. She was carrying a child for a couple from Dubai, United Arab Emirates. Her husband works in the readymade apparel industry earning approximately $40 a month. While she has no formal education, her husband is college-educated. She was recruited to surrogacy by her sister-in law. She knew little about the surrogacy process in spite of having it explained to her by the counselor at the clinic. She had not met the commissioning couple at the time of entering into the contract. From Pande's account, her husband and his family seem to be the active decision makers in the surrogacy, and she is passive. They encouraged her not to inform her own parents of her surrogacy in case they demand a share of the payment. It can be inferred from the interview that Hasomati occupies a subordinate role not only to her husband but also to his extended family. *See* Pande, *supra* note 22, at 72–73.

Pushpa was a 27-year-old at the time of the interview. She was preparing to carry a child for a nonresident Indian couple settled in the United States. She was educated until elementary school but was kept at home from middle school because her father decided to send her brother to school instead. She regrets not finishing her education but works outside the home in a store with her limited education. Her husband is a housepainter who earns approximately $50 a month. Most of their money is expended on the necessities and there is little money left for educating their children. She was also recruited by her sister-in-law. With the money from her first surrogacy, she bought a plot of land and saved some in a bank for her children. She is a second-time surrogate and has taken charge of the decision making regarding the payments and her decision to pursue a second surrogacy. *See* Pande, *supra* note 22, at 65–66.

Rita was a 29-year-old second-time surrogate for a nonresident Indian couple from the United States. She became a surrogate, convincing her husband, a street plastic-bottle and trash picker that his $40 a month income would not be sufficient to repay their debt, replace the roof on their house, or send their daughter to college. She was the one who entered surrogacy, without being induced to do so. Her relationship with her husband, after the death of her in-laws, seemed to be very equitable. Alok, her husband, visited daily, bringing her children with him. He also took care of the children and filled the gap in household duties while Rita performed her surrogacy. She used the money from her first surrogacy to do household repairs and managed to control the money from her surrogacy. At the time of the interview, she was engaged in a second surrogacy to save money for her daughter's college education. *See* Pande, *supra* note 22, at 57–59.

Ramya was a 29-year-old bank teller at the time she entered surrogacy for a nonresident Indian-American couple. Her husband was a factory worker, and their joint earnings were $70 a month. Unlike the other surrogates, Ramya chose her husband. At the beginning of the marriage, her husband had a good job, until ten years into their marriage when he lost that job and had to take a lower paying job. Ramya continued to work but their joint earnings were insufficient to educate their daughter privately at an English language school. She entered into the surrogacy agreement against her husband's wishes. Interestingly, she chose to only have one child and was sterilized after her first child. She also has limited interaction with her in-laws because she chose to live in a nuclear rather than a joint household. While she claimed that she and husband are joint decision makers, it was noted that her spouse rarely visited her at the clinic. And fearing the stigma of surrogacy, she has chosen to hide her pregnancy. Pande, *supra* note 22, at 59–61.

existing class and educational backgrounds of the women made a difference to their ability to control and determine the uses of their earning, in some cases, the earnings themselves gave women leverage in the home to achieve greater autonomy and status.[148]

Table 1. Factors Determining Ability to Negotiate the Best Surrogacy Contract[149]
(Light gray boxes indicate better contracting ability)

Work Outside the Home	Semi-Professional	Menial work or respected in home	Homemaker
Class Background	Higher class	Lower class	Lower class
Education	College educated	Some education	No/little education
Number of Surrogacies	Second surrogacy	Second surrogacy	First surrogacy

As Sandoval's and Pande's field research shows, a large number of women entered surrogacy to save money for their children's education, to renovate, build, or buy their own home, to start a business, or to pay down debt. A lump-sum payment for surrogacy enabled women to contribute to these projects in a way that they would never have been able to otherwise. Within the family, surrogacy elevated women from merely "reproductive" workers to productive workers.[150] Most women experienced a sense of increase in self-worth and autonomy having contributed such a large sum to the

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Parvati was a 36-year-old hospital orderly at the time of her surrogacy. Her husband was a factory worker and their joint income was $100. She never completed middle school. In spite of living away from her in-laws, she cared for them on a daily basis, managing both their care and that of her son. She described her position in the home as good in that she and her husband made joint decisions about their earnings. Most of her earnings went towards her son's education, but her hope was that the money from surrogacy would be enough to build "a real house." Unusually, she had the support of her entire family although, she also noted that her husband did not help with housework but that it was less of an issue because she had hired a maid. *See* Pande, *supra* note 22, at 62–64.

While these women are poor and undereducated, there are critical differences in power and autonomy among them, and a generalization that casts them all as oppressed victims in the same manner cannot withstand scrutiny.

148. *See* Pande, *supra* note 22, at 57–66, 72–73.

149. *Id.* This table is derived from an analysis of Pande's interviews and the data she collected in her fieldwork.

150. *See* BIRTHING A MARKET, *supra* note 134, at 55–56 ("[T]he work that is traditionally assigned to a woman, be it housework or reproductive labour, is invisibalized and devalued."); *see also* Sandoval, *supra* note 112, at 139–43 (describing surrogacy as "an exchange and a legitimate job for [the] women").

family.[151] However, there were women who saw nothing of the money they earned.[152] Either husbands or families took control of the wages, and these women did not find themselves better off in terms of bargaining and authority within the family. Furthermore, a majority of women reported that two years after their contracts had been fulfilled, life had gone back to normal, with a few gains retained in terms of family distributions of decision making and authority.[153] But this picture is not uniformly bleak. Many women also reported a subtle change in the attitude of their husbands, a greater willingness to do housework. and more collaboration in making decisions, particularly about money.[154]

C. *The Long-Term Benefits of Surrogate Labor*

Much of the gains from such a large payout depends on whether women are able to save the money they earn. And that depends on what the money is used for and how it is invested.[155] For some women, because of their decisions about saving versus spending the money, the economic benefit will likely be fleeting, temporary, or never achieved. If this is the vast majority of women—a proportion that we have yet to track through longitudinal study—then the question as to who are the ultimate and long-term beneficiaries of the surrogacy business must be asked, and perhaps different policy and legal interventions might be warranted.

In the long term, some parties will certainly benefit. The commissioning parents who are able to cheaply acquire a child through surrogacy are certainly winners because they get a child that they would otherwise be unable to have.[156] They do face some degree of uncertainty in the short-run if their surrogate is unable to carry a child to term. However, the clinics may insure against losses, and they are able to try again with other surrogates. The clinics and their owners are winners because they are able to keep the lion's share of the fees for surrogacy and accumulate wealth for their owners and operators.[157] The middle women or brokers who recruit surrogates and run surrogacy hostels, allowing them to accumulate fees and

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151. *See* Sandoval, *supra* note 112, at 139–43.

152. *See* Pande, *supra* note 22, at 71, 74.

153. *See id.* at 220–22.

154. *See id.* at 32, 76, 216, 220–22.

155. *See, e.g., id.* at 55–80 (providing surrogates' accounts of the financial aspects of surrogacy).

156. *See* Shetty, *supra* note 11, at 1634 (quoting Dr. Kaushal Kadam as arguing that surrogacy is mutually beneficial because the couple gets a baby while the surrogate gains as well).

157. *See id.* at 1633 (documenting the total cost of surrogacy and payment to the surrogate).

grow their businesses, are also winners because they are able to command a fee for finding a surrogate without necessarily taking on any risk or cost.[158] The surrogates themselves are only winners if they too are able to accumulate property or meet their stated goals without compromising their long-term health and wellbeing. Moreover, even if they are "winners," attention must be paid to the overall distribution of income from surrogacy among these actors and the long-term consequences. The empirical research demonstrates that the surrogates themselves are the only participants whose successes are quite uncertain.

Given the vulnerability of the surrogate, legal interventions that improve the distribution of income more equitably along the "value-chain" of surrogacy and promote the longer-term investment of monetary benefits naturally suggest themselves as priorities. In other words, the law and development literature suggests that, because women who do waged work outside the home, who have property of their own, and who can contribute monetarily to their families experience higher status within their families and more independence and have better bargaining and decision-making power, policies and laws that promote women's earnings, property accumulation, and savings ought to be priorities.[159] Because commercial surrogacy is one means by which substantial remuneration for services can be achieved in a short amount of time, women have been attracted to the business.[160] But the lure of surrogacy and its promise of economic prosperity in short order does not by itself validate its practice. But the practices of commercial surrogacy do not exist in a vacuum, as noted above. Rather, there is a complex political economy of the family nested in a state with development and population policies that affect women's lives and choices. The development literature shows that women who are able to contribute wages and property to their families do enjoy better status than those who are entirely dependent on their husband and joint families.[161] As such, calls for a blanket ban that foreclose the ability of women to rationally choose surrogacy assume a great deal about exploitation and commodification and can have negative consequences. The ban position rests on a uniformly negative view of the impact of surrogacy, but such a clear verdict is not possible.

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158. *See* BIRTHING A MARKET, *supra* note 134, at 56–58 (describing the role of agents in recruiting surrogates and mediating surrogacy agreements).

159. *See supra* notes 126–30 and accompanying text (discussing the effects of wage earnings and property on social status).

160. *See* BIRTHING A MARKET, *supra* note 134, at 50.

161. *See* KABEER, *supra* note 121, at 101–15; BARUAH, *supra* note 129, at 5–10.

Surrogacy has a range of impacts for women both economically and in terms of health and wellbeing.[162] The story of these women, who are undoubtedly choosing surrogacy in quite constrained societal and economic structures, is complicated because the structures inevitably work to make other choices problematic, too. For instance, choices to migrate to work, sex work, or other hazardous work have obvious dark sides. Much like these kinds of work, the reality of surrogacy is that the narratives are complex and braided together; they are about exploitation but also about agency within constraint, power exercised in the interstices of oppression and resistance from multiple locations, to paraphrase Foucault.[163] These narratives defy the traditional explanations and discursive frameworks used to understand surrogacy either as an unalloyed good or an exploitative evil. The calls for a ban do not account for the reality of surrogate lives, their agency, and the reality of the existing business of surrogacy that the state has no intention to curb let alone ban.[164] Questions still remain about the long-term benefits and further longitudinal empirical work must be done to assess outcomes.[165] In the short run, it is clear that surrogacy payments that equal five years' worth of wages has the potential to change the circumstances of women quite drastically.[166] Consequently, this Article argues that the market ought to be regulated to preserve this opportunity and to protect the wellbeing of the surrogate.[167] The section below explores the regulatory regimes in the United States and South Africa to ascertain whether they may serve as possible models for Indian regulation.

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162. *See* ART Draft Bill, *supra* note 28, at 5 (noting that surrogacy may "open up avenues for unethical practices which can affect adversely the recipient of the treatment, medically, socially and legally").

163. 1 MICHEL FOUCAULT, A HISTORY OF SEXUALITY: AN INTRODUCTION 15–34 (Reissue ed. 1990) (arguing against the repressive hypothesis).

164. *See* BIRTHING A MARKET, *supra* note 134, at 56–58 (describing the motivation behind many decisions to become a surrogate and the role of agents and clinics in recruiting surrogates).

165. For some surrogates, the earnings are put towards educating female children, which certainly benefits women's empowerment and advancement. *See supra* text accompanying note 147.

166. *See* Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, July 29, 2007, at 1, *available at* http://www.marieclaire.com/world-reports/news/surrogate-mothers-india [http://perma.cc/W8P-J4ND] (archived Oct. 5, 2014).

167. *See* Aggarwal, *supra* note 125, at 7–10.

IV. LEGAL REGULATION OF SURROGACY IN COMPARATIVE PERSPECTIVE: THE UNITED STATES AND SOUTH AFRICA AS POSSIBLE MODELS

Countries like Israel, Ukraine, South Africa, and India have become key players in the provision of reproductive health care. However, few countries have embraced the business of commercial surrogacy as enthusiastically as India.[168] On the contrary, several countries in Europe have banned surrogacy entirely.[169] The United States, on the other hand, has no uniform surrogacy market and displays what some scholars have termed "ambivalence" towards surrogacy.[170] However, California does allow commercial surrogacy, while other states permit altruistic surrogacy.[171] Others have banned the practice entirely, refusing to enforce surrogacy agreements at all. What can India learn from the regulation of these surrogacy markets? The purpose of this section is to examine briefly the regulations in the United States or South Africa as possible bases for Indian regulation.

A. *United States: From Prohibition to Ambivalence to Laissez-Faire*

The business of surrogacy is regulated at the state level in the United States. The result is that there is no uniformity, and various states exhibit a range of policy and legal preferences towards the business and the practice. This section surveys some examples of the most permissive states as possible models for regulation that India might consider. At the outset, it ought to be understood that, in general, the United States do not permit commercial surrogacy, the

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168. *See* Nolen, *supra* note 42, at 1–2 ("[I]n the global community of infertility, India is the salvation destination, the country where an unregulated reproductive-technology sector makes anything possible.").

169. *See* Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 439, 463–64 (Katarina Trimmings & Paul Beaumont eds., 2013) (discussing "anti-surrogacy jurisdictions").

170. *See* Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 23 (Rachel Cook et al. eds., 2003) ("[T]here is no uniform national position on surrogacy in the United States."). *See generally* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 455 n.19 (2009) (describing the approach to surrogacy in California case law).

171. *See* CAL. FAM. CODE §§ 7960–62 (West 2013) (displaying that there are no limits by statute on the basis for payment to a surrogate), *available at* http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=12.&title=&part=7.&chapter=&article= [http://perma.cc/UP6D-TEUF] (archived Oct. 5, 2014); *see also* MODERN FAMILY SURROGACY CTR., http://www.modernfamilysurrogacy.com/page/state_laws_in_california_for_surrogacy (last visited Mar. 11, 2014) [http://perma.cc/KVJ6-LS2Y] (archived Oct. 5, 2014).

exception being California. However, surrogacy is regulated in very similar fashion throughout the jurisdictions where it is legal.

According to Steven Snyder, state regulation in the United States falls into three categories: first, states that are proactive in that they have either legislated permissively or prohibitively; second, states which have not legislated but in which appellate decisions have supplied some judicially created law that governs; and finally, those states that have no legislation or case law.[172] This may give the impression that in states where "compensated surrogacy" has been criminalized, the practice does not occur, but, as Snyder notes, even in these states, courts have ruled affirming the parentage of intending parents as long as the surrogacy arrangement is uncontested.[173] That is to say, the state does not substitute a different legal notion of parentage in place of the surrogacy agreement, thereby giving it effect even where the practice is criminalized.[174] For the purposes of this Article, the regulations that are most important are those that surround the business of gestational surrogacy, in particular those that might protect surrogates from exploitation in unequal bargaining positions. The table below sets out the regulation of surrogacy in a selection of states.

172. *See* Steven H. Snyder, *United States of America*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 169, at 387, 389–90.

173. *See id.*

174. *See id.*; *see also* THE CTR. FOR BIOETHICS AND CULTURE, STATE-BY-STATE SURROGACY SUMMARY 1–6 (2012), *available at* http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State_Surrogacy_Sum_CBC.pdf [http://perma.cc/5LPD-YSRQ] (archived Oct. 5, 2014) (providing the current state of the law on surrogacy in each of the fifty states).

Table 2. Selected Legislated Surrogacy Regulation by State

State	Commissioning Parent	Surrogate	Courts
California[175]	• An action to establish the parent-child relationship permitted to be filed before the child's birth, and specifies where that action may be filed • Assisted reproduction agreement for gestational carriers executed in accordance with these provisions is presumptively valid • The assisted reproduction agreement for gestational carriers and related documents are not open to inspection, except by the parties to the proceeding and their attorneys and the State Department of Social Services, except as specified	• A surrogate mother and the intended parent or intended parents required to be represented by separate independent counsel prior to executing an assisted reproduction agreement for gestational carriers • An assisted reproduction agreement for gestational carriers required to contain specified information • The assisted reproduction agreement for gestational carriers required to be executed by the parties and notarized or otherwise witnessed, as specified	• The parties are prohibited from commencing procedures to begin surrogacy until the assisted reproduction agreement for gestational carriers has been fully executed • The parties to the assisted reproduction agreement for gestational carriers required to attest, under penalty of perjury, and to the best of their knowledge and belief, as to their compliance with these provisions.

175. FAM. §§ 7960–62; *see, e.g.*, Eliza B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998); In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).

Florida[176]	• One parent must be genetically related • Commissioning mother must show she cannot maintain pregnancy • Limits types of payments	• Must be at least 18 • Undergo medical evaluation • Relinquishes her rights upon birth • Is the default parent if neither commissioning parent is genetically related to child • Intended parents must take child regardless of any impairment	
Illinois[177]	• One parent must be genetically related to child • Can establish parent status before birth • Can challenge agreement within twelve months of birth • Must undergo evaluation and legal consultation	• May not supply her own eggs • Relinquishes rights upon birth or earlier • Can challenge agreement within twelve months of birth • Must undergo evaluation and legal consultation	• If statutory requirements are not met, Court determines parentage based on intent

176. FLA. STAT. §§ 63.212, 742.11–742.16 (2009); *see, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); Lowe v. Broward Cnty., 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000); Wakeman v. Dixon, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006).

177. 750 ILL. COMP. STAT. ANN. 47/1 (2009); In re K.M., 653 N.E.2d 888 (Ill. App. Ct. 1995).

New Hampshire[178]	• Must be married • One must supply gametes (intended mother or surrogate supplies eggs) • Home visits, evaluations and counseling of all parties before impregnation • Mother must be physically unable to bear children • Residency requirement of 6 months of either surrogate or intended parents • Fees limited to medical expenses, lost wages, insurance, legal costs, and home studies • Fees for arranging surrogacy prohibited	• 21 years or older • Must have one viable pregnancy prior to surrogacy • Home visits, evaluations and counseling before impregnation of all parties • 72 hour window for surrogate to keep child • No donor eggs either surrogate or intended mother supplies egg • If surrogate is over 35, must have genetic counseling • Residency requirement of 6 months of either surrogate or intended parents • Surrogate may collect fee or damages for breached contract • Commissioning parents are liable for support if they refuse to take child • Cannot be required to become pregnant, carry child to term, or to abort	• Agreement must be judicially preauthorized

178. N.H. REV. STAT. ANN. §§ 168-B:1 to 168:B:32 (2009).

Texas[179]	• Must be unable to carry a pregnancy or give birth • Must be married • Home study required • Residence requirement of parents or surrogate of 90 days	• Cannot be egg donor • Must have had one prior pregnancy and delivery • Control over all health decisions • Residence requirement of parents or surrogate of 90 days	• Must be validated in court • A nonvalidated agreement is unenforceable
Utah[180]	• 21 years or older • Must be unable to carry a pregnancy or give birth • One intended parent must supply gametes • Must be married • Home study required • Residence requirement of parents or surrogate of 90 days	• 21 years or older • Must have had one prior pregnancy and delivery • Surrogate's husband cannot provide sperm • Controls over all health decisions • Residence requirement of parents or surrogate of 90 days • May not be on Medicaid or state assistance • Payment to surrogate must be "reasonable"	• Must be validated in court • A not validated agreement is unenforceable

179. TEX. FAM. CODE ANN. §§ 160.754, 160.762 (West 2000).
180. UTAH CODE ANN. §§ 78B-15-801 to 808 (West 2009).

Virginia[181]	• One intended parent must supply gametes • Must be unable to carry a pregnancy or give birth • Home study required • Medical evaluations and counseling required • Approved contract results in legal parentage for commissioning parents • If contract was never approved, intended parents will be parents if there is a genetic link to either. • No compensation beyond reasonable medical and ancillary costs • Ability to recoup costs of invalid contract	• Must have had one prior pregnancy and delivery • Married • Medical evaluations and counseling required • Retains rights to clinical management of pregnancy • Void contract results in surrogate and husband as legal parents • If contract was never approved, surrogate may sign consent form relinquishing rights • If surrogate is genetic mother, she may terminate contract within first 6 months of surrogacy • No recruitment fees • Ability to recoup costs of invalid contract	• Requires judicial preauthorization • Must appoint counsel for surrogate and guardian ad litem for children to be born • Approval is valid for 12 months

The provisions found in the United States go some way toward protecting the parties to a surrogacy agreement. In particular, the autonomy of the surrogate to continue with the pregnancy or not, to control her medical care, and to be compensated for the costs of care and wage loss are very important. There are also state-sanctioned requirements such as age restrictions, that surrogates have already given birth or experienced a viable pregnancy, and that parties undergo counseling that may seem paternalistic but that work to ensure that the parties are aware of the choices they are making given the nature of the contract for embodied labor. Another requirement that clarifies the relationship between surrogate, intended parents, and child is the prohibition of the use of surrogate

181. VA. CODE ANN. § 20-162 (West 2014).

eggs or the surrogate husband's sperm for the surrogacy and the requirement that the commissioning parent(s) have some genetic relationship to the child. Such requirements would prohibit the use of surrogates to carry an embryo from donor eggs and sperm not genetically related to any of the parties. Some states give surrogates a window of opportunity to challenge the agreement or assert parental rights, although these rights are severely limited by valid contracts. On the downside, surrogate remuneration may be restricted by the state's prohibition of "commercial" surrogacy. As such, surrogates can receive only costs and living expenses in most states.[182]

The most important aspect of surrogacy regulation in the United States may not be the actual laws surrounding surrogacy but the other background rules that inform women's status in the country. For instance, women's ability to assert independence from her family, the typical nuclear family structure, access to education and to legal resources, and established notions of (formal) equality undergird American surrogates' agency.[183] While India's context is different because of the larger social and legal disparities in gender equality and the prevalence of commercial surrogacy, there are regulations here that can be applied. Before assessing which regulations do travel, surveying the regulation of a country developmentally closer to India provides another perspective from which to draw.

B. *South Africa: State-Regulated Altruism*

South Africa, as a heterogeneous, democratic, developing nation, bears greater similarity to India than does the much more economically advanced United States.[184] It too allows altruistic but not commercial surrogacy. In an effort to prevent the commercialization of surrogacy, South Africa regulates the practice extensively. The surrogate mother must give her consent to the surrogacy agreement. Her partner must also give consent, although there is a judicial bypass if the consent is unreasonably withheld. In

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182. One major drawback to the way in which surrogacy is structured in the United States is that, beyond the provision of immediate healthcare, there are no required long-term care requirements for surrogates. Given the long-term complications that are possible from IVF, hormone injections, multiple ongoing medical interventions, and the pregnancy and birth itself, the surrogate might fare better with additional occupational safety and workers compensation-like measures.

183. *See generally* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006) (commenting on the market for surrogacy in the United States and abroad and providing several frameworks for regulating surrogacy).

184. *See, e.g.*, ISABEL HOFMEYR & MICHELLE WILLIAMS, SOUTH AFRICA AND INDIA: SHAPING THE GLOBAL SOUTH (2011) (addressing the growing importance of the relationship between South Africa and India).

addition to this threshold requirement, the surrogate mother must also

> (a) be legally competent to enter into a surrogate motherhood agreement;
>
> (b) in all respects, be a suitable person to act as surrogate mother;
>
> (c) understand and accept the legal consequences of the surrogate motherhood agreement and the relevant provision of the Children's Act, including her rights and obligations in terms of the agreement and the provision of the Act;
>
> (d) not be using surrogacy as a source of income;
>
> (e) have entered into the surrogate motherhood agreement for altruistic reasons and not for commercial reasons;
>
> (f) have a documented history of at least one pregnancy and viable delivery;
>
> (g) have a living child of her own; and
>
> (h) hand the child born as result of a valid surrogate motherhood agreement over to the commissioning parent(s) as soon as reasonably possible after the birth of the child.[185]

In addition, the court must validate and confirm the agreement before the surrogate embarks on the procedures to become pregnant.[186] The court must also confirm that the intended mother cannot give birth to a child and that the condition is permanent or irreversible.[187] A valid agreement gives the intended parents parental rights over the surrogate and her family unless the surrogate is also a genetic parent to the child. For the agreement to be enforceable, the surrogate and at least one commissioning parent must be domiciled in South Africa and the agreement must be confirmed by the relevant High Court.[188] This means that transnational surrogacy in which the

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185. Melodie Slabbert & Christa Roodt, *South Africa*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 169, at 325, 328.

186. *See id.* at 328–45.

187. *See id.* at 328–45. Relatively little has appeared in the media or scholarly sources on South African surrogacy. One media report presents a positive picture of surrogacy. *See* Caroline Van Den Heever, *Surrogacy: We Went from Nought to Three in Barely a Year*, DAILY MAIL (Aug. 21, 2010, 1:35 PM), http://www.dailymail.co.uk/home/you/article-1303868/Caroline-Van-Den-Heever-reveals-surrogacy-parenting-dreams-come-true.html [http://perma.cc/BTV5-JPJR] (archived Oct. 5, 2014). On the other hand, there have been attempts to extract additional payments even in a jurisdiction that strictly prohibits commercial surrogacy. *See* Tania Broughton, *Unborn Baby Hostage to Greed*, IOL.CO.ZA (Jan. 19, 2011, 9:41 AM), http://www.iol.co.za/news/south-africa/kwazulu-natal/unborn-baby-a-hostage-to-greed-1.1013913#.UxyvJv3oBA8 [http://perma.cc/FH8J-9J9H] (archived Oct. 5, 2014).

188. *See* Slabbert & Roodt, *supra* note 185, at 329; Melodie Slabbert, *Legal Issues Relating to the Use of Surrogate Mothers in the Practice of Assisted Conception*, 5 S. AFR. J. OF BIOETHICS & L. 1–2 (2012), *available at* http://www.sajbl.org.za/index.php/sajbl/article/view/190/200 [http://perma.cc/X5L7-F5XP] (archived Oct. 5, 2014).

commissioning parents can enter the agreement in one country and then leave the clinics and intermediaries to take care of the process is nearly impossible.

In terms of compensation, South African regulation is quite specific in its goal to impede commercialization.[189] The surrogate may only be compensated for medical expenses relating to the surrogacy and the pregnancy and birth, loss of earnings, and insurance costs for health and possible death or disability.[190] A surrogate or third party may not advertise the services of the surrogate, which means brokering surrogacy is illegal. [191] These legal rules attempt to minimize the commercialization of surrogacy as well as the potential exploitation by surrogates of desperate commissioning parents.

C. *Surrogacy Regulations that Travel*

Similarities between the regulatory approaches in a number of states that allow surrogacy in the United States and South Africa suggest the emergence of a some best practices that might well be relevant for India. Some of these regulations have already found their way into the proposed ART (2010) bill.[192] For instance, the Indian bill limits a surrogate to a number of live births,[193] it restricts the age of surrogates,[194] it prohibits the surrogate from also being the egg donor,[195] it prohibits the surrogate from receiving more than three embryo transfers, [196] it clarifies parentage, [197] and it requires commissioning parents to accept the child even if born with a defect.[198] In addition to these, Indian legislation might include the protection of both surrogates and commissioning parents through more specific informed consent and disclosure, evaluations and assessments as to the health and preparedness of both parties to surrogacy, autonomy in healthcare decision making, provision of

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189. *See generally* Slabbert & Roodt, *supra* note 185, at 328–45 (explaining the numerous statutory surrogacy requirements established by South African legislation).

190. *See generally id.* at 335–36 (articulating South African compensation qualifications proscribed by Parliament).

191. *See id.* at 336.

192. *See* ART Draft Bill, *supra* note 28, ch. VII.34 (enumerating specific rights and duties applicable for individuals engaging in surrogacy).

193. *See id.* ch. VII.34 (5) ("Provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.").

194. *See id.* ("No woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act.").

195. *See id.* ch. VII.34 (13).

196. *See id.* ch. VII.34 (9) ("No surrogate mother shall undergo embryo transfer more than three times for the same couple.").

197. *See id.* chs. VII.34 (10), (19), VII.35 (1) (articulating birth certificate attribution procedures, standards for nonresident Indians seeking surrogacy, and status determination standards for children born to married couples).

198. *See id.* ch. VII.34 (11).

judicial bypasses to spousal consent or the removal of spousal consent, and the requirement that surrogacy be medically necessary. While India can import these provisions, it is clear that the goals for regulation in both the United States and South Africa differ significantly. Moreover, the actual business of surrogacy also differs, as do the socioeconomic contexts in which surrogates are undertaking the work. As a result, these provisions simply do not go far enough to protect a surrogate engaged in a commercial, increasingly industrialized business. In assessing the current and proposed regulation, this Article elaborates on these provisions and propose additional protections below.

V. THE INSUFFICIENCY OF CURRENT REGULATORY FRAMEWORKS: INTRODUCING A LIMITED CONTRACT-LABOR FRAMEWORK TO BETTER PROTECT INDIAN SURROGATES

Thus far, this Article has argued that the current frameworks that prevail in constructing surrogacy are insufficient to capture the lived reality of Indian surrogates. Further, it has argued that surrogacy has benefits economically for women and their families, and thus, calls for a ban would foreclose an avenue for development. Rather than viewing surrogates as altruistic angels or abject victims, this Article has argued that they are agents and exercise differing levels of autonomy depending on a number of variables. Moreover, they use their reproductive capacities in a state that has spent much of its focus on curbing their reproduction. State ambivalence when it comes to protecting poor women under the circumstances is unsurprising. This Part turns now to the current frameworks—products of this ambivalence—to show that they are insufficient and that any regulatory framework ought to take the political economy in which Indian surrogacy occurs into account. First, it describes the current legislation that has been proposed. It then discusses the prevailing private contract regime that is in effect and how it disadvantages the worker and fails to create a fair distribution of resources and earnings. Finally, it suggests that policymakers consider surrogacy as hazardous, gendered work and regulate it as such.

A. *Current Approaches: Laissez-Faire Contract and Regulating Surrogacy as Medical Procedure*

India's surrogacy market has grown so rapidly that legal regulation has literally been chasing after it.[199] Furthermore, legislation from the executive branch has been stalled, with a bill that was initially proposed in 2005 (and subsequently redrafted) that still has not achieved passage.[200] The lacuna in Indian legislation is on occasion addressed directly by judicial lawmaking through the mechanism of public interest litigation.[201] But in the realm of surrogacy, even the courts have declined to enter into the fray by opining on the validity of surrogacy agreements. In 2007, the Delhi High Court refused to adjudicate a public interest petition brought by Namita Roy, who sought to have the court enact laws from the bench to regulate surrogacy.[202] The chief justices instead directed the petitioner to raise these issues with the relevant branches of the executive rather than the court.[203] Seven years later, the business continues to operate in a regulatory no man's land. Thus, feminists have a unique opportunity to suggest and shape regulation in a relatively open field, and that opportunity ought to be taken with a view to protecting surrogates as workers as well as women.

The two dominant approaches to regulation to date have been the proposed Assisted Reproductive Technology (ART) 2010 bill that

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199. *See generally* Shetty, *supra* note 11 (explaining the burgeoning surrogacy landscape in India).

200. *See* Vishaka & Ors v. State of Rajasthan & Ors, A.I.R. 1997 S.C. 3011 (India), *available at* http://www.iiap.res.in/files/VisakaVsRajasthan_1997.pdf [http://perma.cc/V4ZT-ZKM5] (archived Sept. 29, 2014) (highlighting the unwillingness or lack of action by the executive branch when the judiciary has created whole cloth legal rules to govern sexual harassment); Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671, 671 (2013) (citing the Indian Council of Medical Research); Sama-Resource Group for Women & Health, *Constructing Conception: The Mapping of Assisted Reproductive Technologies in India*, 11, SAMA, http://www.samawomenshealth.org/downloads/Constructing%20Conceptions.pdf [http://perma.cc/3YVC-SNEQ] (archived Sept. 29, 2014) (discussing the nonbinding nature of the National Guidelines for accreditation). *See generally* ART Draft Bill, *supra* note 28.

201. For instance, the judiciary created out of whole cloth legal rules to govern sexual harassment when the executive was either unwilling or too slow to do so. *See* Vishaka & Ors v. State of Rajasthan & Ors, A.I.R. 1997 S.C. 3011 (India), *available at* http://www.iiap.res.in/files/VisakaVsRajasthan_1997.pdf [http://perma.cc/V4ZT-ZKM5] (archived Sept. 29, 2014).

202. *See HC Directs Petitioner to Approach Govt for Law on Surrogacy*, WEBINDIA (Apr. 5, 2007), http://news.webindia123.com/news/articles/India/20070405/627322.html [http://perma.cc/STZ9-CH2L] (archived Sept. 26, 2014) ("'It's a personal issue and the court could not interfere,' said the court.").

203. *See id.* ("[J]ustice Sanjiv Khanna directed the petitioner and Advocate Namita Roy to approach the Ministry of Social Welfare and Ministry of Health to frame the guidelines to regulate the surrogate children.").

has yet to be enacted into law and the existing laissez-faire approach that allows contract law to regulate private surrogacy agreements.[204] The prevailing approach of private contract and free-market dominance has been described by some as a "free for all," or the absence of regulation.[205] While contract law does regulate the actual agreements and their enforcement, each party is left to their own devices as to what they are able to negotiate for; consequently, the result is that unequal bargaining power and information asymmetries work against the surrogate when she is of a lower educational and economic status. As was seen in Pande's ethnographic work, the surrogates were able to bargain for a number of benefits like higher living expenses, healthcare, and domestic help, but these were determined by their own initiative and savvy in contracting.[206] Without information about the realm of benefits that they might have gotten, many surrogates likely did not know that they could seek improved terms. Furthermore, certain kinds of autonomy rights and benefits have been missing from these individually negotiated agreements perhaps in contravention to guaranteed fundamental rights in the Indian constitution.

The draft bill currently before the legislature is a result of the work of the Indian Council for Medical Research (ICMR). Upon reading it, that fact becomes quite apparent. The bill is aimed towards regulating the clinics that provide ART services rather than surrogacy per se.[207] The regulation of surrogates is treated in a single section and is limited to the enforceability of a commercial surrogacy agreement [208] and the characteristics of surrogates and their qualification for entering into the agreement. By operation of this law, women over the age of twenty-one and under the age of thirty-five would be limited in the number of surrogacy contracts they can enter into;[209] they would only be eligible as surrogates if they have had their own children and may not give birth more than five times

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204. *See* Usha Rengachary Smerdon, *India*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 169, at 187, 218 ("Although regulation of surrogacy in India draws near, surrogacy to date has operated in a largely unregulated environment, leading to a number of complications and lack of protections or children born through surrogacy, surrogate mothers and commissioning parties.").

205. Chetan Chauhan, *Surrogacy Law to Protect Women*, HINDUSTAN TIMES (June 26, 2008), http://www.hindustantimes.com/india-news/surrogacy-law-to-protect-women/article1-319805.aspx [http://perma.cc/Y86C-X8XW] (archived Nov. 14, 2014) (quoting Women and Child Development Minister Renuka Chowdhury as characterizing India's unregulated surrogacy market as a "free for all").

206. *See* Pande, *supra* note 22; *supra* note 147 and accompanying text.

207. *See* ART Draft Bill, *supra* note 28, ch. VII.34 (enumerating surrogacy rights and duties, including expenses, parental rights, age restrictions, medical testing, and advertisement restrictions).

208. *See id.* ch. VII.34 (5).

209. *See id.*

in total.[210] Thus, surrogates must have four or fewer children of their own. The only kind of surrogacy allowed would be gestational surrogacy.[211] The surrogate would not be allowed to donate eggs as well as be the gestational mother.[212]

The provisions also protect the health-care privacy of the surrogates insofar as her identity is protected.[213] However, that privacy does not give her absolute rights about healthcare decision making because it requires her to undergo testing for disease and to disclose healthcare received while performing the surrogacy. In fact, the law opens the door for draconian restrictions on autonomy by mandating that a surrogate will be "duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s)."[214] Further, the surrogate would have no parental right to the child, and the bill clarifies that the commissioning parents would be deemed the legal parents of any child and obligated to accept that child after birth, regardless of birth defects.[215]

Over twenty-four provisions, it is apparent that the bill does not make any major intervention in regulating the largely private contractual arrangements that govern surrogacy now. The surrogate is given little by way of protection in deciding what procedures she will undergo, and no threshold exists that requires the agreement to adequately compensate the surrogate or provide insurance long-term, or even to ensure that the contract is provided in a language that she understands, let alone that she comprehends the specific medical provisions included in it. In fact, the bill leaves open the very real likelihood that many surrogates will continue to accede to harsh strictures on behavior and give up substantial autonomy in decision making.

B. *The Insufficiency of Current and Proposed Regulation*

Given the Indian state's antinatalist bent, it is hardly surprising that it has not taken a robust role in regulating to protect the

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210. *See id.* ("Provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.").

211. *See id.* ch. VII.34 (13).

212. *See id.*

213. *See id.* ch. VII.34 (12) ("Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction.").

214. *See id.* ch. VII.34 (23).

215. *See id.* ch. VII.34 (11) ("The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.").

workers in the surrogacy market. After all, these are the same women they have been demanding for decades not have more than two children. The result has been a virtually unregulated free-market, contract regime in which the worker is left to fend for herself against the pressures of both the clinic and the wealthier and better-educated commissioning parents. The one upside that makes this bargaining somewhat less predatory at the moment is that because of the stigma attached to surrogacy, there is bigger demand for surrogates than there is supply. However, in a country of one billion people, as the stigma diminishes, that advantage may be significantly eroded. It is clear that a free contract regime will be insufficient to protect surrogates.

There is nothing in the bill that regulates the conditions of work or the treatment of the worker nor is there any regulation of compensation—these are all left to individual contractors to negotiate. There may be wide variations in the same clinic between what surrogates are getting paid for doing exactly the same labor.[216] Moreover, there is a class, race, and national origin discrimination that comes into play in the surrogacy contract that makes no economic sense but simply reinforces the societal prejudices that are prevalent.[217] For instance, women bearing the children of Indian and NRI parents may be required to be of the same or upper caste backgrounds and are paid more for their caste.[218] Not only are surrogates paid differently according to client, their perks are also different, including how much monthly support they receive, their accommodations, and the quality of their care may be different.[219] The ART bill does nothing to prevent differential treatment of surrogates, even those based on race or caste, as long as they are not advertised for by the clinic.

Surrogates are not negotiating entirely separately from the clinic and the middle women that recruit them.[220] The ethnographic research shows that pressure is brought to bear on surrogates to "not be greedy" and bargain for less than they might.[221] Here, narratives of good mothers versus bad mothers, altruism versus greed, and maternity versus sex work are deployed to keep women "in their

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216. *See* Pande, *supra* note 22, at 189 (discussing the procuring of "foreign" clients for those surrogates who are particularly needy).

217. *See* BIRTHING A MARKET, *supra* note 134, at 39–40 (discussing the preference for upper caste surrogates and the differential pay for such a surrogate).

218. *See id.*

219. *See generally id.* at 90–91 ("The contract is the only legal tool that sets the terms of the arrangement.").

220. *See id.* at 46–47.

221. *See* Pande, *supra* note 22, at 48, 58 (discussing surrogate desires to complete goals such as educating their children, making household repairs, and the like).

place" and from forming the best contract they can.[222] In terms of the procedures that surrogates are subjected to and the requirement that they reside in either clinic run or clinic-sanctioned hostels, these contractual terms are governed by the contract between the surrogacy clinic and the surrogate.[223]

It is of interest that the clinic-surrogate contract, written in English, has to be explained in translation by either the clinic employees or the broker who brought the surrogate to the clinic.[224] No independent counsel is given. In some cases, women were deemed too illiterate to understand the full provisions of the contract and so signed a contract that was in essence a mystery to them.[225] Those best able to understand and protect their rights were women who were moderately educated and had some English skills. In some respects, the clinic contracts are drafted by the clinic and are contracts of adhesion, with very little by way of negotiability of important terms like the method of birth. The result is that surrogate's rights as a worker are rarely given any consideration. The focus is on the payment for the service and the duties and obligations of the surrogate to the commissioning family. The ability to protect their own health or right to make decisions about procedures through these contracts is minimal. Clearly, private contract presents a number of large gaps and lacks the protections that such hazardous work should require.[226] On the other hand, private ordering with

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222. *See id.* at 133–36 ("This mother-worker combination is produced through a disciplinary project, which deploys the power of language along with a meticulous control over the body of the surrogate.").

223. *See* BIRTHING A MARKET, *supra* note 134, at 24.

224. *See id.* at 90–94 (explaining the difficulty surrogates have in reading and understanding contractual terms); Pande, *supra* note 22, at 46 (providing examples of surrogate ignorance in understanding contractual terms of surrogacy).

225. *See* BIRTHING A MARKET, *supra* note 134, at 90–94 ("In all cases barring one, the surrogates were not informed about the actual clauses and the content of the contract."); Pande, *supra* note 22, at 46 (explaining that a large number of surrogates are unable to understand contractual obligations without the assistance of a translator).

226. Some scholars have suggested that private contract is perfectly adequate to deal with the problems outlined in this Article. For example, Hezi Margalit argues that the well-acknowledged problem of unequal bargaining power that has undergirded much of the critique of transnational surrogacy—whether it is couched in terms of neocolonialism and racism or, more materially, economic inequality—can be dealt with via doctrines of fraud, trust, and, most importantly, unconscionability. Using the two-prong inquiry into both substantive and procedural unconscionability, he argues, courts would be able to set aside those terms or even entire agreements if it can be proven that poor women were "duped" into agreements. He specifically references Indian surrogates. *See* Hezi Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 444–50 (2014). The problem with this approach, especially in the absence of other regulatory frameworks, is that it requires poor Indian surrogates to take their disputes to court, to prove their case, and then to rely on the vagaries of judicial discretion to rule in their favor. Without a better understanding of India's judicial system, such a position is simplistic.

minimal extra costs attached allows for the clinic to maximize profit and for the surrogate to command a higher fee.[227] If the state begins to add labor safety requirements to the business, the argument is (as it has always been) that this will reduce the profitability of the business, will force either the clinic or the surrogate to pass on costs to the commissioning parents, and will drive away business to other countries. Or it will require the surrogate to absorb at least some of the costs in lower fees because the commissioning parents and clinics will seek to avoid paying for them. These are important possibilities to be taken into consideration, but, as argued below, they are not enough to justify the complete lack of protections and regulations that currently exists in the market.

C. *Why a Labor Framework May Work Better in India*

Given the inadequacy of the private contract regime that now exists as well as the minimal protections afforded by the draft ART (2010) bill, there remains an opportunity to regulate the business (rather than the medical practice) more robustly. Given the unlikelihood of a ban on commercial surrogacy, feminist activists and theorists interested in protecting vulnerable women have to expand their theorizing to cover the labor—the work—of surrogacy, much as they have done to cover sex work and other forms of embodied labor. To be sure, there are a multitude of ethical issues that arise out of the surrogacy arrangement, including the impact on meanings of family and gender roles and the possible harm to women because of commodification and devaluation, but reformers must engage pragmatically with the reality that these forms of work will continue to exist and will continue to be chosen by women who seek an

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It does not take into account the very real problems of access to justice faced by the poor, not to mention the lag times in judgments. *See generally* Jayanth K. Krishnan et al., *Grappling at the Grassroots: Litigant-Efforts to Access Economic and Social Rights in India*, 24 HARV. HUM. RTS. J. (forthcoming 2014); C. Rajkumar, *Expanding Access to Justice*, HINDU (Nov. 28, 2013), http://www.thehindu.com/opinion/lead/expanding-access-to-justice/article5398212.ece [http://perma.cc/UVK6-27PA] (archived Sept. 27, 2014). Further, even in the United States, the doctrine of unconscionability has proven to be fickle. *See generally* Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First Century Survey* (UC Hastings College of Law Legal Studies Research Paper Series, Research Paper No. 71), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346498 [http://perma.cc/KB5T-ZTSD] (archived Oct. 5, 2014). As such, it is imperative to include background labor regulations and contractual terms and to make those regulations known to contracting parties at the outset rather than requiring ex post facto enforcement of private contract after the harm has already obtained.

227. *See* BIRTHING A MARKET, *supra* note 134, at 90–94 ("A successful commercial surrogacy arrangement culminates in the relinquishment of the child by the surrogate to the commissioning parents. The multiple actors who are involved in the arrangement are deeply invested in it, so that the need to ensure relinquishment becomes a matter of great importance.").

economic benefit from them in the absence of other choices.[228] However, like in the sex work debates, this Article has argued above that Indian women have been choosing surrogacy *even if* it is an exploitative form of labor and that they ought to be allowed to do so. In a society where women are engaging in a number of exploitative industries, such as long and tedious factory work, hazardous manual labor, and sex work, and are being paid very little for it, it does not make sense to foreclose one industry that pays substantially better only because of its moral or ethical ambiguity.[229] The ban approach is overly patronizing, infantilizing to women, and deprives them of the agency they might exercise in deciding to enter into such dangerous work. Further, it does not take into consideration the formation of underground/black markets that would then inevitably arise, even if those markets are smaller than the legal one. Bans simply make the work more dangerous for the worker.[230] Yet this reality in no way alibis the state's failure to provide adequate health, education, and work opportunities for women or the poor distribution of resources in Indian society. Feminist scholars and activists continue to work towards greater equality and gender justice through activism directed at the state even while striving to alleviate the vulnerabilities of women within a deeply unequal and constrained context.

The work position—that is, acknowledging surrogacy as work—is one means of achieving some measure of protection for surrogates. The reframing of surrogacy also makes sense when one takes into account that not every attempt at this form of reproduction results in a child. Indeed, even in the United States with the best of care, the rate of success in surrogacy is not more than 50 percent.[231] While

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228. *See* KOTISWARAN, *supra* note 77 (explaining the economic considerations that must be analyzed within a surrogacy framework).

229. For instance, factory workers are paid a pittance for working well over eight hours a day. *See* sources cited *supra* note 97. The poorest of women in India, such as brick workers, suffer not only poor wages but also grueling physical labor associated with serious health effects. *See, e.g.*, Humphrey Hawksley, *Why India's Brick Kiln Workers 'Live Like Slaves'*, BBC NEWS (Jan. 1, 2014), http://www.bbc.com/news/world-asia-india-25556965 [http://perma.cc/DC47-YCRT] (archived Sept. 27, 2014) (describing the hardship Indian Brick Kiln workers endure); Moumita Sett & Subhashis Sahu, *Effects of Occupational Heat Exposure on Female Brick Workers in West Bengal, India*, GLOBAL HEALTH ACTION (Feb. 3, 2014), http://www.globalhealthaction.net/index.php/%20gha/article/view/21923/html [http://perma.cc/7UVU-NVSZ] (archived Sept. 27, 2014).

230. *See* J.L. Hill, *The Case for Enforcement of the Surrogate Contract*, 8 POL. & LIFE SCI. 147, 147–60 (1990) (discussing the effects of an unregulated surrogacy environment); Pande, *supra* note 22, at 204 ("The frame through which we analyze surrogacy will shape the ultimate policies and regulations devised.").

231. *See India Surrogacy Success Rates*, GLOBAL DOCTOR OPTIONS, http://www.globaldoctoroptions.com/india-surrogacy-success-rates/1214 [http://perma.cc/BD6B-QLYD] (archived Sept. 27, 2014) (providing U.S. success rates and claiming Indian success rates "approaching 50%"); BIRTHING A MARKET, *supra* note 134, at 64–65 (noting low success rates, requiring surrogates to undergo multiple IVF cycles).

Indian success rates are difficult to ascertain, for some clinics it appears that rates *approaching* 50 percent are considered very good.[232] The import of this is not to be lost. Over half the women who undertake surrogacy do not produce a child. However, through the process, surrogates are taking time out of their daily lives to receive hormone treatments and IVF and to undergo various medical procedures for which they ought to be compensated. These costs ought not to be internalized by the surrogate. If the emphasis is on the child and the outcome, then these costs might be overlooked. In other words, the unrelenting focus on the end result, the child, has obscured the work that surrogates do, the service they provide while they are attempting to fulfill a contract that may ultimately not be successful. Reframing would capture the work that goes into surrogacies regardless of the outcomes.

First, a state-mandated set of terms in surrogacy contracts could preserve key rights for the surrogate. These would set a floor or a minimum set of disclosure requirements, procedural and substantive fairness requirements, and at least provide a legal background that makes clear that surrogates have some protections. The chart below breaks down some of the possible legal norms that can be demanded by the state in contracting as well as some of the labor safety provisions that may be provided. These provisions would improve the rights and conditions of the surrogate allowing for some minimum standards from which the surrogate may bargain for even better conditions.

Table 3: Select Minimum Protections for Surrogates in a Contract-Labor Framework

Standard Contract Terms and Procedures	Labor Rights Provisions
1. Language of contract must be understood by surrogate 2. Surrogate must have access to independent counsel about the agreement 3. Surrogate must be provided with adequate disclosures about the main provisions of the contract 4. The consequences of rescinding the agreement must be adequately disclosed. 5. The medical procedures and decision-	1. The surrogate may only provide services to those who are medically unable to have their own children. 2. The surrogate must have decision-making authority over her healthcare. 3. The surrogate cannot be forced to undergo medically unnecessary procedures. Refusal to undergo a procedure deemed unnecessary will not terminate the contract. 4. The surrogate may not be forced to

232. *See India Surrogacy Success Rates*, *supra* note 231; Smerdon, *supra* note 22, at 29.

making process must be disclosed. 6. The surrogate must consent freely and without the coercion of any family member, clinic staff, agent, or broker. 7. The surrogate must have a period of time to cancel the contract before medical procedures proceed. 8. Remove the spousal consent requirement or provide for a judicial bypass 9. Terms that are excessively one-sided may be struck for unconscionability. 10. The contract may not infringe the fundamental rights guaranteed to the individual by the Indian constitution.	have a cesarean section when a vaginal birth is possible. 5. The surrogate may consult her own physician or demand a second opinion with regard to any invasive medical procedure. 6. The surrogate may not be forced to live in a hostel or clinic-provided accommodation without express consent. 7. If the surrogate consents to live on the premises of the clinic, she shall have the right to visit her home and to leave the facility. 8. The surrogate has the right to terminate the pregnancy at will. If she does so, she may forfeit compensation but not the costs incurred in the surrogacy contract. 9. The clinic must provide adequate life insurance for the surrogate at the expense of the clinic or the commissioning parents. 10. The clinic must provide adequate health-care provisions for three years after the completion of the contract at the expense of the clinic or the commissioning parent. 11. The clinic must cover healthcare and insurance for a reasonable period of time for surrogates who are unsuccessful at birthing a child through no fault of their own. 12. The clinic must make provision of insurance coverage for occupational health and safety due to the hazardous nature of surrogacy.[233] 13. The contract must cover costs of the surrogate in lost wages, additional childcare if she lives in a hostel, and other costs in addition to the

233. For a complete discussion of the risks of surrogacy to the surrogate including ovarian twisting, increased rates of cancer, ectopic pregnancy, multiple gestations, and spontaneous abortion, see BIRTHING A MARKET, *supra* note 134, at 148–52.

	compensation for providing surrogacy services that are successful. 14. Surrogates must be compensated for costs for surrogacies that are unsuccessful through no fault of the surrogate. 15. The clinic and the commissioning parents may not pay a differential fee to the surrogate based on the race, ethnicity, or caste of the commissioning parents or the surrogate. 16. The commissioning parents may not pay a differential fee based upon the sex of the fetus. 17. The state must inspect all clinics and hostel facilities to ensure that they are adequate and provide privacy and proper living conditions to the surrogate. 18. The surrogate must have a right to know the identity of and to communicate with the commissioning parents for whom she is performing the service. 19. The surrogate has a right to take maternity leave from her place of employment for a reasonable recovery period. 20. In the event that parties agree, the surrogate has a right to adopt the child or to be declared its legal mother.

While regulating surrogacy as work may benefit the surrogate, at the same time, the labor framework may not be a perfect fit. Surrogacy is still a stigmatized labor done often in secret.[234] Women choose to live in hostels away from family and communities in order to avoid explaining their pregnancies and subsequently missing

234. *See* Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN J. GENDER STUD. 141, 154–55 (2009) [hereinafter Pande, *Not an Angel*] ("As a consequence, almost all the surrogates in this study except one decided to keep their surrogacy a secret from their communities, villages and, very often, from their parents.").

child.[235] Being paid for producing another family's child can easily slide into analogies to sex work.[236] Moreover, the current law prohibits women from engaging in surrogacy more than four times (assuming they have only one child).[237] As such, the "career" span of surrogates is limited. Protections such as collective bargaining or unionization are of little value to such short-term, individualized workers.[238] Rather than being part of a workforce or even an employee, the surrogate is more akin to an independent contractor. Nevertheless, the state can intervene to equalize some of the bargaining disparities between both the clinic and the surrogate and the commissioning parents and the surrogates through worker rights and mandatory contractual requirements.

To elaborate upon Table 3 above, it is imperative that the contracts that are entered into have some basic requirements, such as being in a language understood by the surrogate. The surrogate herself must be informed and must consent freely to the agreement. This means that she must understand the terms and the medical procedures, because there are two layers of informed consent here: first, the legal consent for the agreement and, second, the medical informed consent to the procedures. Then, by ensuring not only a minimum amount of insurance coverage, mandatory postnatal care, and the right to refuse cesarean sections or other procedures that may compromise the long term health of women, surrogates are provided a measure of autonomy. The state can provide rules allocating the risk of a "change of mind" to the parties best able to bear the cost. For instance, it might require the clinic to share the risk in the event that a surrogate subjectively feels unable to continue the surrogacy. This prevents the surrogate from essentially specifically performing simply because they are indebted to the clinic or the commissioning parents (that is, unable to repay what has been paid already). The state can regulate the conditions of the surrogacy hostels to ensure a minimum level of comfort and autonomy. While clinics may want to regulate surrogates and require surveillance to ensure a healthy and safe birth, some hostels are overly Dickensian, with lines of cots, no privacy, and round-the-clock surveillance of

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235. *See* Pande, *supra* note 22, at 32.

236. *See id.* ("Surrogacy, often equated to sex work, is unusually stigmatized in India.").

237. *See* ART Draft Bill, *supra* note 28, ch. VII.34 (5) (restricting women to five successful births in their lifetime).

238. *See, e.g.*, The Unorganized Workers' Social Security Act, 2008, No. 33, Acts of Parliament, 2008 (India). The government of India clearly recognizes that a large majority of its workers cannot obtain employment benefits because of the informal nature of their work. Surrogacy ought to be included in the kind of informal work contemplated by this Act. *See id.*

adult women.[239] The state may certainly intervene here to demand some degree of privacy and comfort for women. And the state can provide fast-track access to the legal system to adjudicate the contracts in the event of a breach or a conflict. Bargaining in the shadow of the law does prevent some of the abuses that may result from no regulation at all, even if the parties never avail themselves of the formal legal system.[240] Moreover, an active interest by the state in the business of surrogacy may prevent the discourse of "dirty work" or sex work from being used to prevent the negotiation of the best contracts.[241] In some sense, then, regulating the industry will legitimize surrogates as *workers*.

VI. CONCLUSION: GETTING THE BEST OF A FAUSTIAN BARGAIN?

Surrogacy is a complicated transaction in human emotion and economics. For Indian women, too often depicted as voiceless subalterns and vulnerable to exploitation, the fact is that surrogacy is a transaction that is a rational economic choice in constrained circumstances. Embedded in political economies of state and family that reward wage earning and property ownership with better intrafamily decision-making power, status, and even protection against violence, women with limited opportunities for accumulation of wealth, limited skills, and limited employment prospects have turned to surrogacy. The business allows them at least a chance to accumulate money and property and to advance the next generation through education. Their choices are not baby-selling, altruism, sex work, or outsourced cheap labor. These frames fail to take into account the ethnographic work done on surrogates, the self-conception of surrogates themselves, and the driving forces of political economies behind the choices to enter surrogacy.

Surrogacy is work. The relationship between the clinic and the surrogate is a work relationship as is the relationship between commissioning parent and surrogate. While affective ties through such an intimate form of labor can arise, it should not obscure the

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239. *See* Sharmila Rudrappa, *India's Reproductive Assembly Line*, CONTEXTS (Spring 2012), http://contexts.org/articles/spring-2012/indias-reproductive-assembly-line/ [http://perma.cc/4JSA-XYZN] (archived Sept. 27, 2014) (illustrating the conditions of women in some Indian surrogacy clinics).

240. *See generally* Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982), *available at* http://scholarship.law.berkeley.edu/facpubs/85/ [http://perma.cc/8BMS-APZT] (archived Sept. 27, 2014).

241. *See* Pande, *Not an Angel*, *supra* note 234, at 155. *See generally* Amrita Pande, *"At Least I Am Not Sleeping With Anyone": Resisting the Stigma of Commercial Surrogacy in India*, 36 FEMINIST STUD. 292 (2010).

fact that labor is being done for remuneration, and the ties are contingent on the production of a child. Moreover, affective ties should not be deployed to the disadvantage of the worker, as is being done through discourses of altruism and motherhood.

It is well and good to view surrogacy as labor, but in order to regulate it effectively and with an eye toward protecting women, it cannot be seen *only* as ordinary labor. This is the kind of work that only women can do; it is deeply embodied and has the potential to be very exploitative if allowed to rob women of substantial autonomy over their own bodies.[242] Feminists have been right to be concerned about the potential for increased subordination that women might experience as they enter a market-driven version of reproduction.[243] This Article takes these concerns seriously even though it does not seek to answer the ethical questions of whether women *ought to be able* to marketize their reproductive capabilities. Regarding the question whether commodification always results in degradation or devaluation of women as a mere means to an end, the Article raises the possibility that with adequate regulation, this end is not predetermined, a position that has already been theorized by some feminists.[244] This Article agrees with those feminist scholars who are attempting to theorize alternatives to simplistic, binary views of surrogacy caught between the practical benefits that surrogacy provides versus the deontological theoretical objections to it.[245] Assertions that surrogacy renders women as "no more than" incubators or "hosts" are reductive, without thought to surrogates' dignity and worth as human agents.[246] It makes little sense to object to a position that considers surrogacy work, however, based on fears that commodification will reduce women once again to their biology, this time for a price. One might similarly reduce any worker merely a human machine creating some product through the alienation of their

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242. *See* Pande, *Not an Angel*, *supra* note 234, at 155 ("[S]urrogacy is also surrounded by controversies around the ethics of 'selling motherhood' and 'renting wombs'.").

243. *See generally* MARTHA ERTMAN & JOAN C. WILLIAMS, RETHINKING COMMODIFICATION (2005); Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2349–50 (1995); Noa Ben-Asher, *The Curing Law: The Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1914 (2009); 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); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987).

244. *See* ERTMAN & WILLIAMS, *supra* note 243.

245. *See* Laufer-Ukeles, *supra* note 31, at 1224–29 ("Thus, in an often-asymmetric manner, deontological theoretical concerns go head-to-head with practical utilitarian benefits in a manner that creates dissociation and tension.").

246. *See* Laufer-Ukeles, *supra* note 31, at 1224–29.

labor.[247] And commentators do not, as a rule, object to work that produces a commodity in other forms or view the worker only as her ability to produce. [248] The characterizations of surrogacy as commodification of babies or women's bodies do not settle the argument in favor of the deontological anticommodification position. [249] On the other hand, nor does the fact that surrogates are indeed providing a practical and valuable service that benefits infertile families mean that it is an optimal activity that created a win-win situation for all involved. The impasse that has been set up between anticommodification and prosurrogacy advocates must be resolved particularly because the surrogate, as well as those who desire families, stands to lose if it is not.

This Article has argued that the work position that construes surrogacy as labor is best suited to offer both redistributive results and protection for surrogates. While the growth of commercial surrogacy in the Global South must be understood in the broader context of global economic relationships between the North and the South, feminists concerned with third-world women must also account for the cleavages within the South amongst various strata of society as well as the state's failure to adequately provide for opportunities and to distribute resources to those at the economic lower rungs.[250] Freedom of contract and the prevailing draft bill are inadequate to the task of addressing the very serious possibilities of exploitation particularly if surrogacy becomes less stigmatized and more widespread with a fungible labor supply.[251] In sum, both the global and local economic structures conspire to reduce the alternatives for poor women and feminists must continue the struggle to hold the state and the global economies of transnational surrogacy accountable. Moreover, the struggle to improve opportunities and increase alternatives cannot be abandoned even while reformers struggle to make surrogacy a better labor choice for women.

Although this Article has argued for the reframing of surrogacy as a rational economic choice of work, it recognizes that it is a Faustian bargain that provides some economic relief even while reinscribing the worth of women through their biology. This is why both contract law and labor protections must be deployed to ensure that that bargain does not result in the increased subordination of an already vulnerable group while others profit. The world has already

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247. *See* FRANCE WINDDANCE TWINE, OUTSOURCING THE WOMB: RACE, CLASS, AND GESTATIONAL SURROGACY IN A GLOBAL MARKET 13–20 (2011). *See generally* KOTISWARAN, *supra* note 77, at 76–82.

248. *See generally* KOTISWARAN, *supra* note 77, at 50–82.

249. *See id.* at 75.

250. *See* Vincent & Aftandilian, *supra* note 200. *See generally* Goodwin, *supra* note 31.

251. *See* TWINE, *supra* note 247, at 18–20.

accepted that commercial surrogacy is a big business. Now surrogates should be given the dignity of being recognized as its primary workers.

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