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## International Law in the Gestational Surrogacy Debate

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# INTERNATIONAL LAW IN THE GESTATIONAL SURROGACY DEBATE

*Kristiana Brugger\**

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*INTRODUCTION*

Over the past few decades, debates have raged worldwide about the extent to which the human body and its component parts should be bought, sold, rented, or donated.<sup>1</sup> Gestational surrogacy<sup>2</sup> in particular has become more popular in recent years and, in an increasing number of cases, individuals wishing to obtain the services of a surrogate are leaving their own countries to do so.<sup>3</sup> The subject of surrogacy brings with it a host of concerns, including ethical worries over exploitation of surrogates in the global marketplace, the increasing potential for reproductive tourism as a result of national differences in regulation, and the geographic and socioeconomic imbalances between providers and purchasers. It is therefore worthwhile to examine more thoroughly the need for—and mechanisms for creating—international regulation to protect all parties involved in international gestational surrogacy.

This Article expands the global gestational surrogacy debate by analyzing surrogacy's potential as a subject of international regulation, particularly under the trade and labor frameworks. This Article recognizes that surrogacy's complexity as a legal issue is such that regulation would require a broad-based instrument that is unlikely to have the necessary political will behind it. Further, this Article accepts the premise that different legal frameworks are likely to have different impacts on the rights and interests of parties,<sup>4</sup> and examines the feasibility

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1. Examples of such debates include those surrounding the legal status of sex work (and its relationship to sex trafficking and human slavery), standards for organ and tissue procurement and transplantation (including debates about the feasibility and defensibility of nonreproductive organ sales), gamete donation or sale (for both reproduction and scientific research), and gestational surrogacy (particularly when the surrogate's identity is unknown to the procurer of the surrogate's services).

2. In gestational surrogacy, a surrogate mother carries and births a child that is genetically unrelated to her. See Brigitte Clark, *Surrogate Motherhood: Comment on the South African Law Commission's Report on Surrogate Motherhood (Project 65)*, 110 S. AFR. L.J. 769, 769 (1993). Some surrogacy arrangements, sometimes called "partial surrogacy," involve the use of the surrogate mother's egg. See *id.* at 769–70. This Article, however, limits its discussion to gestational surrogacy.

3. See, e.g., Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 15–16, 23–27 (2008).

4. See, e.g., Bartha M. Knoppers, *Reproductive Technology and International Mechanisms of Protection of the Human Person*, 32 MCGILL L.J. 336, 338 (1987) (noting that different international instruments adopt different perspectives regarding rights).

and effects of regulating surrogacy in a new, narrowly focused international instrument under the auspices of either the World Trade Organization or the International Labour Organization. Ultimately, this Article concludes that, while both platforms and legal frameworks face many challenges, the regulation of surrogacy in a new instrument under the ILO is an acceptable, if still imperfect, alternative to a comprehensive instrument introduced through the United Nations General Assembly.

### I. BACKGROUND: THE GLOBAL TRADE IN WOMBS

Traditionally, surrogacy was sought by infertile heterosexual couples, but now is increasingly sought by gay couples, particularly men, as a way of having children that are biologically related to one parent.<sup>5</sup> The concept of surrogacy itself is not new; indeed, surrogacy scholars are fond of making references to biblical stories of partial surrogacy.<sup>6</sup> Transnational gestational surrogacy operations are relatively recent phenomena, however, and are becoming increasingly common, particularly in Eastern Europe,<sup>7</sup> India,<sup>8</sup> and certain US states.<sup>9</sup>

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Although Knoppers's article focuses on human genetic material, many of its conclusions and arguments are applicable to similar concerns underlying surrogacy. See, e.g., A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW MED. & HEALTH CARE 34, 37 (1988) (arguing, inter alia, that the application of adoption law to children born of surrogacy arrangements would protect the interests of the child).

5. See, e.g., Susan Donaldson James, *More Gay Men Choose Surrogacy to Have Children*, ABC NEWS, Mar. 12, 2008, <http://abcnews.go.com/Entertainment/OnCall/story?id=4439567&page=1>.

6. See, e.g., Smerdon, *supra* note 3, at 16 (citing the Old Testament stories about the impregnation of Hagar, Sarah's maid, by Abraham, and of Bilhah, Rachel's maid, by Jacob); Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1437 (2009).

7. See Anne Donchin, *Reproductive Tourism and the Quest for Global Gender Justice*, 24 BIOETHICS 323, 327 n.19 (2010); Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQUALITY 277, 299 (2009).

8. See, e.g., Donchin, *supra* note 7, at 327 n.19; Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 276-77, 284 (2009); Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 4, 2008, at A9 (noting that while exact statistics are difficult to find, "anecdotal evidence suggests a sharp increase" in out-of-country surrogate usage, particularly from India, which tend to be less expensive than surrogacy services in, for example, the United States).

The decision to go abroad for these reproductive services often is triggered by substantive differences in national laws.<sup>10</sup> For example, surrogacy is prohibited in several European countries, even as a remedy for infertility,<sup>11</sup> and is permitted but carefully regulated in other countries, including parts of the United States.<sup>12</sup>

India's surrogacy industry has received perhaps the most attention.<sup>13</sup> The surrogacy process in India is reportedly less expensive than in Canada or the United States, and the industry is largely unregulated.<sup>14</sup> According to research conducted by US journalists on one Indian clinic, a surrogate pregnancy there costs approximately US\$12,000 (of which the surrogate mother may earn between US\$5000 and US\$7000 for her services<sup>15</sup>), as opposed to costs of up to US\$80,000 for the same services in the United States.<sup>16</sup> Other estimates put the total costs of surrogacy in India at US\$10,000 to US\$35,000 per pregnancy, and at US\$59,000 to US\$80,000 per pregnancy in the United States.<sup>17</sup> The trend toward surrogacy globalization and, in particular, toward surrogacy tourism in a few favorable—and inexpensive—parts of the world, has raised concerns about the need to develop and implement measures on a global level to ensure

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9. See Lee, *supra* note 8, at 276–77; Scott Friedman, *International Surrogacy Ripening in Texas*, NBC DALLAS-Ft. WORTH (May 13, 2010, 11:14 PM), <http://www.nbcdfw.com/news/health/International-Surrogacy-Ripening-in-Texas-93688734.html>.

10. Ikemoto, *supra* note 7, at 295, 299.

11. See Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1016 (2010).

12. See Smerdon, *supra* note 3, at 24–26.

13. See Ryznar, *supra* note 11, at 1012–16. See generally Smerdon, *supra* note 3; Rimm, *supra* note 6.

14. See Amrita Pande, “At Least I Am Not Sleeping with Anyone”: Resisting the Stigma of Commercial Surrogacy in India, 36 FEMINIST STUD. 292, 295 (2010). To date, the Assisted Reproductive Technologies Regulation Bill, which would provide standards for the surrogacy industry (albeit “friendly” ones, according to the author), and make surrogacy contracts binding and enforceable, has not yet been enacted into law.

15. Smerdon, *supra* note 3, at 50.

16. See *Journey to Parenthood*, OPRAH WINFREY SHOW (Jan. 1, 2006), <http://www.oprah.com/world/Wombs-for-Rent>.

17. See Smerdon, *supra* note 3, at 32; see also Ryznar, *supra* note 11, at 1018–19 (citing US\$25,000 to US\$30,000 as the estimated cost of Indian surrogacy, noting that such costs are around one-third the cost of US surrogacy, and citing US\$6000 to US\$10,000 as the amount retained by the Indian surrogate).

that exploitation does not occur in the industry.<sup>18</sup> Presently, however, no surrogacy-specific international instrument or regulatory scheme exists.<sup>19</sup>

## II. ETHICAL AND POLICY CONSIDERATIONS

The human body is the vessel in which a person navigates his or her life. As such, it is commonly viewed in the legal context as deserving of special care and protection, particularly with regard to the circumstances in which it may be bought, sold, or rented.<sup>20</sup> Generally speaking, however, there appears to be a greater tolerance for the commercialization of reproductive services (e.g., buying and selling gametes for reproduction or renting female sex organs for gestational surrogacy<sup>21</sup>) compared to bodily services that do not involve reproduction (e.g., prohibitions on buying and selling nonreproductive organs or renting female sex organs for nonprocreative sexual recreation).<sup>22</sup> Significantly, the World Health Organization's

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18. See Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEVELOPING WORLD BIOETHICS 111, 116 (2009); Lee, *supra* note 8, at 299; Angie Godwin McEwen, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 303–04 (1999). For a parallel discussion of global ethics, see Heather Widdows, *Localized Past, Globalized Future: Towards an Effective Bioethical Framework Using Examples from Population Genetics and Medical Tourism*, 25 BIOETHICS 83, 84 (2011) (arguing that “effective ethical frameworks must be global” and must “recognize the injustices that arise in the global context,” as in the case of medical tourism).

19. See Ryznar, *supra* note 11, at 1011.

20. See Cynthia B. Cohen, *Selling Bits and Pieces of Humans to Make Babies: The Gift of the Magi Revisited*, 24 J. MED. & PHIL. 288, 291 (1999) (“We have no ethical qualms about selling other materials and procedures that are designed to save lives, such as respirators, oxygen tanks, intensive care services, and transplant surgery. The reason we are reluctant to exchange money for human kidneys is that this would deny something distinctly valuable about human beings—their human dignity and worth.”).

21. See Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1769 (2010). Kimberly Krawiec notes that society tends to stigmatize “virginity sales and other sex work,” and “romantic[ally] recharacteriz[e] . . . a monetary transaction into an altruistic one, in the case of oocyte and surrogacy sales,” regardless of the difference in reaction. *Id.* She ultimately argues, however, that both reactions are an “attempt to relegate these taboo trades to the shadows, where they are less overt and thus less destabilizing to societal norms.” *Id.* But see Cohen, *supra* note 20, at 289 (“The sale of fetal eggs and ovaries strikes many as ethically repulsive.”).

22. See H. Tristram Engelhardt, Jr., *Giving, Selling, and Having Taken: Conflicting Views of Organ Transfer*, 1 IND. HEALTH L. REV. 31, 42 (2004). But see Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1648–51 (2008) (suggesting the use of organ transfer regulation as a model for the regulation of assisted reproductive

(“WHO”) Guiding Principles on Human Cell, Tissue, and Organ Transplantation, which prohibit the purchase and sale of nonreproductive organs for transplantation purposes, explicitly exempt reproductive organs and tissue from their scope.<sup>23</sup> While a detailed ethical analysis of this dichotomy is beyond the scope of this Article, it is helpful to recognize that such a divergence of views may exist. This recognition is particularly useful when analyzing the regulation of gestational surrogacy in light of regulation pertaining to other uses of the human body.<sup>24</sup>

#### A. *Gender and Poverty in Surrogacy*

At the outset, many of the concerns surrounding gestational surrogacy appear to mirror those surrounding sex work, particularly with regard to gender-based disparities.<sup>25</sup> As with sex work, the surrogacy debate disproportionately impacts women. In the case of surrogacy, however, the disproportionate impact is due largely to the biological reality that only women can be gestational surrogates and that the demand for female body parts, namely the eggs and womb, cannot be met by any

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technology). However, Marsha Garrison also offers an interesting analysis of the differences between reproductive tissues and nonreproductive tissues and their treatment in US law, particularly in the context of her arguments in favor of regulating the industry. *Id.* at 1651–55; *see also* Rimm, *supra* note 6, at 1450 (acknowledging comparisons between prostitution and surrogacy but noting the “fundamental[] differen[ce]” in the use of the woman’s body in each scenario).

23. World Health Organization, *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation*, ¶ 4, WHO Doc. EB 123/5 (May 2008) (“The Guiding Principles do not apply to transplantation of gametes, ovarian or testicular tissue, or embryos for reproductive purposes, or to blood or blood constituents collected for transfusion purposes.”).

24. One legal commentator, Margaret Ryznar, noted succinctly: “Interestingly, while most legal systems around the world have sought to uniformly outlaw or heavily regulate other markets wherein humans or their parts are bought and sold—including human trafficking, embryo trafficking, prostitution, and internal organ selling—they have not yet done so with surrogacy.” Ryznar, *supra* note 11, at 1011.

25. *See, e.g.*, Donchin, *supra* note 7, at 324 (discussing issues of gender in the sex work and surrogacy contexts). *But cf.* Jean M. Sera, *Surrogacy and Prostitution: A Comparative Analysis*, 5 *AM. U. J. GENDER & L.* 315, 316 (1997). Other scholars focus less explicitly on gender issues and more generally on exploitation concerns. *See, e.g.*, Jennifer Damelio & Kelly Sorensen, *Enhancing Autonomy in Paid Surrogacy*, 22 *BIOETHICS* 269, 270 (2008) (“The prostitution argument is sensitive in some ways to the gestational surrogate’s vulnerability; but it’s somewhat off target.”); Rimm, *supra* note 6, at 1443 (“Opponents of surrogacy liken these arrangements to prostitution, paid adoptions, or organ sales.”).

other demographic.<sup>26</sup> Lisa Ikemoto, a bioethics and legal scholar, has articulated her concerns that women would be systematically underprotected in surrogacy arrangements, stating that the “interplay between biological essentialism and commodification of the women who are the means to the end may permit a laxness in minimizing risk to those women.”<sup>27</sup>

Indeed, because women tend to be at greater risk of being marginalized and exploited,<sup>28</sup> particularly in conservative or poverty-stricken societies,<sup>29</sup> there is concern that women may be forced against their will into lives as gestational surrogates.<sup>30</sup> In addition, the lack of meaningful education and employment opportunities may be a powerful motivation for the provision of surrogacy services, resulting in women becoming surrogates out of necessity,<sup>31</sup> which could perhaps lead to some women failing to give truly informed consent.

Furthermore, surrogates may actually reinforce gender hierarchies in their attempts to resist the stigma associated with surrogacy.<sup>32</sup> For example, some Indian surrogates who were interviewed about their work reportedly responded with an “emphasis on the morality of husbands, their ‘generosity’ in giving permission to their wives to be surrogates, and [a] striking absence of any narrative about surrogacy as paid work done by women.”<sup>33</sup> In other instances documented in India, surrogates’ families “often spoke of surrogacy not as individual (woman’s) choice or work, but as a ‘team effort’ made by the entire family

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26. See Ikemoto, *supra* note 7, at 305, 307.

27. *Id.* at 305.

28. See Donchin, *supra* note 7, at 325–26 (discussing “the gendered cycle of vulnerability”); Smerdon, *supra* note 3, at 54 (“Indian women may be pressured by their families, brokers, and personal circumstances to lend their bodies for cash.”).

29. See Donchin, *supra* note 7, at 325–27; Ryznar, *supra* note 11, at 1011; Rimm, *supra* note 6, at 1445.

30. See Pande, *supra* note 14, at 301–02 (noting that some of the surrogates justified their decision by arguing that surrogacy was a necessity for them, not a choice freely made); Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 330–31 (1997); see also Donchin, *supra* note 7, at 326; Ryznar, *supra* note 11, at 1017; Rimm, *supra* note 6, at 1444–45.

31. See Leibowitz-Dori, *supra* note 30, at 331 n.11. One scholar interviewed Indian surrogates and found that their education level ranged from illiteracy to a high school level. Their average education level was middle school. See Pande, *supra* note 14, at 297.

32. Pande, *supra* note 14, at 303 (discussing Indian surrogates).

33. *Id.*

to improve the members' financial situation."<sup>34</sup> When interviewed, one father-in-law of a surrogate stated that he had "decided not to 'become a surrogate' again" due to perceived inequities in pay when "*we* delivered two babies" but "still *we* got the same rate."<sup>35</sup>

Poverty is another troubling element of the surrogacy trade.<sup>36</sup> The potentially coercive influence of offering money for the sale or rental of body parts, services that do not require existing wealth or education, may create situations in which the sellers are disproportionately those who have nothing other than their bodies to sell.<sup>37</sup> This risk is apparent in both the sex work<sup>38</sup> and organ trafficking<sup>39</sup> contexts. The trends in international surrogacy appear to support this assumption in the surrogacy context<sup>40</sup> as well. In low-income countries with permissive regulatory standards or poor enforcement of surrogacy laws, it thus stands to reason that cottage industries and "tourist" trades are likely to become prevalent.

34. *Id.*

35. *Id.* (emphases added).

36. *See id.* at 297 (noting that thirty-four of forty-two interviewed surrogates reported a family income level at or below the poverty line and that "[f]or most women who work as surrogates, the [US]\$3000 earned is equivalent to four or five years of family income"); *Journey to Parenthood*, *supra* note 16 (characterizing surrogates' earnings of US\$5000 as approximately ten years' worth of income); *see also* Rimm, *supra* note 6, at 1443–46 (examining the dangers of economic exploitation of surrogates).

37. *See, e.g.*, Donchin, *supra* note 7, at 326 ("Poverty induces people to resort to work that separates them from their families or jeopardizes their health. These conditions put pressure on women to become sex workers, surrogates or ovum donors. . . ."). *But see* Lee, *supra* note 8, at 276 (arguing that in the United States the "prevailing stereotype of [US] women who opt to become gestational surrogates is that they are motivated primarily by financial considerations, which is not true").

38. *See* Gergana Danailova-Trainor & Patrick Belser, *Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand* 10 (Int'l Lab. Office, Working Paper No. 53, 2006), available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_081931.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_081931.pdf); *see also* Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *FORDHAM INT'L L.J.* 1178, 1179 (2010) ("[M]any African sex workers enter the trade due to economic stressors . . . [which] lead African women to view sex work as an economically viable option for themselves and their families.").

39. *See* Nancy Scheper-Hughes, *Organs Without Borders*, *FOREIGN POL'Y*, Jan.–Feb. 2005, at 26; Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, 85 *BULL. WORLD HEALTH ORG.* 955, 958–59 (2007).

40. *See* Pande, *supra* note 14, at 297 (discussing the relative poverty and lack of education among surrogates).

### B. *Health and Human Dignity*

The link between poverty and health is well-documented.<sup>41</sup> However, despite their often low socioeconomic status, surrogates initially are in good health because the provision of surrogacy services depends on it.<sup>42</sup> Furthermore, surrogates tend to use their earnings to lift their families out of poverty, which presumably improves their families' health. As a result, the general association between poverty and poor health may not be reflected in an examination of surrogates and their families, with the possible exception of health-related surrogacy risks, discussed in detail below. Interestingly, it has been argued that surrogacy may have a broader negative impact on a destination country's public health. For example, some commentators have raised the possibility that a blossoming surrogacy industry may drain precious health resources in developing countries.<sup>43</sup> Nevertheless, it is likely that many of the risks of surrogacy will be borne by individual surrogates as a direct result of their work.

#### 1. Potential Negative Impacts

Any time that there is an exchange of money for access to the body or body parts, there is the risk of harm to human dignity.<sup>44</sup> One risk is that poor women, who comprise a majority of surrogates, may begin to value themselves as the market values them—based on age, health history, or any other factors

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41. See Allyn L. Taylor & Karen C. Sokol, *The Evolution of Global Health Law in a Globalized World*, in 1 THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2007, at 19, 19 (Giuliana Ziccardi Capaldo ed., 2008) (noting that “income is the primary determinant of health in low income countries”).

42. See Kalsang Bhatia et al., *Surrogate Pregnancy: An Essential Guide for Clinicians*, 11 OBSTETRICIAN & GYNAECOLOGIST 49, 52 (2009); Lee, *supra* note 8, at 279 (discussing a fertility clinic requiring surrogates to be in “good health,” among other qualifications).

43. See Ikemoto, *supra* note 7, at 302 (discussing fears of health resources going into private clinics that service tourists). Similar concerns arise when physicians are employed to take care of surrogates in the private industry when their skills could be used to benefit more people by providing basic healthcare in the community. See Rimm, *supra* note 6, at 1446 n.108.

44. Some commentators believe that the commodification of the body, even for reproductive purposes, is so fundamentally incompatible with human dignity that it is “ethically unacceptable.” See, e.g., Cohen, *supra* note 20, at 305.

that cause a surrogate's "price" to rise or fall.<sup>45</sup> Existing cultural views of women as second-class citizens may further compound such a skewed sense of self-worth. These cultural views include practices that treat women as property, such as marital dowries; deprive them of property, such as unequal or gender-biased inheritance laws; or view them as burdens who are less valuable than their male counterparts, such as preferential feeding and access to education for male children, sex-selective abortion, and girl-child infanticide.<sup>46</sup> Indeed, the very act of serving as a surrogate may be seen as stigmatizing to the surrogate and her family.<sup>47</sup> Amrita Pande, a gender studies scholar who has interviewed and conducted ground studies of surrogacy in India, notes that the commercial or contractual nature of the surrogate's relationships with the intended parents makes some surrogates uncomfortable. In some instances this discomfort causes surrogates, as a means of protecting their own integrity and self-worth, to "establish[] or imagin[e] a relationship with the couple hiring them," believing in some instances that their "sisters" (i.e., the intended mothers) would continue to take care of the surrogates or the surrogates' families, or would continue to involve the surrogate in the life of the contracted child.<sup>48</sup> Regardless of the origin or basis for a surrogacy stigma, it is still a hurdle that the participating parties must overcome.

Many of the physical risks involved in surrogacy are at least as serious as those involved in other contracted uses of the body, such as sex work or organ sales.<sup>49</sup> Although a surrogate presumably will not face rape or physical abuse by those involved

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45. See Pande, *supra* note 14, at 305 (discussing one surrogate who believes that because she is college-educated and not from the Indian state of Gujarat, she has increased negotiating power and feels "special").

46. See generally GEETANJALI GANGOLI, *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA* (2007) (discussing these cultural views and their impact on reform in India).

47. See Pande, *supra* note 14, at 293 ("Women who work as gestational surrogates in India are engaged in a particularly stigmatized form of labor, and they do considerable emotional and ideological work to manage that stigma."). *But see* Lee, *supra* note 8, at 280 (noting one surrogate's comments that the stigma she faced as a surrogate was reduced or removed when family and friends saw her financial status improve as a result of her surrogacy work).

48. Pande, *supra* note 14, at 306–07.

49. See Bhatia et al., *supra* note 42, at 52–53 (describing the risks associated with surrogacy).

in her contracted pregnancy, she obviously risks damage to her health, including death, in the scope of her duties. The risks of pregnancy are well-known, may be life-threatening, and increase with the number of fetuses in the womb or number of past pregnancies.<sup>50</sup> Even in the “best case scenario”—in which the pregnancy is uncomplicated and the baby is born healthy and without the need for cesarean section surgery—the surrogate will face the pain of labor (or, alternatively, potential complications from epidural administration), and may face physiological damage from the birthing process, infection, negative health effects flowing from pregnancy, such as weight gain, postpartum depression, and the emotional upheaval<sup>51</sup> that comes with giving to others a child that one has nurtured and birthed.

Surrogacy also carries with it the challenge of balancing the interests of the prospective parents with the interests of the surrogate.<sup>52</sup> The interests of the surrogate (e.g., maintaining personal health, human dignity, and financial interests that can be met only by delivering a healthy baby) could be at odds with the interests of the parents (e.g., a financial interest in minimizing cost<sup>53</sup> or a desire to obtain a healthy baby even at the

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50. See Susan Donaldson James, *Surrogate Mom Damages Heart After Four Babies*, ABC NEWS, Mar. 3, 2011, <http://abcnews.go.com/Health/surrogate-mother-suffers-heart-damage-giving-birth-children/story?id=13028197>.

51. See Bhatia et al., *supra* note 42, at 52 (suggesting counseling so that, among other things, the surrogate can consider anticipate the emotional “effect of parting with the child if the pregnancy is successful”); Lee, *supra* note 8, at 290. *But see* Bhatia et al., *supra* note 42, at 52–53 (noting that theoretical concerns about the postpartum mental health of the surrogate have not been borne out in clinical practice).

52. Certainly, any child born via surrogacy also will be impacted by the parameters of the surrogacy arrangement. *See, e.g.*, Ikemoto, *supra* note 7, at 294 (discussing the risks that arise from legal uncertainty over the parent-child relationships formed from the use of assisted reproductive technology, and noting that “[t]he child’s status and future” also hinge on the outcome of such an issue); Ryznar, *supra* note 11, at 1031–35. However, the extent to which an unborn fetus has separate and protectable interests is less clear. *See* Knoppers, *supra* note 4, at 341 (noting the lack of “legal personality” of an embryo in vitro).

53. Craig R. Sweet, *Surrogacy: Practical Medical Aspects*, AM. SURROGACY CENTER, INC., <http://www.surrogacy.com/medres/article/aspects.html> (last visited Feb. 20, 2012) (listing the potential unexpected costs associated with surrogacy:

Pregnancy complications costs; maternal complications; fetal complications such as multiple pregnancy complications; [c]osts for uterine evacuation procedures for spontaneous pregnancy losses; [c]osts for selective reduction in multi-fetal pregnancies; [c]osts for genetic amniocentesis; [c]osts for

expense of the health of the surrogate).<sup>54</sup> While the abstract notion of making surrogates “disposable”<sup>55</sup> may be abhorrent, the truth of the matter is that there will be complications resulting from some of the pregnancies,<sup>56</sup> and difficult decisions will have to be made about whose interests should be protected.

## 2. Potential Positive Impacts

Surrogacy is perhaps unique among contracted uses of the body in terms of the quality of health care a service provider can expect to receive. In fact, it is in the interest of the prospective parents to protect the health of the surrogate, because it increases the likelihood of delivering a healthy child.<sup>57</sup> Therefore, unless there is a direct conflict between the health of the surrogate and the health of the baby—or, as perhaps may be more likely, a question of expensive and excellent medical care versus cheap and merely good or adequate medical care—surrogates are more likely than, for example, sex workers to have their health needs respected and even promoted by their clients.<sup>58</sup> This, indeed, is one of the ways gestational surrogacy may be beneficial for surrogates: despite the risks they undertake by agreeing to carry and deliver a child, they at least are likely to receive a level of medical care higher than the level of care their nonsurrogate peers receive.<sup>59</sup>

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termination of a genetically abnormal pregnancy (rare); [o]ngoing psychologic [sic] counseling costs; [m]edical complication costs (rare)).

54. For a discussion of health-related conflicts of interests between gestational surrogate mother and the egg donor mother, see Bhatia et al., *supra* note 42, at 53. *But see* Rimm, *supra* note 6, at 1455–56 (acknowledging the limitations on the ability of commissioning parents to compel surrogates to make decisions in her interests at the expense of the baby).

55. *See* Pande, *supra* note 14, at 304.

56. Usha Rengachary Smerdon suggests that the risk of complications may increase due to the lack of genetic relationship between surrogate and fetus. *See* Smerdon, *supra* note 3, at 54.

57. *See* Humbyrd, *supra* note 18, at 118 (arguing that “the best interests of the child and prospective parents match the well-being of the surrogate mother during pregnancy”); Rimm, *supra* note 6, at 1456 (noting the argument that the “commissioning couple’s interests are aligned with the surrogate’s own,” including protecting her mental and physical health).

58. *See* Sera, *supra* note 25, at 332.

59. *See* Pande, *supra* note 14, at 296 (observing that “most surrogates [the commentator saw] stayed under constant medical supervision during the last six months of their pregnancies”).

Furthermore, some argue that women's ability to be surrogates and to be paid handsomely for their service may actually increase the surrogate's feelings of control and self-worth, while at the same raising the status of childbearing as a valued and respected process.<sup>60</sup> In her studies, Amrita Pande interviewed a married, college-educated surrogate who clearly felt special and empowered by her role as a surrogate: she proudly described her desirability as a surrogate in the eyes of clients, and emphasized that it was *she* who was doing the work, *she* who would decide what to do with the money, and *she* who would decide whether a couple who "wanted [her]" was deserving of her services.<sup>61</sup> Indeed, Pande found that "for some surrogates, the narrative of 'being special' [because of desirability as a surrogate] did more than just counter the stigma of being disposable mothers; it also encouraged them to take care of their health and think of their own needs."<sup>62</sup> Pande rightly observed:

This 'I am special' narrative is particularly powerful when invoked by lower-class women in India, a country where sex-selective abortions, skewed sex ratios at birth, and high female infanticide and mortality present compelling evidence of the prevalence of son preference . . . . Being 'special' increases the women's feelings of self-worth.<sup>63</sup>

Additionally, some view surrogacy as a form of mutual assistance—two or more people helping each other to obtain what alone none of them could have obtained: a child for one and a better life for the other.<sup>64</sup> While commercial gestational

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60. See, e.g., Sera, *supra* note 25, at 332–33.

61. See Pande, *supra* note 14, at 304–06.

62. *Id.* at 306.

63. *Id.* at 305.

64. See *Journey to Parenthood*, *supra* note 16 (reporting that a purchaser of surrogacy services in India stated:

You have not walked in my shoes as someone who cannot have a child . . . . And you don't know how it feels to not be able to pay for your children to go to school, to not be able to . . . take care of your family. . . . And we were able to come together, [the surrogate] and I, and give each other a life that neither of us could achieve on our own. And I just don't see what's wrong with that);

see also Sera, *supra* note 25, at 332–33 (arguing that the surrogate "gives the gift of a child" while at the same time earning money, and noting "the inherent benefit of two persons from different worlds meeting in order to strike a bargain, in that both women can learn from each other").

surrogacy may not be attributed with the same level of altruism as, for example, a woman carrying a child for her infertile sister for free,<sup>65</sup> there is nonetheless an argument that surrogacy is a unique service that permits the surrogate to be honored for her work, and to enjoy the feeling of having helped another family.<sup>66</sup>

### III. *INTERNATIONAL LAW IN REGULATING GESTATIONAL SURROGACY*

It is clear that surrogacy rapidly is becoming a truly globalized enterprise, with all the concomitant risks of disparate impacts on different countries. In fact, it is precisely because there are differing standards in different countries—leading to concerns about tourism and exploitation of low-income populations in particular—that many have called for international decisionmakers to become involved in the regulation of this industry.<sup>67</sup> Indeed, the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption noted the increasing incidence of international surrogacy arrangements and “recommended that the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy.”<sup>68</sup> However, as discussed in Part I,

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65. See Clark, *supra* note 2, at 770.

66. See Sera, *supra* note 25, at 332–33.

67. See, e.g., Humbyrd, *supra* note 18, at 116–18 (discussing the implementation of fair trade principles at the international level for surrogacy regulation); Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIVATE INT’L L. 627, 633 (2011) (“It has been widely recognised that there is an urgent need for a multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy.”); Leibowitz-Dori, *supra* note 30, at 352 (identifying the Hague Convention on Intercountry Adoption as an instrument in which surrogacy should be included by “minor modifications in interpretation” involving existing language pertaining to adoption and trafficking in children); Rimm, *supra* note 6, at 1445 n.102 (citing Leibowitz-Dori). See generally Lee, *supra* note 8 (describing the lack of uniformity in international surrogacy regulation).

68. Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, June 17–25, 2010, *Conclusions and Recommendations Adopted by the Special Commission*, ¶¶ 25–26, available at [http://www.hcch.net/upload/wop/adop2010concl\\_e.pdf](http://www.hcch.net/upload/wop/adop2010concl_e.pdf); see Lauren Jade Martin, *Reproductive Tourism in the Age of Globalization*, 6 GLOBALIZATIONS 249, 260 (2009) (suggesting international surrogacy

ethical views on the subject of gestational surrogacy vary, and countries have differing views on the proper substantive content of surrogacy laws.<sup>69</sup> For that reason, it seems that international regulation of gestational surrogacy is unlikely to occur at the present juncture.<sup>70</sup>

In an attempt to fill surrogacy's regulatory gap, some commentators have identified existing international instruments or legal frameworks that may be used to govern surrogacy.<sup>71</sup> Many argue that a separate instrument<sup>72</sup>—preferably with a human rights-based framework,<sup>73</sup> erring on the side of

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standard-setting based on the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption); Trimmings & Beaumont, *supra* note 67, at 636–38 (describing a convention on international surrogacy based on the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption).

69. See, e.g., Smerdon, *supra* note 3, at 24–25 (discussing different regulatory standards for surrogacy in different countries).

70. See, e.g., Leibowitz-Dori, *supra* note 30, at 350; McEwen, *supra* note 18, at 297. But see Trimmings & Beaumont, *supra* note 67, at 635 (cautioning against an attempt to unify substantive rules and instead advocating for a flexible framework agreement).

71. See, e.g., Knoppers, *supra* note 4, at 358 (discussing the addition of “new provisions to existing international human rights covenants” for human genetic or reproductive material); McEwen, *supra* note 18, at 298–304 (discussing the potential basis for regulation under the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy, the Declaration Concerning the Aims and Purposes of the International Labour Organization, and the Hague Convention on Intercountry Adoption); Rimm, *supra* note 6, at 1453–62 (arguing for a labor rights “lens” through which surrogacy regulation should be approached; note, however, that it is not clear whether she limits her argument to advocating for a labor rights framework for India's domestic law—as her arguments are made in the broader context of analyzing Indian guidelines and proposed legislation—or whether she advocates such a legal backdrop for international treatment of surrogacy as a matter of principle).

72. See, e.g., Martin, *supra* note 68, at 260–61; Trimmings & Beaumont, *supra* note 67, at 635–46 (calling for and outlining a proposed convention on gestational surrogacy); Leibowitz-Dori, *supra* note 30, at 354; Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 529–30 (2010) (noting that the lack of international regulation presents challenges and suggesting that a comprehensive US federal law or system of laws on the subject could be the basis for an international treaty).

73. See, e.g., Leibowitz-Dori, *supra* note 30, at 346–49 (discussing the right to privacy in making decisions about reproduction, the right to procreate, both for the self and “for the benefit of others,” and the right to make decisions about the number and spacing of children, the latter as articulated in the Convention on the Elimination of All Forms of Discrimination Against Women); Emily Stehr, Note, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided*

protecting the surrogate over the contracting parents,<sup>74</sup> and having the utmost regard for the children born of the surrogacy arrangement<sup>75</sup>—would be the ideal solution.

Reform efforts should strive for this outcome, but realistically it is unlikely to be achieved. This is due not only to the documented lack of consensus regarding substantive legal approaches to surrogacy, but also to the complexity of surrogacy.<sup>76</sup> Surrogacy requires regulation in so many areas of law that any comprehensive single instrument will be unlikely to achieve the necessary political support. The Sections that follow discuss more narrowly-focused regulatory alternatives and offer an analysis of the political feasibility, the substantive effects, and the efficacy of the regulatory scheme in achieving its goals when using trade- and labor-focused international organization platforms as alternatives to an all-encompassing instrument that,

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*Quests to Prevent Exploitation*, 35 HASTINGS INT'L & COMP. L. REV. 253, 286–87 (2012). Iris Leibowitz-Dori argues that procreative liberty best protects surrogates' interests. *See* Leibowitz-Dori, *supra* note 30, at 346. She also posits that the surrogate must not be denied the opportunity to change her mind and keep the child, although this may be going a step too far in ignoring the interests of the contracting parents. *Id.* at 349. Indeed, a legal definition of “parent” that eliminates this conundrum (noted in the discussion *infra* Part III.A) would foreclose potential conflicts on the subject as a matter of law.

74. *See id.* at 345 (“Although the intent behind prohibition (i.e., protecting parties from potential abuses) is laudable, it can be satisfied more effectively by improving the bargaining position of the exploited person.”); *see also id.* at 346–49 (providing an excellent discussion of examples of ways in which the surrogates' rights should receive primary protection, including at virtually every decision point). *See generally* Ryznar, *supra* note 11 (arguing that an international framework should be child- and woman-centric).

75. *See* Clark, *supra* note 2, at 777 (“The primary objectives of any legislation on surrogacy should be, first, the protection of children from being treated as commodities regardless of their interests, and, secondly, the protection of women from being forced to surrender their children against their wishes.”); *see also* Smerdon, *supra* note 3, at 59–62 (discussing issues pertaining to the children born of surrogacy arrangements, particularly with respect to concerns about commodification). *See generally* Ryznar, *supra* note 11 (arguing that an international framework should be child- and woman-centric).

76. *See supra* note 70 and accompanying text. The type of regulatory convention proposed by Katarina Trimmings and Paul Beaumont also may be a reasonable alternative legal framework. However, an analysis of their proposal is outside the scope of this Article, as the Article compares the utility and feasibility of a broad-based substantive agreement with a more narrowly-focused substantive agreement under the auspices of either the World Trade Organization (“WTO”) or the International Labour Organization (“ILO”). *See generally* Trimmings & Beaumont, *supra* note 67.

ideally, would be created under the auspices of the United Nations General Assembly.

### A. Substantive Challenges to Regulation

For countries that lack substantive surrogacy regulation, concerns have been raised about the perils of such an industry being left to self-regulate.<sup>77</sup> Some argue that regulation of surrogacy would help protect against abuses of surrogates (or, indeed, the children born of surrogate arrangements) by “limit[ing] profiteering activities by surrogacy intermediaries,” thereby “shift[ing] the return of profits to the surrogate mother rather than to various agents.”<sup>78</sup> In fact, legalized surrogacy has been described as a form of wealth redistribution, flowing from rich childless couples to disadvantaged surrogates.<sup>79</sup> Explicitly legalizing and regulating surrogacy would enable surrogates to solidify their contract rights to be compensated, thus giving disadvantaged and uneducated women a way to earn a good income, while simultaneously reinforcing the surrogates’ autonomy to make decisions about their own bodies.<sup>80</sup> Furthermore, at an international level, regulation—if properly structured so as to be most effective—would have the

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77. See, e.g., Humbyrd, *supra* note 18, at 116 (“Similarly, international surrogacy is currently a laissez-faire or free trade system, and surrogacy arrangements are likely to benefit the healthcare providers, surrogacy agencies, and prospective parents at the expense of the surrogate mothers and their communities. This absence of regulation nearly ensures that a surrogate mother in a poor country has been underpaid and thus exploited by wealthier individuals.”); Lee, *supra* note 8, at 281–83.

78. E.g., Leibowitz-Dori, *supra* note 30, at 342; see also Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 220–21 (1996) (discussing the case of a man intending to run a “baby farm” with Eastern European surrogates, and stating: “As more individuals learn that gestational surrogacy can become a profitable investment, the industry could grow at an alarming rate without proper oversight. This unexpected and uncontrolled growth in the industry could lead to another significant problem: the exploitation and commercialization of women”); Rimm, *supra* note 6, at 1457.

79. See, e.g., Leibowitz-Dori, *supra* note 30, at 342.

80. See *id.* This reasoning parallels that which is advanced by supporters of legalizing sex work. See, e.g., Victoria Hayes, *Prostitution Policies and Sex Trafficking: Assessing the Use of Prostitution-Based Policies as Tools for Combating Sex Trafficking* (Fall 2008) (unpublished paper) (on file with Chicago-Kent College of Law), available at [www.kentlaw.edu/perritt/courses/seminar/VHayes-final-IRPaper.pdf](http://www.kentlaw.edu/perritt/courses/seminar/VHayes-final-IRPaper.pdf) (providing a thorough discussion of the debate regarding decriminalization, legalization, and criminalization of prostitution, along with philosophies and theories driving those policy choices).

opportunity to ensure that the global surrogacy industry operates on an even plane, thus reducing the possibility of exploitation due to the tourist trades.<sup>81</sup> International regulation is a uniquely valuable tool for combating truly international problems encountered when moving from one country to another with a surrogate or with a child born of a surrogacy arrangement.<sup>82</sup>

A comprehensive surrogacy regulatory scheme would impact several different areas of law, both domestic and international.<sup>83</sup> Such a scheme would implicate issues of family law, such as determinations of parenthood<sup>84</sup> and child custody,<sup>85</sup> questions of default parental responsibility,<sup>86</sup> and the boundaries of child welfare arrangements.<sup>87</sup> Because of the international nature of the surrogacy industry, laws pertaining to adoption and child abduction<sup>88</sup> also would have to be considered, along with immigration and citizenship laws (which are particularly

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81. *See supra* note 67 and accompanying text; *see also* Humbyrd, *supra* note 18, at 116–18 (arguing that a “fair trade” approach to surrogacy would help ensure benefits to all parties and remove the potential for exploitation); Krim, *supra* note 78, at 226 (“Eventually, the United States must work with other countries to develop an international code of ethics to safeguard the use of [in vitro fertilization] and related technologies. As long as one country allows for unregulated surrogacy, the threat of baby trafficking and exploitation of women will exist.”).

82. *See* Krim, *supra* note 78, at 219–20 (discussing choice of law problems in international surrogacy arrangements); Lee, *supra* note 8, at 285–86 (providing a real-life example of such a problem).

83. *See* Knoppers, *supra* note 4, at 346, 350–56 (discussing the various issues of human rights law impacting the “status, protection and uses of, and access to, human genetic material”).

84. *See* Ikemoto, *supra* note 7, at 294; Leibowitz-Dori, *supra* note 30, at 337 n.50.

85. *See* Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts*, 31 *MCGEORGE L. REV.* 673, 678–79 (2000) (discussing a US case in which state law “provide[d] that a child born to a married woman living with her husband is a presumed child of the (surrogate’s) marriage” and detailing the custody issues that ensued); *see also* Lee, *supra* note 8, at 276–77, 285–86 (addressing possible international ramifications of the parentage determination).

86. *See* Veronica English et al., *Ethics Briefings*, 28 *J. MED. ETHICS* 205, 205 (2002).

87. *See* Lee, *supra* note 7, at 291–92 (describing an unfit parent who had commissioned the birth of twins and the resulting issues surrounding it, particularly given the differences between US state laws).

88. *See* English et al., *supra* note 86, at 205 (explaining child abduction and international law related to adoption); *see also* Lee, *supra* note 8, at 287, 291–92 (relating adoption laws to surrogacy regulation schemes); Leibowitz-Dori, *supra* note 30, at 330–37 (discussing adoption and international law).

significant for a global surrogacy industry).<sup>89</sup> Furthermore, a comprehensive instrument would have to assess cross-cutting legal frameworks, such as those pertaining to abortion,<sup>90</sup> contracts (particularly regarding the conscionability and enforceability of contracts for children or access to the body),<sup>91</sup> trade (especially trade in services),<sup>92</sup> labor,<sup>93</sup> property (particularly regarding ownership of embryos),<sup>94</sup> healthcare,<sup>95</sup> and substantive human rights (e.g., in defining and applying rights to reproductive and sexual freedom).<sup>96</sup> Resolution of these issues at the international level would help ensure that both surrogates and contracting parents know their rights and responsibilities and are protected to the extent that the international community believes they need to be protected.<sup>97</sup> It

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89. See Smerdon, *supra* note 3, at 62–81; Lee, *supra* note 8, at 285–86.

90. See Leibowitz-Dori, *supra* note 30, at 348–49.

91. See Havins & Dalessio, *supra* note 85, at 675–87 (detailing US state laws and legal cases pertaining to surrogacy); see also Clark, *supra* note 2, at 776–77 (criticizing the enforceability requirement of a draft South African surrogacy law and arguing that the “interests of the surrogate demand that she be given a breathing space to decide whether to go through with the contract”).

92. See Christina Stephenson, *Reproductive Outsourcing to India: WTO Obligations in the Absence of US National Legislation*, 43 J. WORLD TRADE 189, 195–97 (2009).

93. See Pande, *supra* note 14, at 293 (arguing that commercial surrogacy is a form of labor); Rimm, *supra* note 6, at 1450, 1453 (noting the comparison between surrogacy and other contracts for services, and advocating for a labor rights framework); see also *infra* notes 137–38 and accompanying text.

94. See R. Alta Charo, *Children by Choice: Reproductive Technologies and the Boundaries of Personal Autonomy*, 4 NATURE CELL BIOLOGY (FERTILITY SUPP.) s23, s24 (2002); see also Knoppers, *supra* note 4, at 343–45 (arguing that determinations about human genetic material’s “qualification as person or property” must be made before laws can be enacted on the subject).

95. See, e.g., Lee, *supra* note 8, at 296–97 (noting that Israel’s public healthcare system provides care for surrogates).

96. See Knoppers, *supra* note 4, at 351–56 (discussing the right to marry and found a family under the International Covenant on Economic, Social and Cultural Rights, and the rights to life, privacy, and health under international law in the context of human genetic material); Lee, *supra* note 8, at 287 (noting the UK’s prohibition on surrogacy for “homosexual couples of either gender, non-married heterosexual couples, and single persons”).

97. See Humbyrd, *supra* note 18, at 116; Eileen Smith-Cavros, *Fertility and Inequality Across Borders: Assisted Reproductive Technology and Globalization*, 4 SOC. COMPASS 466, 474 (2010) (noting that “[t]otal lack of regulation, however, can lead to abuse and negatively affect egg donors, surrogates, and traveling patients”); Patton, *supra* note 72, at 522, 529 (stating that where jurisdictions lack surrogacy regulation, the result is a “less predictable outcome for the parties involved in . . . custody disputes”); see also Patton, *supra* note 72, at 526 (“First, the lack of regulation may lead to the exploitation

also would ensure that any child born of these arrangements (who did not consent, but nonetheless may suffer the greatest impacts of all) is protected.<sup>98</sup> Such a comprehensive approach to surrogacy is necessary to avoid difficult questions that, frankly, would remain unanswered otherwise, leaving the parties with high levels of risk and no recourse if problems arise.

It is unlikely that enough countries will reach a consensus on all these issues to make an international surrogacy instrument possible in the near future. The challenges do not, however, end there. Even assuming an international consensus is achieved, decisionmakers still would have to defend their decisions to the citizens of their home countries. Furthermore, there is a high probability that a comprehensive international instrument would conflict—somewhere, at some point—with an existing body of domestic law. Broad reform of domestic law would be unlikely, however, given the many different areas of law implicated and the possibility for political backlash.

In the face of such challenges, countries may be unwilling to cede the national autonomy necessary to arrive at a comprehensive international instrument. In addition, commentators have raised concerns about certain countries' actions effectively controlling international organizations.<sup>99</sup> Thus, a large, influential country may derail instrument creation efforts by either refusing to sign such a broad international instrument, or by hesitating to adjust its domestic laws to protect surrogates in other countries, particularly if it felt it already was protecting surrogates within its own borders. Even with a comprehensive international instrument, there would remain a reasonable risk of noncompliance by individual surrogacy operations within countries, especially in countries with limited capacity for, or desire to, monitor and enforce the treaty.

Given the serious risks to health and human rights that international gestational surrogacy could entail, the efficacy of

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of surrogate mothers. With no legal or regulatory framework in place to protect them, surrogate mothers are subject to the demands of contracting couples willing to pay.”).

98. See Ryznar, *supra* note 11, at 1035 (stating that regulation of surrogacy should take place keeping in mind the interests of the children involved).

99. See, e.g., JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 642 (2005); see also Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 584 n.31 (2005).

any applicable international instrument in protecting health and human rights is more important than even technical “compliance.”<sup>100</sup> A comprehensive surrogacy instrument would have to cover so many issues that, in order to achieve agreement from all parties, the instrument probably would have very low legal standards with few meaningful protections in place.<sup>101</sup> Therefore, countries may be able to be in technical compliance, but to no effective avail—that is, the aforementioned surrogacy-related harms would still occur.<sup>102</sup> This raises further concerns about the potential international political and monetary capital that would be spent to produce a relatively toothless instrument. Once the international community has been moved to act on the surrogacy issue, it may be unlikely to do so again, and so an ineffective international instrument also may act as a barrier to future corrective action.

With those concerns in mind, and in light of the academic discussion regarding the desirability of using different frameworks (particularly trade and labor) to approach surrogacy regulation, this Article now examines the feasibility of a more narrowly-focused instrument that could be created under either of two international lawmaking platforms: the World Trade Organization (“WTO”)<sup>103</sup> or the International Labour Organization (“ILO”).<sup>104</sup> As “[international organizations] do not aspire to achieve the same things,”<sup>105</sup> it makes sense that the use of different international organization platforms will result in varying levels of protection to the interested parties in the

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100. See Smerdon, *supra* note 3, at 82 (questioning whether international regulation of surrogacy could be effective, or at least more so than an outright ban); *id.* at 82 n.402 (quoting another scholar who expressed the view that human rights-based instruments are generally focused on articulating ideals rather than being truly effective).

101. See Raustiala, *supra* note 99, at 610 (discussing the relationship between efficacy and compliance).

102. See *id.*

103. While some commentators have made observations regarding the utility and biases of the WTO, in particular, see Stephenson, *supra* note 92, at 195–208, this Article offers additional commentary regarding the feasibility of creating a new, human-rights-related surrogacy instrument under its auspices.

104. See *supra* note 71 and accompanying text (noting that some commentators have suggested regulating surrogacy in the context of labor, and highlighting the potential role of the ILO).

105. ALVAREZ, *supra* note 99, at 7.

surrogacy debate.<sup>106</sup> The challenges to these approaches include (1) a lack of political will to push the boundaries of instrument creation into the surrogacy arena, and (2) a high risk of an imbalance in the protection given to various parties to a surrogacy arrangement. Both challenges ultimately derive from these two organizations' limited scope.<sup>107</sup>

### B. *Building Consensus at the International Level*

As noted previously, the major challenge to the creation and adoption of an international surrogacy instrument is the lack of international consensus regarding the ethical and legal issues raised by surrogacy. Particularly for issues that involve human rights, such as surrogacy, the results of international "audits" and supervision on those subjects (which may be used as a tool to improve compliance<sup>108</sup>) may serve as useful fodder for international discussion on the subject of human rights boundaries in the surrogacy trade.<sup>109</sup> Indeed, at least one commentator has noted that one "function served by state reporting is to assist state parties in implementing international

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106. This is due, in part, to the substantive limitations of the platforms (i.e., the areas of law in which they have influence). Advocates for particular frameworks necessarily argue that the framework in question will succeed in protecting whichever party they believe deserves the highest level of protection, usually surrogates or children. *See, e.g.*, Humbyrd, *supra* note 18, at 116–18 (highlighting how "fair trade" regulations could protect the surrogate by limiting "mutually advantageous exploitation"); Rimm, *supra* note 6, at 1453–54 (discussing the impact of a labor rights framework on surrogate protection in particular and positing that such an approach has the potential to decrease surrogate exploitation); *see also supra* notes 74–75 and accompanying text (arguing that any stand-alone international agreement on surrogacy should protect the surrogate and the child).

107. *But see* ALVAREZ, *supra* note 99, at 12–13 (calling it "shortsighted" to view certain organizations as "contributing only" to the substantive thrust of their charter).

108. Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 *AM. J.L. & MED.* 479, 519 (1999). Allyn Taylor touts the use of such measures by the ILO: "The effectiveness of the ILO, especially in its earlier years, in utilizing supervisory mechanisms to implement international standards has been widely recognized, and the ILO's supervisory procedures are still generally viewed as a model for the UN system." *Id.* at 517–18.

109. *See id.* at 531 (similarly noting that, for international instruments pertaining to the human genome, "[i]n promoting an auditing process for the [Universal Declaration on the Human Genome and Human Rights], [the United Nations Educational, Scientific and Cultural Organization] may well be able to enlist the political assistance of countries and regions that recognize the critical importance of harmonization of norms in this realm").

commitments by triggering international assistance to solve domestic problems identified during the reporting process.”<sup>110</sup> By this mechanism, then, surrogacy, which usually is addressed at the domestic level, could find itself the subject of international publicity and, consequentially, international debate.

Nongovernmental organizations (“NGOs”) with human rights or women’s rights platforms also may serve as catalysts for international consensus building at the international organizations that permit NGO involvement. Even where NGOs are unable to participate directly in international organizations, they nevertheless may have sufficient influence to raise the level of international discussion on the subject.<sup>111</sup> The only challenge is ensuring that, once the institutional mechanisms for generating discussion have been used, the member countries are able to reach the level of consensus needed to create a meaningful instrument on the subject of surrogacy.<sup>112</sup>

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110. *Id.* at 524.

111. See generally Cenap Çakmak, *The Role of Non-Governmental Organizations (NGOs) in the Norm Creation Process in the Field of Human Rights*, 3 ALTERNATIVES: TURKISH J. INT’L REL. 100 (2004) (discussing the influence of nongovernmental organizations in the creation and implementation of human rights-related international instruments).

112. For example, during discussions on the United Nations Declaration Against Human Cloning, a deep conflict developed between governments wishing to ban all forms of cloning and those that wished only to ban reproductive cloning but permit therapeutic cloning. See Allyn L. Taylor, *Governing the Globalization of Public Health*, 32 J.L. MED. & ETHICS 500, 504 (2004) (stating that the negotiation process was “stymied by a split between those states . . . that favor[ed] a broad-based cloning treaty that bans all human cloning, including therapeutic cloning, and those states that favor[ed] a treaty with a narrow focus on human reproductive cloning”). Compare Working Group of the Sixth Committee, 59th Sess., International Convention Against Human Cloning, ¶¶ 2–3, A/C.6/59/L.2 (Sept. 29, 2004) (establishing a draft resolution on human cloning that would seek to impose a global ban on the cloning of human embryos, regardless of purpose), with Working Group of the Sixth Committee, 59th Sess., International Convention Against the Reproductive Cloning of Human Beings, ¶ 2, A/C.6/59/L.8 (Oct. 6, 2004) (calling for an international ban on human reproductive cloning but permitting cloning for “therapeutic” purposes). These negotiations ultimately resulted in the Declaration Against Human Cloning, although “it is widely recognized that adoption of the Declaration does not indicate that any meaningful consensus has been reached.” Timothy Caulfield & Barbara von Tigerstrom, *Globalization and Biotechnology Policy: The Challenges Created by Gene Patents and Cloning Technologies*, in 27 GLOBALIZATION AND HEALTH: CHALLENGES FOR HEALTH LAW AND BIOETHICS 129, 140 (Belinda Bennett & George F. Tomossy eds., 2006) (citation omitted).

IV. *POTENTIAL LAWMAKING RUBRICS AND PLATFORMS*A. *Trade*

When one thinks of a truly international set of standards that may be enforced between and among participating nations, the system of international trade laws springs quickly to mind. The WTO is the premier intergovernmental organization for issues of international trade. It is structured so that members must accept all so-called WTO-covered agreements as a single undertaking.<sup>113</sup> In other words, countries are not permitted to be selective about which trade-related agreements they are bound to honor. Furthermore, and perhaps most significantly, the WTO is well-known for its unusual authority to enforce the agreements within its purview. If one member state believes that another member state has violated a WTO-covered agreement, the offended member may lodge a complaint against the offending member, setting in motion a process of dispute resolution that includes formal consultations between the parties, an initial decision by a reviewing panel, and potentially a decision by the appellate body on appeal.<sup>114</sup> The outcome of this process binds the parties, and sanctions may be harsh.

As a general rule, WTO-covered agreements are designed to implement principles such as lowering barriers to trade, ensuring equal access to markets by treating all member countries equally, and permitting free market economies to operate unfettered by unnecessary intrusion.<sup>115</sup> While many WTO-covered agreements pertain to trade in goods, the General Agreement on Trade in Services (“GATS”) has a different focus,

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113. See *Frequently Asked Questions About TRIPS in the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm) (last visited Feb. 20, 2012) (explaining the structure under which states operate in the WTO).

114. See generally *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (laying out the dispute resolution procedure).

115. See *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 14. A notable exception is the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”), which requires that all countries put in place certain substantive laws designed to ensure protection of intellectual property. See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

and “distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.”<sup>116</sup> The GATS

was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade []: creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization.<sup>117</sup>

In fact, at least one commentator has argued that commercial gestational surrogacy may be seen as a “service” such that the GATS could be applied to it in instances of “cross-border surrogacy agreements.”<sup>118</sup> This raises the issue of having “Most-Favoured-Nation Treatment” for services—in other words, ensuring that Country *A* has to give suppliers of surrogacy services from Country *B* treatment “no less favourable” than that offered to Country *A*’s own surrogacy service providers.<sup>119</sup> This would result in a lowering of barriers to the surrogacy service industry, which would run the risk of benefitting the commissioning parents at the expense of the service providers—an unacceptable outcome in and of itself, according to many commentators.<sup>120</sup> However, “[i]f we are genuinely concerned

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116. *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Feb. 20, 2012).

117. *Id.*

118. Stephenson, *supra* note 92, at 190. Christina Stephenson focuses specifically on US obligations and the challenges created by differing state standards for surrogacy. *See id.* Jennifer Rimm also notes, without reference to the WTO or trade law per se, that “[s]upporters of legalized commercial surrogacy argue that surrogacy contracts are less like prostitution and more like other service contracts that individuals enter into for purely financial reasons.” Rimm, *supra* note 6, at 1450.

119. *See* Stephenson, *supra* note 92, at 202–03.

120. *See* Clark, *supra* note 2, at 777 (“The primary objectives of any legislation on surrogacy should be, first, the protection of children from being treated as commodities . . . and, secondly, the protection of women from being forced to surrender their children against their wishes.”); Leibowitz-Dori, *supra* note 30, at 341 (“[S]urrogacy . . . should be regulated to protect women and children.”); *see also* Humbyrd, *supra* note 18, at 116 (noting that the free trade system benefits other parties at the expense of surrogates, and suggesting the use of “fair trade” principles to correct the imbalance).

about the exploitation of women, then a policy of non-encouragement in regard to surrogacy would seem to be desirable.”<sup>121</sup>

Nevertheless, given the increasing discussion of “mission creep” in international organizations, particularly with regard to the insertion of human rights principles into discussions in previously unrelated platforms,<sup>122</sup> one wonders whether the creation of a WTO-covered agreement relating to surrogacy services could be a viable alternative option to a broad-based United Nations undertaking. After all, the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) is universally recognized as an anomaly in the general system of WTO-covered agreements because of its requirement that WTO members enact domestic laws with minimum standards for intellectual property protection.<sup>123</sup> TRIPS nevertheless remains one of the most powerful WTO-covered agreements, albeit one of the most controversial, ostensibly due to its impacts on access to medicines,<sup>124</sup> and is enforceable under WTO dispute

121. Clark, *supra* note 2, at 777; *see also* Krim, *supra* note 78, at 221 (warning of the dangers of “uncontrolled growth” of international surrogacy in the absence of “proper oversight”).

122. *See* Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT’L AFF. 15, 24–25 (2001) (arguing that the WTO is “at risk” from nongovernmental organizations pushing the WTO to include a human rights agenda). *See generally* Boyan Konstantinov, *Human Rights and the WTO: Are They Really Oil and Water?*, 43 J. WORLD TRADE 317 (2009) (discussing the relationship between the WTO and human rights); Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, 2 IDLO VOICES DEV. JURISTS 1 (2005).

123. *See* Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT’L L. 1, 11, 19–26 (2011); *Frequently Asked Questions About TRIPS in the WTO*, *supra* note 111 (“[T]he TRIPS Agreement requires members to comply with certain minimum standards for the protection of intellectual property rights covered in it.”); *see also* TRIPS art. 1(1) (establishing a floor, but not a ceiling, for domestic intellectual property rights in each member state).

124. *See* Brewster, *supra* note 123, at 2–3 (arguing that TRIPS is “controversial” but has “actually provided developing countries with some benefits”); Thomas Pogge, *Access to Medicines*, 1 PUB. HEALTH ETHICS 73, 75–76 (2008) (“The TRIPS Agreement and its imposition are plainly unjust and will, in terms of the magnitude of harm caused, number among the largest human rights violations in history.”); Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha “Solution,”* 3 CHI. J. INT’L L. 47, 49, 65–68 (2002) (arguing that TRIPS actually provides incentives for the development of drugs to treat diseases such as malaria). *See generally* OXFAM INT’L, *PRICED OUT OF REACH: HOW WTO PATENT POLICIES WILL REDUCE ACCESS TO MEDICINES IN THE DEVELOPING WORLD* (2001), *available at* [www.oxfam.org.uk/](http://www.oxfam.org.uk/)

resolution mechanisms.<sup>125</sup> We might therefore envision a surrogacy service instrument that, similar to TRIPS, contains requirements for enactment of surrogacy-specific domestic laws. The usual concerns about free trade principles (i.e., lower regulatory barriers) creating a “race to the bottom”<sup>126</sup> would dissolve because of the standard-setting requirement.<sup>127</sup> Due to its WTO-covered status, such an agreement would be enforceable against countries that have failed to meet the requisite standards, thus increasing the potential for compliance—and, if the instrument is drafted so that the legal standards are stringent ones, efficacy.<sup>128</sup>

As with the notion of a broad-based UN instrument, however, the challenges to such a scenario arise largely as a function of platform-related politics. As legal scholar Boyan Konstantinov stated eloquently: “[The] WTO seems to lack visionaries to serve as catalysts of the political will.”<sup>129</sup> Konstantinov argues that, because an increasing number of WTO members are not democratic (and thus presumptively unsupportive of so-called human rights creep), and because the WTO “lacks a system on non-trade related requirements such as the requirement that Member States respect, protect, and fulfil [sic] human rights . . . the likelihood [of] incorporat[ing]

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resources/policy/health/downloads/bp04\_priced.rtf; Press Release, Doctors Without Borders, WTO & Drugs: Will the Majority Prevail? (Nov. 11, 2001), *available at* <http://www.doctorswithoutborders.org/press/release.cfm?id=688&cat=press-release>.

125. TRIPS art. 64(1); DSU art. 4 n.4.

126. See June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 512 (2006) (describing a “race to the bottom” as “competition in laxity by which jurisdictions compete to attract new industries by providing a favorable regulatory climate”); *see also id.* at 521–37 (discussing the impact of the “race to the bottom” on fertility tourism).

127. See generally Humbyrd, *supra* note 18 (advocating a “fair trade” international standard for surrogacy to ensure that all parties benefit and surrogates are not exploited).

128. See Raustiala, *supra* note 99, at 610 (addressing the relationship between efficacy and compliance and noting the importance of “stringency of the legal standard” in changing the behavioral baseline of parties).

129. Konstantinov, *supra* note 122, at 337; *see also, e.g.*, Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT’L L. 151, 166–67 (1992) (noting that General Agreements on Tariffs and Trade negotiators in the early 1990s were unwilling to address the potential for including substantive labor rights in the instrument, preferring instead to focus on removing barriers to trade).

human rights issues [moves] farther and farther [away].”<sup>130</sup> In short, it is unlikely that a surrogacy-specific, human rights-sensitive instrument will have any hope of being proposed, much less drafted and implemented.

Furthermore, even if such an instrument did have the political will to be created and welcomed into the WTO fold, there is a risk that the WTO’s touted enforcement mechanisms would not achieve their intended result. Dispute resolution is “costly and time-consuming,”<sup>131</sup> and, while countries obviously would make such an investment to protect their access to international markets in traditional goods and services, they may not be as willing to spend the necessary capital when the issue is protecting the human rights of citizens of other countries.<sup>132</sup> Moreover, as is ubiquitously argued by trade and health commentators, the WTO panels and appellate bodies are staffed with international trade experts who lack the expertise to make decisions about what would be, in the case of surrogacy, issues of bioethics and substantive human rights law.<sup>133</sup> Indeed, Konstantinov notes that WTO dispute settlement bodies frequently have “found protectionism,”<sup>134</sup> and thus, presumably,

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130. Konstantinov, *supra* note 122, at 337.

131. See Diana Tussie & Valentina Delich, *Dispute Settlement Between Developing Countries: Argentina and Chilean Price Bands*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES* 23, 23 (Peter Gallagher et al. eds, 2005), available at [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case1\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case1_e.htm) (noting that the WTO dispute resolution system is “accessible only to highly profitable sectors because participation is too costly and time consuming”).

132. Furthermore, a contracting parent who is able to contract for a child on terms more advantageous to himself due to a foreign country’s lack of creation or enforcement of its own laws is hardly likely to petition his government to change the situation.

133. See Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 *EUR. J. INT’L L.* 753, 765–66 (2002) (“[P]anelists and members of the Appellate Body are trade experts, not experts in human rights or labour . . . law.”); Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19 *LEIDEN J. INT’L L.* 633, 636 (2006) (“[T]rade diplomats in the WTO have neither a mandate nor the expertise to discuss human rights.”); Zagel, *supra* note 122, at 35, 36 (noting “Dispute Settlement institutions’ lack of expertise on human rights issues,” but suggesting that it may be possible to solve that problem “by integrating human rights experts to examine the case from a human rights perspective”); Lisa Hird Chung, Note, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 *MINN. J. INT’L L.* 263, 295–96 (2006) (discussing WTO concerns in the context of gametes).

134. Konstantinov, *supra* note 122, at 325.

required a lowering of existing barriers to trade (some of which may have been argued to be an exception, for example, to protect the public's health under Article XX of the General Agreement on Tariffs and Trade<sup>135</sup>). However, an institutional bias toward free trade leaves an unacceptable risk of exploitation for those involved in the surrogacy "trade."<sup>136</sup>

### B. Labor

As legalized surrogacy is, indeed, paid labor (in the truest sense of the word),<sup>137</sup> it is unsurprising that commentators have argued for the use of labor law or labor rights frameworks to address the substantive challenges of surrogacy regulation.<sup>138</sup> In an endeavor to advance the practical discussion of international surrogacy regulation, then, the next logical platform to investigate is that of the ILO.<sup>139</sup> Simply stated, "[t]he ILO is the

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135. *Id.* at 328–29.

136. *See* Humbyrd, *supra* note 18, at 118 ("The absence of regulations has created a market that is free but not fair, providing fertile ground for unjust and exploitative practices."). As a logical matter, however, commentators who have called for international regulation—or, indeed, any regulation at all—necessarily argue that a lack of regulation, which is the ultimate "free trade" scenario, results in too much risk for the parties involved in surrogacy. *See, e.g., id.* at 115–16; Lee, *supra* note 8, at 281–83.

137. Many commentators recognize (implicitly or explicitly) surrogacy as labor. *See, e.g.,* Damelio & Sorensen, *supra* note 25, at 271 ("Surrogacy is more like the case of being paid for the service. The contracting couple does not gain a right to do whatever they please with the woman's body while she carries the child. The most they can do is ask that she do with her body what she agreed to do in the contract. In surrogacy, then, a woman is not 'selling her body' but being compensated for her services."); Humbyrd, *supra* note 18, at 112 (comparing the risks of surrogacy to those in other workplaces in developing countries); Pande, *supra* note 14, at 293 ("[C]ommercial surrogacy is a form of labor.").

138. *See, e.g.,* Humbyrd, *supra* note 18, at 117–18 (arguing for "fair trade"-type regulations, including laws governing working conditions); McEwen, *supra* note 18, at 300–01 (discussing the application of existing ILO frameworks and instruments to the problem of surrogacy regulation); Rimm, *supra* note 6, at 1453–54 (advocating for a "labor rights" regulatory framework for surrogacy).

139. *See* Ilse L. Feitshans, *Is There a Human Right to Reproductive Health?*, 8 TEX. J. WOMEN & L. 93, 119–26 (1998) (discussing the ILO's role in articulating human rights and suggesting its utility for protecting a right to reproductive health for female workers); McEwen, *supra* note 18, at 300–01 (discussing existing ILO instruments that may be useful in regulating surrogacy). Ilse Feitshans uses the ILO as an example of an organization whose policies and instruments support the existence of a right to reproductive health that must be protected as part of workers' occupational health. *See* Feitshans, *supra*, at 119–26. While her article does not appear to contemplate or analyze the creation of a surrogacy-specific instrument under the auspices of the ILO, she

international organization responsible for drawing up and overseeing international labour standards.”<sup>140</sup> In general, the ILO promotes such values as equality, decent work, and good and safe working conditions for all laborers.<sup>141</sup> Indeed, the ILO’s Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy reflects values applicable to international surrogacy, particularly given concerns about the power imbalance between, for example, poor women and the organizations that may wish to lure them into surrogacy service.<sup>142</sup> Furthermore, the ILO’s aims and principles appear consistent with human rights,<sup>143</sup> although there may be only a partial overlap between the human rights normally considered pertinent to the ILO’s mission and those considered pertinent to the debate on surrogacy.<sup>144</sup>

Significantly, the ILO has a “tripartite structure” (the International Labour Conference, the Governing Body, and the International Labour Office<sup>145</sup>) that permits representatives of governments, employers, and workers to provide input regarding labor-related standards and policies.<sup>146</sup> Thus, for any new surrogacy-specific standards, there is at least a theoretical potential that both surrogates and procurers of surrogacy

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nevertheless recognizes in her conclusion that surrogates may need special attention in any articulation or protection of the right to reproductive health, whether the articulation comes under existing laws or under new instruments. *See id.* at 124–25.

140. *About the ILO*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Feb. 20, 2012).

141. *See Decent Work Agenda*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (last visited Feb. 20, 2012).

142. McEwen, *supra* note 18, at 300. Rimm also recognizes the problem of powerful, and potentially exploitative, intermediary entities, although her discussion of labor frameworks is a more general one and is not tied specifically to the ILO as an institution. Rimm, *supra* note 6, at 1456–59.

143. *See Zagel*, *supra* note 122, at 6 (stating that “[h]uman rights are also to be understood generally to encompass not only the rights contained in the ‘International Bill of Rights,’ but also basic social standards, as protected by the [ILO]”); *id.* at 36 (suggesting that the ILO could provide technical assistance to the WTO in making decisions pertaining to human rights issues in the trade context); *see also* McEwen, *supra* note 18, at 299–300 (discussing the right to receive fair compensation under the International Covenant on Economic, Social and Cultural Rights).

144. *But see* Feitshans, *supra* note 139, at 119–24 (discussing the importance of the ILO as part of the author’s advocacy for the right to reproductive health).

145. *How the ILO Works*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang-en/index.htm> (last visited Feb. 20, 2012).

146. *See id.*

services could have a voice in the debate. The potential is theoretical because it is difficult to imagine that surrogates would unionize, or, if they did, that they would have the medical expertise necessary to understand and advocate for their health-related needs. Prospective contracting parents also may not be likely to petition for a place in ILO's decisionmaking process, as one could assume that their interest in surrogacy may be limited only to the gestation and birth of their own child or children. Despite these concerns, all parties' interests could be represented via government participation in ILO discussions, particularly with respect to the balance of rights and protections each of the parties should receive.

One substantive challenge, however, is that the particular work-related risks for surrogates are truly unique in the labor world and, one could argue, are even unique to each pregnancy. Furthermore, unlike most other types of employment, all the workplace protection in the world cannot entirely eliminate the risks inherent in surrogacy.<sup>147</sup> Additionally, as most legal labor practices worldwide presumably lack the types of moral and ethical qualms inherent in the practice of surrogacy, the question arises whether the ILO has the institutional expertise to provide substantive answers to the difficult questions the surrogacy industry faces. There is no mechanism for enforcement of ILO laws, and so any surrogacy-related standard must be constructed to encourage effectiveness—even without the threat of sanctions.<sup>148</sup>

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147. It should be noted that the workplace protections for surrogates necessarily will differ in some respects from workplace protections for female workers in another field who merely wish to preserve their reproductive rights (e.g., to remain pregnant or to retain fertility). For example, Feitshans focuses largely on such issues as toxicity and disease in the workplace and "protective reassignment" of pregnant women to avoid workplace hazards. See Feitshans, *supra* note 139, at 95, 100–01, 105–08, 110. While protection of surrogates from toxic chemicals and disease certainly is important, a surrogacy-specific agreement under the ILO would need to address additional fundamental issues that would help protect rights other than simply reproductive rights, or the right to preserve fertility and protect against fetal damage. The fact that surrogates' actual work is the pregnancy will require considerably more attention to the nature and extent of permissible work contracts, the ability of the surrogate and/or the contracting parents to make decisions regarding the appropriate level of medical care, et cetera.

148. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 607 (2005) (noting that the ILO has no enforcement mechanism beyond some

On balance, an ILO-based instrument would appear to favor surrogates<sup>149</sup> because of both its institutional purpose in protecting labor rights and its commitment to fundamental human rights. After all, in the eyes of the international community, this is likely to be an acceptable imbalance in the recognition and protection of surrogates' rights vis-à-vis the rights of the contracting parents. An ILO-based instrument certainly would contrast favorably with a free-trade-based instrument, in which the imbalance would benefit the contracting parents.<sup>150</sup> Nevertheless, the relatively limited scope of the ILO's mandate might risk excluding the children born of surrogacy from protection as well as ignoring some of the truly international legal barriers to consistent treatment, such as immigration and citizenship laws. However, while piecemeal regulation of surrogacy is a risky proposition, due to the interrelated nature of the pertinent legal issues, the potential for disproportionate protections of one party over another, and the concern that political will may last long enough to create only one surrogacy-related instrument from whole cloth, it remains possible that some of the children's interests could be protected by minor changes to existing instruments.<sup>151</sup> Should a global consensus be reached about the substantive boundaries of ethical international surrogacy, such an "ILO plus" plan may be a feasible solution.

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monitoring procedures). *But see* Feitshans, *supra* note 139, at 123–24 (suggesting the utility of ILO reporting mechanisms and “public shaming” in ILO's successes).

149. This argument is made by proponents of a labor-based framework for regulating surrogacy, regardless of national or international scope, or choice of lawmaking platform. *See, e.g.*, Feitshans, *supra* note 139, at 119–26 (discussing ILO's role in supporting a right to reproductive health); McEwen, *supra* note 18, at 300–01 (discussing the benefits to surrogates under an application of the ILO's Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy); Rimm, *supra* note 6, at 1454–61 (focusing on protecting surrogates).

150. *See supra* notes 116–21 and accompanying text (describing how implementing a WTO-based instrument likely would lower barriers to the industry so that the contracting parents would benefit at the expense of the service providers).

151. *See, e.g.*, Leibowitz-Dori, *supra* note 30, at 350–54 (discussing the possible inclusion of surrogacy in the Convention on Intercountry Adoption and in the Hague Convention).

*CONCLUSION*

In sum, while a broad-based instrument governing surrogacy is ideal, it is unlikely to succeed because of the political barriers inherent in such a massive undertaking. The international community has several mechanisms by which it could spur consensus building discussions regarding gestational surrogacy and, should the community achieve consensus on key issues, regulation under the auspices of the ILO may be a reasonable, if imperfect, vehicle for achieving legal uniformity in protecting surrogates from exploitation.