

CROSSING BODIES, CROSSING BORDERS: INTERNATIONAL SURROGACY BETWEEN THE UNITED STATES AND INDIA

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I. INTRODUCTION

With an increasingly restrictive global market for international adoption and an increasingly global expansion of surrogacy programs, it is almost certain that cross-border surrogacy arrangements will flourish.² The market supply will become concentrated in nations such as India, which have access to contemporary technology and skilled individuals who can provide surrogacy programs at lower cost, to serve the demand in wealthier nations such as the United States. Yet little has been done on a national level in India or the United States to protect the interests of Indian women who serve as surrogate mothers, the children they bear, or those individuals who travel overseas to commission pregnancies. A global market has developed with few checks and balances, and those who stand to suffer the most in this free market are those with the least bargaining power – women and children. This article establishes that international surrogacy arrangements between commissioning parties in the United States and surrogate mothers in India should come to an end.³

Part II provides an overview of surrogacy arrangements and related new reproductive technologies. Part III describes the current landscape of international surrogacy in India and the reasons for its rise in popularity. Part IV discusses ethical concerns pertaining to surrogacy in India. Part V reveals the murky parentage and citizenship status of babies commissioned by American parents who are born to surrogates in India. Part VI concludes with the recommendation that abolition of international surrogacy is the only so-

¹ J.D. Boalt Hall School of Law, University of California, Berkeley (1996), B.S. University of Missouri, Columbia (1990). I wish to offer my deepest appreciation to my family for their patience while I completed this article.

² See Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 332 (1997) (noting that adoption intermediaries have already taken advantage of the strong economic incentives of the international baby market with surrogacy soon to follow as a natural substitute to adoption).

³ Although the focus of this article is on the United States and India, the principles underlying the recommendation that international surrogacy should be banned apply to international surrogacy among all nations.

lution that will protect all parties given the ethical concerns involved.

II. OVERVIEW OF SURROGACY ARRANGEMENTS

Surrogacy is not so new as far as “new” reproductive technologies are concerned, and it is often noted that the practice dates back to Biblical times. The Old Testament offers the example of Abraham’s infertile wife, Sarah, who “commissions” her maid Hagar to bear her a child by persuading Abraham to sleep with her.⁴ Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her.⁵ The class distinctions between the commissioning and surrogate women in these stories reflect modern day practices.

Hindu mythology also offers instances of surrogacy and reflects the secrecy that still surrounds surrogacy practice. In the Bhagvata Purana, Vishnu heard Vasudev’s prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki’s womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead.⁶

Today, there are two types of surrogacy. The first type of surrogacy arrangement is traditional surrogacy, or “complete surrogacy,” in which the eggs of the surrogate mother are used in the conception of the child.⁷ The surrogate mother is genetically related to the child and is thus more accurately considered the child’s biological mother. Commercial surrogacy began to take

⁴ See Genesis 16.

⁵ See Genesis 30:1-8; see also Angie Godwin McEwen, Note, *So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT’L L. 271, 274-75 (1999); Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113, 116-17 (1997).

⁶ See VERONICA IONS, INDIAN MYTHOLOGY 58-59 (1983); Raghav Sharma, An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India 11 (July 2, 2007) (working paper, on file with Nat’l Law Univ., Jodhpur), available at <http://ssrn.com/abstract=997923>; see also Gail Hinich Sutherland, *Bija (seed) and Ksetra (field): Male Surrogacy or Niyoga in the Mahabharata*, 24 CONTRIBUTIONS TO INDIAN SOC. 1 (1990) (discussing the practice of “niyoga”, a practice employed by childless men to ensure the birth of sons, either through “wife lending” or having a brother sire a son in his dead brother’s name with the dead brother’s widow).

⁷ MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 103 (2002).

hold in the United States in the late 1970s and early 1980s when brokers, such as agencies and private attorneys, began to advertise their services to infertile couples.⁸ These pregnancies are achieved using artificial insemination, typically with sperm provided by the commissioning husband.⁹ As Barbara Katz Rothman observed, “[s]urrogate motherhood was not brought to us by the march of scientific progress. It was brought to us by brokers, by people who saw a new market and went after it.”¹⁰ Rothman noted that the commercial aspect of surrogacy had nothing to do with scientific progress (the technologies involved, she wryly noted, were the technology of masturbation and the turkey baster or its equivalent), but rather, had everything to do with marketing.¹¹

The second type of surrogacy arrangement is gestational surrogacy, in which an embryo created *in vitro* is transferred into the uterus of a woman who does not contribute the egg.¹² Gestational surrogacy has become increasingly more common and presently accounts for approximately 95% of all surrogate pregnancies in the United States.¹³ In India, the non-binding guidelines¹⁴ and proposed legislation¹⁵ covering commercial surrogacy arrangements

⁸ GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 214 (1985); JUDITH F. DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 426 (2006).

⁹ DAAR, *supra* note 8, at 426.

¹⁰ BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD* 158 (1989).

¹¹ *Id.*

¹² SHANLEY, *supra* note 7, at 103-04.

¹³ DAAR, *supra* note 8, at 426 n.4 (citing David P. Hamilton, *She's Having Our Baby: Surrogacy is On the Rise as In Vitro Improves*, WALL ST. J., Feb. 4, 2003, at D1).

¹⁴ See INDIAN COUNCIL OF MED. RESEARCH, NAT'L COUNCIL OF MED. SCIENCES, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA §§ 1.2.33-34 (2005), http://www.icmr.nic.in/art/art_clinics.htm [hereinafter GUIDELINES] (defining “surrogacy” in § 1.2.33 as “an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate” and defining “surrogacy with oocyte donation” in § 1.2.34 as “a process in which a woman allows insemination by the sperm/ semen of the male partner of a couple with a view to carry the pregnancy to term and hand over the child to the couple.”); see also *id.* § 3.5.4 (prohibiting a donor from serving as a surrogate to parties to whom the egg is donated).

¹⁵ The Assisted Reproductive Technology (Regulation) Bill & Rules 2008 [hereinafter Draft Bill], available at [http://www.icmr.nic.in/art/Draft%20ART%20\(Regulation\)%20Bill%20&%20Rules%20-%202008-1.PDF](http://www.icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20-%202008-1.PDF) (preliminary pages); *id.* §§ 2(t)-2(u), available at [http://www.icmr.nic.in/art/Draft%20ART%20\(Regulation\)%20Bill%20&%20Rules%20-%202008-2.PDF](http://www.icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20-%202008-2.PDF) (defining “surrogacy” in § 2(t) as “an arrangement in which a woman agrees to a pregnancy achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with

define only gestational surrogacy. Some doctors at assisted reproductive technologies (ART) clinics in India indicate that they assist only with gestational surrogacy, and it is not clear the extent to which traditional surrogacy arrangements occur in practice.

Thus, surrogacy arrangements involve gamete transfer – either sperm transfer, egg transfer, or both.¹⁶ In gestational surrogacy, the ultimate transfer is that of an embryo created from the gametes of the commissioning parties and/or the gametes of sperm and/or egg “donors.”¹⁷ Embryos themselves can also be donated, for example, by a woman who has undergone *in vitro* fertilization (IVF) and has surplus embryos to spare.¹⁸

the intention to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate and defining “surrogate mother” in § 2(u) as “a woman who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to full term and deliver the child to its biological parent(s)); *see also id.* § 34(13) (providing that a “surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy”).

¹⁶ Another possibility of gamete transfer is ooplasmic transfer. *See* CTR. FOR GENETICS & SOC’Y, OOPASMIC TRANSFER (2003), <http://www.geneticsandsociety.org/article.php?id=381>. Ooplasmic transfer is an experimental technique that involves injecting a small amount of ooplasm from the eggs of a fertile women into the eggs of a woman whose fertility is compromised. *Id.* The modified egg is then fertilized with sperm and implanted into a woman’s uterus. *Id.* The technique is controversial because children born from the procedure have been reported to have a condition called “mitochondrial heteroplasmy” meaning that they possess mitochondria from both eggs. *Id.* Because mitochondria carry their own sets of genes that are passed from generation to generation, the mixing of parent and cytoplasmic donor mitochondria may be considered to be a form of genetic or germline modification. *Id.* After the technique was reported to have been used in New Jersey, the FDA notified all U.S. fertility clinics known to be offering the procedure in 2001 that further ooplasm transfer procedures could not take place without FDA approval. *Id.*

¹⁷ It has been pointed out that the term “donor” is a misnomer since most people who contribute their gametes are typically paid. *See, e.g.,* Jim Hopkins, *Egg-Donor Business Booms on Campuses*, USA TODAY, Mar. 15, 2006, http://www.usatoday.com/money/industries/health/2006-03-15-egg-donors-usat_x.htm.

¹⁸ DAAR, *supra* note 8, at 489. There are reported instances of international “embryo adoption” in India whereby embryos formed from Indian gamete donors are implanted in women of foreign nationalities. *See, e.g.,* Ashling O’Connor, *The White Parents, an Indian Baby and the New £3bn Fertility Tourism*, TIMES, Feb. 9, 2007, at 3, available at <http://www.timesonline.co.uk/tol/news/uk/health/article1356033.ece> (describing a white British couple who traveled to India for embryo implantation and gave birth to an Indian child). Such embryo transfer is described as “a lot like adoption but you have the feeling of a natural pregnancy.” *Id.* The laws of the commissioning parties’ residence can be circumvented through the procedure, for example, laws restricting the number of embryos which may be implanted which are fewer

Sperm transfer is relatively easy and is a procedure that can be done anonymously.¹⁹ However, storing and washing sperm is more complex and, hence, more expensive.²⁰ Under U.S. federal regulations, all sperm must be stored for at least six months while the donor is tested for HIV, hepatitis, and other diseases.²¹

The global market in sperm is a thriving business. One of the leaders in the global sperm market is Cryos International Sperm Bank headquartered in Denmark.²² By 2002, Cryos was exporting semen to more than fifty countries.²³ According to Cryos's founder, its sperm bank is popular globally because anonymity can be assured, and the bank offers quality testing and excellent customer service.²⁴ Cryos has established a Cryos sperm bank in India, which opened in September 2008.²⁵ Its website touts the offering of "high quality donor semen from an extensive selection of ethnicities and races."²⁶

Egg transfer became possible after the first successful IVF.²⁷ July 25, 1978 marked the successful birth of the world's first "test-tube" baby conceived by IVF and embryo transfer. The procedure took place in the United Kingdom and was orchestrated by Drs. Steptoe and Edwards who implanted the embryo into the genetic mother's uterus.²⁸ The world's second baby born through IVF and embryo transfer occurred sixty-seven days later on October 3, 1978

than that which can be accomplished in India. *Id.* In addition, since it is an embryo crossing international borders, not an infant, there is very little that can be regulated from an immigration aspect should a pregnant woman return to her home country and give birth on her home soil.

¹⁹ DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 37 (2006).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 38.

²³ *Id.*

²⁴ *Id.* Although under Danish law donors generally must be anonymous, Cryos obtained special permission from Danish authorities to operate a non-anonymous donor program in October 2006. See Cryos International – Denmark, Donor Semen Questions and Answers, <http://dk.cryosinternational.com/information/questions-answers/donor-semen.aspx#2076> (last visited Oct. 31, 2008). The non-anonymous donor program allows children conceived from the sperm of such donors to gain access to the donor's identity upon attaining age 18. *Id.*

²⁵ See Cryos International – India Home Page, <http://in.cryosinternational.com/home.aspx> (last visited Oct. 31, 2008). According to the company website, the Indian bank began accepting sperm donations on September 22, 2008. *Id.*

²⁶ *Id.*

²⁷ SHANLEY, *supra* note 7, at 79.

²⁸ COREA, *supra* note 8, at 115.

in Kolkata, India through the efforts of Dr. Subhas Mukherjee and two of his colleagues.²⁹ The birth of the baby, Kanupriya (also known as Durga), through the novel procedure was marked by tremendous controversy.³⁰ Dubious of the claims, the West Bengal Government demanded Mukherjee to prepare a report of the procedure.³¹ Despite the report and a note Mukherjee published in the *Journal of Cryogenics*, doubts remained.³² Reportedly, the controversy and resulting humiliation contributed to Mukherjee's eventual suicide.³³ India's second IVF baby and first "scientifically documented" birth was Baby Harsha born on August 6, 1986, in Mumbai.³⁴ This birth generated much less controversy since it was a project mounted and funded by the Indian Council for Medical Research (ICMR), a governmental body that formulates, coordinates, and promotes biomedical research.³⁵

Egg transfer is a far more complicated procedure than sperm transfer. For several weeks, an egg donor must inject herself with Lupron, which shuts down the ovaries so that eggs cannot develop.³⁶ The donor then injects herself for approximately one week with hormones to hyper-stimulate the ovaries and cause an exces-

²⁹ Although this was the second test-tube baby to be born in the world, Dr. Mukherjee's techniques were markedly different from those used by Edwards and Step-toe. Mukherjee was the first person in the world to (1) use gonadotropins for ovarian stimulation before egg harvesting in an IVF cycle, (2) harvest eggs from a transvaginal route by colpotomy, and (3) freeze and thaw human embryos before transferring them into the uterus that led to the successful birth. TC Anand Kumar, *Advent of Medically Assisted Reproductive Technologies (MART) in India*, in THE ART AND SCIENCE OF ASSISTED REPRODUCTIVE TECHNIQUES 4 (Gautam N. Allahbadia & Rita Basuray Das, eds., 2004) [hereinafter Kumar, *MART*]; TC Anand Kumar et al., *In-Vitro Fertilization and Embryo Transfer in India*, 16 ICMR BULL. 41 (1986) [hereinafter Kumar, *In-Vitro*].

³⁰ Fearing social ostracism, the baby's parents requested confidentiality. Therefore, Kanupriya's pseudonym was Durga. Kumar, *MART*, *supra* note 29, at 4.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4-5. The term "scientifically documented" is widely used in scientific circles apparently to negate the parallel claims made by Dr. Subhas Mukherjee. Aditya Bharadwaj, *Conception Politics: Medical Egos, Media Spotlights, and the Contest over Test-Tube Firsts in India*, in INFERTILITY AROUND THE GLOBE 315, 318 (Marcia C. Inhorn & Frank van Balen eds., 2002).

³⁵ Kumar, *MART*, *supra* note 29, at 4. At the request of the Indian Parliament, ICMR was easily able to verify the procedure. The birth was also documented in ICMR Bulletin 1986-16. Kumar, *In-Vitro*, *supra* note 29. The birth of the first GIFT baby and first baby from embryo donation soon followed through the efforts of the same hospital where Harsha was born. *Id.*

³⁶ SHANLEY, *supra* note 7, at 84.

sive number of eggs to be produced.³⁷ The donor then receives an injection of human chorionic gonadotropin (hCG).³⁸ The eggs are then “harvested” by laparoscopy or ultrasound.³⁹ This complicated medical treatment, combined with more difficulty in finding donors, led to market pressure to pay egg donors more than sperm donors.⁴⁰ The result is that trade in the human global egg market is thriving.⁴¹

The recipient of a transferred egg must also undergo hormonal treatment in order to synchronize her menstrual cycle with that of the woman transferring the egg.⁴² The recipient of the egg often needs additional hormone injections after the egg is transferred to facilitate implantation of the egg in the uterine wall.⁴³ The entire procedure is not without risks of physical complications.⁴⁴

III. THE LANDSCAPE OF SURROGACY IN INDIA

The first reported gestational surrogacy in the world occurred in 1984 when a woman without a uterus had her eggs transferred to the uterus of a friend who gave birth to the child with whom she had no genetic relation.⁴⁵ Thereafter, doctors began using IVF to combine the husband’s sperm with donated eggs so that couples in which the wife could not produce healthy eggs could have a child.⁴⁶

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ SPAR, *supra* note 19, at 43.

⁴¹ See, e.g., Antony Barnett & Helena Smith, *Cruel Cost of the Human Egg Trade*, OBSERVER, Apr. 30, 2006, at 6, available at <http://www.guardian.co.uk/uk/2006/apr/30/health.healthandwellbeing> (describing “a burgeoning global trade in women’s eggs where infertile British women who cannot find a donor in the UK will pay thousands of pounds for the chance of finding one overseas”); Hopkins, *supra* note 17 (citing the United States as an international source for human eggs because commercial egg donation is banned in most industrialized nations); Karen Brulliard, *In Competitive Marketplace Asian Egg Donors In Demand*, WASH. POST, Nov. 19, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/18/AR2006111801196_pf.html. In the context of surrogacy, Caucasian egg donors are also being flown into India from other countries. See, e.g., Am Over My Hissy Fit, <http://amaniandbobsurrogacy.blogspot.com/2008/10/am-over-my-hissy-fit.html> (last visited Nov. 29, 2008).

⁴² SHANLEY, *supra* note 7, at 83-85.

⁴³ *Id.*

⁴⁴ See *infra* notes 257-59 and accompanying text.

⁴⁵ WH Utian et al., *Successful Pregnancy After an In-vitro Fertilization-embryo Transfer from an Infertile Woman to a Surrogate*, 313 NEW ENG. J. MED. 1351 (1985).

⁴⁶ SHANLEY, *supra* note 7, at 83-84.

India's first gestational surrogacy took place in 1994 in Chennai.⁴⁷ In 1997, a woman from Chandigarh, India agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband.⁴⁸ In 1999, an Indian newspaper carried the story of a villager in Gujarat who served as a surrogate for a German couple.⁴⁹ In 2001, almost 600 children in the United States were born through surrogacy arrangements.⁵⁰ In comparison, in India, it is estimated that the number of births through surrogacy doubled between 2003-2006,⁵¹ and estimates range from 100-290 each year⁵² to as many as 3,000 in the last decade.⁵³

Outside of the United States, India is quickly becoming the top destination spot for fertility tourists due to a number of interrelated factors creating a "perfect storm" for a booming commercial surrogacy market. Beginning in the late 1980s, the United States stood virtually alone in that it permitted commercial surrogacy arrangements in some states, with little regulation over a full array of reproductive technologies. India now provides the same opportunities with the added attraction of lower costs.⁵⁴

⁴⁷ Geeta Padmanabhan, *Hope in the Test Tube*, THE HINDU, Jan. 19, 2006, available at <http://www.thehindu.com/thehindu/mp/2006/01/19/stories/2006011900540200.htm>.

⁴⁸ Sandhya Srinivasan, *Surrogacy Comes Out of the Closet*, SUNDAY TIMES OF INDIA, July 6, 1997, at 1.

⁴⁹ Jyotsna Agnihotri Gupta, *Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies*, 13 EUR. J. WOMEN'S STUD. 23, 30 (2006).

⁵⁰ SPAR, *supra* note 19, at 94.

⁵¹ Sudha Ramachandran, *India's New Outsourcing Business – Wombs*, ASIA TIMES ONLINE, June 16, 2006, http://www.atimes.com/atimes/south_asia/hf16df03.html.

⁵² Kritivas Mukherjee, *Rent-a-womb in India Fuels Surrogate Motherhood Debate*, REUTERS, Feb. 12, 2007, available at www.reuters.com/article/latestCrisis/idUSDEL298735 (though noting that the number of failed attempts is likely much higher); Alifiya Khan, *Surrogacy is Soaring in India*, HINDUSTAN TIMES, Sept. 18, 2008, <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=93bca0a7-e5d0-4c06-9552-dbebb0669833>.

⁵³ Neeta Lal, *A Labour of Love*, KHALEEJ TIMES, Feb. 29, 2008, available at http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/weekend/2008/February/weekend_February116.xml§ion=weekend&col= (reporting that Dr. Anoop Gupta, Medical Director, Delhi IVF and Fertility Research Centre, New Delhi claims he has delivered over 3,000 surrogate children since he opened his clinic in 1995).

⁵⁴ See ROTHMAN, *supra* note 10, at 187.

A. *The Rise of Reproductive Tourism in India*

In 2002, the Confederation of Indian Industry (CII), a non-profit trade organization, and international management consultants McKinsey & Company published a study of India's potential for a medical tourism sector.⁵⁵ In 2003, India's finance minister, Jaswant Singh called for India "to become a 'global health destination'" and encouraged measures to facilitate a medical tourism industry including improvements in airport infrastructure.⁵⁶ The General Agreement in Trade in Services (GATS) included trade in medical services under World Trade Organization agreements that enabled private hospitals treating foreign patients to receive financial incentives. These incentives included the ability to raise capital at low interest rates and eligibility for a low import duty on medical equipment.⁵⁷ The Indian External Affairs Ministry agreed to streamline medical tourism by fast-tracking the entry of medical patients on arrival to the country.⁵⁸ In that regard, a new category of medical visa was introduced and allowed patients and family members to stay in the country for twelve months instead of the normal six months under a tourist visa.⁵⁹ Indian State tourism departments are running joint medical tourism campaigns and medical tour packages with hospitals to attract foreign patients.⁶⁰ The majority of medical tourists are non-resident Indians.⁶¹ The CII estimates that 150,000 medical tourists came to India in 2005, and it is estimated that the number of tourists increased to 450,000 by 2008.⁶² A report by India Brand Equity Foundation and Ernst &

⁵⁵ Rupa Chinai & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, 85 BULL. OF WORLD HEALTH ORG. 161 (2007), available at <http://www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.

⁵⁶ *Id.*

⁵⁷ Shree Mulay & Emily Gibson, *Marketing of Assisted Human Reproduction and the Indian State*, 49 DEVELOPMENT 84, 85 (2006).

⁵⁸ *Id.*

⁵⁹ *Id.* However, many Indian consular offices overseas have not acted on the directives of the Ministry of External Affairs in arranging for this class of medical visa. *Id.* Nevertheless, the Union Government is considering introducing "visas on arrival" beginning in airports in Delhi and Mumbai on an experimental basis in an effort to further promote medical tourism. See *Medical Tourism: Centre Considering Visa on Arrival*, HINDU BUSINESS LINE, Mar. 29, 2007, <http://www.thehindubusinessline.com/2007/03/29/stories/2007032903031100.htm>.

⁶⁰ Mulay & Gibson, *supra* note 57, at 85.

⁶¹ *Id.*

⁶² Chinai & Goswami, *supra* note 55; *India turning affordable, quality options for medical tourists*, THE ECON. TIMES, Nov. 18, 2008, http://economictimes.indiatimes.com/Healthcare/India_turning_affordable_quality_option_for_medical_tourists/articleshow/3729654.cms.

Young estimated that outsourced health care would employ nearly two million people in India in 2008, an increase from the 20,000 employed previously.⁶³ A concerted effort by the Indian government to promote medical tourism has resulted in growth at the rate of 30% per year.⁶⁴

Fertility tourism has been compared to *The Handmaid's Tale* by Margaret Atwood, whereby wealthy infertile couples treat third parties from disenfranchised groups as "passports" to reproduction.⁶⁵ In turn, gamete donors and clinics use traveling infertile couples as passports out of penury.⁶⁶ The exchange has created a valuable industry. The reproductive segment of the Indian medical tourism market is valued at more than \$450 million a year⁶⁷ and was forecast by the ICMR to be a six billion dollar a year market in 2008.⁶⁸ Couples in search of fertility treatment travel not only from Western countries, but also from neighboring countries of Sri Lanka, Pakistan, Nepal, Bangladesh, Thailand, and Singapore.⁶⁹ Between 2004 and 2006, the number of websites advertising ART more than quadrupled with marketing heavily geared to foreigners.⁷⁰ IVF and other fertility clinics have been established in both rural and urban areas of virtually every state in India.⁷¹

1. Restrictiveness of Laws in Other Countries

In most Western countries, commercial surrogacy is either banned or sharply regulated.⁷² For example, Italy, Germany,

⁶³ Lal, *supra* note 53.

⁶⁴ Mulay & Gibson, *supra* note 57, at 86.

⁶⁵ See Richard F. Storrow, *The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception*, 12 TEX. WESLEYAN L. REV. 189, 204 (2005).

⁶⁶ See *id.*

⁶⁷ See *Cheaper Overseas: Surrogate Mothers, In-Vitro Fertilization is \$6,000 in India and \$60,000 in the U.S.*, ABC NEWS, Sept. 28, 2007, <http://abcnews.go.com/GMA/story?id=3664065&page=1> [hereinafter *Cheaper Overseas*] (600 IVF clinics in India bring more than \$400 million a year into the local economy); see also Ramachandran, *supra* note 51 (reproductive tourism valued at more than \$450 million in India); Randeep Ramesh, *British Couples Desperate for Children Travel to India in Search of Surrogates: Ethics under Scrutiny as Would-be parents are Enticed by Lower Costs and Relaxed Laws*, GUARDIAN, Mar. 20, 2006, at 26, available at <http://www.guardian.co.uk/world/2006/mar/20/health.topstories3> (noting that fertility market is worth about 250 million pounds per year).

⁶⁸ Lal, *supra* note 53.

⁶⁹ *Id.*

⁷⁰ Mulay & Gibson, *supra* note 57, at 84.

⁷¹ *Id.* at 86.

⁷² For tables of comparative international laws on surrogacy, see SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 24-25 (2007); Eric

France, Switzerland, Greece, Spain, Norway, New Zealand, and several Australian states prohibit commercial surrogacy contracts.⁷³ The enforcement of surrogacy contracts is sharply limited in Canada, Israel, and the United Kingdom.⁷⁴ Several countries have developed these laws after evaluating recommendations of national commissions formed to study the practice. The studies reveal that the recommendations to develop restrictions rest primarily on public policy grounds.⁷⁵

In the United States, the federal government has not regulated surrogacy.⁷⁶ Instead, surrogacy is regulated inconsistently among the states through a combination of legislative action⁷⁷ and court

Blyth & Abigail Farrand, *Reproductive Tourism – a Price Worth Paying for Reproductive Autonomy?*, 25 CRITICAL SOC. POL'Y 91, 93 (2005).

⁷³ SPAR, *supra* note 19, at xiii; J. McGregor & F. Dreifuss-Netter, *France and the United States: The Legal and Ethical Differences in Assisted Reproductive Technology (ART)*, 26 MED. & L. 117, 120 (2007) (noting that both “altruistic” and gestational surrogacy are banned in France – the result has been in some cases that children can be born with no legal mother); Rhonda Shaw, *Rethinking Reproductive Gifts as Body Projects*, 42 SOCIOLOGY 11, 14 (2008) (noting that only altruistic surrogacy arrangements in New Zealand are permitted and require advance approval from an ethics committee); McEwen, *supra* note 5, at 281-82. Countries such as France have called upon the European Union (EU) to develop laws on new reproductive technologies to avoid medical tourism. *See id.* at 282.

⁷⁴ *See* SPAR, *supra* note 19, at 71, 83. In the United Kingdom, legislation on surrogacy, the Surrogacy Arrangements Act of 1985, was rushed through as a result of the Baby Cotton case, which involved surrogacy across international borders wherein a U.S. couple contracted with a British woman for a fee. McEwen, *supra* note 5, at 283-84. However, the EU internal free market guarantee of the free movement of goods, persons, services, and capital to EU citizens allowed a woman in the United Kingdom to import her dead husband’s sperm in a manner not permitted under the Human Fertilisation and Embryology Act since she could not obtain his consent. Blyth & Farrand, *supra* note 72, at 97.

⁷⁵ For example, the Warnock Committee was organized by the government in Britain to analyze issues surrounding new reproductive technologies. It recommended the adoption of statutes that would make all surrogacy contracts unenforceable and criminally punish agents that recruited potential surrogates. McEwen, *supra* note 5, at 283. In France, a national ethics committee recommended that surrogacy be prohibited on the basis that it exploits women. Its recommendations were adopted by the French government in 1987. *See id.* at 282.

⁷⁶ SPAR, *supra* note 19, at 95. Spar noted that it is not clear whether Congress could use its powers under the Commerce Clause to regulate the commercial aspects of surrogacy or whether the Supreme Court would view such regulation as unconstitutional on the basis that it intrudes into matters best left to the states. *Id.* In addition, it is unclear whether there is a constitutional basis for asserting that procreation by surrogacy is a “fundamental right.” *Id.*

⁷⁷ For a state survey of surrogacy laws, see DAAR, *supra* note 8, at 465-470. Daar summarized state legislation of surrogacy as follows:

A significant minority of states have enacted legislation addressing surrogate parenting arrangements. At current count, twenty-three states and

decisions.⁷⁸ The inconsistency among the states has made it common for parties to cross state lines into surrogacy friendly states such as California and Florida.⁷⁹ Because of high demand, parties enter into surrogacy arrangements in states even when they are aware that the underlying contract is void or unenforceable.⁸⁰ Marketing of surrogacy through Internet procurement has contributed greatly to surrogacy transactions being conducted on an interstate

the District of Columbia have at least one statute pertaining to surrogacy. The statutes differ widely in how they regulate the practice, ranging from outright bans on all surrogacy contracts to provisions for medical and psychological screening of all parties involved. Eleven states, by statute, authorize surrogacy, with varying degrees of restrictions: Arkansas, Florida, Illinois, Iowa, Nevada, New Hampshire, Texas, Virginia, Washington, West Virginia, and Wisconsin. Seven states plus the District of Columbia ban all surrogacy contracts, usually by declaring such agreements to be null and void under state law: Arizona, D.C., Indiana, Michigan, Nebraska, New York, North Dakota and Utah. The remaining states with surrogacy laws address parentage questions such as whether a parent-child relationship exists between the intended couple and the child.

Id. at 465. In addition, two uniform laws drafted by the National Conference of Commissioners on Uniform State Laws have addressed surrogacy. *Id.* at 473. The Uniform Status of Children of Assisted Conception Act (USCACA) was the first uniform law, which was promulgated in 1988 and addressed surrogacy by providing two alternatives – one alternative that validated surrogacy contracts under certain circumstances and the other that declared surrogacy contracts void. *Id.* at 473. The second uniform law updated the 1973 Uniform Parentage Act, which was modeled after the 1988 law, but only incorporated the version which allows the validation and enforcement of surrogacy agreements. *Id.* at 473; *see also* MARKENS, *supra* note 72, at 22 (noting that in 1987, bills addressing surrogacy were split 50-50 on whether to permit or ban the practice, but by the mid-1990s, the vast majority of bills adopted a more accepting yet regulatory approach).

⁷⁸ Compare *In re Baby M*, 537 A.2d 1227 (N.J. 1998) (holding that a commercial surrogacy contract was void as against public policy and unenforceable in a case involving traditional surrogacy), with *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (holding that the woman who intended to bring about the birth of a child whom she intended to raise as her own is the child's natural mother in a case involving gestational surrogacy).

⁷⁹ SPAR, *supra* note 19, at 85. The first case involving a commercial surrogate mother in the United States, Elizabeth Kane, involved crossing state lines into a then-friendly jurisdiction. In her memoir, Kane described her husband's instructions to the pilot while she was in labor on a chartered flight from her home state of Illinois to Kentucky to give birth: "If this baby is born in the airplane, don't radio the tower until we cross the state line. We can tell them it's just been born and make up a time. He has to be born in Kentucky, preferably in Jefferson County." ELIZABETH KANE, BIRTH MOTHER 241-42 (1990).

⁸⁰ SPAR, *supra* note 19, at 94.

basis and encouraged the physical acts involved in the transaction to be conducted with an eye toward forum shopping.⁸¹

With respect to surrogacy in the United States, “[a]s technology made it easier for parents to choose all the components of assisted conception – the eggs, the sperm, the womb, the broker, and the governing jurisdiction – it was only a small and logical leap to international trade.”⁸² One of the first known cases of international surrogacy was in 1987 when a nineteen-year-old Mexican woman crossed illegally into the United States to become a surrogate using the sperm of her cousin’s husband.⁸³ Beginning in the mid-1990s, couples from the United Kingdom, Australia, and elsewhere began searching out and hiring surrogates in the United States due to the restrictiveness of their own countries’ surrogacy laws, despite the high costs involved.⁸⁴

Before the current reproductive tourism market exploded, it was predicted that “today’s modern ‘global village,’ with its means of transportation and communication, would allow citizens to practice ‘procreative tourism’ in order to exercise their personal reproductive choices in other less restricted states.”⁸⁵ The result of differing laws has been forum shopping where individuals restricted in

⁸¹ See Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 305-06 (2007); see also ROTHMAN, *supra* note 10, at 163 (quoting the website for the Center for Surrogate Parenting: “all payments are made in California, contracts are drafted and signed in California, medical procedures are performed in California, and the birth occurs in California. In this way we ensure that California laws apply, which is in the best interests of our couples.”).

⁸² SPAR, *supra* note 19, at 85-86.

⁸³ *Id.* at 86; Uma Narayan, *Family Ties: Rethinking Parental Claims in the Light of Surrogacy and Custody*, in HAVING AND RAISING CHILDREN: UNCONVENTIONAL FAMILIES, HARD CHOICES, AND THE SOCIAL GOOD 67 (Uma Narayan & Julia J. Bartkowiak eds., 1999).

⁸⁴ Ellen Goodman, Op-Ed, *The Globalization of Baby-Making*, BOSTON GLOBE, April 11, 2008, at A15, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/11/the_globalization_of_baby_making/.

⁸⁵ Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J.L. & MED. 329, 341 (1991); see also McEwen, *supra* note 5, at 296 (noting that “[w]hile surrogacy brokers will have to abide by domestic laws, both state and national, they will inevitably resort to canvassing the globe for the countries with the least restrictive regulations” and calling for the international community to address surrogacy arrangements to prevent “a single nation from becoming a breeding ground for babies by allowing gestational surrogacy to exist unregulated within its borders”). One of the first documented examples of reproductive tourism began occurring in the 1980s when the Swedish ban on donor anonymity prompted couples to travel to Denmark for gametes. Blyth & Farrand, *supra* note 72, at 96.

their home state or country can find fertility treatment in a locale like India with little regulation.⁸⁶

2. The Response of ART to Infertility in the Indian Context

Indian culture generally attaches a large stigma to infertility and childlessness, especially to the woman, even when the source of infertility is the male.⁸⁷ In a patriarchal society, fertility defines womanhood, and womanhood, in turn, is defined by a woman's capacity to be a mother.⁸⁸ Indian couples seeking infertility treatment tend to favor assisted reproduction, including gamete donation, over adoption because the whole process may be done in secret.⁸⁹ Even if the infertile couple cannot easily hide the use of a surrogate, the couple still may prefer surrogacy instead of adoption in order to maintain a genetic tie with the child.⁹⁰ In a culture that

⁸⁶ Hannah Gardner, *Long-distance babies spur outcry*, THE NATIONAL, July 14, 2008, <http://www.thenational.ae/article/20080714/PAGETHREE/567226060/1119/BUSINESS> (quoting a commissioning father as saying, "Westerners are fed up with draconian western rules. . . . India is a delight and so are their surrogates.").

⁸⁷ Anjali Widge, *Sociocultural Attitudes Towards Infertility and Assisted Reproduction in India*, in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION: REPORT OF A MEETING ON MEDICAL, ETHICAL AND SOCIAL ASPECTS OF ASSISTED REPRODUCTION 60, 63 (2001) [hereinafter Widge, *Sociocultural Attitudes*]; see also Pushpa M. Bhargava, *The Social, Moral, Ethical, Legal and Political Implications of Today's Biological Technologies: An Indian Point of View*, 1 BIOTECHNOLOGY J. 34, 41 (2006) ("Traditionally, if a couple is infertile in India, the family places the blame on the woman even though we know today that in about half the diagnosable cases a male factor is the cause of infertility."); Anjali Widge, *Seeking Conception: Experiences of Urban Indian Women with In Vitro Fertilization*, 59 SOCIAL & CULTURAL ISSUES IN FERTILITY 3, 226 (2005) [hereinafter Widge, *Seeking Conception*] (finding through a study of 22 childless women seeking IVF that infertility is deeply feared, women's status and security are affected, and they experience stigmatization and isolation).

⁸⁸ Widge, *Seeking Conception*, *supra* note 87, at 226.

⁸⁹ See Aditya Bharadwaj, *Why Adoption is Not an Option in India: the Visibility of Infertility, the Secrecy of Donor Insemination, and Other Cultural Complexities*, 56 SOC. SCI. & MED. 1867 (2003) ("Secrecy is born out of a need to obfuscate a public and visible violation of a culturally priced ideal that views intimate connection between the married body and the progeny.").

⁹⁰ See TULSI PATEL, *SEX-SELECTIVE ABORTION IN INDIA: GENDER, SOCIETY, AND NEW REPRODUCTIVE TECHNOLOGIES* 258 (2007) ("In the case of donated gamete surrogacy, the interested parties collude in recrafting the biosocial bond to mark their offspring as biologically related even when it is not. Such a transgression can be tacitly reconfigured into a legitimate kinship unit."). Many people favor surrogacy over adoption in Western countries as well. See, e.g., Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 187 (1994) ("In addition, the fervent wish to raise one's genetic child, as a link to immortality or an expression of one's self, is a major reason why many people choose surrogacy over adoption."); B.R. Sharma, *Forensic Considerations of Surrogacy – an Overview*, 13 J. CLINICAL FORENSIC MED. 80, 81 (2006) (not-

views infertility as a curse, any method that improves a couple's chances of conceiving is considered worth trying.⁹¹ Thus, ART gives these Indian couples, who can afford it – for there is no public health program that offers infertility treatment – hope to have their own biological child through contemporary technology options.⁹²

As a result, women in India have turned to ART in great numbers. IVF cycles are up from 7,273 in 2001 to 19,005 in 2005.⁹³ In 2005, the number of IVF cycles in surrogate mothers was 177 with a reported 38% success rate.⁹⁴ Some critics have observed that a climate where infertile patients are emotionally vulnerable and highly motivated to achieve “success” at any cost provides a ground ripe for unethical practices.⁹⁵ With respect to the treatment of infertile women, unethical practices have been found to include lack of informed consent, minimization of side effects to the woman and the baby, inflation of success rates, and the prescription of unnecessary treatments.⁹⁶

ing that adoption does not provide a genetic link to the child, an important consideration for some prospective parents).

⁹¹ Kumar, *MART*, *supra* note 29, at 3.

⁹² Widge, *Sociocultural Attitudes*, *supra* note 87, at 69. The Institute of Human Reproduction in Kolkata has recently begun offering discounts on IVF treatment for people referred from government hospitals whose monthly income is less than Rs. 1,500, but due to lack of funds, it is unable to offer assistance to all patients. Rakitima Bose, *Low-cost IVF baby package on offer*, THE HINDU, Sept. 21, 2008, <http://www.thehindu.com/2008/09/21/stories/2208092156802000.htm>.

⁹³ Purvi Malhotra, *Baby Bloom*, INDIA TODAY, Dec. 20, 2007, http://indiatoday.digitaltoday.in/index.php?issueid=&id=2731&option=com_content&task=view§ionid=30.

⁹⁴ *Id.*

⁹⁵ See Aniruddha Malpani, *Are We Exploiting the Infertile Couple?*, 8 INDIAN J. MED. ETHICS 1 (2000), available at <http://www.issuesinmedicalethics.org/081or024.html>.

⁹⁶ SAMA Team, *Assisted Reproductive Technologies in India: Implications for Women*, 42 ECON. & POL. WKLY. 2184 (2007) (In a study of 23 ART providers in India, only one provider was found to be using informed consent forms in English as well as the local language. Patients reported trouble understanding the doctor because he or she often spoke in English only, and they feared offending the physician by requesting more information.); Malpani, *supra* note 95 (“Paradoxically, rich patients may end up getting IVF unnecessarily, while poor patients who need it are deprived because of the expense involved.”); JAN SWASTHYA ABHIYAN, NAT’L COORDINATION COMM., NEW TECHNOLOGIES IN PUBLIC HEALTH – WHO PAYS AND WHO BENEFITS? 65-66 (2007) (citing Indian Council of Medical Research, *Need and Feasibility of Providing Assisted Technologies for Infertility Management in Resource Poor Settings*, 30 ICMR Bulletin 6-7, 5 (June-July 2000)) (noting that the take-home baby rate from IVF as reported by the Indian Council of Medical Research is 25% of cumulative pregnancies whereas clinics report the rate as high as 40%).

Current estimates of infertility in India, a population of 200 million people in the reproductive stage, are 10%.⁹⁷ Even if this statistic is overinflated to help justify the existence of the ART industry,⁹⁸ it still represents a large number of couples who turn to ART practitioners for treatment, and provides incentive for the research and development in India of newer technologies.

3. Role of the Media and the Internet

Although commercial surrogacy has cropped up in other countries, a contributing factor to the rise in popularity of surrogacy in India is the availability of English-speaking doctors, who can communicate with English-speaking patients and promote surrogacy in the press.⁹⁹ “We are now seeing medicine by press release,” said one ART practitioner in India, critical of current practices in the field.¹⁰⁰ Other observers have noted that the Indian press carries articles glorifying the success stories of these technologies but does not highlight the many failed attempts to get there.¹⁰¹

Many Indian ART practitioners and fertility tourism agencies have created websites that “are designed to function as marketing tools for medical tourism, to attract patients from around the world to India and more importantly, to the clinic. It is difficult to distinguish factual information from marketing strategies, as the two often appear to be indistinguishable.”¹⁰² It is not uncommon for websites to encourage couples to disregard the laws implemented in

⁹⁷ Malhotra, *supra* note 93.

⁹⁸ See Widge, *Sociocultural Attitudes, supra* note 87, at 69; see also Janice G. Raymond, *Reproduction, Population, Technology and Rights*, 2 WOMEN IN ACTION (1998), available at <http://www.isiswomen.org/wia/wia298/rep00001.html> (noting that infertility is a concept with no scientific consensus and that the definition conflates inability to conceive with difficulty in conceiving quickly, which routes a large number of women into unnecessary, experimental, and costly medical treatment).

⁹⁹ Ramachandran, *supra* note 51.

¹⁰⁰ Malpani, *supra* note 95.

¹⁰¹ Lakshmi Lingam, *New Reproductive Technologies in India: A Print Media Analysis*, 3 ISSUES IN REPRODUCTIVE & GENETIC ENG'G 13 (1990) (examining the coverage that IVF, IVF-ET, AID, and GIFT have received in the Indian press); Aditya Bharadwaj, *How Some Indian Baby Makers are Made: Media Narratives and Assisted Conception in India*, 7 ANTHROPOLOGY & MED. 63 (2000) (“Media narratives are publicity driven ‘institutional advertisements’ and have succeeded in creating a credible image of the medical expertise/experts in an iniquitous disregard for code of good medical practice in India.”); cf. JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN’S FREEDOM* 109 (1993) (“Science journalism in the United States and in many other Western countries generally promotes the great promise of technological breakthrough. Many articles convey the message that technology is instrumental in constructing a better world.”).

¹⁰² Mulay & Gibson, *supra* note 57, at 87.

their home countries.¹⁰³ Examples of marketing strategies for surrogacy used on Indian ART-related websites include the following:

The birth mother will deliver her baby at an excellent private hospital. If the surrogate is carrying twins, the mother will undergo caesarean delivery. The mother will not bond with the child but breast milk from the mother will be given to the baby (or babies).¹⁰⁴

PlanetHospital takes a lot of the guess work, stress and confusion out of the equation. Based on your medical history and doctor recommendation we prepare everything you need to make your surrogacy journey stress-free – from ordering your tests to arranging passports and visas for your children. . . . When you arrive at the destination, a PlanetHospital concierge will be there to assist you every step of the way (for a small additional fee). So with PlanetHospital, all you have to do is show up.¹⁰⁵

The Indian Health Ministry has appointed the Indian Council for Medical Research (ICMR) to formulate guidelines for supervising Assisted Reproductive Clinics in India. . . . Presently, all IVF clinics are supposed to work under these Guidelines which should be considered “legal.”¹⁰⁶

Our pregnancy rates are very high, because we can transfer more embryos in difficult patients (unlike in UK and Australia, where the number of embryos which can be transferred is limited by law).¹⁰⁷

A high success rate in helping infertile couples build a family as well as the advantages of highly-skilled manpower and a substantially lower cost of treatment is making India the ‘mother destination’ for those seeking ‘our own child’. And it costs a fraction of the amount which clinics in the West charge. . . .

Indian doctors have proven they are as good as anyone in the world, but because India is still a developing country, they charge much less than their colleagues in the West. . . .

¹⁰³ *Id.* at 88.

¹⁰⁴ Planet Hospital, http://www.planethospital.com/?page=procedure_details&page2=sub&id=324&id2=177 (last visited Oct. 31, 2008).

¹⁰⁵ *Id.*

¹⁰⁶ Rotunda – The Center for Human Reproduction, The Rotunda Gestational Surrogacy/Gestational Carrier ART Program, <http://www.iwannagetpregnant.com/surrogacy.asp> (last visited Oct. 31, 2008).

¹⁰⁷ Rotunda – The Center for Human Reproduction, The Rotunda Overseas IVF Patient (ROIP) Program, <http://www.iwannagetpregnant.com/roip.shtml> (last visited Oct. 30, 2008).

The travel and concierge service offers patients tailor made services in exotic spas, resorts and Ayurveda centers. They partner with quality service providers in these areas to deliver a comprehensive, fully-integrated and individualized package.¹⁰⁸

In contrast, the websites contain very little information pertaining to the side effects of treatment, the immigration issues involved, or how success rates are defined.

4. Lower Costs

The relative costs involved in the surrogacy process are probably the largest incentive for foreigners to travel to India. A commissioning party can expect to pay \$14,000 to \$18,000 to a gestational surrogate in the United States.¹⁰⁹ Donor eggs cost \$4,500 on average, but can sell for as much as \$50,000.¹¹⁰ Donor sperm typically costs \$300 on average with “top end” sperm going for \$2,950.¹¹¹ Total costs for contracting with a surrogate mother in the United States fluctuate between \$59,000 and \$80,000.¹¹²

India’s current costs are markedly lower than American standards. In the country where annual per capita income is \$500,¹¹³ fees for surrogates are reported to range anywhere from \$2,500 to \$7,000.¹¹⁴ Donating eggs can garner a woman \$150 per visit.¹¹⁵ Total costs reportedly range between \$10,000 and \$35,000.¹¹⁶

¹⁰⁸ Indian Med Guru, <http://www.indianmedguru.com> (last visited Oct. 31, 2008).

¹⁰⁹ See Jennifer L. Watson, Note, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAMILY ADVOC. 529, 551 (2007) (noting that surrogates should earn \$33,372 if paid at minimum wage); see also McEwen, *supra* note 5, at 292 (noting that if a surrogate is paid \$10,000, it works out to an hourly wage of \$1.54).

¹¹⁰ ABHIYAN, *supra* note 96, at 67-68; see also Hopkins, *supra* note 17 (quoting fees in the range of \$5,000 to \$8,000).

¹¹¹ ABHIYAN, *supra* note 96, at 67-68.

¹¹² See Jamie D. Brooks, Biopolitical Times, *Oprah on Renting Wombs in India: “It’s Beautiful”* (Oct. 11, 2007), <http://www.biopoliticaltimes.org/article.php?id=3713> (\$70,000); Mike Celizic, TODAYShow.com, *More and More Couples Finding Surrogates in India* (February 20, 2008), <http://www.msnbc.msn.com/id/23252624/> (\$80,000 in U.S. for surrogacy).

¹¹³ Mukherjee, *supra* note 52.

¹¹⁴ See Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, <http://www.marieclaire.com/world/articles/surrogate-mothers-india> (last visited Oct. 31, 2008) (Indian surrogates are paid between \$5,000 to \$7,000, the equivalent of upwards of 10 years’ salary for rural Indians); see also The Feminist eZine, *Is Paying the Poor to Have Children Morally Wrong?*, <http://www.feministezine.com/feminist/international/Wombs-for-Rent.html> (last visited Oct. 21, 2008) (claiming that Brahman surrogates can garner more in fees than those in lower castes); *Surrogate Mothers Lined Up in Gujarat*, THE HINDU, Mar. 2, 2006, available at <http://www.thehindu.com/2006/03/02/stories/2006030201872400.htm> (surro-

Indian surrogates are paid in installments over a period of nine months.¹¹⁷ Surrogates may not get paid at all if they do not achieve a pregnancy, or they may forfeit the portion of their fee if they miscarry before an installment payment is due.¹¹⁸

B. Regulation of Surrogacy in India

Before the current guidelines,¹¹⁹ ethics 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 that dominated Indian social and customary practices.¹²⁰ Approximately 79% of the Indian population is Hindu (including Sikhs, Jains and Parsis), 13% of Indians are Muslim, and 8% are Christian.¹²¹ Hindu law is described as flexible and accepting of anything that is good for mankind, provided that it does not inflict moral injury.¹²² Thus, it is

gates get paid between 1 and 2 lakhs); Celizic, *supra* note 112 (\$7,000); 'Wombs for Rent' Grows in India (Marketplace radio broadcast Dec. 27, 2007), available at http://marketplace.publicradio.org/display/web/2007/12/27/surrogate_mother_s/ (\$6,000 to \$10,000); Mukherjee, *supra* note 52 (\$3,000 to \$6,000).

¹¹⁵ The Feminist eZine, *supra* note 114.

¹¹⁶ Radha Sharma, *UK Spinster Rents Womb in Anand!*, TIMES OF INDIA, May 10, 2008, http://timesofindia.indiatimes.com/Cities/Ahmedabad/UK_spinster_rents_womb_in_Anand/rssarticleshow/3026401.cms (total costs for surrogacy reported to be \$15,000 compared to an estimated \$100,000 in the UK); see also Brooks, *supra* note 112 (\$12,000); Celizic, *supra* note 112 (\$30,000); Sam Dolnick, *Pregnancy Becomes Latest Job Outsourced to India*, USA TODAY, Dec. 30, 2007, http://www.usatoday.com/news/health/2007-12-30-surrogacy_N.htm (many couples pay less than \$10,000 total in India for surrogacy); *India Looks to New Laws to Regulate 'Rent-a-Womb' Baby Trade*, TIMES, March 15, 2008, available at <http://www.foxnews.com/story/0,2933,338139,00.html> (\$12,350); Medical Tourism Corporation, <http://www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php> (last visited Nov. 24, 2008) (quoting an upper range of \$35,000).

¹¹⁷ *Insight: Outsourcing to Indian Surrogate Mothers* (CNN television broadcast Oct. 17, 2006), available at http://transcripts.cnn.com/TRANSCRIPTS/0610/17/i_ins.01.html.

¹¹⁸ See PlanetHospital, Surrogacy, http://www.planethospital.com//?page=procedure_details&page2=sub&id=454&id2=177 (last visited Oct. 31, 2008) (payments for surrogates are due only when there is a pregnancy); The Feminist eZine, *supra* note 114 (reporting that one woman who took four attempts to get pregnant miscarried within her first trimester which meant she was not even paid the first installment of \$660).

¹¹⁹ GUIDELINES, *supra* note 14.

¹²⁰ B.N. Chakravarty, *Legislation and Regulations Regarding the Practice of Assisted Reproduction in India*, 18 J. ASSISTED REPROD. & GENETICS 10-11 (2001).

¹²¹ *Id.*

¹²² *Id.* at 11.

argued that all manner of ART is acceptable under the majority of religious law unless it is used for commercial purposes.¹²³

India currently has no laws regulating assisted reproductive technologies.¹²⁴ In 2000, the ICMR released a "Statement of Specific Principles for Assisted Reproductive Technologies."¹²⁵ With respect to surrogacy, the guidelines offered several protections to the surrogate: (1) surrogacy should be resorted to only when it is coupled with authorized adoption wherever applicable; (2) it should be rebuttably presumed that a woman who carries the child and gives birth to it is its mother; (3) the intending parents should have a preferential right to adopt the child subject to six weeks' postpartum delay for necessary maternal consent; (4) the contract for surrogacy, despite permitting reasonable payment of compensation on completion of adoption, would be valid, subject to the surrogate's right to retain the baby if she so desires; (5) the only remedy for the genetic parent would be to make a claim for custody on the grounds of the best interest of the child; and (6) abortion under the abortion law on medical grounds should be the inviolate right of the surrogate, and, in that event, the adopting parents have no claim over the amounts already paid.¹²⁶

Amidst reported stories of eggs and embryos stolen or given to researchers, fertility drugs sold illegally, missing medical records,

¹²³ *Id.* Chakravarty indicated that Muslims accept ART subject to reservations about gamete and embryo transfer; however, they do not accept commercial surrogacy. *Id.*; see also Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*, 30 *CULT. MED. PSYCHIATRY* 427 (2006), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1705533>. Indian Catholics do not accept ART. Chakravarty, *supra* note 120, at 11.

¹²⁴ Chakravarty, *supra* note 120, at 10. In 1995, the Delhi Legislative Assembly enacted the Delhi Artificial Insemination (Human) Act, which permits sperm and egg transfer. *CTR. FOR REPROD. RIGHTS, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, SOUTH ASIA* 80 (2004), available at http://www.reproductiverights.org/pdf/pdf_wowsa_india.pdf. The Act requires the registration of sperm banks and requires HIV testing for semen. *Id.* It also mandates the confidentiality of donors and recipients and requires written consent of both spouses, the husband and the recipient spouse. *Id.*

¹²⁵ INDIAN COUNCIL OF MED. RES., *ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH ON HUMAN SUBJECTS* 97 (2006), available at http://www.icmr.nic.in/ethical_guidelines.pdf. Similarly, in the United States, it is the American Society for Reproductive Medicine (ASRM) that has established rules regarding the conduct of fertility clinics. See SPAR, *supra* note 19, at 51.

¹²⁶ INDIAN COUNCIL OF MED. RES., *supra* note 125, at 102-03. The *Ethical Guidelines for Biomedical Research on Human Subjects* also provided anonymity for sperm donors, but specified that their records should be preserved and that children born through donor insemination should be presumed to be legitimate. *Id.* at 102. In addition, the guidelines stated that no donor should be a relative "[i]n order to avoid identification and claims of parenthood and inheritance rights." *Id.* at 100.

and women recruited as surrogates who chose to parent the child, the Secretary of Family Welfare released draft guidelines on Assisted Reproductive Technology (ART) Clinics on September 4, 2002.¹²⁷ The draft guidelines were developed by a committee formed by the ICMR and the National Academy of Medical Sciences, New Delhi.¹²⁸ With respect to surrogacy, the draft guidelines provided that no relative could act as a surrogate; genetic (biological) parents must adopt a child born through surrogacy; surrogacy should normally be considered only for patients for whom it would be physically or medically impossible/undesirable to carry a baby to term; and a child born through ART should be presumed to be the legitimate child of the couple, born within wedlock and with all the attendant rights of parentage, support, and inheritance.¹²⁹

After several years of discussion and debate, primarily among the ICMR, the National Academy of Medical Sciences, and practitioners of ART, the Ministry of Health and Family Welfare published the non-binding National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2005.¹³⁰ The preamble to the Guidelines cites the mushrooming of infertility clinics in India providing services in the private sector and the provision of “highly questionable” services provided by some clinics along with the lack of adequately trained manpower and infrastructure facilities to deliver highly sophisticated technologies.¹³¹ In addition to establishing a procedure for state governmental bodies to oversee all matters relating to the accreditation, supervision, and regulation of ART clinics,¹³² the Guidelines include provisions with respect to gamete transfer and surrogacy.

¹²⁷ See Press Release, Ministry of Health & Family Welfare, Guidelines on Assisted Reproductive Technology Clinics in India (Sept. 4, 2002), <http://pib.nic.in/archieve/lreng/lyr2002/rsep2002/04092002/r040920029.html>; Nirupa Sen, *ICMR Spurs Public Debate on Infertility Clinics*, 83 CURRENT SCI. 1185 (2002), available at <http://www.ias.ac.in/currsci/nov252002/1185.pdf>.

¹²⁸ Press Release, Ministry of Health & Family Welfare, *supra* note 127.

¹²⁹ *Id.*

¹³⁰ GUIDELINES, *supra* note 14. Discussions were held in Chennai, Jodhpur, Kolkata, Bangalore, Hyderabad, and Mumbai and involved over 4,000 participants including doctors, scientists, bureaucrats, legal experts, infertile couples, and the general public. N.K. Ganguly, *Preface* to GUIDELINES, *supra* note 14, at xii. However, some commentators indicate that the draft Guidelines did not engender much debate except among some professional groups like the consortium of 43 infertility specialists. See Mulay & Gibson, *supra* note 57, at 90.

¹³¹ Prasanna Hota, *Foreward* to GUIDELINES, *supra* note 14, at ix.

¹³² GUIDELINES, *supra* note 14, § 3.15; see also *id.* § 3.14.5-6 (ART clinics must be registered and accredited).

With respect to gamete transfer, the Guidelines include the following salient provisions:

- “Use of sperm donated by a relative or a friend of either the wife or the husband [is] not permitted. It [is] the responsibility of the ART clinic to obtain sperm from appropriate banks; neither the clinic nor the couple shall have the right to know the donor identity and address, but both the clinic and the couple, however, shall have the right to have the fullest possible information from the semen bank on the donor such as height, weight, skin color, educational qualification, profession, family background, freedom from any known diseases or carrier status (such as hepatitis B or AIDS), ethnic origin, and the DNA fingerprint (if possible), before accepting the donor semen. It [is] the responsibility of the semen bank and the clinic to ensure that the couple does not come to know the identity of the donor.”¹³³ The same rules apply to egg donation.¹³⁴
- “No more than three [eggs] or embryos may be placed in a woman in any one cycle regardless of the procedure/s used, except under exceptional circumstances (such as older women, poor implantation, adenomiosis or poor embryo quality).”¹³⁵
- “No woman should be treated with gametes or with embryos derived from the gametes of more than one man or woman during any one treatment cycle.”¹³⁶

¹³³ *Id.* § 3.5.13; *see also id.* § 3.12.2 (“Children born through the use of donor gametes, and their ‘adopted’ parents shall have a right to available medical or genetic information about the genetic parents that may be relevant to the child’s health.”).

¹³⁴ *Id.* § 3.5.14.

¹³⁵ *Id.* § 3.2.7; *see also id.* § 3.5.12. This Guideline appears to be commonly ignored. *See, e.g., infra* notes 204 and 282 and accompanying text; Posting Potpourri, <http://procreatedinindia.blogspot.com/> (Nov. 4, 2008) (“Shawn and I had a momentarily unsettling conversation with Dr. Yash last night about the embryo transfer after discussing how many follicles I had. . . . Smiling, I told her that we were most concerned with having enough embryos to try multiple times since we only want to transfer 2 for each shot. Although this was something we had discussed with them before, I could tell she wasn’t thrilled by that decision. . . . All in all, she said that transferring 4 embryos (2 on day 2 and 2 on day 5) would give us the best chance – about 50% – of a pregnancy. . . . We had already made the decision not to transfer anything more than 2 embryos at a time, but I have to admit that we were both struggling with that decision last night. We both realized that we are so used to following doctors’ advice that it was difficult to listen to scientific ‘facts’ and not do what we were told is best. . . . just wishing that we could transfer 4 embryos like Dr. Yash wants us to, but get them to agree that they won’t perform a selective reduction. The only thing I knew was that I would never be able to live with myself if I killed my child. And that is what I would be doing if we did what the doctors want and more than two embryos implanted.”)

¹³⁶ GUIDELINES, *supra* note 14, § 3.2.7.

- The ART clinic should release information about the donor (including a copy of the donor's DNA fingerprint, if available, but not reveal the donor's identity) only to the offspring and only upon request after age 18, and never to the parents, or as otherwise required by law.¹³⁷
- The couple should be made aware that a child born through ART has a right to seek information (except the individual's personal identity) about his genetic parent/surrogate mother upon reaching age 18. Though the couple is not obligated themselves to provide this information, no attempt must be made by the couple to hide the information from the child "should an occasion arise when this issue becomes important for the child."¹³⁸

With respect to surrogacy, the Guidelines provide the following:

- "A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death."¹³⁹
- "The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother."¹⁴⁰
- "All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother."¹⁴¹

¹³⁷ *Id.* § 3.3.6.

¹³⁸ *Id.* §§ 3.4.8, 3.12.3. In addition, "[a] third party donor of sperm or [eggs] must be informed that the offspring will not know his/her identity." *Id.* § 3.5.1.

¹³⁹ *Id.* § 3.5.4. This requirement reportedly stemmed from a case in Hyderabad where a doctor agreed to admit a surrogate in the name of her sister; the surrogate did not die, but the doctor realized there would be issues if the woman did not survive the delivery. See Bhargava, *supra* note 87, at 42.

¹⁴⁰ GUIDELINES, *supra* note 14, § 3.5.4

¹⁴¹ *Id.*

- “An [egg] donor cannot act as a surrogate mother for the couple to whom the [egg] is being donated.”¹⁴²
- Consent must be true informed consent and must be witnessed by one who is not associated with the clinic.¹⁴³
- “[Compensation] negotiations between a couple and the surrogate mother must be conducted independently between them.”¹⁴⁴
- “Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART center should not be involved in this monetary aspect.”¹⁴⁵
- “Advertisements regarding surrogacy should not be made by the ART clinic. The responsibility of finding a surrogate mother, through advertisement or otherwise, should rest with the couple, or a semen bank.”¹⁴⁶
- The surrogate mother should not be over forty five (45) years of age.¹⁴⁷
- “A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.”¹⁴⁸
- The surrogate must be tested for HIV and provide a written certificate that she has not had intravenous drugs administered through a shared syringe or any blood transfusions and that she and her husband have had no extramarital relationship in the last six months. The surrogate must also declare she will not use intravenous drugs or receive blood transfusions except through a certified blood bank.¹⁴⁹
- “No woman may act as a surrogate more than [three times] in her lifetime.”¹⁵⁰

Regarding parental rights, the Guidelines provide the following:

¹⁴² *Id.*

¹⁴³ *Id.* § 3.5.22.

¹⁴⁴ *Id.* § 3.9.2.

¹⁴⁵ *Id.* § 3.10.3.

¹⁴⁶ *Id.* § 3.10.4.

¹⁴⁷ *Id.* § 3.10.5.

¹⁴⁸ *Id.* § 3.10.6.

¹⁴⁹ *Id.* § 3.10.7.

¹⁵⁰ *Id.* § 3.10.8.

- There are no bars to a single woman using ART. Any resulting child would have all the legal rights of a woman or a man and would be deemed legitimate.¹⁵¹ However, artificial insemination with donor sperm should normally be performed on a married woman because a “two-parent family would always be better for the child than a single parent one, and the child’s interests must outweigh all other interests.”¹⁵²
- “A third-party [gamete] donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.”¹⁵³
- In light of ooplasm transfer technology, in which a fertilized egg containing ooplasm (including mitochondria) from a donor egg has been successfully cultured,¹⁵⁴ the embryo or the future child may have three genetic parents. “In such cases, the ooplasm donor must sign a waiver relinquishing all rights on the child, and must be screened for and declared free of known mitochondrial genetic abnormalities.”¹⁵⁵
- “A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.”¹⁵⁶
- “A child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse.”¹⁵⁷
- In the case of a divorce during the gestation period, if the offspring is conceived through donated gametes, either sperm or egg, “the law of the land as pertaining to normal conception would apply.”¹⁵⁸

¹⁵¹ *Id.* §§ 3.5.2, 3.16.4.

¹⁵² *Id.* § 3.16.4.

¹⁵³ *Id.* § 3.5.5.

¹⁵⁴ See CTR. FOR GENETICS & SOC’Y, *supra* note 16.

¹⁵⁵ GUIDELINES, *supra* note 14, § 3.14.4. This provision appears to conflict with section 3.2.7 that provides: “no woman should be treated with gametes or with embryos derived from the gametes of more than one man or woman during any one treatment cycle.”

¹⁵⁶ *Id.* § 3.10.1.

¹⁵⁷ *Id.* § 3.12.1; see also *id.* § 3.16.1.

¹⁵⁸ *Id.* § 3.12.4.

The Guidelines contain nine sample consent forms for the commissioning parties, surrogate, egg donor, and sperm donor.¹⁵⁹ The consent forms are, in general, startlingly short.¹⁶⁰ The sample consent form for a potential surrogate mother must be signed by her husband.¹⁶¹ The sample consent form includes a provision acknowledging that the surrogate has worked out the financial terms and conditions of the surrogacy with the couple and has filed a written confidential copy of the agreement with the clinic.¹⁶² The surrogate further agrees to hand over the child to the couple (and to a designee in case of their separation or to the survivor upon one of their deaths) as soon as she is permitted at the place where the child is delivered.¹⁶³ The surrogate acknowledges that the commissioning couple has a legal obligation to accept the child and that the child will have all the inheritance rights of a biological child in accordance with prevailing law.¹⁶⁴ The surrogate also acknowledges that she has the right to terminate her pregnancy at will; however, if she chooses to do so she must refund all expenses incurred by the commissioning parents, unless the pregnancy is terminated on expert medical advice.¹⁶⁵ Finally, the surrogate agrees not to disclose the identity of the couple.¹⁶⁶

The Guidelines erase nearly all the protections under the 2000 Statement of Specific Principles for Assisted Reproductive Technologies with respect to the surrogate mother's right to the child.¹⁶⁷ Some have questioned whether surrogacy contracts would stand up under Indian law. For example, under the Indian Contract Act, contracts which are contrary to public policy are unenforceable.¹⁶⁸

¹⁵⁹ *Id.* §§ 4.1-4.9.

¹⁶⁰ See Siddhartha Chatterjee & Rajib Gon Chowdhury, *Third Party Reproduction in Recent Scenario*, 105 J. INDIAN MED. ASSOC. 242 (2007) (asserting that gestational carrier contracts should be as comprehensive as possible, setting forth, for example, the parties' intentions with respect to the parentage of the child, financial arrangements, prenatal care, delivery plans, selective reduction, abortion, future contact among the parties, and cooperation on legal steps to establish parentage).

¹⁶¹ GUIDELINES, *supra* note 14, § 4.7.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *Statement of Specific Principles of Assisted Reproductive Technologies*, 15 J. ACAD. HOSP. ADMIN. (2000).

¹⁶⁸ Indian Contract Act § 23, No. 9 of 1872; INDIA CODE (1872); see Sharma, *supra* note 6, at 11-12; Siddarth Aneja, *Commercial Surrogacy Agreements: Concept with special emphasis on the Draft Assisted Reproductive Technologies (Regulation) Bill of 2008*, available at <http://www.indlawnews.com/Display.aspx?7128e327-651c-41c9-bf08-7ad9ab353b4c> (noting that surrogacy contracts raise concerns of baby

Unenforceability has been extended to contracts considered likely to deprave, corrupt, or injure the public morality.¹⁶⁹ A court could find a surrogacy contract unenforceable on public policy grounds¹⁷⁰ or unconstitutional under Article 23 of the Constitution of India which prohibits forced labor and trafficking in human beings.¹⁷¹

Critics challenge the Guidelines on numerous grounds. Commentators note that the Guidelines reinforce social prejudices toward infertility without stressing the need for the prevention of infertility.¹⁷² Informed consent is dealt with in a vague and cursory manner and is not even made mandatory under the Guidelines.¹⁷³ There has also been a great deal of criticism about the lack of guidance given to the bodies charged with approving new technologies and accrediting ART clinics.¹⁷⁴

Many observers have called for legislation to be enacted not only to effectively implement the Guidelines but also to address the issue of exploitation of surrogates.¹⁷⁵ Some ART practitioners

selling on the basis that some part of the payment due under the contract is for a baby and the contract is not fulfilled until the child is delivered to the intended parents). *But see* Swapnendu Banerjee & Sanjay Basu, *Rent A Womb: Surrogate Selection, Investment Incentives and Contracting* (May 29, 2006) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894022 (arguing for the enforceability of surrogacy contracts).

¹⁶⁹ *Rajasthan v. Basant Nahata*, 2005 AIR 3401 (S.C.) (Madras H.C.).

¹⁷⁰ *See, e.g.*, Deepa Kharb, *Assisted Reproductive Techniques Ethical and Legal Concerns*, 4 INTERNET J. OF L., HEALTHCARE & ETHICS (2007), <http://www.ispub.com/ostia/index.php?xmlFilePath=journals/ijlhc/vol4n2/reproduction.xml>; Sharma, *supra* note 6, at 11-12.

¹⁷¹ INDIA CONST. art. 23, §1; *see* Sharma, *supra* note 6, at 11-12. *But cf.* *Yamada v. Union of India*, 2008 INDLAW SC 1554 (Sept. 29, 2008), available at <http://judis.nic.in/supremecourt/qrydisp.aspx> (noting that commercial surrogacy is "legal" in India).

¹⁷² *See* Laxmi Murthy & Vani Subramanian, *ICMR Guidelines on Assisted Reproductive Technology: Lacking in Vision, Wrapped in Red Tape*, 3 INDIAN J. MED. ETHICS (2007), available at <http://www.issuesinmedicalethics.org/153cm123.html>; Manjeer Mukherjee & Sarojini B. Nadimipally, *Assisted Reproductive Technologies in India*, 49(4) DEVELOPMENT 128, 133 (2006).

¹⁷³ *See* Murthy & Subramanian, *supra* note 172.

¹⁷⁴ *See, e.g., id.* (noting that the Guidelines leave the approval of new technologies entirely up to the National Advisory Committee without providing any framework for the granting of such approval); ABHIYAN, *supra* note 96, at 76.

¹⁷⁵ *See, e.g.*, Ritesh G. Menezes & Prashanth K. Adiga, Letter to the Editor, *Surrogacy in India*, 14 J. FORENSIC & LEGAL MED. 307 (2006); Anil Malhotra & Ranjit Malhotra, *No Child's Play: Problems Faced by NRIs to Adopt Children*, ECON. TIMES, March 6, 2008, http://economictimes.indiatimes.com/The_Global_Indian_Takeover/No_childs_play_Problems_faced_by_NRIs_to_adopt_children/articleshow/2841488.cms ("A law governing surrogate motherhood, hiring of wombs in India and sperm banks needs to be enacted immediately. The abuse of this process for exploiting women

themselves have called for legal certainty through legislation.¹⁷⁶ Government officials have also expressed the need for surrogacy legislation.¹⁷⁷

In September 2008, after a push to end months of delay spurred by the Baby Manji case,¹⁷⁸ the Assisted Reproductive Technologies (Regulation) Bill and Rules were released for public comment.¹⁷⁹ The Draft Bill was drafted by a 12-member committee comprised primarily of medical experts from ICMR and the Ministry of Health.¹⁸⁰ The Draft Bill contains the following major provisions with respect to surrogacy: (i) the commissioning parties and the surrogate mother must enter into a surrogacy agreement which will be legally enforceable,¹⁸¹ (ii) surrogates must have all expenses, including insurance expenses, incurred during pregnancy and through delivery of the child paid for by the commissioning parties,¹⁸² (iii) the surrogate mother may also receive monetary compensation for agreeing to act as a surrogate,¹⁸³ (iv) the surrogate must relinquish parental rights over the child,¹⁸⁴ (v) a woman serving as a surrogate must be between the ages of 21 and 45 and may

and misusing children born in surrogacy for commercial considerations, must be stopped forthwith.”); Pankaj Sattawan & Partha Pratim Medhi, Resolving Disputes Arising Out of Surrogacy 1, 5 (May 4, 2007) (working paper), *available at* <http://ssrn.com/abstract=998512> (“[S]teps should be taken to regulate and minimize the negative effects of surrogacy. This will protect those who are affected by the use of such technologies.”); Raghav Sharma, *supra* note 6, at 10 (“Surrogacy, if not regulated, will prove to be an avenue of exploitation and subjugation of women.”).

¹⁷⁶ See *Stricter ‘Womb Rent’ Laws Needed: Docs*, TIMES OF INDIA, Nov. 28, 2007, http://timesofindia.indiatimes.com/Stricter_womb_rent_laws_needed_Docs/articleshow/2576538.cms.

¹⁷⁷ Seema Singh, *Draft regulation on surrogacy in two months for public debate*, LIVE MINT, Sept. 7, 2008, <http://www.livemint.com/2008/09/08000257/Draft-regulation-on-surrogacy.html?d=1> (quoting Union health minister Anbumani Ramadoss, as saying, “I think it’s time we had a law on surrogacy. It’s become more than sporadic and is lending itself to commercial exploitation like the kidney (transplant).”); *India plans to regulate indiscriminate “womb renting.”* INDIAN CATHOLIC, June 25, 2008, <http://www.theindiancatholic.com/report.asp?nid=10613> (quoting Women and Child Development Minister Renuka Chowdhury as calling for regulation to end this “free for all”).

¹⁷⁸ See *infra* notes 331-52 and accompanying text.

¹⁷⁹ See C.H. Unnikrishnan, *Bill to regulate IVF clinics to be tabled soon*, LIVE MINT, Sept. 24, 2008, <http://www.livemint.com/2008/09/24001126/Bill-to-regulate-IVF-clinics-t.html>.

¹⁸⁰ Draft Bill, *supra* note 15, at iii.

¹⁸¹ *Id.* § 34(1).

¹⁸² *Id.* § 34(2).

¹⁸³ *Id.* § 34(3).

¹⁸⁴ *Id.* § 34(4).

not serve as a surrogate for more than three live births,¹⁸⁵ (vi) commissioning parties must approach registered semen banks or advertise to arrange surrogate mothers; clinics are prohibited from arranging surrogates,¹⁸⁶ (vii) the birth certificate for the child will bear the names of the child's "parents,"¹⁸⁷ (viii) the commissioning parties are legally bound to accept the child regardless of any abnormality the child may have,¹⁸⁸ (ix) foreign and non-resident Indian commissioning parties must appoint a local guardian who will assume legal responsibility in caring for the surrogate,¹⁸⁹ (x) foreign and non-resident Indian commissioning parties must provide the ART clinic with documentation that they would be able to take the child born through surrogacy outside the country,¹⁹⁰ (xi) the child born of surrogacy is considered the legitimate child of the commissioning parties, even in the event of divorce,¹⁹¹ and (xii) a child born of surrogacy would have the right to obtain non-identifying information about the surrogate upon attaining age 18.¹⁹² The Draft Bill has been criticized on the grounds that it was drafted by a medico-business lobby and primarily promotes its interests, and that rights and health of women and children are inadequately protected.¹⁹³ It is expected that some form of the Draft Bill will be enacted within a year.¹⁹⁴

¹⁸⁵ *Id.* §§ 34(5) and (6).

¹⁸⁶ *Id.* § 34(8).

¹⁸⁷ *Id.* §§ 34(10) and 35(7). Section 34(9) of the Draft Bill specifies that the birth certificate will bear the name of the "genetic" parent(s), whereas Section 35(7) specifies that the birth certificate will bear the name of the parent(s) who sought the use of assisted reproductive technology.

¹⁸⁸ *Id.* § 34(11).

¹⁸⁹ *Id.* § 34(19).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at §§ 35(1)-(4).

¹⁹² *Id.* at § 36(1). The child born of surrogacy may obtain identifying information about the surrogate or genetic parent in the case of life threatening medical conditions, but only upon the consent of the surrogate mother or genetic parent. *Id.* § 36(3).

¹⁹³ Mayura Janwalkar, *Law soon on rent-a-womb deals*, DAILY NEWS & ANALYSIS, Sept. 19, 2008, www.dnaindia.com/report.asp?newsid=1191497; Mayura Janwalkar, *Surrogacy bill needs to be discussed threadbare*, DAILY NEWS & ANALYSIS, Sept. 19, 2008, <http://www.dnaindia.com/report.asp?newsid=1191490>; T.K. Rajalakshmi, *Abetting surrogacy*, 25 FRONTLINE 22 (Oct. 25-Nov. 7, 2008), available at <http://www.hinduonnet.com/fline/fl2522/stories/20081107252210000.htm>.

¹⁹⁴ Rajalakshmi, *supra* note 193.

C. *Indian Clinics Performing Surrogacy for International Commissioning Parties*¹⁹⁵

In the absence of a national registry, there is no reliable information on the number of ART clinics in India.¹⁹⁶ Clinics offer-

¹⁹⁵ Brokers with surrogacy websites catering to international clients have recently cropped up in other countries. The spike in these business ventures may be directly related to increasing regulation in the arena of international adoption. For example, an attorney who previously facilitated international adoptions from Guatemala recently became a principal with the Surrogacy & Fertility Law Center, LLC, which was organized in December 2007. See Missouri Secretary of State, Business Entity Search, <https://www.sos.mo.gov/BusinessEntity/soskb/Corp.asp?2400085> (last visited Oct. 31, 2008). The timing of the Center's organization is curious; it coincides with the passage of Guatemalan legislation to implement its obligations under the Hague Convention on Intercountry Adoption. See U.S. Department of State Announcement, Guatemala Congress Passes Adoption Legislation (Dec. 11, 2007), http://www.travel.state.gov/family/adoption/intercountry/intercountry_3903.html. The passage of the legislation effectively puts international adoptions from Guatemala on hold, at least temporarily, because Guatemala has stopped registering cases entered in Guatemala as of December 31, 2007. See U.S. Department of State Announcement, Guatemala Update: The Registration Period has ended for Registering In-Process Cases with the National Adoption Council (Feb. 13, 2008), http://www.travel.state.gov/family/adoption/intercountry/intercountry_3955.html. The website for the law firm claims:

Our team of professionals have extensive experience in Guatemala and all of Central America. . . . At the Surrogacy & Fertility Law Center a/k/a SFLC, we are more than just an infertility and surrogacy law center. Our mission is making your surrogacy and infertility needs affordable. . . . We have achieved this by forming alliances with some of the best infertility clinics in Central America

Surrogacy & Fertility Law Center, About Us, <http://www.fertilitysurrogacy.com/1.html> (last visited Oct. 31, 2008). In addition, the website states: "Why do people want to travel to Central America to undergo a surrogate pregnancy? The answer is simple. Incredible savings of tens of thousands of dollars. Complete anonymity. Not to mention a little leisure and peaceful retreat in a beautiful country." Surrogacy & Fertility Law Center, Our Services Resolving Infertility Issues, <http://www.fertilitysurrogacy.com/2.html> (last visited Oct. 31, 2008). A few U.S. international adoption agencies, including some that were denied Hague accreditation, have recently expanded their services to include international surrogacy and embryo adoption programs. See, e.g., Listing of Adoption Agencies, <http://www.adoption2.com/agencies/a1.htm> ("Adopt International: Professional, ethical licensed adoption agency directed by an attorney providing home studies and/or placements from Kazakhstan, Liberia and now introducing International Surrogacy.") (last visited Nov. 29, 2008); Partners for Adoption, www.partnersforadoption.org/surrogacy.shtml ("Partners for Adoption is excited to share the news of our sister program with International Surrogacy Partners.") (last visited Nov. 29, 2008); Adoptions From the Heart, www.adoptionsfromtheheart.org/heartbeats/index.html (describing the agency's new "Heartbeats: Embryo Placement Program") (last visited Nov. 29, 2008).

ing surrogacy arrangements to international clients have sprung up in major metropolitan areas throughout India, including: Kolkata,¹⁹⁷ Pune,¹⁹⁸ New Delhi,¹⁹⁹ Bhopal, and Indore.²⁰⁰ The clientele appears mostly to be non-resident Indians, constituting as much as 70% of the total client base.²⁰¹ Indian clinics report that surrogacy arrangements have more than doubled in recent years with demand being driven primarily from abroad.²⁰² The websites and flurry of popular press articles on Indian surrogacy suggest that these clinics do not strictly adhere to the Guidelines; instead, in many respects, they regulate themselves based on their own principles of ethics.²⁰³

Non-adherence to the Guidelines by ART clinics occurs most commonly in the areas of surrogate advertising, matching, and involvement in the financial negotiations between the surrogate and the commissioning couple.²⁰⁴ ART clinics vary in their require-

¹⁹⁶ See Ganguly, *Preface* to GUIDELINES, *supra* note 14, at xii.

¹⁹⁷ See, e.g., Ghosh Dastidar Institute, <http://gdifr.com/index.html> (last visited Oct. 31, 2008).

¹⁹⁸ See, e.g., Ruby Hall IVF & Endoscopy Centre, Infertility with Dr. Sunita Tandulwadkar, <http://www.infertilityinindia.com> (last visited Oct. 31, 2008).

¹⁹⁹ See, e.g., Delhi IVF & Fertility Research Centre Test Tube Baby Clinic, <http://www.delhi-ivf.com> (last visited Oct. 31, 2008).

²⁰⁰ Shuriah Niazi, *Surrogacy Boom*, BOLOJI, Oct. 14, 2007, <http://www.boloji.com/wfs6/wfs1027.htm>.

²⁰¹ Mata Press Service, *Wombs for Rent in a Hamlet of Hope*, ASIAN PAC. POST, Mar. 9, 2006, http://www.asianpacificpost.com/portal2/ff80808109dc23b20109dc491ba8001a_Wombs_for_rent_in_a_hamlet_of_hope.do.html.

²⁰² Ramesh, *supra* note 67. One medical tourism agency expects to send at least 100 couples to India this year for surrogacy, up from twenty-five in 2007. Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, March 10, 2008, at A9, available at <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

²⁰³ Posting of Deepali Gaur Singh, *Rent-A-Womb: Surrogacy in India on the Rise*, <http://www.rhrealitycheck.org/blog/2008/01/25/rent-a-womb-surrogacy-in-india-on-the-rise> (Jan. 25, 2008, 9:53 EST).

²⁰⁴ See, e.g., Rotunda – The Center for Human Reproduction, *The Rotunda Gestational Surrogacy/Gestational Carrier ART Program*, <http://www.iwannagetpregnant.com/surrogacy.asp> (“We can provide you an Indian surrogate recruited through advertisements in our local newspapers.”) (last visited Oct. 2, 2008); see also SAMA-Resource Group for Women and Health, *Assisted Reproductive Technologies, ARTs and Women: Assistance in Reproduction or Subjugation?* (June 6, 2007), available at <http://us.oneworld.net/node/150013> (study noting that ART practitioners were found not to adhere to the Guidelines in number of embryos transferred); cf. Kajari Bhattacharya, *Surrogate Motherhood Emerges as a Job Option*, THE STATESMAN, Jan. 12, 2008, <http://www.thestatesman.net/page.arcview.php?clid=6&id=212456&usrss=1> (quoting Dr. Ghosh Dastidar of the Ghosh Dastidar Fertility Research Centre as

ments for screening commissioning couples. For example, some ART clinics refuse to accept gay men and lesbians as clients whereas others declare themselves to be LGBT friendly.²⁰⁵ Most ART clinics appear to allow contact between commissioning parties and Indian surrogate women, but some still insist on complete anonymity.²⁰⁶ ART clinics also vary in the screening requirements

saying, "We do not take part in the monetary negotiations between the infertile couple and the surrogate mother. We simply charge between Rs 75,000 and Rs 80,000 for the IVF process.").

²⁰⁵ See Siddhartha D. Kashyap & Abhishek Kumar Chand, *Foreign Gay Couples Seek Surrogate Moms in India*, DAILY NEWS & ANALYSIS, Feb. 17, 2008, <http://www.dnaindia.com/report.asp?newsid=1151328> (quoting Dr. Sunita Tandulwadkar in Pune, "I refuse any such request because I personally believe in ethical medical procedures, taking into account the overall growth and development of the child. Unfortunately, same-sex couple adoption may not provide enough for the maturity of the infant."); *id.* (quoting Dr. Shehbaaz Daruwala in Pune, "[B]ecause of the social stigma attached to same-sex surrogacy, it is commendable that these couples are coming forward. This proves that society is changing and there is greater awareness among them."); see also Gagandeep Kaur, *Outsourcing a Womb*, THE HINDU BUS. LINE, Apr. 6, 2007, <http://www.thehindubusinessline.com/life/2007/04/06/stories/2007040600190400.htm> (reporting that Dr. Sunita Tandulwadkar will not take on cases of career women who opt for surrogacy to not interrupt their careers); *Stricter 'Womb Rent' Laws Needed*, *supra* note 176 (reporting that IVF specialist at Lilavati Hospital Hrishikesh Pai expresses concern about social implications related to bringing up children of same sex couples once they return to their home country). Compare PlanetHospital,

http://www.planethospital.com/?page=procedure_details&id=177&name=Surrogate (last visited Oct. 31, 2008), and PlanetHospital, http://www.planethospital.com/?page=procedure_details&page2=sub&id=322&id2=177 (last visited Oct. 31, 2008) (stating that it will take on single commissioning parents pending criminal checks, but will reject those who do not want to get pregnant for "lifestyle reasons" with the exception of gay men in which case one member of the gay couple has to provide viable sperm), with Rotunda – The Center for Human Reproduction, *I Wanna Get Pregnant*, <http://www.iwannagetpregnant.com> (last visited Oct. 31, 2008) (displaying a "LGBT Friendly Clinic" badge on its website). Commentators have noted the paradox of commercial surrogacy being available to gay couples in a country which criminalizes homosexuality pursuant to Section 377 of the Indian Penal Code. See, e.g., Editorial, *Double standards*, DAILY NEWS & ANALYSIS, Nov. 18, 2008, <http://www.dnaindia.com/report.asp?newsid=1207670>.

²⁰⁶ Anil B. Pinto & Nona Morgan Swank, *Gestational Surrogacy*, in THE ART AND SCIENCE OF ASSISTED REPRODUCTIVE TECHNIQUES 345, 346 (Gautam N. Allahbadia & Rita Basuray Das eds., 2004) (noting that few infertility centers offer the option of anonymous surrogacy in which the surrogate has no identifying information on the contracting couple); Ketan Tanna, *Mumbai Mom for Chinese Child*, TIMES OF INDIA, Sept. 29, 2005, <http://timesofindia.indiatimes.com/articleshow/1247050.cms> (follow to second page of article) (discussing how a couple from Singapore whose child was born at Hiranandani Hospital in Mumbai was not permitted to meet or have direct contact

for potential surrogates. Almost all require a surrogate to have previously given birth because they question the legitimacy of informed consent unless the surrogate has had the experience of childbirth and delivery and perhaps to provide some assurance that the surrogate can achieve a pregnancy.²⁰⁷ Some clinics also house surrogate mothers reportedly to monitor them and provide medical care.²⁰⁸

Surrogacy practitioners consistently downplay the commercial aspect of surrogacy by highlighting the surrogate's altruistic objectives over financial motivation.²⁰⁹ Marketing by ART clinics to the surrogates themselves also highlights the supposed altruistic aspect of surrogacy.²¹⁰ Websites advertising surrogacy are often directed primarily to commissioning parties and secondarily to surrogates.²¹¹

with the surrogate mother, because, according to the hospital, the interaction could have led to "emotional bonding").

²⁰⁷ See, e.g., Pinto & Swank, *supra* note 206, at 346 (stating that no informed consent can be given if the surrogate does not have at least one child).

²⁰⁸ Singh, *supra* note 203.

²⁰⁹ See, e.g., Mukherjee, *supra* note 52 (According to Deepak Kabir, a Mumbai-based, gynecologist, "Surrogate mothers are giving their (the eventual parents) lives a new meaning. For them the money they pay is just a token gesture that by no way substitutes their gratefulness."); see also RAYMOND, *supra* note 101, at 40 ("[T]he discourse of altruism is appropriated by reproductive scientists to shield their objectives, interests and ambitions."); Drabiak, *supra* note 81, at 303 (noting that commercial surrogacy agencies attempt to reduce the relative financial bargaining power of potential surrogates by reframing "the surrogate's act as altruistic and rewarding in and of itself").

²¹⁰ See, e.g., Surrogacy India, Surrogate Benefits and Motivation, http://www.surrogacyindia.com/s_Surrogatebenefits.html (last visited Oct. 2, 2008). The webpage, directed to potential surrogates, states:

The act of becoming a mother (surrogate mother), is not only a self-sacrificing but truly a brave decision. The act of giving life, a reason to live, making dreams possible for childless couples, is more than a benefit for you. . . .

Unlike the western countries, we understand the awareness in Indian people and the myths they believe in. This decision of yours is indeed the most rewarding act of kindness in history of human mankind.

It cannot be compensated nor valued in money. It is because Intended parents acknowledge you for your sisterly love, godly act, and motherly care; they would provide you compensation in the form you think is the best to bring in wonderful opportunities for you and your family. Be it education for your children, care of your family members or something more personal.

Id.

²¹¹ Ruth McElroy, *Whose Body, Whose Nation?: Surrogate Motherhood and its Representation*, 5 EUR. J. CULTURAL STUD. 325, 329 (2002).

One difficulty in marketing to different audiences is that the tone of the website has to remain “professional and commercial at the same time as being personal and sentimental. . . . [S]urrogacy narratives often make recourse to altruism as a prime motive, with the effect that all other motives appear implicitly inferior or tainted.”²¹²

One of the most well-known international surrogacy clinics is the Akanksha Infertility Clinic located in Anand, in the state of Gujarat, and operated by Dr. Nayna Patel.²¹³ Previously, Anand was known as the milk capital of India because of its hugely successful dairy cooperative;²¹⁴ however, because of Dr. Patel’s pioneering involvement in international surrogacy, Anand has now become the epicenter of the surrogacy industry.²¹⁵ Dr. Patel’s first surrogacy effort was in 2003 when she assisted the surrogacy of a local forty-four year old woman who wished to bear a child for her daughter who was living in the United Kingdom.²¹⁶ A snapshot of the company shows that in August 2006, the clinic had nine IVF surrogates pregnant with babies for Indian and foreign couples.²¹⁷ By 2007, the clinic had twenty surrogates contracted for couples abroad, a waiting list of 250 couples worldwide, and over forty total babies born to surrogates.²¹⁸ In March of 2008, over fifty surrogates were carrying children for foreign clientele.²¹⁹

At Dr. Patel’s clinic, babies are given up one to two days after birth.²²⁰ Dr. Patel claimed that no problems have arisen with surrogates bonding emotionally with the babies. She is quoted as saying, “[t]he first question is, ‘[i]s the baby OK?’ The second is, ‘[i]s the couple happy?’ And then they say, ‘Thank God,’ And then they don’t think about it after that.”²²¹ As with other ART practitio-

²¹² *Id.* at 330.

²¹³ See Akanksha Infertility Clinic Home Page, <http://www.ivfcharotar.com> (last visited Oct. 31, 2008).

²¹⁴ Mukherjee, *supra* note 52.

²¹⁵ *Id.*

²¹⁶ Haworth, *supra* note 114; The Feminist eZine, *supra* note 114.

²¹⁷ See Akanksha Infertility Clinic Home Page, <http://www.ivfcharotar.com/> (last visited Oct. 22, 2008).

²¹⁸ Mukherjee, *supra* note 52; Dolnick, *supra* note 116; Uday Mahurkar, *Donating a womb*, INDIA TODAY, Sept. 13, 2007, http://indiatoday.digitaltoday.in/index.php?issueid=80&id=1174&option=com_content&task=view§ionid=25.

²¹⁹ Gentleman, *supra* note 202.

²²⁰ Henry Chu, *Wombs for Rent, Cheap*, L.A. TIMES, Apr. 19, 2006, at 1, available at <http://www.truthout.org/article/wombs-rent-cheap>.

²²¹ *Id.* Contra Sudeshna Banerjee, *Surrogate Motherhood: the Gain and the Pain*, TRIBUNE (India), July 7, 2002, <http://www.tribuneindia.com/2002/20020707/herworld.htm#1> (reporting infertility specialist, Dr. M. Gouri Devi, as saying, “The problem in this procedure is

ners, Dr. Patel highlights the surrogate's altruistic motivations.²²² She said, "If you say it's a business of emotions, I would say yes. It's not a business of economics and finances. There are a lot of emotions involved in this. And if a female is just doing this for business, I think this is not the right thing to do."²²³ Dr. Patel finds that convincing a woman to become a surrogate is the most difficult part: "[w]hen they come first to me they are really a desperate lot because this is the last thing they would want to try. . . . It's not easy carrying a baby for 9 months for someone else."²²⁴

Dr. Patel only provides services for couples who have a medical reason for turning to surrogacy.²²⁵ Citing her conservative cultural beliefs, she will not accept gay couples as clients.²²⁶ Dr. Patel permits commissioning couples to converse with the surrogates at the clinic; in fact, many commissioning couples shower the surrogate with attention and gifts.²²⁷ Some couples continue to stay in touch with the surrogate via the internet even after the birth.²²⁸

Dr. Patel advertises, locates the surrogates, and matches them with commissioning couples herself.²²⁹ Most women live locally but some travel from far away places, lured by the money to be earned.²³⁰ Anand has a population of roughly 150,000, so it is not unusual for surrogacy for hire to be spread by word of mouth.²³¹ There are instances of families in which several of the women have served as surrogates. For example, in one family, a mother and her three daughters served as surrogates, and in another, three sisters

that a mother naturally bonds with the child during pregnancy and giving up the child is often hard.").

²²² Chu, *supra* note 220 (Dr. Patel alludes to Hindu teachings of being rewarded in the next life for good deeds performed in this one.); Kaur, *supra* note 205 (Dr. Patel states that surrogates "initially do it for monetary gain but as they come in contact with the infertile couple, their main aim is to give joy to the infertile couple.").

²²³ 'Wombs for Rent' grows in India, *supra* note 114.

²²⁴ *Cheaper Overseas*, *supra* note 67.

²²⁵ Kaur, *supra* note 205; Sharma, *supra* note 116 (Dr. Patel said that "[t]here is yet another woman who has a good uterus but wants me to arrange for a surrogate mother to carry her child. We are convincing her that she should also be bold enough to carry the baby in her womb.").

²²⁶ Haworth, *supra* note 114.

²²⁷ Chu, *supra* note 220.

²²⁸ Dolnick, *supra* note 116.

²²⁹ The Feminist eZine, *supra* note 114.

²³⁰ Indian Express Group, Bundle of Hope for Surrogate Mother, U.S. Couple, (Feb. 27, 2007), <http://cities.expressindia.com/fullstory.php?newsid=224289> (detailing the account of a woman who traveled from Kolkata to Anand to become a surrogate to earn money for her son who suffers from a heart problem).

²³¹ Haworth, *supra* note 114.

and a sister-in-law.²³² Dr. Patel does acknowledge the difficulties faced by surrogates: “[y]ou see, Indian society is still quite conservative and questions get asked. So often these women will just move out of the local area to have the child.”²³³ One surrogate mother recounted: “Madam told me I should become a surrogate and if I do, all my worries will go away.” She told the women to “think of the pregnancy as ‘someone’s child comes to stay at your place for nine months.’”²³⁴

In Dr. Patel’s operation, several surrogates live together in a rented home near the clinic and some live on the third floor of the clinic itself, which has been converted into a dormitory.²³⁵ The surrogates’ husbands and children may visit during the day, and some take classes such as English or computer skills.²³⁶

Surrogates at Dr. Patel’s clinic are paid on the upper end of the Indian surrogacy market scale, between \$5,000 and \$7,000 to carry a baby to term.²³⁷ Many of the surrogates also donate eggs but are not allowed to serve as traditional surrogates.²³⁸ Dr. Patel herself retains control over the fee paid to surrogates, indicating that the clinic will hold the money for the surrogate if she wants to use it for a house purchase or that the clinic will accompany the surrogate to the bank to establish an account in her own name.²³⁹ She, releasing surrogate fees only into fixed term deposits or other long-range plans, said, “I don’t want them to waste the money on ordinary things.”²⁴⁰ She reports that she is looking into insurance policies for surrogates and setting up a trust fund for them.²⁴¹ She also reportedly continues to provide their health care even after their pregnancies are over.²⁴²

²³² Ramesh, *supra* note 67; Mata Press Service, *supra* note 201.

²³³ Ramesh, *supra* note 67.

²³⁴ Dolnick, *supra* note 116.

²³⁵ *Id.*; The Feminist eZine, *supra* note 114.

²³⁶ Dolnick, *supra* note 116.

²³⁷ Haworth, *supra* note 114.

²³⁸ The Feminist eZine, *supra* note 114.

²³⁹ Haworth, *supra* note 114; *see* Singh, *supra* note 203 (questioning claims by doctors of ensuring that surrogates retain control over their money: “But many who understand the position of women in rural societal set-ups such as India’s also recognize the reality behind these claims. How can one fully protect a poor, uneducated woman who has spent her life in a patriarchal set-up, fed on those patriarchal beliefs even when laws have failed to give her any relief? What stops the middle men here (clinics/doctors) from exploiting her, let alone her own family?”).

²⁴⁰ The Feminist eZine, *supra* note 114.

²⁴¹ *Id.*

²⁴² *Id.*

IV. ETHICAL CONSIDERATIONS SURROUNDING SURROGACY IN INDIA

Bringing a third party into reproduction raises a host of ethical concerns. This section examines ethical concerns as it relates to surrogates in India, the persons conceived through surrogacy, and the commissioning parties.

A. *Surrogate Mothers*

Surrogacy in the context of a non-Western nation was foretold at the time gestational surrogacy took hold in the West because surrogacy in the international context involves overlapping issues of neocolonialism, classicism, and racism but to a more extreme degree. As early as the mid-1980s, feminists such as Gena Corea warned that once embryo transfer technology was developed, surrogate brokers would seek out surrogates not only from “poverty-stricken parts of the United States, but in the Third World as well.”²⁴³ In Janice G. Raymond’s view, it is more accurate to call surrogacy “reproductive trafficking” “because it creates a national and international traffic in women in which women become moveable property, objects of reproductive exchange, and brokered by go-betweens mainly serving the buyer.”²⁴⁴

Excising the physical act of pregnancy and childbearing from the notion of motherhood necessarily leads to commodification. And for whites, women of color may be easier to commodify. It

²⁴³ COREA, *supra* note 8, at 215; *see also* Trevor Allis, *The Moral Implications of Motherhood by Hire*, 5 INDIAN J. MED. ETHICS (1997), available at <http://www.issuesinmedicalethics.org/051mi021.html> (“What we may see in the future is a class of breeder women, probably poor women, who rent their wombs to wealthy people.”); Ramona Koval, *What Price the Sale of Reproductive Technology?* 7 CRITICAL SOC. POL’Y 5, 12, 14 (1987) (“The extension of the surrogacy market is inevitable in this climate. While comparatively small fees are paid to women who engage in this activity in the United States, the fees paid to women in less developed nations must be a powerful attraction for this industry. . . . With the use of IVF and embryo transfer these women could bear blond-haired, blue-eyed babies for Westerners. . . . [I]t is highly likely that the push for IVF clinics in a country with a history of reproductive abuses against women of lower socio-economic status, may easily open the market place to Third World surrogates.”); Jeremy Rifkin & Andrew Kimball, *Put a Stop to Surrogate Parenting Now*, USA TODAY, Aug. 20, 1990, at A8 (“Minority women increasingly will be sought to serve as ‘mother machines’ for embryos of middle- and upper-class clients. It’s a new, virulent form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a ‘breeder class’ for those who can afford \$30,000 to \$40,000 to avoid the inconvenience and danger of pregnancy.”).

²⁴⁴ Raymond, *supra* note 98 (noting that surrogacy has been called “intrauterine adoption” and, like international adoption, its routes move children from less developed to more developed countries).

may be easier to view a woman of color's womb as merely a component or a tool when that woman's race does not match the child she is bearing. In this vein, Mary Lyndon Shanley wrote:

In a society where employment opportunity is as stratified by race as it is in the United States, it is not irrational to think that black and hispanic women would often agree to be gestational surrogates for a lower fee than would white women. Because our society tends to regard both genetics and race as natural and essential components of personal identity, in cases in which the gestational mother and the child share no genes and are of different races, the temptation to regard the child as a "product" wholly separate and distinct from the pregnant woman will be very strong. In such cases the temptation to view the agreement to bear a child as a binding employment contract will be particularly great. The separability of the gametes from the donors' bodies makes them appear like commodities, and the resulting child like a product produced with those raw materials. If the gestational surrogate and the intentional parents have different racial features, in a society in which race is such a strong social marker, the tendency to view the (white) child as utterly distinct from the (black) mother will be great, as indeed it will be if a black child is born to a white woman."²⁴⁵

Some surrogates themselves have noted that differences in skin color enable them to distance themselves emotionally from the child they are carrying. As one Indian surrogate remarked on the white child she would bear, "[i]t won't even have the same skin

²⁴⁵ SHANLEY, *supra* note 7, at 121; *see also* RAYMOND, *supra* note 101, at 69 (noting that in the *Calvert* case, "[i]t appears that the Calverts may have selected Johnson precisely because her Black skin would ensure the Calverts' claim to the resultant child. . . . Not many people seem concerned about its racist consequences or about its implications for an international market in surrogacy where women of color could easily be exploited and hired at a lower rate than the current market price."); D. Grayson, *Mediating Intimacy: Black Surrogate Mothers and the Law*, 24 CRITICAL INQUIRY 525, 528-29 ("[G]estational surrogacy invites the singling out of black women for exploitation not only because a disproportionate number of black women are poor and might possibly turn to leasing their wombs as a means of income, but also because it is incorrectly assumed that black women's skin colour can be read as a visual sign of their lack of genetic relation to the children they would bear for the white couples who seek to hire them."); *Black Women Giving Birth to White Babies on the Rise*, EMERGING MINDS, Mar. 25, 2008, <http://emergingminds.org/Black-Women-Giving-Birth-to-White-Babies-on-the-Rise.html> (noting a London fertility expert's comment that "many [white] women were willing to use black surrogates because there was a lesser chance of the host becoming attached to a child of a different color").

color as me, so it won't be hard to think of it as [the commissioning mother's]."²⁴⁶

Neocolonialism is related to racism and to the history of reproductive abuses against women in countries like India. Historically, corporations, states, and international aid agencies have perpetuated abusive reproductive practices such as sterilization, conditioning aid on population control programs, and unregulated testing of birth control devices. Surrogacy and egg transfer can be viewed as the newest forms of reproductive abuse in India.²⁴⁷ Though the underlying technologies are new, surrogacy perpetuates the legacy of reproductive oppression of poor Indian women.²⁴⁸

Oprah Winfrey declared in front of eight million viewers in 2007 that Indian surrogacy was a case of "women helping women."²⁴⁹ But people like Jyotsna Agnihotri ask, "[s]hould we view these cases as examples of women's agency, self-determination, and solidarity of 'global sisterhood' between the fertile/infertile, first world/third world, rich/poor and support them? If only things were that simple!"²⁵⁰ Such "win-win" type declarations presume that the commissioner and commissioned are on equal footing. But it "is debatable whether women are choosing freely to become surrogates, or that their will is socially and economically constructed."²⁵¹

²⁴⁶ Haworth, *supra* note 114; see also Heléna Ragoné, *Of Likeness and Difference: How Race is Being Transfigured by Gestational Surrogacy*, in IDEOLOGIES AND TECHNOLOGIES OF MOTHERHOOD, RACE, CLASS, SEXUALITY, NATIONALISM 56, 62 (Heléna Ragoné & France Winddance Twine eds., 2000) (preliminarily finding that gestational surrogates may actually find it desirable to be matched with a couple from a different racial background – one surrogate interviewed stated that the reason for the preference is that racial or ethnic difference provides "more distance" between them).

²⁴⁷ Mukherjee & Nadimipally, *supra* note 172, at 128; Koval, *supra* note 243, at 14. Though this section focuses on the potential harms to women serving as gestational surrogates, similar questions are raised with respect to Indian women who donate eggs for money. See, e.g., Mayank Tewari, *Wanted: 'Perfect' donors for 'perfect' babies*, DAILY NEWS & ANALYSIS, Aug. 26, 2008, www.dnaindia.com/report.asp?newsid=1185735 (recounting the story of an Indian egg donor who felt cheated after her compensation was dramatically reduced when she was told by the clinic, without independent verification, that her eggs were not of good quality).

²⁴⁸ RAYMOND, *supra* note 101, at 14-21 (discussing the testing of Norplant and other birth control methods in South Asian nations); Jyotsna Agnihotri Gupta, *Women's Bodies: The Site for the Ongoing Conquest by Reproductive Technologies*, 4 ISSUES IN REPROD. & GENETIC ENG'G 93 (1991) (discussing the history of reproductive abuses in India including coercive sterilization and hormonal and injectible contraceptive trials); Lingam, *supra* note 101, at 13.

²⁴⁹ Brooks, *supra* note 112.

²⁵⁰ Gupta, *supra* note 49, at 31.

²⁵¹ *Id.* at 32.

One must question the notion of free choice and self-determination when Indian women are agreeing to surrogacy to earn money to obtain urgent medical care for loved ones,²⁵² win back lost children,²⁵³ raise children as a single parent or as the sole breadwinner,²⁵⁴ and pay for their children's dowries,²⁵⁵ particularly when the amount of money involved is so high in relation to the woman's standard of living. As attorney Susan Crockin noted, "to the extent that people are looking to India because of the less expensive arrangement they can make, if you do the math, they're making ten times their husband's, then that's the equivalent of paying somebody here probably \$150,000 to \$200,000 for being a gestational surrogate."²⁵⁶ When the "choices" can be so dire, it is possible that Indian women may be pressured by their families, brokers, and personal circumstances to lend their bodies for cash.²⁵⁷

Free choice must also be questioned in terms of what is meant by informed consent and the extent to which surrogates are adequately counseled about the physical risks of surrogacy. The physical hazards of gamete transfer, embryo implantation, pregnancy, and birth are multifold and include perforation of organs, increased risk of ectopic pregnancy, complications from multiple pregnancies, fetal reduction, and cesarean sections.²⁵⁸ Some posit that "the relative biological strangeness of the fetus to the gestational mother, as compared to a woman carrying a child conceived through sexual intercourse," carries with it an "even greater biological investment from her during pregnancy."²⁵⁹ As such, the gestational mother may face even greater risks of developing severe pregnancy complications.²⁶⁰ Are surrogates truly counseled thoroughly about these risks?

²⁵² Indian Express Group, *supra* note 230.

²⁵³ The Feminist eZine, *supra* note 114.

²⁵⁴ *Id.*; Mukherjee, *supra* note 52 (According to one surrogate, "My husband lost his limbs working in the factory. . . . We could not manage even a meal a day. That is when I decided to rent out my womb.").

²⁵⁵ Haworth, *supra* note 114.

²⁵⁶ *Insight: Outsourcing to Indian Surrogate Mothers*, *supra* note 117.

²⁵⁷ Kharb, *supra* note 170 (observing that some women could be pressured into surrogacy by their husbands for money); Sharma, *supra* note 6, at 10 (questioning whether surrogacy practices "amplify the malady of the dowry system whereby a woman is reduced to a mere economic resource by greedy in-laws"); Ramachandran, *supra* note 51 ("[I]n countries like India where women are often forced to do as ordered by husbands and in-laws, the possibility of family pressure on her to become a surrogate mother for the sake of big money cannot be ruled out.").

²⁵⁸ ABHIYAN, *supra* note 96, at 67-68.

²⁵⁹ Kandel, *supra* note 90, at 188.

²⁶⁰ *Id.* at 189.

Severing an Indian woman's ties with a child by contract also dismisses bonds between woman and child that can be created by pregnancy. It is not merely a womb that is rented, but the woman as a whole. "[P]regnancy isn't a condition of one isolated organ. Women experience pregnancy with our whole bodies – from the changes in our hair to our swollen ankles – with all of our bodies and perhaps with our souls as well."²⁶¹ A mother has a physical and social relationship with her baby during pregnancy.²⁶² Unborn babies hear, dance to, and recognize the gestational mothers' voices.²⁶³ Through physical and social exchanges between the woman and fetus, bonding can occur during the pregnancy itself.

No formal research has been done from the perspective of the Indian surrogate mother.²⁶⁴ Anecdotally, Indian surrogates appear to "toe the party line," at least on the surface, and attribute their motivations primarily to altruistic purposes.²⁶⁵ However, some have

²⁶¹ ROTHMAN, *supra* note 10, at 6 (arguing that the gestational mother is the mother, regardless of the source of sperm and eggs); *see also* Kandel, *supra* note 90, at 190 ("From the perspective of biology, when the genetic mother's hereditary contribution to the child is balanced against the gestational mother's developmental contribution, both must be viewed as equally 'natural' mothers. Biology, when divorced from our cultural ideology about naturalness, provides no basis for choosing only one of them.").

²⁶² Kandel, *supra* note 90, at 189.

²⁶³ *Id.*

²⁶⁴ For research of surrogate mothers in Western contexts, see, for example, Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 EUR. SOC'Y HUM. REPROD. & EMBRYOLOGY 2196 (2003) (interviewing 34 women who had given birth to a surrogate child approximately 1 year previously, and finding that surrogate mothers do not generally experience major problems in their relationship with the commissioning couple, in handing over the baby, or from the reactions of those around them, and that the emotional problems experienced by some surrogate mothers in the weeks following the birth appeared to lessen over time); Shaw, *supra* note 73, at 11 (detailing accounts from surrogates in New Zealand who view their acts not so much gifts, but as projects of the self, or as events that serve to mark out new beginnings in their lives); Hazel Basilington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57 (2002) (British study postulating that attitude towards payment becomes part of a psychological detachment process in which surrogate mothers emotionally distance themselves from the growing foetus and finding a strong psychological component evident in the conscious effort by surrogate mothers to think of their surrogacy arrangement as being a job with payment and not to think of the baby as theirs); HELÉNA RAGONÉ, *SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART passim* (1994) (ethnographic study of American surrogate motherhood).

²⁶⁵ Ragoné, *supra* note 246, at 52-53 ("The stated motivations of surrogates are often expressed in what can be described as a scripted manner, reflective of culturally accepted ideas about reproduction, motherhood, and family, and reinforced by the programs.").

pointed out that “[i]f women were truly lining up to become surrogate mothers out of altruism and concern for the infertile, we would have middle- and upper-class women bearing the babies of lower-class couples, where the added gift of aiding those who cannot afford to pay would be an even greater expression of altruism.”²⁶⁶ Furthermore, even if the majority of Indian women were agreeing to become surrogates primarily out of altruism, surrogacy would be no less exploitative or commodifying.²⁶⁷

However, “dig deeper and their emotional anguish becomes evident.”²⁶⁸ Indian surrogates do acknowledge the psychic costs of service, including missing the children they have while confined at a clinic²⁶⁹ and missing the child they have relinquished.²⁷⁰ Fear of miscarriage and fetal disabilities also cause psychic injury and stress for surrogates.²⁷¹ In addition, traditional Indian attitudes towards sex and procreation often force a surrogate to hide her pregnancy and/or invent stories about her pregnancy – for example, saying the baby has died or that they have been away for months on the pretext of visiting relatives.²⁷²

²⁶⁶ RAYMOND, *supra* note 101, at 45.

²⁶⁷ See, e.g., Sharyn Roach Anleu, *Surrogacy: For Love But Not For Money?* 6 GENDER & SOC’Y 30, 31-32 (1992) (positing that the distinction between commercial and altruistic surrogacy is socially constructed, rather than based on self-evident or intrinsic differences, and that both types of surrogacy involve the application of pervasive gender norms that women’s motivations to have children should be based on emotion, selflessness and caring, not on self-interest, financial incentives or pragmatism); Narayan, *supra* note 83, at 66 (“I have . . . come to think that many of the moral and legal problems with commercial surrogacy do not seem unique to such arrangements or necessarily connected to the commercial and contractual aspects of paid surrogacy.”); Uma Narayan, *The “Gift” of a Child: Commercial Surrogacy, Gift Surrogacy and Motherhood*, in EXPECTING TROUBLE: SURROGACY, FETAL ABUSE & NEW REPRODUCTIVE TECHNOLOGIES 177 (Patricia Boling ed., 1995).

²⁶⁸ Ramachandran, *supra* note 51.

²⁶⁹ Brooks, *supra* note 112.

²⁷⁰ *Id.* (As one surrogate noted, “It is up to the child to remember us. . . . We will remember the child for the rest of our lives.”); The Feminist eZine, *supra* note 114 (describing a surrogate who still cries sometimes when she thinks of the baby); Kaur, *supra* note 205 (A second-time surrogate mother said, “Of course, it is difficult to give away the child; you become attached. But I also know that the couple badly wanted a child and they will look after it well. However, this is the last time that I am doing it.”).

²⁷¹ Pinto & Swank, *supra* note 206, at 346.

²⁷² Mukherjee, *supra* note 52 (“It’s a lie we have to tell, otherwise how can we earn this much money? . . . A lie for a good cause is not a sin.”); Anuj Chopra, *Childless Couples Look to India for Surrogate Mothers*, CHRISTIAN SCI. MONITOR, April 3, 2006, <http://www.csmonitor.com/2006/0403/p01s04-wosc.html> (One husband of a surrogate said, “Otherwise we’ll be treated like social pariahs. . . . This isn’t a respectable thing to do in our society.”).

B. *Commissioning Parents*

Potential harm to the commissioning party goes beyond not being able to be in close contact with the surrogate during pregnancy or the inability to know the sex of the child before birth.²⁷³ Commissioning mothers who transfer their own eggs also face medical risks from hormones and the procedure of extracting eggs.²⁷⁴ The side effects can include ovarian hyperstimulation which can have serious and even fatal consequences, post-operative infections, punctures of internal organs, hemorrhage, and intra-pelvic adhesions.²⁷⁵

Commissioning parties are also prone to over-inflated claims of chances for a successful pregnancy. The IVF take-home baby rate in India is documented to be around 25%, and it varies with age.²⁷⁶ Yet in practice, success rates are incomplete or obscured by glowing testimonials, media hype, and success stories, which create huge publicity for rare successful pregnancies and silence regarding the large number of failures and miscarriages.²⁷⁷ Clinics have also been known to inflate the success rate by defining “success” in terms other than the take-home baby rate – for example, by including chemical pregnancies in the statistic.²⁷⁸ The financial costs of undertaking multiple trips to India for additional attempts to achieve pregnancy success can erode the relative savings that Indian surrogacy is often said to offer.

Commissioning parents may be lured into surrogacy through other unethical practices. One Indian ART practitioner remarked that the indications for surrogacy are rare and most infertile pa-

²⁷³ Celizic, *supra* note 112. In India, the sex of a child may not be revealed before birth by medical practitioners pursuant to the Pre-natal Diagnostic Techniques Act, No. 57 of 1994; INDIA CODE (1994).

²⁷⁴ Gupta, *supra* note 248, at 103.

²⁷⁵ *Id.* at 103; *see also* ABHIYAN, *supra* note 96, at 67.

²⁷⁶ *Need and Feasibility of Providing Assisted Technologies for Infertility Management in Resource-Poor Settings*, 30 ICMR Bull. 5 (2000), available at <http://icmr.nic.in/bujunJuly00.pdf>.

²⁷⁷ Joseph D. Schulman, Genetics and IVF Institute, “What’s Your Success Rate?”: Understanding IVF Pregnancy Statistics: Part I, <http://www.givf.com/library/whatisyoursuccessrate1.cfm> (last visited Oct. 22, 2008).

²⁷⁸ Widge, *Seeking Conception*, *supra* note 87, at 230; ANIRUDDHA MALPANI & ANJALI MALPANI, HOW TO HAVE A BABY: OVERCOMING INFERTILITY 6 (2001), available at <http://www.drmlpani.com/book/chapter25f.html#How%20can%20you%20make%20sense%20of%20IVF%20success%20rates> (commenting that chemical pregnancies in which the embryo does not develop beyond the earliest stage are fairly common after IVF).

tients can be helped with simpler procedures.²⁷⁹ However, “[i]n a market economy, supply rises to meet demand, and there are many clinics who are happy to oblige these desperate couples.”²⁸⁰

Personal accounts of commissioning couples who travel to India in surrogacy arrangements have described the psychological roller coaster of emotions they experience in their endeavors to obtain a surrogate baby. Upon arrival in India, one commissioning woman wrote: “Well just a quick note to let everyone know we made it here safe and sound. Wonderful flight. Hotel is perfect. The docs had flowers delivered to our room first thing. What a wonderful sentiment. Mumbai is amazing!”²⁸¹

At the stage of embryo transfer, she continued:

I stood at Asha’s (our surrogate) shoulder and watched on the ultrasound screen. I placed my hand on her shoulder to comfort her and when the procedure concluded I leaned over and placed my cheek next to hers and gave her a kiss and whispered ‘Shukria’ (thank you in Hindi) into her ear. Gerry and I are both overwhelmed with gratitude for this very special woman. . . . 5 embryos were transferred. . . . Dr. Pai said he normally only transfers 3 embryo’s [sic] into surrogates but decided on transferring all 5 embryos. He truly believes that the success rate is based on technique and said that all his surrogates last month had a positive pregnancy. Now we wait and pray for success.²⁸²

A few weeks later, the couple encounters a failed attempt but vows not to give up:

We are devastated, but trying to move forward. . . . We have decided we are not going to give up. Although the disappointment is horrible, our passion to have a child is greater. We both want this more than anything. As far as what direction we will be going in, that is uncertain at this point, but there is a good chance we will be heading back to India in the near future.²⁸³

²⁷⁹ Posting of Aniruddha Malpani to The Patient’s Doctor, <http://www.doctorandpatient.blogspot.com/2006/07/surrogacy-in-india-real-picture.html> (July 27, 2006, 17:00 EST).

²⁸⁰ *Id.*

²⁸¹ We Made It, <http://ourjourneytosurrogacyinindia.blogspot.com/search?updated-max=2008-04-15T22%3A03%3A00-07%3A00&max-results=25> (April 5, 2008, 12:02 EST).

²⁸² The SEED(S) Have Been Planted, <http://ourjourneytosurrogacyinindia.blogspot.com/search?updated-max=2008-08-28T17%3A55%3A00-07%3A00&max-results=25> (April 17, 2008, 7:15 EST).

²⁸³ Coming Up for Air, <http://ourjourneytosurrogacyinindia.blogspot.com/search?updated-max=2008-08-28T17%3A55%3A00-07%3A00&max-results=25> (May 3, 2008, 22:10 EST).

Another commissioning couple, who was prompted to go to India for surrogacy after watching an episode on the *Oprah Winfrey Show* about Indian surrogacy, also wrote of clinging to hope after encountering failure in egg retrieval:

Infertility is such an unknown science still, and that is the toughest part of it all. Some people are successful on their first try with it, and for others it may take multiple tries. We have not given up hope yet. I am seeing an Infertility Specialist this month and seeing what their opinion is. And then we will go from there. If we do decide to do the Surrogacy still, we will definitely be going back to India. It is a great program that has had so much success. The only bad thing would be having to go back to India for any length of time! But oh well! You do what you gotta do.²⁸⁴

After the failure of their contracted surrogate to achieve pregnancy, another couple embarked on another trip to India for a second attempt:

It has been difficult for Bob and I to get excited about this trip...well, about this cycle. We are tired of the emotional roller coaster of all these infertility treatments. We find ourselves talking more and more about what life without children would be like.²⁸⁵

C. *Persons Born Through Surrogacy*

Commodification extends to the children born of surrogacy as well. “[C]onceiving of any child in market rhetoric harms personhood.”²⁸⁶ Personhood is harmed when it is not adequately recognized that the product of a woman’s reproductive labor is *someone* not *something*.²⁸⁷ Shabir Bhimji wrote:

²⁸⁴ Our Trip to India, www.mikeandsarahhorgan.blogspot.com/2008/05/our-trip-to-india.html (May 10, 2008, 11:33 EST).

²⁸⁵ Two for the Road, <http://myindiasurrogate.blogspot.com/search?updated-max=2008-06-29T14%3A13%3A00-07%3A00&max-results=7> (May 26, 2008, 18:05 EST); see also A Serious Note...and a nervous laugh, <http://spawnofmikeandmike.blogspot.com/2008/08/serious-noteand-nervous-laugh.html> (Aug. 8, 2008) (detailing a couple’s choice to hire two surrogates simultaneously and grappling with the ethical dilemma of selective reduction in the potential event of having “a litter”).

²⁸⁶ MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 137, 139 (1996).

²⁸⁷ Anton van Niekerk & Liezl van Zyl, *The Ethics of Surrogacy: Women’s Reproductive Labour*, 21 J. MED. ETHICS 345, 347 (1995); Kharb, *supra* note 170 (“Certainly the most serious ethical objection to commercial surrogacy is that it reduces children to objects of barter by putting a price tag on them.”).

Why is it wrong if the surrogate mother does not desire the child for its own sake, when a couple is waiting eagerly to be its parents? The basic problem is that creating a child without desiring it will fundamentally change the way we look at children – instead of viewing them as unique individuals to be desired in their own right, we may come to view them as commodities.²⁸⁸

Commodifying persons conceived through surrogacy means that their inherent needs and rights are ignored. There have been no studies of the experiences of persons born through surrogacy or other new reproductive technology procedures such as IVF, egg donation, or embryo donation.²⁸⁹ Again, one must rely on anecdotal narratives and it can be expected that experiences vary, perhaps dependent in part on the existence of a genetic tie with the surrogate mother.

For example, one fourteen year old girl born of a gestational surrogate remarked,

I can't really remember how I felt about it when I was younger, but now that I'm older, I can see from my mother's point of view how much she wanted a daughter. . . . It helps me realize, it doesn't really matter how I was born and that my mother didn't actually carry me. But it does matter that I am here. I am born.²⁹⁰

Whereas a nearly eighteen year old son born of a traditional surrogate wrote:

How do you think we feel about being created specifically to be given away? . . . I don't care why my parents or my mother did this. It looks to me like I was bought and sold. . . . When you exchange something for [m]oney it is called a commodity. Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? . . . Because somewhere between the narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kids['] needs. We, the children of surrogacy, become lost. That is the real tragedy.²⁹¹

²⁸⁸ Shabir Bhimji, *Womb for Rent: Ethical Aspects of Surrogate Motherhood*, 137 CAN. MED. ASS'N J. 1132, 1134 (1987).

²⁸⁹ Blyth & Farrand, *supra* note 72, at 107.

²⁹⁰ Brigid Schulte, *Sharing the Gift of Life*, WASH. POST, May 4, 2008, at C1, available at <http://www.heraldtribune.com/article/20080510/NEWS/805100660/-1/RSS>.

²⁹¹ The Son of a Surrogate (Aug. 9, 2006), <http://sonofasurrogate.tripod.com>.

Adoptees have been instructive in advocating for disclosure and highlighting the struggle for identity.²⁹² Persons conceived through donor insemination (DI) are also becoming a growing and vocal group advocating disclosure.²⁹³ “Children come into the world through the actions of specific persons, which now can include both ‘intentional’ parents (those who plan their conception) and genetic donors.”²⁹⁴ “It is safe to assume that an adult born of a surrogacy arrangement will want to know the identity of each of the persons involved in his or her conception, gestation, and birth.”²⁹⁵ International surrogacy will create a new set of individuals who bear intangible losses as a result of being cut off from some portion of their origins.²⁹⁶

Individuals conceived through egg transfer and surrogacy are subject to physical risks as well, including complications resulting from being one of several babies in a multiple birth, pre-term birth, with low-term birth weight and increased risks of genetic damage.²⁹⁷

Finally, until the law is clarified both within India and with respect to state parentage laws and immigration law, the legal status of persons born through surrogacy arrangements may be unclear,

²⁹² For overviews of disclosure and identity issues in adoption, see E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998); JUDITH S. MODELL, *A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION* (2002); KATARINA WEGAR, *ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS* (1997).

²⁹³ See, e.g., Bill Cordray, *Baby Corner, Views on Disclosure*, <http://www.thebabycorner.com/page/1354/> (last visited Oct. 31, 2008) (“Parents need to respect and honor the child’s full heritage. How can we understand a DI child if we ignore his origins, if we pretend it has no influence on the child? Non-disclosure encourages the idea that we can erase the blueprint of genetic inheritance and creates an artificial self. We feel we have a right to our authentic identity.”); Bill Cordray, *An open letter to the HFEA*, *DONOR INSEMINATION NEWSLETTER* 1999 (on file with the author) (summarizing the results of a survey of 36 DI adults reflecting “overwhelming support” for disclosure). In November 2008, a 26-year old woman conceived with donor sperm filed a proposed class action lawsuit in British Columbia seeking a permanent injunction prohibiting the destruction of any gamete donor records. *Pratten v. Attorney General of British Columbia, et al*, Supreme Court of British Columbia, No. S-087449 (filed Oct. 24, 2008).

²⁹⁴ SHANLEY, *supra* note 7, at 90.

²⁹⁵ *Id.* at 89-90; see also ANNETTE BARAN & REUBEN PANNOR, *LETHAL SECRETS* 165 (1999) (“It should be noted that the more complex the method of conception, gestation, and birth, the more complex the psychological implications and emotional reverberations. We believe that being open and honest, and sharing the facts with the offspring are universally necessary. The true facts of origins become more difficult for the child to understand and accept in high-tech baby making.”).

²⁹⁶ In recent years, some sperm banks in the United States allow donors increasing amounts of information. SPAR, *supra* note 19, at 38-39. Some allow donors to agree to let their offspring contact them after they turn eighteen. *Id.*

²⁹⁷ Gupta, *supra* note 248, at 103; see also ABHIYAN, *supra* note 96, at 69-70.

thereby threatening their future economic, familial, and legal security.²⁹⁸ These issues are examined in the next section.

V. PARENTAGE AND CITIZENSHIP ISSUES WITH RESPECT TO SURROGATE BABIES BORN ABROAD

A. *Parentage*

The Guidelines provide that a birth certificate will be issued in the names of the genetic parents. Some sources, including ART practitioners themselves, indicate that it is the names of the commissioning parties who are placed on the Indian birth certificates in practice.²⁹⁹ Under the Registration of Births and Deaths Act, the medical officer or a hospital or health center designee is charged with providing information to the registrar about births occurring in its facility.³⁰⁰

A current Indian case calls the practice of listing the commissioning parties' names on the child's birth certificate into question.³⁰¹ The petitioner, Jan Balaz, a resident of Germany, and his wife, Susanne Anna Lohle, entered a surrogacy arrangement with

²⁹⁸ *Insight: Outsourcing to Indian Surrogate Mothers*, *supra* note 117 (“What I worry about are the people who use donor egg or donor sperm, are told how easy this is going to be, and then come back and find out that maybe it isn't so easy. You know, unfortunately we have a divorce rate in the United States of about 50 percent. So 10 years down the line, is somebody going to be questioning the legal status of these children because they haven't gone through those types of protections?”); Niazi, *supra* note 200 (quoting an ART practitioner as saying, “In India, in the absence of any clear laws on the issue so far, foreigners are unable to get legal assistance when it comes to taking their child back to their home country.”).

²⁹⁹ See, e.g., The Rotunda Gestational Surrogacy/Gestational Carrier ART Program, <http://www.iwannagetpregnant.com/surrogacy.asp> (last visited Oct. 31, 2008) (“Birth certificate will be issued in the name of the Genetic parent/Intended parent. You are requested to find out prevailing laws in your country or from your respective consulate in Mumbai to facilitate and expedite the process for you to carry your baby back to your hometown. We also offer to help you with contact with a lawyer to expedite your paperwork.”).

³⁰⁰ Registration of Births and Deaths Act § 8(1), No. 18 of 1969; INDIA CODE (2003), available at <http://des.delhigovt.nic.in/Vital/ACT.pdf>. The definition of “birth” includes “live-birth.” Live-birth is defined as “the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which after such expulsion or extraction, breathes or shows any other evidence of life, and each product of such birth is considered live-born” *Id.* § 2.

³⁰¹ Jan Balaz v. Anand Municipality, No. 3020, Special Civil Application (Gujarat H.C. 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/briefcasevdetails.jsp?cs=C&ct=SCA&cn=3020&cy=2008&ctstval=r45hht56nhhj768778&qrytypr=CASE-WISE>.

Dr. Patel's fertility clinic in Anand. It was reported that twins were conceived with Balaz' sperm and an egg from an "unknown source" because Susanne Lohle failed to produce eggs.³⁰² Apparently the suit stemmed from the couple's difficulty in securing a visa for the twins.³⁰³

After the twins' birth on January 4, 2008, the Anand Municipality listed Jan Balaz and Susanne Lohle as the twins' parents on their birth certificates, although this did not conform with the names in the birth register maintained by the hospital. It was explained that the names of the commissioning parents were given to the Anand Municipality pursuant to the parents' wishes, and "no attempt [was] made by either of the parties to play a foul game or the same has been done with any ulterior motive."³⁰⁴

The court has issued a series of interim orders in the case. In an interim order dated March 26, 2008, the court joined Dr. Nayna Patel as party respondent and stated:

It appears that there is some negligence on her part in dealing with the entire exercise including the registration of birth of newly born child and that may even lead to cancellation of her licence or permission to run the clinic. However, unless she is given opportunity of hearing, it would not be proper for this Court to comment on the alleged mistake/error committed by her or by her staff of clinic in reference to the procedural aspect.³⁰⁵

In an interim order dated April 2, 2008, the court expressed a desire that the Assistant Solicitor General of India appear for the Respondent No. 4, Regional Passport Office, and that the Assistant Solicitor General and two other learned counsel assist the court as amicus curiae "considering certain larger issues found in the mat-

³⁰² *More Rights for Surrogate Mother*, TIMES OF INDIA, Apr. 6, 2008, available at <http://timesofindia.indiatimes.com/articleshow/2929527.cms>.

³⁰³ *Id.*

³⁰⁴ Balaz v. Anand Municipality, No. 3020, Special Civil Application, Interim Order ¶ 6 (Gujarat H.C. Apr. 2, 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/showoj.jsp?side=C&casetype=SCA&caseno=3020&caseyr=2008&orddate=02/04/2008&ordno=5&incmo=5&findcatg=ordnSearch&h=asda#238#901dsdsa>.

³⁰⁵ Balaz v. Anand Municipality, No. 3020, Special Civil Application, Interim Order (Gujarat H.C. Mar. 26, 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/showoj.jsp?side=C&casetype=SCA&caseno=3020&caseyr=2008&orddate=26/03/2008&ordno=4&incmo=4&findcatg=ordnSearch&h=asda#238#901dsdsa>.

ter.”³⁰⁶ The court stated that it realized that the facts of the case were not as simple as they first appeared from the petition and the court took notice of the Guidelines.³⁰⁷ Because “there are a number of areas that may be required to be addressed,” the court decided to keep the case open but grant interim relief with respect to the petitioner so that the twins could travel with Balaz out of India. The surrogate mother, who was also named in the petition, gave her consent that if the substantive relief prayed for by the petitioner was granted, she would cooperate with the petitioner in having the children taken out of India.

The court directed that the twins’ birth certificates be changed to reflect the name of the surrogate mother as the mother of the twins and remove Susanne Lohle’s name.³⁰⁸ The court noted that a legal professional in Germany said it would be more convenient for both infants to have the correct names of their surrogate mother in the Birth Register, as the German law recognizes the lady who has actually delivered the child “like that of ours.”³⁰⁹ The court further stated that “the hospital authorities should not have mentioned the name of the wife of the petitioner as the mother of the said babies. Sometimes, the professional will have to prevail over the wishes of the client or consumers.”³¹⁰ Finally, the court ordered the petitioner on the next hearing date to update the court about the progress in the matter and further requested that the State and Central Government “express their views as some important issues are involved in the matter where a policy decision of both the respective Governments obviously shall play an important role.”³¹¹

This is a case of first impression for the Gujarat High Court and the scope of the legal issues the court intends to examine with respect to international surrogacy arrangements were not publicly identified. The court appeared to accept the surrogacy arrangement and disposed of the issue of modifying the twins’ birth certificates promptly to enable them to obtain travel documents to leave the country. However, the actions taken by the court were likely

³⁰⁶ Balaz v. Anand Municipality, No. 3020, Special Civil Application, Interim Order ¶ 3 (Gujarat H.C. Apr., 2, 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/showoj.jsp?side=C&casetype=SCA&caseno=3020&caseyr=2008&orddate=02/04/2008&ordno=5&incmo=5&findcatg=ordnSearch&h=asda#238#901dsdsa>.

³⁰⁷ *Id.* ¶ 4.

³⁰⁸ *Id.* ¶ 8.

³⁰⁹ *Id.* ¶ 7.

³¹⁰ *Id.*

³¹¹ *Id.* ¶ 10.

due to the fact that the petitioner was also the genetic father of the children and the surrogate mother willingly relinquished her rights. The court seems to implicitly disregard the petitioner's wife as an interested party since she was not the genetic mother of the children and did not give birth to them.³¹² One can imagine a different outcome in the case if the surrogate laid claim to the children or if the father was not also genetically related to the children. The case also suggests that the appropriate mother to list on the Indian birth certificate is the Indian surrogate mother.³¹³

Inconsistent state law already creates parentage issues for children born of surrogacy in the United States.³¹⁴ Birth to an Indian surrogate adds an additional layer of complication. Birth certificate practices in India may lead to individuals conceived through surrogacy to encounter legal parentage issues later on after arriving in the United States, even years down the line.³¹⁵ In the United

³¹² See *Balaz v. Anand Municipality*, No. 3020, Special Civil Application, Interim Order *passim* (Gujarat H.C. Apr., 2, 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/showoj.jsp?side=C&casetype=SCA&caseno=3020&caseyr=2008&orddate=02/04/2008&ordno=5&incrnno=5&findcatg=ordnSearch&h=asda#238#901dsdsa>.

³¹³ See *id.* ¶ 10. Notwithstanding the Gujarat High Court's Interim Order, Balaz reportedly continued to encounter difficulty in obtaining Indian passports for the twins. He had to subsequently approach the Gujarat High Court to have the twins' birth certificates further modified to remove all references to the court case such that the passport office would agree to issue the passports. See *Balaz v. Anand Municipality*, No. 4791, Civil Application, Oral Order (Gujarat H.C. Apr. 21, 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/showoj.jsp?hidTxtVal=./showoj.jsp?side=C&casetype=CA&caseno=4791&caseyr=2008&orddate=21/04/2008&ordno=1&side=C&casetype=CA&caseno=4791&caseyr=2008&orddate=21/04/2008&ordno=1>. The Gujarat High Court later specifically directed the Union of India to create no obstruction of any nature with respect to Balaz' intention to take the twins out of India. See *Balaz v. Anand Municipality*, No. 6046, Civil Application, Oral Order (Gujarat H.C. May 13, 2008), available at <http://gujarathc-cases-tatus.nic.in/gujarathc/showoj.jsp?side=C&casetype=CA&caseno=6046&caseyr=2008&orddate=13/05/2008&ordno=1&incrnno=1&findcatg=ordnSearch&h=asda#238#901dsdsa>. Balaz finally departed with the twins in August 2008. See *German twins unite with mom after 8 months*, TIMES OF INDIA, Aug. 8, 2008, <http://timesofindia.indiatimes.com/articleshow/3344404.cms>.

³¹⁴ See Jerald V. Hale, Note, *From Baby M. to Jaycee B: Fathers, Mothers, and Children in the Brave New World*, 24 J. CONTEMP. L. 335, 373 (1998) (noting that "in one state a child born as a result of ART may be deemed 'parentless,' while a similarly situated child in a neighboring state enjoys the security and safety of a legally recognized family at birth.").

³¹⁵ See, e.g., Devangshu Datta, *Whose baby is it anyway?*, BUS. STANDARD, January 5, 2008, at 17, available at <http://www.business>

States, laws regulating who should be listed as the surrogate child's parents on the birth certificate vary by state. In some states, the commissioning couple may be listed on the child's original birth certificate, either by court order or through other procedures developed by the state.³¹⁶ In other states, the surrogate mother's name is placed on the original birth certificate and the commissioning couple must take additional steps for an amended birth certificate to be issued, such as a step-parent adoption.³¹⁷ In some

stan-

standard.com/common/news_article.php?storyflag=y&leftnm=4&subLeft=2&chklogin=N&autono=309707 ("If adoption is out, surrogacy contracts are unenforceable, and notions of biological parenthood stretched to the max by technology, there could soon be many babies wandering the Earth in search of visas. Not to mention paternity and maternity suits targeting sperm and egg donors."). The legal parentage of Indian citizens who have children born through a surrogate has also been questioned. For example, in 1995, a single man in Kolkata commissioned a pregnancy with a surrogate using a donor egg and his sperm. Lawyers interviewed opined that his parenthood would not be recognized under Indian law unless the court allowed him to adopt the boy and that both the surrogate and egg donor could claim the baby as well as the father notwithstanding the Guidelines. The Juvenile Welfare Board indicated it had not encountered such a case before and it was not clear to them what the status of the child would be. See Subir Bhaumik, *IVF Son for Single Indian Father*, BBC NEWS, Oct. 4, 2005, http://news.bbc.co.uk/2/hi/south_asia/4309332.stm; Sujoy Dhar, *First Single Father: But What about the Laws?*, DAILY NEWS & ANALYSIS, Oct. 3, 2005, <http://www.dnaindia.com/report.asp?newsid=4408>.

³¹⁶ See, e.g., 750 ILL. COMP. STAT. 45/6 (2005) (providing that if at least one of the parents is a genetic parent, the names of the intended parents will be listed on the child's birth certificate upon filing of certified statements from all parties involved in the surrogacy arrangement with the hospital and the Illinois Department of Public Health before the child's birth); 750 ILL. COMP. STAT. 47/35 (2005); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001) (ruling that commissioning couple who were both the genetic parents of twins could have their names placed on children's original birth certificate); *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Ch. 2000) (commissioning parents could not obtain a pre-birth order permitting their names to be placed on the child's birth certificate, but their names could be placed on the certificate if the surrogate mother relinquished her rights within three days after the birth of the child); cf. *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (permitting gestational mother to have her name removed from birth certificate on state equal rights grounds on the basis that men in the state could deny paternity on the basis of the absence of a genetic connection).

³¹⁷ See, e.g., ARK. CODE ANN. § 9-10-201(c)(2) (1987) (gestational mother is listed on the original birth certificate but a substituted certificate of birth may be issued upon court order); Minn. Dep't of Health, <http://www.health.state.mn.us/divs/chs/osr/birthreg/surrogatemother.doc> (last visited Oct. 23, 2008) (surrogate mother is listed on the original birth certificate, unless the hospital is presented with a court order directing that the surrogate's name not be entered on the birth record); see also *Arredondo v. Nodelman*, 622 N.Y.S.2d 181 (Sup. Ct. 1994) (The court declared maternity of the commissioning

instances, commissioning parents are left with no ability to have their name placed on the child's birth certificate.³¹⁸

Parentage issues of surrogate children born in India may surface once the children are in the United States if the commissioning parents cannot rely upon the Indian birth certificate as proof of parentage. The problem of reliability occurs either because a foreign birth certificate is not accepted or the birth certificate lists parties other than the commissioning parents. The problems can affect school admissions, child custody, and child support disputes. In some cases, parentage, as reflected on birth certificates, may be established by following state law procedures.³¹⁹ However, if a commissioning couple resides in or moves to a state that prohibits surrogacy arrangements – or has not defined procedures through legislation or administrative regulation – their only recourse may be to resort to a judicial determination of parentage.

B. Citizenship

The issue of citizenship status of infants born to surrogates in one country for commissioning parties in another has cropped up in some countries.³²⁰ Cross-border custody disputes have also sur-

mother based on the results of genetic testing and directed the issuance of amended birth certificates reflecting that fact).

³¹⁸ See, e.g., *Dantzig v. Biron*, Highland App. No. 07CA1, 2008 WL 187532 (Ohio Ct. App. Jan. 18, 2008) (denial of review of appeal); Hagit Limor, *Surrogacy Birth Certificates*, KY. POST, May 23, 2008, http://www.kypost.com/content/wcposhared/story.aspx?content_id=C6D2C43F-3818-4F97-84B6-A60A32E9407F&gsa=true (in the case of a commissioning single gestational father who used an anonymous egg donor, only surrogate mother's name placed on birth certificate in Ohio).

³¹⁹ See, e.g., Mayura Ramanna, *Overseas Gestational Arrangements and Texas Surrogacy Law* (2006), available at [http://www.law.uh.edu/healthlaw/perspectives/2006/\(mr\)intlsurrogacy.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006/(mr)intlsurrogacy.pdf) (concluding that under Texas law, intended parents contemplating a gestational agreement with a surrogate in another country would be able to validate the agreement in a Texas court as long as the intended parents or the prospective gestational mother and her husband are residents of the state. Intended parents may file a petition to validate the agreement and once the child is born under such an agreement, the parents may file a notice of birth to have the court require the bureau of Vital Statistics issue the birth certificate pursuant to TEX. FAM. CODE ANN. §§ 160.754(e), 160.760 (Vernon 2008)).

³²⁰ Recently, Japan's Supreme Court rejected a Japanese couple's bid to register the birth of their twins, who had been born to a surrogate mother in the United States. See *Japanese Couple Not Allowed to Register Twins Born to U.S.-based Surrogate Mother as Their Own*, PRAVDA, March 23, 2007, <http://english.pravda.ru/society/88588-twins-0>. The Supreme Court cited Japanese law that presumes the woman who gives birth to a child is its mother. *Id.* The couple would have to legally adopt the children and then apply for their citi-

faced.³²¹ Some commissioning parents have even faced criminal consequences for attempting to take babies who were purportedly born through surrogacy arrangements out of the country.³²²

Immigration issues with respect to infants born to surrogates in India first arose with the immigration of twins born at Dr. Patel's Akanksha Fertility Clinic in Anand in 2004.³²³ The twins were conceived with the gametes of the commissioning couple who resided in the United Kingdom, and the surrogate mother was the twins' genetic grandmother.³²⁴ The twins were initially denied passports by the British High Commission because they were born in India and their surrogate mother was an Indian citizen; the British High Commission opined that visas were necessary for the twins' re-

zension through immigration authorities. *Id.* The couple decided to raise the twins as U.S. nationals. *See Twin boys born via surrogacy to be raised as Americans*, YAHOO! ASIAN NEWS, Apr. 11, 2007, <http://asia.news.yahoo.com/070411/kyodo/d8oebkoo0.html>.

³²¹ For example, a court in Utrecht recently ruled that a Dutch couple who bought a baby from a Belgian surrogate mother could keep the child. The case was brought by the girl's biological father who is Belgian and who had sought a surrogate mother because his own wife was infertile. Instead of handing over the baby as the couple agreed, the surrogate mother sold the baby to the Dutch couple. *See Biological Father Loses Internet Baby Battle*, DUTCH NEWS, May 7, 2008, http://www.dutchnews.nl/news/archives/2008/05/court_rules_against_biologica1.php.

³²² In August 2008, an Indian couple were detained at the Mumbai airport and jailed when they attempted to take a 16-month old child to Canada. The couple was charged with carrying a fraudulently obtained passport for the child which listed the couple as parents instead of the child's biological mother. According to a deputy commissioner involved in the case, "It seems like a matter of surrogacy. Whatever the case might be, the passport has to document the details accurately." *See Baby girl's fake passport lands couple in trouble*, TIMES OF INDIA, Aug. 15, 2008, <http://timesofindia.indiatimes.com/articleshow/3367440.cms>. In November 2007, authorities detained a 56-year old U.S. citizen attempting to take a baby girl out of Ukraine on forged documents. The woman and her husband, also a U.S. citizen, were listed as the parents of the girl on the documents. According to news reports, the woman signed a contract under which a surrogate mother was to give birth to a child using anonymous donors. The child was born on October 10 and the woman arrived in the Ukraine on October 12. A birth registration institution registered the child in the name of the American woman. The police filed a criminal case under Section 3, Article 149 of the Ukrainian Criminal Code (proscribing illegal deprivation of freedom or theft of a human being for profit). *See Police Detain American Woman Attempting to Take Newborn Baby Out of Ukraine*, UKRAINIAN NEWS AGENCY, Nov. 6, 2007, <http://www.chasingevil.org/2007/11/hate-monger-arrested-for-human.html>.

³²³ Sarah Pook, *Twins Born to Their Granny Win Entry to UK*, DAILY TELEGRAPH, July 27, 2004, at 9, available at http://www.telegraphindia.com/1040728/asp/nation/story_3551289.asp.

³²⁴ *Id.*

turn.³²⁵ After waging a six-month legal battle, the commissioning couple was able to secure the twins' entry into the country on a fixed-term entry for one year.³²⁶ Many speculated that the genetic parents would have to obtain a parental order under the 1990 Human Embryology and Fertilisation Act or legally adopt the children, with citizenship only becoming obtainable thereafter.³²⁷

Since this case, Parliament clarified British law to accommodate immigration in the context of international surrogacy in certain cases. According to the Human Fertilisation & Embryology Authority,³²⁸ if a child is born through surrogacy abroad and the commissioning couple is domiciled in the United Kingdom, they may apply for a parental order.³²⁹ The commissioning couple must apply for a visa to enable the infant to enter the United Kingdom while the parental order is processed. If the commissioning couple is ineligible for a parental order,³³⁰ the only way they can acquire legal parenthood is through adoption.

In 2008, a media firestorm erupted in the Baby Manji case. The case involved a child conceived with the gametes of a Japanese man and an anonymous Indian egg donor. The man, Ikufumi Yamada, and his wife elected to try to have a baby using a surrogate mother.³³¹ The couple traveled to India in November 2007 and arranged for the surrogacy with Dr. Nayna Patel at the Akanksha Infertility Clinic.³³² The baby was born on July 25 and named Manji.³³³

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Twins Born to Own Gran Fly Home*, BBC NEWS, July 26, 2004, http://news.bbc.co.uk/2/hi/uk_news/england/london/3927321.stm.

³²⁸ The Human Fertilisation & Embryology Authority is the United Kingdom's independent regulatory body overseeing the use of gametes and embryos in fertility treatment and research. Human Fertilisation & Embryology Authority, <http://www.hfea.gov.uk> (last visited Oct. 31, 2008).

³²⁹ The Human Fertilisation and Embryology Act, 1990, c. 37 (U.K.), makes surrogacy arrangements unenforceable by or against any person making it. Under British law, surrogacy is legal if it involves payment only of expenses reasonably incurred by the surrogate mother, which have to be determined by the parties. The contract is nonbinding on either of the parties. Six weeks after childbirth, the genetic parents can apply for a parental order from a court under Section 30 of the Act, 1990, which gives them full and permanent rights over the child after the surrogate relinquishes her rights.

³³⁰ For example, if the parents are not married to each other or neither is domiciled in the United Kingdom, they cannot apply for a parental order. *Id.*

³³¹ *Father eager to bring daughter to Japan*, DAILY YOMIURI ONLINE, Aug. 9, 2008, <http://www.yomiuri.co.jp/dy/national/20080809TDY02308.htm>.

³³² *Id.*; Prakash Bhandari, *Conceived in Japan, abandoned in Jaipur*, TIMES OF INDIA, Aug. 6, 2008, http://timesofindia.indiatimes.com/Conceived_in_Japan_abandoned_in_Jaipur/rssarticleshow/3330790.cms.

However, earlier that month the couple had divorced.³³⁴ The man's ex-wife chose not to make any claim to Manji, and that factor is most likely what led to Manji's case being given special scrutiny.³³⁵

Initially there was a delay in issuing Manji's birth certificate because of doubt as to how to address a mother for Manji on the certificate.³³⁶ After receiving guidance from the chief registrar, the Anand municipal office issued a provisional birth certificate with only the father's name on it.³³⁷ Apparently, difficulties with citizenship first arose because the Japanese Foreign Ministry told Yamada that in order to bring the baby to Japan, he would have to adopt Manji pursuant to Japanese and Indian laws and obtain an Indian passport.³³⁸ Yamada encountered difficulties both in obtaining travel documents from the Indian government and in obtaining a visa from the Japanese government.³³⁹

In the wake of bomb blasts in Gujarat, Yamada moved his daughter to Jaipur to remain in the care of his mother who had traveled from Japan and local friends.³⁴⁰ In Jaipur, a non-governmental organization called Satya filed a petition in Rajasthan High Court, seeking to prevent Yamada from taking Manji to Japan.³⁴¹ Satya's petition alleged in that in the absence of a surrogacy law in India, the legitimacy of the baby could not be claimed by

³³³ *Father eager to bring daughter to Japan*, *supra* note 331.

³³⁴ *India surrogate baby's fate still unknown*, DAILY YOMIURI ONLINE, Aug. 17, 2008, <http://www.yomiuri.co.jp/dy/national/20080817TDY03002.htm>.

³³⁵ *No entry for surrogate baby/Divorce of Japanese couple leaves girl stranded in India*, DAILY YOMIURI ONLINE, Aug. 8, 2008, <http://www.yomiuri.co.jp/dy/national/20080808TDY02308.htm>.

³³⁶ *Japanese baby finally gets birth certificate*, TIMES OF INDIA, Aug. 10, 2008, <http://timesofindia.indiatimes.com/articleshow/3346424.cms> (quoting a municipal office official as saying, "The issue was complicated as the baby technically has three mothers – her biological father Dr Ikufumi Yamada's ex-wife, the egg donor and the surrogate mother – and we had no experience of issuing a birth certificate in such cases.").

³³⁷ *Id.*; *Manjhee gets provisional birth certificate*, TIMES NOW, Aug. 9, 2008, www.timesnow.tv/Newsdtls.aspx?NewsID=13210.

³³⁸ *No entry for surrogate baby/Divorce of Japanese couple leaves girl stranded in India*, DAILY YOMIURI ONLINE, Aug. 8, 2008, <http://www.yomiuri.co.jp/dy/national/20080808TDY02308.htm>.

³³⁹ *Indian surrogate baby in legal limbo after parents divorce*, DAILY TIMES, Aug. 7, 2008 ("Yamada went to the local passport office. He was told to go to the Japanese Embassy, which asked him to get a document from an Indian court to get custody of the child. He felt like a football.").

³⁴⁰ *Japanese parents' surrogate child stuck in India's Jaipur*, EARTHTIMES.ORG, Aug. 6, 2008, <http://www.earthtimes.org/articles/show/223767.japanese-parents-surrogate-child-stuck-in-indias-jaipur.html>.

³⁴¹ *Satya v. Union of India et al.*, Habeas Corpus Petition 7829 of 2008, Rajasthan High Court.

anyone, thus the NGO claimed custody could not be assumed by Manji's grandmother.³⁴² The petition also challenged the legality of commercial surrogacy and alleged that Dr. Nayna Patel and her clinic were engaged in the illegal trade in infants and selling them to foreigners.³⁴³ The Rajasthan High Court issued notices to the Union Home Ministry and Department of Home of the state government to produce Manji within four weeks.³⁴⁴ In response, Manji's grandmother filed a writ petition on Manji's behalf in the Supreme Court of India.³⁴⁵ On August 14, 2008, the Supreme Court granted Manji's grandmother temporary custody, restrained the police from taking any steps to produce Manji before the Rajasthan High Court and sought the assistance of the solicitor general of India to examine surrogacy and nationality issues resulting therefrom in India.³⁴⁶

In an order disposing of the case dated September 29, 2008, the Supreme Court stated that the commission organized under the Protection of Children Act, 2005 was the appropriate authority to hear complaints of the type made by Satya.³⁴⁷ On that basis, the Supreme Court disposed of Satya's proceedings in the Rajasthan High Court.³⁴⁸ With respect to commercial surrogacy, the Court effectively validated the procedure in India:

[Commercial surrogacy] is legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".³⁴⁹

³⁴² *Suit filed to stop Manji from leaving India*, TIMES OF INDIA, Aug. 13, 2008, <http://timesofindia.indiatimes.com/articleshow/3358677.cms>.

³⁴³ *Id.*

³⁴⁴ *Produce surrogate child Manji in court: Rajasthan HC*, ZEE NEWS, Aug. 12, 2008, <http://www.zeenews.com/Nation/2008-08-12/461870news.html>.

³⁴⁵ *Baby Manji Yamada v. Union of India et al.*, Writ Petition No. 369 of 2008, Supreme Court of India.

³⁴⁶ *Manji Snub for NGO*, THE TELEGRAPH, Aug. 21, 2008, http://www.telegraphindia.com/1080821/jsp/frontpage/story_9722522.jsp; Rakesh Bhatnagar, *Manji's fate depends on Centre's decision*, DAILY NEWS & ANALYSIS, Sept. 16, 2008, <http://www.dnaindia.com/report.asp?newsid=1190487>.

³⁴⁷ *Yamada v. Union of India*, 2008 INDLAW SC 1554, ¶ 13 (Sept. 29, 2008), available at <http://judis.nic.in/supremecourt/qrydisp.aspx>.

³⁴⁸ *Id.* ¶ 18.

³⁴⁹ *Id.* ¶ 9. The Supreme Court also noted that payment to a woman serving as a surrogate varies widely from "almost nothing" above expenses to over \$30,000. *Id.* ¶ 12.

With respect to Baby Manji's travel, the Supreme Court noted the Solicitor General's statements that if a comprehensive application for travel documents for Baby Manji were filed, the application would be disposed of expeditiously and not later than four weeks.³⁵⁰ After the Supreme Court's judgment was issued, the Jaipur passport office gave special dispensation and issued a "certificate of identity" to Manji.³⁵¹ Thereafter, the Japanese Embassy in New Delhi issued her a one-year visa on humanitarian grounds, and Manji arrived in Japan with her grandmother on November 2, 2008.³⁵²

The Baby Manji case highlights that the law remains unclear as to whether a child born to an Indian surrogate is a citizen of India. A child born in India after December 3, 2004 is a citizen of India by birth if (1) both the child's parents are Indian citizens, or (2) one parent is an Indian citizen and the other is not an illegal migrant at the time of the child's birth.³⁵³ Issues are raised as to whether a gestational surrogate, who is an Indian citizen, is considered a parent of the child born through surrogacy. In any event, Indian citizenship terminates upon the voluntary acquisition of citizenship in another country, subject to delayed implementation in the event of "any war in which India may be engaged."³⁵⁴ Acquiring another country's passport is deemed to be a voluntary acquisition of citizenship of another country.³⁵⁵

In contrast, the focus of citizenship status of infants born to Indian surrogates for American commissioning parties has been on their U.S. citizenship; U.S. citizenship for these babies has been questioned by some commentators but has only been partially ad-

³⁵⁰ *Id.* ¶ 17.

³⁵¹ *Baby born to surrogate Indian mother, Japanese father allowed to leave India*, MAINICHI DAILY NEWS, Oct. 18, 2008, <http://mdn.mainichi.jp/mdnnews/news/20081018p2a00m0na004000c.html>; *Japan gate-pass for baby Manji*, THE TELEGRAPH, Oct. 18, 2008, http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp. According to the passport officer involved, a certificate of identity is granted to people who are stateless or who cannot get a passport from their own country and was the first one issued from the Jaipur passport office. *Id.*; *Japanese grandmother files papers for migration of surrogate baby*, NEWKERALA.COM, Oct. 13, 2008, <http://www.newkerala.com/topstory-fullnews-32464.html>; *see also* Indian Passports Act, 1967 § 4(2)(b).

³⁵² *Baby Manjhi arrives in Japan*, NDTV.COM, Nov. 3, 2008, <http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20080071002>.

³⁵³ The Citizenship (Amendment) Act, No. 6 of 2004; INDIA CODE (2003) (amending Section 3 of the Citizenship Act, 1955).

³⁵⁴ The Citizenship Act, No. 57 of 1955; INDIA CODE (2003).

³⁵⁵ Citizenship Rules, 1956, Rule 3, Schedule 3. In addition, an adult may formally renunciate Indian citizenship subject to exceptions during wartime. The Citizenship Act, No. 57 of 1955; INDIA CODE (2003).

dressed.³⁵⁶ Application of the Immigration and Nationality Act to these infants is unclear primarily because being born “of parents” and being born “out of wedlock” are not defined by statute or regulation in the context of ART. The problems with unsettled citizenship status are not limited to the initial difficulty in entering the United States but extend also to subjecting the child to the risk of having his or her citizenship status challenged later. Problems from unsettled citizenship status may include difficulty in traveling to and from the United States or even facing deportation proceedings.

Citizenship for children born overseas is based on the doctrine of *jus sanguinis* (i.e., the right of blood).³⁵⁷ A child born outside the United States or its outlying possessions can acquire U.S. citizenship at birth through a relationship with parents as follows:³⁵⁸

1. Child born “of parents” both of whom are U.S. citizens. The child is entitled to citizenship if one of the parents resided in the United States before the child’s birth.³⁵⁹

³⁵⁶ See, e.g., Malhotra & Malhotra, *supra* note 175 (“Equally baffling is the situation for any foreign embassy in India when processing an immigration application of a child born out of surrogacy to an NRI couple in India who wish to take their child to their foreign home. Does the child have to be adopted? . . . Even the regulations of foreign missions do not contain answers in the basic substantive immigration rules.”); Cyrus D. Mehta, In Vitro Fertilization, Surrogate Motherhood and Citizenship (Sept. 7, 2007), <http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus2007978232> (posing several hypotheticals as to citizenship status of children born to surrogates in India for commissioning same-sex parents or where a commissioning husband who is the only parent with a genetic connection to the child is a permanent resident).

³⁵⁷ See DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1111.2(2) (2007), available at <http://www.state.gov/m/a/dir/regs/fam/> [hereinafter FAM]; I.N.S. Interp. Ltr. 301.1(b)(1)(i), 2001 WL 1333852 (INS) (noting that legislative enactments dating back to the Act of March 26, 1790 have applied a concept of derivative citizenship based upon the principle of *jus sanguinis* under which citizenship is conferred at birth upon children born to citizens abroad). In contrast, for children born in the U.S., citizenship as embodied in the 14th Amendment to the U.S. Constitution is based on the doctrine of *jus soli*, (i.e., the law of the soil) in which the place of a person’s birth determines citizenship. See 7 FAM, *supra*, § 1111.2(1).

³⁵⁸ In addition, pursuant to section 101 of the Child Citizenship Act of 2000, a child born outside the U.S. automatically becomes a citizen when (1) at least one parent of the child is a U.S. citizen, (2) the child is under age 18, (3) the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence (i.e., has entered the U.S. on an immigrant visa and has an alien resident card), and (4) in the case of an adopted child, the child meets the requirements applicable under 8 U.S.C. § 1101(b)(1). 8 U.S.C. § 1431 (Supp. 2006).

³⁵⁹ 8 U.S.C. § 1401(c) (2000). No specific time period for residence is required. 7 FAM, *supra* note 357, § 1133.3-1(a)(2).

2. Child born “of parents,” one of whom is a U.S. citizen and one a non-U.S. citizen (on or after November 14, 1986). The child is entitled to citizenship if the U.S. citizen parent was physically present in the United States for five years before the child’s birth, at least two years of which were after the parent reached age 14.³⁶⁰

3. Child born out of wedlock to a U.S. citizen mother. The child is entitled to U.S. citizenship if the U.S. citizen mother was physically present in the United States for a continuous period of at least one year at some time before the child’s birth.³⁶¹

4. Child born out of wedlock to a U.S. citizen father (on or after November 14, 1986). The child is entitled to U.S. citizenship if the U.S. citizen father was physically present in the United States for five years before the child’s birth, at least two years of which were after the parent reached age 14, and (a) a blood relationship between the child and the father is established by clear and convincing evidence, (b) the father had U.S. nationality at the time of the child’s birth, (c) the father agrees in writing to provide financial support for the child until he or she reaches age 18, and (d) while the child is under age 18, the father acknowledges paternity of the child in writing under oath, the child is legitimated under the law of his or her residence or domicile, or the paternity of the child is established by a competent court.³⁶²

The State Department has the authority to determine claims to U.S. nationality when made by persons abroad upon application for

³⁶⁰ 8 U.S.C. § 1401(g).

³⁶¹ 8 U.S.C. § 1409(c) (2000). Under this section of the statute, the Department of State applies a preponderance of the evidence standard. 7 FAM, *supra* note 357, § 1131.4-1(b).

³⁶² 8 U.S.C. § 1409(a). In the case of a child born out of wedlock to a U.S. citizen father and a non-U.S. citizen mother, the State Department requires an affidavit of parentage, physical presence, and support from the father acknowledging he is the natural father (or alternatively, a court judgment of paternity). 7 FAM, *supra* note 357, § 1445.5-3. The different requirements as applied to mothers and fathers survived an equal protection challenge in the Supreme Court’s decision in *Nguyen v. INS*, 533 U.S. 53 (2001). The Supreme Court’s rationale was that gender neutrality was not required because “the mother is always present at birth, but the . . . father need not be.” *Nguyen*, 533 U.S. at 64. Commentators have noted that this rationale does not hold up with respect to gestational surrogacy where the commissioning mother may not always be present at birth. See David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship*, 47 ARIZ. L. REV. 313, 320-21 (2005); Lica Tomizuka, *The Supreme Court’s Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275, 310 (2002); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 245 n.107 (2002); Ashley Moore, Note, *The Child Citizenship Act: Too Little, Too Late for Tuan Nguyen*, 9 WM. & MARY J. WOMEN & L. 279, 282-83 (2003).

a Consular Report of a Birth Abroad of a Citizen of the United States of America and/or for a U.S. passport.³⁶³ Consular Reports of Birth Abroad and U.S. passports are proof of citizenship that have the same effect as certificates of naturalization or of citizenship.³⁶⁴ However, Consular Reports of Birth Abroad are not birth certificates because consular officers are not authorized to assume a foreign, local, or state vital statistics function.³⁶⁵ If the applications are complete, the Consular Report of Birth Abroad usually can be issued in just a day.³⁶⁶ Once the State Department issues a Consular Report of Birth Abroad, it takes approximately seven to ten days for the child's U.S. passport to be issued.³⁶⁷

To obtain a Consular Report of Birth Abroad, the applicant must submit proof of the child's birth, identity, and citizenship.³⁶⁸ The State Department's position is that the Immigration and Nationality Act requires that for a child born abroad to acquire derivative U.S. citizenship, both a blood and a legal relationship must exist between the child and the U.S. citizen parent.³⁶⁹

The State Department notes that "in unusual circumstances, such as *in vitro* fertilization cases, surrogate mother cases, etc., additional evidence may be required."³⁷⁰ The State Department encourages applicants to undergo parentage blood or "purely voluntary" DNA testing when primary and secondary documentary evi-

³⁶³ 8 U.S.C. § 1104(a)(3) (2000); 22 C.F.R. §§ 50.2, 50.5 (2007). Consular Reports of Birth are made on Form FS-240. 7 FAM, *supra* note 357, § 1441.1. Authority for consular officers to issue Reports of Birth Abroad is derived from Article 5 of the Vienna Convention on Consular Relations. 7 FAM, *supra* note 357, § 1442.

³⁶⁴ 22 U.S.C. § 2705 (2000).

³⁶⁵ 7 FAM, *supra* note 357, § 1441.1(b).

³⁶⁶ See U.S. Embassy, New Delhi, Consular Report of Birth Abroad, http://newdelhi.usembassy.gov/birth_abroad.html (last visited Oct. 31, 2008).

³⁶⁷ *Id.*

³⁶⁸ 22 C.F.R. §§ 51.43(h)(3), 51.45 (2007).

³⁶⁹ See 7 FAM, *supra* note 357, § 1131.4-1(a) ("It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired."); 7 FAM, *supra* note 357, § 1131.4-1(c) ("Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual blood relationship to a U.S. citizen parent is required. If doubt arises that the citizen 'parent' is related by blood to the child, the consular officer is expected to investigate carefully."); Department of State, DNA and Parentage Blood Testing, http://travel.state.gov/visa/immigrants/info/info_1337.html (last visited Oct. 31, 2008); see also Kandel, *supra* note 90, at 186 ("Hereditary transmission has traditionally been accorded privileged status in determining family affiliation.").

³⁷⁰ Department of State, DNA and Parentage Blood Testing, *supra* note 369.

dence are deemed insufficient to establish a claim of citizenship.³⁷¹ According to the State Department, “[t]he Department appreciates that this situation may be troubling to parents, but under the circumstances, it appears that there is no other way to establish the child’s claim to U.S. citizenship.”³⁷² The State Department pledges that upon positive test results establishing a blood relationship, “the Department of State would expedite issuance of a Consular Report of Birth of a U.S. Citizen Abroad and a U.S. passport,” provided that the other applicable requirements of the Immigration and Nationality Act are met. However, it is not clear the extent to which DNA testing is being used in practice, particularly if birth certificates listing only the commissioning parents are being accepted as primary documentary evidence of parentage and given the State Department’s view that it cannot require such testing.³⁷³ Some accounts by commissioning parents have indicated that U.S. Consulates in India have affirmatively assisted in facilitating the issuance of Indian birth certificates listing the commissioning parties as parents.³⁷⁴

³⁷¹ See 9 FAM, *supra* note 357, § 42.41 PN4.1 (When to Recommend Genetic Testing). Apparently, the State Department is of the view that it does not have the regulatory authority to require DNA testing notwithstanding 22 C.F.R. § 51.45 pursuant to which the State Department may require an applicant to provide “any evidence” that it deems necessary to establish that he or she is a U.S. citizen. 22 C.F.R. § 51.45; see also Memorandum from Michael L. Aytes, Assoc. Dir. U.S. Citizenship & Immigration Service, Genetic Relationship Testing; Suggesting DNA Tests 2 n.1 (Mar. 19, 2008), available at http://www.uscis.gov/files/pressrelease/genetic_testing.pdf (citing Memorandum from Michael D. Cronin, Guidance on Parentage Testing for Family-Based Immigrant Visa Petitions (July 24, 2004)) (noting that USCIS policy concerning DNA testing was established in a July 2000 USCIS policy memorandum which allows field offices to “suggest” DNA testing when other forms of evidence have provide inconclusive but cannot require such testing since 22 C.F.R. § 204.2 permits requiring blood parentage tests, but there is no similar statutory or regulatory authority allowing DNA testing to be required). But see 9 FAM, *supra* note 357, § 42.41 (Exhibit II DNA Testing) (“DNA technology should be the only method accepted for proof of a biological relationship.”).

³⁷² See Department of State, DNA and Parentage Blood Testing, *supra* note 369.

³⁷³ According to the New York Times, “A surrogate’s name is not even on the birth certificate. This eases the process of taking the baby out of the country.” See Gentleman, *supra* note 202.

³⁷⁴ See, e.g., They are in our arms!, <http://switzerlandtwins.wordpress.com> (June 20, 2008 at 10:58 a.m. EST) (“So, after some serious drag-ass on the hospitals [sic] part, we finally got the birth certificate straightened out. Our many, many thanks to the US Consulate for their help! The certificate lists me and Lisa as the parents.”); Woo Hoo!!!! Our Embassy Kicks Ass!!!, <http://switzerlandtwins.wordpress.com> (June 19, 2008 at 12:25 p.m. EST) (“[O]ur personal Embassy Angel Suzanne, calls me to let me know that the Consular General of the whole embassy signed a letter to the hospital requesting the hospital clear up all the confusion with the birth

If the parentage issue does come to consular attention with respect to ART, the State Department offers consular officers some adjudicatory “suggestions”:³⁷⁵

- a. A child born abroad to a foreign surrogate mother who is the natural/blood mother (*i.e.*, who was the egg-donor) and whose claimed father was a U.S. citizen is treated for citizenship purposes as a child born out of wedlock. The procedures for proving citizenship under section 309(a) INA, as amended apply. . . . The blood relationship between the child and the putative U.S. citizen father must be proven. Additional evidence beyond the child's birth certificate and statement of the parents is required. Certification by appropriate medical authorities of all facts and circumstances surrounding the entire insemination procedure is required. Examples of appropriate supporting documentation include hospital records from the facility where the sperm donation was made, affidavit from the doctor who performed the operation, and possibly blood tests.
- b. A child born abroad to a foreign surrogate mother who was not the egg donor and whose claimed mother (egg-donor) and/or claimed father was a U.S. citizen is treated for citizenship purposes either as a child born out of wedlock to a U.S. citizen mother (if the sperm donor was not a U.S. citizen) or as the child of two U.S. citizens. The applicable sections of law generally are sections 309(c) and 301 INA.³⁷⁶

certificates immediately. The hospital responds to this letter by informing the US Embassy that they will defer to the judgment of the Municipality (Local Government). . . . We got a call from Suzanne around 4:30 pm and she said she had contacted the representative from the Municipality and explained the urgency of the situation. The Representative suggested a meeting at the hospital to clear up all the confusion. . . . Forty five minutes later Suzanne comes out of the elevator and she is beaming. We have success!” The Municipality agrees with us and with a little bit of paperwork our girls will finally be officially Switzers!”).

³⁷⁵ 7 FAM, *supra* note 357, § 1131.4-2(a)-(c) (Citizenship in Artificial and In Vitro Insemination Cases); *see* Isaacson, *supra* note 362, at 328 n.51 (“Although DHS has no similar explicit policy, it does not appear to have any contrary policy either.”). Isaacson also noted that if a U.S. citizen gestational mother is considered the mother for purposes of Section 309(c) of the INA, citizenship would be transmitted despite a complete lack of blood relationship, and parentage could not be verified by a DNA test. *Id.* at 328 n.54. Isaacson concluded that an approach completely divorced from biological parenthood would be in tension with the INA’s special requirements for adopted children. *Id.*

³⁷⁶ This suggestion appears to assume that the egg donor and sperm donor are not married to each other. Compare the example in 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(c), which also considers a scenario in which the sperm donor is not a U.S. citizen, but expressly mentions that the egg and sperm donors are married to each other; in that case, the State Department specifically states that the case cannot be adjudicated as a birth out of wedlock.

c. The status of the surrogate mother is immaterial to the issue of citizenship transmission. The child is considered the offspring of the biological parents and the appropriate INA section is applied.

Additional examples of the determination of citizenship status in ART cases are provided in the section of the FAM addressing preparation of Form FS-240.³⁷⁷ Regarding an artificial insemination with anonymous donor sperm where the child's parents are each U.S. citizens, the case could be adjudicated as a birth out of wedlock to a U.S. citizen mother.³⁷⁸ However, a child conceived with a donor egg and sperm of non-U.S. citizens, born to the U.S. citizen wife of the sperm donor through IVF embryo transfer, will have no claim to U.S. citizenship because the child is genetically related to two non-U.S. citizens.³⁷⁹ In the case of conception from the harvested egg of a U.S. citizen wife and *in vitro* fertilization by a U.S. citizen husband's sperm, with the resulting embryo transferred to a U.S. citizen grandmother who gives birth abroad, the case would be adjudicated as a birth in wedlock to two U.S. citizens abroad.³⁸⁰ If the husband was a foreign national, the case would be treated as a child born in wedlock to one U.S. citizen parent and one non-U.S. citizen parent, precluding adjudication as a birth out of wedlock.³⁸¹ In the case of a child conceived with anonymous sperm and born to a U.S. citizen mother, who is also the egg donor and in a same-sex union with another woman, the case would be adjudicated as a child born out of wedlock to a U.S. citizen mother.³⁸²

It is not clear all courts would agree with the State Department's surrogacy analysis, specifically that (1) a child born to a gestational surrogate, as commissioned by two married U.S. citizens,

³⁷⁷ 7 FAM, *supra* note 357, § 1446.2-2(c)(4).

³⁷⁸ 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(a). The husband's name could be listed on the amended Form FS-240 if the husband adopts the child. *Id.*

³⁷⁹ 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(b). This example highlights the difference between the *jus sanguinis* and *jus soli* doctrines, for if the U.S. citizen wife had given birth in the United States instead of overseas, the child would be entitled to U.S. citizenship pursuant to 8 U.S.C. § 1401(a). 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(b).

³⁸⁰ 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(c).

³⁸¹ *Id.* Additionally, the FAM notes that "the child might be eligible for citizenship under the Child Citizenship Act of 2000 through the U.S. citizen grandmother, who may be eligible to apply for a Certificate of Citizenship for the child through expeditious naturalization." *Id.*

³⁸² 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(d). In the case of same-sex parents, the FAM notes that if the non-genetic parent later adopts the child, an amended FS-240 listing that parent could be issued once the Form FS-240 is revised to reflect forthcoming rules from the Centers for Disease Control and Prevention regarding minimum standards for birth certificates. *Id.*

must nevertheless prove a blood relationship, and (2) a child genetically related only to one U.S. citizen, born to a gestational surrogate who is married to the other commissioning parent, is born “out of wedlock.” In *Scales v. Immigration & Naturalization Service*, the Ninth Circuit ruled that where a child is born to a non-citizen mother who is married to a U.S. citizen at the child’s birth, the child is not born out of wedlock and qualifies for U.S. citizenship.³⁸³ In *Scales*, the Ninth Circuit refused to apply the FAM requirement of a blood relationship between the child and the parent whom the child’s claim is based because (i) the State Department is not the agency entrusted with determining the citizenship of individuals within the United States, and (ii) the FAM, as an agency manual, is not entitled to *Chevron*-style deference.³⁸⁴ The Ninth Circuit reached a similar result in the case of a child born to a married non-U.S. citizen father and U.S. citizen mother, where the U.S. citizen did not share a blood relationship with the child.³⁸⁵ On the other hand, citizenship “at birth” has not been extended to a child born outside the United States who is subsequently adopted by married U.S. citizens.³⁸⁶

Additionally, the FAM includes instructions as to whose name shall be included on the Consular Report of Birth.³⁸⁷ In ART cases, the Consular Report of Birth should list the name of the sperm donor as the father and the egg provider as the mother, and the application for Form FS-240 should explain any discrepancies with the names listed on the birth certificate.³⁸⁸ If the gamete donor is anonymous, the consular officer is to assume the donor is not a U.S. citizen and adjudicate the case accordingly.³⁸⁹ In the case of an anonymous gamete donor, the Consular Report of Birth is to leave blank the item listing the mother or father.³⁹⁰

In addressing false or fraudulent citizenship claims involving children not related to the U.S. citizens claiming to be their parents,³⁹¹ the State Department cautioned:

³⁸³ *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000) (holding “there is no requirement of a blood relationship”).

³⁸⁴ *Id.* at 1165–66.

³⁸⁵ See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005).

³⁸⁶ See *Crider v. Ashcroft*, 74 F. App’x 729, 730 (9th Cir. 2003) (holding a child is not born “of parents” in the context of adoption).

³⁸⁷ 7 FAM, *supra* note 357, § 1446.2-2(c)(4).

³⁸⁸ 7 FAM, *supra* note 357, § 1446.2-2(c)(4)(a).

³⁸⁹ 7 FAM, *supra* note 357, § 1446.2-2(c)(4).

³⁹⁰ *Id.*

³⁹¹ See 7 FAM, *supra* note 357, § 1131.5-1 (“False or fraudulent citizenship claims involving children not related by blood to the U.S. citizens claiming to be their parents can involve false claims of paternity or false claims of maternity. When a

Parentage fraud issues must be handled sensitively. Necessary efforts to enforce the citizenship laws may result in the Department being accused of threatening the family unit and of jeopardizing the welfare of the child. Cases of this kind often have public relations ramifications or give rise to congressional interest. All such cases must be handled in a timely manner with consideration for the family. Posts should provide information on visa eligibility in cases where it has been proven that the child has no claim to U.S. citizenship and the parents wish to take the child to the United States.³⁹²

In the State Department's view, U.S. citizenship does not accrue to a baby in the absence of a genetic relationship with a U.S. citizen parent.³⁹³ However, the extent to which the State Depart-

married couple falsely claims that a child is theirs for purposes of citizenship documentation, it is sometimes referred to as adoption fraud. These fraudulent claims are often detected when the alleged parents apply on behalf of a child for a Consular Report of Birth Abroad or other documentation as a U.S. citizen.”). The FAM also states:

Cases in which an unmarried U.S. citizen woman falsely claims a child as her natural child for citizenship purposes are relatively rare but can occur The couple falsely claims that a foreign-born child is their natural child, when typically, in fact, they have adopted the child or, otherwise, obtained physical custody of it. The false claim that the child is theirs is made to avoid adoption and/or visa procedures and to fraudulently document the child as a U.S. citizen. This is often referred to as “fraud by adoption” – a false claim to citizenship filed on behalf of a child by the alleged biological parents, who, in fact, share no blood relationship with the child and, therefore, could not confer citizenship on the child. An interview with the alleged parents may disclose some or all of these fraud indicators: (1) The alleged mother arrived in the foreign country a few days before the child's birth. (2) The alleged mother is middle-aged and this is a first child/or the couple has been married for many years without children. (3) The child was born in a private home with the mother unattended or with only a midwife present. (4) The alleged mother claims to have had no prenatal care and not to have known the baby's due date. (5) The alleged mother claims that the child was born prematurely. (6) The physical characteristics of the child and of the alleged parents do not seem compatible.

7 FAM, *supra* note 357, § 1135.5-4(a). Many of these factors can be present in a surrogacy arrangement. In cases where donor gametes are used, it can be difficult to distinguish between (a) what the State Department considers “adoption fraud” and (b) what the State Department considers bona fide claims to U.S. citizenship by commissioning parties in a surrogacy arrangement.

³⁹² 7 FAM, *supra* note 357, § 1131.5-2.

³⁹³ 7 FAM, *supra* note 357, § 1446.2-2(c)(4) (“[T]he basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg.”).

ment is actually adjudicating surrogacy cases by examining genetic relationships is unclear.³⁹⁴ To the extent that Indian birth certificates list solely the commissioning parties, such a birth certificate is accepted as primary evidence of parentage. If a determination of derivative citizenship cannot be established, the parent retains the option of filing a petition for a visa based on the child's classification as an immediate relative.³⁹⁵ The adjudicative issues would involve the petitioner's status, the beneficiary's age, the beneficiary's marital status, and the relationship between the petitioner and beneficiary.³⁹⁶ A more cumbersome alternative would be adoption; however, rules for international adoption of babies born through surrogacy are non-existent.

VI. CONCLUSION

Given the ethical considerations and potential harm, primarily to Indian surrogate women but also to the children conceived through surrogacy and the commissioning parties, international surrogacy arrangements with Indian surrogates should be banned. Some argue the abolition of surrogacy would cause a black market trade to develop, leaving the surrogate and commissioning parents with no legal recourse against potential abuses.³⁹⁷ However, this argument fails for several reasons. First, as Janice Raymond noted, "[e]ven if outlawing surrogacy . . . did drive it underground, the number of surrogate arrangements would be miniscule compared to the explosive growth that would result from permissive regulation."³⁹⁸ International surrogacy would be much more difficult to implement if it were outlawed. Second, surrogate mothers in India are presently afforded very few legal protections. Were surrogacy banned in India, the woman who gives birth would have a greater claim as the legal mother of any child born of a prohibited surrogacy arrangement – thereby affording the Indian woman the ultimate legal protection regarding the child.³⁹⁹ Third, the fact that commissioning parties, who reside in countries or states where sur-

³⁹⁴ See *supra* note 373 and accompanying text.

³⁹⁵ See 8 U.S.C. § 1151(b)(2)(A)(i).

³⁹⁶ See U.S. CITIZENSHIP & IMMIGRATION SERV., USCIS FIELD MANUAL § 21.4 (2008), available at <http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2>.

³⁹⁷ See Leibowitz-Dori, *supra* note 2, at 347.

³⁹⁸ RAYMOND, *supra* note 101, at 206.

³⁹⁹ See Leibowitz-Dori, *supra* note 2, at 351 n.145.

rogacy is prohibited, travel to other jurisdictions to engage in surrogacy arrangements demonstrates that the “black market” effectively becomes the countries with the least regulation, *not* the locale in which surrogacy is banned.⁴⁰⁰

At present, no international regulation of surrogacy is in effect.⁴⁰¹ To prevent international forum shopping, an international treaty honoring the laws of the nations with the strictest laws prohibiting surrogacy should be formulated. However, an international law against surrogacy is not likely to become a reality, and, even if it were, it is questionable how effective such an international law would be.⁴⁰² The alternative would be for nations to independently ban international surrogacy.

The issue then becomes whether regulation of international surrogacy is a desirable alternative to prohibiting international surrogacy altogether. Short of an outright ban on international surrogacy, should the United States and India develop more stringent laws to regulate international surrogacy with respect to its participation in the international surrogacy system?

With respect to the abolition vs. regulation debate, Janice Raymond wrote:

Basically, the regulatory approach leaves the technologies intact while making them less haphazard. It restricts the more egregious abuses of these technologies by legislating the conditions and the contexts in which they can be used and by watchdogging the ways in which these technologies are used. . . . Regulation functions as quality control rather than as critical challenge.

Regulation is a perceived rational response advocating restriction rather than absolutism, and within the dominant medical and commercial ecology of reproductive technologies and contracts, scientists, lawyers and entrepreneurs have made a plea for this kind of legislation. . . . It gives the surrogate brokers, for

⁴⁰⁰ *See id.* at 334 n.30.

⁴⁰¹ *Id.*; *see also id.* at 331.

⁴⁰² *See id.* at 331; David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 407 (2005) (“Much of international law, and especially human rights law, is arguably hortatory in nature, with little or no effective enforcement mechanism. The primary effect of broadly adopted human rights treaties is often to identify and express international ideals and standards, rather than to provide an effective means of enforcement.”). For a discussion of existing international agreements and declarations that may be applied to surrogacy arrangements to protect the interests of women serving as surrogates, see McEwen, *supra* note 5, at 297-303.

example, a stable marketing environment and makes the process of surrogacy more convenient for the client and broker.⁴⁰³

Raymond points out that laws that regulate surrogacy end up promoting it.⁴⁰⁴ On the other hand, given that countries like the United States and India may lack the political will to curtail international surrogacy, the primary risk is international surrogacy proliferation in the absence of protective safeguards in place.⁴⁰⁵

Short of enacting a federal law banning American citizens from entering into international surrogacy arrangements, regulation by the U.S. federal government may be a viable possibility. For example, the Immigration and Nationality Act is a possible mechanism for protecting American citizens. Regulations pursuant to the Immigration and Nationality Act could be promulgated offering some minimum basic protections.

For example, commissioning parents could be required to obtain advance approval before entering into a surrogacy arrangement. Approval to travel could be conditioned on (1) assurance that the commissioning parties meet state's laws on surrogacy, and the presentation of a plan for how parentage will be legally established in accordance with applicable state law,⁴⁰⁶ (2) requiring a home study of the commissioning parties, including criminal background checks and counseling on the risks of the intended ART procedures each party, including the child, face, and counseling

⁴⁰³ RAYMOND, *supra* note 101, at 207-08. Raymond ultimately argued in favor of abolition of most types of new reproductive technologies. *Id.* at 209 ("The starting point for the protection of women's bodily integrity is the abolition of technological reproduction by penalizing its vendors and purveyors and by preventing women from being technologically ravaged.").

⁴⁰⁴ *Id.* at 207; *see also* Janwalkar, *Surrogacy bill needs to be discussed threadbare*, *supra* note 193 (quoting an Indian surrogacy service provider as saying "Once there is a legal sanction for commercial surrogacy, more people will be open to the idea."); Rajalakshmi, *supra* note 193 ("Regulation of surrogacy, many feel, would give a legitimate stamp to the commercial activity that is already under way.").

⁴⁰⁵ *See, e.g.*, RAYMOND, *supra* note 101, at 206 (noting that in the United States there has been more of an institutional trend towards regulation than abolition which can be attributed to American values of choice and laissez-faire individualism, but also the notion that "to prohibit any of these reproductive procedures is technological McCarthyism – a repressive, retrogressive censorship of progress and a gross intrusion into the reproductive lives of individuals who may need the techniques"); Hale, *supra* note 314, at 342 (observing that in the domestic context, congressional dormancy in enacting federal surrogacy legislation could be attributed to lack of public pressure and the complex ethical dilemmas it presents).

⁴⁰⁶ In the international adoption context, adopting parents are required to demonstrate that their state's preadoption requirements have been met. *See* 8 CFR §§ 204.3(f), 204.305.

around psychological issues each may encounter,⁴⁰⁷ (3) requiring disclosure of relevant surrogacy contracts and the ability to interview surrogate mothers, and (4) requiring the commissioning couple to disclose information regarding third parties (e.g., name of ART practitioner and itemized list of costs).

After the child is born, the following measures could be implemented: (1) mandatory DNA testing in all cases to establish genetic relationships (if any), and (2) affirmative declarations of parentage and support to the child by the commissioning parties in all cases (regardless of the marital status or sex of the parties). However, there is little legal protection the U.S. federal government could enact (1) to ensure protections for women serving as surrogates in India, or (2) to adequately address the inherent inequities in international surrogacy arrangements in India.

A parallel area that helps to illustrate the inadequacy of regulation is international adoption from India. International adoption from India is subject to numerous levels of regulatory guidance and oversight including the Hague Convention on Inter-Country Adoption, guidelines implemented by the Ministry of Social Welfare through the Central Adoption Resource Agency, state Social Welfare Boards, scrutinizing agencies appointed by the State Judiciary, and Adoption Coordinating Agencies.⁴⁰⁸ Nevertheless, adoption scandals and abuses have continued and illustrate the gap between regulation and reality.⁴⁰⁹ One researcher who spent two years in India conducting anthropological research of unmarried mothers, many of whom had relinquished children to adoption, summarized the discrepancies she observed between official policies and reality, as presented by these women:

While working in the field of adoption, I soothed my conscience with the idea that the power of official documents would prevent malicious practices. I initially believed in monitoring and regulation. International conventions and agreements appeared to be the right tools to me. But after listening to the biological mothers, I am convinced that these Conventions, Regulations and Guidelines are not the appropriate instruments because they do not address the main concerns. The controlling and monitoring policy implies that the business component is under control. But in practice, the formal controlling process is counter-productive. Instead of taking away threats, it takes away transparency and causes a mystification of reality. The

⁴⁰⁷ Compare 8 C.F.R. §§ 204.3(e), 204.311.

⁴⁰⁸ PIEN BOS, ONCE A MOTHER: RELINQUISHMENT AND ADOPTION FROM THE PERSPECTIVE OF UNMARRIED MOTHERS IN SOUTH INDIA 220 (2007).

⁴⁰⁹ See Smolin, *supra* note 402, at 475-89.

more adoption is regulated and monitored, the more politically correct objectives get distanced from daily practices.⁴¹⁰

Similar to the international adoption context in India, notwithstanding the development of extensive regulation, it is likely that Indian women will experience systemic abuses, internal and external pressure and exploitation, none of which is likely to be widely publicized. However, unlike the arena of international adoption where the welfare of children in the system is considered when advocating a shutdown of adoption in a particular country, there are no existing children to consider when recommending a ban on surrogacy in India. Accordingly, the only acceptable solution to international surrogacy in India remains abolition.

⁴¹⁰ Bos, *supra* note 408, at 239, available at <http://adoptie-opstellingen.blogspot.com/2008/01/once-mother-e.html> (book excerpt).