

COMMERCIAL SURROGACY:
IS REGULATION NECESSARY TO MANAGE THE INDUSTRY?

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The 2007 Assisted Reproductive Technology Report indicated that as of 2002, 2 percent of women of reproductive age had fertility-related medical appointments.¹ Over 1 percent of all infants born every year in the United States are conceived using Assisted Reproductive Technology (ART).² Thus far, approximately four million people have been born following *in vitro*

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1. CENTERS FOR DISEASE CONTROL AND PREVENTION, ET. AL., 2007 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2009) [hereinafter ART REPORT], available at http://www.cdc.gov/art/ART2007/PDF/COMPLETE_2007_ART.pdf.

2. *Id.* at 15.

fertilization.³ It has been estimated that more than 10 percent of couples worldwide are infertile.⁴ In 2010, the Nobel Peace Prize for Physiology or Medicine was given to the inventor of *in vitro* fertilization, Robert G. Edwards.⁵ ART success rates were tracked over a nine-year period from 1996 to 2005,⁶ and the number of ART cycles performed went from over 64,000 in 1996 to over 134,000 in 2003.⁷

With more people using commercial surrogacy, there is a considerable amount of legal complications resulting from inadequate laws are expanding. This paper will examine discrepancies in laws internationally and domestically, and discuss how these incongruences are being addressed. Part I introduces Assisted Reproductive Technology, specifically surrogacy and then examines the current state of surrogacy in several countries. Part II discusses the concerns that a legislative body should take into consideration when developing regulations concerning commercial surrogacy, such as the ethical, legal, and health care implications involved when determining whether and how to regulate the surrogacy industry. Part III examines the policies regarding commercial surrogacy that are currently at play at the international level, how these policies are inadequate in addressing the policy concerns addressed in Part II, and what possible solutions are available to improve uniform regulation. Part IV examines, at the domestic level, the current state policies regarding surrogacy contracts and state regulation, how these policies do not adequately address the policy concerns discussed in Part II, and what the possible approaches are in achieving a more uniform means of regulating commercial surrogacy within the United States among the several states. Finally, Part V suggests ways to achieve a more uniform means of regulating commercial surrogacy firstly at the international level and more specifically within the United States.

INTRODUCTION

Assisted Reproductive Technology (ART) is defined by the Center for Disease Control (CDC) as including all fertility treatments in which both eggs and sperm are handled.⁸ The CDC's definition of ART does not include artificial insemination or medicines women use to increase egg production.⁹ This is different from the Uniform Parentage Act, which does define

3. Press Release, The Nobel Assembly at Karolinska Inst., Nobel Assembly Awards Nobel Prize in Physiology or Med. 2010 to Robert G. Edwards (Oct. 4, 2010) available at http://www.nobelprize.org/nobel_prizes/medicine/laureates/2010/press.pdf.

4. *Id.*

5. *Id.*

6. Judith Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 27 (2008).

7. *Id.*

8. Assisted Reproductive Technology Report, 3 (2007), available at http://www.cdc.gov/art/ART2007/PDF/COMPLETE_2007_ART.pdf.

9. *Id.*

intrauterine insemination as a form of Assisted Reproduction.¹⁰ The CDC asserts that the most commonly used form of ART is in vitro fertilization (IVF).¹¹ IVF is the process where an egg is taken from an ovary and is fertilized by sperm in a lab. Then, the fertilized egg is implanted in the woman's uterus.¹²

Aside from IVF, there are other types of ART. Surrogacy, one type of ART, is the "process of carrying and delivering a child for another person".¹³ There are two basic types of surrogacy: traditional and gestational.¹⁴ When a surrogate uses her own eggs for fertilization, this is considered traditional surrogacy.¹⁵ Gestational surrogacy occurs when the surrogate is a host for an implanted embryo.¹⁶ The surrogacy agreement is labeled as altruistic when the surrogate mother¹⁷ receives no compensation or child support in return.¹⁸ Commercial surrogacy occurs when a woman is paid monetary compensation or child support for her services as a gestational surrogate.¹⁹

The statistics previously detailed show an increasing use of ART for couples that are suffering from fertility issues. It is becoming more commonplace for couples to turn to different types of ART to be able to have children of their own.²⁰ Infertility stigma, which has discouraged treatment-seeking by many infertile couples, has been shifted by three elements. First, there is an increased acknowledgment that infertility is a medical condition.²¹ Second, the growing number of same-sex couples and single individuals using ART has paved the way for other prospective unconventional parents to have access to assistance with their reproduction.²² Finally, there is an increasing number of third party participants – egg donors and gestational carriers.²³ Although statistics on the number of surrogacy arrangements are incomplete, surrogacy agencies claim that the number of people involved in gestational

10. UNIF. PARENTAGE ACT § 102 (amended 2002), 9B U.L.A. 303 (2000).

11. Centers for Disease Control and Prevention, *Assisted Reproductive Technology (ART)*, available at <http://www.cdc.gov/art/>.

12. Mayo Clinic Staff, *In Vitro Fertilization (IVF): Definition*, MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, (Apr. 22, 2011), <http://www.mayoclinic.com/health/in-vitro-fertilization/MY01648>.

13. BLACK'S LAW DICTIONARY, SURROGACY (9th ed. 2009).

14. Rosemarie Tong, *Surrogate Parenting*, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, (Oct. 21, 2010) <http://www.iep.utm.edu/surr-par/>.

15. *Id.*

16. *Id.*

17. For the purposes of this paper, surrogate mother and gestational carrier will be used interchangeably.

18. *Assisted Reproductive Technology (ART) Glossary*, REPRODUCTIVE TECHNOLOGY COUNCIL, <http://www rtc.org.au/glossary/index.html> (last visited Sept. 25, 2011).

19. Ruby L. Lee, *New Trends in Global Sourcing of Commercial Surrogacy: A Call For Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 277 (2009).

20. Daar, *supra* note 6, at 27, 30.

21. *Id.* at 30.

22. *Id.*

23. *Id.*

surrogacy has increased in recent years.²⁴ The Director of Organization of Parents Through Surrogacy has approximated that 28,000 traditional and gestational surrogacies have occurred since 1976.²⁵ It is approximated that 1,500 to 2,000 surrogate/contracted babies are born in the United States every year.²⁶ Because the area of ART affects such a vast number of children and parents, it is important to examine the industry and address its complications as well as its advantages.

I. LEGISLATIVE POLICY CONCERNS IN THE UNITED STATES AND ABROAD

In order to properly regulate commercial surrogacy, legislatures have to factor and balance legal and ethical considerations. These concerns include such issues as whether it is considered distasteful for women to receive compensation for their reproductive services and whether the parties involved are able to properly protect their interests when entering into a surrogacy. These considerations must be balanced against the freedom to contract and the paternalistic view that women are unqualified to make the decision to become surrogates on their own. Additionally, it is important to consider the consequences when people are free to forum shop and decide which jurisdiction best fits their needs. All of these interests must be considered by legislatures as the decision of whether to regulate the commercial surrogacy industry arises.

A. *Ethical Concerns*

The moral implications of commercial surrogacy are intensely debated.²⁷ When deciding whether to allow or prohibit commercial surrogacy and surrogacy contracts, legislatures disagree on whether the industry is in alignment with the morals in their respective cultures. Critics refer to the practice as a form of prostitution or slavery and refer to the surrogate mothers as “baby machines.”²⁸ The practice of commercial surrogacy has been called a “reproductive supermarket.”²⁹ Supporters say that the decision to use reproductive technology are given the same level of constitutional protection as other procreation decisions.³⁰ They point out that decisions made by competent

24. National Partnership for Women & Families, *The Daily Report: New York Times Magazine Examines Infertility, Surrogacy*, WOMEN’S HEALTH POLICY REPORT (Dec. 1, 2008), http://www.nationalpartnership.org/site/News2?news_iv_ctrl=-1&abbr=daily2_&page=NewsArticle&id=14327.

25. *Id.*

26. *Id.*

27. Thomas Wm. Mayo, *Commercial Surrogacy*, 1 HEALTH L. PRAC. GUIDE, § 15:8 (2011).

28. *Id.*

29. Katherine Drabiak, Carole Wegner, Valita Fredland & Paul R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call For Uniformity*, 35 J. L. MED. & ETHICS 300, 303 (2007).

30. Mayo, *supra* note 27.

adults about reproduction and their desire to have children need to be accorded respect.³¹ One doctor's work has been criticized as "renting a womb," but she considers it to be the equivalent of "donating a womb."³²

One reason for the debate is the social stigma associated with receiving compensation for reproductive services.³³ Women in the United States who take part in surrogacy for monetary gain are looked down upon because there is a belief in that children are priceless and that to receive money in return is distasteful.³⁴ Courts in the United States have addressed this belief found throughout American culture. In 1988, the Supreme Court of New Jersey addressed commercial surrogacy in the case, *In the Matter of Baby M*. In this case, the court considered the moral implications encompassing commercial surrogacy.³⁵ *Baby M* involved a surrogacy contract between the biological father and the surrogate mother.³⁶ The contract included terms that terminated the parental rights of the surrogate mother while providing her with compensation.³⁷ The court noted that without monetary compensation, surrogacy probably would not survive.³⁸ However, the use of money to attract surrogate mothers so that they may become pregnant creates potential health risks.³⁹ Another issue the court looked at is the suitability of the parents.⁴⁰ In an adoption, the mother is able to give the child up to an agency who then finds parents who are best suited to take care of the child.⁴¹ With commercial surrogacy, the child is often given to the parents who are willing to pay the most money to the surrogate.⁴² Essentially, the court equated commercial surrogacy with taking advantage of a woman's financial distress in order to take her child.⁴³

On the other hand, many women who take part in surrogacy arrangements claim that their reasons for doing so have nothing to do with money.⁴⁴ Some authors suggest that surrogacy is a way to connect a woman's need for paid employment with the desire to define herself as a female and a mother.⁴⁵ One

31. *Id.*

32. Lee, *supra* note 19, at 279.

33. Drabiak, *supra* note 29, at 305.

34. *Id.*

35. *In re Baby M*, 537 A.2d 1227, 1250 (N.J. 1988).

36. *Id.* at 1235.

37. *Id.*

38. *Id.*

39. *Id.*

40. *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988).

41. *Id.*

42. *Id.*

43. *Id.*

44. Drabiak, *supra* note 29, at 303-304.

45. *Id.* at 304. See also HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 57 (1994); Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*. 61 J. SOC. ISSUES 21, 30 (2005).

surrogate stated that she “wanted to do something good and worthwhile.”⁴⁶ Some surrogates describe it as a way to “give the ultimate gift of life to another couple.”⁴⁷ In Prince Edward Island, Canada, a couple was able to have a second child through a gestational carrier.⁴⁸ The gestational carrier wanted to be a surrogate because she loved being pregnant and always wanted to be part of the surrogacy process.⁴⁹ The couple and the surrogate were able to communicate their interests, discuss what each party wanted out of the process, and come to an agreement that suited both parties.⁵⁰

Another moral issue debated is the inability of surrogate mothers and sometimes commissioning parents to properly protect their interests in the agreement. A concern is that a woman will enter into a surrogacy agreement, because there is a large amount of money involved, without knowing the full extent of the physical and psychological effect it will have on her.⁵¹ Rich couples may intentionally or unintentionally take advantage of poorer women by offering them a sum of money that she will not be able to refuse.⁵² Without independent representation, surrogates may be vulnerable to manipulation and may accept an unfair price or contract term in response to pressure or out of a lack of understanding.⁵³ Without someone assisting the surrogate in negotiating contract terms, the surrogate will likely be forced to bear the full weight of the risks involved in the agreements.⁵⁴ Surrogacy agencies may attempt to take advantage of financially desperate potential surrogates and child-desperate parents so to reduce the bargaining power each party has.⁵⁵

Conversely, the idea that women are unable to contract freely is argued as being paternalistic.⁵⁶ The “thought that commercial surrogacy should be banned because the poor working women who mostly choose surrogacy are too incompetent to be entrusted to make their own decisions in this sphere has an ugly, elitist sound.”⁵⁷ It is maintained that the women involved in surrogacy contracts would be exploited more by this paternalistic idea than they would by

46. Drabiak, *supra* note 29, at 304.

47. *Id.* at 305.

48. Mary McKay, *N.B. Surrogate Helps Complete Island family: P.E.I. Couple Grateful for Reproductive Technology and Caring ‘Gestational Carrier,’* TIMES & TRANSCRIPT, October 16th, 2009, at B2, available at <http://timestranscript.canadaeast.com/lifetimes/article/826282>.

49. *Id.*

50. *Id.*

51. Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L L. 1429, 1443-44 (2009).

52. *Id.*

53. *Id.* at 1459.

54. *Id.*

55. Drabiak, *supra* note 29, at 301.

56. Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 41 (2000).

57. *Id.*

“donating their womb.”⁵⁸ Just because surrogate mothers and the intended parents have potentially unequal bargaining power does not mean that the surrogate mother should be prevented from entering surrogate agreements altogether.

B. Legal Concerns in the United States

Aside from having conflicting views regarding the morality of the surrogacy process, legislatures are concerned with the process' legality. A contract, either oral or written, is involved in every surrogacy arrangement. The legal issues that arise with the differences in the laws regarding the legality of surrogacy contracts are troubling. States have different policies regarding altruistic and commercial surrogacy. Some surrogacy agencies are able to discover which states have the most favorable surrogacy laws and choose to avoid those states that would inhibit their abilities to provide surrogacy services.⁵⁹ This gives surrogacy agencies a higher level of bargaining power over biological parents and surrogate mothers in the contract. Of the cases that discuss the different aspects of surrogacy, none fully discuss the “inequities of the parties' decision-making authority.”⁶⁰ Only a few states have addressed the issue of surrogacy within their legislation, and have come up with different conclusions.⁶¹ This gives agencies, surrogates, and adoptive parents the ability to contract for and carry out the surrogacy arrangement in whatever state best suits their needs. In one case study, a New Jersey school teacher hired a lawyer in Indiana who found a surrogate in North Carolina.⁶² The lawyer and the surrogate met in Indiana to execute the surrogacy agreement and complete an adoption to transfer parental rights.⁶³ Under Indiana law, an adopter must be a citizen of the state unless he or she is a genetic parent or the child is difficult to place.⁶⁴ Without permanent disabilities or other severe medical problems, the twins could not be categorized as hard to place.⁶⁵ Although the New Jersey school teacher was reported to be the father, he was unable to establish paternity.⁶⁶ This case study illustrates how parties to surrogacy contracts are able to bypass state laws that are unfavorable to those involved. It also demonstrates how the courts look to adoption statutes to guide them on parentage issues because they are unfamiliar with the surrogacy process.

Another issue often raised with the agreements is whether the surrogate mother and the parents understand the terms of the contract. In *Baby M*, the surrogate mother did not receive proper legal advice or counseling before

58. *Id.*

59. Drabiak, *supra* note 29, at 301.

60. *Id.* at 302.

61. *Id.*

62. *Id.* at 300.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

signing the agreement with the commissioning father.⁶⁷ An infertility center conducted a psychological evaluation of the surrogate, but ignored warning signs that indicated that the mother would have difficulties surrendering the child.⁶⁸ Without knowing the extent of the bond she would feel towards the child, informed consent could never be given prior to birth.⁶⁹ It is argued by one scholar that women who enter these agreements could never really give informed consent.⁷⁰ One solution is to limit surrogacy to those women who have already carried a child and have the personal experience to understand what they are giving up.⁷¹ This is assuming that a woman is incapable of giving informed consent without having a child of her own first.

Conversely, just because some women regret their decision to enter the surrogacy agreement does not mean that all women will regret entering such agreements. One author compares gestational surrogacy to a contract to undergo any other type of long-term, possibly dangerous venture.⁷² It is not exploitative to force someone to go through with a contract that they have knowingly undertaken.⁷³ Women do not need to be protected from themselves, as they are capable of making their own decisions and accepting responsibility for the risks involved in those decisions.⁷⁴ As one commentator pointed out, being a gestational carrier is a choice so it is not exploitative for those who wish to take part in it.⁷⁵

C. *Conflicting Laws Among Foreign Countries*

The issue with conflicting laws does not end between states, in fact, this issue has worldwide implications because contract laws vary between countries as well. One example is a case where twin babies were stuck in India with their surrogate mother.⁷⁶ The parents of the children were German citizens, but the twins were unable to receive German passports because Germany does not recognize surrogacy as a type of parenthood.⁷⁷ At the same time, India refused

67. *Baby M*, 537 A.2d at 1247.

68. *Id.*

69. *Id.* at 1247-48.

70. Molly Walker, *Precommitment in Free-market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 330 (2005).

71. See 750 ILL. COMP. STAT. 47/20 (2005). Illinois has chosen to require that the surrogate mother have at least one child of her own before a surrogacy contract will be valid.

72. Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 165 (2001).

73. *Id.*

74. *Id.* See also, John Dwight Ingram, *Surrogate Gestator: A New and Honorable Profession*, 76 MARQ. L. REV. 675, 683-85 (1993).

75. Ingram, *supra* note 74, at 684-85.

76. Hilary Brenhouse, *India's Rent-a-Womb Industry Faces New Restrictions*, TIME WORLD (June 5, 2010), <http://www.time.com/time/world/article/0,8599,1993665,00.html>.

77. *Id.*

to grant citizenship to surrogate-born children conceived by foreigners.⁷⁸ Another example took place in the Netherlands in 1995.⁷⁹ Polish women were brought to the Netherlands to serve as surrogates to infertile couples.⁸⁰ Although the Netherlands had banned commercial surrogacy, infertile couples still chose to partake in the recruitment of Polish women to engage in surrogacy arrangements.⁸¹ Without international regulation protecting these women and the parents desiring a surrogacy arrangement, the potential for exploitation is elevated.⁸² With the increasing demand for surrogate mothers in all countries, it is necessary to implement a uniformed regulation of commercial surrogacy to avoid situations like these where parties attempt to “forum shop” between states and countries that have the least restrictions and that leave the children and the parties without adequate security in the laws.

With all of the moral and legal considerations to take into account, it is easy to see why confusion abounds within the legal system of the United States and among different countries. Law makers have to balance a woman’s freedom to contract with the desire to protect those that have unequal bargaining power.

D. Discrepancies in Health Care Policies

Health care is an important concern for the legislature to address because couples and gestational mothers are turning to insurance companies to absorb the expenses that go along with surrogacy. The costs associated with ART are often over \$10,000.⁸³ With these high prices, it is difficult for many couples to afford infertility treatments. Moreover, the ABA Model Act requires that adequate provisions are made for “all reasonable health-care expenses associated with the gestational agreement until the birth of the child”.⁸⁴ Including regulation regarding health care along with contractual regulation will help prevent further confusion in the area by addressing the issue upfront.

Israel, a country in which the practice of surrogacy is highly regulated, incorporates health care plans in its comprehensive system. All citizens of Israel are entitled to a basic package of benefits under the National Health

78. *Id.* The children were eventually allowed to go to Germany after a drawn-out legal battle over inter-country adoptions. *Id.*

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

80. *Id.*

81. *Id.*

82. *Id.* at 330-31.

83. Debra Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J. L. SCI. & TECH. 41, 49 (2009).

84. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 703(2)(d) (February 2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

Insurance Law.⁸⁵ Israel's basic package covers *in vitro* fertilization treatments for married and single women for up to two births.⁸⁶ Israeli women are eligible for unlimited cycles of *in vitro* treatments until those two births are achieved.⁸⁷ This is linked to Israel's widespread acceptance of surrogacy and their "pro-natalist" tendencies.⁸⁸ Israel has formed a system to protect all those involved in the surrogacy process from its potential effects.⁸⁹

Not all countries are as willing to include ART procedures within their health care plans because of the likelihood that the cost of health insurance would increase, creating a larger group of those who will be unable to afford even basic health care plans. In the United States, where there is little insurance coverage for ART, only half of all women with infertility seek treatment.⁹⁰ Conversely, Finland has about 67 percent of its women with fertility issues seeking treatment.⁹¹ The Netherlands rate is at 86 percent, and the United Kingdom is between 72 and 95 percent.⁹² These European countries are all developed countries with national health care systems that cover at least some forms of infertility treatment.⁹³ The European model incorporates fertility treatments in its health care system because infertility is seen as a medical problem.⁹⁴ The United States, on the other hand, does not follow this principle. Currently, only a few states have addressed the necessity of health plans to include infertility treatments.⁹⁵ The following are a list of states that have addressed infertility treatments in their insurance conditions:⁹⁶

Arkansas: Requires health care to cover *in vitro* fertilization.⁹⁷

California: Requires health care coverage for infertility, but not *in vitro*. Infertility may refer to the inability to carry a pregnancy to

85. Ellen Waldman, *Cultural Priorities Revealed: The Development And Regulation Of Assisted Reproduction In The United States And Israel*, 16 HEALTH MATRIX 65, 82 (2006).

86. *Id.*

87. F. Simonstein, *Pressures, On Women To Reproduce And The Drive Towards Assisted Reproductive Technologies*, 25 MED. & L. 355, 359 (2006).

88. *Id.*

89. *Id.* at 293.

90. Daar, *supra* note 6, at 37.

91. *Id.*

92. *Id.*

93. *Id.*

94. Daar, *supra* note 6, at 37.

95. Spar, *supra* note 83, at 68.

96. *State Laws Related to Insurance Coverage for Infertility Treatment*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14391> (last updated April 2011).

97. ARK. CODE ANN. §§ 23-85-137, 23-86-118 (2004 & Supp. 2011).

term for a year or more. Infertility treatment refers to diagnosis and tests, medication, surgery and gamete intrafallopian transfer.⁹⁸

Connecticut: Requires health insurance to provide coverage for medically necessary expenses in the diagnosis and treatment of infertility – including in vitro.⁹⁹

Hawaii: In order to qualify for in vitro fertilization procedures, the couple must have a history of infertility for at least five years or if the infertility is due to a medical condition.¹⁰⁰

Illinois: If the policy provides pregnancy-related benefits, it must provide coverage for the diagnosis and treatment of infertility. This includes several types of ART.¹⁰¹

Maryland: Prohibits certain health insurers that provide pregnancy-related benefits from excluding benefits for all outpatient expenses arising from in vitro fertilization procedures performed.¹⁰²

Massachusetts: Require general insurance policies and other health organizations that provide pregnancy-related benefits to also provide coverage for the diagnosis and treatment of infertility, including in vitro fertilization.¹⁰³

Minnesota: Specifies that medical assistance shall not provide coverage for fertility drugs when specifically used to enhance fertility.¹⁰⁴

Montana: Requires health maintenance organizations to provide health services on a prepaid basis; includes infertility services.¹⁰⁵

New Jersey: Requires health insurers to provide coverage for medically necessary expenses incurred in diagnosis and treatment of infertility, including medications, surgery, in vitro fertilization, artificial insemination, and several types of ART.¹⁰⁶

98. CAL. INS. CODE § 10119.6 (West 2005).

99. CONN. GEN. STAT. §§ 38a-509, -536 (2006).

100. HAW. REV. STAT. §§ 431:10A-116.5, 432.1-604 (2003).

101. 215 ILL. COMP. STAT. 5/356m (1997).

102. MD. CODE ANN., INS. § 15-810 (Lexis Nexis 2006).

103. MASS. ANN. LAWS ch. 175, § 47H (Lexis Nexis 2008); ch. 176A, § 8K; ch. 176B, § 4J ch. 176G, § 4; 211 MASS. CODE REGS 37.05 (2010).

104. MINN. STAT. ANN. § 256.B.0625 subd. 13(a) (West 2010 & Supp. 2011).

105. MONT. CODE ANN. § 33-31-102(2)(h)(v) (2011).

106. N.J. STAT. ANN. §17:48-6x (West 2008); § 17:48A-7w; § 17:48E-35.22; § 17B:27-46.1x.

New York: Prohibits individual and group health insurance policies from excluding coverage for certain medical expenses that are otherwise covered by the policy solely because the medical condition results in infertility.¹⁰⁷

Ohio: Requires health maintenance organizations (HMOs) to provide basic health care services, which include infertility services, when medically necessary.¹⁰⁸

Rhode Island: Requires any contract or policy of health insurance and health maintenance organizations to provide coverage for medically necessary expenses for the diagnosis and treatment of infertility. Rhode Island includes *IVF* coverage.¹⁰⁹

West Virginia: Requires health insurers to cover basic health care services, including infertility services.¹¹⁰

Only fourteen states required some form of coverage of ART.¹¹¹ Of these states that require coverage, only twelve require coverage of infertility services while the other two states require that insurance companies simply offer coverage.¹¹² Only ten of these twelve states mandate coverage of IVF.¹¹³ California and New York are two states that allow IVF to be excluded from coverage.¹¹⁴ California and Connecticut, among other states, allow religiously affiliated employers to be excused from coverage of infertility services if it is not consistent with their beliefs.¹¹⁵

While the United States still has problems with health plans, including coverage, because states are reluctant to add statutes regarding ART, there are countries that are yet to start considering the revision of health plans as a possible solution to this issue. India, for instance, has a national health plan that is extremely insufficient when compared to its economic growth.¹¹⁶ People from India suffer from diseases that are eradicated from most other parts of the world, and Indian women have almost no postnatal care.¹¹⁷ Currently, the

107. N.Y. INS. LAW § 3216 (13) (McKinney 2006); § 4303(a)(1)(E).

108. OHIO REV. CODE ANN. § 1751.01(A)(1)(h) (LexisNexis 2008).

109. R.I. GEN. LAWS §§ 27-18-30, -19-23, -20-20, -41-33 (2008); see *State Laws Related to Insurance Coverage for Infertility Treatment*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14391> (last updated April 2011).

110. W. VA. CODE ANN. § 33-25A-2 (Lexis Nexis Supp. 2011).

111. Spar, *supra* note 83, at 52.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Simon Robinson, *India's Medical Emergency*, TIME MAGAZINE WORLD (May 1, 2008), <http://www.time.com/time/magazine/article/0,9171,1736516,00.html>.

117. *Id.*

country has no basic infrastructure to ensure that its citizens receive clean water, power, a sewage systems, or immunizations.¹¹⁸ India is the world leader in outsourced pregnancies,¹¹⁹ and only one in ten citizens of India has any form of health insurance.¹²⁰ According to a recent National Family Health Survey, half of India's children remain at risk of "health problems such as stunted growth, mental retardation, and increased susceptibility to infectious diseases."¹²¹ Even with these problems, there is hope for improvement. The Indian government has indicated that it will increase its spending on public health from 1 percent of its GDP to 3 percent by 2010.¹²² In addition, the Assisted Reproductive Technologies (Regulations) Bill has instituted a duty on the couple seeking a surrogate to pay all insurance expenses the surrogate may incur relating to the pregnancy.¹²³

Infertility needs to be treated as a medical problem, as it is in Europe and be incorporated into the health care system.¹²⁴ Without this coverage, the U.S. will not truly be able to address the inequalities amongst its states' statutes.¹²⁵ The lack of uniformity within the health care plans become problematic when, like in many circumstances, the adopting parents and the gestational carrier are living in different states or different countries. Insurance coverage would theoretically help with the screening process and assist in preventing agencies from exploiting the gestational carriers.¹²⁶

II. INTERNATIONAL POLICIES

On the international level, countries have different policies regarding commercial surrogacy. In Brazil, ART centers are banned from any involvement in financial agreements regarding the surrogacy.¹²⁷ Argentina requires a case-by-case analysis to be completed by a Special Committee to determine whether surrogacy by IVF will be allowed.¹²⁸ Italy banned both commercial and altruistic forms of surrogacy with the passage of the Medically

118. *Id.*

119. Brenhouse, *supra* note 76.

120. Robinson, *supra* note 116.

121. *Id.*

122. *Id.*

123. THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL § 34(2) (Indian Council of Medical Research, Proposed Draft 2010) [hereinafter ASSISTED REPRODUCTIVE TECHNOLOGIES BILL], *available at* <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

124. Spar, *supra* note 83, at 68.

125. *Id.*

126. *Id.*

127. IFFS Surveillance 07, 87 Fertility and Sterility 50, S50, eds. Howard Jones et al. (2007), *available at* http://www.iffs-reproduction.org/documents/Surveillance_07.pdf.

128. *Id.*

Assisted Reproduction Law.¹²⁹ Other countries legalized non-commercial forms of surrogacy. Examples of these countries are Denmark and the United Kingdom. Specifically, Denmark has laws banning advertising and marketing of surrogacy, and it invalidates contracts for surrogacy.¹³⁰ In the United Kingdom, the Human Fertilisation and Embryology Authority (HFEA) oversees the use of embryos in fertility treatment and research.¹³¹ The HFEA prohibits the cash payment for any donations but allows for reasonable expenses.¹³² While these countries disallow commercialized forms of surrogacy, there are countries that specifically legalize the practice.¹³³

A. Commercial Surrogacy in India

India is one country that has legalized the commercial surrogacy industry. It was first legalized in India in 2002 to promote medical tourism.¹³⁴ Since then, hundreds of people have visited India each year in order to hire a surrogate mother.¹³⁵ When potential adopting parents visit India to hire surrogate mothers, it is labeled as “fertility tourism.”¹³⁶ Fertility tourism is defined as “the network of services set up to provide infertility treatment to travelers from abroad.”¹³⁷ This is a phenomenon that is posited to result from the prohibitions on surrogacy and other fertility treatments in surrounding countries, and the high costs involved with getting a surrogate mother from the United States. In India, the cost to hire a surrogate mother is around \$23,000, with the mother typically getting around \$7,500.¹³⁸ Would-be parents compare this amount with the price that it would cost to contract with a surrogate in the United States: between \$59,000 and \$80,000.¹³⁹

With this new-found popularity among couples seeking a surrogate mother, the Indian market for commercial surrogacy has exploded. The

129. Lee, *supra* note 19, at 284. The author attributes this to the fact that Italy is an extremely religious country. *Id.* (“[I]taly, a predominately Catholic country with a more conservative social and religious view on surrogacy ...”).

130. Linda Nielsen, *The Right to a Child Versus The Rights of a Child*, in PARENTHOOD IN MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY 213, 216 (John Eekelaar & Petar Sarcevic eds., 1993).

131. *All About the HFEA*, HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/25.html> (last visited Sept. 26, 2011).

132. *Sperm, Egg and Embryo: Background Briefing – Payments and Expenses*, HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/3422.html#3435> (last visited Sept. 26, 2011) (Reasonable expenses can consist of travel costs and lost wages).

133. Brenhouse, *supra* note 76.

134. *Id.*

135. *Id.*

136. Lee, *supra* note 19, at 284.

137. *Id.*

138. *Id.*

139. Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India*, 39 CUMB. L. REV. 15, 32 (2009).

Confederation of Indian Industry estimates that the industry will grow to be worth \$2.3 billion annually by the year 2012.¹⁴⁰ The enormity of the industry suggests a certain level of regulation. However, this was not the case for a period of time after the legalization of the practice. Even though surrogacy has been legalized, “the procedure can take place without reams of government red tape.”¹⁴¹ The existing laws were not clear enough to protect the interests of those involved.¹⁴² In 2005, the Indian Council of Medical Research created a national guideline that required a surrogate mother to sign a contract with the future parents.¹⁴³ However, the guidelines did not address the requirements of what should be in the contract.¹⁴⁴

The increasing need for regulation became apparent in the relations between clinics and the surrogates, as fertility clinics were often acting as “brokers” for the surrogacy transactions.¹⁴⁵ “We need to create a safe distance between the clinic and the surrogate to avoid unethical practices,” says Dr. R.S. Sharma, deputy director general of the ICMR and member-secretary of the bill’s drafting committee.¹⁴⁶ “IVF clinics should only be concerning themselves with science.”¹⁴⁷

To address the lack of regulation, India has proposed legislation termed the Assisted Reproductive Technologies (Regulation) Act 2010.¹⁴⁸ The bill regulates ART clinics, embryo research, the rights of the donors, and penalties involved with the violation of the act.¹⁴⁹ The bill details procedures for accreditation and supervision of infertility clinics dealing with surrogacy, as well as the rights and duties of patients, surrogates and donor.¹⁵⁰ This is to ensure that the services provided by such clinics are “ethical, and that the medical, social and legal rights of all those concerned are protected.”¹⁵¹

B. Commercial Surrogacy in Israel

Similar to India, Israel has also legalized the commercial surrogacy industry. As opposed to India, Israel has already established a comprehensive regulation system to protect the surrogate mothers and future parents.¹⁵² As

140. Brenhouse, *supra* note 76.

141. *Id.*

142. Mahendra Kumar Singh, *New Laws to Reign in “Womb Business”*, THE TIMES OF INDIA (Oct. 31, 2007) available at http://timesofindia.indiatimes.com/India/Govt_mulls_laws_to_regulate_surrogacy/articleshow/2503791.cms.

143. *Id.*

144. *Id.*

145. Brenhouse, *supra* note 76.

146. *Id.*

147. *Id.*

148. ASSISTED REPRODUCTIVE TECHNOLOGIES BILL, *supra* note 123.

149. *Id.* at chs. IV, VI, VII & VIII.

150. *Id.* at chs. III & VII.

151. *Id.* at 1.

152. Lee, *supra* note 19, at 293.

early as 1992, Israel recognized the need for protection of gestational carriers.¹⁵³ Some suggest that Israel's willingness to create regulation for the practice of commercial surrogacy can be attributed to the fact that it is a "pro-natalist" society.¹⁵⁴ This means that the nation places large importance on bearing children.¹⁵⁵ Israel's regulation scheme revolves around the "Approvals Committee," which is in charge of judicial review and the approval of surrogacy contracts.¹⁵⁶ Israel also has safeguards set up to prevent potential surrogate mothers from being exploited.¹⁵⁷ These safeguards consist of physical and psychological suitability assessments and the requirement of informed and voluntary consent, among other things.¹⁵⁸ This extensive scheme is sufficient to prevent the industry from being self-regulated by the community.

C. *Belgium: No Official Policy on Commercial Surrogacy*

Unlike India and Israel, Belgium has regulations regarding different types of ART but does not have an official policy on commercial surrogacy.¹⁵⁹ However, a recent case was decided in which birth certificates of two twin girls born to a surrogate mother in California were recognized by the Belgium Court.¹⁶⁰ The lower court refused to recognize the birth certificates as a matter

153. *Id.* at 296.

154. *Id.* at 295.

155. *Id.*

156. *Id.* at 296.

157. *Id.*

158. Lee, *supra* note 19, at 296-98. Other safeguards are screening to ensure the suitability of the parties, and social worker services to assist the parties through the process. In addition, the Approvals Committee also protects the commissioning parents by denying the gestational surrogate a right to breach the contract. *Id.*

159. *IFFS Surveillance 07*, *supra* note 127, at S51 (In Belgium, ART is covered in statutes, but IVF surrogacy is not mentioned by the ART statutes). *See also*, Macarena Saez, *18th Annual Congress Of The International Academy Of Comparative Law Washington, Dc; July 25-August 1, 2010: General Report: Same-Sex Marriage, Same-Sex Cohabitation, And Same-Sex Families Around The World: Why "Same" Is So Different*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1, 5 n.15 (2011) ("surrogacy was performed in Belgian hospitals, though there was no current regulation on this matter"); *see also*, I. Stuyver, K. Denys, P. De Sutter, J. Gerris, M. Dhont, "A three-year experience with gestational surrogacy: an evaluation of medical, ethical and legal aspects," *Abstracts of the 23rd Annual Meeting of the ESHRE, Lyon, France* (July 1-4, 2007), p. i198, available at http://humrep.oxfordjournals.org/content/22/suppl_1/i198.full.pdf ("Due to the absence of legislation on surrogacy in Belgium every fertility centre has to develop its own criteria to select and treat requests for surrogacy."). *See also*, DOLORES DOOLEY AND PANAGIOTA DALLA-VORGIA, *ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES: CASES AND QUESTIONS* 66 (Berghahn Books) (2003) ("Surrogacy also takes place in absence of any legislative provisions or ethical guidelines in Belgium, Finland, Greece, and Ireland.").

160. Patrick Wautelet, *Belgian Court Recognizes Californian Surrogacy*, CONFLICT OF LAWS.NET (November 2, 2010), <http://conflictoflaws.net/2010/belgian-court-recognizes-californian-surrogacy/> [hereinafter Wautelet, *Belgian Court*].

of public policy under Article 27 of the Code of Private International Law.¹⁶¹ The lower court pointed out that surrogate motherhood raised questions under the Convention of the Rights of Children and the European Convention on Human Rights.¹⁶² It also noted that most countries that allow surrogacy disallow the commercialization of it, which was existent in the case before them.¹⁶³ The Court of Appeal of Liege found that under Belgian law, the twins' biological father (one of the petitioners) could have legally become their father because their biological mother was not married.¹⁶⁴ The Court of Appeal also addressed the issue of whether the mother receiving monetary compensation for her services as a surrogate was a violation of public policy.¹⁶⁵ The Court of Appeal noted that while contracts regarding human beings and the human body were void under public policy, denying the twins a legal link with their father and mother would be an even greater violation of public policy because it would be against the best interests of the children.¹⁶⁶ Thus, the court found the birth certificates to be valid as a legal link between the twin girls and their biological father.¹⁶⁷

III. REGULATION OF COMMERCIAL SURROGACY IN THE UNITED STATES

Although many countries have official policies regarding the legality of surrogacy, the United States has no federal policy on the issue and regulation is left to the states.¹⁶⁸ The different regulations in the United States have been divided by some experts into four types: prohibition, inaction, status regulation, and contractual ordering.¹⁶⁹ These differences in statutory schemes result in inconsistent regulation in each states.¹⁷⁰

A. *Prohibition of Commercial Surrogacy*

Several of the states in the United States have prohibitions regarding both commercial and surrogacy contracts. Arizona has a statute that bans the formation of surrogate parentage contracts.¹⁷¹ The Arizona Supreme Court addressed the unconstitutionality of the portion of the statute concerning the

161. Patrick Wautelet, *Belgian Judgment on Surrogate Motherhood*, CONFLICT OF LAWS.NET (April 27, 2010), <http://conflictoflaws.net/2010/belgian-judgment-on-surrogate-motherhood/> [hereinafter Wautelet, *Belgian Judgment*].

162. *Id.*

163. *Id.*

164. Wautelet, *Belgian Court*, *supra* note 160.

165. *Id.*

166. *Id.*

167. *Id.*

168. Kimberly D. Kraweic, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1765 (2010).

169. Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 23, 23 (Rachel Cook et al. eds., 2003).

170. Drabiak, *supra* note 29, at 302.

171. ARIZ. REV. STAT. ANN. § 25-218(A) (2007).

rights of the biological mother.¹⁷² Here, the biological father and mother were divorced, and the biological father attempted to deny parental rights of the couple's triplets to the biological mother by asserting the Arizona commercial surrogacy statute.¹⁷³ The statute indicated that the surrogate mother was the legal mother of a child born to a surrogacy and she had parental rights to that child.¹⁷⁴ This would give the surrogate greater parental rights over the children than their biological mother.¹⁷⁵ The court found that this provision was unconstitutional under the Equal Protection clause.¹⁷⁶ The statute did not allow the rebuttable presumption to prove maternity that the statute allowed for fathers.¹⁷⁷ Moreover, under the current statute, if the surrogate refused to accept parentage of the child, the child would be left without a mother because its language did not allow for the biological mother to step into the role.¹⁷⁸ The Arizona Court declined to determine whether the surrogate mother or biological mother had superior rights to the child.¹⁷⁹

Many other states have similar prohibitions regarding surrogacy contracts. A New York statute voids surrogacy contracts as contrary to public policy.¹⁸⁰ Additionally, another statute expressly prohibits any compensation, directly or indirectly connected with a surrogacy contract. Thus, New York explicitly prohibits commercial surrogacy; and even altruistic surrogacy, if it involves a contract, is considered against public policy. Michigan has adopted a Surrogate Parenting Act to address the ever-rising industry. Michigan has strict laws finding commercial surrogacy and surrogacy agreements void and unenforceable against public policy.¹⁸¹ Michigan laws impose fines of up to \$10,000 or jail time for up to 1 year for anyone who enters into such agreements.¹⁸² A surrogate mother could be imprisoned for entering into a contract with adopting parents to bear their child. Other states, such as Nebraska, simply prohibit surrogacy for compensation. Nebraska laws prohibit surrogacy agreements, but the law defines such agreements as involving compensation.¹⁸³ With this restricted definition of surrogacy, a contract that does not involve compensation will be allowed within its borders.

172. *Soos v. Superior Court*, 897 P.2d 1356, 1359 (1994).

173. *Id.* at 1358.

174. ARIZ. REV. STAT. ANN. § 25-218(B) (2007).

175. *Soos*, 897 P.2d at 1358, 1360.

176. *Id.* at 1357, 1359.

177. *Id.* at 1360.

178. *Id.* at 1358.

179. *Id.* at 1359.

180. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

181. MICH. COMP. LAWS ANN. § 722.855 (West 2011).

182. MICH. COMP. LAWS ANN. § 722.859 (West 2011).

183. *Nebraska Surrogacy Laws*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/parenting/surrogacy/1234.htm> (last updated Sept. 9, 2009); *see also*, NEB. REV. STAT. ANN. § 25-21, 200 (LexisNexis Supp. 2010).

These states have determined that completely banning the practice of surrogacy (or prohibiting compensation) will better protect those involved in the surrogacy process than remaining silent on the issue.

B. Express Permission of Commercial Surrogacy

Conversely, many states expressly permit commercial surrogacy by statute or case law. Florida *requires* (not merely allows) a binding and enforceable surrogacy contracts between the surrogate mother and the commissioning parents.¹⁸⁴ Florida also requires that a health risk to the mother or the fetus be existent in order for the contract to be valid.¹⁸⁵ Furthermore, there are a number of provisions that need to be included in the contract, such as: a medical evaluation of the surrogate and an agreement by the surrogate to relinquish parental rights over the child.¹⁸⁶ Hence, Florida allows surrogacy contracts to exist but places restrictions on its medical necessity and the terms of the contract. While Arkansas's statute does not explicitly require the formation of a surrogacy contract like Florida, it does not expressly prohibit them either.¹⁸⁷ This suggests that a contract involving the biological father, surrogate mother, and intended mother could be recognized as valid. Arkansas law states that the child shall belong to the biological father and the woman intended to be the mother if the father is married.¹⁸⁸ The law also provides that the mother of a child born to a surrogate shall be the woman intended to be the mother according to the agreement when anonymous sperm is used.¹⁸⁹ Nevada law likewise allows for a surrogacy contract.¹⁹⁰ The law requires that the contract terms provide the intended parentage of the child, custody, and the responsibilities and liabilities of the parties.¹⁹¹ Although Nevada allows for the contracts, the law limits compensation to medical and living expenses related to the birth of the child.¹⁹² Illinois expressly allows traditional surrogacy contracts and has statutes regulating the requirements of the agreements, entitled the Gestational Surrogacy Act.¹⁹³ Illinois established the act to "establish consistent standards and procedural safeguards for the protection of all parties involved" in the agreement.¹⁹⁴ Illinois has strict requirements for the contract, including a requirement that the agreement be in writing, witnessed by 2 competent adults,

184. FLA. STAT. ANN. § 742.15 (West Supp. 2010).

185. *Id.*

186. *Id.*

187. ARK. CODE ANN. § 9-10-201(b)(1) (Supp. 2011).

188. *Id.*

189. ARK. CODE ANN. § 9-10-201(b)(3) (Supp. 2011).

190. NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010).

191. *Id.*

192. *Id.*

193. *Illinois Surrogacy Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/parenting/surrogacy/962.htm> (last updated Sept. 9, 2009); *see also*, 750 ILL. COMP. STAT. ANN. 47/1 (West Supp. 2011).

194. 750 ILL. COMP. STAT. ANN. 47/5 (West Supp. 2011).

surrenders custody to the intended parents, and express agreement by all parties.¹⁹⁵

These states have chosen not to simply allow the practice, but to regulate surrogacy and the contracts involved to avoid the confusion that could arise from turning a blind eye to the ever-growing industry.

C. *Legislatures that are Silent on Commercial Surrogacy*

Other state legislatures neglect to address whether contracts for commercial surrogacy would be valid, so courts are forced to consider the validity of such contracts. In these situations, courts look to precedent set through adoption law and applicable public policy standards. In Connecticut, there are no applicable statutes or cases on point regarding surrogacy.¹⁹⁶ However, there are statutes addressing artificial insemination.¹⁹⁷ In *Doe v. Doe*, a defendant father and plaintiff mother disputed over the custody of a child born to a surrogate.¹⁹⁸ The plaintiff mother conceded that although she acted as the child's mother after the surrogacy arrangement, she is not the biological mother of the child.¹⁹⁹ Upon the birth of the child, the surrogate merely handed the child over to the plaintiff and defendant without a formal adoption.²⁰⁰ Because the child was born to a surrogate, there was an argument between the parties as to whether the child was an issue of the marriage.²⁰¹ The court declined to address the issue of whether either or both parties had parentage over the child.²⁰² Additionally, the court refused to reconcile family statutes based on the scientific conception methods, and would not consider the validity of the contract between the parents and the surrogate mother.²⁰³ Further, the court declined to regard the non-surrogate mother as the legal mother of the child.²⁰⁴

One Idaho case indirectly suggested that surrogacy contracts are enforceable.²⁰⁵ The child was initially given up for adoption to a couple according to a surrogacy arrangement, but the surrogate later revoked her consent to the adoption.²⁰⁶ The surrogate mother alleged that she had received

195. 750 ILL. COMP. STAT. ANN. 47/25 (West Supp. 2011).

196. Christine Bjorkman, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 143-144 (2008).

197. Conn. Gen. Stat. § 45a-771-774 (2011).

198. *Doe v. Doe*, 710 A.2d 1297, 1300 (Conn. 1998).

199. *Id.* at 1301.

200. *Id.* at 1303.

201. *Id.* at 1304-05.

202. *Id.* at 1308.

203. *Id.* at 1307.

204. *Doe v. Doe*, 710 A.2d 1297, 1319-20 (Conn. 1998). The artificial insemination statutes in Connecticut would make the surrogate mother and her husband the legitimate parents of the child, instead of the plaintiff and the defendant father. *Id.* at 1320.

205. *DeBernardi v. Steve B.D.*, 723 P.2d 829, 845 (Idaho 1986).

206. *Id.* at 831.

no counseling concerning her decision prior to the baby's birth and that she was being pressured into giving the baby up for adoption.²⁰⁷ Despite these allegations, the court found that the surrogate did have proper counseling prior to the birth and had full knowledge of the consequences of her consent.²⁰⁸ Moreover, without any evidence of fraud, duress, or undue influence, the surrogate's consent was irrevocable.²⁰⁹ The surrogacy arrangement was not addressed by the court, but it was also not invalidated. Without applicable Idaho statute concerning surrogacy, the case is being viewed as passively allowing surrogacy contracts to exist.²¹⁰

New Jersey is a state that does not have clear prohibition or acceptance of commercial surrogacy in its statutes, but has addressed the issue in its case law.²¹¹ In the *Baby M* case, the New Jersey Supreme Court applied its current adoption statutes to the surrogacy agreement at issue. The Court found that the contract resulting in compensation for the surrogate mother was not permissible under their current state laws.²¹² The contract was not valid for two reasons: it conflicted with New Jersey's adoption statutes and it was void for public policy.²¹³ New Jersey's adoption laws disallow any monetary exchange in connection with the adoption;²¹⁴ they require proof of parental unfitness prior to termination and the consent to adoption needs to be revocable.²¹⁵ Thus, the facts that the surrogate mother was receiving compensation, that her parental rights were terminated outside the judicial system through a contract, and that the contract did not give her a chance to rescind her consent all operated to make the contract invalid.²¹⁶ The contract was void against public policy because the nature of the contract terms was to separate a child from one of its natural parents.²¹⁷ The purpose of the contract was "to give the father the exclusive right to the child by destroying the rights of the mother."²¹⁸ Moreover,

It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes

207. *Id.* at 832-33.

208. *Id.* at 833.

209. *Id.*

210. *Idaho Surrogacy Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/4168.htm> (last updated Sept. 9, 2009).

211. *New Jersey Surrogacy Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/1555.htm> (last updated Sept. 9, 2009).

212. *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 1240-44.

217. *Id.* at 1247.

218. *In re Baby M*, 537 A.2d 1227, 1247 (N.J. 1988).

the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, through the exchange of money.²¹⁹

However, the Court went to note that if a woman is not paid for her services and retains the right to assert her parental rights, it is not prohibited.²²⁰ Similarly, several Massachusetts court decisions also discuss the validity of surrogacy agreements based on adoption and public policy statutes. *Culliton v. Beth Israel Deaconess Medical Center* was a case concerning a contract between the surrogate mother and the commissioning parents.²²¹ The contract terms consisted of compensation²²² to the surrogate in return for physical and legal custody of any children born of the surrogacy.²²³ The parents asked a Family and Probate Court judge to issue an order of pre-birth parentage, but he denied the request.²²⁴ The judge based his decision on his interpretation of adoption and paternity statutes, which disallow a declaration of maternity, paternity, and adoption parentage before the birth of the child.²²⁵ The Massachusetts Supreme Court in *R.R. v. M.H.* applied the adoption statute to another situation “to assure that no economic pressure will cause a woman ... to act as a surrogate.... [C]ompensated surrogacy arrangements raise the concern that, under financial pressure, a woman will permit her body to be used and *her* child to be given away.”²²⁶ On the other hand, in *Culliton*, the Massachusetts Supreme Court declined to use the adoption statutes as they could not adequately apply to surrogacy contracts.²²⁷ The Court noted that new protocols need to be considered with gestational surrogacy arrangements because they are becoming increasingly commonplace among infertile couples.²²⁸ In light of their concerns for gestational surrogacy arrangements, the court upheld the contract and gave the commissioning parents legal custody of the children.²²⁹

In these cases from both the New Jersey and Massachusetts courts, the court was forced to look at statutes already enacted and try to apply them to a gestational surrogacy contract.²³⁰ As illustrated above, it is difficult for a court

219. *Id.* at 1250.

220. *Id.* at 1264.

221. *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1135 (Mass. 2001).

222. *Id.* The compensation was for medical expenses, maternity clothing, travel expenses, health insurance, lost wages, child care and legal expenses, and counseling and living expenses. *Id.* at n.6.

223. *Id.* at 1135.

224. *Id.* at 1136.

225. *Id.*

226. *R.H. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998).

227. *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Mass. 2001).

228. *Id.*

229. *Id.* at 1138.

230. *See, Doe v. Doe*, 710 A.2d 1297, 1300 (Conn. 1998); *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1135 (Mass. 2001).

to try to apply concepts involving adoption or artificial insemination to commercial surrogacy. The Massachusetts Supreme Court noted how important it was for these inadequacies to be addressed by stating “[l]egislature is the most suitable forum to deal with the questions involved in this case, and other questions as yet unlitigated, by providing a comprehensive set of laws that deal with the medical, legal, and ethical aspects of these practices.”²³¹ Without statutory guidance for the courts to use, along with the possibility that contracts will be voided, there is an increased potential for exploitation and coercion of all parties to surrogacy agreements.²³²

IV. ATTEMPTS AT REGULATION

With ART, and specifically surrogacy, on the rise, attempts have been made by international and domestic organizations to address the policy concerns regarding the surrogacy agreements.

A. *Regulation by International Organizations*

Suggestions have been made at an international level to address concerns that involve surrogacy agreements that stretch across several continents. In order to regulate commercial surrogacy at an international level, several policy structures are implicated.

One way to regulate internationally is through the Hague Conventions. The vision of the Hague Conference on Private International Law is to “work for a world in which individuals...whose lives and activities transcend the boundaries between different legal systems, enjoy a high degree of legal security;” and “to promote the orderly and efficient settlement of disputes, good governance and the rule of law, while respecting the diversity of legal traditions.”²³³ Currently, the scope of the Conference on Private International Law specifically addresses adoption, and the Conferences do attempt to protect international situations for adults who may not be able to protect their own interests.²³⁴ In 1993, the Conference addressed “the need to eliminate baby-selling, child abduction, and trafficking in children.”²³⁵ Recently, in response to the growth of the commercial surrogacy industry, the Hague Conference on Private International Law’s Council on General Affairs and Policy required its Permanent Bureau focus on issues arising from international surrogacy

231. *Culliton*, 756 N.E.2d at 1139.

232. Drabiak, *supra* note 29, at 302.

233. *Vision & Mission*, HAUGE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=27 (last visited Nov. 14, 2011).

234. *See International Protection of Children, Family, and Property Relations*, HAUGE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=10#family (last visited Nov. 10, 2011).

235. Leibowitz-Dori, *supra* note 79, at 337.

arrangements.²³⁶ The Permanent Bureau is required to “gather information on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach to addressing international surrogacy issues.”²³⁷ With adoption, the UN found that the only way to adequately protect the parties was to legalize international adoption and then define its scope.²³⁸ A similar approach would be beneficial to protect international surrogacy relationships. Critics point out that without protection, surrogate mothers will be vulnerable to exploitation and the children will be in danger of being sold as a commodity on the international market.²³⁹

Outside of the Hague Convention on Private International Law, other international policies have been considered as a possible solution. The recent Belgium lower court decision regarding the surrogacy agreement between Belgium natives and a Californian surrogate implicated the Convention on the Rights of the Child²⁴⁰ and the European Convention on Human Rights.²⁴¹ The Convention of the Rights of the Child was “the first legally binding instrument to incorporate the full range of human rights – civil, cultural, economic, political, and social rights.”²⁴² The rights of children are specifically: the right to survival; to develop to the fullest; the protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. If a state in the United Nations chooses to ratify the Convention or an Optional Protocol, then they have an obligation to protect and promote all human rights by adopting or changing their current laws.²⁴³ The Belgium court indicated that Article 7, which states, “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents,” applied to commercial surrogacy.²⁴⁴

Commercial Surrogacy could also be connected to the Convention of the Rights of the Child under its Optional Protocol. The Protocol focuses on the sale of children, child prostitution and child pornography. This draws attention to the criminalization of children’s rights violations and emphasizes the

236. *Cross-Frontier Surrogacy Issues Added to Hague Conference Work Programme*, (July 4, 2011), available at, http://www.hcch.net/index_en.php?act=events.details&year=2011&varevent=216&zoek=surrogacy.

237. *Id.*

238. Leibowitz-Dori, *supra* note 79, at 338.

239. *Id.*

240. Wautelet, *Belgian Judgment*, *supra* note 161.

241. *Id.*

242. *Convention of the Rights of the Child*, UNICEF.ORG, <http://www.unicef.org/crc/> (last updated June 3, 2011).

243. *Id.*

244. *Convention of the Rights of the Child*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/crc.htm> (Sept. 2, 1990). *See also* Wautelet, *Belgian Judgment*, *supra* note 161.

importance of public awareness and international cooperation in efforts to prevent them.²⁴⁵ As some critics believe that commercial surrogacy is baby-selling, the practice could fall under the scope of that Optional Protocol. Without reference to commercial surrogacy or surrogacy contracts, the practice does not necessarily fall under the scope of the Optional Protocol. Because this is optional, each state in the UN has a choice of whether they will choose to ratify it individually.²⁴⁶

The European Convention on Human Rights declared in its Convention for the Protection of Human Rights and Fundamental Freedoms that each contracting party shall secure certain rights and freedoms within their own jurisdictions.²⁴⁷ They listed the rights and freedoms as: the right to life, a prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination, derogation in time of an emergency, restrictions on political activity of aliens, prohibition of abuse of rights, and the limitation on the use of restrictions on rights.²⁴⁸ The lower Belgian court opined that Article 3 of the European Convention applied to commercial surrogacy.²⁴⁹ Specifically, because a surrogate mother is paid for her services, the Court could not reconcile that with human dignity.²⁵⁰

As of this commentary, none of these Conventions have addressed commercial surrogacy; only by indirect human rights implications. Any of these mediums would be an effective means to regulate commercial surrogacy to prevent the exploitation of the women and children involved.

B. Domestic Uniform Regulation

Just as important as it is for commercial surrogacy to be addressed at the international level, the United States needs to improve its own regulations by adopting a uniform regulation for every state to follow, which would consequently eliminate the incongruences that exist with current regulation of surrogacy agreements. This has been recommended in the Revised Uniform

245. *Optional Protocols to the Convention of the Rights of the Child*, UNICEF.ORG, http://www.unicef.org/crc/index_protocols.html (last updated June 2, 2011).

246. *Id.*

247. *Convention for the Protection of Human Rights and Fundamental Freedoms*, EUROPEAN COURT OF HUMAN RIGHTS, (June 1, 2010) <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

248. *Id.*

249. Wautelet, *Belgian Judgment*, *supra* note 161.

250. *Id.*

Parentage Act²⁵¹ and the American Bar Association Model Act Governing Assisted Reproductive Technology.²⁵²

In 2000, the Uniform Parentage Act (UPA) added a proposal by the National Conference of Commissioners on Uniform State Law (NCCUSL) on the acceptance of surrogacy agreements.²⁵³ The Act was revised in 2002 as a response to the current inconsistencies between states and their requirements for surrogacy contracts.²⁵⁴ Section 801 of the Uniform Parentage Act lists the requirements that, if adhered to, will allow a gestational agreement to be authorized.²⁵⁵ It states:

A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that: 1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction; 2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and 3) the intended parents become the parents of the child.

(a) The man and the woman who are the intended parents must both be parties to the gestational agreement.

(b) A gestational agreement is enforceable only if validated as provided in Section 803.

(c) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(d) A gestational agreement may provide for payment of consideration.

(e) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.²⁵⁶

Section 803 of the UPA allows for the court to issue an order validating the agreement if the requirements listed above are met.²⁵⁷ This would allow all agreements to be considered valid in the states that follow the UPA, thereby removing the need for forum shopping to find a state that will allow the agreement to be valid. Even though the UPA contains the language allowing

251. UNIF. PARENTAGE ACT §§ 801-809 (amended 2002), 9B U.L.A. 362-69 (2000).

252. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY prefatory note (Tentative Draft February 2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

253. UNIF. PARENTAGE ACT § 801 prefatory comment (amended 2002), 9B U.L.A. 360 (2000).

254. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 296-98 (2000).

255. UNIF. PARENTAGE ACT § 801 (amended 2002), 9B U.L.A. 362 (2000).

256. *Id.* The 2000 version of the statute stated that the intended parents must be married.

257. UNIF. PARENTAGE ACT § 803 (amended 2002), 9B U.L.A. 364 (2000).

surrogacy agreements, it still needs to be adopted by the states to give it any affect.²⁵⁸

In February 2008, the American Bar Association (ABA) adopted its Model Act Governing Assisted Reproductive Technology (Model Act).²⁵⁹ The Model Act was created as a response to the “confusion and contradictions” in the application of existing statutes and common law resulting from the legal issues regarding ART.²⁶⁰ Article 7 specifically addresses gestational agreements in two alternative ways.²⁶¹ The ABA scheme lists out several requirements for the gestational carrier, the intended parents, and the contract.²⁶² Alternative B of the Model Act was constructed to give states that did not want to require a judicial hearing to validate the agreement an alternative statutory scheme.²⁶³ This alternative requires that the gestational carrier be of a certain age, she must have given birth to at least one child, seek legal consultation (to avoid any informed consent issues), have a medical and psychological evaluations, and have health care.²⁶⁴ The Model Act requires that the intended parents have a medical necessity to have a gestational carrier and they must also seek independent legal advice.²⁶⁵ The contract also has a list of requirements with two of them being custody and compensation provisions.²⁶⁶ Alternative A is similar in nature. However, this alternative requires that a court issue an order after it finds that the parties have met the jurisdictional requirements and that there is proper consideration on the part of both parties.²⁶⁷

Both of these Acts were created and revised as a solution to the disparities in the states’ laws, but the issues still persist and additional regulations are necessary.²⁶⁸ Even with the Uniform Parentage Act and the ABA Model Act in place, it is up to the states to take the next step and adopt an Act that will remedy the incongruences.

258. *Id.*

259. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY prefatory note (Tentative Draft February 2008), *available at* <http://www.abanet.org/family/committees/artmodelact.pdf>.

260. *Id.*

261. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 7 (Tentative Draft February 2008), *available at* <http://www.abanet.org/family/committees/artmodelact.pdf>.

262. *Id.*

263. *Id.*

264. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 702(1) (Tentative Draft February 2008), *available at* <http://www.abanet.org/family/committees/artmodelact.pdf>.

265. § 702(2).

266. § 703.

267. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 7 (Alternative A) (Tentative Draft February 2008), *available at* <http://www.abanet.org/family/committees/artmodelact.pdf>.

268. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 297 (2000).

CONCLUSION

The incongruences of laws regulating surrogacy among countries as well as among the states of the U. S. raise the risk of exploitation as a concern for policy makers everywhere and, as discussed, various avenues are available in addressing this lack of uniformity. Not all countries have attempted to reduce the inadequacies in their laws, and states have not adopted statutes that will improve the inconsistencies. Before adopting laws on the practice of altruistic and commercial surrogacy, legislators must take into account several legal and moral considerations. It is important for law-makers to consider the abilities of the surrogate mothers and the intended parents to contract for themselves. It is equally important for the legislatures to consider the ramifications of allowing the industry to police itself. Too many opportunities exist for possible exploitation of surrogate mothers through the imbalance of power, lack of knowledge, incongruent laws, and discrepancies in health care. Regardless of whether legislators want to allow compensation to gestational carriers, some form of regulation is required. The practice is only going to continue to grow with more individuals and couples willing to use ART to assist them with infertility.