

# REGULATING INTERNATIONAL COMMERCIAL SURROGACY: A BALANCE OF HARMS AND BENEFITS

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## Abstract

International surrogacy can produce great joy, as well-paid surrogates help produce healthy children for caring parents. However, many current cross-border surrogacy arrangements occur under conflicting citizenship laws, which can leave surrogate-born children stateless and their intended parents fighting for parental rights. In addition, without sufficient regulation, international surrogacy can lead to abuses, including exploitation of surrogate mothers and abandonment of surrogate-born children. At the other extreme, excessive regulation, including prohibition, can also cause great harm as surrogates and intended parents are denied surrogacy's benefits. Moreover, inadequate regulation can quickly lead to prohibition, as abuses cause a country to flip from one extreme to the other. Accordingly, moderate regulation is essential to protect surrogates, intended parents, and surrogate-born children. In addition, a transnational agreement to respect parental rights established in other countries would create international regulatory consistency and solve the heartbreak of a restrictive country refusing to recognize a surrogacy from another nation, stripping the parents of custody.

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INTRODUCTION

The international commercial surrogacy market made global headlines in 2020 when COVID-19 travel bans led to the abandonment of thousands of babies around the world.<sup>1</sup> As travel froze, biological parents were unable to claim newborns born to surrogate mothers in Russia, Ukraine, the United States, and elsewhere.<sup>2</sup> Some babies were left in hospitals, in orphanages, or in the hands of surrogacy agencies for months.<sup>3</sup>

While these particular logistical problems are likely unique to the pandemic, other problems have become evident as the industry has expanded in recent years. International commercial surrogacy has grown into a \$6 billion annual industry as advances in reproductive technology make it increasingly easy for parents, called “intended parents,”<sup>4</sup> to have a biological child through a surrogate.<sup>5</sup> Both the diversification of family structures beyond traditional heterosexual couples and the fertility problems associated with women waiting longer to have children have increased the demand for surrogacy services in many developed countries.<sup>6</sup> Meanwhile, surrogacy services are often supplied by poor women that can earn many times their annual salary as a surrogate.<sup>7</sup>

Although commercial surrogacy has grown in popularity, it is illegal in most countries.<sup>8</sup> As a result, intended parents regularly travel abroad to hire a surrogate. In theory, and sometimes in practice, cross-border surrogacy arrangements make possible a mutually beneficial exchange between intended parents and surrogates. The parents are able to have a biological child, and surrogates earn much-needed income. However, in

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1. Lizzie Widdicombe, *The Stranded Babies of the Coronavirus Disaster*, NEW YORKER (July 20, 2020), [www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster](http://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster) [https://perma.cc/8Q6Z-GTYF].

2. *Id.*

3. *Id.*

4. *Id.*

5. Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. & HEALTHCARE POL’Y 111, 111 (2015).

6. See Jenny Kleeman, *Having a Child Doesn’t Fit into These Women’s Schedule: Is This the Future of Surrogacy?*, GUARDIAN (May 25, 2019, 5:00 AM), <https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy> [https://perma.cc/UR4G-MDK2].

7. Jack Glaser, *Womb for Rent: Regulating the International Surrogacy Market*, BROWN POL. REV. (Nov. 1, 2021, 2:08 PM), <https://brownpoliticalreview.org/2016/11/womb-for-rent-regulating-international-surrogacy-market/> [https://perma.cc/X5M5-SGHC].

8. See *infra* Part II.

some places, a lack of meaningful regulation has led to the exploitation of both surrogates and surrogate-born children.<sup>9</sup> Many poor women are coerced into surrogacy arrangements without fully understanding the physical, emotional, and financial consequences.<sup>10</sup> Most lack legal representation when signing surrogacy contracts, and some are even illiterate and unaware of what they are signing.<sup>11</sup> Further, as with any industry, the goal of most commercial surrogacy agencies is to make a profit.<sup>12</sup> This profit motive has sometimes led agencies to neglect the health of the surrogate.<sup>13</sup> Surrogates are often forced to undergo unnecessary health procedures, such as C-sections and multiple embryo transfers, for the convenience of the intended parents.<sup>14</sup> In extreme cases, women have even been trafficked to work as surrogates for little to no pay.<sup>15</sup>

Insufficient surrogacy regulations have also left surrogate-born children vulnerable to exploitation.<sup>16</sup> Because international surrogacy contracts are often difficult to enforce, some children born with unexpected health issues have been abandoned by their intended parents.<sup>17</sup> On rare occasions, intended parents have even entered surrogacy agreements for the sole purpose of abusing their surrogate-born child.<sup>18</sup> In addition, conflicting citizenship laws among the countries where surrogates give birth and the countries where intended parents live can leave surrogate-born children “stateless” after their intended parents’ home country denies them citizenship.<sup>19</sup> As a result, some surrogate-born children have been trapped in their country of birth for many months, or even years.<sup>20</sup>

Moreover, insufficient regulation has had another, counterintuitive effect in many countries. Unregulated markets often result in high-profile cases of exploitation and abuses that ultimately cause the country to react by prohibiting surrogacy completely.<sup>21</sup> Although these markets initially benefitted many childless parents and surrogates by increasing the availability of surrogacy, the switch to prohibition ends up harming them

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9. See *infra* Part III.

10. See Glaser, *supra* note 7.

11. *Id.*; see *infra* Part III.

12. See Glaser, *supra* note 7.

13. *Id.*

14. See *infra* Part III.

15. See Glaser, *supra* note 7; *infra* Part III.

16. See *infra* Part III.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See *infra* Part III.

by causing surrogacy to be eliminated.<sup>22</sup> Comprehensive sensible regulation is the sweet spot for protecting surrogates and surrogate-born children from harm and maximizing the availability of surrogacy for intended parents and surrogates.<sup>23</sup>

Some jurisdictions have enacted minimal regulations to address commercial surrogacy's potential harms.<sup>24</sup> For example, a few countries require both the intended parents and the surrogate to consult with independent legal counsel, and others require the surrogate to be of "full age" with at least one child of her own.<sup>25</sup> However, most countries that allow commercial surrogacy have very few protections in place.<sup>26</sup>

In this Article, I explain the burgeoning international commercial surrogacy market and discuss the benefits and harms that accompany current surrogacy arrangements. I discuss the lack of regulations to protect surrogates and surrogate-born children and then propose several regulations that could minimize the current harms of the industry. I also champion a transnational agreement to address the citizenship issues that often arise from conflicting surrogacy laws in different nations. Ultimately, with the right protections in place, international commercial surrogacy can provide important benefits to both intended parents and surrogates.

This Article proceeds as follows. Part I describes the market for international commercial surrogacies, and Part II explores the potential benefits and harms that result from these arrangements. Part III presents several reforms that countries could adopt to minimize harms to surrogates, surrogate-born children, and intended parents, and this Article will end by offering conclusions.

## I. THE MARKET FOR INTERNATIONAL SURROGACY

Traditional surrogacy, in which the surrogate is inseminated with sperm and uses her own egg and is, therefore, genetically related to the child, has been informally practiced for thousands of years.<sup>27</sup> In contrast, the most common form of commercial surrogacy today is gestational surrogacy.<sup>28</sup> In gestational surrogacy, a surrogate is implanted with another woman's egg.<sup>29</sup> It was made possible by the introduction of in

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22. *Id.*

23. *Id.*

24. *See infra* Part IV.

25. *Id.*

26. *Id.*

27. Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html> [<https://perma.cc/NB2A-HFYU>].

28. *What is Gestational Surrogacy?*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/gestational-surrogacy> [<https://perma.cc/K7T4-BHDM>] (last visited May 1, 2022).

29. *Id.*

vitro fertilization (IVF) in 1978.<sup>30</sup> In an IVF procedure, an egg is fertilized with a sperm outside of the uterus, and then the embryo is implanted inside a woman's uterus.<sup>31</sup> Gestational surrogacy enables intended parents to have biologically related children. It can alleviate infertility issues that affect over ten percent of women worldwide or allow people that are not in traditional heterosexual relationships to have biological children.<sup>32</sup>

The first legally recognized case of surrogacy occurred in 1986, when a traditional surrogate, Mary Beth Whitehead, was sued by the intended parents for breaching their contract and trying to keep the baby.<sup>33</sup> Since then, advances in reproductive technology have greatly expanded the commercial surrogacy industry. Today, an estimated \$6 billion is spent each year on surrogacy arrangements around the world.<sup>34</sup>

However, regulations on commercial surrogacy arrangements vary greatly between countries. In this Part, I describe the most common legal regimes governing commercial surrogacy.

#### A. Countries Prohibiting All Forms of Surrogacy

Most countries ban surrogacies altogether and consider surrogacy contracts unenforceable.<sup>35</sup> In these countries, the surrogate is generally considered the legal mother of the child.<sup>36</sup> Intended parents, surrogacy facilitators, and assisted reproduction clinics can even face criminal charges in some jurisdictions.<sup>37</sup> Countries prohibiting surrogacies include China, El Salvador, Ethiopia, Iceland, Indonesia, Morocco, Norway, Saudi Arabia, Singapore, and Tunisia.<sup>38</sup> Surrogacy is also banned in India, Nepal, and Thailand, but only to foreigners.<sup>39</sup>

Surrogacy is also prohibited by a large number of European countries, and surrogacy contracts in these jurisdictions are illegal or unenforceable. For example, France, Germany, Italy, Spain, and Switzerland prohibit all

30. Gloria Torres et al., *A Review of Surrogate Motherhood Regulation in South American Countries: Pointing to a Need for an International Legal Framework*, 19 BMC PREGNANCY & CHILDBIRTH 1, 2 (2019).

31. *Id.*

32. *Id.*

33. Haberman, *supra* note 27.

34. Deonandan, *supra* note 5, at 111.

35. Sonia Allan, *The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations*, in SURROGACY, LAW AND HUMAN RIGHTS 131 (Paula Gerber & Katie O'Byrne eds., 2015).

36. *Id.*

37. *Id.*

38. *Id.*

39. Paul Mieczyslaw, *Ukraine's Surrogacy Industry*, HYPHEN-REPORT (Apr. 15, 2022), <https://www.hyphen-report.com/ukraines-surrogacy-industry/#:~:text=Countries%20such%20as%20India%2C%20Nepal%2C%20and%20Thailand%20have,inclue%20liberal%20laws%20and%20lack%20of%20enforced%20regulations> [https://perma.cc/8Y27-HWWD].

types of surrogacies.<sup>40</sup> However, among European countries that ban surrogacy, there is divergence in how surrogate children born abroad to their own citizens are treated. For example, in 2015 the highest French civil court decided to recognize as French citizens surrogate children born abroad who had at least one French parent.<sup>41</sup> A similar German Federal Court of Justice case in 2014 recognized the rights of German same-sex couples who had children abroad via surrogacy to be parents and their children to be German citizens—as long as the children had the same genetic material as one of the intended parents.<sup>42</sup>

Other countries, such as Italy and Switzerland, have refused to recognize the parental rights of intended parents or same-sex parents and denied the surrogate child citizenship.<sup>43</sup> In Switzerland, a 2015 decision by the Swiss Federal Court refused to give parental rights to a Swiss same-sex couple who had a child via a surrogate in California.<sup>44</sup> In Italy, an Italian court ordered that a child born through surrogacy be taken from his Italian parents and placed in a government foster home.<sup>45</sup> However, in 2015 the European Court of Human Rights ruled the Italian Court's decision violated Article 8 of the European Convention of Human Rights by disrespecting an individual's private and family life.<sup>46</sup>

Other countries, including Belgium, Czech Republic, Ireland, and Japan have no legislation regarding surrogacy.<sup>47</sup> In these jurisdictions, surrogacy contracts are similarly unenforceable, yet the participating parties are not considered to be engaging in a crime.<sup>48</sup> The majority of South American countries similarly have no legislation regulating surrogacy.<sup>49</sup> For many of these countries, such as Argentina, Chile, and

40. ALEX FINKELSTEIN ET AL., COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, SURROGACY LAW AND POLICY IN THE US: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING I, 12–13 (2016), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf) [<https://perma.cc/RME9-3RSS>].

41. *Surrogate Children Can Now Claim French Citizenship, Top Court Rules*, RT (July 3, 2015, 8:20 PM), <https://www.rt.com/news/271570-france-surrogate-children-legal/> [<https://perma.cc/52AT-XDUW>].

42. Dina Reis, *German Federal Court of Justice on Surrogacy and German Public Policy*, CONFLICTOFLAWS.NET (Mar. 4, 2015), <https://conflictoflaws.net/2015/german-federal-court-of-justice-on-surrogacy-and-german-public-policy/#:~:text=In%20its%20ruling%20of%2010,of%20a%20surrogacy%20arrangement%20should> [<https://perma.cc/D7FY-D6Q3>].

43. See FINKELSTEIN ET AL., *supra* note 40, at 12–13.

44. *Id.* at 13.

45. Elena Ignovska, *Paradiso and Campanelli v. Italy: Lost in Recognition*, STRASBOURG OBSERVERS (Apr. 4, 2017), <https://strasbourgoobservers.com/2017/04/04/paradiso-and-campanelli-v-italy-lost-in-recognition-filiation-of-an-adopted-embryo-born-by-surrogate-woman-in-a-foreign-country/> [<https://perma.cc/9JCR-FFJS>].

46. FINKELSTEIN ET AL., *supra* note 40, at 12–13.

47. Allan, *supra* note 35, at 131.

48. *Id.*

49. Torres et al., *supra* note 30, at 4–9.

Colombia, political leaders avoid regulating surrogacy because it is controversial and opposed by South American Catholicism.<sup>50</sup>

### B. *Countries Allowing Only Altruistic Surrogacy*

Meanwhile, other countries allow only altruistic surrogacy, in which surrogates are motivated by a desire to help couples that cannot have children and are only compensated for the “reasonable expenses” associated with the surrogacy.<sup>51</sup> Such nations include Australia, Belgium, Brazil, Canada, Denmark, Greece, the Netherlands, New Zealand, South Africa, South Korea, U.K.,<sup>52</sup> Vietnam,<sup>53</sup> and Cambodia.<sup>54</sup> These countries view commercial surrogacy as effectively selling children but allow altruistic surrogacy because the surrogate is not paid for her services.

### C. *Countries Allowing All Types of Surrogacy*

Finally, some jurisdictions permit both altruistic and commercial surrogacy, including Armenia, Georgia, Israel, Kyrgyzstan, Laos, Mexico, Russia, Slovenia, Uganda, Ukraine, and eighteen states within the United States.<sup>55</sup> In these jurisdictions, surrogacy contracts are legal and enforceable, and there is usually legislation giving the intended parents legal parentage of their surrogate-born children.<sup>56</sup> However, these countries do not necessarily permit all surrogacies. For example, in Israel, intended parents must be in a heterosexual relationship, surrogates must be single and in no way related to the intended parents, and intended parents and surrogates must observe the same religion.<sup>57</sup>

Moreover, as I discuss in Part II, many of these jurisdictions have insufficient regulation to protect surrogates and surrogate-born children.<sup>58</sup> As a result, high-profile examples of exploitation and abuse pressure political leaders to prohibit surrogacies altogether.

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50. *Id.*

51. *Commercial Surrogacy vs. Altruistic Surrogacy*, WORLDWIDE SURROGACY SPECIALISTS (Jan. 11, 2021), <https://www.worldwidesurrogacy.org/blog/commercial-surrogacy-vs-altruistic-surrogacy#:~:text=Altruistic%20surrogacy%20refers%20to%20those,family%20member%2Fclose%20friend> [https://perma.cc/3WJA-2MGQ].

52. Allan, *supra* note 35, at 132.

53. ANDREA WHITTAKER, INTERNATIONAL SURROGACY AS DISRUPTIVE INDUSTRY IN SOUTHEAST ASIA 174 (2019).

54. *Id.* at 173.

55. See Allan, *supra* note 35, at 131.

56. *Id.*

57. See WHITTAKER, *supra* note 53, at 30–31.

58. See *infra* Part II.

### D. *Surrogacy Across the United States*

In the United States, there is no federal law regulating commercial surrogacy. Accordingly, each state has its own laws and regulations regarding surrogacy, with wide variations between these laws.<sup>59</sup>

For example, Michigan and Louisiana prohibit both altruistic and commercial surrogacy, and state law criminalizes commercial surrogacies.<sup>60</sup> Until mid-2021, New York also banned all surrogacies, though recent legislation has legalized surrogacy.<sup>61</sup> Arizona, Indiana, and Nebraska prohibit both types of surrogacy, considering surrogacy contracts unenforceable, though not criminal.<sup>62</sup> Nevertheless, courts in Arizona and Indiana will sometimes issue parentage orders so that surrogacy is still practiced. For example, Arizona Revised Statute § 25-218 prohibits individuals from entering into or assisting in creating a surrogacy contract.<sup>63</sup> However, intended parents can petition Arizona Courts for pre-birth orders, and courts do grant these pre-birth orders.<sup>64</sup> This allows gestational surrogacy to continue to function, albeit with legal hurdles.

Other states, including Florida, Nevada, New Hampshire, Utah, and Washington, permit only altruistic surrogacy.<sup>65</sup> Meanwhile, the states of California, Delaware, Illinois, and Texas allow both commercial and altruistic surrogacy and have instituted regulations for surrogacy contracts.<sup>66</sup> Nevertheless, there remain legal hurdles in some of these states. For example, Texas surrogacy laws exclude same-sex couples from surrogacy arrangements.<sup>67</sup>

### E. *The Drivers of International Surrogacy*

Laws prohibiting domestic surrogacy in their countries of origin have led many intended parents to seek surrogacy arrangements abroad.

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59. See FINKELSTEIN ET AL., *supra* note 40, at 8–10.

60. *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> [https://perma.cc/J7SC-PC2K] (last visited Oct. 20, 2021).

61. David Crary, *No Longer an Outlier: New York Ends Commercial Surrogacy Ban*, AP NEWS (Feb. 14, 2021), <https://apnews.com/article/new-york-surrogacy-laws-a5e4323f6b1fb82b424c272ee791d90a> [https://perma.cc/4A9F-9DPQ].

62. *Id.*

63. ARIZ. REV. STAT. ANN. § 25-218 (2021).

64. *The United States Surrogacy Map*, *supra* note 60.

65. See Richard F. Storrow, *Surrogacy: American Style*, in SURROGACY, LAW AND HUMAN RIGHTS, *supra* note 35, at 204 n.107.

66. See *Surrogacy Laws by State*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> [https://perma.cc/9LJK-AVLM] (last visited Apr. 27, 2022).

67. HEATHER JACOBSON, LABOR OF LOVE: GESTATIONAL SURROGACY AND THE WORK OF MAKING BABIES 19 (2016).



Intended parents also seek international surrogates because surrogacy services in less-developed nations are generally much less expensive than surrogacy services found in more-developed countries such as the United States. For example, until recently, India was the world's hub for affordable surrogacy services. In India, intended parents usually paid under \$30,000 USD for surrogacy, while in the United States, intended parents pay between \$70,000 USD and \$100,000 USD.<sup>68</sup> At its height, the surrogacy industry in India grossed more than \$400 million USD annually.<sup>69</sup> However, as I discuss in Part II, in 2015, the Supreme Court of India banned international clients from procuring surrogacy services in India due to exploitation concerns.<sup>70</sup> Other popular destinations for international commercial surrogacy—Thailand, Cambodia, and Nepal—suffered similar fates when their respective governments outlawed the practice.<sup>71</sup> Presently, many intended parents travel to Mexico,<sup>72</sup> Laos,<sup>73</sup> Russia, and Slovenia<sup>74</sup> to procure surrogacy services. Ukraine and Georgia are also popular destinations, though surrogacy contracts are not granted to gay couples in these countries.<sup>75</sup> As people cross borders to receive more-affordable surrogacy services or bypass the restrictive laws in their country, they contribute to the international surrogacy industry, sometimes described as a form of “reproductive tourism.”<sup>76</sup>

## II. THE ETHICAL DEBATE AROUND INTERNATIONAL SURROGACY

At first glance, the wealth gap between surrogates and intended parents seems to create an opportunity for a mutually beneficial arrangement in which the latter pays the former a life-changing sum of money to carry their biological child. However, unregulated markets often result in exploitation and abuse of both surrogates and surrogate-born children. In this section, I discuss the potential benefits and harms resulting from international commercial surrogacy.

### A. *Potential Benefits of International Surrogacy*

On the surface, international commercial surrogacy seems to benefit everyone involved. Intended parents are able to have a biological child

68. Jonathan W. Knoche, *Health Concerns and Ethical Considerations Regarding International Surrogacy*, 126 INT'L J. GYNECOLOGY & OBSTETRICS 183, 183 (2014).

69. *See id.*

70. Jyoti Chaudhary, *Consequences of Surrogacy on Surrogates in India*, 49 INDIAN ANTHROPOLOGIST 91, 94 (2019).

71. WHITTAKER, *supra* note 53, at 170.

72. *Id.* at 171.

73. *Id.* at 173.

74. Sharmila Rudrappa & Caitlyn Collins, *Altruistic Agencies and Compassionate Consumers: Moral Framing of Transnational Surrogacy*, 29 GENDER & SOC'Y 937, 940 (2015).

75. WHITTAKER, *supra* note 53, at 170–71.

76. Deonandan, *supra* note 5, at 111.

even if they suffer from fertility issues or if their family structure would not otherwise allow them to have biological children.<sup>77</sup>

Meanwhile, the commissioned surrogates receive a large sum of money for their services and are able to improve their standard of living. For example, before surrogacy was outlawed in India, most surrogates either did not work prior to their surrogacy, or worked in factories earning \$0.50 USD per hour or roughly \$120 USD per month. The \$6,000 USD they received from a surrogacy arrangement, although low compared to what U.S. surrogates are paid, was an order of magnitude more than they could earn in other jobs.<sup>78</sup> Similarly, before surrogacy was banned in Thailand, surrogates received an average of \$10,000 USD for each surrogacy arrangement, whereas the minimum wage in Bangkok was only \$10 USD *per day*.<sup>79</sup> As a result of the significant surrogacy fees, surrogates could stay home with their own children instead of working long hours on farms, construction sites, or factories.<sup>80</sup> Moreover, the money from surrogacy arrangements has allowed many women to pay off debts, send their own children to school, buy a house,<sup>81</sup> or even start a business.<sup>82</sup>

Some surrogates are further motivated by the chance to receive Buddhist good merit, called “tan-bun,” for offering their surrogacy services. Similar to the idea of karma, this merit is believed to cancel out bad deeds committed earlier in life and provide good merits for the future and even the next life.<sup>83</sup>

### B. *Potential Harms of International Surrogacy*

Although international commercial surrogacy arrangements can be mutually beneficial to surrogates and intended parents, a lack of meaningful regulation often results in the exploitation and abuse of surrogate mothers and surrogate-born children. Moreover, cross-border surrogacy arrangements with conflicting citizenship laws can leave surrogate-born children stateless and their intended parents fighting for parental rights.

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77. WHITTAKER, *supra* note 53, at 41.

78. *Id.* at 35.

79. *Id.* at 54.

80. *Id.* at 54.

81. *Id.* at 35.

82. Allan, *supra* note 35, at 188.

83. Patricia Fronek, *Current Perspectives on the Ethics of Selling International Surrogacy Support Services*, 8 MEDICOLEGAL & BIOETHICS 11, 14 (2018).

## 1. Surrogate Mothers

The poverty experienced by many surrogates in developing countries leaves them vulnerable to exploitation by agents trying to profit from the international commercial surrogacy industry. This “exploitation of desperation”<sup>84</sup> is exacerbated by the fact that many surrogates lack the education necessary to fully understand their surrogacy contracts. In some cases, surrogates are illiterate and do not understand the terms of their contracts.<sup>85</sup> In many other situations, poor women lack legal representation to ensure their surrogacy contracts are fair.<sup>86</sup> There have been instances in which the contract was not even signed by both parties until the fourth month of the pregnancy, leaving the surrogate with nothing if she miscarried earlier.<sup>87</sup>

A surrogacy arrangement involves much more risk than a regular business transaction. Surrogates who do not have children of their own are unlikely to understand the dangers associated with pregnancy and childbirth. Even surrogates who have gone through pregnancy may not realize the higher mortality rate associated with a gestational surrogacy as opposed to a natural pregnancy.<sup>88</sup> In some societies, such as India, husbands and relatives have forced their female family members to become surrogates because, in nine months, a surrogate can earn several times the annual salary of her family members.<sup>89</sup> The surrogate’s husband may even sign her surrogacy contract, leaving the surrogate unaware of the terms she has agreed to. In such cases, the husband can steal all of the money that the wife earned.<sup>90</sup>

Part of the appeal of international surrogacy for intended parents is its convenience and efficiency. However, this efficiency is sometimes achieved by risking the surrogate’s health. For example, to ensure that an embryo can be implanted on a certain date, surrogacy agencies often prep several surrogates for the possible transfer of the embryo.<sup>91</sup> This means injecting several women with potent medication and hormones, even though only one surrogate will actually receive the embryo depending on the thickness of her uterine lining.<sup>92</sup>

There are countless other examples of surrogates’ health being sacrificed for the benefit and convenience of the intended parents. For instance, several embryos are often implanted in the surrogate to increase

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84. Deonandan, *supra* note 5, at 115.

85. Allan, *supra* note 35, at 127.

86. Fronek, *supra* note 83, at 15.

87. Allan, *supra* note 35, at 127.

88. Fronek, *supra* note 83, at 15.

89. Allan, *supra* note 35, at 125.

90. Fronek, *supra* note 83, at 15.

91. WHITTAKER, *supra* note 53, at 44.

92. *Id.*

the chance that she will get pregnant. However, this can lead to the surrogate carrying multiple fetuses, which poses more risk to both the surrogate and the babies.<sup>93</sup>

Similarly, surrogacy agencies often require their surrogates to undergo medically unnecessary C-sections instead of natural births. Although this typically happens because the intended parents want to be at the hospital when their child is born, surrogates have also undergone C-sections when the intended parents insisted on a certain birth date for astrological reasons or because they wanted to prevent emotional attachment from forming between the surrogate and the baby during natural childbirth.<sup>94</sup> Although more convenient for the intended parents, C-sections have a higher risk of infection and a longer recovery time for the surrogate.<sup>95</sup>

In extreme cases, surrogacy firms have become so motivated by profit that they have trafficked women to work as surrogates. For instance, in 2009, several Burmese women were bought by Chinese men and forced to work as surrogates, with only \$250 USD compensation.<sup>96</sup> In an even more alarming case in 2011, the Taiwanese-owned Baby 101 surrogacy firm trafficked fourteen Vietnamese women into Thailand to work as surrogates.<sup>97</sup>

In addition to mistreatment by surrogacy agencies, surrogates can also face stigma from their communities. Before international surrogacy was banned in India in 2015, many Indian citizens denounced surrogates for “selling” their children.<sup>98</sup> Other people in India assumed that surrogacy involves sexual intercourse and accused surrogates of adultery.<sup>99</sup> Such serious accusations sometimes compelled surrogates and their families to leave their longstanding communities, forcing them to lose their jobs and established social circles.<sup>100</sup>

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93. *Id.* at 34.

94. Chaudhary, *supra* note 70, at 99.

95. *Id.* at 98.

96. Allan, *supra* note 35, at 123.

97. *Id.* See also *Thailand Police Investigate Baby Sales Ring*, BBC NEWS (Feb. 25, 2011), <https://www.bbc.com/news/world-asia-pacific-12575566> [<https://perma.cc/HG9T-3H6L>].

98. Nathan Hodson et al., *Removing Harmful Options: The Law and Ethics of International Commercial Surrogacy*, 27 MED. L. REV. 597, 613 (2019).

99. Fronek, *supra* note 83, at 15.

100. Hodson et al., *supra* note 98, at 613.

## 2. Surrogate-born Children

The international commercial surrogacy industry also risks the well-being of the children born in surrogacy arrangements. Although most surrogate-born children have completely normal childhoods, some are harmed due to the lack of consistent, transnational regulations. Surrogate-born babies with unexpected health problems have been abandoned by their intended parents. For instance, in 2015, a Thai surrogate bore a set of twins for an Australian couple.<sup>101</sup> The twin girl, who was healthy, was taken back to Australia, but the twin boy, born with Down Syndrome, was left in Thailand by his intended parents.<sup>102</sup> The Thai surrogate assumed care of the twin boy, known as Baby Gammy, and appealed to the media for donations to help care for the boy.<sup>103</sup> With the global media attention that followed, it was revealed that the intended father had previously been convicted and imprisoned for twenty-two child sex offenses.<sup>104</sup> The Baby Gammy case and several other controversial cases led the Thai government to eventually ban the industry for foreigners in 2015.<sup>105</sup>

In other rare cases, intended parents have abused their surrogate-born children.<sup>106</sup> For example, in 2013, an Australian couple was convicted and imprisoned for using their son, a product of Russian surrogacy, to produce and disseminate child pornography.<sup>107</sup> Likewise, in 2014, an Australian man was convicted of molesting his twin daughters, who were born using a Thai surrogate.<sup>108</sup>

## 3. Conflicting Citizenship Laws

Surrogacy arrangements involving parties from countries with conflicting citizenship rules can also leave surrogate-born children stateless and their intended parents fighting for parental rights. Many surrogate-born children have been denied citizenship after their intended parents' home country refused to recognize the intended parents' parental rights.<sup>109</sup> As a result, some surrogate-born children have been trapped in

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101. WHITTAKER, *supra* note 53, at 148.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Thailand Bans Commercial Surrogacy for Foreigners*, BBC NEWS (Feb. 20, 2015), [www.bbc.com/news/world-asia-31546717](http://www.bbc.com/news/world-asia-31546717).

106. See FRONEK, *supra* note 83, at 16.

107. Patricia Fronek & Marilyn Crawshaw, *The 'New Family' as an Emerging Norm: A Commentary on the Position of Social Work in Assisted Reproduction*, 45 BRITISH J. SOC. WORK 737, 741 (2015).

108. WHITTAKER, *supra* note 53, at 153.

109. Rich Vaughn, *Children Born Abroad Via Surrogacy Denied U.S. Citizenship*, INT'L FERTILITY L. GRP. (Aug. 2, 2019, 5:58 PM), <https://www.iflg.net/children-born-foreign-surrogacy-denied-u-s-citizenship/> [<https://perma.cc/4Q4F-NV8E>].

their birth country for many months, or even years.

In 2008, for instance, the Balaz twins were born out of a surrogacy agreement between intended German parents and an Indian surrogate.<sup>110</sup> However, Germany does not recognize surrogacy and consequently considered the Indian surrogate to be the twins' legal mother.<sup>111</sup> When the intended parents tried to procure German citizenship for the twins, they were denied.<sup>112</sup> Meanwhile, India's progressive surrogacy laws at the time treated the German intended parents as the legal parents of the twins and, therefore, similarly denied the twins Indian citizenship.<sup>113</sup> Consequently, the Balaz twins were effectively stateless for two years until the German government relented and granted them visas.<sup>114</sup>

Citizenship laws were also an issue in the infamous Baby Manji case of 2008.<sup>115</sup> Baby Manji's Japanese intended parents divorced before the child's birth to an Indian surrogate.<sup>116</sup> The baby's intended father wanted custody of the child, but under Indian law, he could not adopt it as a single father.<sup>117</sup> Meanwhile, Japan did not recognize surrogacy, so it considered the surrogate to be the child's legal mother.<sup>118</sup> Neither country granted the child citizenship or even legal documents to travel, so the child was trapped in India for its first three months.<sup>119</sup>

With thousands of children born using commercial surrogacy each year, protective policies must be instituted to prevent the exploitation of both vulnerable children and surrogates. In Part IIII, this Article discusses various reforms that would provide more protections in the international commercial surrogacy industry.<sup>120</sup>

### C. Under-Regulation Leading to Prohibition

In many jurisdictions, a lack of meaningful regulation creates another, counter-intuitive risk for surrogates and intended parents.<sup>121</sup> An unregulated surrogacy market often produces high-profile abuses that puts pressure on political leaders to over-regulate or ban surrogacies all

110. Normann Witzleb & Anurag Chawla, *Surrogacy in India: Strong Demand, Weak Laws*, in *SURROGACY, LAW AND HUMAN RIGHTS*, *supra* note 35, at 181.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Deonandan, *supra* note 5, at 116.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Finally, Manji Goes Home to Her Dad*, PUNEMIRROR (Nov. 1, 2008), <https://punemirror.com/news/india/finally-manji-goes-home-to-her-dad/cid5270422.htm> [<https://perma.cc/D6EE-XMA7>].

120. *See infra* Part IV.

121. *See* Fronek, *supra* note 83, at 11–12.

together.<sup>122</sup> This pressure can cause the jurisdiction to flip to prohibiting surrogacy, denying both surrogates and intended parents any of the benefits of commercial surrogacy.<sup>123</sup> A surrogacy market in which some surrogates and surrogate-born children experienced harm is replaced with a regime in which no women can earn significant surrogacy fees and intended parents must look elsewhere to have a biological child.<sup>124</sup>

This switch from under-regulation to prohibition has occurred recently in several countries that were once popular destinations for international commercial surrogacy: Cambodia, India, Nepal, and Thailand.<sup>125</sup> For example, just a few years ago, India was the world's largest market for commercial surrogacy services, grossing more than \$400 million USD per year as of 2012.<sup>126</sup> India legalized commercial surrogacy in 2002.<sup>127</sup> Before long, the high demand for low-priced Indian surrogates and lack of regulation resulted in numerous instances of exploitation.<sup>128</sup> Some surrogacy agencies forced women to live in "baby factories" until they gave birth, and most agencies paid surrogates only a small amount of the intended parents' fee.<sup>129</sup> For example, although intended parents often paid \$30,000 USD for surrogacy services, the Indian surrogates rarely received more than \$5,000 USD in compensation.<sup>130</sup> In comparison, American surrogates often receive \$25,000 USD per surrogacy.<sup>131</sup>

Indian politicians reacted to the high-profile examples of abuse by passing legislation in 2013 that banned surrogacy for foreign same-sex couples and single parents.<sup>132</sup> Under the 2013 legislation, foreign heterosexual couples who had been married for at least two years could

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122. *Id.*

123. *Id.*

124. *Id.*

125. WHITTAKER, *supra* note 53, at 170.

126. Neha Thirani Bagri/Anand, *A Controversial Ban on Commercial Surrogacy Could Leave Women in India with Even Fewer Choices*, TIME (June 30, 2021, 6:00 PM), <https://time.com/6075971/commercial-surrogacy-ban-india/> [<https://perma.cc/2A25-YH97>].

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Being Compensated as a Surrogate*, SURROGATE.COM, <https://surrogate.com/surrogates/becoming-a-surrogate/being-compensated-as-a-surrogate/> [<https://perma.cc/CD2T-ERQW>] (last visited May 1, 2022) ("The average base pay for surrogacy is \$25,000 for first-time surrogates, and the money is paid in monthly installments throughout the surrogacy process (usually after a pregnancy is confirmed by a physician).").

132. See Sandip Roy, *Surrogacy and Homophobia: India Bans Gay Parents*, FIRSTPOST (Jan. 21, 2013, 2:34 PM), <https://www.firstpost.com/living/surrogacy-and-homophobia-india-bans-gay-parents-596203.html> [<https://perma.cc/98A7-N8EY>].

still obtain surrogacy services.<sup>133</sup> However, in 2015, the Indian surrogacy ban was extended to include all foreign couples.<sup>134</sup>

Although the complete prohibition on international surrogacies has certainly eliminated some instances of exploitation in India, it has also harmed potential Indian surrogates by eliminating an important source of income. Moreover, it forced intended parents to look elsewhere for surrogacy services, eventually driving much of the business to new hubs, including Laos and Ukraine.<sup>135</sup>

### III. REFORMING INTERNATIONAL COMMERCIAL SURROGACY

Most countries ban international commercial surrogacy arrangements within their borders. The countries that allow surrogacy often under-regulate the industry, resulting in exploitation and abuse of surrogates and surrogate-born children. Moreover, cross-border surrogacy arrangements under conflicting citizenship laws can leave surrogate-born children stateless and their intended parents fighting for parental rights. In this Part, I discuss various reforms that would protect surrogates and surrogate-born children and reduce citizenship problems.

Jurisdictions that allow commercial surrogacy have adopted a wide range of legislation to regulate surrogacy arrangements. California, considered the United States' surrogacy hub, has stricter regulations than any other jurisdiction.<sup>136</sup> It requires that both parties have a lawyer to review their contract and that the contract is signed and notarized before the surrogate receives any surrogacy-related medical treatment.<sup>137</sup> Furthermore, California permits the intended parents to file an action to receive legal parentage even before the child is born.<sup>138</sup>

Another hub for international surrogacy, Ukraine, attracts many foreign clients because its regulations prioritize the intended parents.<sup>139</sup> Legislation is in place that recognizes the intended parents as the child's

133. *Id.*

134. *India to Ban Foreign Surrogate Services*, BBC NEWS (Oct. 28, 2015), <https://www.bbc.com/news/world-asia-india-34655084#:~:text=India%20to%20ban%20foreign%20surrogate%20services%2028%20October,surrogacy%20would%20be%20available%20%22only%20for%20Indian%20couples%22> [<https://perma.cc/SM8S-6DMG>].

135. *Surrogacy in Ukraine*, SENSIBLE, <https://www.sensible-surrogacy.com/surrogacy-in-ukraine/> [<https://perma.cc/T796-857Q>] (last visited May 3, 2022).

136. *See* Surrogacy Agreements, Assemb. B. No. 1217, 2011–2012 Sess. (Cal. 2012), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201120120AB1217](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1217) [<https://perma.cc/46L3-E6RU>].

137. *Id.*

138. *Id.*

139. William Houghton, *The Surrogacy Guide: Surrogacy in Ukraine*, SENSIBLE, <https://www.sensible-surrogacy.com/surrogacy-in-ukraine/> [<https://perma.cc/NW2X-KU2S>] (last visited Apr. 27, 2022).



legal parents, and their names are placed on the child's legal documents from the beginning.<sup>140</sup> Ukrainian law also protects surrogate mothers by requiring that the surrogate be of "full age" with at least one child of her own and that she give her informed consent for the arrangement.<sup>141</sup>

The regulations in Laos, a third surrogacy hub, stand in stark contrast. Unlike California and Ukraine, Laos has no regulation governing surrogacy contracts or protecting surrogate mothers.<sup>142</sup> Because of Laos's lack of regulation, many brokers flock to the country.<sup>143</sup> However, growing exploitation concerns have prompted the government in Laos to consider a ban on surrogacies like that recently enacted in Cambodia, India, Nepal, and Thailand.<sup>144</sup>

This existing patchwork of laws and regulations has resulted in surrogacy practices that exploit the differences across countries. Surrogates and egg donors often circumvent the restrictive laws in their own countries by traveling to jurisdictions with fewer regulations.<sup>145</sup> Known as "supply chain segmentation" in other industries, brokers can divide the surrogacy process into different segments, which can each occur in separate locations.<sup>146</sup> This makes surrogacy difficult to regulate because as long as any country permits surrogacy, brokers can facilitate the process there.<sup>147</sup>

For example, even though Thailand banned surrogacy to foreigners in 2015 due to exploitation concerns, Thai surrogates can still work in the industry.<sup>148</sup> They prepare for the embryo implantation in Thailand, travel to Laos for the actual implantation, gestate and give birth in Thailand, and return to Laos to transfer the baby to its intended parents.<sup>149</sup> This way, surrogacy companies utilize Thailand's first-rate hospitals while avoiding the penalties of Thailand's surrogacy ban.

Similarly, although commercial surrogacy is outlawed in Canada, Oregon clinics can transfer embryos to Canadian surrogates, who gestate the surrogacy in Canada to take advantage of its free healthcare.<sup>150</sup> When

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140. See *Surrogacy Law in Ukraine: Legal Surrogacy Programs*, BABY ON BOARD, <https://ukrainesurrogacy.com/the-law/> [<https://perma.cc/27WQ-GQ9C>] (last visited Apr. 27, 2022).

141. See *Surrogacy: Why Ukraine?*, MEDICARE FOR YOU, <https://www.medicare-4u.com/treatments/fertility-treatment/surrogacy-ukraine/> [<https://perma.cc/94RG-ZP8P>] (last visited Apr. 27, 2022).

142. WHITTAKER, *supra* note 53, at 174.

143. *Id.* at 173.

144. *Id.* at 172–74.

145. *Id.* at 175.

146. *Id.*

147. *Id.* at 175.

148. WHITTAKER, *supra* note 53, at 175–77.

149. *Id.* at 176–77.

150. *Id.* at 176.

inconsistent laws persuade surrogates to relocate and undertake the process in many different jurisdictions, the surrogacies become increasingly difficult to monitor. This only makes both surrogates and surrogate-born children more vulnerable to exploitation.

In an attempt to reduce the problems associated with international surrogacy, some countries have banned their citizens from using surrogates abroad. For instance, the Australian states of Queensland, New South Wales, and the Australian Capital Territory prohibit citizens from engaging in commercial surrogacy both domestically and overseas.<sup>151</sup> However, many citizens ignore the prohibition since it is so difficult to enforce. Other citizens enter supposedly “altruistic” surrogacy contracts in Canada, but the reimbursements to surrogates are so generous that they are effectively a commercial arrangement.<sup>152</sup>

Ideally, countries would homogenize their surrogacy rules so intended parents have less incentive to seek surrogacy abroad. Surrogacies that occur inside a country’s borders are much easier to regulate than surrogacies occurring abroad.<sup>153</sup> However, with the controversy surrounding commercial surrogacy, any sort of multinational agreement that would standardize surrogacy practices is likely an impossible goal. It is unlikely that all sixty-two countries that currently ban surrogacy would ever institute more lenient regulations as some sort of international compromise.<sup>154</sup>

However, even countries that do not want commercial surrogacy within their own borders might collectively agree on transnational standards to regulate the international industry to which their citizens may turn. A transnational agreement could operate similarly to the global agreement on international organ transplants. In 2010, in response to a patchwork of regulations among countries that led to exploitation in the organ transplant market, the World Health Assembly and World Health Organization created guiding principles on the acceptable acquisition and transplantation of human organs and tissues.<sup>155</sup> Similarly, a transnational agreement on commercial surrogacy could, at a minimum, address the citizenship issues that often arise from conflicting surrogacy laws in different nations. Currently, if neither the child’s birth country nor its intended parents’ home country issues the child’s legal documents, surrogate-born children can end up stateless and trapped in the country where they were born.

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151. *Id.* at 188.

152. *Id.* at 176.

153. *Id.* at 188.

154. Allan, *supra* note 35, at 140.

155. SIXTY-THIRD WORLD HEALTH ASSEMB., WHA63.22, HUMAN ORGAN AND TISSUE TRANSPLANTATION (May 21, 2010), [http://apps.who.int/gb/ebwha/pdf\\_files/WHA63/A63\\_R22-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R22-en.pdf) [<https://perma.cc/3692-3HK2>].

Ideally, all countries would realize that children are innocent of their parents' crimes and should not be denied citizenship because their parents broke a domestic surrogacy law.<sup>156</sup> The German courts accepted this reasoning in a 2014 case involving a German homosexual couple who had a child through a surrogate mother in California.<sup>157</sup> The child was legally registered in the United States as a child of the intended parents, yet when the couple returned to Germany, German authorities refused to register the child's birth or acknowledge the couple as the child's parents.<sup>158</sup> Two lower courts denied the intended parents' parenthood status. However, the German Supreme Court ultimately determined that a foreign country's determination of parental rights, even if arising out of a surrogacy that was illegal in Germany, should be recognized because "the child's best interests must always be given preference in all decisions concerning the child."<sup>159</sup>

However, in other cases, courts have refused to recognize parental rights arising out of international surrogacy. In a 2014 Belgium case, two Belgian nationals had a child through a surrogate in Ukraine and obtained a Ukrainian birth certificate recognizing the Belgian intended parents as legal parents.<sup>160</sup> However, after the Belgian Embassy refused to provide travel documents because of insufficient evidence of parental rights, the Belgian Court of Appeal decided that the questioning of parental rights was "justified as pursuing several legitimate aims, namely the prevention of crime, especially trafficking in human beings, and the protection of the rights of others—those of the surrogate mother and of the child."<sup>161</sup>

By requiring all countries to recognize parental rights established in other jurisdictions, a transnational agreement could put an end to situations in which surrogate-born children are deemed stateless. Indeed, since 2015, an Experts' Group from the Hague Conference on Private International Law has been developing an international protocol for recognizing the legal parentage of children born through international surrogacy.<sup>162</sup> The Group has convened eight times and hopes to submit its final report to the Council on General Affairs and Policy of the Hague

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156. Gerber & O'Byrne, *Souls in the House of Tomorrow: The Rights of Children Born Via Surrogacy*, in SURROGACY, LAW AND HUMAN RIGHTS, *supra* note 35, at 88–89.

157. Supreme Court of Germany Decision XII ZB 463/13, CHILD RTS. INT'L NETWORK, <https://archive.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii.html> [<https://perma.cc/49EE-3T87>] (last visited Aug. 16, 2021).

158. *Id.*

159. *Id.*

160. *D and Others v. Belgium*, CHILD RTS. INT'L NETWORK (Aug. 7, 2014), <https://legallibrary.crin.org/d-and-others-v-belgium/> [<https://perma.cc/33YU-CZWK>].

161. *Id.*

162. *The Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT'L L., [www.hcch.net/en/projects/legislative-projects/parentage-surrogacy](http://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy) (last visited Oct. 19, 2021).

by 2023.<sup>163</sup> Similarly, in 2019, a Special Rapporteur to the General Assembly of the United Nations called on governments to develop an international protocol for determining the parentage of surrogate-born children that prioritizes the best interests of the child.<sup>164</sup>

Countries that are willing to allow commercial surrogacy within their borders should consider additional reforms that would protect surrogates and surrogate-born children. For example, one of the major problems with the international surrogacy industry is the exploitation of poor surrogates who can be coerced into signing unfair surrogacy contracts that prioritize reducing the costs of the surrogacy process at the expense of the surrogate's health. The problem arises from the power imbalance inherent to international surrogacy relationships, in which wealthy intended parents from developed countries commission impoverished women in less developed countries to be their surrogates. Countries could encourage surrogates to form surrogacy cooperatives so that they can improve their negotiating power both with intended parents and with the local surrogacy companies that sometimes exploit them.<sup>165</sup> Alternatively, the government could set minimum prices for surrogacy services so that surrogates cannot be coerced into arrangements offering inadequate pay by intended parents and surrogacy companies.<sup>166</sup>

Other regulations would ensure that surrogates fully consent to surrogacy arrangements. Countries could require that surrogates receive independent legal advice, so a lawyer can review and certify the fairness of the surrogacy contract.<sup>167</sup> Regulations could further require that all exchanges between the intended parents and the surrogate are translated into the surrogate's native language. Countries could also institute screening requirements that mandate surrogates are of a certain age and undergo medical and psychological screening. Further, countries could require that surrogates already have at least one child of their own, since women who have gone through pregnancy are more likely to understand both the physical and emotional impacts of a surrogacy.<sup>168</sup> These measures would ensure that surrogates are equipped to deal with surrogacy and give their informed consent for the procedure.

Beyond ensuring the fairness of commercial surrogacy contracts, countries should also institute various medical protections to reduce the risk to the surrogate's health. For example, countries could impose a limit

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163. *Id.*

164. Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and any Other Child Sexual Abuse Material, *Report on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and any Other Child Sexual Abuse Material*, U.N. Doc. A/74/162 (July 15, 2019).

165. WHITTAKER, *supra* note 53, at 190.

166. *Id.* at 190–91.

167. Allan, *supra* note 35, at 137.

168. *Id.* at 138.

on the number of embryos that can be implanted in the surrogate,<sup>169</sup> as well as establish a protocol for how to proceed in case of multiple pregnancies. Further, a life insurance policy could become a mandatory part of every surrogacy contract,<sup>170</sup> so that a surrogate's dependents are provided for in the event she dies from the surrogacy.

Surrogacy brokers or facilitators play a large role in the exploitation of surrogates in developing countries. In order to make a profit, facilitators sometimes disregard the surrogate's health in favor of meeting the needs of the intended parents. Facilitators may force surrogates to undergo unnecessary medical procedures (such as multiple embryo transfers or C-sections) or, in extreme cases, even traffic women to work as surrogates for little or no compensation.<sup>171</sup> To protect potentially vulnerable surrogates, countries should regulate these surrogacy agencies. For instance, the government could require that all facilitator companies get certified by the state.<sup>172</sup> That way, only facilitators which meet basic medical and human rights standards can conduct business within the country. Alternatively, facilitator companies could be eliminated altogether. In their place, government agencies or charities would broker surrogacy agreements.<sup>173</sup> Because these nonprofit entities would have no profit motive, they would be less incentivized to exploit surrogates.

Children born from surrogacy arrangements are another vulnerable party in the international surrogacy industry. Some intended parents have commissioned children from international surrogates only to abuse and exploit the children back home.<sup>174</sup> In contrast to adoption, in which potential parents undergo intense vetting and home checks before being allowed a child,<sup>175</sup> intended parents in surrogacy arrangements face little to no screening requirements. The screening requirements that do exist only serve to exclude some couples, namely, gay couples, from becoming parents.<sup>176</sup> States could implement screening requirements to ensure all intended parents can provide a suitable, safe home for their child. The government could conduct a family assessment report, in addition to an assessment of the intended parents' criminal records.<sup>177</sup> Some people have argued against such screening requirements, claiming that surrogacy should be treated like natural birth in which there is no screening of

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169. Pikee Saxena et al., *Surrogacy: Ethical and Legal Issues*, 37 INDIAN J. CMTY. MED. 211, 211 (2012).

170. *Id.*

171. *See supra* Part II.

172. WHITTAKER, *supra* note 53, at 190–91.

173. Allan, *supra* note 35, at 138.

174. *See* WHITTAKER, *supra* note 53, at 153.

175. Deonandan, *supra* note 5, at 117.

176. WHITTAKER, *supra* note 53, at 170–71.

177. Allan, *supra* note 35, at 138.

potential parents.<sup>178</sup> However, governments could decide to prioritize the surrogate-born children's human rights over the intended parents' reproductive rights in surrogacy cases.<sup>179</sup>

Surrogate-born children should also be protected from abandonment by their intended parents. Abandonment often occurs when a child is born with an unanticipated disorder, when the intended parents divorce during the surrogacy, when extenuating circumstances prevent the intended parents from retrieving their child, or even when the intended parents simply change their mind about the child. Countries should institute various regulations to reduce the likelihood of abandonment in each case. The intended parents could be required to post a significant bond when they enter into a surrogacy agreement. If they take the baby home at the end of the surrogacy as planned, they would be refunded their money. If not, the bond would be used to care for the child. In addition, the bond would deter intended parents from abandoning their children in the first place.

Further, each government could require intended parents to appoint a local guardian to assume care of the baby until it can be passed on to the parents. This measure was part of legislation proposed in India before commercial surrogacy was banned in 2015.<sup>180</sup> In a similar vein, Israel appoints a social worker to act as the child's guardian for, at most, seven days until the intended parents are granted legal parentage.<sup>181</sup> Indeed, the appointment of local guardians would have reduced the abandonment of surrogate-born children that occurred in several countries during the COVID-19 pandemic.

## CONCLUSION

With the right protections in place, surrogacy opens the doors for all couples to have biological children, regardless of their familial status or fertility troubles. Simultaneously, it gives poor women an opportunity to earn a life-changing income. However, governments' failures to enact adequate regulations for commercial surrogacy have resulted in numerous harms to both surrogates and surrogate-born children. Surrogacy agreements often lack the informed consent of the surrogates, who may not have legal representation, a translator, or a full understanding of the physical and emotional impacts of pregnancy upon entering into these agreements. Surrogates' physical health is also

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178. *Surrogacy*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R (2021), [www.ohchr.org/EN/Issues/Children/Pages/Surrogacy.aspx#:~:text=The%20Special%20Rapporteur%20on%20the,of%20children%20born%20from%20surrogacy](https://www.ohchr.org/EN/Issues/Children/Pages/Surrogacy.aspx#:~:text=The%20Special%20Rapporteur%20on%20the,of%20children%20born%20from%20surrogacy) [https://perma.cc/8N86-F8AB].

179. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

180. Saxeena et al., *supra* note 169, at 211.

181. *Report on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and any Other Child Sexual Abuse Material*, *supra* note 164, ¶ 56.

sometimes neglected by surrogacy facilitators who seek to make a profit by making the surrogacy process more efficient for intended parents.

The absence of sufficient regulations can also harm surrogate-born children. Some have been pronounced “stateless” due to conflicting citizenship laws between their country of birth and the home country of their intended parents. Other surrogate-born children, after being born with an unanticipated disorder, have been abandoned by their intended parents. Even worse, some surrogate-born children, upon returning home with their intended parents, are subject to abuse and molestation. Fortunately, regulatory reform can minimize some of these harms and protect all parties involved.

Understanding the potential harms of international commercial surrogacy, the United Nations is currently considering ways to address the industry. Whether it comes from the United Nations or individual countries, regulatory reform is needed to realize the benefits of international surrogacy while minimizing the harms. All people should have the opportunity to reproduce and experience parenthood. However, achieving this objective through surrogacy shouldn’t cause harm to those involved in the process, namely the surrogates and the surrogate-born children. In the end, comprehensive and sensible regulation will benefit all involved in surrogacy: surrogate-born children, intended parents, and surrogates.