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REGULATING THE TRADE OF COMMERCIAL SURROGACY IN INDIA

Izabela Jargilo*

INTRODUCTION

“It’s her egg and his sperm, and I’m just the oven, it’s totally their bun.” Phoebe Buffay, a character on the popular American sitcom *Friends*, said this as she explained the process of being a surrogate.¹ Following the airing of this episode on January 8, 1998, surrogacy has quickly become increasingly popular as a common and trendy solution for developing a family.² The World has come a long way from America’s first surrogate baby in 1980.³ Since then, surrogacy has become a popular alternative to childbirth, using a “host of boldfaced names from Elton John to Sarah Jessica Parker and Nicole Kidman [all of which have] publicly acknowledged using surrogates to birth babies for them.”⁴ As the number of surrogacies trends up and becomes mainstream,⁵ the demand for surrogates will continue to grow in the global market.⁶ This will result in the expansion of surrogacy programs,⁷ raising cross-border surrogacy agreements, and creating both national and international debate.⁸

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¹ *Friends: The One with Phoebe’s Uterus* (NBC television broadcast Jan. 8, 1998); see also Rikita Mujgerjee, *The Baby Business: A Study on Indian Market of Commercial Surrogacy and Its Implications*, PRINCETON <http://paa2015.princeton.edu/uploads/152404> (last visited Apr. 19, 2016).

² *Friends: The One with Phoebe’s Uterus*; CTR. FOR SOC. RESEARCH, SURROGATE MOTHERHOOD – ETHICAL OR COMMERCIAL 15, <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>.

³ See *The History of Surrogacy*, MODERN FAMILY SURROGACY CTR., http://www.modernfamilysurrogacy.com/page/surrogacy_history (last visited Apr. 19, 2015); see also Elizabeth Kane, *Surrogate Mother Elizabeth Kane Delivers Her ‘Gift of Love’ – Then Kisses Her Baby Goodbye*, PEOPLE (Dec. 8, 1980), <http://www.people.com/people/archive/article/0,,20078051,00.html>. In 1980 Elizabeth Kane was paid \$10,000 for this traditional commercial surrogacy arrangement, where she was genetically related to the baby she gave birth. *Id.*

⁴ See Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA JOURNAL (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate.

⁵ John Rustin, *The Exploitation of Women Through Surrogacy*, NC FAMILY POLICY COUNCIL (Oct. 8, 2015), <http://www.ncfamily.org/the-exploitation-of-women-through-surrogacy/>.

⁶ See Kerry Peterson, *Cross Border Commercial Surrogacy: A global patchwork of inconsistency and confusion*, in 16 L. AND GLOBAL HEALTH 209, 213 (Michael Freeman, Sarah Hawkes & Belinda Bennett eds., 2014).

⁷ *Id.*

⁸ See generally Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT’L L.J. 665 (2012). There are many negative aspects of surrogacy such as the physical risk involved to the surrogate mother, who risks damage to her health, including death. However, there are also many positive aspects to surrogacy such as the fact that the surrogate mother in poverty stricken nations are likely to receive a

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The market for surrogacy is becoming concentrated in developing nations such as India, “which have access to contemporary technology and skilled individuals who can provide surrogacy program[s] at lower costs and service wealthier nations such as the United States.”⁹ The economic disparity between men and women seeking a surrogate, and the women who offer their reproductive services for sale, is so extreme that the potential for abuse and exploitation is very high.¹⁰ Thus, international safeguards should exist to protect these women from being exploited into providing these services for profit. However, due to many controversies surrounding surrogacy, it is unlikely that such an international treaty can be formulated and put into effect in the near future.¹¹

This Note will focus on the exploitation of Indian women who enter into commercial surrogacy agreements due to a lack of regulations. The Indian government has recently implemented a ban on all commercial international surrogacy agreements,¹² however this ban presents many new dangers.¹³ Part I explores the background of international surrogacy agreements including variations in international surrogacy laws, and more specifically the surrogacy laws of India. Part II examines the exploitation of Indian woman through commercial surrogacy; this exploitation can be seen in the case studies exploring how these women are lured into becoming surrogate mothers.¹⁴ Part III explains why an international treaty appears impractical; additionally it examines how the recent ban on international commercial surrogacy by the Indian government will create more danger for surrogate mothers.¹⁵ Banning international surrogacy agreements will lead to the creation of an underground market and will take away the potential economic benefits these women can receive through surrogacy agreements.¹⁶ Finally, this Note proposes that strict regulations are necessary to protect all parties involved in surrogacy agreements, especially the surrogate mothers.

level of medical care higher than they would normal receive, an increased feeling of control and self-worth from the fact that they are compensated for these services, and the satisfaction of assisting someone who could not obtain a child alone. *Id.*

⁹ See Usha R. Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV 15 (2008).

¹⁰ Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 331 (1997).

¹¹ *Id.* at 354.

¹² Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India), <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>.

¹³ See generally Nirmala George, *Surrogates feel hurt by India's ban on foreign customers*, CTV News (Nov. 8, 2015 2:09 AM), <http://www.ctvnews.ca/health/surrogates-feel-hurt-by-india-s-ban-on-foreign-customers-1.2663609>. Many feel that the ban on surrogacy in India does not help surrogate mothers but closes doors for them; activists for India's surrogacy market believe that the ban will only drive the surrogacy business underground. *Id.*

¹⁴ See generally Mujgerjee, *supra* note 1. Case Studies of women in India show that these women are often unaware and uneducated regarding the risks related with becoming a surrogate. Often the decision to become a surrogate is based on a need to help support their families. *Id.*

¹⁵ See generally George, *supra* note 13.

¹⁶ *Id.*

I. BACKGROUND

Surrogacy is quickly becoming a mainstream method of creating a family.¹⁷ However, the idea of surrogacy dates back to Biblical times.¹⁸ The Book of Genesis says Abram's wife Sara could not conceive a child so she gave her husband her maid, Hagar, saying "the Lord has kept me from bearing children. Have intercourse, then, with my maid; perhaps I shall have sons through her."¹⁹

Today surrogacy is defined as "the process of carrying and delivering a child for another person."²⁰ A surrogate mother is defined as:

a woman who carries out the gestational function and gives birth to a child for another; especially, a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of a child.²¹

A. Gestational v. Traditional Surrogacy

There are two types of surrogacy, traditional surrogacy and gestational surrogacy.²² Traditional surrogacy is when the surrogate mother has a biological link to the child she carries, she is the biological mother of the child.²³ Traditional surrogacy is accomplished by artificial insemination.²⁴ The surrogate mother uses her own egg and becomes inseminated with a man's sperm.²⁵

Gestational surrogacy is when a woman is impregnated with an embryo formed from another woman's fertilized egg.²⁶ The process of gestational surrogacy is the result of In

¹⁷ See Rustin, *supra* note 5 (discussing how the number of surrogacy contracts are trending up as it becomes more mainstream, acceptable and seen as a "wonderful way to help people have families.").

¹⁸ Kirsty Horsey & Sally Sheldon, Note, *Still Hazy After All These Years: The Law Regulating Surrogacy*, 20 MED. L. REV. 67, 68 (Winter 2012).

¹⁹ *Genesis* 16:3.

²⁰ *Surrogacy*, BLACK'S LAW DICTIONARY 1674 (10th ed. 2009).

²¹ *Id.* at 1168.

²² Shany Noy Kirshner, Note, *Selling a Miracle? Surrogacy through International Borders: Exploration of Ukrainian Surrogacy*, 14 J. OF INT'L BUS. & L. 77, 80 (Winter 2015).

²³ See Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of Gestational Carrier's Rights to Abortion*, 70 FORDHAM L. REV. 93, 95 (2001) (stating how in traditional surrogacy the surrogate mother and the intended father provide the genetic make-up of the resulting child); BLACK'S LAW DICTIONARY 1674 (10th ed. 2009) ("traditional surrogacy. A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.").

²⁴ See Kirshner, *supra* note 22.

²⁵ *Id.*

²⁶ See Emily Stehr, Note, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quest to Prevent Exploitation*, 35 HASTINGS INT'L & COMP. L. REV. 253, 254 (2012); *Gestational Surrogacy*, BLACK'S LAW DICTIONARY 1674 (10th ed., 2009) ("gestational surrogacy. A pregnancy in which one woman [the genetic mother] provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.").

vitro fertilization and embryo transplantation.²⁷ Unlike traditional surrogacy, the result of gestational surrogacy is a child with no genetic link to the surrogate mother.²⁸ Generally, a gestational surrogacy agreement is between the intended parents and the surrogate mother.²⁹ These agreements state that the surrogate mother will carry the baby to term, and then relinquish her rights to the child after she delivers the baby.³⁰

If the surrogate mother has been paid for her service, the transaction is considered a commercial surrogacy.³¹ This is considered a business transaction and is purely for monetary compensation.³² On the other hand, if the surrogate mother is not compensated, beyond medical costs, it is known as an altruistic surrogacy.³³ An altruistic surrogacy is when a surrogate mother decides not to take a fee for her services.³⁴ This type of surrogacy most often occurs between immediate family members and close friends.³⁵

B. National Surrogacy Laws

Each nation's approach to the legality of surrogacy varies, as each nation has a different view on the ethical and moral questions surrounding surrogacy.³⁶ The various national laws on surrogacy can be broken down into four categories: Category 1 are those countries whose law is silent on surrogacy (e.g. Belgium); Category 2 are those countries where all surrogacy contracts, whether commercial or altruistic, are prohibited (e.g. France and Germany); Category 3 are those countries where only altruistic surrogacy is permitted (e.g. United Kingdom); and Category 4 are those countries where all forms of surrogacy are permitted (e.g. Ukraine and Israel).³⁷

Until recently India fell into Category 4, where all forms of surrogacy were permitted.³⁸ However, a recent order from the Supreme Court of India ("the Order") has

²⁷ See ROBERT E. OLIPHANT & NANCY VER STEEGH, *EXAMPLES AND EXPLANATIONS: FAMILY LAW* 353 (2nd ed. 2007) ("In vitro fertilization (IVF) is the fertilization of a human egg outside the human body in a laboratory. Children conceived in this way are sometimes referred to as 'test tube babies', because their actual conception may have occurred in a petri dish."); *Embryo Transfer*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/infertility/embryo-transfer/> (last visited Jan. 28, 2016) ("Embryo transfer is a procedure that follows in vitro fertilization (IVF) and is often considered the simplest and final step of the in vitro fertilization process. The objective of embryo transfer is to facilitate conception following fertilization from the in vitro fertilization procedure.")

²⁸ *Gestational Carrier*, CNY FERTILITY, <http://cnyfertility.com/fertility-treatments/options/> (last visited Jan. 24, 2016).

²⁹ See generally *id.*

³⁰ Caitlin Cinklin, *Simply Inconsistent: Surrogacy Laws in The United States and The Pressing Need for Regulation*, 35 *WOMEN'S RTS. L. REP.* 67, 70 (2013).

³¹ Tina Lin, Note, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 *CARDOZO J. INT'L COMP. L.* 545, 551 (2013).

³² See *id.*

³³ *Id.*

³⁴ *Altruistic Surrogacy – Surrogate Pregnancy For Free*, INFO. ON SURROGACY, <http://information-on-surrogacy.com/altruistic-surrogacy> (last visited Apr. 10, 2016).

³⁵ *Id.*

³⁶ See CTR. FOR SOCIAL RESEARCH, *supra* note 2, at 20.

³⁷ Lin, *supra* note 31, at 552.

³⁸ Lin, *supra* note 31, at 552.

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made commercial surrogacy for foreign couples illegal.³⁹ This new order has placed India in a new category. International commercial surrogacy agreements are now illegal, but Indian couples may continue to commission Indian women for their services as surrogate mothers.⁴⁰ Unlike some aspects of commercial surrogacy, altruistic surrogacy continues to be legal in India.⁴¹

There is no uniform federal law governing surrogacy in the United States.⁴² Although, there have been several bills introduced in the House of Representatives that would prohibit commercial surrogacy; Congress has yet to act on any of these bills.⁴³ The National Conference of Commissioners on Uniform State Laws approved a statute called the Uniform Status of Children of Assisted Conception Act, which set forth two possible approaches to surrogacy in the United States.⁴⁴ A state could either make surrogacy contracts void and unenforceable, or enforce surrogacy contracts so long as they comply with statutory requirements.⁴⁵ This choice was left to each individual state, which gave states much discretion, but left vast variations in surrogacy laws between states.⁴⁶

For example, California has a very favorable attitude towards all types of surrogacy as established through common law.⁴⁷ On the other hand, New York forbids surrogacy;⁴⁸ anyone who enters into a surrogacy agreement can be fined up to \$10,000 and under certain circumstance may be guilty of a felony.⁴⁹ Similarly, in Michigan surrogacy is forbidden and individuals who enter into surrogacy agreements can be fined up to \$50,000 and imprisoned for up to five years.⁵⁰ In Washington uncompensated agreements (altruistic surrogacy agreements) are permitted,⁵¹ however, compensated agreements (commercial surrogacy agreements) are considered void and unenforceable.⁵² Yet, in Florida traditional surrogacy is considered a “pre-planned adoption agreement” and is regulated under the Florida’s adoption statute;⁵³ gestational surrogacy is permitted only between legally married couples.⁵⁴ Maine,

³⁹ Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India); Nirmala George, *India's lucrative surrogacy business has been shut down*, STARTRIBUNE (Dec. 24, 2015, 6:15 PM), <http://www.startribune.com/india-s-lucrative-surrogacy-business-has-been-shut-down/363333171/>.

⁴⁰ See Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India).

⁴¹ See generally Lin, *supra* note 31; Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India), <http://courtnic.nic.in/supremecourt/temp/ac%20871410p.txt>.

⁴² Lin *supra* note 31; see also Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* (2003).

⁴³ Rao, *supra* note 42.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *U.S. Surrogacy Law By State*, THE SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/surrogate-mothers/the-law/u-s-surrogacy-law-by-state/> (last visited Jan. 26, 2016) ([i]n the notable cases of *Calvert v. Johnson* (1993) and *Buzzanca v. Buzzanca* (1998), California first established and then reinforced its position that intent governs in the determination of parentage in gestational surrogacy situation.”).

⁴⁸ *Id.* (“Those who facilitate surrogacy arrangements, e.g. lawyers and agencies, are fined in the first instance and, for a second offense, are guilty of a felony.”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

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Rhode Island, Vermont and a number of other states have no laws governing surrogacy but are generally considered favorable jurisdictions.⁵⁵

The vast variances in surrogacy laws in both the United States and in other nations have contributed and encouraged commissioning parents to enter into surrogacy arrangements in nations with more welcoming policies.⁵⁶ Finding surrogate mothers in nations such as Ukraine and Israel, where all forms of surrogacy are permitted allows the commissioning couple to rest assured that they will be able to legally go through the surrogacy process.⁵⁷ India was on this list, as it was a nation with little to no regulation regarding surrogacy laws,⁵⁸ until the Order banned commercial surrogacy in India for all foreign couples.⁵⁹

C. India's Surrogacy Laws

Until recently, India was quickly becoming a hub for commercial international surrogacy due to its relatively low costs, lax regulations, and a population of willing surrogates.⁶⁰ The Indian Ministry of Health and Family Welfare and the Indian Council of Medical Research ("ICMR"), along with the Indian National Academy of Medical Science have all realized there is a need for regulations as surrogacy becomes ever more prevalent in India.⁶¹ The aforementioned organizations published the National Guideline for Accreditation, Supervision and Regulation of ART Clinics in India ("Guidelines") in 2005.⁶² These Guidelines are nonbinding because the Indian government has not adopted them into law.⁶³ While these Guidelines have not been adopted into law, they have been debated over by sets of experts, practitioners of Assisted Reproductive Technology ("ART"), and the Indian public in an effort to provide safe and ethical ART services for infertile couples.⁶⁴

The Guidelines define ART as "all techniques that attempt to obtain a pregnancy by manipulating the sperm or/and oocyte outside the body, and transferring the gamete or embryo into the uterus."⁶⁵ Professor N.K. Ganguly, Director General of ICMR stated that "[t]he increasing demand for ART has resulted in a mushrooming of infertility clinics in

⁵⁴ *Id.*

⁵⁵ *See generally id.* The following states do not have any set regulations regarding commercial surrogacy: Alaska, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, West Virginia and Wyoming. *Id.*

⁵⁶ *See* PERMANENT BUREAU, *Hague Conference on Private Int'l Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* 7, (Mar. 2011), <https://assets.hcch.net/upload/wop/genaff2011pd11e.pdf>.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *Union of India & Anr. v. Jan Balaz & Ors.* (2015) SC (India).

⁶⁰ *See Lin, supra* note 31, at 553.

⁶¹ *See* INDIAN COUNCIL OF MED. RESEARCH & NAT'L ACAD. OF MED. SCI., NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA, at ix (2005) [hereinafter THE GUIDELINES], http://icmr.nic.in/art/art_clinics.htm.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.* at xii.

⁶⁵ *Id.* at 6.

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India.”⁶⁶ The Guidelines aim to “fill [the] lacuna” that has been created by a lack of guidelines and aim at providing a means of maintaining a national registry of ART clinics in India.⁶⁷

Professor Ganguly acknowledges there are many issues with the regulations of surrogacy agreements, or more accurately the lack thereof.⁶⁸ He states there is no reliable information available on the number of ART clinics, no information on the follow-up of babies born after the use of ART, in addition there have been multiple reports in the press of malpractice carried out by some of the clinics.⁶⁹ The Guidelines strive to address these issues by creating regulations for surrogacy in India by (1) setting requirements for ART clinics; (2) listing ethical and legal considerations; (3) providing sample consent forms; and (4) listing training requirements for staff involved in the process.⁷⁰ However, the Guidelines have been highly criticized for their vagueness on a number of key issues such as surrogates’ rights; surrogates’ minimum age; contract specifications; the voluntary nature of surrogacy agreements; and overall lack of guidance.⁷¹

These Guidelines can continue to make India a favorable place for couples or individuals seeking surrogacy because the surrogate mother is not considered to be the legal parent.⁷² The genetic parents of the child are the named parents on the birth certificate,⁷³ therefore when a surrogate mother delivers the baby the surrogacy contract determines who the legal parents of the child are.⁷⁴

This is of great importance for many commissioning couples; across the world issues have arisen where genetic parents were not recognized as the legal parents of the child resulting from the gestational surrogacy.⁷⁵ Their situations occur in nations where surrogacy contracts are not recognized, thus the surrogate mother is considered the legal parent.⁷⁶ In the

⁶⁶ *Id.* at xii.

⁶⁷ *Id.*

⁶⁸ *Id.* at xi.

⁶⁹ *Id.* at xii.

⁷⁰ *See id.*

⁷¹ *See* Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, THE KANAN INSTITUTE FOR ETHICS AT DUCK UNIVERSITY (2009), <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>.

⁷² THE LAW COMMISSION OF INDIA, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy* at 11, Report No. 228 (Aug. 5, 2009) [hereafter COMMISSION OF INDIA], <http://lawcommissionofindia.nic.in/reports/report228.pdf>.

⁷³ *Id.* at 14.

⁷⁴ Wannan Van Hoof & Guido Pennings, *Cross-Border Reproductive Care Around the World: Recent Controversies*, in *MED. TOURISM AND TRANSNAT’L HEALTH CARE* 98, 108 (David Botterill et al. eds., 2013).

⁷⁵ *See* Mary Keyes, *Cross-border Surrogacy Agreements*, 26 *AUSTRALIAN J. OF FAM. L.* 28, 46 (2012), http://www98.griffith.edu.au/dspace/bitstream/handle/10072/48503/80585_1.pdf; *see also* Sarah Mortazavi, *It takes a village to make a Child: Creating Guidelines for International Surrogacy*, 100 *THE GEORGETOWN L. J.* 2249, 2253 (2012). The commissioning couples are the people who wish to have a child conceived for them and seek out a surrogate to accomplish this goal, also known as intended parents. *Id.*

⁷⁶ Hoof & Pennings, *supra* note 74; *Surrogacy Around the World*, THE NEXT FAMILY (last visited Jan. 28, 2016), <http://thenextfamily.com/2015/08/surrogacy-laws-around-the-world/>. There are many concerns with using a surrogate in a country that does not have law governing surrogacy agreements. In many cases the country will not enforce the surrogacy contract if a dispute arises and in many other situations the country will list the surrogate mother on the birth certificate. Ireland is an example of a country where it is likely that a surrogate will be documented as the birth mother on the birth certificate. Another example is Nepal, since no

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end these situations come before the courts, where a judge typically allows an exception to the law in “the best interest of the child.”⁷⁷ However, this is often a long drawn-out battle that can last many years.⁷⁸

Until recently these non-binding Guidelines, with no actual legal authority, governed surrogacy agreements in India;⁷⁹ commercial surrogacy was legal and essentially unregulated.⁸⁰ In 2008, in *Baby Manji Yamada vs. Union of India and Another*, the Supreme Court of India held that commercial surrogacy was legal.⁸¹ In this case a commissioning couple contracted with a surrogate mother, but prior to the birth of the child the commissioning couple divorced and the commissioning mother no longer wanted to move forward with the surrogacy.⁸² When the commissioning father went to pick up the child, the government of India did not offer the child an exit permit since she did not have a legal mother listed on the birth certificate.⁸³ The case reached the Supreme Court of India where the court decided to honor the surrogacy contract.⁸⁴ Following this case, commercial surrogacy was considered legal, even though there were no uniform laws in India requiring any pre-requisites for a commercial surrogacy.⁸⁵

The ICMR has been working on a draft bill to regulate surrogacy since 2005, entitled The Assisted Reproductive Technology (Regulation) Bill 2010.⁸⁶ This bill has made

law governs surrogacy agreements, these contracts do not have to be enforced by the government according to the U.S. Embassy. *Id.*

⁷⁷ See PAULA GERBER & KATIE O’BYRNE, SOULS IN THE HOUSE OF TOMORROW: THE RIGHTS OF CHILDREN BORN VIA SURROGACY, SURROGACY LAW AND HUMAN RIGHTS 81 (Paula Gerber & Katie O’Byrne eds., 2015) (examining the meaning of “best interest of the child,” pointing out how this is difficult to define and often it is not required that the “best interest of the child be a single overriding consideration but rather the States Parties must promote a child centered approach by ‘asking whether the forces of any other consideration outweigh[s] it’.”).

⁷⁸ Keyes, *supra* note 75, at 28.

⁷⁹ See COMMISSION OF INDIA, *supra* note 72, at 14.

⁸⁰ See Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1017 (2010); see also Vinita Lavania, *Commercial Surrogacy In India: Exploitation or Mutual Assistance*, FERTILITY MATTERS, <http://www.iaac.ca/en/commercial-surrogacy-in-india-exploitation-or-mutual-assistance-4> (last visited Apr. 19, 2016) (discussing how surrogacy was legal in India after 2002, however there were no laws governing it).

⁸¹ *Union of India & Anr. v. Jan Balaz & Ors.* (2015) SC (India); Mortazavi, *supra* note 75, at 2274; Points, *supra* note 71. A Japanese couple, Ikufumi and Yuki Yamada, traveled to India in 2007 to find a surrogate mother to carry a child for them. Using the father’s sperm and an egg harvested from an anonymous Indian woman, the embryo was implanted into the womb of an India surrogate. The couple divorced and a month later Baby Manji was born to the surrogate mother. The father wanted to raise the child, his ex-wife who had contracted for the surrogacy, did not. When Mr. Yamada went to collect his child and arrange for it to return to Japan with him, the baby could not get a passport or exit permit because she had no legal mother listed on her birth certificate. This case was the first surrogacy case to reach India’s Supreme Court. *Id.*

⁸² Points, *supra* note 71.

⁸³ *Id.*

⁸⁴ *Id.* at 7.

⁸⁵ Surgato Mukherjee, *Legal and Ethical Issues of Commercial Surrogacy in India: An Overview*, ACADEMIA, https://www.academia.edu/1955503/LEGAL_AND_ETHICAL_ISSUES_OF_COMMERCIAL_SURROGACY_IN_INDIA_AN_OVERVIEW (last visited Apr. 20, 2016).

⁸⁶ Vandana Shukla, *Unregulated surrogacy: Law yet to deliver*, THE TRIBUNE (Jun 24, 2015, 12:50 AM), <http://www.tribuneindia.com/news/comment/unregulated-surrogacy-law-yet-to-deliver/97741.html>.

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an appearance in three subsequent drafts - 2008, 2010, and 2013.⁸⁷ However, the bill has yet to be passed by the Indian Parliament.⁸⁸ The bill addresses the rights and duties, as relates to surrogacy, in under a mere three pages; in its two-dozen enumerated points the bill addresses expectations and requirements of both the surrogate mother and the couple/individual seeking surrogacy.⁸⁹

Passed alongside the Assisted Reproductive Technologies (Regulation) Bill – 2010, is a set of Rules, which contains forms for surrogacy arrangements.⁹⁰ Sample contracts for surrogacy agreements were outlined; “Form-U” lays out a proposed contract between the patient and the surrogate.⁹¹ This form is a three page contract stating the commissioning couple, and the surrogate, are contracting to facilitate the surrogacy process under the ART (Regulations) Act; it addresses the proposed payment plan and contains basic information for all contracting parties.⁹² The contract is signed by the commissioning couple, the surrogate and her husband, if applicable.⁹³ On July 9, 2012 the Ministry of Home Affairs issued further guidelines restricting surrogacy to infertile Indian couples and to foreign couples who have been married for at least two years and have a medical visa for surrogacy in India.⁹⁴ A previous order had already barred gay and unmarried couples and single people from hiring surrogates.⁹⁵

The Department of Health Research of the Indian Ministry of Health and Family Welfare, Government of India, filed an affidavit with the Supreme Court on October 27, 2015 in an effort to ban foreigners from using surrogates in India.⁹⁶ It announced that India “does not support commercial surrogacy and the scope of surrogacy is limited to Indian married infertile couples only, and not to foreigners.”⁹⁷ This ban is being put into effect in an effort to protect women from being exploited from a lack of legal safeguards via an order from the Supreme Court of India.⁹⁸

The Indian Supreme Court states that notifications have been made regarding the prohibition of the import of human embryo via an order dated October 26, 2015.⁹⁹ The Ministry of Health and Family Welfare and the Department of Health Research have “la[id] down guidelines and instructions to be followed by Surrogacy Clinics/ART Clinics/IVF

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See generally The Assisted Reproductive Technologies (Regulation) Bill - (2010), INDIAN COUNCIL OF MED. RESEARCH (2010), <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Rules%201.pdf> [hereafter Draft ART Bill].

⁹⁰ *Id.* at 83.

⁹¹ *Id.*

⁹² *Id.* at 84.

⁹³ *Id.* at 85; Smerdon, *supra* note 9, at 42.

⁹⁴ George, *supra* note 13.

⁹⁵ *Id.*

⁹⁶ Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India).

⁹⁷ See George, *supra* note 13.

⁹⁸ See George, *supra* note 13; *Despair over ban in India's surrogacy hub*, BBC NEWS (Nov. 22, 2015), <http://www.bbc.com/news/world-asia-india-34876458>; Philip Sherwell, *India surrogacy ban dismays British couples*, TELEGRAPH (Nov. 18, 2015, 6:00 AM), <http://www.telegraph.co.uk/news/worldnews/asia/india/12001903/India-surrogacy-ban-dismays-British-couples.html>.

⁹⁹ Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India).

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Clinics etc. which offer surrogacy services.”¹⁰⁰ The Ministry of Home Affairs has banned the issuing of visas to foreign nationals intending to visit India for the purposes of commissioning a surrogacy.¹⁰¹ The Ministry of Home Affairs has issued instructions dated March 11, 2015 addressing the fact that “no exit permission should be granted ... to the child/children to be born through surrogacy to foreign nationals[.]”¹⁰² Surrogacies commissioned prior to this order shall be decided by the Foreigners Regional Registration Officers (FRROs)/Foreigners Registration Officers (FROs) on a case-by-case basis.¹⁰³

The Supreme Court of India concluded by stating that all instructions mentioned in its Order are to take immediate effect.¹⁰⁴ It states, “[i]nsofar as the banning of commercial surrogacy is concerned the stand of the Government of India is that it is opposed to commercial surrogacy.”¹⁰⁵ The previously published Guidelines remain in force until enactment of further legislature.¹⁰⁶ However, the instructions issued in the Order prevail over the provisions in the guidelines.¹⁰⁷

D. Payment for Babies

Commercial surrogacy can be very expensive, especially in the United States; the cost of surrogacy in the United States is estimated at \$100,000.00.¹⁰⁸ Commissioning couples who look to other nations for a surrogate tend to do so because the costs are significantly less than that in the United States.¹⁰⁹ The estimated cost of a surrogacy in India is approximately \$47,350.00 this cost is paid directly to the clinic.¹¹⁰ The compensation the surrogate mother

¹⁰⁰ *Id.* (Via an affidavit filed on November 4, 2015, “(ii) that the Surrogacy Clinics/ART Clinics/IVF Clinics/any centre/Genetic Counseling Centres/other clinical establishments, by whatever name they may be called, offering surrogacy services/Assisted Reproduction Services will not import human embryo for offering surrogacy services or in connection thereto.”).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* This exception also allows for a case-to-case review in situations where steps “have been initiated /taken by surrogacy clinics/ART Clinics/IVF Clinics [...] or such other establishments to commission surrogacy, including import of ‘Human Embryo’ and implantation thereof into surrogate mother or child/children born from it.” These cases will be allowed to complete the process that has already been started in an effort to avoid medical complications, however, the State Health Authorities must give permission. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Union of India & Anr. v. Jan Balaz & Ors.* (2015) SC (India). The matters discussed in the Order of the Supreme Court were adjourned to enable all contesting parties to obtain necessary instructions and is to be listed in March 2016. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Helier Cheung, *Surrogate Babies: Where can you have them, and is it legal?*, BBC NEWS (Aug. 6, 2014), <http://www.bbc.com/news/world-28679020>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Darlena Cunha, *The Hidden Costs of International Surrogacy*, THE ATLANTIC (Dec. 22, 2014), <http://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/>, (discussing how surrogacy in the United States can cost upwards of \$120,000 while a surrogacy in India is regularly cited as under \$30,000. Out of the amount surrogates are paid anywhere from \$800-\$8,000 and the clinics and staff pocket the rest).

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receives is often arbitrarily decided by the clinic.¹¹¹ On average a surrogate is paid \$5,000.00 to \$6,000.00 if she successfully carries the baby to term, and even more if she bears twins.¹¹² The rest of that money goes to the clinic and doctors.¹¹³ Even though the amount paid to the surrogate is small in comparison to the total amount one pays for surrogacy, surrogates in India depend on this money, as it is more than they would make in a year of ordinary labor.¹¹⁴ In fact, many women in India go into surrogacy looking forward to collecting their checks and moving on with their lives.¹¹⁵

A prime example of the surrogacy payment in India is the Akanksha Infertility Clinic, India's most successful fertility clinic. The payments to surrogates are usually made in installments, with the surrogate receiving \$50.00 every month during the pregnancy, \$500.00 at the end of each trimester, and the remainder upon a successful delivery.¹¹⁶ If the surrogate has a miscarriage, she keeps what she has been paid up to that point of the pregnancy.¹¹⁷ However, if at any point the surrogate chooses to abort the pregnancy – an option that is usually contractually allowed – she must reimburse the clinic and the client for all expenses.¹¹⁸

Overall, commercial surrogacy is a business that brings millions of dollars into India's economy every year.¹¹⁹ One study by an advocacy group in New Delhi, called Sama, estimated that the trade of surrogacy in India is worth over \$44 billion dollars.¹²⁰ It is estimated that annually surrogacy brings in half a billion dollars, and in 2012 it was estimated to be a \$2.3 billion dollar industry in India alone.¹²¹ Consequently, due to the low medical costs, lax laws, and poverty, many women are willing and ready to rent wombs at low compensation amounts, making India into the surrogacy capital of the world.¹²²

II. EXPLOITATION OF WOMEN THROUGH COMMERCIAL SURROGACY

Indian women are being led to surrogacy as a means of making extra income to help support their families.¹²³ These women are often in desperate situations and have no other means of making ends meet,¹²⁴ they are illiterate with a grade school education, at best, and

¹¹¹ See Aditi Malhotra & Joanna Sugden, *India's Surrogacy Industry Needs Regulation, Not a Ban, Say Women's Rights Groups*, WALL ST. J., (Nov. 17, 2015, 11:52 AM), <http://blogs.wsj.com/indiarealtime/2015/11/17/indias-surrogacy-industry-needs-regulation-not-a-ban-say-womens-rights-groups/>.

¹¹² Scott Carney, *Inside India's Rent-a-Womb Business*, MOTHERJONES (2010), <http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel?page=1>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Carney, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Nida Najar, *India Wants to Ban Birth Surrogacy for Foreigners*, N.Y. TIMES (Oct. 28, 2015), http://www.nytimes.com/2015/10/29/world/asia/india-wants-to-ban-birth-surrogacy-for-foreigners.html?_r=0.

¹²⁰ *Id.*

¹²¹ Mujgerjee, *supra* note 1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

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are not educated on the process and steps of surrogacy.¹²⁵ Ranjana Kumari, the director of the New Delhi-based Centre for Research has said, “[m]ost often, the woman doesn’t even know what she is signing, except that her womb will be used to carry a baby.”¹²⁶ Many of the rules and regulations are often not adhered to.¹²⁷ The regulations in India state that the surrogates have to be at least 21 years old; despite these regulations, families are often persuaded into letting girls as young as 16 years old become surrogates.¹²⁸ These girls are provided with fake documentation showing them as older than their actual age.¹²⁹

For example, Diksha a woman who came to the Akanksha clinic to become a surrogate describes the perspective of the women living in the dormitories through an interpreter.¹³⁰ “We miss our families, but we also realize that by being here we give a family to a woman who wants one.”¹³¹ Diksha used to be a nurse at the clinic; she left her home in a neighboring village to find work.¹³² She plans on using the money from the surrogacy to fund the education of her two school-aged children.¹³³ Even though Diksha was able to uplift herself through becoming a surrogate, many critics have said that commercialization has led to the exploitation of these women.¹³⁴ Although many of these women realize that they are helping the commissioning couple develop a family, the main reason they agree to become surrogates is for financial purposes.¹³⁵ Ranjana Kumari, a critic on commercial surrogacy agreements, has said, “If someone really has to opt for the child, somebody’s friend should offer a womb, somebody’s relative should offer the womb. Why it has to be the poor woman? It’s like organ sale.”¹³⁶

A. Case Studies

Case studies of women that interview to become surrogates in Kolkata, India, show that there are many similarities between the women that seek to be become surrogates.¹³⁷ All the women interviewed were between the ages of 22 and 35 years old.¹³⁸ Most of these women were unemployed or without a fixed job or income, and had an education level ranging from illiterate to that of a 6th grade standard.¹³⁹ All these potential women were

¹²⁵ *See id.*

¹²⁶ George, *supra* note 13.

¹²⁷ *See generally id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Carney, *supra* note 112. In the Akanksha clinic the surrogates spend their entire pregnancies living in a building together with other surrogate mothers. These dormitories claim to facilitate medical monitoring and provide the women with better living conditions than they might have back home. *Id.*

¹³¹ Carney, *supra* note 112.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Kevin Voigt, Mallika Kapur & Lonzo Cook, *Wombs for rent: India’s surrogate mother boomtown*, CNN (Nov. 3, 2013, 8:00 PM), <http://www.cnn.com/2013/11/03/world/asia/india-surrogate-mother-industry/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See Mujgerjee supra* note 1.

¹³⁸ *See id.*

¹³⁹ *See id.*

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married; some were even separated from their husbands.¹⁴⁰ Similar to the wives, the husbands of these women were mostly unemployed and illiterate as well.¹⁴¹

The main similarity between all these women was their reason for being a surrogate.¹⁴² Out of the nine women interviewed, all of them said, money was their primary motivation for becoming a surrogate.¹⁴³ While the specific financial reasons varied, from needing the money to buy a piece of land, to build a house, open shop or even being able to send their children to school, all the women showed “strength and courage” in moving forward with the process.¹⁴⁴ However, they were not without concern.¹⁴⁵ They feared having to stay away from their families, about their health and bodies post surrogacy and the stigma that is attached to the process.¹⁴⁶ These concerns did not outweigh the need for the financial gain they sought to get through becoming a surrogate.¹⁴⁷ “It seems that wombs in India are [for] rent which translates into babies for foreigners and dollars for Indian surrogate mothers.”¹⁴⁸

It became clear through the interviews with these women was that they were not fully aware of all the procedures of surrogacy.¹⁴⁹ The Guidelines provide that all clinics should have a counselor to ensure that all patients are adequately informed on what to expect from the treatment offered to them.¹⁵⁰ A perfect example of this lack of knowledge is Rita, a 27-year-old participant in this case study; when asked about her experiences she said “I am illiterate I do not understand about all the medical aspects the doctors talk about and neither do I understand English. I do not know exactly what was written in the agreement. I just know whatever they told me.”¹⁵¹ Analogously, Rina, a 28-year-old woman in this study said,

I am in a lot of pain. I cannot even move. These many injections and medicines are making me weak. I was not told about all this before. I too had my own children but then things were simpler. I do not understand why it is so complicated and painful this time.¹⁵²

Clearly, these women are not fully aware of the process of surrogacy when they agree to become surrogate mothers.¹⁵³

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See Mujgerjee, supra note 1.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See generally id.*

¹⁴⁸ COMMISSION OF INDIA, *supra note 72.*

¹⁴⁹ *See Mujgerjee, supra note 1.*

¹⁵⁰ *See THE GUIDELINES, supra note 61, at 22.*

¹⁵¹ *See Mujgerjee, supra note 1.*

¹⁵² *Id.*

¹⁵³ *See generally id.*

B. Methods Used to Attract Surrogate Mothers

Often clinics will hire agents to find women who are willing to be surrogate mothers and then refer them to their respective clinic employers.¹⁵⁴ Radha initially became involved with the clinic in Kolkata when she went to donate eggs, now she works for them referring women who want to be surrogate mothers.¹⁵⁵ She comments on how finding women who are willing to be surrogates is not an easy task, “[a]ll of them are poor and in desperate need of money.”¹⁵⁶ Radha studied till the fourth grade and is the most educated person in her family.¹⁵⁷ Additionally, she states that she would never be a surrogate herself, saying that she is afraid of the whole arrangement.¹⁵⁸

A research study on how couples around the world approach finding surrogacy services in India showed that there were many different methods to obtaining a surrogate.¹⁵⁹ Surrogates could be found in family owned nursing homes that worked as IVF centers, to highly sophisticated third-party agencies of Mumbai that provided hostels for the surrogate mothers to live in.¹⁶⁰ “The study shows, the ART industry has created another parallel industry for the poor – the sale or hire of one’s own body – which is touted as a form of social development.”¹⁶¹

The clinics have no financial incentive to ensure the health of the surrogate mother, they are getting paid to deliver a fetus, therefore there is nothing preventing them from cutting costs on the amount they pay the surrogate mother and follow-up care.¹⁶² An illustrative example can be seen with a surrogate mother named Pinky, a ghost name given to her, who died with her eight-month-old fetus, in a hospital in Mahali, India.¹⁶³ Pinky’s death left behind “a web of unanswered questions.”¹⁶⁴ She was reported to be sick for some time and her sudden death remains inconclusive.¹⁶⁵ Similarly, at the Ishwarya Fertility Clinic a young surrogate died after giving birth.¹⁶⁶ Unlike Pinky, this pregnancy and birth went as planned, however, afterward she began bleeding heavily; the ill equipped hospital was unable to handle her hemorrhaging.¹⁶⁷ In a perfunctory police investigation the fertility clinic denied any wrongdoing.¹⁶⁸ Despite the surrogate’s death, the child was delivered to the customer in

¹⁵⁴ See Voigt, *supra* note 134.

¹⁵⁵ See Mujgerjee, *supra* note 1.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See generally Deepa V., Mohan Rao, Rama, Baru, Ramila Bisht, Sarojini N. & Susan Fairly Murray, SOURCING SURROGATES. ACTORS, AGENCIES AND NETWORKS (Zubaan Publishing Services, 2013).

¹⁶⁰ Vandana Shukla, *Unregulated surrogacy: Law yet to deliver*, THE TRIBUNE (June 24, 2105, 12:05 AM), <http://www.tribuneindia.com/news/comment/unregulated-surrogacy-law-yet-to-deliver/97741.html>; citing Deepa, *supra* note 159.

¹⁶¹ Shukla, *supra* note 160; citing Deepa, *supra* note 159.

¹⁶² See generally Carney, *supra* note 112.

¹⁶³ Shukla, *supra* note 160.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Carney, *supra* note 112.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

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accordance with the surrogacy contract.¹⁶⁹ Unfortunate situations like this are often kept quiet and the surrogacy business in India continues to grow exponentially.¹⁷⁰

III. CREATING NEW STRICT REGULATIONS TO ALLOW GOVERNMENTAL CONTROL OF COMMERCIAL SURROGACY AGREEMENTS

A. Impracticality of Passing an International Agreement

Many argue that an international agreement, similar to the 1993 Hague Convention on Protection of Children and Co-Operation of Intercountry Adoption (“Hague Adoption Convention”), is needed to create consistency throughout national surrogacy law.¹⁷¹ The Hague Adoption Convention is an “international agreement to establish safeguards to ensure that inter-country adoptions take place in the best interest of the child.”¹⁷² However, this is difficult in the case of surrogacy since there are vast discrepancies in surrogacy laws across different countries.¹⁷³ Moreover, it is unlikely that countries will agree to any one set of standard.¹⁷⁴

The Hague Adoption Convention governs international adoption.¹⁷⁵ However, not all countries are parties to the Convention.¹⁷⁶ The impracticality of such a treaty lies in the fact that countries may choose to not be parties, which does not solve the problems that exist between the interactions of these countries because differences in international laws remain.¹⁷⁷ Additionally, such international treaties, like the Hague Adoption Convention, take years to come into force.¹⁷⁸ The Hague Adoption Convention concluded in May 1993,¹⁷⁹ the

¹⁶⁹ *Id.*

¹⁷⁰ Shukla, *supra* note 160.

¹⁷¹ See Kirshner, *supra* note 22, at 88 (proposing that implementation of the existing Hague Convention procedures be applied to surrogacy agreements).

¹⁷² *Hague Convention*, BUREAU OF CONSULAR AFFAIRS, <http://travel.state.gov/content/adoptionsabroad/en/hague-convention.html> (last visited Apr. 19, 2016).

¹⁷³ See Lin, *supra* note 31, at 552.

¹⁷⁴ Cheung, *supra* note 108; Lin, *supra* note 31, at 552.

¹⁷⁵ Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 32 I.L.M. 1134 (May 29, 1993) [hereinafter *Hague Adoption Convention*];

Helier Cheung, *Surrogate Babies: Where can you have them, and is it legal?* BBC NEWS (Aug. 6, 2014), <http://www.bbc.com/news/world-28679020>.

¹⁷⁶ See *Hague Convention*, *supra* note 155; see also *Hauge Convention*, FAQ (last visited Mar. 12, 2015) <https://www.hcch.net/en/faq>.

The Permanent Bureau carries out the basic research required for any subject that the Conference takes up. It also maintains and develops contacts with the National Organs, experts and delegates of Member States and the Central Authorities designated by the States Parties to the Hague Conventions on judicial and administrative co-operation, as well as with international organization's and, increasingly, responds to requests for information from users of the Conventions. *Id.*

¹⁷⁷ *Hague Convention*, *supra* note 172; see also FAQ, *supra* note 176.

¹⁷⁸ *Understanding The Hague Convention*, BUREAU OF CONSULAR AFFAIRS <https://travel.state.gov/content/adoptionsabroad/en/hague-convention/understanding-the-hague-convention.html>

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United States did not sign the treaty until 1994, and it did not enter into force in the United States until April 1, 2008.¹⁸⁰

The Bureau acknowledges that it needs to address international surrogacy and the Hague Special Convention (“Convention”) for Surrogacy was held in 2010.¹⁸¹ This Convention aims at discussing the possibility of an international treaty to control surrogacy.¹⁸² In 2015, the Permanent Bureau published an updated note.¹⁸³ The Convention met and decided that expert groups should convene and explore the feasibility of advancing work in this area.¹⁸⁴

In January 2016, the Permanent Bureau published notes from the experts’ group meeting.¹⁸⁵ The notes list three potential problems in the use of international surrogacy agreements: “(1) [d]enial of parentage and thus nationality by home state of intending parents; (2) [r]efusal to recognize foreign judgment establishing parentage; (3) [r]efusal to recognize foreign birth certificate.”¹⁸⁶ In their meetings, this experts’ group, seemed to have done extensive research on the safety and well being of children in international surrogacy agreements.¹⁸⁷ However, there is no recognition of the dangers that are posed to the women - the surrogate mothers.¹⁸⁸

(last visited Jan. 28, 2016) (discussing how adopting a child from a country that is a party to the convention is in many ways similar to adopting a child from a country that is not a party to the convention, however, there are additional protections provided to individuals conducting adoptions between countries that are parties to the convention).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Anne-Marie Hutchinson, *The Hague Convention on Surrogacy: Should we agree to disagree?*, DAWSON CORNWELL (Oct. 2012), http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf; BUREAU OF CONSULAR AFFAIRS, <http://travel.state.gov/content/adoptionsabroad/en/hague-convention.html> (last visited Apr. 19, 2016).

¹⁸² Mortazavi, *supra* note 75, at 2273.

¹⁸³ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PREL. DOC. NO 3A, THE PARENTAGE / SURROGACY PROJECT: AN UPDATING NOTE (Feb. 2015), <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>, (discussing key developments relevant to the “Parentage / Surrogacy Project” that have taken place since 2014. The Permanent Bureau recognized the work that was done and agreed that further work should continue to explore the “feasibility of drawing up a multilateral instrument.”).

¹⁸⁴ HAGUE CONFERENCE ON INTERNATIONAL LAW, CONCLUSIONS & RECOMMENDATIONS (Mar. 2015), <https://assets.hcch.net/docs/8e756bba-54ed-4d3e-8081-1e777d6950dc.pdf>, (discussing how the organization intends to proceed with issues surrounding the status of children, including issues arising from international surrogacy arrangements. An Experts’ Group will convene to explore the feasibility of advancing work in this area, by exploring the international law rules regarding the legal status of children in cross-border situations, including those born of international surrogacy arrangements. The Experts’ Group will report to the 2016 Council, it will be geographically representative and composed in consultation with Members, and the Members are encouraged to keep the Permanent Bureau updated regarding significant developments in their States in relation to legal parentage and surrogacy).

¹⁸⁵ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, BACKGROUND NOTE FOR THE MEETING OF THE EXPERT’S GROUP ON THE PARENTAGE / SURROGACY PROJECT (January 2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

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Research is being done and an international surrogacy agreement is in the works.¹⁸⁹ However, similar to the Adoption Convention, it is possible that will take many years before an agreement is available on international surrogacy that a majority of countries agree on.¹⁹⁰ This is especially true since surrogacy has shown to be a controversial issue with each nation having an individual take on the subject matter.¹⁹¹ Now that surrogacy has become a trendy and popular way for developing a family in the modern world,¹⁹² it is impractical to put the issue aside and wait for an international agreement. This is a real and current issue in India that needs to be dealt without undue delay, and it is unforeseeable that an international agreement will be able to provide assistance for the women of India in the near future.¹⁹³

B. India's ban on cross-border commercial surrogacy

There is much criticism of the recent ban regarding international commercial surrogacy agreements that the Supreme Court of India ordered.¹⁹⁴ Devi Parmar, an Indian surrogate mother has said, “[w]hat the government is doing is wrong. Are they going to come to our homes to ask us about our problems and feed us if we’re starving?”¹⁹⁵ Surrogate women have said that being a surrogate mother brings them an income far above what they could earn otherwise.¹⁹⁶ Although many aspects of being a surrogate mother in India are unregulated and lead to the exploitation of women, being a surrogate mother has become a trade that women depend on.¹⁹⁷ Becoming a surrogate mother gives these women a way to earn more money than they would by doing ten years of domestic help employment.¹⁹⁸

It is recognized that the recent ban aims to protect women from exploitation.¹⁹⁹ However, some women who have worked as surrogates say that the ban on surrogacy agreements with foreigners will actually hurt them.²⁰⁰ On average approximately 70 percent of surrogacy cases are from foreign clients.²⁰¹ An additional, 25 percent are non-resident Indians and persons of Indian origin; it is only, a mere 5 percent who are local Indian couples.²⁰² Some surrogacy clinics approximate that as much as 90 percent of surrogacy

¹⁸⁹ *Id.*

¹⁹⁰ *See generally id.*

¹⁹¹ *See* CTR. FOR SOCIAL RESEARCH, *supra* note 2.

¹⁹² *See* Rustin, *supra* note 5.

¹⁹³ *See generally* Cheung, *supra* note 108.

¹⁹⁴ *See generally* Malhotra & Sugden, *supra* note 111; *See generally* *Despair Over Ban In India's Surrogacy Hub*, *supra* note 98.

¹⁹⁵ *See generally* *Despair over ban in India's surrogacy hub*, *supra* note 98.

¹⁹⁶ Malhotra & Sugden, *supra* note 111.

¹⁹⁷ *Id.*

¹⁹⁸ George, *supra* note 13.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *India Introduces Legislation to Ban Surrogacy Tourism*, INT'L MED. TRAVEL J. (Dec. 7, 2015), <http://www.imtj.com/news/india-introduces-legislation-ban-surrogacy-tourism/>; *see generally* George, *supra* note 13.

²⁰² *Id.*

agreements come from overseas clients,²⁰³ most customers come from the United Kingdom, the United States, and Canada.²⁰⁴ With the majority of the surrogacy business coming from overseas clients, it is understandable why women, who have depended on being a surrogate mother as a source of income, are unhappy with this ban on international commercial surrogacy.²⁰⁵

The Supreme Court of India made clear that the purpose of the ban was to safeguard the rights of the surrogate mother.²⁰⁶ However, a ban on international surrogacy agreements in India may do the opposite by driving the surrogacy market underground.²⁰⁷ Here, those doctors and clinics that are successful are dependent on overseas clients for their success and are unlikely to give up because of the ban.²⁰⁸ In fact, they are likely to carry on making agreements with international couples seeking to develop a family.²⁰⁹

Moreover, there are already many underground surrogacy clinics in India.²¹⁰ As a result of this ban, foreigners traveling to India in search of starting a family are locating these clinics and paying as much as it takes to find a surrogate.²¹¹ Since surrogacy is so much more expensive in other countries, individuals are willing to take the risk of entering into a surrogacy agreement with an underground clinic in India, regardless of the recent ban.²¹² Commissioning couples do not know how they will take their future child back to the United States or even how the process will work out now that surrogacy is banned in India, but their desperation to start a family overrides these risks.²¹³

Underground medicine, also known as black market medicine,²¹⁴ thrives because there is a demand for some treatment or product.²¹⁵ This demand for surrogate mothers obviously exists as thousands of commissioning couples travel to India every year with the hopes of contracting with a surrogate.²¹⁶ The demand is present, as are the women willing to

²⁰³ Nita Bhalla and Mansi Thapliyal, *Foreigners Are Flocking To India to Rent Wombs and Grow Surrogate Babies*, BUSINESS INSIDER (Sept. 30, 2013, 6:05 AM), <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9>.

²⁰⁴ *India Introduces Legislation to Ban Surrogacy Tourism*, *supra* note 202.

²⁰⁵ *Id.*

²⁰⁶ *See* George, *supra* note 13.

²⁰⁷ Kanishka Singh, *Ban drives surrogacy-for-foreigners underground*, SUNDAY GUARDIAN LIVE (Jan. 2, 2016), <http://www.sundayguardianlive.com/investigation/2446-ban-drives-surrogacy-foreigners-underground>.

²⁰⁸ *Id.*

²⁰⁹ *India Introduces Legislation to Ban Surrogacy Tourism*, *supra* note 202.

²¹⁰ *See* Singh, *supra* note 208.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* ("We will stay here till our child is born. I don't know how we'll take the child back home. We are just desperate right now," Kate added.)

²¹⁴ Louis Alphonse Crespo, *Black Market Medicine: An Ethical Alternative to State Control*, LIBERTARIAN ALL., <http://www.libertarian.co.uk/lapubs/polin/polin054.pdf> (last visited Jan. 28, 2016) (using underground medicine and black market medicine interchangeably to describe how state control is creating a society where underground medicine expanding); Singh, *supra* note 207.

²¹⁵ *See generally* Malhotra & Sugden, *supra* note 111; *see generally* *Despair Over Ban In India's Surrogacy Hub*, *supra* note 98.

²¹⁶ *See generally* Voigt, *supra* note 134; *see generally* Louis Alphonse Crespo, *Black Market Medicine: An Ethical Alternative to State Control*, LIBERTARIAN ALL., <http://www.libertarian.co.uk/lapubs/polin/polin054.pdf> (last visited Jan. 28, 2016).

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be surrogate mothers.²¹⁷ In India hundreds of women are willing to become surrogate mothers in hopes that the paycheck that comes along with it will help make their lives a little easier.²¹⁸ This is a lethal combination. Thus, with the recent ban passed by the Indian government, it is susceptible the development of a black market for surrogacy.²¹⁹

Becoming a surrogate mother entails many medical procedures²²⁰ that range from IVF to embryo transplantation – all with the hope of resulting in pregnancy.²²¹ Overall, in a surrogacy agreement pregnancy is the goal. This often causes much joy to the commissioning couple. However, pregnancy is a time where a woman is vulnerable and susceptible to many dangers.²²² If the surrogacy agreements in India get pushed into an underground surrogacy market, it is foreseeable that women will face more harm from shifty doctors and unsafe medical treatments than it was ever possible with a legal, but unregulated market.²²³ In fact, banning international commercial surrogacy agreements may, in fact, do the opposite of what the government intended.²²⁴ The Indian government is not protecting these women from exploitation; it is leading them down the rabbit hole.²²⁵

Dr. Nayna Patel runs the Akanksha fertility clinic, one of the largest clinics in India.²²⁶ She addresses the recent ban and argues that the government should consider tough regulations instead of a ban.²²⁷ There is a large outcry against this ban from the individuals involved in the surrogacy process.²²⁸ Most acknowledging that some sort of regulatory regime is needed and that this ban is not going to protect the surrogate mothers from exploitation.²²⁹ In fact, it will harm them both by eliminating a possible source of income and potentially endangering the lives of other women who are desperate enough to participate in an underground surrogacy market.²³⁰

C. Need for Strict Regulations to Govern Commercial Surrogacy

Commercial surrogacy in India is the cause of much controversy.²³¹ In order to calm this controversy, there is a need for the government to step in. However, a ban is not the answer. This Note advocates for the implementation of strict procedures to be applied to all

²¹⁷ See generally Voigt, *supra* note 134.

²¹⁸ See generally *id.*

²¹⁹ *Id.*

²²⁰ AM. PREGNANCY ASS'N., *supra* note 27.

²²¹ *Id.*

²²² Tracy Stickler, *Health Risks*, HEALTHLINE (Dec. 17, 2014), <http://www.healthline.com/health/pregnancy/risk-factors#RiskFactors>.

²²³ See Singh, *supra* note 208.

²²⁴ See generally *id.*

²²⁵ See *id.*

²²⁶ *Despair over ban in India's surrogacy hub*, *supra* note 98.

²²⁷ See *id.*

²²⁸ See *id.*; George, *supra* note 13; *India Introduces Legislation to Ban Surrogacy Tourism*, *supra* note 201; Singh, *supra* note 207 (approximately 8,000 surrogacy clinics are currently operating illegally or underground in Delhi, India).

²²⁹ See generally Singh, *supra* note 208; George, *supra* note 13; *Despair over ban in India's surrogacy hub*, *supra* note 98.

²³⁰ Singh, *supra* note 208.

²³¹ CTR. FOR SOCIAL RESEARCH, *supra* note 2 at 27.

commercial surrogacy agreements in India. The Supreme Court of India, in its most recent order, noted that the Bill of Assisted Reproductive Technology (“The Bill”) is presently at a consultative stage.²³² This ban should be lifted and commercial surrogacy should continue to be legal for both foreigners and locals in India couples. The Bill should offer protections for all parties involved: the commissioning couple, the resulting child, and the surrogate mother. It should also provide a system for the government to track the number of surrogacies being performed; the agencies that offer such services; and the doctors, agents and other employees that facilitate ART practices.

The Bill proposes that all assisted reproductive clinics be registered with the Registration Authority.²³³ The Registration Authority would give all clinics, which satisfy the specified rules, a registration for a term of three years.²³⁴ This registration should be reported to the State Board.²³⁵ Renewal of this registration is permitted as long as all requirements continue to be met.²³⁶ No registration is granted to a clinic unless the Registration Authority has inspected the facility of the applicant.²³⁷ By structuring a governmental authority to oversee and regulate how surrogacy clinics and facilities operate would allow the government to: track the number of clinics; the number of surrogates the clinics are working with; the number of surrogate children that are result from surrogacy agreements; and the revenue that is coming out of such agreements.²³⁸ Currently, a major issue for commercial surrogacy in India is the government’s inability to track or control the surrogacy market.²³⁹ Requiring clinics to register and report to a governing body would provide the government with the power to oversee and regulate the industry.²⁴⁰

The Bill lists duties of the clinics; noting that all patients shall be tested for any diseases that may endanger the life of the commissioning couple, the resulting child, or the surrogate mother.²⁴¹ A duty of the clinic would be to provide professional counseling to patients or individuals involved in the process.²⁴² More specifically, that all patients or individuals shall be informed of the advantages, disadvantages, costs, medical side effects, risks, and the possibilities of adoption as an alternative to surrogacy to the commissioning couple.²⁴³ However, it seems not to offer similar professional counseling to the surrogate

²³² Union of India & Anr. v. Jan Balaz & Ors. (2015) SC (India).

²³³ The Assisted Reproduction Technologies Act 2010 (Ministry of Health & Family Welfare Govt. of India, New Delhi) [hereinafter The Bill]. A Registration Authority or Authorities is a group of at least six experts in assisted reproduction technology or related field that has been put together by the State Government with the advise of the National Board. The State Board has the power of setting all policies and plans for assisted reproduction in the state and consists of twelve members. The Central Government shall establish a Board known as the National Advisory Board for Assisted Reproductive Technology who shall have jurisdiction and power to discharge the functions and duties conferred or imposed on the Board by the proposed Act. *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See generally *id.*

²³⁹ See THE GUIDELINES, *supra* note 61, at xii.

²⁴⁰ See generally The Bill, *supra* note 233.

²⁴¹ *Id.* at 15.

²⁴² See *id.*

²⁴³ *Id.*

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mother.²⁴⁴ In addition to counseling the commissioning couple on the options they may have, it is crucial to ensure that the surrogate mother is aware of all her options, the risk, medical side effects, and everything else that may come along with carrying a child for a commissioning couple.²⁴⁵ In addition to professional counseling, the surrogate mother should meet with a psychologist to ensure she is entering into a surrogacy agreement of her own free will.²⁴⁶ Specifically, to ensure that she is not being exploited, or coerced into a contract.²⁴⁷

The Bill lists the rights and duties in relation to the surrogacy.²⁴⁸ These include that the agreement entered into by the commissioning couple and the surrogate mother shall be legally enforceable.²⁴⁹ All expenses related to the surrogacy up until the child is born shall be covered by the commissioning couple.²⁵⁰ The Bill states:

The commissioning parent(s) shall ensure that the surrogate mother and the child she deliver are appropriately insured until the time the child is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of the surrogacy.²⁵¹

Although this regulation appears standard for both commercial and altruistic surrogacies, this is of the utmost importance.²⁵² Ensuring that all medical costs resulting from issues, complications, post pregnancy examinations, and any psychological assistance the surrogate may need as a result of the surrogacy lay with the commissioning couple will guarantee that the mother is properly taken care of post surrogacy. There have been stories in news articles of surrogates dying post surrogacy as a result of complications resulting from the pregnancy.²⁵³ Additionally, the clinics and facilities that help arrange these surrogacy agreements have incentives and duties placed on them by the Regulations Authorities that ensure they have a vested interest in ensuring the health of the surrogate mother post-pregnancy.²⁵⁴ After the surrogacy is complete, these facilities have been paid and have no interest in protecting the wellbeing of the surrogate mother.²⁵⁵ The Regulations Authorities would track the status of the surrogate mothers post-delivery, to ensure compliance with the proposed regulations. Any clinics or facilities where an excessive number of these women have post-delivery complications that are not properly dealt with should have their registration re-evaluated, and a forum should be made available to the public warning patients. The health of the surrogate women is of great importance; these women are already

²⁴⁴ See generally *id.*

²⁴⁵ See generally Stickler, *supra* note 223.

²⁴⁶ The Bill, *supra* note 233.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ The Bill, *supra* note 233.

²⁵² See generally *id.*

²⁵³ See Carney, *supra* note 112.

²⁵⁴ See generally Mujgerjee, *supra* note 1.

²⁵⁵ See generally *id.*

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putting their lives into some risk by agreeing to be surrogate mother.²⁵⁶ It should be a priority that their health is protected both pre-pregnancy, during pregnancy and post-pregnancy.

The Bill lists that the surrogate mother may receive compensation for her services, which is the commercial aspect of the surrogacy.²⁵⁷ The Regulation Authorities should set some standards regarding minimums that a surrogate mother is entitled to in a commercial surrogacy. As mentioned previously, on average, the commissioning couple pays the clinic \$47,350.00, with the surrogate mother receiving between \$5,000.00 and \$6,000.00.²⁵⁸ This seems like a small slice of the pie for the woman who is actually carrying the child for nine months, and in many instances giving up nine months of her life to live in a communal home for the duration of the pregnancy.²⁵⁹ In some instances, it has been recorded that a surrogate gets as little as \$800.00 for her time.²⁶⁰ Surrogate mothers need protections, similar to a minimum wage set by the federal government to protect workers;²⁶¹ surrogate mothers need set minimums to ensure they are not being taken advantage of.

No woman shall enter into a surrogacy arrangement unless she is between the ages of 21 and 35 years of age.²⁶² The birth certificate shall have the names of the commissioning couple as the parents.²⁶³ The commissioning couple shall be legally bound to accept custody of the child.²⁶⁴ Information about the surrogate shall be kept confidential and shall not be disclosed to anyone other than a database for the Department of Health Research.²⁶⁵ Furthermore, no clinic shall provide information regarding the surrogate mother or potential surrogate mothers to any person.²⁶⁶ This is of particular importance to the woman of India, as there is a negative stigma associated with surrogacy and many surrogates may not want this information disclosed.²⁶⁷

The Indian government should re-evaluate the recent ban for commercial surrogacy agreements for foreigners. It should pass stricter regulations to govern commercial surrogacy. The Assisted Reproductive Technologies (Regulation) Bill presents a great start to regulations that would ensure the wellbeing of surrogate mothers, children resulting from surrogacy agreements, and the commissioning parents.²⁶⁸ The Bill should be past propyl with a few tweaks to ensure that the surrogate mother has proper protections. These protections need to be offered in the form of mandatory psychological evaluations prior to signing a surrogacy agreement, during the entire pregnancy, and post medical and psychological care.²⁶⁹ The industry needs to be regulated by a controlling governmental body, in addition to tracking the

²⁵⁶ Stickler, *supra* note 222.

²⁵⁷ See The Bill, *supra* note 233.

²⁵⁸ Cheung, *supra* note 108; Carney, *supra* note 112.

²⁵⁹ Carney, *supra* note 112.

²⁶⁰ Cunha, *supra* note 110.

²⁶¹ Fair Labor Standards Act of 1938: Maximum Struggle For A Minimum Wage, United States Department of Labor (last visited Jan. 28, 2016), <http://www.dol.gov/general/aboutdol/history/flsa1938>.

²⁶² The Bill, *supra* note 233, at 26.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See Mujgerjee, *supra* note 1; The Bill, *supra* note 233.

²⁶⁸ The Bill, *supra* note 233.

²⁶⁹ See generally Brugger, *supra* note 8.

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number of clinics and facilities and their operations,²⁷⁰ including the number of surrogacies and profits made from such arrangements. The government should track the health of women post-pregnancy to ensure the clinics are offering proper treatment to them following the birth of the resulting child.²⁷¹

In addition, the Regulations Authorities need to set some sort of minimum for the amount a surrogate can receive for her services; the minimum should be a percentage of the total contracted amount.²⁷² In India, surrogacy is sometimes referred to as renting-a-womb, and women are offering their bodies multiple times and most often they do this for the income.²⁷³ If this is becoming a sort of trade, the profits these women gather from such agreement need to be regulated in a manner that is less arbitrary, especially since they are doing bulk of the work in the process.²⁷⁴

IV. CONCLUSION

In recent years India has become a hub for international commercial surrogacy.²⁷⁵ Fifteen percent of couples around the world are infertile, and surrogacy is a growing trend with couples looking to develop their families.²⁷⁶ India's lax surrogacy laws, low costs and the number of woman willing to become surrogate mothers have made India the hot destination for surrogacy.²⁷⁷ However, with thousands of couples traveling to India yearly in search of surrogate mothers, clinics began to mushroom.²⁷⁸ Lack of regulations on the issue of surrogacy, along with a lack of protections for surrogate mothers, brought forth many ethical issues involved with this practice.²⁷⁹

The Supreme Court of India issued an order in November 2015 banning commercial surrogacy for foreign couples.²⁸⁰ The court said the ban was put into place to stop the exploitation of women in India.²⁸¹ However, it has been highly criticized.²⁸² A ban is not the answer, as it will potentially lead to the expansion of an underground/black market for

²⁷⁰ THE GUIDELINES, *supra* note 61, at xii.

²⁷¹ Carney, *supra* note 112; Malhotra & Sugden, *supra* note 111.

²⁷² Carney, *supra* note 112.

²⁷³ *Id.*

²⁷⁴ *Id.* (Usha Smerdon, a lawyer who runs a U.S. based adoption reform group called Ethica has been quoted saying Surrogacy is a form of labor," he further explains that "it's an exploitative one, similar to child labor and sweatshops driven by Western consumerism ... I challenge the notion that within these vastly differential power dynamics that surrogates are truly volunteering their services, that hospitals are operating aboveboard when driven by a profit motive." Amit Karkhanis, a prominent surrogacy attorney has offered his opinion: "Surrogacy is a type of employment, plain and simple. Foreigners are not coming here for their love of India. They are coming here to say money.").

²⁷⁵ See Lin, *supra* note 31, at 553; THE GUIDELINES, *supra* note 61, at xii.

²⁷⁶ *Mother or nothing: the agony of infertility*, WORLD HEALTH ORG. (last visited Mar. 14, 2016) <http://www.who.int/bulletin/volumes/88/12/10-011210/en/>.

²⁷⁷ Lin, *supra* note 31, at 553; see Union of India & Anr. v. Jan Balaz &Ors. (2015) SC (India).

²⁷⁸ See THE GUIDELINES, *supra* note 61, at xii.

²⁷⁹ See *id.*

²⁸⁰ Union of India & Anr. v. Jan Balaz &Ors. (2015) SC (India).

²⁸¹ See George, *supra* note 13.

²⁸² See Points, *supra* note 71.

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surrogacy that will be even more dangerous to the woman of India.²⁸³ This Note suggests that the government lift the ban and pass strict regulations protecting surrogate mothers.

²⁸³ See generally George, *supra* note 13.